

0239a
October 2, 1985

Note. Changes may be made in this Agenda. For meeting information, please call John H. DeMouilly (415) 494-1335.

Time

Oct. 10 (Thursday) - 3:30 p.m. - 10:00 p.m.
Oct. 11 (Friday) - 9:00 a.m. - 6:00 p.m.

Place

Stanford Law School
Room 85
Stanford

FINAL AGENDA

for meeting of

CALIFORNIA LAW REVISION COMMISSION

Stanford

October 10-11, 1985.

1. Minutes of September 12-13 Meeting (sent 9/24/85)
2. Administrative Matters

Legislative Program

Memorandum 85-83 (sent 9/27/85)
First Supplement to Memorandum 85-83 (enclosed)

Annual Report

Memorandum 85-85 (sent 9/20/85)

Future Meeting Schedule

Memorandum 85-84 (sent 9/24/85)
First Supplement to Memorandum 85-84 (sent 9/27/85)

3. Study F-602 - Division Upon Dissolution of Marriage of Property Held in Joint Tenancy Form (Retroactive Application of Statute)

Memorandum 85-52 (enclosed)

4. Study L-640 - Probate Code (Comprehensive Trust Law)

Memorandum 85-73 (sent 8/29/85; another copy sent 9/20/85)

Draft of Tentative Recommendation (attached to Memorandum)

Note. We will start with Section 16420 on page 73 of Memorandum 85-73.

First Supplement to Memorandum 85-73 (sent 9/9/85; another copy sent 9/20/85)

Second Supplement to Memorandum 85-73 (sent 9/20/85)

Third Supplement to Memorandum 85-73 (sent 9/27/85)

Fourth Supplement to Memorandum 85-73 (to be sent)

Memorandum 85-86 (sent 9/24/85)

Memorandum 85-87 (sent 9/26/85)

5. Study L-1020 - Estates and Trusts Code (Standard of Care of Personal Representative)

Memorandum 85-93 (sent 9/20/85)

6. Study L-1028 - Estates and Trusts Code (Independent Administration)

Memorandum 85-71 (sent 8/29/85; another copy sent 9/20/85)

Draft of Tentative Recommendation (attached to Memorandum)

First Supplement to Memorandum 85-71 (sent 9/4/85; another copy sent 9/20/85)

Second Supplement to Memorandum 85-71 (sent 9/7/85; another copy sent 9/20/85)

Third Supplement to Memorandum 85-71 (sent 9/25/85)

Fourth Supplement to Memorandum 85-71 (to be sent)

7. Study L-1032 - Estates and Trusts Code (Small Estate Set-Aside)

Memorandum 85-74 (sent 8/29/85; another copy sent 9/20/85)

Draft of Tentative Recommendation (attached to Memorandum)

First Supplement to Memorandum 85-74 (enclosed)

Second Supplement to Memorandum 85-74 (to be sent)

8. Study L-1031 - Estates and Trusts Code (Passage of Property to Surviving Spouse Without Administration)

Memorandum 85-72 (sent 8/29/85; another copy sent 9/20/85)

Draft of Tentative Recommendation (attached to Memorandum)

First Supplement to Memorandum 85-72 (sent 9/5/85; another copy sent 9/20/85)

Second Supplement to Memorandum 85-72 (to be sent)

9. Study L-1030 - Estates and Trusts Code (Collection or Transfer of Small Estate Without Administration)

Memorandum 85-88 (sent 9/20/85)

Draft of Tentative Recommendation (attached to Memorandum)

First Supplement to Memorandum 85-88 (sent 9/24/85)

Second Supplement to Memorandum 85-88 (sent 9/26/85)

Third Supplement to Memorandum 85-88 (to be sent)

10. Study L-1020 - Estates and Trusts Code (Probate Code Section 854)

Memorandum 85-92 (sent 9/20/85)

ADMINISTRATIVE MATTERS

MINUTES OF SEPTEMBER 12-13, 1985, MEETING

The Minutes of the September 12-13, 1985, Meeting were approved as submitted by the staff.

SCHEDULE FOR FUTURE MEETINGS

The Commission adopted the following schedule for future meetings.

December 1985

| | | |
|-----------------------|------------------------|------------|
| December 5 (Thursday) | 2:00 p.m. - 10:00 p.m. | Sacramento |
| December 6 (Friday) | 8:30 a.m. - 4:30 p.m. | |

Note. At the October meeting, the Commission decided to meet on December 7 as well as on December 5 and 6. However, after the meeting, the Chairperson determined that the Commission would not meet on December 7 (because it was not possible to obtain a quorum on that date) and changed the times of the meeting on December 5 and 6 so that the meeting will be held at the times set out above. The changed times will provide additional time for the December meeting.

January 1986

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|-----------------------|------------------------|-----------|
| January 16 (Thursday) | 3:00 p.m. - 10:00 p.m. | San Diego |
| January 17 (Friday) | 9:00 a.m. - 6:00 p.m. | |

February 1986

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|------------------------|------------------------|---------------|
| February 13 (Thursday) | 3:00 p.m. - 10:00 p.m. | San Francisco |
| February 14 (Friday) | 8:30 a.m. - 6:00 p.m. | |

March 1986

| | | |
|---------------------|------------------------|------------|
| March 13 (Thursday) | 3:00 p.m. - 10:00 p.m. | Sacramento |
| March 14 (Friday) | 9:00 a.m. - 6:00 p.m. | |

April 1986

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|---------------------|------------------------|--------|
| April 17 (Thursday) | 3:00 p.m. - 10:00 p.m. | Eureka |
| April 18 (Friday) | 8:30 a.m. - 6:00 p.m. | |

May 1986

| | | |
|-------------------|------------------------|----------|
| May 15 (Thursday) | 3:00 p.m. - 10:00 p.m. | Monterey |
| May 16 (Friday) | 9:00 a.m. - 6:00 p.m. | |

June 1986

June 26 (Thursday) 3:00 p.m. - 10:00 p.m. Sacramento
June 27 (Friday) 9:00 a.m. - 6:00 p.m.

July 1986

July 17 (Thursday) 3:00 p.m. - 10:00 p.m. Orange County
July 18 (Friday) 9:00 a.m. - 6:00 p.m.

September 1986

September 4 (Thursday) 3:00 p.m. - 10:00 p.m. Sacramento
September 5 (Friday) 9:00 a.m. - 6:00 p.m.

November 1986

November 13 (Thursday) 3:00 p.m. - 10:00 p.m. Los Angeles
November 14 (Friday) 9:00 a.m. - 6:00 p.m.

December 1986

December 4 (Thursday) 3:00 p.m. - 10:00 p.m. Sacramento
December 5 (Friday) 9:00 a.m. - 6:00 p.m.

LEGISLATIVE PROGRAM

The Commission considered Memorandum 85-83.

1985 Legislative Program. The Executive Secretary made the following report concerning the 1985 Legislative Program:

Enacted

1985 Stat. ch. 41 (Assembly Bill 98) - Creditors' Remedies
1985 Stat. ch. 90 (Assembly Bill 690) - Uniform Transfers to Minors
1985 Stat. ch. 157 (Assembly Bill 96) - Property Law
1985 Stat. ch. 359 (Assembly Bill 97) - Urgency Probate Bill
1985 Stat. ch. 362 (Assembly Bill 150) - Family Law
1985 Stat. ch. 403 (Senate Bill 1270) - Powers of Attorney
1985 Stat. res. ch. 25 (ACR 4 - Continues Authority to Study
Previously Authorized Topics
1985 Stat. ch. 731 (Assembly Bill 1030) - Mediation Privilege
1985 Stat. ch. 982 (Assembly Bill 196) - Probate Law

Placed on Inactive File

Assembly Bill 195 - Revision of Law Revision Commission Statute

Not Introduced

Duration of Directive to Physicians (Increase From 5 to 7 Years)

Other Measures Enacting Commission Recommendations
(Not Introduced Upon Commission Recommendation)

1985 Cal. Stat. ch. 100 - Enacting 1976 Commission recommendation relating to admissibility of duplicates in evidence

1985 Cal. Stat. ch. 545 - Enacting 1980 Commission recommendation that psychotherapist-patient privilege be extended to licensed educational psychologists

1985 Cal. Stat. ch. 1077 - Enacting 1980 Commission recommendation proposing the repeal of Evidence Code Section 1028 (exception to psychotherapist-patient privilege where psychotherapist is not a psychiatrist or licensed psychologist and privilege is claimed in criminal proceeding)

1986 Legislative Program. The staff suggested the following as possible items for inclusion in the 1987 legislative program:

(1) Comprehensive Trust Statute. The Commission already has determined to submit this recommendation in 1987.

(2) Directive to physicians. This is an earlier recommendation that the duration of a directive to physicians be increased from 5 to 7 years. The Commission decided that a bill should be introduced in 1987 to effectuate this recommendation.

(3) Proration of Estate Taxes. The Commission plans to submit this recommendation in bill form in 1987.

(4) Small Estate Set-Aside. The Commission will determine whether to submit this recommendation in 1987 after it has reviewed the staff draft of the recommendation.

(5) Distribution of Estates Without Administration. The Commission will determine whether to submit this recommendation in 1987 after it has reviewed the staff draft of the recommendation.

ANNUAL REPORT

The Commission considered Memorandum 85-85 and the attached draft of the Annual Report.

The Executive Secretary indicated that the draft would be revised to reflect the 1986 legislative program adopted by the Commission and to reflect the Commission membership as of December 1, 1985.

The Executive Secretary reported that the Joint Commission of the State Bar and the Judicial Council has drafted the proposed California Discovery Act of 1986. The Joint Commission's schedule calls for obtaining approval of the proposed act from the State Bar and the Judicial Council (after any necessary revisions have been made) and for submission of the proposed act to the Legislature before the end of 1985. In view of this development, the Executive Secretary suggested that the Commission might wish to recommend that the topic of discovery be deleted from its agenda of authorized topics. The Commission during prior years had deferred study of this topic because the matter was under study by the State Bar and the Commission did not wish to duplicate the work of the State Bar. Deleting the topic from the Commission's agenda would relieve the Commission of any future responsibility in this area, leaving the area to continued study by the State Bar and the Judicial Council.

The Commission asked that each member of the Commission be sent a copy of the proposed act so that the member can review the draft if so inclined and submit his or her comments individually to the Joint Commission.

The Commission decided not to recommend that discovery be removed from its agenda of authorized topics.

The staff will present a memorandum at a future meeting that will provide background information concerning each of the topics authorized for Commission study so that the Commission can determine the matters that will be given priority for study when the Probate Code study is completed.

STUDY F-602 - DIVISION UPON DISSOLUTION OF MARRIAGE OF PROPERTY
HELD IN JOINT TENANCY FORM (RETROACTIVE APPLICATION OF STATUTE)

The Commission considered Memorandum 85-52, relating to a possible legislative response to the recent Supreme Court decision in In re Marriage of Buol (filed September 16, 1985). The Commission decided to give its attention to this matter at the December 1985 meeting.

STUDY L-640 - PROBATE CODE (COMPREHENSIVE TRUST LAW)

The Commission concluded its consideration of Memorandum 85-73 and the comprehensive trust law. The Commission also considered the First, Second, and Third Supplements to Memorandum 85-73 and part of Memorandum 85-86, which presented redrafted sections of the comprehensive trust law. The Commission considered comments of the California Bankers Association which were distributed at the meeting and are attached to these Minutes as Exhibit 1. The draft of the recommendation will be revised to implement the Commission's decisions and presented for consideration at the December meeting, but the statutory material should be sent to the Legislative Counsel for preparation as a preprint bill before the December meeting so that the trust law bill can be introduced early in the 1986 legislative session. The Commission made the following decisions:

[Except as noted, the following draft sections are set out in the draft recommendation attached to Memorandum 85-73.]

§ 15600. Acceptance of trust by trustee [Memorandum 85-86]

Subdivision (a)(2) should be revised to make clear that the exercise of a power or performance of a duty under the trust instrument as modified is considered as acceptance only if the trustee acted with knowledge of the modification.

§ 15601. Rejection of trust; nonliability of person who rejects trust [Memorandum 85-86]

The Commission discussed the problem of who should get notice of rejection when the trustee rejects a trust or modification of a trust. The staff should consider whether this question can be answered by a statement in the comment.

§ 15620. Actions by cotrustees

This section should be revised to provide that cotrustees must act unanimously unless the trust provides otherwise. This will continue the existing law and is consistent with the rule applicable to powers of appointment.

§ 15660. Appointment of trustee to fill vacancy [Memorandum 85-86]

Subdivision (a) should be revised to provide that a vacancy must be filled in a situation where the trust has no trustee.

§ 15802.5. Rights of holder of power of appointment or withdrawal [Memorandum 85-86]

This section should be revised as follows:

15802.5. The holder of a presently exercisable power of appointment or a power to withdraw property from the trust has the rights of a settlor provided by Sections 15800 to 15802, inclusive, to the extent of the holder's power over the trust property.

This and the following section will be renumbered to eliminate the decimal.

§ 15803. Notice in case involving future interest of beneficiary [Memorandum 85-86]

Subdivision (c) should be revised as follows:

(c) Nothing in this section affects any of the following:

(2) ~~Requirements for appointment~~ Availability of a guardian ad litem pursuant to Section 17207.

This revision is a technical change in light of Section 17207 which does not actually require appointment of a guardian ad litem.

§ 16002. Duty of loyalty [Memorandum 85-86]

Subdivision (b) should be revised to restore the requirement that the trustee give the beneficiaries notice in a case where the trustee

proposes to deal between two trusts. However, notice of the material facts relating to the transaction between the trusts should go only to a limited class of beneficiaries, such as current adult income beneficiaries and presumptive adult remainder beneficiaries.

§ 16060. Trustee's general duty to report information to beneficiaries
[Memorandum 85-86]

The staff should check the part of the comment relating to the Restatement to make sure that it is accurate.

§ 16222. Participation in business; change in form of business
[Memorandum 85-86]

The staff should see whether there is any case law concerning what constitutes a business under this section that would be appropriate for citation in the comment.

§ 16225. Deposits [Memorandum 85-86]

The staff should check subdivision (b) to make sure that the usage of "affiliate" is consistent with other places where this term is used in the draft statute.

§ 16401. Trustee's liability to beneficiary for acts of agent
[Memorandum 85-86]

Subdivision (a) and the first part of subdivision (b) of this section should be revised as follows:

16401. (a) Except as provided in subdivision (b), the trustee is not liable to the beneficiary for the acts or omissions of an agent ~~employed by the trustee in the administration of the trust.~~

(b) The trustee is liable to the beneficiary for ~~the acts or omissions~~ an act or omission of an agent employed by the trustee in the administration of the trust that would be a breach of the trust if committed by the trustee

Subdivision (b)(5) should be revised to refer to knowing acquiescence in a breach by a cotrustee. The comment should contain a

cross-reference to Section 16000 (duty to administer trust according to terms of trust).

§ 16402. Trustee's liability to beneficiary for acts of cotrustee
[Memorandum 85-86]

Subdivision (b)(3) should be revised to refer to knowing acquiescence in a breach by a cotrustee. The word "the" preceding "trustee" should be changed to "a" throughout this section. The comment should contain a cross-reference to Section 16000 (duty to administer trust according to terms of trust).

§ 16420. Remedies for breach of trust

Subdivision (c) should be revised to read: "(c) To compel the trustee to redress a breach of trust by payment of money or otherwise." The comment should note that it may be appropriate in certain circumstances to order transfer of property as a remedy for breach of trust. The comment should also state that any one or more of the remedies may be used as is appropriate under the circumstances of the case. A provision should be added to this section to make clear that the remedies listed in this section are not necessarily exclusive and that the section is not intended to prevent resort to any other appropriate remedy provided by statute or the common law.

§ 16421. Remedies for breach exclusively equitable

The policy of this section was approved, but the staff should consider rewording it to say that the remedies are "exclusively in equity" rather than "exclusively equitable."

§ 16440. Measure of liability for breach of trust

In subdivision (a)(3), the word "a" should be changed to "the."
Subdivision (b) should be revised to read:

(b) If the trustee has acted reasonably and in good faith under the circumstances as known to the trustee, the court in its discretion may excuse the trustee in whole or in part from liability under subdivision (a) if it would be equitable to do so.

The discussion of Estate of Talbot in the comment should be revised to explain the extent to which subdivision (b) is consistent with Talbot.

[\$ 16442.] Liability for exemplary damages

The staff should draft a provision for consideration at the December meeting that authorizes the assessment of punitive damages against trustees for breach of trust. The amount of punitive damages should be restricted to no more than three times the amount of actual damages assessed under draft Section 16440. Punitive damages would be appropriate in cases involving willful misconduct or gross negligence.

§ 16460. Limitations on proceedings against trustee

The one year statute of limitations in this section should be increased to three years. Subdivision (b) should be revised to provide that notice in the case of a minor with a guardian is to be given the guardian. Subdivision (b) should also deal with the problem of notice and bar in situations involving incapacitated beneficiaries who have not been declared legally incompetent. It was suggested that it might be appropriate to provide for appointment of a guardian ad litem to receive notice and accountings on behalf of an incapacitated beneficiary.

§ 16461. Exculpation of trustee

Subdivision (b) should also provide that an exculpatory provision in a trust is not effective to relieve the trustee for gross negligence.

§ 16462. Nonliability for following instructions under revocable trust

In the second line of subdivision (a), the word "the" should be changed to "a."

[\$ 16463.] Consent

A section governing consent by a beneficiary to relieve the trustee of liability should be included in the trust law.

§ 17000. Subject matter jurisdiction

The phrase "sitting in probate" should be deleted from both subdivision (a) and subdivision (b). This change makes Section 17000 consistent with language relating to jurisdiction in probate administration that was approved at the March meeting. The comment may need to be revised to make clear that jurisdiction over proceedings relating to the internal affairs of trusts is in the department of the court that handles probate matters.

§ 17001. Probate court as full-power court

This section should be revised substantially as follows:

17001. In proceedings ~~brought~~~~before~~~~the~~~~court~~ concerning the internal affairs of trusts commenced pursuant to this division, the superior court ~~sitting~~~~in~~~~probate~~ has all the powers of the superior court.

§ 17004. Basis of jurisdiction over trust, trust property, and trust parties

This section should be revised as follows:

17004. The superior court ~~sitting~~~~in~~~~probate~~ may exercise jurisdiction in proceedings under this division on any basis permitted by Section 410.10 of the Code of Civil Procedure.

§ 17006. Jury trial

The citation of Burton in the comment should be deleted since Burton is no longer authority, a rehearing having been ordered by the Supreme Court.

§ 17102. Manner of mailing; when mailing complete

The introductory exception clause ("unless otherwise expressly provided by statute") should be deleted unless the staff discovers a sufficient reason for keeping it. The same change should be made in Probate Code Section 1465 (guardianship-conservatorship law).

§ 17103. Personal delivery instead of mailing

The second sentence should be deleted since it is unnecessary. This provisions reads: "Personal delivery as provided in this section satisfied the provision that requires or permits the notice or other paper to be mailed." The same change should be made in Probate Code Section 1466 (guardianship-conservatorship law).

§ 17200. Petitioners; grounds for petition

Subdivision (b)(12), which refers to compelling redress of breach of trust, should be broadened so that it applies to all remedies for breach. Otherwise it might be inferred that redressing a breach is limited to liability for damages. The comment should state that the list of remedies is not exclusive and does not limit the internal affairs that may be considered in these proceedings.

§ 17202. Dismissal of petition

The word "petitioner" should be replaced by "trustee or beneficiary."

§ 17203. Notice

Subdivision (b) should refer to charitable trusts subject to the jurisdiction of the Attorney General, rather than trusts subject to supervision of the Attorney General. The limitations on the duty to give notice the Attorney General provided in paragraphs (1)-(5) of subdivision (b) should be eliminated. The policy is that the Attorney General should get notice in cases involving charitable trusts to the same extent as would a beneficiary of a private trust with the same

interest in the trust. The notice requirement should be subject to waiver by the Attorney General.

§ 17204. Request for notice and copy of petition

The staff should attempt to clarify whether the request for a copy of a petition refers to a petition in a pending or future proceeding and what is the effect of a request filed when there is no pending proceeding. In the fourth line, the word "the" should be changed to "a."

§ 17206. Appeal

Subdivisions (c), (d), and (f), preventing appeals in certain cases, should be deleted.

§ 17207. Appointment of guardian ad litem

The first part of subdivision (a) should be revised as follows:

17207. (a) the court may, on its own motion or on request of a trustee or other person interested in the trust, appoint a guardian ad litem at any stage of a proceeding concerning the trust ~~/// if to represent the interest of any of the following persons, if the court determines that representation of the interest otherwise would be inadequate, /// a guardian ad litem may be appointed to represent /// the interest of any of the following:~~

§ 17208. Intermittent judicial intervention in trust administration

This section should be revised as follows:

17208. The administration of trusts is intended to proceed expeditiously and free of judicial intervention, subject to the jurisdiction of the ~~courts of this state as invoked pursuant to this chapter~~ court.

§ 17209. Enforcement of beneficiary's rights under charitable trust by Attorney General

This section should be revised as follows:

17209. In a case involving a charitable trust subject to ~~supervision~~ by the jurisdiction of the Attorney General under ~~the Uniform Supervision of Trustees for Charitable Purposes Act, Article III (commencing with Section 12580) of Chapter 6 of Part 12 of Division 13 of Title 2 of the Government Code, during the period when no private beneficiary has at any time been interested in the trust~~, the Attorney general may petition under this chapter.

The relation of this section to Section 15800 relating to right of beneficiaries under revocable trusts should be clarified. The policy of this section is that the Attorney General should have the same right to bring proceedings involving charitable trusts as would a beneficiary of a private trust having the equivalent interest in the trust.

§ 17351. Removal of trust from continuing jurisdiction where trustee is trust company

Subdivision (b)(1) should be revised as follows: "(1) A statement that as of January 1, 1983, the ~~probate code~~ law was ~~amended~~ changed to remove the necessity for continuing court jurisdiction over the trust."

§ 17403. Notice and hearing

Subdivision (b), a special provision for notice to the Attorney General, should be deleted since it is unnecessary in light of Section 17203(b) as revised. The comment should contain a cross-reference to Section 17203(b).

§ 17404. Order granting transfer

Subdivision (a) should be revised as follows:

(a) The transfer of the trust property to a trustee in another jurisdiction, or the transfer of the place of administration of the trust to another jurisdiction, will ~~facilitate the economical and convenient administration of the trust~~ and promote the best interests of the trust and those interested in it, taking into account the interest in the economical and convenient administration of the trust.

§ 17455. Order accepting transfer and appointing trustee

Subdivision (a)(1) should be revised in the same manner as Section 17404(a). Subdivision (b) should provide that bond may be required in the discretion of the court pursuant to the general rules provided in Section 15602.

§ 17457. Administration of transferred trust

The comment to this section should say that it is not intended to deal with choice of law questions and that the trust transferred to California is not subject to continuing court jurisdiction unless the trust so provides and the court determines in the order accepting transfer.

§ 18000. Personal liability of trustee to third persons on contracts

This section should make clear that it does not excuse liability under other provisions of this chapter. The comment should make clear that nothing in this section excuses liability to the beneficiary for breach of trust. The comment should also explain that a contract properly entered into is one that the trustee enters into in a manner consistent with the powers and duties of the trustee under the terms of the trust.

§ 18100. Protection of third person dealing with trustee

This section should be revised to protect only third persons who act in good faith and for valuable consideration.

§ 18102. Protection of third person dealing with former trustee

This section should be revised as follows:

18102. If a third person acting in good faith and for a valuable consideration enters into a ~~good/fair~~ transaction with a former trustee without knowledge that the trustee's office is vacant, the third person is fully protected just as if the ~~trustee's office were not vacant~~ former trustee were still a trustee.

The addition of the reference to valuable consideration conforms this section to Section 18100 as revised.

§ 18200. Creditor's rights against revocable trust during settlor's lifetime

§ 18201. Creditor's rights against revocable trust after settlor's death

The Commission discussed the policy issues arising in the area of enforcement of creditor's claim against revocable trusts. There was general agreement that the statute should attempt to deal with this area, but there was disagreement over whether Sections 18200 and 18201 should be enacted without a procedure for handling creditors' claims after the settlor's death. The staff was directed to prepare a memorandum analyzing the issues in this area in greater detail and perhaps proposing a procedure for Commission consideration.

Civil Code §§ 2223-2224. Constructive trusts

These sections of existing law should be preserved in the Civil Code, perhaps in a renamed Title 8. The concern is that Section 15003 (constructive and resulting trusts unaffected) is not adequate to preserve California law of constructive trusts.

Civil Code § 2235. Transactions between trustee and beneficiary

The staff should draft language that puts the burden on the trustee to show that the trustee has not taken advantage of a beneficiary in dealing with the beneficiary. This would supersede the provision of Civil Code Section 2235 that presumes such transactions to be without sufficient consideration and under undue influence.

STUDY L-1020 - ESTATES AND TRUSTS CODE (STANDARD OF
CARE OF PERSONAL REPRESENTATIVE

The Commission considered Memorandum 85-93 and the attached staff draft of a section concerning the standard of care required of a

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personal representative in managing the estate. The Commission approved the staff recommendation to codify existing case law (personal representative required to use ordinary care and diligence), consistent with the guardianship-conservatorship law (Prob. Code § 2401), as set out in Exhibit 1 to the Memorandum.

APPROVED AS CORRECTED _____ (for
corrections, see Minutes of next
meeting)

Date

Chairperson

Executive Secretary



ESTABLISHED 1889

LEGAL DEPARTMENT 530 BROADWAY | SUITE 1208 | SAN DIEGO, CA 92101 | (619) 238-2119

October 4, 1985

Mr. John DeMouly
Executive Secretary
California Law Revision Commission
400 Middlefield Road, Suite D-2
Palo-Alto, California 94303-4739

Re: California Bankers Association's Recommendations
Regarding Proposed Trust Law Staff Draft Dated 9-18-85)

Dear John:

The California Banker's Association has the following comments and suggested revisions of the Staff Draft prepared as a result of the September 12-13 meeting.

15004. Application of division to charitable trusts

Charitable Trust The Definition - Should exclude Charitable contingent remainder beneficiaries, as is done in Probate Code § 1120.1(a)(f). A charitable remainderman's right to an accounting should only arise when his or her interest is vested. Charities are almost always named as last resort, with no intention that the trust become a charitable trust.

15402. Power to revoke includes power to modify

1. Our notes from the last meeting indicate changes were going to be made to reflect community property rules (per Professor Halbach's recommendation), in allowing amendments. No changes appear in the draft.

15600. Acceptance of trust by trustee

15600(a)(2) should require delivery of Amendment to the Trustee. Add to the comment a cross reference to proper delivery as defined in the Code of Civil Procedure.

15601. Rejection of trust

The Section should be amended to add the underlined words:

"Trustee or Successor Trustee, may at any time give rejection or anticipatory rejection."

The section should also be clarified to state to whom Trustee gives notice of rejection. An example of a problem that arises frequently is in the Successor Trusteeship context.

15643. Vacancy in office of trustee

The definition of vacancy should be changed, as follows:

(b)"If there are two or more Trustees acting, and one Trustee ceases to act, the remaining trustees shall exercise the office of Trustee and there shall be no vacancy."

This is in accordance with CC § 2288, and is much more likely to represent the Trustor's intent.

15660. Appointment of trustee to fill vacancy

Comment appearing in 15660 is inconsistent with 15643; the definition of "Vacancy" should comply with current law, CC §2288.

15802.5. Rights of holder of power of appointment or withdrawal

This section should be clarified so that the person having power to withdraw some assets only has power over that portion of the trust. Example: With a 5/5 Power, the tax consequences of having the power of settlor over the total trust will be included in the total trust in the power holders estate.

15803. Notice in case involving future interest of beneficiary

15803(b)(2) Should be amended to state:

"The ability to have a guardian ad litem"

To state that there is a requirement is inconsistent, as there is no requirement to have a guardian ad litem, under § 17207.

16002. Duty of loyalty

We support the Staff's analysis that this is a reasonable position and should not be changed as it is needed to administer marital trusts. Comment should state:

"This type of transaction would be permitted under the Restatement, § 170, comment r."

Example: In marital residual trusts, exchanges and sales should be allowed!

16005. Duty not to undertake adverse trust

This section should be amended to give beneficiaries the ability to consent to a conflict. The draft does not conform to existing law. Currently, the Trustee is able to deal with conflicting trusts if the Trustee gets consent of the beneficiaries

(CC § 2232) upon disclosure. The current statutory scheme should be retained.

16012. Duty not to delegate

It is unclear that:

(1) the duty not to delegate allows the reasonable use of affiliates or outside service providers.

(2) An uncertainty is created between 16015, and 160 12: should be clarified to include §16015 in comment. The trustee should be able to delegate duties to affiliates.

(3) In 16247, reference to 16015 should be added; duty against delegation should not prohibit use of affiliates.

Many financial institutions must use outside resources to provide private label services. Small institutions do not have the capability to personally perform many functions. Individual trustees also habitually retain other service providers to:

- a. Prepare tax returns. (CPA's)
- b. Provide investment management services. (Investment Counselors)
- c. Trust accounting system.
- d. Custody of the Trust Assets. (Securities Depository)

(4) Change the section to add:

"Nor the supervision of agents performing services."

16013. Duty with respect to cotrustees

The CBA strongly OPPOSES this statutory scheme as drafted. We urge that the requirement for UNANIMOUS acts of cotrustees be reinstated. The liability inherent in the current draft is

unacceptable. Majority Rule without exculpatory provisions is not acceptable. If the dissenting Trustee is liable for acts of the majority, administration will come to a stand still. Trustees will consistently be in court, seeking injunctions.

In some instances, an injunction will be too late and the act will already have occurred. This is unworkable in its present form.

Corporate Trustees cannot administer these trusts. At minimum, the section should only be prospective to trusts executed or trusts coming into being after the statute's effective date.

The comment should cross reference to incapacity of Trustees.

NOTE: For "old" statutory provisions which will continue to apply to trusts, the relevant code sections on the effective date of the new statute must be included in some form in the new code.

16040. Certain actions not violations of duties

CBA opposes the section and the comment. This is not an accurate statement of the law of California! There is no case holding this, there is only dictum or cases relying on dictum.

16060. Trustee's general duty to report information to beneficiaries

The section is fine but the comment should be changed! Add back in to the comment:

"Except as otherwise provided in the statute the Trustee is not ordinarily under a duty to account to a beneficiary unless requested."

Restatement Section 173 does not normally require the trustee to account. Exceptions in 173 comment (d) of the Restatement are:

1) If the Trustee is dealing for his own account, or 2) if the beneficiary is dealing with a third party (i.e., needs information so he can borrow against the trust).

The section is O.K., but the comment to the section is unacceptable as an inaccurate characterization of 173 comment (d).

16222. Participation in business; change in form of business

Since the Commission has made it abundantly clear that they are only concerned with individual fiduciaries, Corporate Fiduciaries should be excepted from this requirement.

Problems: does "business" mean an income producing real property such as an apartment building, or even an interest in a Limited partnership? If so, this is much too broad.

Need to narrowly define business: if the only concern is with closely held businesses of the family or sole proprietorships of Trustor, this should be clarified.

16225. Deposits

16225(b) should have the same definition of affiliate as appears in 16015. These should be consistent.

16247. Hiring persons

There should be one definition of "affiliate" in the Code and reference can be made to it in each appropriate section.

There should be a cross reference to § 16015 in the comment.

16401. Trustee's liability to beneficiary for acts of agent

16401(a) Delete "employed by the Trustee"

(b)(1) "Acts."

(b)(5) "Acquiesces in" should be changed to "knowingly acquiesces in."

Comment should state:

"See also section 16000 (duty subject to control of Trust Agreement)."

16402. Trustee's liability to beneficiary for acts of cotrustee

16402(b)(3) should state: "Knowingly acquiesces"

16402(b)(4) and (b)(5) represent new, serious areas of liability, under the majority vote rule. The California Bankers Association strongly urges the Commission to go Back to the UNANIMOUS CONSENT Rule.

The comment should refer to §16000 (duty subject to control of Trust Agreement).

16403. Liability of dissenting cotrustee to beneficiary

1. Beneficiaries ought to be able to consent to not suing the prior Trustee for redress.
2. The section should be prospective only.
3. Comment should have a cross-reference to § 16000.

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Thank you for giving the CBA the opportunity to again review the Staff Draft and comment on inappropriate or unworkable provisions.

Sincerely,



Paulette E. Leahy
Co-Chairman, Trust State Governmental Relations Commission

PEL:ma;

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