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Trusts and Estates

by *Joseph S. Brock**

During the period covered by this review little in the way of trends or departures differing from established positions seems to have appeared; there is much repetition and emphasis of "black-letter law". There are, however, in several cases unusual factual patterns which are of interest. The results of these cases, interesting and of course contributing to the normal growth of case law, seem to flow naturally and quite easily from principles long-established and accepted, not departing from what could be expected.

There were several statutory changes, prominent among which were the Revised Uniform Principal and Income Act, effective July 1, 1968, as well as statutory provisions which

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are applicable in estates where allocation and apportionment problems are not troublesome.

Trusts

Trusts Involving Convicts Serving Life Sentences

Hillman v. Stults[1] is a case presenting an unusual factual pattern in that it involves a wealthy convict who created a trust as a method of holding and conserving his large property interests while serving a sentence in San Quentin.

Hillman owned extensive ranch holdings in San Luis Obispo County. In January, 1955, he murdered his wife and in April, 1955, during the murder trial, he appointed his sister guardian of his children. She then also took possession of his separate property. To administer the property, Hillman and his sister later decided to set up a simple trust, and a letter was addressed by the sister to Hillman in which she stated that although a deed and bill of sale purported to convey absolute ownership to her, she nevertheless held the property in trust for him.

Hillman and his sister had disputes concerning the administration of the ranch properties and in September, 1959, he applied to the Adult Authority for permission to petition for the appointment of his attorneys as conservators of his property in San Luis Obispo County. This permission was granted and in January, 1960, the San Luis Obispo Superior Court appointed Hillman's attorneys as conservators of the property. In May, 1960, the conservators filed an action to establish title to the property, to declare a trust, and to compel a conveyance and accounting of the property deeded and conveyed to the sister in June, 1955.

On February 23, 1962, Hillman was released on parole and appeared and testified at the trial. The following June the court made an interlocutory judgment holding that the property was held in trust by the sister and ordered an accounting and reference. In its final judgment in May, 1965, the

1. 263 Cal. App.2d 848, 70 Cal. Rptr. 295 (1968).

court decreed the trust terminated and found that the defendant sister had breached her trust.

The appeal involved several arguments. Among them was the argument that Hillman was civilly dead and lacked the capacity to create any trust because of his conviction and sentence to life imprisonment, and thus the orders of the Adult Authority and the San Luis Obispo Superior Court were void and in excess of their jurisdiction. In discussing this problem, the appellate court cited and quoted California Penal Code section 2601.[2] The section does, indeed, provide that a person sentenced to imprisonment in the state prison for life is thereafter deemed civilly dead. It adds, however, that the Adult Authority may restore to such person during his imprisonment such civil rights as the authority may deem proper, and the section preserves the convict's right to inherit real and personal property.

As to Hillman's capacity, the court held that his limited restoration to civil rights came within the framework of the constitutional plan permitting limited civil rights for inmates and parolees, and that this power of the Adult Authority was not related to the pardoning power of the governor. Furthermore, when the legislature prohibited a prisoner from becoming a trustee of a trust it did not deny him the right to become a beneficiary.

The argument made that the State of California was a necessary or indispensable party to the litigation was without merit. The court then added that the trial court's grant of authority to Hillman to file his supplementary complaint as real party in interest in place of conservator was approved:

> The Adult Authority did not exceed its jurisdiction when it partially restored [Hillman's] civil rights: (1) To

2. Cal. Penal Code § 2601: "A person sentenced to imprisonment in the state prison for life is thereafter deemed civilly dead. But the Adult Authority may restore to such person during his imprisonment such civil rights as the authority may deem proper, except the right to act as a trustee, or hold public office, or exercise the privilege of an elector, or give a general power of attorney. This section shall not be construed so as to deprive such person of his right to inherit real and personal property in accordance with the laws of this State.

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execute the deed and bill of sale to implement the trust (June 14, 1955); (2) To sign a petition for conservatorship (September 24, 1959); (3) Gave permission to plaintiff to substitute as party plaintiff (September 13, 1963).[3]

As to whether any trust was created during the early days of Hillman's imprisonment, the trial court found that the trust was founded on an express agreement; i.e., the letter addressed to Hillman by his sister. If, however, for any reason the trust could not have been recognized as an express trust, it could have been considered a resulting trust for equitable reasons. The appellate court pointed out that the real issue before the trial court was simply whether a trust was created, not whether it was an express, resulting or constructive trust. The pretrial order permitted the court to find any one of the three types of trust and provided that "This suit is one to . . . (b) Impress a trust on said property, . . . (d) Compel a conveyance and transfer of said real and personal property respectively from Defendants, Stults, to Plaintiff, Hillman."[4] The court observed that a resulting trust would avoid the effects of any possible innocent illegal transactions and would effectuate the original intentions of the parties. It further observed that a trust was consonant with the original intentions of the parties. Aside from the express written evidence, however, the intent of the brother and sister could be inferred from the circumstances of Hillman's predicament. This was a classic simple trust expressed in a letter specifying that the property was vested in the sister for the benefit of the brother while he was in prison.

The appellants attacked the conservatorship granted by the San Luis Obispo Superior Court on the basis that the court had no jurisdiction, since Hillman was a prison inmate and was not a resident of San Luis Obispo County. The appellate court remarked that it was aware of no cases which interpreted conservatorship provisions for prisoners or parolees. Section 2051 of the Probate Code provides that con-

3. 263 Cal. App.2d at 866, 70 Cal. Rptr. at 305.

4. 263 Cal. App.2d at 868, 70 Cal. Rptr. at 306.

servatorship proceedings for a California resident are to be instituted in the superior court in the county of the residence of the proposed conservatee.[5] In this case, Hillman was a long-time resident of San Luis Obispo County and was involuntarily removed to various prisons outside his home county. Prisoners do not gain or lose residence as a result of being removed to the prison system.[6] The meaning of residence in these sections is synonymous with domicil.[7] Furthermore, the location of the property, the situs of the leases, and the permanent home of Hillman in that county made it the practical venue for the conservatorship.

The appellate court further stated that a prison inmate or parolee is not required to abandon his property. While the Adult Authority has control over the person of the inmate, his outside property does not come within its administration, nor does the Adult Authority have facilities for its supervision or control. The court commented that the appellants were correct in saying that conservatorship was either very rare or unknown among prison inmates. It may be, the court added, that prisoners have not utilized conservatorships for the reason that most felons have little or no property and that it is very unusual for anyone with the financial resources of Hillman to be confined in state prison. In any

5. Cal. Probate Code § 2051: "Conservatorship proceedings for a resident of this State shall be instituted in the superior court in the county of the residence of the proposed conservatee. . . ."

6. Constitution of California, Art. II § 4: "For the purpose of voting, no person shall be deemed to have gained or lost a residence by reason of his presence or absence while employed in the service of the United States, nor while engaged in the navigation of the waters of this State or of the United States, or of the high seas; nor while a student at any seminary of learning; nor while kept at any almshouse or other asylum, at public expense; nor while confined in any public prison."

Cal. Elections Code § 14,283: "A person does not gain or lose residence solely by reason of his presence at or absence from a place while employed in the service of the United States or of this State, nor while engaged in navigation, nor while a student of any institution of learning, nor while kept in an almshouse, asylum or prison. This section shall not be construed to prevent a student at an institution of learning from qualifying as an elector in the locality where he resides while attending that institution, when in fact the student has abandoned his former residence."

7. Smith v. Smith, 45 Cal.2d 235, 288 P.2d 497 (1955).

event, the court held that where conservatorships are specified in case of certain physical and mental disabilities by Probate Code section 1751,[8] the further provisions of that section are that conservatorships are available where for "cause [one] is unable properly to care for his property . . . or who voluntarily requests the same and to the satisfaction of the court establishes good cause therefor." The statute protects individuals who are handicapped by disabilities other than mental. Here the disability was a physical restriction which prevented Hillman from managing his property.

Charitable Trusts

Because of the well-known property involved, "The Irvine Ranch", as well as the law in connection with the issues raised, the case of *Smith v. The James Irvine Foundation,*[9] is of interest. The plaintiff in the action was an heir at law and a beneficiary under the will of James Irvine who was her paternal grandfather. She asked that certain shares of corporate stock of The Irvine Company standing in the name of The James Irvine Foundation be held to be part of the estate of the decedent, James Irvine. Since plaintiff was a citizen of Virginia, whereas all defendants were residents of California, the suit was brought in federal court with federal jurisdiction based on the diversity of citizenship.

The stock involved in this litigation was the majority stock of The Irvine Company, a corporation having large assets, the largest being a tract of land known as The Irvine Ranch. The ranch consisted of approximately 88,000 acres in Orange

8. Cal. Probate Code § 1751: "Upon petition as provided in this chapter, the superior court, if satisfied by sufficient evidence of the need therefor, shall appoint a conservator of the person and property or person or property of any adult person who by reason of advanced age, illness, injury, mental weakness, intemperance, addiction to drugs or other disability, or other cause is unable properly to care for himself or for his property, or who for said causes or for any other cause is likely to be deceived or imposed upon by artful or designing persons, or for whom a guardian could be appointed under Division 4 of this code, or who voluntarily requests the same and to the satisfaction of the court establishes good cause therefor. The court, in its discretion, may appoint one or more conservators."

9. 277 F.Supp. 774 (D.C. [1967]).

County and had an estimated worth of one-half billion to a billion and one-half dollars. James Irvine succeeded to the ownership of the ranch on the death of his father in 1886, and in 1894 he caused The Irvine Company to be incorporated. Its capital stock consisted of 1,000 shares of common stock, all of which, except the qualifying shares, were issued to him, and these he owned by endorsement. James Irvine transferred the ownership of the ranch to the corporation although he remained president of the corporation until his death in August, 1947.

In 1936 James Irvine caused The James Irvine Foundation to be incorporated under the laws of California. He was never an officer or director of the foundation. On February 24, 1937, James Irvine executed an indenture of trust in which the foundation was designated as trustee. The indenture stated that he transferred, assigned and set over to the trustee certain shares of stock of The Irvine Company; he later added five more shares. The company later redeemed some of its shares and at the present time there are 855 shares of its stock outstanding of which 459 shares stand in the name of The James Irvine Foundation. The status of these shares was the subject of this litigation.

The will of James Irvine was admitted to probate and a decree of final distribution was entered by the superior court in San Francisco on December 29, 1952. The shares of stock referred to in the trust indenture were not administered in the estate proceedings nor included in the decree of distribution, and the plaintiff claimed that this stock should have been included in the distribution of the property of the estate and asked that it be held to be part of the estate assets. The defendants asked that the stock in question be held to be the property of The James Irvine Foundation and that the trust be held to be a valid charitable trust.

The indenture of trust between James Irvine and The James Irvine Foundation provided that the trustor, James Irvine, could revoke the trust in whole or in part and could withdraw from the trust all or any part of the property, including the stocks. In addition, he reserved for his lifetime all income

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from the trust property and the right to vote all the shares of stock held in the trust, as well as the right to direct the investment of any liquidating dividends and proceeds or profits from the corpus of the trust property. The trustor bound himself during his lifetime to pay all taxes, assessments, insurance and care-cost of the trust property. Irvine provided that after his death the balance of income, after certain deductions, should be used for any charitable purpose in California, as authorized in the articles of incorporation of the trustee, but that it should not be used for charities having substantial support through taxation.

After the death of James Irvine, the secretary of the foundation sent in the stock certificates, which had been endorsed in blank by Irvine, for transfer to the foundation. A stock certificate for the shares was thereupon issued to The James Irvine Foundation.

The plaintiff contended that the indenture of trust was void as an attempted testamentary disposition by James Irvine; that the trust indenture contained both charitable and noncharitable provisions rendering the indenture void in its entirety; that the trust indenture was void and created no trust because it conveyed neither legal nor equitable title to the Irvine stock *in praesenti;* that there was no delivery of the stock or the indenture by James Irvine to the foundation, as trustee, until after his death; and that after his death the stock descended to his heirs.

The court held that the stock had not been transferred on the stock record book of the company and that James Irvine was the only person entitled to vote those shares but that he had reserved that right in the indenture and he could not have voted them had they been transferred. But as between James Irvine and The James Irvine Foundation the fact that the shares had not been transferred on the stock record book was not determinative as to their respective interests. The court further found that the indenture of trust was delivered to the foundation by James Irvine and that the certificates of stock had been delivered by him to the foundation during his lifetime.

The plaintiff contended that the trust indenture suspended the power of alienation of the corpus of the trust in perpetuity and therefore was invalid because of the rule against perpetuities. The court pointed out that the State Constitution prohibits perpetuities except for eleemosynary purposes.[10] The rule is well-established in California that trusts for charitable uses are eleemosynary in purpose and therefore are without the scope of the rule against perpetuities.[11]

The plaintiff further contended that the charitable and non-charitable provisions of the indenture of trust were so inseparably blended as to deny the trust the status of a charitable trust. Under California law a trust which permits the trustee to devote the funds to both charitable and non-charitable purposes is in violation of the rule against perpetuities.[12] The theory of the plaintiff was that under paragraph 2 of the indenture,[13] the board of directors of the foundation might in their uncontrolled discretion continually invest all of the income from the corpus and thus freeze all such income into the corpus and thereby negate the use of income for charitable uses. The court said that in the indenture of trust, it was stated that the purpose of the trust was to assist California charities. The articles of incorporation of the foundation stated the same purpose, and the two documents were closely related. The manifest objective of James Irvine in incorporating the foundation and in executing the indenture of trust was to make it possible for a substantial part of his

10. California Constitution, Article XX § 9.

11. Smith v. The James Irvine Foundation, 277 F.Supp. 774 at 793 (1967).

12. Estate of Sutro, 155 Cal. 727, 102 P. 920 (1909); Estate of Kline, 138 Cal. App. 514, 32 P.2d 677 (1934).

13. In the paragraph preceding paragraph 2, provision is made for deductions from the income of the corpus of the trust for administrative expenses and to make good or replace losses suffered in the corpus of the trust. Paragraph 2 then provides as follows: "2. Out of the balance of said income, after the deductions hereinabove provided, the Trustee may, and in the judgment of the Trustor should, each year set aside such sum as the Board of Directors of the Trustee shall in its sound discretion deem wise and expedient for investment, and said Trustee shall invest the same in accordance with subparagraph 3 of the powers hereinafter enumerated, which said investments, when made, shall become a part of the corpus or principal of the trust property, and the income and profits therefrom shall thereafter be used, applied and devoted as in this trust provided."

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property to be devoted to the assistance of California charities. In addition, under California code provisions the Attorney General is charged with supervision of charitable trusts.[14] The court held that the trust was a valid one for charitable uses under the California law exempting such trusts from the rule against perpetuities.

The plaintiff then contended that the indenture of trust was invalid because under the indenture The James Irvine Foundation became the owner of the majority of the shares of The Irvine Company and took control of that company, including its dividend policies. Thus, the plaintiff asserted, such control would give rise to a conflict of fiduciary duties in the use of the income of The Irvine Company in regard to whether the income would be allocated to private commercial use or use by the foundation for charitable purposes. The court commented that the plaintiff's contention actually encompassed the broad general question as to whether ownership by a charitable corporation of the majority of voting stock in a private commercial corporation is contrary to pubic policy. The court said that if the legislature deemed that gifts or bequests carrying with them the control of private commercial corporations were contrary to public policy, it could prohibit such corporations from receiving such gifts or bequests. The legislature, however, has not done so, and no California cases are cited which hold that this is contrary to public policy. Accordingly, the court held that the indenture of trust was not illegal as being contrary to public policy.

Another of plaintiff's contentions was that the indenture did not create a trust as to the Irvine stock but merely created an agency which was revoked by his death and also that the trust created an attempted testamentary disposition of the stock. The court cited and discussed a number of California cases[15] in which it pointed out the distinction between

14. Cal. Corp. Code §§ 9505 and 10207.

Uniform Supervision of Trustees for Charitable Purposes Act, Cal. Gov. Code §§ 12580–12595.

15. Monell v. College of Physicians & Surgeons, 198 Cal. App.2d 38, 17 Cal. Rptr. 744 (1961); Nichols v. Emery, 109 Cal. 323, 41 P. 1089 (1895); Dessar v. Bank of America National Trust & Savings Assn., 353 F.2d 468 (9th Cir. [1965]).

the interest transferred and the enjoyment of the interest. After reviewing the cases, the court held that the transfers of stock by James Irvine were not testamentary in character and that the foundation was not a mere agent.

The court held that it seems clear under California law that the delivery of an endorsed certificate of stock is sufficient to effect a valid transfer of the shares of stock represented by the certificate.[16] The court, after reviewing all of plaintiff's contentions, found none of them well founded and denied her the relief sought.

Another case of interest in the area of charitable trusts is that of *Hart v. County of Los Angeles*.[17] The case involved an action for declaratory relief, forfeiture, and an accounting arising out of the last will and testament of silent screen star William S. Hart, Sr., who died in 1946, leaving a will designating the defendant county as the primary beneficiary under two trusts. The plaintiff was the only son of the testator, and he contended that the county had not performed the conditions under the decree of distribution and had thereby forfeited its rights under the will. The will provided that if the county failed to meet the conditions imposed, the property should revert to the state for the same uses and purposes. The plaintiff alleged that the state would not accept the property or trusts and, therefore, that he was entitled to the property as though his deceased father had died intestate.

The court pointed out that the county holds the property as trustee of a charitable trust for the benefit of the public in general.[18] The court will not allow such a trust to fail because of the actions of the trustee but will appoint a successor trustee if the appointed trustee is not performing his duties. If performance by a political entity as trustee is required by some of the trust provisions and no willing political entity can be found, the doctrine of *cy pres* may be invoked to carry out the manifest intent of the testator. In this case

16. Stone v. Greene, 181 Cal. 569, 185 P. 670 (1919); Burkett v. Doty, 176 Cal. 89, 167 P. 518 (1916); and Driscoll v. Driscoll, 143 Cal. 528, 77 P. 471 (1904).

17. 260 Cal. App.2d 512, 67 Cal. Rptr. 242 (1968).

18. Estate of Hart, 151 Cal. App.2d 271, 311 P.2d 605 (1957).

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the will had indicated that the testator's intent was that the property was to continue in trust for the benefit of the public and that it was not to return to the son since he had been provided for during the testator's life.

The Uniform Supervision of Trustees for Charitable Purposes Act[19] requires that the Attorney General supervise the activities of trustees administering trusts of a charitable nature. The plaintiff cited Government Code, section 12583[20] for the proposition that the Attorney General had no power to bring a suit against the county to compel compliance with the terms of a trust but, representing the *cestui qui,* the Attorney General must have standing as a member of the public at large to bring the suit. But the court noted that Government Code, section 12591, reads in part ". . . The powers and duties of the Attorney General provided in this article are in addition to his existing powers and duties. . . ." The court added that even though the county itself is exempt from the reporting duties under the act, it is not any more immune from suit by the Attorney General than it would have been under common law before the uniform act.[1]

Constructive Trusts

There were a few cases of interest in the area of constructive trusts In *Cramer v. Biddison,*[2] the court was involved with a judgment of divorce which incorporated a stipulation of the parties to the effect that:

> Defendant shall maintain insurance on his own life with death benefits of not less than $15,000.00 for each of the minor children, or a total of $45,000.00. Said insurance shall be maintained until the child in question reaches the age of majority or completes his or her college education, whichever first occurs. For the pur-

19. Cal. Gov. Code §§ 12580–12596.

20. Cal. Gov. Code § 12583: "This article does not apply to . . . any state, . . . or to any of their agencies or governmental subdivisions. . . ."

1. Pratt v. Security Trust & Savings Bank, 15 Cal. App.2d 630, 59 P.2d 862 (1936).

2. 257 Cal. App.2d 720, 65 Cal. Rptr. 624 (1968).

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> pose of convenience, plaintiff shall remain the primary beneficiary under said policy or policies, and the respective child shall become the secondary beneficiary.[3]

After the divorce, Hummer, who was the defendant in the case, made his estate the beneficiary of all his life insurance policies except of one $12,000 policy of which his former wife was beneficiary. At the time of his death his three children were still minors, and none of them had graduated from college. This was an action to establish a constructive trust to enforce the insurance provision of the divorce judgment. The appellant prayed that respondent executors of Hummer's estate be declared constructive trustees of $33,000, that she be allowed to trace the funds into the estate, and that she be given a deficiency judgment for sums not capable of being traced.

The court held that imposition of a constructive trust is authorized by section 2224 of the Civil Code.[4] The court said that the elements of a cause of action under this section are three; the existence of a thing, plaintiff's right to the thing, and defendant's gain of that thing by fraud. The property was sufficiently identified to be impressed with a trust since the fruits of the policies, rather than the policies themselves are what are sought, and the proof of the "existence of the tree on which they grew seems to us to be a matter for trial."[5]

The complaint alleged a wrongful act since it alleged that Hummer changed beneficiaries on all his policies and therefore that he changed it on those on which the divorce judgment required plaintiff to be carried as beneficiary. Respondents charged that the first cause of action was ambiguous and uncertain in averring both that the proceeds were payable to Hummer's estate and that the executors were constructive

3. 257 Cal. App.2d at 723, 65 Cal. Rptr. at 625.

4. Cal. Civil Code § 2224: "One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it."

5. 257 Cal. App.2d at 724, 65 Cal. Rptr. at 626.

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trustees of the proceeds. The court pointed out that the constructive trust is an equitable remedy and that one is not entitled to it because one has legal title to property belonging to another but rather because one has an equitable right to property though legal title stands in another.

The court held that the general demurrers to the second, third and fourth causes of action were properly sustained and that the acts alleged by appellant to have been wrongful acts of respondents were consistent with the performance of their duties as Hummer's executors. By alleging that the policies were payable to the estate, appellant alleged a fact which, if proved, would have protected respondents from liability to appellant in the absence of a judicial determination that the proceeds were actually hers. When respondents performed the acts which the appellant complained of, the estate was beneficiary. In overruling the demurrer to the first count the court held that it was merely recognizing that the appellant had pleaded a justiciable claim to the property.

The opinion of Mr. Justice Herndon concurred with the majority in holding that the first cause of action alleged facts sufficient to state a cause of action. He dissented, however, from the holding that the facts in the second, third, and fourth causes of action were not sufficient to state a cause of action against respondents. The dissenting opinion stated that it may be that the executors acted properly in collecting the proceeds of all insurance policies as the majority opinion held. But it does not follow that they were justified in paying out the insurance proceeds adversely claimed by appellant to discharge estate debts prior to appropriate adjudication. If appellant's claim to the proceeds was ultimately found valid, then the executors received and held these proceeds as the trustees of a constructive trust. To the extent that the appellant's adverse claim was valid, she was in equity the true beneficiary of the insurance policy as well as the beneficiary of the resulting constructive trust.

The executors should not have disbursed the fund in question without awaiting an adjudication of the validity of appellant's claim and would have been well advised to have filed a petition for instructions in the probate proceedings.

Judge Herndon added that in the more realistic modern concept of probate jurisdiction, as recently enunciated in *Estate of Baglione,*[6] it is probable that the ownership of the fund could have been decided in the probate proceedings. But even if it were held that the Probate Court lacked jurisdiction, it would have directed the executors to proceed in the proper forum.

The dissenting opinion would have reversed the order of dismissal on all counts.

Problems with Trustees

In the *Estate of Bullock,*[7] the court had occasion to rule that the superior court, in probate, has jurisdiction to hear and determine a petition by beneficiaries for instructions as to whether the beneficiaries may ask for the removal of trustees without invoking an *in terrorem* clause in the will which had set up the trust under which they claim.

The will of Margaret Bullock had been admitted to probate in 1952. It contained a no-contest clause in the usual form, providing that if any devisee, legatee or beneficiary under the will or anyone entitled to share in the estate through intestate succession were to attack the will, such a contestant would receive only one dollar. Several trusts were created and the estate assets were distributed to the sole trustee who filed his eleventh account current and report as to certain trusts. Due to some irregularities, the beneficiaries believed that the trustee was not suited to be sole trustee. They petitioned the Probate Court for instructions as to whether an action by them for removal of the trustee pursuant to sections 2233, 2282 and 2283 of the Civil Code[8] would bring into operation the no-contest clause of the will. The beneficiaries appealed from an order that the Probate Court had no jurisdiction in the

6. 65 Cal.2d 192, 53 Cal. Rptr. 139, 417 P.2d 683 (1966).

7. 264 Cal. App.2d —, 70 Cal. Rptr. 239 (1968).

8. Cal. Civil Code §§ 2233, 2282 and 2283 provide in effect that a trustee who has violated or is unfit to execute the trust, or who acquires any interest, or becomes charged with any duty, adverse to the interest of his beneficiary or the subject to the trust, may be removed at once.

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matter. Their contention was that the petition was denied solely because of lack of jurisdiction. As there was doubt that such an order was appealable, the beneficiaries in a separate proceeding requested a writ of mandate to compel the Probate Court to hear and determine the petition for instructions.

The court pointed out that section 1120 of the Probate Code[9] has been liberally interpreted by the courts. The court stated that the beneficiaries' action to oust the trustee was not necessarily in opposition to the will or the trust thereunder. Frowning on any proceeding which deterred an interested party from resorting to the Probate Court in proper cases, the court stressed the importance of maintaining access to the courts with the least possible obstruction. The court even suggested a moral duty not to stand silently by and accept what is given by the trustee knowing it to be the wrong amount.[10]

With reference to the particular application of Probate Code section 1120, the court cited *Estate of Smith*[11] to the effect that the language of that section was broad enough to give the Probate Court jurisdiction over practically all controversies arising between trustees and beneficiaries and that the beneficiary was entitled to petition the court for instructions to the trustee.[12]

The court dismissed the appeal from the order below denying jurisdiction of the Probate Court and ordered that a peremptory writ of mandate issue to the superior court in

9. Cal. Probate Code § 1120 provides: "When a trust created by a will continues after distribution, the superior court shall not lose jurisdiction of the estate by final distribution, but shall retain jurisdiction for the purpose of determining to whom the property shall pass and be delivered upon final or partial termination of the trust, to the extent that such determination is not concluded by the decree of distribution, of settling the accounts and passing upon the acts of the trustee, of authorizing the trustee to accept additions to the trust from sources other than the estate of the decedent, and for the other purposes hereinafter set forth. . . . The trustee may also petition such court, from time to time, for instructions as to the administration of the trust . . .".

10. In re Cocklin's Estate, 236 Iowa 98, 17 N.W.2d 129, 157 A.L.R. 584 (1945); Estate of Seipel, 130 Cal. App. 273, 19 P.2d 808 (1933).

11. 4 Cal. App.2d 548, 41 P.2d 565 (1935).

12. 4 Cal. App.2d at 553, 41 P.2d at 568.

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probate requiring it to hear and determine the issues raised by the beneficiaries' petition.

Wills

Holographic Wills

In *Estate of Callahan,*[13] a holographic will was admitted to probate, and a contest of the will was filed within six months on the grounds of lack of testamentary capacity, undue influence, fraud, and lack of due execution. The last ground of contest was presented as a separate issue, the other issues being reserved, pending its determination. The appellate court held the will legally sufficient in its execution and form and reversed the superior court's order revoking probate with directions to try the other issues.[14] Upon retrial, judgment of nonsuit was entered at the close of contestants' case, and contestants appealed.

The will consisted of three strips of paper fastened together with transparent adhesive tape. The top portion (Sheet A) bore the date and made specific gifts, providing for payment of taxes from the residue. It ended with an incomplete sentence: "I give, devise and bequeath all of the rest, residue and remainder of my property, whatsoever and wheresoever situated,"[15] and it appeared that this sheet was cut by scissors from a larger page. Sheet B read: "I will to Helen—Gorge [sic]—Willbur—Maurece—the sum of 2000.00 each. I will to Margret all my stocks and bonds to have and to hold."[16] Sheet C appoints Margaret C. Young executrix without bond and revokes former wills. The will bore the decedent's signature at the bottom. Margaret, Helen, George and Maurice were all children of a deceased brother of the decedent, and all were proponents of the will.

The court stated that the law applicable to the question of whether the proponents' motion for nonsuit was properly

13. 67 Cal.2d 609, 63 Cal. Rptr. 277, 432 P.2d 965 (1967).

14. Estate of Callahan, 237 Cal. App. 2d 818, 47 Cal. Rptr. 220 (1965).

15. 67 Cal.2d at 612, 63 Cal. Rptr. at 279, 432 P.2d at 967.

16. 67 Cal.2d at 612, 63 Cal. Rptr. at 279, 432 P.2d at 967.

granted was carefully stated by this court in *Estate of Lances*.[17] The court then went on to consider the evidence introduced by contestants which, viewed in the light most favorable to the contestants, was that Sheet B was executed within three months before or after January, 1960, and that during that period the decedent suffered from senile dementia to the extent that she did not know the nature and extent of her property, did not understand her relationship to those with a claim upon her bounty, and would not understand the nature of her act had she undertaken to execute a will. The proponents argued that such evidence would be insufficient to support a jury's finding of lack of testamentary capacity and that the nonsuit was properly granted. The supreme court did not agree.

The court addressed itself to the issue of undue influence and fraud for the guidance of the trial court upon retrial. It pointed out that only the children of decedent's deceased brother benefited by the will and that there was no provision for other deceased siblings. Furthermore, the decedent would have been capable of physically integrating Sheet B into the will. But the court said that while these facts appear sufficient to establish some of the indicia of undue influence,[18] they were not enough to establish that Margaret Young was active in procuring execution of the will. A contestant must show that the influence was brought directly to bear upon the testatmentary act.[19]

Ademption

The question of whether a mere change in the form of property, described as a specific bequest in a will, *ipso facto* constitutes an ademption arose in the *Estate of Creed*.[20] Creed owned commercially developed real property. After his wife's death he married Pauline. His sole surviving daughter by

17. 216 Cal. 397, 14 P.2d 768 (1932).

18. Estate of Yale, 214 Cal. 115, 4 P.2d 153 (1896); Estate of Lingenfelter, 38 Cal.2d 571, 241 P.2d 990 (1952).

19. Estate of Welch, 43 Cal.2d 173, 272 P.2d 512 (1954); Estate of Lingenfelter, 38 Cal.2d 571, 241 P.2d 990 (1952).

20. 255 Cal. App.2d 80, 63 Cal. Rptr. 80 (1967).

his previous marriage, Betty, married Melvin Knoll, and there were four daughters of this marriage. By holographic will Creed specifically devised certain real property to his daughter in trust for his four grandchildren and provided a residual clause in favor of his wife, Pauline.

Later, Creed's daughter and her husband became concerned with estate and inheritance taxes on the devise and suggested that the real property be transferred to a corporation and that the corporate stock be transferred to the children in tax-free *inter-vivos* gifts. Such a corporation was formed and 465 shares of stock were issued to Creed. Eighteen shares were transferred to each of the children, aggregating 72 shares valued at $33,000. There were 393 shares of the corporate stock remaining in Creed's hands at the time of his death.

The decedent's widow, Pauline, contested the right of Creed's daughter, as a testamentary trustee, to the distribution of the property on the principle that the devise was specific, and that ademption had occurred by the *inter vivos* transfer of the real property to the corporation. Since Pauline was the residual legatee, she claimed that she was entitled to the 393 shares of the corporate stock in the estate. The trial court awarded the stock to Creed's daughter in trust for the grandchildren. The decedent had dealt with the real property after the corporation was created exactly as he had before it was transferred to the corporation.

The court pointed out that a specific devise is not wholly extinguished because it is changed in form.[1] The general rule emerges that a change in form will not work an ademption unless the testator so intended. The court indicated that while an ademption might be effected when the specific property has been sold and the proceeds cannot be traced to other property in the estate,[2] no such result may be reached in the absence of an intent to adeem. Thus it is the extinguishment

1. Estate of Cooper, 107 Cal. App.2d 592, 237 P.2d 699 (1951); Estate of Helfman, 193 Cal. App.2d 652, 14 Cal. Rptr. 482 (1961).

2. Estate of Mason, 62 Cal.2d 213, 42 Cal. Rptr. 13, 397 P.2d 1005 (1965).

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of the presence of the property in the testator's estate and the circumstances surrounding this event which occur after the signing of the will that must be interpreted and decided upon. For this purpose the only procedure in determining the testator's intent is to admit extrinsic evidence upon such intent.

In Terrorem Clauses

In *Estate of Goyette*,[3] the decedent, a widower, was not survived by parents or lineal descendants, and his nearest surviving next of kin were two sisters and a brother. Decedent died on January 16, 1964, leaving a will which was executed less than six months but more than 30 days prior to his death and in which he left a substantial portion of his property in trust to a surviving sister and a nonrelative with a remainder over, upon the death of the survivor, to respondent charities. The appellants are the children of a surviving sister. The residue of the estate was left to certain relatives, including the appellants. The will did not contain a substitutionary clause in the event the charitable gifts should fail. The will did, however, contain an *in terrorem* clause which provided in part:

> Fifth: . . . or should any person whether a beneficiary under this Will or not mentioned herein, contest this Will or object to any of its provisions, then to such person or persons, I hereby give and bequeath the sum of ONE DOLLAR and no more, in lieu of the provision which I have made or which I might have made herein for such person or persons.[4]

The appellants filed an objection to the executrix's petition for preliminary distribution, alleging that the gift to the charities exceeded the limits prescribed by the Probate Code.[5] Respondent's answer asserted that appellants had violated testator's *in terrorem* clause, and thus they could no longer object to charitable gifts. The Probate Court agreed with the

3. 258 Cal. App.2d 768, 66 Cal. Rptr. 103 (1968).

4. 258 Cal. App.2d at 771, 66 Cal. Rptr. at 105.

5. See Cal. Probate Code § 41.

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respondents and ruled that the appellants had forfeited their interests in the residuary estate and could not object to the alleged excessive gift to the charities.

In discussing *in terrorem* clauses, the appellate court commented that such clauses were not against public policy and could be used to prohibit legal proceedings designed to thwart the testator's wishes.[6] Although forfeiture clauses in wills are to be strictly construed, the scope of such a clause depends on the language used by the testator and must be enforced according to his clearly expressed intent unless it violates a basic statutory policy. The court agreed that the appellants violated the *in terrorem* clause of the will when they objected to the petition for preliminary distribution and charged a violation of Probate Code section 41. In so objecting, appellants were not merely seeking a construction of the will, as they attempted to assert, but obviously were attempting to increase the amount of their share of the residue. The court agreed further that appellants forfeited their rights to challenge the gifts to charities at the same time they forfeited their residuary share and that these gifts were valid even if they collectively exceeded one-third of decedent's estate.

The court, in discussing Probate Code section 41, pointed out that that section is not a mortmain statute; the gifts which exceed its prescribed limits are not void, but merely voidable to the extent that they are excessive,[7] and only if challenged by a very limited class. Such gifts to charity are valid in their entirety if the will contains a substitutional clause giving the property to a nonrelative if the gift to charity should fail.[8]

6. Estate of Hite, 155 Cal. 436, 101 P. 443 (1909); Estate of Holtermann, 206 Cal. App.2d 460, 23 Cal. Rptr. 685 (1962); Estate of Howard, 68 Cal. App.2d 9, 155 P.2d 841 (1945).

7. Estate of Hughes, 202 Cal. App.2d 12, 20 Cal. Rptr. 475 (1962); Estate of Moran, 122 Cal. App.2d 167, 264 P.2d 598 (1953); Estate of Leymel, 103 Cal. App.2d 778, 230 P.2d 48 (1951); Estate of Haines, 76 Cal. App.2d 673, 173 P. 2d 693 (1946).

8. Estate of Sanderson, 58 Cal.2d 522, 25 Cal. Rptr. 69, 375 P.2d 37 (1962).

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Statutory Changes

Civil Code

Income and Principal Generally. The Revised Uniform Principal and Income Act, Chapter 2.5 of the Civil Code, sections 730 to 730.17, inclusive, was adopted by the legislature in 1967 and became operative July 1, 1968.

Section 730.02 of the Civil Code provides that a trust is to be administered with due regard to the respective interests of income beneficiaries and remaindermen. Three standards are set out in this connection: (1) it is to be administered in accordance with the terms of the trust instrument, regardless of the provisions of this chapter; (2) in the absence of contrary terms in the trust instrument, then it is to be administered in accordance with the provisions of this chapter; and (3) if neither of the preceding rules is applicable, then it is to be administered in accordance with what is reasonable and equitable in view of the manner in which men of ordinary prudence, discretion and judgment would act in the management of their own affairs. This section also provides that if the trust instrument gives the trustee discretion, no inference of imprudence or partiality arises from the fact that the trustee makes an allocation contrary to the provisions of this chapter.

Section 730.03 sets out in some detail various types of income and principal, and section 730.04 states that an income beneficiary is entitled to income from the date specified in the trust instrument, or if none is specified, then from the date an asset becomes subject to the trust; and in the case of an asset which becomes subject to a trust by reason of a will, from the date of decedent's death, even though an intervening period of time is necessary for estate administration.

Treatment of Depletion of Natural Resources Under the Revised Uniform Principal and Income Act. The problem of depletion of natural resources is provided for in the new sections of the Civil Code numbered 730.09 to 730.11. As to royalties which are governed by section 730.09, if they are received as rent on a lease or extension payments on a lease, the receipts are income; if they are received from a production

payment, the receipts are income to the extent of any factor for interest or its equivalent provided in the governing instrument. Allocated to principal shall be the fraction of the balance of the receipts which the unrecovered cost of production payment bears to the balance owed on the production payment, exclusive of any factor for interest or its equivalent; and the receipts not allocated to principal are income. If received as a royalty or any other interest in minerals or other natural resources, receipts not provided for in the preceding paragraphs shall be apportioned on a yearly basis in accordance with this paragraph. The receipts shall be allocated entirely to income or apportioned between income and principal as the trustee in his absolute discretion may determine, but in no event can more than 27–1/2 per cent of the gross receipts be added to principal as an allowance for depletion. By its terms section 730.09 does not apply to timber, water, soil, sod, dirt, turf, or mosses.

Section 730.10 applies to timber and permits the trustee to use his discretion in allotting between principal and income receipts from taking timber from land, provided that the amount allocated to principal shall not exceed a reasonable allowance for depletion.

By section 730.11, if the principal consists of property subject to depletion (other than property subject to section 730.09 or section 730.10) receipts shall be allocated entirely to income, or apportioned between income and principal at the trustee's absolute discretion, provided that the amount allocated to principal shall not exceed a reasonable allowance for depletion.

Treatment of Corporate Distributions. Section 730.06 deals with corporate distributions and provides that corporate shares of the distributing corporations, including stock splits or stock dividends, are principal. The former statute,[9] provided that distributions not of the same kind or rank as the shares on which such dividends were paid, to the extent that they represented a capitalization of surplus not derived from earnings, or distributions in shares of the declaring corporation

9. Former Cal. Civ. Code § 730.07.

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of the same kind and rank as the shares on which such dividends were paid, were principal. The new statute provides that the right to subscribe to shares or other securities issued by the distributing corporation and the proceeds of the sale of the right are principal.

Subsection (c) of section 730.06 deals with investment companies distributions and provides that distributions made from ordinary income by such companies are income, and all other distributions made by such companies including distributions from capital gains, depreciation, or depletion, are principal. The trustee may rely upon any statement of the distributing corporation as to the source or character of the distribution.

Charges Against Income and Principal. Section 730.13 sets forth charges that shall be made against income and principal. The charges against income that shall be made are: (1) ordinary expenses; (2) a reasonable allowance for depreciation at the trustee's absolute discretion, except that no allowance shall be made for real property used as a residence by a beneficiary; (3) one-half of court costs, attorney's fees and other fees on periodic judicial accounting, unless the court directs otherwise; (4) court costs, attorney's fees and other fees on other accountings if the matter primarily concerns the income interest, unless the court directs otherwise; (5) one-half the trustee's regular compensation, unless the court directs otherwise; (6) expenses reasonably incurred for current management; (7) any tax levied upon receipts defined as income. If charges against income are of unusual amount, the trustee may by means of reserves or other reasonable means charge them over a reasonable period of time.

Probate Code

A noteworthy amendment to Probate Code section 700, relating to creditors' claims against a decedent, shortens the time for presentation of such claims from six to four months after the first publication of the notice to creditors by an executor or administrator.

Probate Code section 930 was amended to provide that

where vouchers for any disbursements are proven to have been lost or destroyed, to be unavailable in duplicate form, to have been paid in good faith, and to have been legal charges against the estate, the executor or administrator shall be allowed such items. The section has been changed by allowing any item of expenditure not exceeding "one hundred dollars ($100)" instead of "twenty dollars ($20)", and by increasing the maximum total of such allowance to "two thousand five hundred dollars ($2,500)" instead of "five hundred dollars ($500)".

Section 718 of the Probate Code has been amended by adding an alternative course of action for an executor or administrator where he doubts the correctness of a claim, or where a claim has been wholly or partially rejected or where it may be deemed so by the claimant. The personal representative may now, in addition to the procedure set forth in the section prior to the current amendment, enter into an agreement in writing with the claimant to refer the matter in controversy to a commissioner or referee regularly attached to the court or to a judge *pro tempore* designated in the agreement, The agreement is then to be filed with the clerk who, with the court's approval, is to enter an order referring the matter to the person designated. This person, given the powers of a judge *pro tempore,* is to promptly hear and determine the matter by summary procedure without pleadings, discovery, or jury trial. Judgment is to be entered on the decision and is to be as valid as if it had been rendered by a judge of the court in a suit commenced by ordinary process.

In lieu of such an agreement and reference, a judge sitting in probate, pursuant to a written agreement of the executor or administrator and the claimant, and with the judge's consent, may hear and determine the matter in controversy.

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