Study L-3059 February 1, 2000

Memorandum 2000-6

Revocable Trust Accounting (Comments on Tentative Recommendation)

This memorandum considers comments we have received on the tentative recommendation on *Revocable Trust Accounting*, which was distributed following the October 1999 Commission meeting.

We have received the following letters, which are included in the Exhibit:

(Another copy of the tentative recommendation is attached for Commissioners' reference.)

Overview of Tentative Recommendation

The tentative recommendation has a limited purpose and is not intended to solve all the problems surrounding rights to accountings and liabilities that may arise in connection with a revocable trust. The Commission is approaching this matter on two fronts: the tentative recommendation addresses the limited statutory construction issues raised by the ruling in *Evangelho v. Presoto*, 67 Cal. App. 4th 615, 79 Cal. Rptr. 2d 146 (1998), which gave beneficiaries of a revocable trust the right, after the death of the settlor, to require an accounting covering the period when the trust was revocable. The purpose of the recommendation is extremely limited: it clarifies the meaning of Probate Code Section 16064, as

understood by those who drafted it, without reopening a policy review of the section. The implicit assumption is that if the added language had been there when the *Evangelho* case was considered, the court could not have misunderstood Section 16064. (All further statutory references are to the Probate Code.) There is absolutely no intention to change the *result* of the *Evangelho* case, because the result could have (and should have) been reached by application of other law. The fortuity that the defendant daughter in this case had been a named cotrustee during the first eight months of a revocable trust enduring for five and a half years should not justify the result in *Evangelho.*

This is a severable issue. Some commentators believe that the erroneous interpretation of the Trust Law in *Evangelho* needs to be corrected without delay. The other complicated issues that have come to the fore as a result of *Evangelho* need to be addressed after a more measured study. The Commission will be exploring a broader range of issues, starting with Memorandum 2000-7, also on the agenda for this meeting.

The immediate issue addressed in this memorandum is whether the Commission should seek a legislative correction of *Evangelho* this year, as a separate initiative. **The staff recommends against correcting *Evangelho*, until a solution to the broader issues can be found.**

Summary of Comments

Opinion was divided. Two commentators support the tentative recommendation without reservation. (Exhibit pp. 1, 8.) Peter Palermo writes that it is a "must in order to preserve the viability of Revocable Living Trusts as an estate planning tool." (Exhibit p. 1.) Charles Collier, who brought this matter before the Commission, supports the thrust of the proposed amendments, but has concerns about some of the commentary. (Exhibit pp. 3-4.)

Robert Temmerman analogizes the duties and liabilities of trustees under revocable trusts to the duties and liabilities of attorneys-in-fact under a durable power of attorney, suggesting that trustees should be accountable to beneficiaries, just as an attorney-in-fact is accountable to successors in interest. (Exhibit p. 5.) Jeffrey Strathmeyer argues that the recommendation ignores the role of revocable trusts as substitutes for durable powers of attorney, and raises the difficult issue of what rules should apply when there is doubt about the capacity of the settlor to manage his or her affairs. (See Exhibit p. 9.)

Several commentators ignore the limited scope and purpose of the tentative recommendation, and are highly critical of the tentatively proposed clarification of the statute. (See Exhibit pp. 2, 6-7, 10, 11-15.) These writers generally reject or ignore the statement in the proposed Comment that appropriate remedies may be available under other law.

One commentator denounces the tentative recommendation as portending the destruction of the revocable living trust as an estate planning device and ensuring a further decline in the public's perception of lawyers. (Exhibit pp. 14-15.)

Scope of Tentative Recommendation

Most of the commentators who oppose the tentative recommendation or express reservations about it have raised important policy issues that are beyond the scope of this proposal. The purpose of the tentative recommendation was to correct an inaccurate interpretation of a statute, leaving more fundamental policy review to a later time (see Memorandum 2000-7). None of the writers disagreed directly with the Commission's conclusion that the statute was incorrectly interpreted. Prof. McGovern believes the case was "correctly decided," although he does not explain whether he was referring to its result or its reading of the relevant statutes. Michael Desmarais (Exhibit p. 6-7) and Charles Goodman (Exhibit p. 10) argue that the Commission should recommend codification or expansion of the *Evangelho* rule, rather than overruling it.

Depending on one's point of view, *Evangelho* may state a preferable policy to the rule under Section 16040 (and the incorporated rule in Section 15800). But the immediate issue presented in the tentative recommendation is whether the statutory rule should be made clearer. *Evangelho* does not correctly interpret the statute, regardless of whether it reflects a better policy than the correct, limited reading of the statute. The interest of those who side with *Evangelho* on policy is to codify, clarify, or expand the newly-minted case law. Clarifying the statute in the manner proposed in the tentative recommendation is counter to that interest.

Evangelho may have achieved a just result on the facts of the case, but the result is not sufficient to escape the charge that the case is poorly reasoned and not well-founded. The decision is based on statutes that are misinterpreted. Compounding its error, the court treats the daughter as if she had been a trustee during the entire term of the trust, which she would have had to be for the trust accounting rules to apply. At the same time, the court ignored the potentially

fruitful course of dealing with the daughter as an attorney-in-fact under a durable power of attorney, which she apparently was throughout the time period in question. (See also the commentary in Exhibit pp. 16-17.) We continue to believe there are other appropriate remedies, such as an action for an accounting (see, e.g., 5 B. Witkin, California Procedure *Pleading* § 775 *et seq.*, at 233 (4th ed. 1997)), or an action for "financial abuse" under the Elder Abuse and Dependent Adult Civil Protection Act (see Welf. & Inst. Code §§ 15600 *et seq.*, 15610.30 (defining "financial abuse")).

The staff discussed some of these issues with Professor Edward Halbach by telephone last October. Prof. Halbach thinks that the court did the "right thing," but based on incorrect reasoning, and he expressed many of the same concerns that arise in the attached letters. He would like to see a more flexible approach permitting beneficiaries or other successors or fiduciaries to look out for the interests of beneficiaries in this type of case.

The staff had assumed there would be general agreement that it is improper to use *trust* accounting proceedings to cover extended periods when the person was *not* a trustee. The daughter in *Evangelho* was named as cotrustee with her brother in February 1990; both of them were removed and replaced by the settlor as sole trustee in October 1990. The settlor died in September 1995, so the daughter was a named cotrustee for one-ninth of the term of the trust.

Proceedings under the broad authority of Section 17200 are not unlimited. The section is not intended to provide a general remedy for all wrongdoing by anyone who may have been a fiduciary at some time in his or her life. But the issue apparently is not as clear as we assumed. Mr. Strathmeyer thinks it is "unwise to limit the court's ability to order the trustee to account for periods *before* the trustee took office." (Exhibit p. 9.) (Emphasis added — in this case, the daughter was also required to account for a time *after* she was a named cotrustee.) Mr. Strathmeyer comments that this may be the "best and cheapest way for the court to get information about the trust." This is no doubt correct, but we do not think efficiency can support the ruling in *Evangelho.* The opinion doesn't provide any standard to determine when a "trust" accounting is permitted, and would seem to leave open the possibility of burdensome and invasive fishing expeditions.

Conclusion

The tentative recommendation was intended as a clarification of legislative intent. However, it has had the perhaps beneficial effect of focusing on an important issue that needs examination. The variety of opinions makes it clear that there is no easy answer. Since the Commission has already decided to review the broader issues, **the staff does not think it would be appropriate, at this time, to attempt to overrule *Evangelho* on the issue of whether the settlor's right to an account may be exercised by beneficiaries (or others) after the settlor's death.**

We remain confident that this is not what the language of the Trust Law means. But at the same time, it would be premature to close the Pandora's box opened by *Evangelho* until the Commission has had time to study the matter and work with interested persons to find an appropriate statutory solution to the emerging issues illustrated by this case.

This leaves the second prong of the tentative recommendation: whether an accounting under the Trust Law can be required for a time when the person was not a trustee. As discussed above, there is not agreement on this limited point. The staff does not believe this issue is significant enough to merit treatment in a separate Commission recommendation. Hence, **the staff recommends that this question also be rolled into the continuing study of revocable trust duties and liabilities.**

Respectfully submitted,

Stan Ulrich
Assistant Executive Secretary

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November 1, 1999

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

Re: **Revocable Trust Accounting**
Request for Public Comment

Gentlemen:

I concur wholeheartedly with this recommendation. It is a **must** in order to preserve the viability of Revocable Living Trusts as an estate planning tool.

Very truly yours,

PETER R. PALERMO

PRP/dml

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November 1, 1999

Mr. Stan Ulrich
California Law Revision Commission
4000 Middlefield Road
Palo Alto, CA 94303-4739

I do not agree with the proposal to amend Probate Code § 16064 so as to overturn Evanghelo v. Presoto, 79 Cal.Rptr.2d 146, which I believe was correctly decided. The second paragraph of the explanation for the proposal erroneously states that "the settlor was the sole trustee" for the period for which an accounting was sought. In fact the settlor's daughter was the original designated trustee, although the settlor later replaced her . Some of the challenged actions of the daughter occurred during her term as trustee. Why should she not be called to account for them? Perhaps the settlor approved her actions in taking money from the trust, perhaps she did not. If the settlor approved the trustee's conduct, perhaps this should be treated as a modification of the trust, but this is not entirely clear since trust modifications must normally be in writing. If the settlor did not approve the trustee's conduct (or was incompetent), surely the trustee's depredations from the trust should be remedied. The suggestion that "common law" remedies would be available is questionable if § 16064 is amended as suggested. The vague references to common law in §§ 15002-03 provide weak support for a remedy if a statute says that trustees need not account "for the period when the trust may be revoked."

The question who has standing to challenge transfers made under undue influence after the transferor as died is somewhat murky. Possibly the transferor's executor may do this. But the beneficiary of a trust which was depleted by wrongful conduct, or a successor trustee acting on behalf of the beneficiaries is the most appropriate party to raise the issue.

Thus I substantially agree with the position of Luther Avery in his letter of October 7.

Sincerely,

William McGovern

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November 1, 1999

California Law Revision Commission
4000 Littlefield Road
Room 1-D
Palo Alto, CA 94303-4739

Re: Tentative Recommendation -- Revocable Trust Accounting
No. L-3059

Dear Commissioners:

In reference to the above Tentative Recommendation on Revocable Trust Accounting, the undersigned has considered the proposed legislation to amend Probate Code § 16064, Memorandum 99-63 and the Tentative Recommendation. I believe the Tentative Recommendation and the explanation accomplish the intended result in clarifying the law as to accountings for revocable trusts. I do have several comments, however, about the last paragraph of the Tentative Recommendation. The second sentence in that last paragraph, page 2, lines 19 through 23 provides:

> "The beneficiary of a revocable trust, whether before or after the settlor's death, should not be able to require a trust accounting covering the period the trust was revocable, either from the settlor acting as sole trustee, or from a successor trustee for the period before the successor became a trustee."

A beneficiary's rights essentially are only an expectancy until the trust becomes irrevocable. The language about not being able to require an accounting "from a successor trustee for the period before the successor became a trustee" suggests, perhaps inadvertently, that a beneficiary with only an expectancy during the revocability of the trust, could nonetheless require a successor trustee to account for the period he or she acts as successor trustee of the trust during its period of revocability. The following is suggested language for that sentence:

> "A beneficiary of a revocable trust, whether before or after the settlor's death, should not be able to require a trust accounting covering the period when the trust was revocable, either from the settlor, acting as sole trustee, or from any other trustee during the period of revocability."

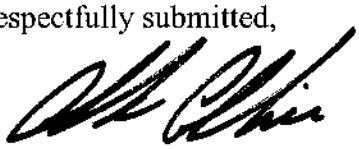
The last sentence of the Tentative Recommendation also is of concern. This provides at page 2, lines 23 through 26, as follows:

> "This would not preclude a beneficiary of a revocable trust from obtaining relief on behalf of the settlor, or the trust under common law remedied for fraud or undue influence exercised against the settlor during the period of the trust revocability."

This sentence appears to give a beneficiary, whose interest while the trust was revocable was only an expectancy, a right to act on behalf of the settlor, alleging fraud or undue influence during the period of a trust's revocability. The rights during the period of revocability should belong exclusively to the settlor or an agent on behalf of the settlor, which normally would be a conservator, a holder of a durable power of attorney, or perhaps a beneficiary on behalf of the settlor of the trust if there is neither a conservator nor a durable power of attorney holder.

I hope these comments will be of assistance.

Respectfully submitted,



Charles A. Collier, Jr.

CAC:vjd

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November 3, 1999

Nat Sterling
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Re: CLRC 99-63
Revocable Trust Accounting (Tentative Recommendation)

Dear Nat:

As you know, our firm specializes exclusively in the fields of estate planning and trust litigation. The case of *Evangelho v. Presoto* 67 CA 4th 615 (1998) has been discussed repeatedly among the partners, associates and paralegals. Additionally, I have discussed the case with Keith P. Bartel who is one of the attorneys involved in arguing the *Evangelho* case both at the trial court and the appellate court level. The only thing that is certain is that among our firm's attorneys, there is no consensus that emerged on the content of the Tentative Recommendation.

I have enclosed a copy of my partner's memorandum to me concerning CLRC Memo 99-63 for your review. I have also witnessed the e-mail debate that is taking place on the State Bar of California's Estate Planning Trust and Probate Law Section's Executive Committee list serve about the Tentative Recommendation. I expect that you will see this matter discussed at greater lengthy at the next ExComm meeting scheduled for November 13, 1999.

I am of the opinion that a Trustee's duty to account while the Settlor retains the right to revoke his or her trust should be similar, if not identical, to an agent's duty to account under a Power of Attorney (see Probate Code § 4236). An agent has a duty to account to a successor in interest after the death of a principal. Similarly, a trust beneficiary should be able to compel an accounting by a trustee following the death of a Settlor for the time the Trustee was serving in the capacity as trustee. However, the Settlor should be able to draft around the requirement if the Settlor does not want financial information provided to certain family members, at least without a Court order.

Good luck in this project and thank you for the opportunity to share my thoughts and opinions.

Sincerely,

Robert E. Temmerman, Jr.
/gmd
enclosures
cc: Geoffrey W. Phillips Michael G. Desmarais

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V

MEMORANDUM

TO: RET
FROM: MGD
DATE: OCTOBER 5, 1999
RE: CLRC MEMO 99-63

Bob, I strongly object to the proposed amendment to Probate Code §16064(b).

One of the principal avenues of elder abuse is the procurement of one's appointment as trustee of a revocable intervivos trust and the mis-appropriation of trust assets. As a general matter, it is extremely difficult, if not impossible, to remedy this kind of breach because the remainder beneficiaries never even discover the breach since the trustee argues that he does not have to account for the period of time prior to the death of the settlor.

While settlors of irrevocable intervivos trusts undoubtedly have a right to maintain the confidentiality of their finances during their lifetime, one does not unduly intrude into their right to maintain the confidentiality of their financial transactions by requiring the trustee of an irrevocable intervivos trust to account to the remainder beneficiaries for his acts prior to the settlor's death after the settlor dies.

Similarly, this requirement of an accounting for the period of time prior to the settlor's death imposes no undue burden on the trustee who is under a fiduciary duty to maintain records during the entire period that the trustee serves.

Accordingly, if anything, Probate Code §16064(b) should be expanded to require the trustee to account to the remainder beneficiaries for all of

his acts while he served as trustee once the settlor dies or the trust otherwise becomes irrevocable.

The proposed change to Probate Code §16064(e) is reasonable as phrased. The Comment to this amendment, however, should emphasize that it does not preclude the court for imposing the common law remedy of an accounting once the plaintiff secures a judgment imposing a constructive trust on property misappropriated by the defendant.

MGD

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November 4, 1999

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California Law Revision Commission
4000 Middlefield Road, Room D-1
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Re: Revocable Trust Accounting - Tentative Recommendation

Dear Ladies and Gentlemen:

The Commission is correct in preparing a proposal overturning the decision in Evangelho. The proposal should be adopted and enacted (preferably retroactively) as quickly as possible.

Sincerely,

Stuart D. Zimring

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November 26, 1999

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Re: Study #L-3059: Tentative Recommendation re: Revocable Trust Accounting

Members of the Commission:

I oppose the recommendation. The recommendation emphasizes the roll of a revocable trust as a will substitute, but fails to give adequate consideration to the roll of these documents as durable power of attorney substitutes. Just because the duty to account is owed to the competent settlor during life does not mean that such an account was ever rendered. Further, the risk of abuse by a trustee is highest in the period shortly before death. The settlor may be in a weakened state. Mental capacity may be highly debatable and difficult to prove after the fact. Proof of incompetence should not be a prerequisite for a court being allowed to order an account. I am very reluctant to tie the hands of the courts in these situations.

I also think it is unwise to limit the court's ability to order the trustee to account for periods before the trustee took office. There will be times when this will be the best and cheapest way for the court to get information about the trust. Compare the provisions of Probate Code 10953 concerning an accounting by the attorney when a fiduciary dies, etc. I think Probate Code 10953 is also a reminder that an obligation to account is not synonymous with legal liability for the transactions of the period of the account.

Very truly yours,

Jeffrey A. Dennis-Strathmeyer

January 28, 2000

Stan Ulrich
Assistant Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, Calif. 94303-4739

RE: Tentative Recommendation on Revocable Trust Accounting (Study #L-3059)

Dear Mr. Ulrich:

In order to illustrate a serious defect with the Tentative Recommendation on Revocable Trust Accounting, the Commission might want to consider the following hypothetical scenario:

An incapacitated elderly widow, B, is primary beneficiary of a revocable trust. The trustee is her child, C, who also holds B's power of attorney. The trust pays for B's home nursing care. Although unable to write or speak, B's mind is intact (to force a competency hearing upon her would be an unthinkable humiliation). C mismanages trust investments and diverts trust resources for personal gain. Claiming financial necessity, C eventually places B in a nursing home, over her most vehement objections (inarticulate wailing and crying), then refuses to meet with siblings to reconsider. They ask C to account retroactively, but C hides behind the claim that only B has the right to an accounting.

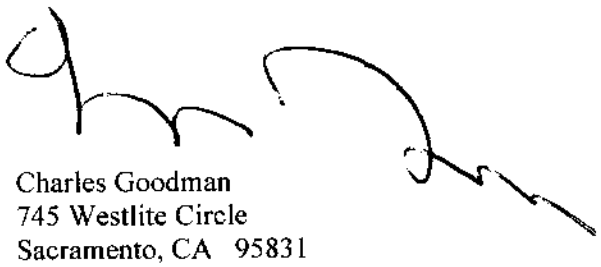
Does the Commission agree that C should be accountable only to C? This would be the inevitable result should the Tentative Recommendation become law. Common law remedies would be useless if C doesn't have to keep records.

The preoccupation with the will-substitute nature of trusts is misplaced. In cases of trustor incapacity, there must be a sure-fire means to make the trustee accountable -- otherwise, the trustee's own will may end up being what substitutes for the will of the trustor. One shudders to think of the Pandora's Box of elder abuse that would be opened should the Legislature adopt this proposal.

Rather than eviscerate *Evangelho*, the Commission should instead recommend fortifying Probate Code sections 15800 and 16064 to insure the requisite accountability.

Thank you for the chance to comment on the tentative recommendation.

Sincerely,



Charles Goodman
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To: comment@clrc.ca.gov
Subject: Comment on Revocable Trust Accounting
From: L Goodman <lgoodman@juno.com>
Date: Mon, 31 Jan 2000 14:37:05 EST

California Law Revision Commission
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Ladies and Gentlemen:

The CLRC's proposed amendment to Probate Code Section 16064 is ill-considered and likely to lead to a result far different from that intended.

The CLRC is acting to preserve the purity of its Trust Law from the "error" of Evangelho v. Presoto. Yet, by the traditional notions of Justice and Equity, Evangelho is not error. The CLRC's proposal will create a situation in which the Legislature could find amendments to those sections of the Probate Code concerning revocable trusts necessary to protect Senior Citizens from outrageous conduct by uncontrolled Trustees.

Let's try this as a hypothetical:

Mr and Mrs. A, are an elderly upper middle class couple, both college educated. Mr. and Mrs. A have children B, C, D, and E. Upon hearing the Buzz about Revocable Trusts as a substitute for Wills, Mr. and Mrs. A. consult their attorney -- an expert in Probate and Trust matters. They are advised that Revocable Trusts are superior to Wills in that distribution is more prompt and fees are reduced. They establish such a Trust scheme, naming Mr. A as the Trustee.

The trust language establishes the following purposes of the Trust: 1) the maintenance and care of Mr. and Mrs. A, 2) the maintenance of their family home as long as Mr. and Mrs. A are alive and wish to remain in it, 3) the provision and maintenance of a home for E, in Trust, 4) on the death of the last of Mr. and Mrs. A, funds, in Trust, for the education of their grandchildren B1, B2, B3, C1, C2, E1, and E2.

Mr. A dies. The successor Trustee is C.

Case 1: C, without informing any beneficiary, makes loans to himself, which reduce the Trust Principal.

Case 2: C, without informing any beneficiary, disburses, for C's own personal benefit, a substantial percentage of the money in a corporation in which the Trust owns all the shares and the Trustee, on the death of Mr. A, and by virtue of being the Trustee, is the sole officer and director.

Case 3: Same as Case 2, except that because of the disbursements of the corporation's cash to C for his personal benefit, the corporation is unable to conduct the business for which it was established and the shares held by the Trust become worthless.

Case 4: C fails to diversify any portion of the Trust's portfolio, indeed sells all the securities, holds only debt instruments, and the Trust entirely misses the Great Bull Market of 1992 to 2000.

Case 5: C diverts a substantial portion of the Trust's funds to an "operating account", which he claims is not part of the Trust.

Case 6: same as Case 5, except that, in

addition, C disburses funds for his own benefit from this "operating account"

Case 7: C fails to maintain the family home, with the result that it has a lower market value than if it had been maintained.

Case 8: C fails to maintain the home for E, with the result that it has a lower market value than if it had been maintained.

Case 9: C fails to record receipt of a large amount of insurance proceeds payable to the Trust.

Case 10: Same as 9, except that to avoid the threat of personally embarassing litigation against C, C transfers to the threatening party a large amount of insurance proceeds payable to the Trust.

Case 11: The acts and omissions of C result in the Trust Corpus being so small that the family home is sold over the objections of Mrs. A, who cannot understand how this happened.

Case 12: Each of these actions or inactions by C occurs while the elderly Mrs. A is ill, and unable to function without the help of agents of C who control her life activities.

Case 13: Same as Case 12, except that Mrs. A is subjected to active physical abuse by one or more of C's agents if she shows any signs of demurring to any of C's acts and impostitures.

Case 14: After the Trust is established, Mr. A., as Trustee, opens a discretionary trading account with a Wall Street Financial Genius. The Genius requires a very substantial minimum investment. C simply takes the funds, and their considerable gains, as his own.

Case 16: C takes substantial fees for his services as Trustee, which substantially reduce the Trust Property. These fees far exceed those which, by law, would be allowed to Executors of Wills.

Case 17: All of the above occurs, but Mrs. A is finally released by Death from this vale of tears.

Does anyone doubt that Mr. C's conduct in the hypotheticals above ought to be the occasion for prompt and effective redress?

Had Mr. C been an Executor of a Will, he would have been required to Account immediately. Under Evangelho's construction of Probate Code Section 15800, Mr. C would be required to Account upon the death of Mrs. A.

Why, it may be asked, does the Staff of the CLRC insist that Probate Code be amended to let Mr. C keep the fruits of his faithlessness and oppression?

The Staff cannot cogently argue that Mr. C should keep his ill-gotten gains because Mr. and Mrs. A's revocable Trust is the same as a Will and treatment should be the same for Mr. C whether he administers a Will or a Trust. Had Mr. C been an Executor or Administrator of a Mr. A's Will, Mr. C would have been required by the Probate Court with jurisdiction to Account for his conduct.

The Staff cannot argue that the expectations of Mr. and Mrs. A in making their revocable Trust as a Will Substitute must be maintained, because surely Mr. and Mrs. A, who made their Trust to avoid the burdens and

expenses of Probate administration would have willingly borne those burdens had they been able to foresee what could happen to their Trust at the unchecked mercy of Mr. C. Who makes a Trust so that it can be stolen from? Who makes a Trust so that a defenseless elderly person can be financially and physically abused by one in a position of Trust? (Who would propose a law that would do so? Study L-3059 does.) Mr. and Mrs. A made this Trust as a Will Substitute so that what THEY -- NOT SOME FAITHLESS TRUSTEE -- did not consume during their lifetimes would pass to the specific objects of their bounty named in the gift clauses of their Trust. Is it consistent with the wishes of Mr. and Mrs. A that much of their property go instead to a Trustee, reducing their intended gifts to their stated beneficiaries? (Who would propose a law that would defeat the intention of the Settlors in making Trusts as Will substitutes? Study L-3059 does.)

One of the stated intentions of Mr. and Mrs. A in making this Trust was to avoid the fees of Probate administration. Yet our hypothetical Trustee, Mr. C., ends up charging more each year than the entire costs of Probate adminstration. (Who would propose a law that would defeat this expectation of those making Trusts as Will substitutes? Why, Study L-3059, of course.)

When the Staff removes the requirement for an Accounting, however delayed it may be under the Court's ruling in Evangelho, it frees the hands of non-Settlor Trustees to take whatever they want, whenever they want it, because there will never be a day of reckoning.

The Staff argument that remedies for such conduct ought to lie elsewhere than in the Trust Law is most interesting. Generally, it ignores the fact that the Codes are to be construed as a whole body of law, with specific Codes governing the kinds of acts and relationships set forth in the particular Code. Where, if not in the Probate Code which governs the relationships among Trustees, Settlors, and Beneficiaries, are the provisions which require a Trustee to Account to be found? Is the Staff contending that the general rules and practices of Equity which would allow an Accounting in the case of theft, malfeasance, oppression, or nelgect, are to govern the express provisions of their beloved and Purified version of Section 16064? Is the Staff contending that their proposed amendment of Probate Code Section 16064, if passed into law by the Legislature, is to be disregarded by Courts because other laws and legal maxims require Courts to do justice and to provide a remedy for every wrong? Given the fact that the Staff Study L-3059 takes the Evangelho Court to task for applying the traditional rules Equity to provide a remedy for a wrong while being consistent with the language of a Statute, it would be disingenuous for the Staff to argue that it intends to leave any civil remedy for the embezzlements, oppressions, and other defalcations of faithless Trustees in any of the cases set forth in hypothetical above, or in any other circumstances, because the proposed CLRC comment to the proposed amendment makes it clear that the section precludes accountings while a Settlor lives.

Purity of Statute. Study L-3059 is a monument to Legal Logic. The challenge is that life -- real life as opposed to what goes on in Legal Academe -- is messy. The facts have a tendency not to cooperate. I would ask the Staff to brush back the ivy and look down for a moment at an aspect of real life:

Our population is aging. Many of us are living longer physically than our minds. Others continue for many years in an elderly state, neither exactly firm or infirm of mind, not legally incompetent, but susceptible. Telemarketers have taken advantage of this -- perfect strangers, over the telephone lines, mulct Senior Citizens of Millions of Dollars every day. If strangers do this with nothing more than a telephone conversation, then the Court's ruling in Evangeho is an attempt to deal with a real problem of oppression and theft during the life of a surviving Settlor of a revocable Trust by requiring an Accounting.

When a Trustee who doesn't have any records is required to Account, the burden is on the Trustee -- no records, no defense. The Staff's pursuit of Purity of Statute would change this. Not being required to Account -- ever -- a theiving Trustee would not keep any records.

A lawyer experienced in the ways of Courts and Trials might well wonder, as a practical matter, whether a showing can be made sufficient to get discovery of confidential documents and personal records of the Trustee in order to avoid Summary Judgment in a civil suit brought by the beneficiaries of a mulcted Trust. First, under Purified Section 16064, the beneficiaries of the Trust have no rights to force a faithless Trustee to Account, except for whatever the Trustee had not yet taken from the Trust by the date of the Settlor's death. Second, the burden of proof would be entirely reversed from a Trustee having to justify his or her depredations and placed squarely upon beneficiaries having to prove at every step of the way that their "fishing expedition" is justified and ought to be allowed, even though they have no documentary evidence to support their claims and are not likely to find any if the Trustee is clever enough to destroy everything. To make matters even more interesting, the faithless Trustee has a large fund of mulcted money to fund his or her defense while the benficiaries who should have received that money have to dig into their own funds to fund their legal action -- a fight which, if successful, might well have the outcome of Jarndyce v. Jarndyce -- all of the funds they are seeking to recover have been expended in legal fees. And if unsuccessful, it would be Jarndyce with a twist: if they are unsuccessful, the thieving Trustee gets to sue the mulcted beneficiaries for Malicious Prosecution -- and would likely prevail! The Staff's pursuit of a Perfect Statute yeilds the Staff's version of Perfect Justice. A double dip -- with impunity. Highest Marks to the Staff!

The real life consequences of Staff Study L-3059 being enacted into law by the Legislature would be these:

+ The amendments sought by Staff Study L-3059 would effectively convert a Trust into an opportunity for free and unfettered feeding at the trough by a non-Settlor Trustee. Such a Trustee would be set at liberty to divert as much of the Trust as he or she wishes into his or her own pockets, to the detriment of the surviving Settlors and their intended beneficiaries.

+ The amendments sought by Staff Study L-3059 would destroy the revocable living trust as an estate planning device in California. No one could be sure that invoking such a device would be safe from the impostitures of uncontrolled and unaccountable Trustees. It will drive most people back to the probate system or out to other States -- those with more normal laws. The revenue losses to California would be considerable, as those with the most wealth and income are most mobile.

+ The amendments sought by Staff Study L-3059 allows Trustees, not Settlors to make donative transfers -- into the Trustees' pockets rather than to the intended beneficiaries of the Trust. This completely turns the purpose of a Trust on its head. The Staff proposals would allow the Trust to exist for the purposes deemed important by the Trustee in his or her unfettered discretion, rather than for the purposes established by the Settlors of the Trust.

+ The amendments sought by Staff Study L-3059 allow theft with impunity to the detriment of surviving elderly Settlors and their beneficiaries. They eliminate entirely the requirement of Trustees to keep and preserve records, so that, as a practical matter, no civil recovery may be had against a theiving, oppressive, or faithless Trustee.

For many years now, the prestige of the legal profession has been declining. Until now, we have barely managed to keep ahead of Telemarketers. Staff Study L-3059 will assure that the public perceives

the legal profession in California as worse than Telemarketers, -- since the Staff Study puts the California Law Revision Commission as standing tall in favor of cheating, stealing from, and opressing Senior Citizens by changing the law to make it easy to do so. The Staff's proposed amendments will be Exhibit A in the Court of Public Opinion. Sending the proposed amendment to the Legislature will most likely result in a hue and cry against the amendment and to all related sections of the Probate Code. It is unlikely that the Probate Code's current provisions concerning revocable trusts will survive unscathed. One would expect the politically powerful Senior Citizens groups to prevail over the Staff's plea for Purity of Statute. If one gives a moment's thought to political dynamics, one could foresee that the end result would be that something like a doubled and redoubled Evangelho ruling would emerge from the Legislature as the Law of California.

If the Staff position should prevail, then the exodus of the wealthy will begin. Thank you for the opportunity!

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Revocable Trusts; Accountings

Original trustee of revocable trust compelled to account to other remaindermen for transactions that occurred during period when settlor was acting as the sole trustee. Absent a timely objection, the trial court can consider verified pleadings, supporting declarations, and other documents in ruling on a probate petition.

Evangelho v Presoto (1998) 67 CA4th 615, 79 CR2d 146

Decedent died in 1995, survived by her six children, including Daughter. Her 1990 revocable trust initially named Daughter and Son *X* as cotrustees, but Son *X* was unaware of the trust until Decedent's death. Daughter served alone as initial trustee.

Under the initial trust, Daughter was to receive all of Decedent's jewelry, and the residue of the trust estate was to be distributed to all six children in equal shares. A week after the initial trust was created, Decedent amended it to leave Daughter a parcel of real property. Seven months later, Decedent amended the trust to name herself as trustee. A few months after that, the trust was amended to add gifts of a car to Son *Y* and $5000 to a third party. In July 1991, the real property to be distributed to Daughter was sold. Decedent used the proceeds to purchase a 58-percent interest in Daughter's residence. Decedent moved into the residence and the trust was amended to distribute this interest to Daughter on Decedent's death. Daughter also held Decedent's durable power of attorney from the day before creation of the trust until Decedent's death.

At the time the trust was created, it included a Paine-Webber brokerage account having a value of $450,000. When Decedent died, the account was worth $132,000. It appears that during Decedent's lifetime various trust assets were deposited in a joint bank account standing in the names of Decedent and Daughter. Daughter then used funds from the account for personal expenses.

In due course, Decedent's five sons (Beneficiaries) brought a petition seeking a declaration that certain proposed actions would not violate the trust's no-contest clause. The court ruled that a petition for imposition of a constructive trust on unspecified property would be a contest, but that a petition for an accounting would not be. Beneficiaries later petitioned for an order compelling Daughter to account. The court granted the order, requiring Daughter to account for the period from the establishment of the trust in 1990 until the present. This included a requirement to account for assets transferred to the joint tenancy account.

Daughter objected, contending in particular that she could not be required to account for the trust (1) for the period when the trust was revocable, and (2) for the period when she was not the trustee. The appeal also challenged the trial court's use of verified petitions and declarations under penalty of perjury in reaching its decision.

The court of appeal affirmed. First addressing the evidentiary issue, the court followed established precedent in ruling that "where the parties do not object to the use of affidavits in evidence, and where both parties adopt that means of supporting their positions, the parties cannot question the propriety of the procedure on appeal." 67 CA4th at 620. Similarly, unsworn, unverified memoranda can also be properly considered as evidence in the absence of objections.

The court then ruled that, although other beneficiaries of a revocable trust cannot demand an accounting while the settlor holding the power to revoke is living and competent, the decedent's right to demand an accounting passes to the beneficiaries when the decedent dies or becomes incompetent. The court noted that the scope of such an accounting, like other "equitable relief" is "generally left to the good judgment of the trial court."

Finally—perhaps somewhat blurring the line between rules applicable to an express trust and those applicable to a constructive trust, and with no mention of the agency relationship—the court ruled, without explanation or qualification, that it was proper to compel Daughter to account for the deposits of trust assets to the joint account even for the period during which she was not the trustee. For some unexplained reason, the court also felt it necessary to point out that the California Multiple-Party Accounts Law (Prob C §§5100–5701) states that it in no way "affects the law relating to transfers in fraud of creditors." Prob C §5202.

▶***COMMENT:*** It is difficult to see the relevance of the observation about transfers in fraud of creditors to the present case. Although obviously relevant, the court generally fails to explain why, and more importantly, in what capacity, in what manner and with what consequences, Daughter could be compelled under the Trust Law to account for transactions occurring when she was not the trustee. (The opinion might leave a casual reader with the impression that she had been the successor trustee, but it appears this was not the case.) Some of the same results might be reached under a constructive trust theory, but the court did not advance such a theory. The trial court, however, in a point apparently not appealed, had ruled that a suit for constructive trust could constitute a "contest" under the trust's anti-contest clause, but a petition for an accounting would not.

In any event, the case raises the issue of the extent to which a nonsettlor family member trustee of a revocable trust should occasionally account to the settlor or seek a waiver of account. It is quite common for an infirm elderly person to move in with a favored child, share or even subsidize that child's living expenses, and then provide that child a greater share of the trust on death than is given to the child's siblings. Postdeath "misunderstandings" among the survivors abound in these situations; the trustee often believes the disproportionate treatment is a fair reward for caring for Mom in her old age, and other siblings often believe that the degree of disproportionate treatment is so excessive that it reflects undue influence or even fraud. Sometimes the other siblings are right; sometimes not.

In these cases, a trustee probably should seek an occasional waiver of accounting from the settlor. This precaution won't help much if the waiver itself appears to be procured by undue influence, but it may be helpful in better circumstances. Of course, the best solution, when acceptable to the settlor, is to avoid postdeath surprises by informing other children in advance of the general nature of the estate plan and the gist of the financial arrangements between the settlor and the trustee.

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