Cal Law Trends and Developments

Volume 1967 | Issue 1 Article 10

January 1967

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by *K. Bruce Friedman**

In the field of trusts and estates, the year 1967 was fairly eventful. Examination of the court decisions reveals a continuing trend toward construing documents wherever possible to conform with the presumed intent of the testator or trustor, and toward liberal construction of statutory language. At the same time, several decisions hold in favor of creditors in their relationships with the decedent's estate or his survivors. From a legislative standpoint, there were several noteworthy revisions in the Probate and Civil Codes, most important of which was the adoption of a modified version of the Revised Uniform Principal and Income Act.

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The author extends his appreciation to Robert Young, fourth-year student at Golden Gate College, School of Law, for assistance in preparation of this article.

Cal Law Trends and Developments, Vol. 1967, Iss. 1 [1967], Art. 10

Case Law

In the area of interpreting personal intent, *Lawson v. Lowengart*[1] deals with the important question of the validity of an *inter vivos* trust. The court in construing the trustor's apparent intent, and thereby negating the trust, strongly reaffirmed existing principles of law. The decedent in this case, shortly before suffering a heart attack that subsequently resulted in her death, had, on two occasions, discussed with an attorney the preparation of an *inter vivos* trust that would include most of her property. The second discussion took place on the day preceding the heart attack. Several days later the attorney presented a trust instrument to the decedent, which the decedent signed without reading. The attorney thereupon left the hospital with the trust agreement and obtained the signatures of the named trustees. The trust agreement purported to transfer securities held in an agency account with a bank, and also authorized the trustees to receive other property. The trust was to be revocable by the decedent during her lifetime. As of the date of the decedent's death, a few days after she signed the trust agreement, the securities remained in the agency account in the bank's possession, not yet having been transferred to the trustees. The court of appeal, in affirming the trial court's judgment in a quiet-title action brought by the executors of an earlier will, held that mere execution of the trust agreement is not sufficient to establish an *inter vivos* trust where there has been no actual or constructive delivery of corpus to the trustees.

The court held, first, that, on the key point of intent, there was substantial evidence to support the trial court's finding that the decedent signed the trust instrument under a mistake of fact since she had not read the document and did not understand it, and because certain provisions of the trust were contrary to her repeatedly expressed wishes. Further, the court held that actual or symbolic delivery to the trustees of the trust corpus was essential to the validity of the trust, and was absent here. The agency account securities had not been indorsed

1. 251 Cal. App.2d 98, 59 Cal. Rptr. 186 (1967).

or physically delivered prior to the decedent's death; and in the absence of evidence of directions from the decedent for delivery of the trust instrument to the trustees, the fact that the decedent signed the instrument and handed it to her attorney did not itself constitute constructive delivery.

In reaching its decision on these points, the court relied on numerous prior rulings indicating that mistake of fact,[2] lack of intent to effect a delivery,[3] and lack of effective delivery[4] were sufficient to negate the effect of signing the trust instrument.

In a second case, *Estate of Taylor,*[5] the supreme court stretched the meaning of Probate Code section 142 in order to effectuate the desires of a testator. In this case, the decedent by her will left one-third of the residue of her estate to a friend, on the condition that the friend survive distribution of the estate. Otherwise, this third was to go to two alternate beneficiaries, one of whom was also the executor of the decedent's will. The legatee died eighteen months after the decedent, but prior to distribution. The court held, on the basis of a reasonable timetable for administering this estate, that the executor had delayed unreasonably in making distribution, that the estate should have been distributed before the legatee died, and that the interest of the legatee consequently vested in her before her death.

The probate court had found that the estate could have been distributed in September, 1964, and should have been distributed before the legatee's death in March, 1965. The executor instead decided, in the fall of 1964, to sell securities, many of which could have been distributed in kind without detriment to the cash needs of the estate. The supreme court held that the findings were supported by the evidence, and on these facts found that the legatee's contingent interest had

2. Turino v. Capra, 237 Cal. App.2d 733, 47 Cal. Rptr. 271 (1965).

3. See Bank of America v. Frost, 205 Cal. App.2d 614, 23 Cal. Rptr. 441 (1962); Kunde v. Kunde, 122 Cal App. 2d 624, 266 P.2d 608 (1954); Estate of McConkey, 33 Cal. App.2d 554, 92 P. 2d 456 (1939); Jeannerette v. Taylor, 2 Cal. App.2d 568, 38 P.2d 831 (1934).

4. Miller v. Jansen, 21 Cal.2d 473, 132 P.2d 801 (1943).

5. 66 Cal.2d 855, 59 Cal. Rptr. 437, 428 P.2d 301 (1967).

vested at the time distribution should have been made. The legatee's estate was thus entitled to her interest in the decedent's estate.

In its decision, the court took note of Probate Code section 142,[6] but found no inconsistency between the statute and its own determination that the legatee's contingent interest had vested. The opinion of the court stressed that:

> The crucial issue under this section is whether a clause requiring survivorship should be interpreted to mean survivorship to distribution or survivorship to the time distribution should have occurred, or, as an alternative, whether survivorship to the earlier date constitutes substantial compliance with the condition. Under either interpretation we believe that unreasonable delay cannot defeat the beneficiary's interest. This conclusion promotes the established policy favoring prompt distribution of estates . . . and carries out the presumed intent of the testatrix. . . .[7]

Another issue worthy of comment resulted from the cross appeal of the personal representative of the primary beneficiary's estate, on the ground that the trial court had allowed the executor and his attorney extraordinary compensation. The court ruled that the allowance of the extra compensation was justified in spite of the delay in settling the estate because of otherwise justified services. It would seem more in keeping with the policy favoring the swift settlement of estates for a court first to consider and fix the extraordinary compensation and then to deduct a certain sum to compensate for unnecessary delay in distribution.

In a federal estate tax case dealing with the important question whether property held in a revocable trust can at the same time be community property, the United States Court of Ap-

6. "A condition precedent in a will is one which is required to be fulfilled before a particular disposition takes effect. It is to be deemed performed when the testator's intention has been substantially, though not literally, complied with. Nothing vests until such condition is fulfilled, except where fulfillment is impossible . . . ."

7. 66 Cal.2d at 858, 59 Cal. Rptr. at 439 (1967).

peals for the Ninth Circuit, reversing the trial court, relied heavily on the intent of the trustors. In *Katz v. United States,*[8] property, which for purposes of the decision was assumed to be post-1927 California community property, was transferred to a revocable trust naming the husband as trustor. The provisions of the trust instrument reserved to the husband-trustor, during his lifetime, full rights to the trust income and the right to amend or revoke the trust. After the husband's death, the trust was to continue for the benefit of the wife during her lifetime, and then for the benefit of the children. Both husband and wife had affixed written approval to the trust instrument. Later, the husband caused the trust to be amended twice, and in each instance the wife's written approval was obtained.

The United States District Court for the Southern District of California[9] had held that by reason of the powers reserved to the husband, the execution of the trust transmuted community property into the husband's separate property. Since the provisions of the continuing trust did not meet the requirements of the federal estate tax marital deduction, the entire trust property was held includible in the husband's taxable estate. The Ninth Circuit reversed,[10] holding that the statutory presumption that property acquired by the spouses during marriage is community property[11] is particularly strong when the property was acquired with community property, and that this presumption extends to every type of property, including a retained equitable interest in a trust.[12]

On the particular facts, the court found no language by which the wife had conveyed any property interest to the husband. The wife's consent to each amendment of the trust (in the absence of which the wife, after the husband's death, could have set aside the trust as to her community property interest) was taken to be an indication of the parties' belief that she had

8. 382 F.2d 723 (9th Cir. [1967]).

9. 255 F. Supp. 642 (1966).

10. In reversing, the court remanded for determination of the community character of the properties at the time of conveyance to the trust.

11. Cal. Civ. Code § 164.

12. The court cited Hill v. Conover, 191 Cal. App.2d 171, 12 Cal. Rptr. 522 (1961); Henie v. Henie, 171 Cal. App. 2d 572, 340 P.2d 1024 (1959); Givens v. Johnson, 73 Cal. App.2d 139, 166 P. 2d 67 (1946).

a community property interest. The court thus concluded that there had been no intent by her to transmute community property to separate property of the husband. It further held that the trust did not confer upon the husband a general power of appointment over the wife's interest in the community property held in the trust, but rather that whatever powers the husband had with respect to the trust property were held by him as manager of or agent for the community.

The Ninth Circuit's decision would seem to be correct. The facts suggest no intent to transmute community into separate property, and the interposition of a trustee holding legal title should not change the result. The import of the decision, in addition to the estate tax result, must also be that no taxable gift from the wife to the husband had taken place. Finally, and very important, in holding that under California law, a retained equitable interest in a trust can be community property, the court provides needed support for the position that appreciated community property placed in a revocable trust qualifies, on the death of the first of the spouses to die, for a full stepped-up basis for federal income tax purposes.[13]

In keeping with the preceding cases, which evidence liberality in construing intent of testators or trustors, the courts in the cases noted below show liberality in statutory construction.

Although it represents a somewhat special situation, an indication of the courts' approach to statutory construction was evident in *Estate of Chichernea.*[14] This case held that California residents can validly bequeath property to persons who are citizens and residents of Rumania. The issue arose because Probate Code section 259 makes the inheritance rights of aliens not residing in the United States dependent upon the existence of reciprocal, nondiscriminatory rights of inheritance on the part of United States citizens under the laws of the foreign beneficiary's country. The court determined that temporary restrictions imposed by Rumanian law upon the right of United States citizens to remove inheritance proceeds

13. Int. Rev. Code of 1954, § 1014(b)(6). See also Rev. Rul. 66–283, 1966–2 Cum. Bull. 297.

14. 66 Cal.2d 83, 57 Cal. Rptr. 135, 424 P.2d 687 (1967).

from Rumania were not fatal to the reciprocity required by Probate Code section 259, since a restriction upon removal is comparable to a currency restriction, and is not a limitation on the right to inherit. The court referred to its decision some months earlier, wherein it used similar reasoning to uphold the right of citizens and residents of the Soviet Union to inherit from California residents.[15] It reaffirmed the principle that reciprocity does not turn on whether the political and socioeconomic institutions of the foreign nation are in accord with our own. Unless the ability of a United States resident to inherit under the law of the foreign country is "economically insignificant," all that section 259 requires is that the right of a United States citizen to inherit in the foreign country be on a parity with the right of one of that country's citizens to receive an inheritance in his own country. In applying this standard the court emphasized that not only the written law itself but also the manner in which it had been consistently applied should be considered. Answering the State of California's argument that on the date of death, Rumanian law required alien beneficiaries to secure official approval to dispose of the proceeds of a Rumanian estate and that there was consequently no reciprocity, the court further pointed out that the time of distribution would be the proper moment to determine the freedom of our citizens to remove inheritance proceeds.

Of somewhat wider application in the matter of statutory interpretation was the court's decision in *Estate of Christiansen*.[16] This case holds that, in addition to distributions of surplus income that are already specifically permitted by statute,[17] a probate court has the power to authorize the making of gifts of principal from an incompetent's estate for estate-planning purposes. The incompetent in this case was in her seventies, and there was virtually no possibility of her restoration to competency. The income of the incompetent's estate was more than sufficient to maintain her. On the basis of Probate Code section 1558,[18] the probate court had authorized the

15. Estate of Larkin, 65 Cal.2d 60, 52 Cal. Rptr. 441, 416 P.2d 473 (1966).

16. 248 Cal. App.2d 398, 56 Cal. Rptr. 505 (1967).

17. Cal. Prob. Code § 1558.

guardian to pay surplus income of the estate to each of the incompetent's adult children, but had ruled that it possessed no authority to permit the guardian to make gifts from principal to the incompetent's children and grandchildren. The court of appeal, however, concluded that the probate court, in the exercise of its equitable powers, might substitute its judgment for that of the incompetent and authorize gifts of principal to the natural objects of the incompetent's bounty, in situations not covered by section 1558. The court also relied upon Probate Code section 1516, which provides that:

> [I]n all cases where no other or no different procedure is provided by statute, the court on petition of the guardian, . . . may from time to time instruct the guardian as to the administration of the ward's estate and the disposition, management, care, protection or preservation of the estate or any property thereof. . . .

In establishing this new California rule, permitting gifts to be made from principal, the court, citing authority from other jurisdictions, held that "the guardian should be authorized to act as a reasonable and prudent man would act under the same circumstances, unless there is evidence of any settled intention of the incompetent, formed while sane, to the contrary."[19] The court reversed the order of the probate court and remanded the case for further proceedings, indicating that before authorizing gifts of the incompetent's property, the probate court should consider the needs of the incompetent, the permanency of the disability, the devolution of the property upon the incompetent's death and the presumed donative intent.

Thus the court, in expanding Probate Code section 1558 by combining it with Probate Code section 1516, has now

18. "On the application of the guardian or next of kin of an insane or incompetent person, the court may direct the guardian to pay and distribute surplus income, not used for the support and maintenance of the ward, or any part of such surplus income, to the next of kin whom the ward would, in the judgment of the court, have aided, if said ward had been of sound mind. The granting of such allowance and the amounts and proportions thereof shall be discretionary with the court . . . ."

19. 248 Cal. App.2d at 422–423, 56 Cal. Rptr. at 521 (1967).

authorized transfers of the incompetent's property for the purpose of avoiding unnecessary estate and inheritance taxes and expenses of administration. This decision is particularly important to estate planners, who may now obtain court sanction for gifts from guardianship estates.

Although the preceding cases bend the statutory language, the court in *Satterfield v. Garmire*[20] relied on equitable principles to virtually nullify a statute. Contrary to the specific language of the statute, the court excused, under a special combination of circumstances, the failure to file or present a creditor's claim within the period prescribed by Probate Code sections 700 and 707. The case involved actions for personal injuries and wrongful death that were commenced against the decedent's estate some two months after the first publication of notice to creditors, at a time when negotiations with the decedent's insurance carrier were already in progress. These negotiations commenced before, and continued until after, expiration of the six-month period prescribed by statute for filing or presenting creditors' claims. In holding that the trial court had improperly sustained a general demurrer to the plaintiff's amended complaint without leave to amend, the supreme court found that the purpose of Probate Code section 707 is twofold. First, it insures that the personal representative will be notified within a reasonable period of time of all claims so that the estate may be expeditiously settled. Second, it provides an opportunity for amicable disposition of a claim prior to the commencement of any action and thus protects the estate from the expense of needless litigation.

The court stated that since the defendant had already received all the benefits that section 707 was intended to confer, the plaintiff should not be denied the right to sue. In this connection the court noted that negotiations for settlement were carried on for two months prior to the filing of the action and did not cease until after expiration of the six-month period, and that the action was filed by *mutual*

20. 65 Cal.2d 638, 56 Cal. Rptr. 102, 422 P.2d 990 (1967).

agreement. Thus the executor was not in breach of his fiduciary duty to the beneficiaries in impliedly waiving the code provision. The court emphasized the fact that generally it is not within the authority of an executor or administrator to waive formal presentation of a claim, but concluded that:

> [H]e may do so where this congeries of circumstances exists prior to the expiration of the period for filing a claim; he has knowledge of the claim and concedes its merit save only as to the specific sum; the estate is protected by insurance coverage exceeding the amount of the claim; and waiver results in relinquishment of no substantial benefit of or causes no detriment to the heirs or legatees.[1]

This case is noteworthy, since most lawyers and commentators have assumed that the statute of limitations on filing creditors' claims was absolute and without exception.

In the area of protecting creditors' rights, an important decision is *Estate of Silverman.*[2] This case of first impression holds that a widow's family allowance, in the hands of the executor of her husband's estate, is not exempt from attachment and execution.

The case involved separate attachments, ancillary to a municipal court action against the widow, levied upon the executor, who consequently withheld payment of family allowance that had been ordered paid to the widow. Affirming the trial court's ruling, the court held that a family allowance is not property specifically exempted from execution under section 690 of the Code of Civil Procedure and the sections enumerated therein. Therefore, since there is no specific statutory exemption, a family allowance is subject to attachment under section 541 of the Code of Civil Procedure,[3] as a debt due the defendant and as property of the

1. 65 Cal.2d at 645, 56 Cal. Rptr. at 107, 422 P.2d at 995.

2. 249 Cal. App.2d 180, 57 Cal. Rptr. 379 (1967).

3. Cal. Code Civ. Pro. § 541. **"Shares of Stock and Debts Due Defendant, How Attached and Disposed of.** The rights or shares which the de-

defendant. In dismissing the argument that such funds are in *custodia legis,* subject to attachment only with permission of the court exercising custody, the court held that the funds are actually in the hands of the executor, who is under a court order to distribute them.

The important question suggested by this case is whether a widow's family allowance should in fact be subject to attachment. Perhaps statutory exemption should be conferred on this type of fund, on a basis comparable to a judgment debtor's exemption under section 690.11 of the Code of Civil Procedure.[4] An alternative solution would be to grant an exemption for the family allowance on a basis analogous to the spendthrift trust, where only excess income can be reached by creditors.[5] In other words, statutory exemption would be provided for that part of the family allowance award that is necessary for basic support.[6]

In another case, *Rupp v. Kahn,*[7] the court decided an issue of significance with respect to transfers made for the purpose of avoiding obligations to creditors. The decision passed on a question apparently never decided in California in the context of the rights of a surviving joint tenant. The court

fendant may have in the stock of any corporation or company, together with the interest and profit thereon, and all debts due such defendant, and all other property in this State of such defendant not exempt from execution, may be attached, and if judgment be recovered, be sold to satisfy the judgment and execution."

4. Cal. Code Civ. Pro. § 690.11. **"Property exempt from execution or attachment: Earnings: Filing with levying officer affidavit of service of summons and complaint or of notice that attachment on earnings to issue.** One-half of the earnings of the defendant or judgment debtor received for his personal services rendered at any time within 30 days next preceding the levy of attachment or execution shall be exempt from execution or attachment without filing a claim for exemption as provided in Section 690.26.

"All of such earnings, if necessary for the use of the debtor's family, residing in this State, and supported in whole or in part by such debtor unless the debts are: (a) incurred by such debtor, his wife or family, for the common necessaries of life; or, (b) incurred for personal services rendered by any employee, or former employee, of such debtor. . . ."

5. Cal. Civ. Code § 859.

6. See Cal. Prob. Code § 680, which states in part that the family allowance shall provide what is "necessary for their maintenance according to their circumstances." This has been construed to mean the standard of living as it existed during the lifetime of the deceased. *In re* Lux Estate, 114 Cal. 73, 45 P. 1023 (1896).

held that where an insolvent, without consideration, places property in joint tenancy, the entire title held by the surviving joint tenant is subject to the debts of the deceased joint tenant. In his complaint, the creditor alleged that the decedent, while insolvent, had acquired various properties, taking title in the names of his wife and himself as joint tenants. The creditor sought a declaration that the wife as surviving joint tenant held the property as trustee for the benefit of plaintiff as a creditor. Reversing the trial court's holding, which had sustained a demurrer to this cause of action without leave to amend, the court of appeal held that an insolvent's creation of a joint tenancy, without consideration, is a transfer in fraud of creditors.[8] The decision stated that after the insolvent's death, as well as during his lifetime, his creditors can reach the entire joint tenancy property.[9] In the usual case, by comparison, a joint tenant's undivided interest is reachable by his creditors only during his lifetime, and, at his death, complete title vests in the surviving joint tenant and the entire property is placed beyond the reach of the decedent's creditors.[10]

Finally, a decision that construes statutory language strictly is *Estate of Johnston*.[11] In this case, the court held that a minor child, who attempts to reach his father's income interest in a spendthrift trust in enforcement of support claims, like any other creditor, can reach only income in excess of the amount necessary for the beneficiary's support.[12] The appellant, the children's guardian, had contended that her children were in a special preferred category, despite Civil Code section 859,[13] regardless of whether there was excess

7. 246 Cal. App.2d 188, 55 Cal. Rptr. 108 (1966).

8. See Cal. Civ. Code § 3439.04.

9. With respect to creditors' rights against the property during the insolvent's lifetime, see Carter v. Carter, 55 Cal. App.2d 13, 130 P.2d 186 (1942).

10. It would seem that the opinion in this case should be the same, regardless of whether the property conveyed into joint tenancy would be community or separate, since both would be subject to the debts of the husband.

11. 252 Cal. App.2d 988, 60 Cal. Rptr. 852 (1967).

12. Cal. Civ. Code § 859.

13. Cal. Civ. Code § 859. **"Rents and profits liable to creditors in certain cases.** Where a trust is created to receive the rents and profits of real or personal property, and no valid direction for accumulation is given, the sur-

income and regardless of the spendthrift provisions. Rejecting this argument, the court determined that the statute makes no special exception that would permit the child to reach the beneficiary's interest in the trust without a finding as to excess income.

The court pointed out that although this was a case of first impression, *San Diego Trust and Savings Bank v. Heustis*[14] had involved a similar problem; a divorced wife was attempting to reach income from a spendthrift trust, advancing the same proposition but seeking alimony rather than child-support payments. The court in that case had refused to treat the woman as a special or preferred creditor.

Legislative Developments

The most signicant legislative development in the field of trusts was the Revised Uniform Principal and Income Act,[15] which is operative July 1, 1968.[16] Significant provisions of the Act deal with the establishment of reserves for depreciation; the depletion of natural resources; the treatment of extraordinary corporate distributions; and the right to income earned during probate administration. The new Act is applicable to any receipt or expense received or incurred after its operative date, regardless of when the trust was established.[17]

Prior to the 1967 legislation, the California Principal and Income Law was silent on the question of establishing reserves for depreciation.[18] A recent decision on the point had been *Estate of Kelley*.[19] In the *Kelley* case, the trustees of a testa-

plus of such rents and profits, beyond the sum that may be necessary for the education and support of the person for whose benefit the trust is created, is liable to the claims of the creditors of such persons, in the same manner as personal property which cannot be reached by execution."

14. 121 Cal. App. 675, 10 P.2d 158 (1932).

15. Cal. Stats, 1967, chap. 1508, §§ 1, 2, p. —.

16. New Cal. Civ. Code § 730.16. Note that the new act applies to trusts only and does not include the legal life estate. Compare old § 730.04 (Cal. Stats. 1953, ch. 37, § 1, p. 667) with new § 730.03(b).

17. Cal. Civ. Code § 730.15.

18. Cal. Civ. Code §§ 730–730.15. (Added Cal. Stats. 1967 ch. 1508, § 2.)

19. 63 Cal.2d 679, 47 Cal. Rptr. 897, 408 P.2d 353 (1965).

mentary trust had borrowed $200,000 in order to remodel and structurally improve a building containing a store. These improvements were made in order to obtain renewal of a favorable lease of the store premises held in the trust. The court determined that depreciation should be charged against income, on the basis of the value of the extraordinary capital improvements over their anticipated useful life, and that this treatment produced an equitable result as between the life tenant and the remainderman. The court further stated that depreciation of income-producing real property that was part of the original corpus received by the trustee is also a proper charge against income, unless the trust instrument expresses a contrary intent.

The 1967 California legislation departs from the rule stated in the Revised Uniform Principal and Income Act, which adopted the same rule as that in the *Kelley* case. The California version of the Act leaves the establishment of reserves for depreciation to the "absolute discretion" of the trustee, unless the governing instrument provides otherwise.[20] It further provides that whatever allowance for depreciation the trustee may make shall be made "under generally accepted accounting principles,"[1] but that no allowance shall be made for depreciation of that portion of real property used by a beneficiary as a residence. The meaning of "generally accepted accounting principles," a phrase that also appears in the Revised Uniform Principal and Income Act, may be questioned. For example, in *Estate of Kelley*[2] the court indicated that depreciation should be taken on a straight-line basis over the anticipated useful life of the improvements. However, there are various acceptable methods of calculating depreciation, and the revised rule may well be interpreted to permit these variations.

Another potential difficulty could arise from the provision of the new law that when an unincorporated business is held

20. Cal. Civ. Code §§ 730.13(a)(2), 730.14. The legislative negation of the requirement of *Kelley*, that depreciation be taken, is immediate. This result is achieved by newly-enacted § 730.16 of the *present* Principal and Income law, which will apply until the new act becomes effective on July 1, 1968.

1. Cal. Civ. Code § 730.13(a)(2).

2. 63 Cal.2d at 689, 47 Cal. Rptr. at 903, 408 P.2d at 359 (1965).

in trust, the net profits, "computed in accordance with generally accepted accounting principles for a comparable business," are income.[3] To the extent that such accounting principles may require that reserves for depreciation be established for business properties, this section is inconsistent with the provisions of the Act that give the trustee absolute discretion over whether to establish depreciation reserves.

The Revised Uniform Principal and Income Act also deals with depletion of natural resources. Under old Civil Code section 730.11, proceeds received from depletion of natural resources were to be wholly allocated to income unless the trustee was under a duty to reinvest the property from which the proceeds were derived. New Civil Code sections 730.09–730.11 change the rule to provide that, with certain exceptions,[4] and with the limitation that any allowance for depletion be reasonable, the trustee is to have absolute discretion in allocating receipts from natural resources to principal or income.

Turning to other provisions of the 1967 principal and income legislation, new Civil Code section 730.06, dealing with extraordinary corporate distributions, is a departure from old section 730.07, which provided that distributions of corporate shares that were not of the same kind or rank, or were not derived from a capitalization of surplus, were income. The new section adopts the so-called "Massachusetts rule," which provides that *all* corporate distributions of shares and subscription rights of the distributing corporation be treated as principal. It also provides that capital gains distributions of a regulated investment company are principal.[5] This provision is of special importance in protecting the federal estate tax deduction for a charitable remainder interest under a trust, from the standpoint of preserving the ascertainable value of the remainder interest.[6]

The new Principal and Income Act changes the law as to the right to income earned during probate adminstration,

3. New Cal. Civ. Code § 730.08.

4. See Cal. Civ. Code § 730.09 for exceptions on royalties.

5. Cal. Civ. Code § 730.06(c).

6. See Int. Rev. Code 2055. See also Rev. Rul. 60–385, 1960–2 Cum. Bull. 77; Rev. Rul. 67–33, 1967–5 Int. Rev Bull. 9.

as between beneficiaries of a testamentary trust. New Civil Code section 730.05 refers to the applicable provisions of the Probate Code, which establish the rule that unless the will provides otherwise, income from trust assets accrues from the date of death.[7] New section 730.04(a) clarifies the application of this rule in the situation where the income beneficiary of a testamentary trust dies during the period of probate administration. New section 730.04(a) provides that the right to income, absent other directions in the governing instrument, accrues from the date an asset becomes subject to the trust, and that an asset becomes subject to a testamentary trust as of the date of the testator's death. This section overcomes existing case law to the effect that the death of an income beneficiary of a testamentary trust, occurring during the probate period, terminates his right to income that has been accumulating in the probate estate for distribution to the trustee.[8]

Turning to other 1967 legislation, new Probate Code section 1122 and Civil Code section 2274 depart from old Civil Code section 2274, which had limited trustee fees to the amount specified in the trust instrument.[9] The sections now provide that when the trustee's compensation is fixed by the provisions of the will or of the declaration of trust, the court may nevertheless, on proper showing, allow the trustee greater compensation, where the duties of the trustee are substantially greater than were contemplated, where the compensation fixed by the instrument would be so unreasonably low that a competent trustee would not undertake to administer the trust, or in other extraordinary circumstances. Since *inter vivos* trusts, as opposed to testamentary trusts, are not subject to court supervision in a continuing probate proceed-

7. See Cal. Prob. Code §§ 160, 162 and 162.5.

8. Estate of Feldman, 145 Cal. App. 2d 19, 301 P.2d 627 (1956).

9. The case law strictly construed the statute. See In re Barton's Estate, 96 Cal. App.2d 234, 214 P.2d 857 (1950); In re Whitney's Estate, 78 Cal. App. 638, 248 P. 754 (1926). See also In re Bodger's Estate, 130 Cal. App.2d 416, 279 P.2d 61 (1955), which holds that Cal. Civ. Code § 2274 and Cal. Prob. Code § 1122 are complementary and therefore where trustee fees are fixed in trust instrument, Cal. Prob. Code § 1122 does not apply.

ing, Civil Code section 2274 provides that the superior court shall have jurisdiction to determine the trustee's compensation in an action brought by the trustee of an *inter vivos* trust, to which all interested persons are made parties.

Two other significant Probate Code changes are the 1967 amendment of section 423 and the addition of section 1120.2. The amendment of Probate Code section 423 extends the right of nomination of administrators to residents of the United States of designated relationship to the decedent,[10] who, but for nonresidence in California, would themselves be entitled to administration. New Probate Code section 1120.2 permits the court to confer upon a testamentary trustee any or all of a set of listed administrative powers not inconsistent with the provisions or purposes of the trust. This last statute will prove useful in cases where the trustee's administrative powers, set forth in the will, are incomplete.

Smaller estates are affected by the amendment of Probate Code section 630, which increases from $2,000 to $3,000 the amount of an estate, consisting of personal property only, that may be turned over to the decedent's next of kin, without probate. Small estates are also affected by amendment of Probate Code sections 645 and 646, which provide for summary distribution to the surviving spouse or minor children of estates not exceeding $5,000, and measure the "other estate" limitation applicable to the distributees by the amount of the homestead exemption allowed the head of a family (presently $15,000). Formerly this limitation was in the fixed amount of $12,500.

With respect to distributions to nonresident beneficiaries, section 19262 of the Revenue and Taxation Code was amended in 1967 to require a certificate from the Franchise Tax Board showing that all taxes due it have been paid, in cases where assets having a total value of $5,000 are distributable from an estate on one or more nonresidents. The section

10. Those now included under the 1967 amendment are child, grandchild, parent, brother and sister. Under former law, the only nonresident who was eligible to nominate an administrator was a nonresident spouse. Cal. Prob. Code § 422.

formerly required such a certificate if the value of the estate exceeded $50,000 and any beneficiary was a nonresident.

Other miscellaneous changes include the amendment of Probate Code section 1233, to codify California case law[11] to the effect that the Civil Discovery Act[12] is applicable to probate proceedings. An amendment to Probate Code section 1852 adds to the powers of conservators those powers granted to guardians by Probate Code sections 1550 through 1560.[13]

11. See, *e.g.,* In re Neilson's Estate, 57 Cal.2d 733, 22 Cal. Rptr. 1, 371 P. 2d 745 (1962); Coberly v. Superior Court, 231 Cal. App.2d 685, 42 Cal. Rptr. 64 (1965).

12. Cal. Code Civ. Pro. §§ 307 and 2016.

13. Corresponding technical amendments were therefore made to Cal. Prob. Code §§ 426, 630, 1060, 1062, 1121, 1208 and 1233.