



TRUSTS & ESTATES SECTION
THE STATE BAR OF CALIFORNIA

REVOCATION OF JOINT TRUSTS FOLLOWING DEATH OF A SETTLOR

LEGISLATIVE PROPOSAL (T&E-2012-07)

To: State Bar Office of Governmental Affairs

From: Marc H. Richards, Executive Committee, Trust and Estates Section
Chair, Estate Planning Subcommittee

Re: Revocation of Joint Trusts Following Death of a Settlor
A proposal to amend Probate Code Sections 15401 and 15410

SECTION ACTION AND CONTACTS:

Date of Approval: March 5, 2011

Approval vote: For: 27 Against: 0 Abstain: 2

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Digest:

I. Introduction

This legislative proposal would clarify the law to (1) make it clear that a settlor can grant a spouse or other party a power of revocation over the settlor's property in a joint trust and that this power can continue after the death of the settlor, and (2) more clearly address what should happen to property that is subject to a power of revocation.

Standard estate planning in California often makes use of a "joint revocable trust," or a trust established by more than one trustor (also referred to herein sometimes as a "settlor"). Most typically, joint revocable trusts are used to plan the combined estates of married persons, but they can be used by persons who are not married. The issues raised by this legislative proposal arise most often in the context of married persons.

Such joint revocable trusts must address what happens to the trust estate at the death of each trustor. Often, on the death of a married person, that person's separate property (if any) and that person's interest in any community or quasi-community property are distributed to one or more *irrevocable* trusts, often for the benefit of the surviving spouse. Such trusts are commonly known among estate planning attorneys as "A-B" or "A-B-C" trusts. These trusts generally are prepared by attorneys and the language of the documents is clear as to which parts of the trust, after the first death, are irrevocable, and which may still be revocable.

In other situations, a joint revocable trust is prepared so that after the first death, the entire remaining trust estate, including that portion belonging to the deceased spouse, remains revocable by the surviving spouse (sometimes referred to as the "outright approach"). This mechanism is generally used for smaller, typically non-taxable estates where the primary purpose for creating a trust is probate avoidance, and the deceased spouse's and surviving spouse's respective interests in the trust property are not segregated from one another upon the first death or the deceased spouse is not concerned that the surviving spouse might change the disposition of the deceased spouse's share of the trust after the death of the deceased spouse. Nevertheless, a variety of other factors can play into that decision. Additionally, this approach is most effectively used where the deceased spouse's interest in the trust property is to be distributed in the same manner as the surviving spouse's interest in the trust property following the death of the surviving spouse. Many spouses use the outright approach because it is simple and it eliminates fiduciary duties a surviving spouse acting as trustee would have under an irrevocable trust.

Estate of Powell, 83 Cal.App. 4th 1434 (2000), and some subsequent unpublished cases available for review on line have created some confusion as to whether or not a settlor can grant a power of revocation over that settlor's property that is in a joint trust to a spouse after the death of the settlor (or to another party that is not a spouse, for that matter). This proposal would clarify the law by amending the Probate Code to make it clear that a settlor can grant a spouse or other party a power of revocation over the settlor's property in a joint trust and that that power can continue after the death of the settlor.

Separately, the same line of cases suggested a need to clarify Section 15410 of the Probate Code to more clearly address what should happen to property that is subject to a power of revocation. This legislative proposal would provide that needed clarification.

II. Uncertainty Created by Estate of Powell.

Estate of Powell involved a surviving husband's attempted revocation of a trust holding entirely community property. The trust document, as amended, "permitted revocation 'during the lifetime of *either* Trustor' . . ." 83 Cal.App 4th at p. 1438. (Emphasis in original). The court concluded that "[b]y permitting revocation during the lifetime of *either* trustor, . . . the trustors contemplated revocation by the sole survivor." 83 Cal.App 4th at p. 1440. (Emphasis in original). Nevertheless, the court held that the surviving spouse could only revoke his share of the community property from the trust, not his deceased wife's share of the community property in the trust as well. The court reasoned that at the wife's death, the community property in the trust transmuted in character to the separate property of each spouse under Probate Code Section 100. Therefore, according to the court, the husband could only revoke his half of the trust assets because Family Code Section 761 (which applies only to community property in a trust) no longer applied to the trust property after the first death and the resulting transmutation.

Estate of Powell is causing confusion, particularly as to whether a surviving spouse who is a joint settlor has been given under the trust instrument the power to revoke as to any portion of the deceased spouse's property. On October 1, 2001, the California Supreme Court announced that it would release unpublished opinions of the California Courts of Appeal and post unpublished opinions on the official website of the California courts for a period of 60 days. LexisNexis and Westlaw have unpublished opinions in their databases for their respective subscribers. Two unpublished cases have cited Estate of Powell for the proposition that the surviving spouse's otherwise proper revocation of a joint living trust after the death of the deceased spouse is only effective as to the surviving spouse's separate property and one-half interest in community property. See Estate of Morra, 2008 WL 401583 (Cal.App. 1 Dist. (February 15, 2008)); Miller v. Miller, 2004 WL 2601792 (Cal.App. 6 Dist. November 16, 2004)). Miller held that the surviving spouse could revoke a trust he had created with his wife, but only as to his one-half of the community property and not as to the one-half of the community property of his deceased wife. The court stated that, "we agree with the *Powell* decision regarding the changed character of the property upon the first spouse's death." Additionally, in Estate of Morra, the court held that the surviving spouse effectively revoked the trust she and her husband had created. The court noted, however, that "like the [surviving spouse's] revocation of the trust in *Powell*, [the revocation] was effective only as to *her* separate one-half property interest. [The deceased spouse's] one-half interest in the property continues to be a part of the Trust and is subject to distribution in accordance with the trust instrument. . . ."

Estate planning attorneys recognize that there are many situations where one joint trustor (usually in a spousal context) wants to give the surviving joint trustor a right to revoke which applies to all or part of the deceased joint trustor's property, whether that is separate property, community property or, property that was previously community property before transmutation. Provisions of the Probate Code should be amended to resolve this uncertainty.

Provisions of the Probate Code (i.e. Section 15410) should also be clarified as to what happens if a power to revoke is exercised.

Pending Legislation:

No similar legislation has been introduced to date.

Pending Litigation:

None known.

Fiscal Impact:

No anticipated fiscal impact.

Likely Support/Opposition:

The Executive Committee of the Trusts and Estates Section anticipates support from estate planners, trust administrators, and those who have or wish to create joint revocable trusts, as a result of the clarification to the law that this proposal provides. There is no known opposition.

Germaneness:

Members of the Executive Committee of the Trusts and Estates Section deal with estate and trust administration, and are involved in such administration on a regular basis. The subject matter of the legislation comes within the scope of the knowledge and expertise of the members of the Executive Committee of the Trusts and Estate Section.

TEXT OF PROPOSAL:

SECTION 1. Section 15401 of the Probate Code is amended to read:

15401. (a) A trust that is revocable by the settlor *or any other person* may be revoked in whole or in part by any of the following methods:

(1) By compliance with any method of revocation provided in the trust instrument.

(2) By a writing (other than a will) signed by the settlor *or any other person holding the power of revocation* and delivered to the trustee during the lifetime of the settlor *or the person holding the power of revocation*. If the trust instrument explicitly makes the method of revocation provided in the trust instrument the exclusive method of revocation, the trust may not be revoked pursuant to this paragraph.

(b) (1) Unless otherwise provided in the instrument, if a trust is created by more than one settlor, each settlor may revoke the trust as to the portion of the trust contributed by that settlor, except as provided in Section 761 of the Family Code.

(2) Nothing in the provisions of subdivision (b)(1) of this section, including the reference to Section 761 of the Family Code, prevents a settlor from granting to someone else, including, without limitation, his or her spouse, a power to revoke all or part of that portion of the trust contributed by that settlor, whether said portion was separate property or community property of that settlor, and whether that power to revoke is exercisable during the lifetime of that settlor or continues after the death of that settlor, or both.

(c) A trust may not be modified or revoked by an attorney in fact under a power of attorney unless it is expressly permitted by the trust instrument.

(d) Nothing in this section limits the authority to modify or terminate a trust pursuant to Section 15403 or 15404 in an appropriate case.

(e) The manner of revocation of a trust revocable by the settlor *or any other person* that was created by an instrument executed before July 1, 1987, is governed by prior law and not by this section.

SEC. 2. Section 15410 of the Probate Code is amended to read:

15410. At the termination of a trust, the trust property shall be disposed of as follows:

(a) In the case of a trust that is revoked by the settlor, *the trust property shall be disposed of in the following order of priority: (1) as directed by the settlor; (2) as provided in the trust; and (3) to the extent there is no direction by the settlor or in the trust, to the settlor, or his or her estate, as the case may be.*

(b) In the case of a trust that is revoked by any person holding a power of revocation other than the settlor: (1) as provided in the trust; (2) as directed by the person exercising the

power of revocation; and (3) to the extent there is no direction in the trust or by the person exercising the power of revocation, to the person exercising the power of revocation, or his or her estate, as the case may be.

~~(b)~~ (c) In the case of a trust that is terminated by the consent of the settlor and all beneficiaries, as agreed by the settlor and all beneficiaries.

~~(c)~~ (d) In any other case, as provided in the trust instrument or in a manner directed by the court that conforms as nearly as possible to the intention of the settlor as expressed in the trust instrument.

~~(d)~~ (e) If a trust is terminated by the trustee pursuant to subdivision (b) of Section 15408, the trust property may be distributed as determined by the trustee pursuant to the standard provided in subdivision ~~(c)~~ (d) without the need for a court order. Where the trust instrument does not provide a manner of distribution at termination and the settlor's intent is not adequately expressed in the trust instrument, the trustee may distribute the trust property to the living beneficiaries on an actuarial basis.