

First Supplement to Memorandum 99-49

Probate Code: Selected Issues

Attached are the following letters we have received concerning issues in Memorandum 99-49.

	<i>Exhibit p.</i>
1. Robert E. Temmerman .....	1
2. Charles A. Collier, Jr. ....	2
3. Joseph L. Wyatt, Jr. ....	5

The letters address the following issues in the memorandum. The staff will raise the points made in the letters in connection with our discussion of the issues.

**Problems in trust litigation.** See letter of Mr. Temmerman, Exhibit p. 1.

**Community property in joint tenancy form.** See letter of Mr. Temmerman, Exhibit p. 1.

**Duty to account under revocable trust.** See letters of Mr. Collier and Mr. Wyatt, Exhibit pp. 2-7.

Respectfully submitted,

Nathaniel Sterling  
Executive Secretary

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August 5, 1999

Law Revision Commission  
RECEIVED

AUG - 9 1999

Nat Sterling  
California Law Revision Commission  
4000 Middlefield Road, Suite D-2  
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File: \_\_\_\_\_

Re: CLRC Memorandum 99-49  
Probate Code: Selected Issues

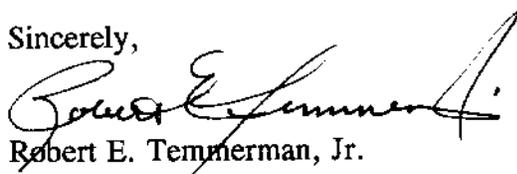
Dear Nat:

I have only briefly reviewed Memorandum 99-49, paying particular attention in trust litigation. Since you are a member of the drafting committee of the Uniform Trust Act, you may have recently received a copy of Mr. Smith's correspondence to Professor English dated July 30, 1999. As part of your continuing study, you may wish to review some of the recommendations proposed by Mr. Smith on pages 11 through 26 of his paper entitled "Reforming the Corporate Administration of Personal Trust: The Problem and a Plan." In some respects, I must agree with Mr. Smith concerns. In my experience, more and more trust beneficiaries have legitimate complaints involving the lack of responsiveness of fiduciaries in general, and occasionally corporate fiduciaries.

If you would like me to provide you with a copy of Mr. Smith's article, kindly so advise.

With respect to the issue of community property with right of survivorship, I am somewhat confused with the CLRC's recommendation to continue to monitor developments since both the California Land Title Association as well as the Executive Committee of the Estate Planning, Trust and Probate Law Section of the State Bar support the concept. Kindly advise as to why the CLRC staff is holding off on supporting the concept of CPWROS in favor of continued monitoring.

Sincerely,



Robert E. Temmerman, Jr.  
RET/gmd

cc: Stanley H. Schmidt  
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August 11, 1999

Nathaniel Sterling  
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Re: Revocable Trust Provisions Under Trust Law

Dear Nat:

As a follow up to my letter to you of May 19, 1999, which discussed in particular the decision of Evangelho v. Presoto and the Probate Code item on the Law Revision Commission's agenda for August 12, I submit the following for consideration by the Commission:

1. Section 15800 states that "During the time that a trust is revocable and the person holding the power to revoke the trust is competent: (a) the person holding the power to revoke, and not the beneficiary has the rights afforded beneficiaries under this division." If a settlor of a revocable trust becomes legally incompetent, there is likely to be either a person holding a durable power of attorney with authority to modify or amend the trust or a conservator appointed who could exercise rights under the substituted judgment provisions of the Code, Section 2580 and subsequent. These persons would be agents to act on behalf of the settlor to protect the settlor's interest. These persons acting on behalf of the settlor would hold the power to revoke the trust and the power to amend either pursuant to court order or pursuant to the durable power of attorney for property, thereby coming within the scope of Section 15800, as competent persons holding the power to revoke (subject to any limitations in the trust document).
2. So long as the settlor is living, the trust remains revocable, whether or not the settlor is incompetent.
3. The rights of successor beneficiaries so long as the trust is revocable should be to enforce the settlor's rights in the trust from and after the date of incompetency only if there is no holder of a power of attorney or conservator, that is, protect the

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settlor's rights and successor beneficiaries should not have any independent rights for their own benefit.

4. The Comment under Section 15800 states in part: "This section has the effect of 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." If a settlor becomes incompetent and there is no other holder of a power to revoke, that is, no holder of a power of attorney for property and no conservator, then it would seem logical that that power to act on behalf of the settlor should pass to the beneficiaries who act not on their own behalf but on behalf of the settlor to ensure that the trust is properly administered for the settlor alone during his or her lifetime. Perhaps some minor rewording of this Comment would make that concept clear, namely, that the settlor's power to revoke the trust may be held by an attorney in fact or conservator, for example, should the settlor become incompetent. Sections 15801, 15802 and 15803 all refer to the time that the trust is revocable and the person holding the power is competent. Perhaps these sections need some clarification by referring back to a revised comment under Section 15800. The following language attempts to express the concept:

"While a trust is revocable, and the settlor does not have capacity to revoke the trust, the settlor's rights can be exercised by an agent acting under a durable power of attorney, a conservator, or a guardian, who is someone other than the trustee, or by the beneficiaries who succeed to the interests of the settlor."

The beneficiaries' rights should arise only when the trust is no longer revocable.

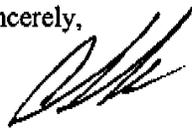
5. Section 16064(b) relating to the duty to account for a period when the trust may be revoked should also be clarified to be consistent with any changes in 15800 or the comment to that section.
6. The concept is to make a revocable trust which is widely used as a will substitute the functional equivalent of a will insofar as possible during the settlor's lifetime. Evangelho blurs that concept by giving successor beneficiaries rights they would not have under a will.

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Thank you for giving this matter further consideration.

Sincerely,



Charles A. Collier, Jr.

CAC:vjd

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August 11, 1999

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**Re: *Evangelho v. Presoto*, 67 Cal.App.4th 615 (1998),  
review denied (4-3) and request to depublish denied**

Dear Mr. Sterling:

I am one of the many lawyers who wrote to the California Supreme Court seeking depublication, as did Ed Halbach, Ann Stodden, and Art Marshall, among many others who aided the Commission when it drafted the Trust Law. They wrote because they knew how much mischief this opinion would do.

I have read Chuck Collier's letters to you of May 19 and August 10 and agree with both. I would like to call the Commission's attention to a further criticism of the case, suggest a further amendment to Section 16064, and add to the proposed Comment.

1. The criticism: that on the authority of the Trust Law, the opinion makes a trustee file a full trust accounting for the trust when she was not the trustee.
2. The amendment: to excuse a trustee from filing a trust accounting for the period when he or she is not a trustee.
3. The comment: to make it clear that the amendment clarifies existing law and is not new law.

1. Mr. Collier was kind enough to send me a copy of pages 7-10 of your Memorandum 99-49, properly evaluating the *Evangelho* case and explaining its misapplication of the Trust Law because of facts that called for remedy, even though other remedies were available "without the need to contort the law governing revocable

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trusts.” Unfortunately, the *Evangelho* case did just that; it based its holding on “the various Probate Code sections” of the Trust Law “considered as a whole” (67 Cal.App.4th at 624): it found justification for the extensive accounting in the same “code sections.” (*Ibid.*) After a summary of the revocable trust sections of the Trust Law, the opinion concluded (67 Cal.App.4th at 622, emphasis mine):

“*Considered as a whole*, the *various Probate Code sections* impose a duty on the trustee to protect the interests of the persons who are entitled to the proceeds of the trust. One facet of the duty is that *the protected persons can compel an accounting*. In the case of a revocable trust, two categories of person are protected. While the trust is revocable, the protected person is the settlor. 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.” (Cal. Law Revision Com. com., 54 West’s Ann. Prob. Code, supra, @15800, p. 644.)

Accordingly, the *actual words of the code sections* and Law Revision Commission reveal the will of the Legislature to be that only decedent as settlor could compel an accounting while she was alive and competent. But once decedent died, the *right to compel the accounting set out in the code sections* passed to the respondents as beneficiaries.

Regarding the scope of the accounting, *the code sections* grant broad equitable powers for the protection of beneficiaries. . . .”

As a consequence of this language, the case may not be “narrowly limited to its facts [because] the Court avoids any broad pronouncements by way of dictum.” (Memorandum 99-49 at page 9.) As Ann Stodden pointed out in her letter requesting depublication, her probate court experience tells her that earnest advocates will try to extend the thrust of this case far beyond its narrow facts by misapplying broad language from the opinion.

2. Like Mr. Collier, I and my fellows are especially concerned with an interpretation of the Trust Law that requires a trustee’s accounting from someone during a period when she was not the trustee — at least when that accounting requirement is justified as derived from the Trust Law.

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To avoid that interpretation, I suggest that Probate Code § 16064 be amended to add the following subsection (e):

“16064. A trustee is not required to report information or account to a beneficiary following circumstances:

. . .

(e) *when the trustee was not serving as a trustee.*”

Remember: in our case the miscreant trustee served for seven months, but she was required — under the Trust Law — to account for the remaining five years — to account, not just for her misdeeds, but “for an accounting of the trust . . . over [its] entire period. . . .” 67 Cal.App.4th at 625.

3. The Comment should be drafted to make it clear that the suggested amendment is not changing the law but clarifying the law as it existed at all times — even prior to *Evangelho* — in order for these amendments to be considered as retrospective. Compare the decision in *Noggle v. Bank of America*, 70 Cal.App.4th 853, 859 (1999) relying on the Law Revision Commission’s Comment to demonstrate that a later amendment “did not change existing law [but] clarified it” by correcting a judicial misinterpretation — not an unknown phenomenon, as *Evangelho* and *DiGrazia* (inter alia) have demonstrated. I suggest the following language or something similar:

Subdivision (e) of section 16064 is amended to make clear that a trustee is not required by the Trust Law to file a trust accounting for a period when he or she is not a trustee or in control of trust assets. This revision is consistent with the original intent of this section, and rejects the contrary conclusion reached by the court in Evangelho.

Thank you for your consideration of this matter. I am sending a copy of this letter to Mr. Collier, who can say better than I what needs to be said on this subject to the Commission. I will be pleased to provide any further information you desire — including copies of others’ letters on this subject.

Sincerely,

Joseph L. Wyatt, Jr.

JLW:md