Study L-3056 July 29, 1999

Memorandum 99-49

Probate Code: Selected Issues

INTRODUCTION

The Commission has decided to address selected probate issues from time to time as scheduling and resources permit. This memorandum reviews a variety of matters that have been brought to our attention in recent years:

(1) Problems in trust litigation.

(2) Issues under Probate Code Section 3100 *et seq.*

(3) Community property in joint tenancy form.

(4) Alternate beneficiaries for unclaimed distribution.

(5) Joinder of estates of spouses.

(6) Determination or confirmation of property belonging or passing to surviving spouse.

(7) Duty to account under revocable trust.

PROBLEMS IN TRUST LITIGATION

At its February 1999 meeting the Commission decided it would not study the concept of informal probate administration. However, the Commission noted that part of the impetus for informal probate administration is an increase in problems and litigation in trust administration. The Commission raised the question whether these problems ought not to be identified and perhaps addressed directly.

The staff has solicited input from selected practitioners and judges about problems in trust litigation that need to be addressed. **The staff is still in the process of collecting information**, but initial responses indicate:

(1) Many of the issues in litigation are not unique to trusts, but would arise in the probate context as well if the operative instrument were a will rather than a trust. These include questions of construction of the document, determination of appropriate distributees under circumstances perhaps not contemplated by the

drafter, tax provisions that may need reformation, removal of fiduciaries, demand for accountings and objections, etc.

(2) Many of the complaints of trust beneficiaries involve lack of responsiveness of corporate fiduciaries. Suggested cures include improved accounting requirements and removal power.

In this connection, we note a new California Continuation of the Bar publication, *California Trust and Probate Litigation*, which should be helpful on these issues.

ISSUES UNDER PROBATE CODE SECTION 3100 *ET SEQ.*

Colin Wied has identified a number of significant policy as well as technical questions in Probate Code Section 3100 *et seq*. Those provisions may be used by a spouse to obtain a court order authorizing the spouse to engage in a particular transaction involving the property interest of an incapacitated spouse, without the need to obtain a conservator for the incapacitated spouse.

Technical issues Commissioner Wied has noted include clarification of the statute to enable transactions affecting separate property of the incapacitated spouse (in addition to community property and mixed assets), resolving internal inconsistencies in the applicable standards (capacity standard v. conservatorship standard), and establishment of guidelines for the court's decisionmaking process. Significant policy questions include authorization of a special needs trust under the statute and development of the durable power of attorney as an alternative to proceeding under the statute.

The staff has obtained some initial input on these matters from the State Bar Estate Planning, Trust and Probate Law Section. We are seeking further input from the State Bar Family Law Section. **We should be in a position to present these issues for Commission review in the near future.**

COMMUNITY PROPERTY IN JOINT TENANCY FORM

At its February 1999 meeting the Commission requested the staff to make inquiry of interested parties (particularly banks, real estate brokers, and title insurance companies) whether now may be the right time to resurrect the Commission's recommendations on community property in joint tenancy form. Correspondence received from the California Land Title Association (Exhibit p.

1) and the State Bar Estate Planning, Trust, and Probate Law Section (Exhibit pp. 2-3) suggests a fair amount of interest in the concept of "community property with right of survivorship." Although the Commission has not recommended enactment of a "community property with right of survivorship" statute due to a number of drawbacks associated with the concept, it would help cure many of the community property and joint tenancy problems we have seen. **Given the current posture of interested parties on this matter, we would hold off resurrecting the Commission's recommendation and would continue to monitor developments.**

ALTERNATE BENEFICIARY FOR UNCLAIMED DISTRIBUTION

It may not be possible to deliver an inheritance to a probate beneficiary because the person's whereabouts are unknown. In that case, the personal representative may still obtain discharge by depositing the property with the county treasurer in the name of the beneficiary. Prob. Code § 11850. If the property is unclaimed after five years, it escheats to the state. Prob. Code § 11903; Code Civ. Proc. § 1441.

The Commission in 1990 approved a policy that, rather than escheating to the state, unclaimed property of this sort should be distributed to the decedent's other heirs, just as a gift to a predeceased beneficiary would be. The Commission circulated a tentative recommendation to require the court to name an alternate beneficiary if the whereabouts of a primary beneficiary is unknown; if the primary beneficiary cannot be located within three years, distribution is made to the alternate beneficiary.

The tentative recommendation received widespread approval, with one exception. The State Controller objected on a number of grounds, including a potential loss of revenue to the state. "While the amount of money received by the State from decedents' estates under these circumstances is a relatively small portion of total state revenue, the current fiscal difficulties of the State could be exacerbated by this measure." See First Supplement to Memorandum 90-93 (9/5/90).

At the time, the state was indeed in severe financial difficulty. All state budgets (including the Law Revision Commission's) were being cut. The Commission decided to shelve the proposal until a time when the state's finances

had improved. The state's finances have now improved, and the Commission may want to revisit this matter.

The proposal is fairly simple:

Prob. Code § 11603 (amended). Order for distribution

11603. (a) If the court determines that the requirements for distribution are satisfied, the court shall order distribution of the decedent's estate, or such portion as the court directs, to the persons entitled thereto.

(b) The order shall:

(1) Name the distributees and the share to which each is entitled.

(2) Provide that property distributed subject to a limitation or condition, including, but not limited to, an option granted under Chapter 16 (commencing with Section 9960) of Part 5, is distributed to the distributees subject to the terms of the limitation or condition.

(c) If the whereabouts of a distributee is unknown, the order shall name alternate distributees and the share to which each is entitled. The alternate distributees shall be the persons who would be entitled under the decedent's will or under the laws of intestate succession if the distributee had predeceased the decedent. If the distributee does not claim the distributee's share within three years after the date of the order, the distributee is deemed to have predeceased the decedent for the purpose of this section.

Comment. Section 11603 is amended to add subdivision (c). Under subdivision (c), a distributee whose whereabouts is unknown has three years in which to claim the share. If the distributee fails to do so, an alternate distributee has an additional two years to claim the share before the property escheats to the state. See Section 11903.

In cases to which subdivision (c) applies, the personal representative may deposit the property with the county treasurer. Section 11850. For money, no court order is required for the deposit. For other personal property, a court order is required. Section 11851. A person may claim the money or other personal property on deposit in the county treasury by filing a petition with the probate court. Section 11854.

In a testate estate, the court determines the alternate distributees under the decedent's will and applicable statutes If the distributee is kindred of the testator or kindred of a surviving, deceased, or former spouse of the testator, the antilapse statute applies (Section 6147), and the alternate beneficiaries are the issue of the missing distributee.

In an intestate estate, the court determines the alternate beneficiaries under the laws of intestate succession. See Sections 6400-6414.

If the Commission is interested in pursuing this matter further, we would recirculate a tentative recommendation for comment.

JOINDER OF ESTATES OF SPOUSES

Under the Probate Code, a surviving spouse receives property from the deceased spouse without probate unless the surviving spouse elects probate. Probate Code Section 13502 also permits the surviving spouse to include in the probate of the deceased spouse's estate the surviving spouse's interest in community and quasi-community property. If the surviving spouse is deceased, the statute allows the survivor's personal representative to make the election.

This statutory scheme can be used where the spouses die in close succession to enable both estates to be probated in one proceeding. However, to achieve this result, it is necessary that an estate proceeding be commenced for the second spouse to die in order to appoint a personal representative to make the election to have the second estate probated with the first.

An alternate approach might be to open an estate for the surviving spouse but not for the deceased spouse. The surviving spouse's personal representative would then elect to administer the assets of the deceased spouse in the survivor's estate. This apparently has been done on occasion in practice, but it is unclear that the procedure is permitted under a literal reading of the statute.

It may be useful to codify the procedure, with proper protections for creditors and beneficiaries of both spouses:

Prob. Code § 13502 (amended). Property subject to administration upon election of surviving spouse

13502. (a) Upon the election of the surviving spouse or the personal representative, guardian of the estate, or conservator of the estate of the surviving spouse, all or a portion of the following property may be administered under this code <u>in the estate of the deceased spouse or in the estate of the surviving spouse</u>:

(1) The one-half of the community property that belongs to the decedent under Section 100, the one-half of the quasi-community property that belongs to the decedent under Section 101, and the separate property of the decedent.

(2) The one-half of the community property that belongs to the surviving spouse under Section 100 and the one-half of the quasi-community property that belongs to the surviving spouse under Section 101, and the separate property of the surviving spouse.

(b) The election shall be made by a writing specifically evidencing the election filed in the proceedings for the administration of the estate ~~of the deceased spouse~~ in which the property is to be administered within four months after the issuance of letters, or within any further time that the court may allow upon a showing of good cause, and before entry of an order under Section 13656.

(c) The election may not be made in proceedings for the administration of the estate of the surviving spouse unless both of the following conditions are satisfied:

(1) Proceedings for the administration of the estate of the deceased spouse have not been commenced at the time the election is filed.

(2) Notice is given to the persons to which, and in the manner that, notice of proceedings for the administration of the estate of the deceased spouse would be given under Section 8110 and subdivision (a) of Section 9050.

Comment. Section 13502 is amended to authorize both halves of the community property and quasi-community property to be administered in the estate of either spouse, and not just in the estate of the first spouse to die. However, this may be done in the estate of the second spouse to die only where an administration proceeding has not been commenced for the estate of the first spouse to die.

In addition to ordinary notice of administration of the surviving spouse's estate, notice must also be given to known or reasonably ascertainable heirs, devisees, and executors of the first spouse to die, as well as to known or reasonably ascertainable creditors. Sections 8110 and 9050(a).

The staff believes this would be a useful procedure that would add flexibility to administration in cases where the spouses die in close succession. **We recommend that this suggestion be circulated for comment as a tentative recommendation.**

DETERMINATION OR CONFIRMATION OF PROPERTY BELONGING OR PASSING TO SURVIVING SPOUSE

Probate Code Sections 13650-13660 provide a procedure for court confirmation of property passing to a surviving spouse without probate. Section

13657 states that such a court order is "conclusive on all persons, whether or not they are in being."

Although the order confirming passage of property to the surviving spouse is conclusive as to title, it does not defeat the rights of the decedent's creditors. The creditors may recover directly from the surviving spouse to whom the property is confirmed. Prob. Code § 13550. However, if creditors appear, a better procedure might be to pull the property back into the decedent's estate. This would avoid the need for multiple lawsuits by adversely affected creditors of the decedent against the surviving spouse.

There already exists a procedure under the Probate Code for restoring the decedent's property held by the surviving spouse to the decedent's estate. Under Sections 13560-13564, the surviving spouse restores the property to the estate only to the extent the surviving spouse still has possession of the property. Otherwise the liability of the surviving spouse is limited to its value. It would be a simple matter to incorporate this procedure by reference in the confirmation statute, and would provide a useful alternative to individual collection efforts by creditors against the surviving spouse.

Prob. Code § 13657 (amended). Effect of court order

13657. Upon becoming final, an order under Section 13656 (1) determining that property is property passing to the surviving spouse or (2) confirming the ownership of the surviving spouse of property belonging to the surviving spouse under Section 100 or 101 shall be conclusive on all persons, whether or not they are in being, subject to Chapter 3.5 (commencing with Section 13560) (liability for decedent's property) .

Comment. Section 13657 is amended to incorporate Sections 13560-13564, providing for restitution of the property (or its value) by the surviving spouse.

The staff would circulate this proposal for comment.

DUTY TO ACCOUNT UNDER REVOCABLE TRUST

Under the trust law, a revocable trust, so long as it remains revocable, is considered to be for the benefit of the settlor of the trust, not for the benefit of the named beneficiaries. The settlor may do as the settlor pleases with the trust assets, including squandering them, withdrawing them from the trust, or revoking the trust in its entirety; the settlor is accountable to no one but himself

or herself. Prob. Code §§ 15800, 16064. The named beneficiaries of a revocable trust have no enforceable interest — only an expectancy — until the trust becomes irrevocable, ordinarily by death of the settlor. (This scheme is analogous to that applicable under a will — a will may be changed or revoked or property disposed of by the testator up until the time of death, and a beneficiary has a mere expectancy that does not become enforceable until the will becomes irrevocable on the testator's death.)

Notwithstanding these principles, a recent court of appeal decision holds that, after the settlor of a revocable living trust dies and the trust becomes irrevocable, the beneficiaries may compel an accounting by the successor trustee retroactively for the period during which the trust was revocable by the settlor. *Evangelho v. Presoto*, 67 Cal. App. 4th 615, 79 Cal. Rptr. 2d 146 (1998). The staff suspects this misapplication of the law occurred because the court was concerned about evidence of fraud and undue influence by the settlor's daughter (who later become the successor trustee) during the settlor's lifetime. But there are other remedies available for fraud and undue influence, without the need to contort the law governing revocable trusts.

We have received correspondence form Charles A. Collier, Jr., of Los Angeles, highly critical of the court of appeal decision and suggesting that the statutes be amended to clearly state the proper interpretation of the law. Exhibit pp. 4-14. Mr. Collier notes that the decision:

- Impairs the usefulness of the revocable living trust as a probate-avoiding will substitute — it burdens the settlor with lifetime record-keeping and heralds the prospect of post mortem accounting and objections to the accounting as the settlor's descendants delve into the settlor's lifetime transfers.
- Converts a revocable living trust into an irrevocable living trust by giving a remainder beneficiary the same rights as if the trust had been irrevocable from its inception. These rights are greater than the beneficiary would have had if the settlor had left a will instead of a revocable living trust, and are not needed to provide relief in a case where there has been fraud or undue influence on the settlor.
- Imposes on a successor trustee the responsibility to construct an accounting for a period when the successor had no responsibility to maintain records.
- Imposes on the settlor the need to maintain records for a future accounting during the time the settlor is the sole beneficiary and

has sole rights and the remainder beneficiaries have none — records the settlor would not need if a will had been used instead.

- Promotes intrafamily litigation over the personal choices of a settlor making donative transfers — during life or at death.

It is arguable that Mr. Collier over-dramatizes the effect of the *Evangelho* decision, the holding of which could be read narrowly to apply only where the successor trustee being required to account is the very person who may have engaged in fraud or undue influence on the settlor during the time the trust was revocable. Moreover, the other remedies available for fraud or undue influence identified by Mr. Collier are somewhat nebulous, particularly those based on common law concepts referenced in the trust law. See Prob. Code §§ 15002, 15003.

To the staff, the most troublesome aspect of this case is that the accounting is ordered from a person who was not the trustee during the period for which the accounting is required. The apparently manipulative daughter should be subject to fraud and undue influence remedies for actions during that period; perhaps the equitable remedy of accounting would even be available. But accounting as a statutory remedy for breach of trust appears ill-suited for the circumstances here; it hinges on the fortuity that the daughter later became the successor trustee.

The staff has a sense that it makes a difference whether the settlor personally, as opposed to a third party, was trustee during the time the suspect transactions occurred. We are more skeptical of an accounting requirement where the settlor personally was trustee at the time; Mr. Collier's concerns appear to be focused on this circumstance.

Where does all this leave us? The staff agrees with Mr. Collier that the case is problematic, but we think the damage it causes is small if it is narrowly limited to its facts. At least the court avoids any broad pronouncements by way of dictum. However, we are sympathetic to Mr. Collier's concern about its potential damage to revocable trust doctrine if broadly construed. **Perhaps some tweaking of the statute is called for**:

> **Prob. Code § 16064 (amended). Exceptions to duty to report information and account**
>
> 16064. The trustee is not required to report information or account to a beneficiary in any of the following circumstances:
>
> (a) To the extent the trust instrument waives the report or account, except that no waiver described in subdivision (e) of

Section 16062 shall be valid or enforceable. Regardless of a waiver of accounting in the trust instrument, upon a showing that it is reasonably likely that a material breach of the trust has occurred, the court may compel the trustee to report information about the trust and to account.

(b) In the case of a beneficiary of a revocable trust, as provided in Section 15800, to the extent the report or information is for the period when the trust may be revoked.

(c) As to a beneficiary who has waived in writing the right to a report or account. A waiver of rights under this subdivision may be withdrawn in writing at any time as to the most recent account and future accounts. A waiver has no effect on the beneficiary's right to petition for a report or account pursuant to Section 17200.

(d) Where the beneficiary and the trustee are the same person.

Comment. Section 16064 is amended to make clear that a beneficiary does not have the right to compel an accounting, either *during* or *for* the period a trust is revocable. See also Section 15800. Thus in circumstances such as those described in *Evangelho v. Presoto*, 67 Cal. App. 4th 615, 79 Cal. Rptr. 2d 146 (1998), a beneficiary could not later require an accounting for the period that the trust was revocable. However, common law remedies may be available for fraud or undue influence on the settlor during that period, whether by a trustee, beneficiary, or other person. See also Sections 15002, 15003.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

California Land Title Association
SINCE 1907

April 20, 1999

Nathaniel Sterling
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

Dear Nathaniel:

Recently, the Beverly Hills Bar Association sponsored legislation which would have created a new form of vesting title: Community Property with Right of Survivorship. The bill was prospective only, and was not opposed by CLTA. In fact, several of my members indicated that this is a form of vesting title in other states. In our opinion, this approach is far more preferable to your suggested approach of years past and would allow those who chose to hold property as joint tenants with right of survivorship to not have their wishes changed by a matter of law. While the Beverly Hills Bar language was removed from the omnibus bill later as being too substantive, I believe that all interested parties would support this approach with a little education and effort behind it showing that it would not have adverse effects.

The community property with right of survivorship achieves much of your goals (i.e. tax benefits and intent of the parties) on a "go forward" (prospective) basis and is a concept the title industry can live with. In addition, it is a very simple approach which does not require a lot of statutory changes to an area of law that many title companies, attorneys and lenders are familiar with.

If you have any questions, please feel free to call me.

Respectfully,

Craig C. Page
Vice President
and Legislative Counsel

CCP:cg

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May 19, 1999

Mr. Kenneth G. Petrulis
Bryan Cave LLP
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Dear Mr. Petrulis:

I have been asked by the Executive Committee of the Estate Planning, Trust and Probate Section to indicate to you the Committee's support for the concept of community property with right of survivorship. Although this should not be construed as support for any specific bill, the Executive Committee is supportive of the idea generally and would be happy to cooperate with you in reviewing legislation and providing technical assistance.

It is our understanding that the legislation you intend to propose does not involve the creation of presumptions with respect to existing title. As you are probably aware, this approach has garnered significant opposition in the past and it is probably unlikely that the Executive Committee would support it.

Obviously, a variety of issues will have to be resolved, including the types of property to be affected by this new form of title, the recission rights of the title holders, the rights of creditors of the title holders, and potential conflicts with existing provisions of, among others, the Probate Code, Family Code and Financial Code.

Please do not hesitate to contact us if you feel we can be of assistance.

Very truly yours,

Barry C. Fitzpatrick, Chair
Trust and Estate Administration Subcommittee

BCF:cps

cc: Ms. Susan T. House
Ms. Betty J. Orvell
Mr. Larry Doyle
Mr. Nat Sterling

34172.1

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May 19, 1999

Nathaniel Sterling
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4000 Middlefield Road, Room D-1
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Re: Evangelho v. Presoto, 67 Cal.App.4th 615 (October 29, 1998)

Dear Nat:

In a letter sent to you several months ago, I had made a brief mention of the *Evangelho vs. Presoto* case which I felt misconstrued the law applicable to a revocable trust and imposed a duty to account on a successor trustee for the period when the settlor was competent and the sole trustee.

A number of interested parties wrote to the California Supreme Court requesting that the matter be depublished. There was also a petition for hearing. The Court on a four to three vote denied the petition for hearing and also voted not to depublish the opinion.

In connection with the effort to have the opinion depublished, Ed Halbach sent a letter dated December 18, 1998 to the California Supreme Court seeking depublication. I also sent a letter dated December 18, 1998 also seeking depublication. A copy of my letter is enclosed. A number of other practitioners also wrote letters seeking depublication. These letters outlined some of the concerns about the broad language in that opinion. The Court in *Evangelho*, referring to Probate Code Section 15800, stated:

> "The effect of this section, according to the law revision commission comment on this code section, is to postpone the enjoyment of rights of beneficiaries of revocable trusts until the death or incompetence of the settlor or the person who can revoke the trust. [Citation]. During the time the trust may be revoked the trustee is not required to account to a beneficiary (§ 16064)." 67 Cal.App.4th at 623.

The Court then continued:

> "Those rights, which were postponed while the holder of the power to revoke was alive, mature into present and enforceable rights under Division 9, the trust law." (At page 624.)

The Court opinion then continued:

> "However once the trust becomes irrevocable, such as by the death of the settlor, the beneficiaries become the protected persons. The law revision commission comments explicitly speak about 'postponing the enjoyment of rights of beneficiaries of revocable trusts until the death or incompetence of the settlor or other person holding the power to revoke the trust.'" (At page 624.)

The Court further states:

> "But once decedent's died, the right to compel the accounting set out in the code section passed to the respondents as beneficiaries." (At page 624.)

The Court then imposed a retroactive right to an accounting from inception of the trust to the date of the settlor's death. It is this retroactive accounting by a successor trustee while the trust was revocable and all rights were held by the trustor or settlor that is troublesome in that opinion.

The following are submitted for consideration:

1. If the person holding the power to revoke becomes incompetent and there is a conservator appointed or there is a holder of a power of attorney for that incompetent, it would seem that the rights ought to pass to that conservator or the holder of the power to act on behalf of the incompetent rather than transferring any rights at that point to the successor beneficiaries. Compare Section 15800.

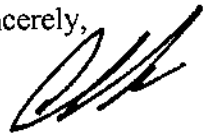
2. When a revocable trust becomes irrevocable (normally on the death of the person holding the power to revoke), the rights of beneficiaries from that point forward should be prospective, thereby precluding the argument made in the *Evangelho* decision that the rights at that point passed to the beneficiaries who then could compel an accounting retroactively to the inception of the trust. I believe that was the intent of Sections 15800, 15801, 15802, 16064(b), etc., to create rights only from the date of death, for example, forward.

3. Section 16064 might be clarified to state, "The trustee is not required to report information or account to a beneficiary and the beneficiary may not compel an accounting in any of the following circumstances: (b) In the case of a beneficiary of a revocable trust, as provided in section 15800, for the period when the trust may be revoked."

Some very minor clarifying language perhaps in Section 15800 or in 16064 might neutralize the broad accounting rights apparently conferred upon beneficiaries after a trustor's death and what would otherwise be a revocable trust.

Thank you for giving consideration to the comments in this letter.

Sincerely,



Charles A. Collier, Jr.

CAC:vjd
Enclosure

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WRITER'S DIRECT DIAL NUMBER
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December 18, 1998

VIA FEDERAL EXPRESS

The Honorable Justices of the California
Supreme Court
303 Second Street, South Tower
San Francisco, CA 94107

Re: Request for Depublication of Evangelho v. Presoto, Nos. A076882 and A077532, First Appellate District, Division Four 67 Cal.App.4th 615 (filed Octoer 29, 1998)

Honorable Justices:

1. **Introduction and Summary.** The undersigned, an attorney who acted as an adviser to the Law Revision Committee when it was drafting the Trust Law, respectfully requests this Court to depublish the opinion in the above case, or at least the discussion of the California Trust Law, especially Probate Code sections 15800 and 16064, at pages 623-625. The opinion as written misconstrued those sections to conclude that they gave the remainder beneficiaries of a revocable living trust the right to compel a former trustee to account for both the eight months when she was trustee and the four years and eleven months when the settlor was trustee, and that all the settlor's rights "passed" to the remainder beneficiaries when the settlor died.

This drastic result is contrary to the Legislature's and Law Revision Commission's declared intent "that beneficiaries of revocable trusts should not have the rights normally given beneficiaries of irrevocable trusts." Indeed, the court considered only two of the code sections that illuminate the legislative intent with respect to accountings for revocable trusts, and only one of the numerous Law Revision Commission comments. The court also ignored the fact that this right to so extensive an accounting will severely impair the practical usefulness of revocable living trusts as will substitutes, adversely affect the administration of the thousands of revocable trusts that already exist. Finally there was no need to so construe California's Trust Law in order to protect the beneficiaries in this case. This opinion should therefore be depublished.

2. **The Key Facts Stated in the Opinion.** The settlor, widowed Joan Evangelho (settlor) created a revocable living trust on February 28, 1990, containing all her assets, except for a Wells Fargo bank account in which her daughter, appellant Darlene

Presoto (Darlene), was a joint tenant. She named Darlene and one of her sons, John Evangelho as co-trustees (although he was not informed of his appointment). Eight months later, on October 8, 1990, the settlor named herself as sole trustee, and served in that capacity until her death on September 12, 1995. The settlor had a statutory right to demand an accounting for the period in which Darlene was the trustee, but there is no indication that she did so.

3. **Reasons for Requesting Depublication.** The opinion affirms orders "requir[ing] appellant [a trustee for only the first eight months of a 5½-year revocable living trust, after which the settlor acted as sole trustee for more than 4½ years] to file a full accounting for a revocable living trust set up by decedent for the benefit of all her children" (67 Cal.App.4th at 617), including "the period when decedent was alive and the trust was revocable by decedent, and . . . the period when appellant was not a trustee of the revocable trust." (*Ibid.*) It holds that, on the settlor's death, her rights to compel a full[1] accounting "passed" to the remainder beneficiaries (*idem* at 624). It bases its holding on "the various Probate Code sections" "[c]considered as a whole" (67 Cal.App.4th at 624).

This opinion so broadly construes the Trust Law -- Sections 15800 and 16064 -- and misconstrues legislative intent as expressed by the Law Revision Commission -- as to adversely affect the current administration of revocable living trusts throughout California and to severely impair the practical use of such trusts as a will substitute. The broad right of remainder beneficiaries to a full accounting "over the entire period of the trust" (*idem* at 617 and 625) will:

a. Saddle a competent settlor with accounting responsibilities over her own property not needed if she had used a will.

b. Saddle a co-trustee (or successor trustee) with the burden of producing and defending an accounting during the settlor's lifetime when that fiduciary did not have any control of trust assets or records from which to produce an accounting -- unlike an executor's duties.

c. Allow remainder beneficiaries a chance to review and challenge all donative transactions that must be shown in such a full accounting over the entire period of the trust -- a right they would not have as devisees.

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[1] The "full accounting" (67 Cal.App.4th at 617) ordered by the court under the "various Probate Code sections" (*Idem* at 624) will require "a statement of receipts and disbursements of principal and income" (section 16063(a)), in other words, every transaction the settlor made.

d. Create the very kind of expense that revocable living trusts are chosen to avoid -- accounting record-keeping over the entire life of the trust.

e. Create more opportunities for litigation expense as remainder beneficiaries review the required ab initio accounting.

f. Convert what every settlor/trustee/beneficiary thought was a revocable trust into an irrevocable trust, by holding that all the settlor's rights during her lifetime "passed to the respondents as [remainder] beneficiaries." (67 Cal.App.4th at 624.)

4. **The "Full Accounting" Remedy "Over the Entire Period of the Trust" Misinterprets the Trust Law and the Law Revision Commission's Report.** The opinion reaches the quoted conclusion by relying on one Comment in the California Law Revision Commission 1986 report on the Trust Law — the only language that was cited or argued to the Court of Appeal. (See 1st Dist. A076882, Respondents' Brief, pages 15-16, and Appellant's Reply Brief, pp. 13-15.) It failed to recognize the extensive statutory provisions and other Comments of the Commission that limit the rights of beneficiaries of a revocable trust and distinguish between their rights and those of the settlor, or between them and the beneficiaries of an irrevocable living or testamentary trust.

For example, the Report under the heading "Duty to Report Information and Account to Beneficiaries" states (two footnotes omitted):

> "Broad statements of obligations to give beneficiaries information concerning activities under the trust generally fail to take into account the special nature of beneficiaries' position under revocable living trusts. The proposed law provides as a general rule that beneficiaries of revocable living trusts are not entitled to accounts or information while the trust is revocable by the settlor. This rule recognizes that normally the settlor of a revocable trust does not want beneficiaries to be able to delve into the affairs of the trust. The settlor in this situation has the power to alter the relationship to deprive the beneficiaries of the right to an account or report. The proposed law thus recognizes the inherent 'at will' nature of the beneficiaries' interest under a revocable trust." (18 Calif. L. Rev'n Rep. at 542.)

Again, at page 584, under the heading "Limitation on Rights of Beneficiaries of Revocable Living Trusts" the Report recognizes the change in general trust law made by California in this area:

> "Trust law generally gives the same rights to beneficiaries of revocable living trusts as it does to beneficiaries of irrevocable living trusts and testamentary trusts. [Footnote omitted.] The general opinion expressed to the Commission by practitioners is that beneficiaries of revocable trusts should not have the rights normally given beneficiaries of irrevocable trusts since the settlor generally holds the ultimate power to direct administration of the trust so long as the settlor has the power of revocation. . . ."

See also Comments of the Law Revision Commission to §§ 16401 (Trustee's liability for acts of agents), 16402 (Liability for acts of co-trustee) and 16403 (Liability for accounts of predecessors), all stating:

> "It should also be noted that the liability [of a trustee] to beneficiaries does not include beneficiaries under revocable trusts during the time the trust can be revoked."

The Law Revision Comment to section 15800, in addition to the language referred to in the opinion about postponing rights of beneficiaries, also stated: "Section 15800 thus recognizes that the holder of the power of revocation is in control of the trust and should have the rights to enforce the trust." Section 15802, dealing with notice, requires notice to "the person holding the power to revoke and not to the beneficiary," with the Law Revision Comment that "notice to a beneficiary of a revocable trust would be an idle act as the beneficiary is powerless to act."

None of the foregoing language was called to the attention of the Court of Appeal, and so it may be forgiven for having misconstrued California Trust Law §§ 15800 and 16064 to permit the complaining remainder beneficiaries the right to a "full" accounting "over the entire period of the trust" (67 Cal.App.4th at 625) i.e., from 1990-1995, on the erroneous theory that "once decedent died, the right to compel the accounting set out in the code sections passed to the [remainder] beneficiaries." (67 Cal.App.4th at 624; emphasis supplied).

5. **This Opinion Will Discourage the Use of the Revocable Living Trust as a Will Substitute.** The revocable living trust as a standard will substitute "has become the primary estate planning vehicle in California, offering privacy, flexibility, and speed when contrasted with wills and the necessity of probate administration.".[2] Such a trust may exist

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[2] *Drafting California Revocable Living Trusts*, (CEB, 3d ed. 1997) at Preface p. xi, and at §3/1/ See also *4 Witkin, Summ. Cal. Law* (9th ed. 1998 Supp.) Personal Property §100A, page 34, discussing Restatement Property 2d § 32.4's "consideration of various ***will substitutes*** the principle one of which is ***the revocable trust.*** ("Emphasis supplied.) At

for years, or decades -- revocable all that time. Throughout that time she considers herself the owner of the trust estate, as does the rest of the world, including the IRS, (no separate tax return or taxpayer identification number[3]). She need account to no one except herself. (See, e.g., Probate Code §§ 15800, 15801, 15802, 16001 and 16064(b).) Yet, if a revocable trust, upon becoming irrevocable, has thereby "passed" from the settlor to the remainder beneficiaries the right to compel an accounting "for the entire period of the trust" while it was revocable, and while the settlor held all beneficial rights, it imposes a burden substantially more onerous than the will it substitutes for, and gives the final takers more rights than they would have as devisees under a will (such as objecting to gifts made or expenses incurred by the settlor alone after she created the trust).

The extensive right created by the language of this opinion effectively imposes on the typical settlor/trustee/beneficiary the duty to keep detailed records of all transactions involving trust property, even though the trust is all hers, lest her co-trustee or a successor trustee find it impossible to produce the required accounting on demand. It imposes on successor trustees or a discharged trustee the duty to account for a period when they had no duties, were not in charge of the records, and did not engage in any transactions.

Yet the opinion construes "the various Probate Code sections" -- "construed as a whole" and including §§ 15800 and 16064 -- to provide the remainder beneficiaries of such trusts the retroactive right to an accounting dating back to the time the trust began, from a trustee who was not a trustee for 80% of the life of the trust. By so doing, the opinion has the practical effect of converting a revocable trust retroactively into an irrevocable trust from the date of its creation.

The burden falls on the accounting trustee (or the personal representative of the deceased settlor-trustee) to prove the accuracy of the required accounting, an accounting that will depend on whatever records the deceased settlor/trustee/beneficiary may have kept.[4] In short, under the opinion as written, a living trust burdens the typical settlor/trustee/

Sections 3.2-3.5 the cited CEB practice books lists probate avoidance, and associated administrative costs, executor's commissions and trustee's fees and attorney fees first among the advantages of the revocable trust as the alternative to a will. (*Idem* at 3-1 to 3-8.)

[3] See *Drafting California Revocable Living Trusts*, (CEB, 3d ed. 1997) I 2.4 and 21.9, citing Treas. Reg. 1.671-4(b) and other Treasury regulation sections.

[4] Purdy v. Johnson (1917) 174 Cal. 521, 527 and 531: ". . ." 'in fact, the burden is upon the trustees to rpove that charges made by them are proper . . .. [and] . . . it is the duty of the trustees to support every item of their account, and that wherever they fail to support the correctness of a charge or credit by satisfactory evidence, the items must be disallowed.'" Purdy is cited in the January 1998 update to California Trust Administration (CEB, Revised

beneficiary with the task, during her lifetime, of maintaining records capable of withstanding court scrutiny, even though the trust is revocable, because her remainder beneficiaries, whoever they may ultimately be, can later compel an accounting (after she dies or becomes incompetent) from her personal representative or co-trustee. That fiduciary must sustain the burden of proving the accuracy of the account back to the time the trust was created. The beneficiaries, by objecting to the accuracy of the items in the account, can challenge any transaction of the settlor disclosed in the accounting -- not just those of the suspected third party.

But if, instead of executing a revocable living trust back in 1990, the settlor had executed a will with exactly the same dispositive provisions, the devisees under that will would have had no such automatic right to compel a retroactive accounting over the same period. If the devisees had cause to complain about any charges or credits that eroded the family bank or brokerage accounts passing under the will, the burden of proof would have been upon the devisees to prove their case, not upon the trustee to "support every item in their [ab initio] account" (see Purdy, note 5, supra), an accounting that they had no hand in keeping records for.

If the successor-trustees (or personal representatives) of deceased settlor-trustee-beneficiaries are required to account for the entire period the trust existed, rather than being required to account only for the period after death or incompetency of the settlor-trustee-beneficiary, it will seriously impair the use of the revocable living trust as a will substitute, since it will impose upon the successor trustee or personal representative a burden of accounting over the lifetime of the trust, a burden that does not exist as to wills.

6. **The Relief the Plaintiffs Sought Could Have Been Awarded Without Straining the Trust Law Beyond its Intent.** Other provisions of the Trust Law and general fiduciary law could have justified the court in giving plaintiffs all the relief they sought. For example: A trustee has a duty not to use trust property for her own benefit (§ 16004(a)); a successor trustee can compel a predecessor trustee to redress a breach of trust (§16403(3)), by payment of damages, setting aside the transaction (subject to rights of third parties), imposing an equitable lien or constructive trust on the property, or recovering the property or its proceeds (§§ 16420(a)(3)(6) (8) and (9)).

1990) at § 6.2, page 201: "All presumptions will be against the trustee, and all doubts arising from the failure to keep records will be resolved against the trustee, and all doubts arising from the failure to keep records will be resolved against the trustee." *See also* Boger, The Law of Trusts and Trustees (Rev. 2d ed. 1983) at § 972, p. 453: "The burden is on the accounting trustee to prove to the satisfaction of the court the merit of all claims for credit which he makes" (citing Purdy, among other cases).

Under California fiduciary law (see § 15003(b), stating that the repeal of Civil Code sections relating to trusts does not "alter the rules applied by the courts to fiduciary and confidential relationships. . . .") —

i) The facts (daughter's joint tenancy of mother's bank account, mother residing in daughter's home, see 67 Cal.App.4th at 619-620) would have justified a finding that the daughter occupied a fiduciary relationship toward mother. (*Solon v. Lichtenstein* (1952) 39 Cal.2d 75, 81-82);

ii) Any transaction between daughter and mother in which the daughter obtained "any advantage," would be presumably obtained under fraud and undue influence (*Bradner v. Vasquez* (1954) 43 Cal.2d 147, 151-152);

iii) As to any such transaction the burden of disproving fraud or undue influence would have fallen on the appellant (see *Solon, supra*).

See also discussion of constructive trusts at 60 Cal.Jur.3d (1994), Trusts §§ 334-354, pp. 479-512.

All of these remedies would have been available to the remainder beneficiaries, without suggesting that all the settlor's rights under the trust law "passed" to the beneficiaries. A successor trustee could also assert claims against a prior trustee § 16403.

7. **Conclusion.** The opinion, if published, severely impairs the usefulness of the revocable living trust as a probate-avoiding will substitute -- burdening with lifetime record-keeping, and heralding for her and her successor the prospect of post mortem accounting and of objections to that accounting as her descendants delve into all her lifetime transfers. It converts all revocable living trusts into **IR**revocable living trusts by giving all remainder beneficiaries the same rights they would have had had the trust been irrevocable from its inception. These are rights far greater than those beneficiaries would have had if the settlor-ancestor had left a will instead of a revocable living trust, and rights not needed to provide relief from such delicts as those of the errant daughter in this case.

The opinion imposes on successor trustees the responsibility of constructing accountings for a period when they had no responsibility for maintaining records.

It imposes on settlors of revocable living trusts the need to maintain records for a future accounting during the time they are the sole beneficiary and have sole rights and the remainder beneficiaries have none -- records they would not need if they used a will.

By according such broad rights to compel a complete accounting, it will promote intra-family litigation over the personal choices of ancestors giving away the various objects of their largesse -- inter vivos or testamentary.

Respectfully yours,

Charles A. Collier, Jr.

Nature of My Interest in This Opinion. I have been a practitioner continuously engaged in estate planning, probate and trust administration and related litigation for about 25 years. I am a past chair of the Estate Planning, Trust and Probate Law Section of the State Bar of California. I am a past president of the American College of Trust and Estate Counsel, am a past member of the Council of the Real Property, Probate and Trust Law Section of the American Bar Association and have served as a chair of various committees of all of those organizations. I serve now and have been serving as a member of the Joint Editorial Board of the Uniform Probate Code for about ten years and as such, deal with many uniform laws including the proposed Uniform Trust Law. In all of those capacities I maintain an interest in the use of revocable trusts as a will substitute and the retention of rights by the grantor similar to those of a testator.