

Memorandum 83-17

Subject: Study L-640 - Trusts

This memorandum discusses policy issues and presents some background information concerning the revision of trust law. At the January meeting, the Commission decided that California trust law should be consolidated in the Probate Code, that the substance of California law should be retained but changed where necessary, and that useful provisions from the Uniform Probate Code (which incorporates the Uniform Trustees' Powers Act) should be considered for adoption in California. The staff has prepared an initial draft of a trust statute that seeks to implement these decisions.

The following exhibits are attached to this memorandum:

- Exhibit 1: Staff Draft of Trust Law--Division 4.5 (commencing with Section 4000) of the Probate Code.
- -- Exhibit 2: Comments showing disposition of repealed trust statutes.
- Exhibit 3: Conforming revisions in selected sections.
- Exhibit 4: Uniform Trustees' Powers Act (1964).
- Exhibit 5: Article 7 (Trust Administration) of the Uniform Probate Code.
- Exhibit 6: For reference purposes, copies of the statutes that would be repealed. The Comments to the repeal of these statutes are set out in Exhibit 2.

At the March meeting, as time permits, we will work through the staff draft statute (Exhibit 1) section by section. After the March meeting, the staff will prepare a revised draft implementing Commission decisions for consideration at the June meeting. It is our hope that a tentative recommendation can be approved for distribution at the June meeting.

The remainder of this memorandum considers particular policy issues regarding the staff draft of trust law in Exhibit 1.

Presumption of Revocability (Draft § 4201)

Draft Section 4201 continues the policy of Civil Code Section 2280 that a trust is revocable unless it is expressly made irrevocable by the creating instrument. This is contrary to the common law rule, which is

also the generally applicable rule throughout the United States. It appears that only California, Oklahoma, and Texas presume revocability. See G.G. Bogert & G.T. Bogert, Handbook of the Law of Trusts § 148, at 534 (5th ed. 1973) [hereinafter cited as Bogert]. Until Section 2280 was amended in 1931, California presumed irrevocability; we have not discovered the reason for the change in 1931.

The California rule can cause problems since the omission of an irrevocability provision means that the trust will be considered revocable by the tax authorities. As one treatise puts it, the "draftsman's inadvertent silence on this subject can lead to disaster." Cohan, Planning the Irrevocable Trust, in Drafting California Irrevocable Inter Vivos Trusts § 7.7, at 8 (Cal. Cont. Ed. Bar 1973). Apparently, the instrument may be reformed, but there may be difficulty in having the reformation recognized for tax purposes. Id. There also may be problems arising in a multi-state context. See Hemmerling, Multi-State Trusts: Tax and Conflict Problems, in Drafting California Irrevocable Inter Vivos Trusts § 14.6, at 307, § 14.24, at 317 (Cal. Cont. Ed. Bar 1973). When drafting a revocable trust, it is advised that the trust provide for the manner of revocation and the conditions for revocation, rather than relying on Civil Code Section 2280. See J. Cohan, Drafting California Revocable Inter Vivos Trusts § 5.2, at 135 (Cal. Cont. Ed. Bar 1972).

The question has also been raised as to why trustors, alone among grantors, should be presumed to make revocable transfers. See Evans, "Observations on the State, Etc., of the California Laws of Uses and Trusts", 28 S. Cal. L. Rev. 111, 120 (1955). It should be noted that the creation of a power of appointment is presumed to be irrevocable (unless it is governed by Section 2280). Civil Code § 1392.1. Accordingly, the staff suggests that the Commission consider reversing the 1931 amendment to Civil Code Section 2280 and returning California to the majority, common law rule presuming irrevocability. If the Commission decides to make this change, should the presumption of revocability apply to all trusts, or just to trusts executed after the operative date of the change?

Spendthrift Trusts (Draft §§ 4210-4213)

Draft Section 4210 preserves California law relating to spendthrift trusts. See the Comment to draft Section 4210 in Exhibit 1. The wording of Civil Code Sections 859 and 867 derives from early New York law under

which only four types of express trusts were permitted, one of them being trusts to receive the rents and profits of lands and apply them to the education and support of a person. The wording of these sections is out of step with California law which allows trusts for any purpose for which a contract can be made. Civil Code § 2220. It now appears to be the law in California that a spendthrift trust may be created that precludes assignment of the beneficiary's interest and protects it from creditors. However, creditors may reach the excess over the amount for education and support if there is no "valid direction for accumulation" in the trust. See generally, 7 B. Witkin, Summary of California Law Trusts § 94 (8th ed. 1974).

At least some of the staff questions the wisdom of permitting spendthrift trusts. The Commission should consider whether spendthrift trusts should be abolished. It has been argued that spendthrift trusts encourage waste by the improvident and mislead and defraud creditors. One may also ask why this one type of equitable interest should be insulated from creditors and inalienable. See generally Bogert, supra, § 40, at 149.

On the other hand, it has been argued that a donor of property should be able to attach conditions as desired, that creditors can make inquiries and be protected, and that the exemption of amounts necessary for education and support serves the same function as the exemption of earnings necessary for support and also other exemptions from enforcement of money judgments. See id.

While retaining existing law, the staff draft proposes to make an exception to the insulation from creditors of amounts necessary for education and support in situations involving enforcement of support. California courts have generally refused to create exceptions. See cases cited in B. Witkin, supra, § 97, at 5456-58. However, in Estate of Lackmann, 156 Cal. App.2d 674, 320 P.2d 186 (1958), a spendthrift trust was held liable to a state hospital for care of a person committed as insane. In Estate of Johnston, 252 Cal. App.2d 923, 60 Cal. Rptr. 852 (1967), the court rejected the claim that the beneficiary's interest in a spendthrift trust was not protected from enforcement of child support, but concluded that the interests of the child should be taken into account in a determination under Civil Code Section 859 of what amount of the beneficiary's interest is surplus. The court also likened California law to the Restatement rule permitting the support claimant to reach the beneficiary's interest in an amount that is equitable under the circum-

stances, taking into account the needs of the support claimant and the beneficiary, other demands on the trust, and any other relevant factors. Id. at 929-30. The staff draft of Section 4213 codifies this result and extends it to the enforcement of spousal support, consistent with the general treatment of exemptions under the Commission's recently enacted Enforcement of Judgments Law. We have not attempted to codify any other exceptions to the spendthrift trust. Does the Commission wish to propose any other exceptions to spendthrift protection? The Restatement also permits enforcement of claims (1) for necessities furnished the beneficiary, (2) for services rendered or materials furnished that preserve the beneficiary's interest, and (3) by the United States or a state. See Restatement (Second) of Trusts § 157 (1959). Exceptions have also been made for tort claims (Pennsylvania) and living expenses of the beneficiary's family (Washington). See Bogert, supra, at 155.

Trustees' Duties (Draft §§ 4300-4396)

General Duty of Trustee

Uniform Probate Code Section 7-301 provides as follows:

Except as specifically provided, the general duty of the trustee to administer a trust expeditiously for the benefit of the beneficiaries is not altered by this Code.

The purpose of this provision appears to be to avoid any construction that traditional trust principles are replaced by the UPC. Section 7-301 has received almost no attention from commentators on this part of the UPC. The staff finds this provision unobjectionable; although it does not provide much guidance, it does anticipate the question of whether the statutory statement of specific duties is exclusive. The staff recommends that a provision of this type be included in the proposed legislation. See draft Section 4300 in Exhibit 1.

Field Code-derived provisions in the Civil Code bear on the general duties of trustees. For example, Civil Code Section 2228 provides:

In all matters connected with his trust, a trustee is bound to act in the highest good faith toward his beneficiary, and may not obtain any advantage therein over the latter by the slightest misrepresentation, concealment, threat, or adverse pressure of any kind.

Most statutory provisions in California law are stated as limitations on the actions of the trustee, such as Civil Code Section 2231: "A trustee

may not use the influence which his position gives him to obtain any advantage from his beneficiary." Draft Sections 4300-4306 continue these admonitions without substantive change, though we invite the Commission to consider eliminating some, most, or all of them.

"Prudent Man" Standard in General

Uniform Probate Code Section 7-302 provides a prudent man standard that applies to all the trustee's actions:

Except as otherwise provided by the terms of the trust, the trustee shall observe the standards in dealing with the trust assets that would be observed by a prudent man dealing with the property of another

The Comment to UPC Section 7-302 recognizes that this standard differs from that in the Restatement of Trusts, which refers to the care a "man of ordinary prudence would exercise in dealing with his own property." The Comment explains the difference in wording as reflecting the traditional standard "as it has been articulated in some decisions regarding the duty of a trustee concerning investments." The Comment also says that the new wording "more clearly conveys the idea that a trustee must comply with an external, rather than with a personal, standard of care." The UPC formulation has been well received in states which have enacted the UPC trust administration provisions.

The prudent man standard appears in several incarnations in California trust law. See Civil Code §§ 730.02(a)(3), 2261, 2290.6. The general rule is set forth in some detail in Civil Code Section 2261 as follows:

(1) In investing, reinvesting, purchasing, acquiring, exchanging, selling and managing property for the benefit of another, a trustee shall exercise the judgment and care, under the circumstances then prevailing, which men of prudence, discretion and intelligence exercise in the management of their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income, as well as the probable safety of their capital. Within the limitations of the foregoing standard, and subject to any express provisions or limitations contained in any particular trust instrument, a trustee is authorized to acquire every kind of property, real, personal or mixed, and every kind of investment, specifically including, but not by way of limitation, corporate obligations of every kind, and stocks, preferred or common, which men of prudence, discretion and intelligence acquire for their own account.

(2) In the absence of express provisions to the contrary in the trust instrument, a trustee may continue to hold property received into a trust at its inception or subsequently added to it or acquired pursuant to proper authority if and as long as the

trustee, in the exercise of good faith and of reasonable prudence, discretion and intelligence, may consider that retention is in the best interests of the trust. Such property may include stock in the trustee, if a corporation, and stock in any corporation controlling, controlled by, or under common control with such trustee.

. . .
[Emphasis added.]

The prudent man standard in subdivision (1) was derived from the Model Prudent Man Statute drafted by the American Bankers Association and was enacted in 1943, replacing the legal list of permissible investments. See Comment, Prudent Man Investment of Trust Funds During Inflation, 39 Calif. L. Rev. 380, 381 (1951). Some remnants of the legal list provisions remain, however, such as in Civil Code Section 2261(3) providing for deposit of funds in an insured bank account.

The more specific language of California law appears to achieve the same purpose as UPC Section 7-302 of referring to an "external" rather than a "personal" standard of care, though Civil Code Section 2261 accomplishes this purpose by frowning upon speculation and requiring consideration of the safety of capital. The staff is not aware of any significant difficulties arising from the language of Civil Code Section 2261 and we conclude that no significant differences would result from the application of one standard rather than the other. The UPC language is certainly simpler, but the Civil Code language seems to provide more guidance. The staff is inclined to retain the general wording of the California standard, as set forth in draft Section 4320 in Exhibit 1. What does the Commission wish to do?

For the text of a proposed revision of this standard, see the note following draft Section 4320.

Expert Standard of Care (Draft § 4321)

Uniform Probate Code Section 7-302 imposes a higher standard of care on professional trustees by providing that "if the trustee has special skills or is named a trustee on the basis of representations of special skills or expertise, he is under a duty to use those skills." A similar rule is provided in the Restatement (Second) of Trusts § 174 (1959). This rule is not codified in California, although it is recognized in several cases. See Estate of Collins, 72 Cal. App.3d 663, 673, 139 Cal. Rptr. 644 (1977) (dictum); Coberly v. Superior Court, 231 Cal. App.2d 685, 689, 42 Cal. Rptr. 64 (1965); cf. Estate of Beach, 15 Cal.3d 623, 635, 542 P.2d 994, 125 Cal. Rptr. 570 (1975) (bank as executor).

See also the Comment to Probate Code § 2401 (greater standard of care applies to professional guardian or conservator of estate). The staff proposes that this rule be codified. See draft Section 4321 in Exhibit 1.

Trustee's Duty to Inform and Account to Beneficiaries (Draft § 4340)

Uniform Probate Code Section 7-303 provides as a general rule that the "trustee shall keep the beneficiaries of the trust reasonably informed of the trust and its administration." Upon "reasonable request" by the beneficiary, the trustee is also required to provide a copy of the terms of the trust relevant to the beneficiary's interest and information about the trust assets and the "particulars relating to the administration." UPC § 7-303(b). The beneficiary is also entitled upon "reasonable request" to a statement of the trust accounts annually, on termination of the trust, or change of the trustee. UPC § 7-303(c). These provisions are recommended as a preferable alternative to routinely required court accountings. General Comment to UPC Article VII. The trustee is encouraged to submit accounts to the beneficiary by UPC Section 7-307 which bars claims against a trustee as to any beneficiary who has received a statement fully disclosing the matter after the expiration of six months from receipt of the statement.

In California there is no statutory duty to account to either the court or beneficiaries on a regular basis. See 7 B. Witkin, Summary of California Law Trusts § 69, at 5429 (8th ed. 1974); id., Wills and Probate § 254, at 5757. Probate Code Section 1121 provides a procedure whereby a beneficiary of a testamentary trust subject to court supervision, or the beneficiary's guardian or conservator, may petition the court for an order requiring the trustee to render an account; the application may not be denied if no account has been rendered to the court within the previous six months. Probate Code Section 1138.1(a)(5), applicable to inter vivos trusts and to testamentary trusts not subject to court supervision, permits a petition compelling the trustee to submit accounts and report acts as trustee to a beneficiary or remainderman "when it appears that the trustee has failed to submit an accounting and report within 60 days after written request of a beneficiary or remainderman and no accounting and report has been made within six months preceding such request." The California Supreme Court has stated that a "trustee has the duty to the beneficiaries to give them upon their request at reasonable times complete and accurate information relative to the

administration of the trust." *Strauss v. Superior Court*, 36 Cal.2d 396, 401, 224 P.2d 726 (1950).

The State Bar has reacted to the UPC provision for informal accountings to the beneficiary as follows:

Under California law, beneficiaries presumably may request a non-court accounting, but there is no requirement that the trustee provide it. California law is superior on this point. If matters between the beneficiary and the trustee cannot be handled on an informal basis, the remedy is to require the trustee to file a formal accounting with the appropriate court. Informal accountings may, of course, be submitted by the trustee to beneficiaries at any time, and there appears to be no particular need for statutes governing these informal accountings. [State Bar of California, *The Uniform Probate Code: Analysis and Critique* 206 (1973).]

The Joint Editorial Board of the UPC found that the State Bar offered "no basic objection" to the duty to give information and accountings and argued that the UPC provision would aid beneficiaries where the trustee is in another state and not subject to the jurisdiction of California courts. See Joint Editorial Board of the Uniform Probate Code, *Response of the Joint Editorial Board* 74 (1974). This comment assumes enactment of the UPC provision or a provision with similar impact in the jurisdiction with power over the trustee.

The staff finds the UPC provision for accounting to beneficiaries to be useful and not in conflict with any policy of California law. See draft Section 4340 in Exhibit 1. It should be noted that UPC Section 7-303(c) provides for an accounting upon request on an annual basis whereas Probate Code Section 1138.1(a)(5) contains an implicit six-month period. Probate Code Section 1120.1a requires an annual account in the case of testamentary trusts created before July 1, 1977. This provision is continued in draft Section 4182.

Trustees' Powers (Draft §§ 4400-4450)

The California provisions on trustees' powers, sponsored by the State Bar in 1967, were drawn from the Uniform Trustees' Powers Act (1964) [hereinafter cited as UTPA]. See Prob. Code § 1120.2; *Estate of Gilliland*, 44 Cal. App.3d 32, 39, 118 Cal. Rptr. 447 (1974). The UTPA is recommended as an appropriate model by the UPC. See the General Comment to Part 4 of Article 7 of the UPC, copy attached to Memorandum 83-4. The staff is not aware of any major inadequacies in California law relating to trustees' powers, although there are some important policy questions that should be considered, and some other beneficial changes that could be made.

Trustees' powers are governed by the trust instrument, by statute, and by general equitable principles. If the trust instrument is competently drafted, the trustee will be able to administer the trust without the need to resort to the courts, barring unforeseen circumstances. In some cases, the trustee may exercise statutory powers not provided in the trust instrument, so long as the trust does not expressly forbid exercise of such powers. For example, Civil Code Section 2261(3) provides for the deposit of funds in a bank in the absence of express provisions to the contrary. If the trustee's powers are inadequate, the trustee may seek additional powers from the court unless the trust precludes seeking additional powers. See Prob. Code §§ 1120.2, 1138.1(a)(7), (b). To carry out the ultimate purpose of the trust, courts have the power to grant the trustee powers deviating from the trust instrument. See 7 B. Witkin, Summary of California Law Trusts §§ 76-78, at 5436-38 (8th ed. 1974).

Automatic Powers

In order to avoid the need to petition the court for approval of the exercise of implied powers, the UTPA provides an extensive list of powers that may be exercised unless limited in the trust instrument. See UTPA §§ 2, 3 in Exhibit 4. The most significant difference between the UTPA and California Probate Code Section 1120.2 is that California law permits the exercise of the common statutory powers only on petition of the trustee if they are not granted in the trust instrument. The policy issue is whether the statutory powers should be automatically available except as limited by the trust instrument.

When Probate Code Section 1120.2 was enacted, it applied only to testamentary trusts which were then subject to the continuing supervisory jurisdiction of the probate court. It is not surprising that the UTPA approach of granting powers automatically was not adopted. The sponsors of the legislation, "the State Bar, thought that if powers of this type were given directly to the trustee, the court would have much less control over his actions, and that it was preferable to consider the circumstances of the particular trust if an order was desired." Review of Selected 1967 Code Legislation 196 (Cal. Cont. Ed. Bar 1967). When the powers listed in Section 1120.2 were made available on petition to trustees of inter vivos trusts in 1970, the change was justified on the basis that it eliminated the need for time-consuming plenary suits. See Review of Selected 1970 California Legislation, 2 Pac. L.J. 289 (1971).

However, in the last 15 years, California law has moved away from the supervisory system. In the 1982 legislative session, Probate Code Section 1120 was amended to provide that a testamentary trust is not subject to continuing jurisdiction unless the testator provides otherwise. See 1982 Cal. Stats. ch. 1199. A new Section 1120.1a has been added to terminate the mandatory court supervision of testamentary trusts created by wills executed before July 1, 1977. In light of this development of California law, the staff recommends that trustees of inter vivos and testamentary trusts be automatically granted statutory powers unless otherwise provided in the trust. See draft Section 4400 in Exhibit 1.

The automatic powers approach should avoid the need in some cases to petition the court, thus saving judicial time and trust resources. It is said that "the idea that a power must be 'found' in the trust instrument at best breeds litigation and at worst obstructs proper trust administration." Haskell, Some Problems With The Uniform Trustees' Powers Act, 32 Law & Contemp. Probs. 168, 170 (1967). Drafting manuals suggest that it is better to spell out the trustee's powers than to rely on implied powers or court instructions, since the trustee will be more confident in administering the trust and third persons will be more confident in transacting business with the trustee, particularly in multi-state transactions. See, e.g., Ellis, Trustees and Administrative Provisions, in California Will Drafting Practice § 14.39, at 676 (Cal. Cont. Ed. Bar 1982). Presumably this would be sound advice even under an automatic powers statute. There may be some trustees and third persons who will remain uneasy about exercising powers not spelled out in the trust instrument, but we assume that in many situations the automatic powers provision would accomplish its purpose.

If the Commission approves the automatic powers approach, it should consider whether and to what extent the trustor may avoid such powers. Section 2 of the UTPA permits the trustor to control the availability of the statutory powers by express limitation in the trust instrument. The Commission may also want to consider whether certain powers may only be exercised with court approval, even if a generally automatic powers scheme is adopted.

General Power (Draft § 4420)

Section 3 of the UTPA provides a general power to perform "every act which a prudent man would perform for the purposes of the trust including but not limited to the powers specified in subsection (c)." In view of the success of the prudent man rule as applied to investments by the trustee, the Uniform Commissioners proposed further expanding the prudent man rule to cover all powers. The chairman of the committee that drafted the UTPA explains the concept as follows:

The adoption of the prudent man concept in defining trustees' powers necessarily changes and liberalizes the doctrine of implied powers. Under existing law, powers may be implied if deemed by the court to be necessary to accomplish trust purposes; under the prudent man rule, implied powers are those which the trustee in the exercise of prudence believes necessary. The trustee must determine whether he has the necessary power to act; if he makes such a determination in good faith and within the bounds of reasonable judgment, the court should be precluded from substituting their judgment for that of the trustee. Horowitz, Uniform Trustees' Powers Act, 41 Wash. L. Rev. 1, 7 (1966) [footnotes omitted].

This liberalization necessitates special provisions protecting third persons who deal with the trustee and protecting the trustee from adverse tax consequences. See UTPA §§ 3(b), 7 in Exhibit 4.

The staff proposes to add a provision granting the trustee the general powers that a prudent person would exercise consistent with the UTPA. See draft Section 4420 in Exhibit 1. In view of the breadth of the specific powers provided in existing law and further expanded in the staff draft, it would appear to be a rare situation where a needed power was not specifically provided, but enactment of the general power would avoid any issue of implied powers arising from some technical argument.

Specific Powers (Draft §§ 4421-4450)

As noted above, Probate Code Section 1120.2 relating to trustees' powers was drawn from Section 3 of the UTPA. However, there are many minor differences in language and the two statutes are organized somewhat differently. The staff has compared the two lists of powers and incorporated changes in existing law in the draft statute. See the Comments to draft Sections 4421-4450 in Exhibit 1. The staff proposes to split the powers into separate sections in order to make the law more accessible and to avoid the need to reprint the complete list of powers whenever an amendment is needed. An instrument could still incorporate the powers by referring to the chapter including the powers. See draft Section 4403 in Exhibit 1.

Compensation and Repayment of Trustees
(Draft §§ 4500-4504)

The substance of California law governing the compensation and repayment of trustees appears to be largely unobjectionable. Accordingly, the staff draft of provisions relating to compensation and reimbursement for expenses retains the substance of existing law. See Exhibit 1 attached hereto. However, the staff draft does reorganize existing provisions, consistent with the aim of combining provisions relating to testamentary and inter vivos trusts.

Compensation of Trustees

If the trust instrument does not provide for compensation of the trustee, the trustee is entitled to reasonable compensation. Civil Code § 2274; Prob. Code §§ 1122, 1138.1(a)(7). If the trust provides for compensation, the trust governs except that the court may allow greater compensation in special circumstances spelled out by statute. See Civil Code § 2274; Prob. Code § 1122. The statutory formulation of these special circumstances is the result of legislative reaction to particular decisions. See 7 B. Witkin, Summary of California Law Trusts § 80, at 5440-41 (8th ed. 1974); Review of Selected 1972 California Legislation, 4 Pac. L.J. 211, 569-70 (1973). The staff draft preserves the language of existing law in this respect.

The staff draft does not continue the provision of existing Civil Code Section 2274 that the "superior court shall have jurisdiction to determine any compensation provided by this section in an action, brought by the trustee, to which all interested persons are made parties." The matter of compensation of the trustee should be determined through the general procedures for petitioning the superior court and are included in those provisions.

We do not propose to codify any additional case law rules regarding trustees' compensation. For instance, there may be some question regarding whether a specific bequest in a will is intended as compensation for the trustee. See Ellis, Trustees and Administrative Provisions, in California Will Drafting Practice § 14.30, at 671 (Cal. Cont. Ed. Bar 1982). Nor do we propose to set a customary rate of compensation, such as has been done by local rules. See Ellis, supra, § 14.28 at 669.

By combining the provisions relating to supervised testamentary trusts and inter vivos trusts, the staff draft makes the provision

permitting the court to fix periodic compensation as to supervised testamentary trusts applicable to all trusts. See Prob. Code § 1122. This appears to be consistent with Probate Code Section 1138.1(a)(7) which permits the court to fix, direct, or allow compensation in accordance with Civil Code Section 2274.

The staff draft is consistent with the rule that a trustee may pay itself reasonable fees without the necessity of first obtaining court approval. See *Estate of Gilfillan*, 79 Cal. App.3d 429, 144 Cal. Rptr. 862 (1978) (interpreting Prob. Code § 1122 and upholding Los Angeles Superior Court policy memorandum). The general procedure for court approval of the trustee's accounts and allowing fees upon petition of an interested person provides the means for passing upon the reasonableness of the compensation.

Under Section 3(c)(20) of the Uniform Trustees' Powers Act (1964), the trustee has the power to set its compensation, subject to the fiduciary principle. It appears that a court may upset the trustee's determination only if it is not in good faith or within the bounds of reasonable judgment. See Horowitz, Uniform Trustees' Power Act, 41 Wash. L. Rev. 1, 7, 22 (1966). Similarly, Section 7-205 of the Uniform Probate Code makes clear that the trustee may set its own compensation, as well as that of employees, subject to court review for reasonableness. Since under California law, a trustee may pay itself before obtaining court approval, and to do so must select an amount, there may be little substantive difference between California law and the uniform acts.

Repayment of Expenses

The trustee is entitled to repayment of expenses "actually and properly" incurred by the trustee in the administration of the trust. Civil Code § 2273; see also Prob. Code § 1122 (court shall allow testamentary trustee "proper expenses"). The staff draft continues this right of reimbursement for expenses although it could be eliminated.

We have some question about continuing the second sentence of Civil Code Section 2273 providing that the trustee is "entitled to the repayment of even unlawful expenditures, if they were productive of actual benefit to the estate." This provision is not discussed in the cases annotating Section 2273. The staff draft restates this rule in somewhat revised form, but we suggest that the Commission consider dropping it. As is often the case with Field Code provisions, exceptions to the stated principle are not codified, leading to an imbalanced statute that may

mislead if it is taken at face value. The rule concerning reimbursement for "unlawful" expenditures is subject to several exceptions, such as where the trustee acts in bad faith. See 3 A. Scott, Law of Trusts § 245.1, at 2156 (3d ed. 1967).

By its terms, Civil Code Section 2273 appears to apply only to expenditures made by the trustee out of its own funds. See, e.g., Security-First Nat'l Bank v. Tracy, 21 Cal.2d 652, 134 P.2d 270 (1943) (allowance for attorney's fees in action "necessarily brought"); In re Estate of Spencer, 18 Cal. App.2d 220, 63 P.2d 875 (1936) (expense of daily transcript in case where trust attacked); Johns v. Peterson, 52 Cal. App.2d 720, 126 P.2d 903 (1942) (repairs of rental property). Section 2273 is only a limited aspect of the larger question of the proper expenditures of the trustee made in the course of administration of the trust estate. Obviously, the costs of administration of a trust should be borne by the trust estate and not by the trustee personally. See A. Scott, supra, § 244, at 2144-46.

As with trustee compensation, if these rules on reimbursement are retained, there are some related rules that could have been codified, that we propose to leave to case law. For example, the right to repayment has been denied a hostile trustee. Estate of Gilmaker, 226 Cal. App.2d 658, 38 Cal. Rptr. 270 (1964).

Liability of Trust Estate and Trustee to Third Persons
(Draft §§ 4520-4523)

Uniform Probate Code Section 7-306 provides substantive rules governing the liability of trustees to third persons. Subdivision (a) makes the trustee personally liable on contracts properly entered into in the administration of the trust only where the contract so provides or where the "trustee fails to reveal his representative capacity and identify the trust estate in the contract." A trustee is liable for obligations arising from ownership or control of trust property or for torts only if the trustee is "personally at fault." UPC § 7-306(b). Third persons are permitted to sue the trust estate on contracts entered into in the trustee's fiduciary capacity, on obligations arising from ownership or control of the trust estate, or on torts by bringing an action against the trustee in the trustee's fiduciary capacity. UPC § 7-306(c). The question of the trustee's liability to the estate may be determined in the main action or other appropriate proceeding such as for an accounting or surcharge. UPC § 7-306(d) and the Comment thereto.

The UPC provision is representative of the modern tendency to put the economic burden on the trust rather than the trustee. See Tepper, Liability of the Trust Estate Arising Out of Trustee's Contracts With Third Persons, 2 Hastings L.J. 53, 61-65 (1950). The general rule followed in California is that the trustee is personally liable for contracts and torts as if the trustee owned the property free of the trust, except where the trustee is expressly exempted by contract. See cases cited in 7 B. Witkin, Summary of California Law Trusts § 100, at 5460 (8th ed. 1974). Under the common law, the trustee was recognized only in an individual capacity so that a judgment would bind the trustee's assets but not the trust estate. The trustee could pass this liability on to the estate if no fiduciary duty had been breached. See Garvey, The Ohio Law of Trusts and the Uniform Probate Code: A Comparison, in Comparative Probate Law Studies 769, 783-84 (1976). Creditors could be subrogated to the trustee's right against the trust estate but the creditor's right was generally limited to the trustee's right of indemnification. Id. at 784.

California statutes are largely silent on the liability of trustees to third persons. Civil Code Section 2267 provides that as a general agent, a trustee may bind the trust estate by acts within the scope of the trustee's authority. One commentator has described Section 2267 as an "enigmatic declaration" which is presumably aimed at the old rule that a trustee necessarily acted as principal since the trust had no legal personality. Evans, Observations on the State, Etc. of the California Laws of Uses and Trusts, 28 S. Cal. L. Rev. 111, 120 (1955); see also Tepper, Liability of the Trust Estate Arising Out of Trustee's Contracts With Third Persons, 2 Hastings L.J. 53, 59-61 (1950). Under Section 2267 obligees on a contract made within the scope of the trustee's authority may reach the trust property directly without being restricted to the trustee's right of exoneration. See Purdy v. Bank of America, 2 Cal.2d 298, 301-02, 40 P.2d 481 (1935).

The staff recommends adoption of the substance of UPC Section 7-306. See draft Sections 4520-4523 in Exhibit 1. This would make the law more accessible and provide clearer rules. Adoption of the substance of UPC Section 7-306 would change California law in several respects. A trustee would no longer be personally liable on contracts entered into in a fiduciary capacity, if the trustee revealed its representative

capacity and identified the trust estate. This would reverse the California rule that a trustee is personally liable unless the contract provides an exemption. See *Duncan v. Dormer*, 94 Cal. App. 218, 221, 270 P. 1003 (1928). Tort liability of the trustee would be restricted to cases where the trustee was personally at fault. Section 7-306 also appears to smooth procedural difficulties by permitting actions against the trust estate. This appears to alter the rule stated in *Rapaport v. Forer*, 20 Cal. App.2d 271, 278, 66 P.2d 1242 (1937).

Limitations on Actions Against Trustee for Breach of Trust
(Draft § 4524)

Uniform Probate Code Section 7-307 bars actions against the trustee for breach of trust brought later than six months after a final account making full disclosure and showing termination of the trust relationship. The accounting may be a formal account made pursuant to court proceedings or an informal accounting made directly to the beneficiary under the provisions of UPC Section 7-303. If the final account does not make full disclosure, a three-year limitations period applies if the beneficiary has received a final account and been informed of the location and availability of the trustee's records. Apparently claims based on interim accounts are barred only by adjudication or consent, unless some general statute is applicable. It also appears that the six-month and three-year provisions do not apply in cases of the trustee's fraud. See UPC § 1-106 (two-year period running from time of discovery of fraud).

The State Bar has summarized California law as follows:

In California, absent fraud, the four-year general statute of limitations applies to trusts not subject to court supervision and to court supervised trusts when no accounting is rendered. Under California law, an accounting settled by the court is final once the period for appeal expires unless the decree of approval is set aside within six months by reason of mistake, inadvertence or neglect. [State Bar, *supra*, at 206-07.]

The four-year catch-all statute of limitations provided in Code of Civil Procedure Section 343 has generally been applied to actions for breaches of express trusts. See *Cortelyou v. Imperial Land Co.*, 166 Cal. 14, 20, 134 P. 981 (1913); *Oeth v. Mason*, 247 Cal. App.2d 805, 811-12, 56 Cal. Rptr. 69 (1967). But *cf.* *Estate of McCabe*, 80 Cal. App.2d 823, 183 P.2d 72 (1947) (termination of trust did not start statute running since Prob. Code § 1121 gives beneficiary absolute right to account if not rendered to court in preceding six months, court not deciding whether

statute of limitations applied). The statute of limitations applicable to actions for relief on the ground of fraud is three years from the discovery of the facts. Code Civ. Proc. § 338(4).

The Uniform Probate Code is more protective of trustees than California law. The effect of court-approved accounts appears to be the same, but the six-month period applicable to nonapproved accounts, including informal accounts to the beneficiary, would be a significant change in California law. Under the UPC scheme, the important factor is whether full disclosure has been made in the final account. If it has, then the six-month period applies; if not, then the three-year period applies. The staff thinks that this scheme makes sense and recommends it for Commission approval. See draft Section 4524 in Exhibit 1.

The Commission may want to consider whether different time limits should be applicable. It should be noted that the six-month period is bracketed in the UPC, indicating that it is recognized that a different period may be preferred in enacting jurisdictions. An examination of the law of 13 states that have enacted a provision like UPC Section 7-307 reveals that only Hawaii altered the six-month period, raising it to two years. Only Florida rejected the three-year period, substituting a reference to general statutes of limitation. Several reported California cases have involved a dispute over whether a three-year or four-year period applies; but of course such cases wouldn't have arisen if the applicable limitation was clear. If the three-year period of the UPC is approved by the Commission, a transitional provision will be needed to preserve rights existing under the four-year statute. The staff would not at this point recommend UPC Section 1-106, the general section on actions based on fraud; this provision will be considered in the course of the probate administration study.

Trustee's Bond (Draft § 4551)

Under California law, a trustee named in a will or inter vivos trust instrument is not required to give bond unless the instrument otherwise requires. However, bond is required of a testamentary trustee appointed by the court, except in the case of a nonprofit corporation acting within the scope of its charitable purposes. Prob. Code §§ 1127, 1127.5. It has been held that bond may be waived if all creditors and beneficiaries consent and there are no minor or unascertained beneficiaries. Estate of Shapiro, 79 Cal. App.2d 731, 181 P.2d 117 (1947).

Drafting manuals suggest that bond is ordinarily an unnecessary expense, and that if it is felt that bond is needed, then perhaps a different trustee should be selected. See, e.g., Ellis, Trustees and Administrative Provisions, in California Will Drafting Practice § 14.26, at 666 (Cal. Cont. Ed. Bar 1982). It has been suggested that bond be required of a nonresident trustee. See 3 J. Goddard, Probate Court Practice § 1819 (2d ed. 1977). It has also been suggested that an attorney who drafts a will or trust instrument naming the attorney as trustee should include a provision requiring bond. Moltzen, The Lawyer and Will Drafting, in California Will Drafting § 1.38, at 21-22 (Cal. Cont. Ed. Bar 1965).

Uniform Probate Code Section 7-304 provides that a bond is not required unless (1) required by the terms of the trust, (2) reasonably requested by a beneficiary, or (3) found by the court to be necessary to protect interests of incapacitated or unrepresented beneficiaries. The general rules governing bonds of personal representatives under UPC Sections 3-604 and 3-606 apply to trustee's bonds when required. Section 7-304 also permits the court to excuse bond or reduce its amount upon petition of the trustee or other interested person but no standard is provided.

The staff does not detect any real conflict between California law and the UPC as regards trustees' bonds. The staff recommends approval of a provision containing the substance of UPC Section 7-304. See draft Section 4551 in Exhibit 1. This section would held clarify the law by providing a general rule subject to several exceptions; California law currently provides only some limited and unrelated exceptions. Adoption of UPC Section 7-304 would result in a less restrictive requirement in situations now governed by Probate Code Section 1127 which requires bond of a testamentary trustee appointed by the court. Section 7-304 would apply the general rule that does not require bond in such cases, unless otherwise ordered by the court or required by the trust. This change would answer the query whether a bond is required if a will nominates rather than appoints a successor trustee, since it is unclear under existing Probate Code Section 1127 whether bond is required of a trustee appointed by the court consistent with the testator's nomination. See California Will Drafting Supplement § 17.21, at 259 (Cal. Cont. Ed. Bar 1981).

Court Jurisdiction Over Trusts (Draft §§ 4600-4679)

At the January meeting the Commission affirmed the policy of providing a unified scheme for judicial involvement in trust administration and eliminating procedural distinctions between testamentary and inter vivos trusts. California law is already headed in this direction. See Prob. Code §§ 1120, 1120.1a, 1138.

The UPC also rejects continuing judicial supervision or mandatory intervention. See UPC § 7-201(b). Section 7-201 provides that the court has "exclusive jurisdiction of proceedings initiated by interested parties concerning the internal affairs of trusts." Under the UPC, court is defined as the one with jurisdiction in matters relating to the affairs of decedents. The same court is given concurrent jurisdiction with other courts of the state as to actions to determine the existence of nontestamentary trusts, actions involving creditors or debtors of trusts, and other actions involving third parties. UPC § 7-204. Section 7-202 provides for venue in the place of registration or where the trust could have been registered as to internal matters, and Section 7-204 incorporates general venue rules for other actions. Section 7-203 provides a forum non conveniens rule applicable to foreign trusts and requires the court to refuse to entertain a proceeding unless all appropriate parties could not be bound by litigation in the foreign courts or when the interests of justice otherwise would be seriously impaired.

Under UPC Section 7-201(a), the court has exclusive jurisdiction over proceedings concerning the administration and distribution of trusts, the declaration of rights, and the determination of other matters involving trustees and beneficiaries. Without limiting the scope of such proceedings, Section 7-201(a) lists the following proceedings: (1) to appoint or remove a trustee, (2) to review trustees' fees and to review and settle interim or final accounts, (3) to ascertain beneficiaries, determine any question arising in the administration or distribution of a trust including questions of construction of trust instruments, (4) to instruct trustees, (5) to determine the existence of any immunity, power, privilege, duty, or right, and (6) to release trust registration. Section 7-205 also permits the court to review "the propriety of employment of any person by a trustee" and the reasonableness of the person's compensation and the trustee's compensation.

The UPC provisions which place exclusive jurisdiction in the superior court at the principal place of administration appeal to the staff and

do not appear to be contrary to any significant policy of existing law. Probate Code Section 1138.11 provides that the remedies of Sections 1138-1138.14 are "cumulative and nonexclusive." The State Bar and the Joint Editorial Board of the UPC have disputed the meaning of this provision. See State Bar, supra, at 200-01; Joint Editorial Board, supra, at 71-72.

The following table compares California law regarding supervised trusts and nonsupervised trusts and the UPC.

<u>California Law</u>		<u>Uniform Probate Code</u>
<u>Supervised Testamentary Trusts</u> <u>Prob. Code §§ 1120-1126</u>	<u>Nonsupervised Trusts</u> <u>Prob. Code §§ 1138.1, 1138.2</u>	<u>§§ 7-201, 7-205</u>
Determine recipients of property on termination of trust. § 1120(b)	Same. § 1138.1(a)(1)	Ascertain beneficiaries. § 7-201(a)(3)
Settle accounts. § 1120(b)	Same. § 1138.1(a)(2)	Settle interim or final accounts. § 7-201(a)(2)
Pass on acts of trustee. § 1120(b)	Same. § 1138.1(a)(2)	[See general language.]
Instruct the trustee. § 1120(b)	Same. § 1138.1(a)(4)	Same. § 7-201(a)(3)
Accept additions to trusts. § 1120(b)	Same. § 1138.1(a)(3)	[See general language.]
Grant powers provided in § 1120.2. § 1120(b)	Same. § 1138.1(a)(6)	Determine existence of any power. § 7-201(a)(3)
Amend trust for charitable estate tax deduction. § 1120(b)	Same. § 1138.1(a)(13)	
Submit accounts to beneficiary and remaindermen. § 1121	Same. § 1138.1(a)(5)	[Duty in § 7-303; see general language.]
Fix compensation. § 1122	Same. § 1138.1(a)(7)	Review trustee fees. § 7-201(a)(2), 7-205
Appoint trustee. §§ 1125, 1126	Same. § 1138.1(a)(8)	Same. § 7-201(a)(1)
Accept resignation of trustee. § 1125.1	Same. § 1138.1(a)(9)	
Remove trustee. § 1123.5	Same. § 1138.1(a)(10)	Same. § 7-201(a)(1)
Modify trust with low principal. § 1120.6	Same. § 1138.1(a)(12)	
		Review employment of persons by trustee. § 7-205

The UPC also provides that proceedings may be maintained concerning the "administration and distribution of trusts, the declaration of rights and the determination of other matters involving trustees and beneficiaries." UPC § 7-201(a). This includes proceedings to "determine any question arising in the administration or distribution of any trust including questions of construction of trust instruments . . . and determine the existence or nonexistence of any immunity, power, privilege, duty or right." UPC § 7-201(a)(3).

California law does not contain such broad language; however, Probate Code Section 1138.2 does provide that the court may make "all orders and decrees and take all other action necessary or proper to dispose of the matters presented by the petition." In *Copley v. Copley*, 80 Cal. App.3d 97, 145 Cal. Rptr. 437 (1978), it was held that the superior court in proceedings under Probate Code Sections 1138-1138.13 was exercising limited probate jurisdiction and did not have the general equity powers of the superior court. In this case the probate court was found to lack jurisdiction to determine the beneficiaries' allegation of fraud or to rescind a sale of stock and determine damages. It appears that the authority granted the court under UPC Section 7-201 is broader than that allowed the probate court under existing California law.

The staff proposes a statute that would consolidate the procedures applicable to supervised testamentary trusts and nonsupervised trusts. We also recommend expanding the jurisdiction of the court consistent with the language in UPC Section 7-201. See draft Sections 4600-4628 in Exhibit 1. This entails provisions for obtaining jurisdiction over all interested parties. This expanded jurisdiction would be consistent with the trend of both the statutes and decisional law. See *Copley, supra*, at 107-08. See also draft Sections 4070-4078 (notice).

Trust Registration Under the UPC

The staff assumes that the Commission will not want to propose the adoption of a trust registration scheme modeled after the UPC. The following discussion is included here for your information and also in case there is some interest in proposing some registration requirements.

The Uniform Probate Code requires trustees to register trusts in the court in the principal place of administration. UPC § 7-101. Unless otherwise designated in the trust instrument, the principal place of administration is "the trustee's usual place of business where the

records pertaining to the trust are kept, or at the trustee's residence if he has no such place of business." Id. The trustee is also under a "continuing duty to administer the trust at a place appropriate to the purposes of the trust and to its sound, efficient management." UPC § 7-305. The court may order a change of place of administration where appropriate, and in doing so may order removal of the trustee and appointment of a trustee in another state. Id.

The concept of trust registration has been described as one of the UPC's most controversial provisions. Averill, A Comparison of the Uniform Probate Code With the Law of Texas--Trust Administration, in Comparative Probate Law Studies 801, 804 (1976). It appears, however, that a certain amount of this controversy has arisen from a misunderstanding of the registration provision. It does not require filing a copy of the trust instrument or registering the terms of the trust. Registration is accomplished, as provided in UPC Section 7-102, by filing a statement including the following: (1) the name and address of the trustee, (2) an acknowledgment of the trusteeship by the trustee, (3) a statement whether the trust has been registered elsewhere, and (4) an identification of the trust. The manner of identifying the trust depends upon the nature of the trust. If it is testamentary, the statement must include the name of the testator and "the date and place of domiciliary probate." If it is a written inter vivos trust, the statement must include the name of each settlor and the original trustee and the date of the trust instrument. If it is an oral trust, the statement must give information identifying the settlor "or other source of funds" and describe "the time and manner of the trust's creation and the terms of the trust, including the subject matter, beneficiaries and time of performance." Hence, only in the case of oral trusts must the terms of the trust be disclosed. The staff considers this to be a desirable provision. There is also a provision permitting the settlor of a revocable trust to exempt the trustee from the registration requirement as long as the power of revocation is retained. See UPC § 1-108. Otherwise, a provision in a trust is not effective to excuse the trustee from the registration requirement. See UPC § 7-104.

Registration results in submitting to the personal jurisdiction of the court in proceedings relating to administration of the trust. UPC § 7-103(a). Beneficiaries given notice pursuant to UPC Section 1-401 are subject to jurisdiction of the court of registration to the

extent of their interests in the trust. UPC § 7-103(b). If a trustee fails to register the trust in a proper place, the trustee is still subject to personal jurisdiction of the court in which the trust could have been registered, in any proceeding initiated by a beneficiary. UPC § 7-104. The settlor or a beneficiary may also give a written demand to the trustee that the trust be registered; if the trustee fails to do so within 30 days after receipt of the demand, the trustee is subject to removal and denial of compensation or to surcharge. UPC § 7-104.

The trust registration scheme serves several purposes. It informs the beneficiaries of the existence of the trust. It provides evidence that the trustee has accepted the trust. It subjects the trustee and beneficiaries to the jurisdiction of an identified court so that any dispute that arise concerning administration of the trust may be litigated with relative ease. While facilitating judicial proceedings initiated by the trustee or beneficiaries, the UPC avoids compulsory, continuing judicial supervision. Uniform Probate Code Section 7-201(b) provides:

Neither registration of a trust nor a proceeding under this section result [sic] in continuing supervisory proceedings. The management and distribution of a trust estate, submission of accounts and reports to beneficiaries, payment of trustee's fees and other obligations of a trust, acceptance and change of trusteeship, and other aspects of the administration of a trust shall proceed expeditiously consistent with the terms of the trust, free of judicial intervention and without order, approval or other action of any court, subject to the jurisdiction of the Court as invoked by interested parties or as otherwise exercised as provided by law.

The trust registration provisions have not been well received by the states that have considered the UPC. The staff has examined the statutes of 15 states--14 of them "UPC states" and Kentucky, which enacted much of the article on trust administration. Only three states--Alaska, Idaho, and North Dakota--enacted the trust registration scheme with a mandatory duty that is not subject to significant exceptions. Two states--Maine and Nebraska--have made the registration an option by substituting the word "may" where "shall" appears in UPC Section 7-101. Six states omit the registration provisions entirely--Arizona, Florida (which had initially enacted the registration scheme), Minnesota, Montana, New Mexico, and Utah. Four states have registration schemes with a mandatory duty but subject to significant exceptions. Colorado provides for registration as a general rule, but exempts trusts having no asset other than the right to receive property upon the occurrence of some future event, trusts nominally funded (assets valued at \$500 or less),

and revocable inter vivos trusts (while revocable). Hawaii requires registration in the principal place of administration or where land held in trust is located and does not require registration of inter vivos trusts unless required by the settlor (the exception does not apply when the settlor dies). Kentucky similarly provides that there is no duty to register an inter vivos trust unless the settlor so directs. Michigan does not require registration of testamentary trusts or any trust containing terms exempting the trustee from the registration provisions.

The State Bar has opposed the registration concept, labelling it "alien to the policy adopted by the California Legislature in respect to inter vivos trusts in that it prevents the creation of private trusts without public disclosure." State Bar of California, *The Uniform Probate Code: Analysis and Critique* 197 (1973). This criticism glosses over the fact that registration does not involve disclosure of the terms of written inter vivos trusts nor of the trust beneficiaries. It is hard to understand what policy concerning the creation of private trusts without public disclosure is impaired in any significant manner by the UPC registration provisions. If the State Bar was referring to some policy in favor of oral trusts, then some additional support for the statement is needed. In addition, as noted by the Joint Editorial Board of the UPC, the State Bar "does not attempt to relate the alleged 'policy' of the California Legislature to private, testamentary trusts which cannot be created in California without full public disclosure of all of the trust terms and assets--much more than would be required by UPC's registration provisions." Joint Editorial Board of the Uniform Probate Code, *Response of the Joint Editorial Board* 70 (1974). In any event, modifications in the registration scheme like those enacted in some other states could make registration permissive during the life of the settlor of a written inter vivos trust and so avoid the State Bar objection.

California has moved away from continuing judicial supervision of testamentary trusts and at the same time provided for intermittent judicial administration of inter vivos and testamentary trusts upon petition of a trustee, beneficiary, or remainderman. See Prob. Code §§ 1120, 1120.1a, 1138, 1138.1. The State Bar has commented that the "philosophical orientation of Article VII of the UPC is similar to that of the California Probate Code." State Bar, *supra*, at 194. It should be noted, however, that Probate Code Section 1138.13 permits a trust to exempt itself from judicial supervision either expressly or by "necessary

implication." The registration provisions of the UPC may not generally be avoided. Probate Code Section 1138.3 gives jurisdiction to the superior court where the principal place of administration of the trust is located. This is the same place where, under UPC Section 7-101, the trust would be required to be registered. (The rules on determining the principal place of administration differ in the case of cotrustees.) Registration under the UPC makes clear that the trustee submits personally to the court's jurisdiction. UPC § 7-103(a). If the trustee does not register the trust, Section 7-103(a) makes clear that accepting the trusteeship results in submitting to the court's jurisdiction and the proceedings may be commenced in the principal place of administration where the trust could have been registered. UPC § 7-202. Draft Section 4603 in Exhibit 1 seeks to achieve the same end by granting jurisdiction over trustees who have accepted the trust.

Registration would make it easier for beneficiaries and remaindermen to know the proper court for initiating proceedings. This benefit must be weighed against the financial burden on government of establishing a registration system and the burden on trustees of routinely requiring registration. Remember, however, that under the UPC the trustee is not subject to any penalty for not registering the trust until 30 days after the trustee receives a written demand for registration.

Various alternatives are available within a trust registration system; the following alternatives should be considered:

1. Adopt the UPC scheme, including mandatory registration of trusts, except revocable trusts which may avoid registration while the power to revoke lasts.

2. Make registration mandatory, subject to certain exceptions where registration would be permissive, such as:

- Trusts with no assets other than right to receive property upon occurrence of future event. (Colorado)
- Trusts nominally funded in an amount such as \$500. (Colorado)
- Inter vivos trusts during the life of the settlor. (Hawaii)
- Inter vivos trusts at any time, unless required by the settlor. (Kentucky)

3. Make registration generally permissive. (Maine, Nebraska)

Foreign Trustees

The draft statute does not attempt to change the law relating to administration of trusts by foreign trustees. Financial Code Section 1503 forbids the conduct of trust business in California by a foreign corporation (other than a national banking association) except for certain actions such as delivering, registering, paying interest on, certifying, redeeming, and cancelling bonds. Apparently there is a possibility that banks may be permitted to conduct trust business under federal law regarding interstate banking. Although California statutes have contained some misleading language, it does not appear that a foreign corporation can qualify to conduct a trust business in this state. We assume that any attempt to expand the role of foreign corporations would be opposed by local interests.

Uniform Probate Code Section 7-105 would permit foreign trustees to receive distributions from local estates, to hold, invest in, manage, or acquire property in California, and to maintain litigation without the necessity of qualifying to do business in the state. Qualification would be required before a foreign corporation would be permitted to maintain the principal place of administration of a trust in the state or otherwise acts in a way requiring qualification to do business. The Comment to Section 7-105 says that this should

correct a widespread deficiency in present regulation of trust activity. Provisions limiting business of foreign corporate trustees constitute an unnecessary limitation on the ability of a trustee to function away from its principal place of business. These restrictions properly relate more to continuous pursuit of general trust business by foreign corporations than to isolated instances of litigation and management of the assets of a particular trust.

Section 7-105 also provides that a foreign cotrustee is not required to qualify in the local jurisdiction solely because its cotrustee maintains the principal place of administration there.

California law, with some very minor exceptions relating to bonds as noted above, precludes foreign corporations, other than national banking associations, from directly or indirectly transacting trust business in this state. Apparently, alien and nonresident individuals may act as trustees. See Ellis, Trustees and Administrative Provisions, in California Will Drafting Practice § 14.3, at 643-44 (Cal. Cont. Ed. Bar 1982). It should be noted that the UPC does not displace the general

rules concerning what other acts require qualification by a foreign corporation in a state. The Corporations Code reflects a more enlightened view of interstate commerce. Corporations Code Section 191(c) provides that a foreign corporation is not conducting intrastate business where it maintains an action or "conducts an isolated transaction completed within a period of 180 days and not in the course of a number of repeated transactions of like nature." See also Corp. Code §§ 2100-2116 (foreign corporations).

The State Bar found that a provision like UPC Section 7-105 "would facilitate the administration of trusts with multi-state real property assets" but also suggested that "this may create other problems that form the basis for the long-standing policy in California of prohibiting out-of-state corporate fiduciaries from transacting business in the State of California without qualifying to do so." State Bar, supra, at 198. The Joint Editorial Board of the UPC responded by noting that the nature and importance of the other problems was not revealed, but presumed that they were "problems for local banks interested in keeping out corporate competitors." The Joint Editorial Board also asked whether the California system is "effective against arrangements involving co-trustees, nominees, and individual original and successor trustee arrangements that are frequently used to circumvent the barriers against foreign corporations." Joint Editorial Board, supra, at 71.

Respectfully submitted,

Stan G. Ulrich
Staff Counsel

EXHIBIT 1

STAFF DRAFT

of

TRUST LAW

Division 4.5 of the Probate Code (§§ 4000-4860)Tentative Outline

Part 1. General Provisions	\$ 4000
Chapter 1. General Provisions	\$ 4000
Chapter 2. Third Persons Dealing with Trustees	\$ 4050
Chapter 3. Notice	\$ 4070
Chapter 4. Transitional Provisions	\$ 4150
Article 1. Application of Division 4.5 and Transitional Provisions	\$ 4150
Article 2. Removal of Trusts From Continuing Court Supervision	\$ 4180
Part 2. Creation and Termination of Trusts	\$ 4200
Chapter 1. General Provisions	\$ 4200
Article 1. General Provisions	\$ 4200
Article 2. Spendthrift Trusts	\$ 4210
Chapter 2. Creation of Trusts	\$ 4220
Chapter 3. Termination of Trusts	\$ 4240
Part 3. Trustees	\$ 4300
Chapter 1. Duties of Trustees	\$ 4300
Article 1. Trustees' Duties in General	\$ 4300
Article 2. Trustees' Standard of Care	\$ 4320
Article 3. Trustees' Duty to Account to Beneficiaries	\$ 4340
Article 4. Duties With Regard to Discretionary Powers	\$ 4350
Article 5. Duties of Trustees of Private Foundations, Charitable Trusts, and Split- Interest Trusts	\$ 4390
Chapter 2. Powers of Trustees	\$ 4400
Article 1. General Provisions	\$ 4400
Article 2. Specific Powers of Trustees	\$ 4420
Chapter 3. Compensation and Expenses of Trustees	\$ 4500
Chapter 4. Liability	\$ 4520
Chapter 5. Office of Trustee	\$ 4550
Article 1. General Provisions	\$ 4550
Article 2. Cotrustees	\$ 4560
Article 3. Appointment of Trustees	\$ 4570
Article 4. Resignation and Removal of Trustees	\$ 4580

Part 4. Judicial Administration of Trusts	\$ 4600
Chapter 1. Court Jurisdiction of Trusts	\$ 4600
Article 1. Jurisdiction and Venue	\$ 4600
Article 2. Proceedings Concerning Trusts	\$ 4620
Chapter 2. Transfer of Trust to Another Jurisdiction	\$ 4650
Chapter 3. Transfer of Trust From Another Jurisdiction	\$ 4670
Part 5. Revised Uniform Principal and Income Act	\$ 4800
Part 6. Uniform Management of Institutional Funds Act	\$ 4850

DIVISION 4.5. TRUSTS

PART 1. GENERAL PROVISIONS

CHAPTER 1. GENERAL PROVISIONS

§ 4000. Judicial Council to prescribe forms

4000. The Judicial Council may prescribe the form of the applications, notices, orders, and other documents required by this division. Any such form prescribed by the Judicial Council is deemed to comply with this division.

Comment. Section 4000 is new and is the same as Section 1456 (forms under guardian-conservator statute).

35062

§ 4001. Clerk to set matters for hearing

4001. When a petition which requires a hearing is filed with the court clerk pursuant to this division, the clerk shall set the matter for hearing.

Comment. Section 4001 continues parts of former Sections 1120(a), 1138.6(a), 1139.3, and 1139.15. Section 4001 is comparable to Section 1451 (guardianship-conservatorship statute).

35084

§ 4002. Appointment of guardian ad litem

4002. (a) The court may, upon its own motion or on request of a trustee or other person interested in a trust, appoint a guardian ad litem at any stage of a proceeding concerning a trust. 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:

- (1) A minor.
- (2) An incapacitated person.
- (3) An unborn person.
- (4) An unascertained person.
- (5) A person whose identity or address is unknown.
- (6) A designated class of persons who are not ascertained or are not in being.

(b) If not precluded by a conflict of interest, a guardian ad litem may be appointed to represent several persons or interests.

(c) Sections 373 and 373.5 of the Code of Civil Procedure do not apply to the appointment of a guardian ad litem under this section.

Comment. Section 4002 continues the substance of paragraph (2) of subdivision (a) and subdivision (b) of former Section 1215.3 and the substance of subdivision (a) of former Section 1138.7, and supersedes part of the last paragraph of subdivision (b) of former Section 1120. Subdivision (c) continues the substance of subdivision (c) of former Section 1138.7 and the last sentence of subdivision (b) of former Section 1120.

100/932

§ 4003. Law applicable to marital deduction gifts in trust

4003. (a) Except as provided in subdivision (b), the provisions of Article 3 (commencing with Section 1030) of Chapter 16 of Division 3 apply to gifts, whether outright or in trust, made in a trust which is subject to this division.

(b) This section does not apply to any trust if its terms expressly or by necessary implication make this section inapplicable to it.

(c) For purposes of this section, references in Article 3 (commencing with Section 1030) of Chapter 16 of Division 3 to a "testator" refer to the trustor and references to a "will" refer to a trust that is subject to this division.

Comment. Section 4003 continues the substance of former Section 1138.14 and supersedes former Civil Code Section 2264.

405/192

CHAPTER 2. THIRD PERSONS DEALING WITH TRUSTEES

§ 4050. Protection of third person dealing with trustee

4050. (a) With respect to a third person dealing with a trustee or assisting a trustee in the conduct of a transaction, the existence of a trust power and its proper exercise by the trustee may be assumed without inquiry. The third person is not bound to inquire whether the trustee has power to act or is properly exercising a power.

(b) A third person without actual knowledge that the trustee is exceeding its powers or improperly exercising them is fully protected in dealing with the trustee just as if the trustee possessed and properly exercised the powers it purports to exercise.

Comment. Section 4050 is drawn from Section 7 of the Uniform Trustees' Powers Act (1964). Section 4050 supersedes former Civil Code Section 2243.

405/198

§ 4051. Application of property delivered to trustee by third person

4051. A third person who acts in good faith is not bound to ensure the proper application of trust assets paid or delivered to the trustee.

Comment. Section 4051 supersedes former Civil Code Section 2244 and is essentially the same as the last sentence of Section 7 of the Uniform Trustees' Powers Act (1964).

405/199

§ 4052. Protection of third person dealing with former trustee

4052. A good faith transaction entered into with a former trustee by any person acting without knowledge that the trustee's office has been vacated as provided in Section 4580 is binding on all parties.

Comment. Section 4052 continues the substance of the second paragraph of former Civil Code Section 2281.

405/203

§ 4053. Effect on purchaser of omission of trust from grant of real property

4053. If an express trust relating to real property is not contained or declared in the grant to the trustee, or in an instrument signed by the trustee and recorded in the same office with the grant to the trustee, the grant shall be deemed absolute in favor of purchasers from the trustee without notice and for a valuable consideration.

Comment. Section 4053 continues the substance of former Civil Code Section 869.

405/204

§ 4054. Effect on real property transactions where beneficiary undisclosed

4054. (a) If an interest in or lien or encumbrance on real property is affected by an instrument in favor of a person in trust but no beneficiary is indicated in the instrument, it is presumed that the person holds the interest, lien, or encumbrance absolutely and free of the trust. This is a presumption affecting the burden of proof. In an action or proceeding involving the interest, lien, or encumbrance affected

by the instrument instituted against the person, the person shall be deemed the only necessary representative of the undisclosed beneficiary and of the original grantor or trustor and anyone claiming under them. A judgment is binding upon and conclusive against these persons as to all matters finally adjudicated in the judgment.

(b) An instrument executed by the person holding the interest, lien, or encumbrance as described in subdivision (a), whether purporting to be the act of that person in his or her individual right or in the capacity as a trustee, is presumed to affect the interest, lien, or encumbrance according to the tenor of the instrument. This is a presumption affecting the burden of proof. Upon the recording of the instrument in the county where the land affected by the instrument is situated, the presumption becomes conclusive in favor of a purchaser or encumbrancer in good faith and for valuable consideration.

Comment. Section 4054 continues the substance of the first two paragraphs of former Civil Code Section 869a. See Hansen v. G & G Trucking Co., 236 Cal. App.2d 481, 491-94, 46 Cal. Rptr. 186 (1965). The language relating to the presumptions affecting the burden of proof in both subdivisions (a) and (b) is consistent with Evidence Code Section 605.

404/996

CHAPTER 3. NOTICE

§ 4070. Application of chapter

4070. This chapter applies to notice in judicial proceedings involving trusts pursuant to this division.

Comment. Section 4070 supersedes former Section 1215. See also Section 82 ("trust" defined).

405/000

§ 4071. Form of notice

4071. If notice of the time and place of hearing is required to be given by this division, the notice shall be in the form prescribed by the Judicial Council or, if the Judicial Council has not prescribed an applicable form, in compliance with Section 1200.1.

Comment. Section 4071 is drawn from Section 1464 (form of notice under guardianship-conservatorship statute). See also Section 4000 (Judicial Council may prescribe forms required by division).

§ 4072. Manner of mailing; when mailing complete

4072. (a) Unless otherwise expressly provided, if a notice or other paper is required or permitted to be mailed to a person pursuant to this division, it shall be sent by:

(1) First-class mail if the person's address is within the United States.

(2) Airmail if the person's address is not within the United States.

(b) Mailing is complete under this division when the notice or other paper is deposited in the mail, postage prepaid, addressed to the person to whom it is mailed.

(c) If the address is not known, notice shall be given as the court may require in the manner provided in Section 413.30 of the Code of Civil Procedure.

Comment. Subdivisions (a) and (b) of Section 4072 are new and are the same as Section 1465. Subdivision (c) continues the substance of part of the second paragraph of subdivision (a) of former Section 1138.6.

§ 4073. Personal delivery instead of mailing

4073. If a notice or other paper is required or permitted to be mailed pursuant to this division (whether by first-class, airmail, certified, or registered mail), it may be delivered personally to the person to whom it is required or permitted to be mailed. Personal delivery as provided in this section is deemed to satisfy the provisions that requires or permits the notice or other paper to be mailed.

Comment. Section 4073 is the same as Section 1466 and continues the substance of the fourth paragraph of subdivision (a) of former Section 1138.6.

§ 4074. Proof of giving notice

4074. (a) Proof of the giving of notice under this division shall be made at or before the hearing to the satisfaction of the court. Such proof may be made by, but is not limited to, the following means:

(1) Proof of notice by personal delivery may be made by the affidavit of the person making such delivery showing the time and place of delivery and the name of the person to whom delivery was made.

(2) Proof of mailing may be made in the manner prescribed in Section 1013a of the Code of Civil Procedure.

(3) Proof of posting may be made by the affidavit of the person who posted the notice.

(4) Proof of publication may be made by the affidavit of the publisher or printer, or the foreman or principal clerk of the publisher or printer, showing the time and place of publication.

(5) Proof of notice, however given, may be made by testimonial evidence presented at the hearing.

(b) If it appears to the satisfaction of the court that notice has been regularly given or that the party entitled to notice has waived it, the court shall so find in its order, and such order when it becomes final is conclusive on all persons.

Comment. Section 4074 is the same as Section 1468 (proof of notice under guardianship-conservatorship statute). Section 4074 supersedes the fifth paragraph of subdivision (a) of former Section 1138.6. This section also supersedes former Section 1123, and subdivision (c) of Section 1200.5 to the extent it applied to proceedings involving trusts.

405/183

§ 4075. Additional notice

4075. (a) The court may, upon its own motion or on request of a trustee or other person interested in a trust, require that further or additional notice be given at any stage of the proceeding. The court may prescribe the form and method of the notice to be given.

(b) A petitioner or other person required to give notice may cause notice to be given to any person interested in the trust without the need for a court order.

Comment. Subdivision (a) of Section 4075 continues the substance of subdivision (a)(1) and subdivision (b) of former Section 1215.3. Section 4075 is comparable to Sections 1204 and 1462.

Subdivision (b) continues the substance of the second sentence of former Section 1215.4.

405/187

§ 4076. Shortening time

4076. The court may for good cause shorten the time for giving any notice required by this division.

Comment. Section 4076 is new and is drawn from subdivision (a) of Section 1462.

405/190

§ 4077. Notice of postponed hearings

4077. The court may continue or postpone any hearing, from time to time, in the interest of justice, and no further notice of the continued or postponed hearing is required unless otherwise ordered by the court.

Comment. Section 4077 is the same as Section 1205 and Section 1463.

405/191

§ 4078. Notice in cases involving future interests

4078. (a) Subject to subdivisions (b) and (c), it is sufficient compliance with a requirement in this division that notice be given to the trust beneficiaries, to persons interested in the trust, or to beneficiaries, including all persons in being who shall or may participate in the principal or income of the trust, if notice is given in the following manners as applicable:

(1) Where an interest has been limited on any future contingency to persons who shall compose a certain class upon the happening of a certain event without further limitation, notice shall be given to the persons in being who would constitute the class if the event had happened immediately before the commencement of the proceedings.

(2) Where an interest has been limited to a living person and the same interest, or a share therein, has been further limited upon the happening of a future event to the surviving spouse or to persons who are or may be the distributees, heirs, issue, or other kindred of the living person, notice shall be given to the living person.

(3) Except as otherwise provided in subdivision (b), when an interest has been limited upon the happening of any future event to a person, or a class of persons, or both, and the interest, or a share of the interest, has been further limited upon the happening of an additional future event to another person, or a class of persons, or both, notice shall be given to the person or persons in being who would take the interest upon the happening of the first of these events.

(b) If a conflict of interest involving the subject matter of the trust proceeding exists between a person to whom notice is given and a person to whom notice is not required to be given under subdivision (a), notice shall be given to persons otherwise not entitled to notice under subdivision (a).

(c) Nothing in this section affects (1) requirements for notice to a person who has requested special notice, a person who has filed notice of appearance, or a particular person or entity required by statute to be given notice, or (2) requirements for appointment of a guardian ad litem pursuant to Section 4002.

Comment. Subdivision (a) of Section 4078 continues the substance of former Section 1215.1. See also Section 24 ("beneficiary" defined). For provisions where this section applies, see Sections 4181 (transitional provisions concerning certain testamentary trusts), 4624 (notice of hearing on petitions generally), 4654-4655 (notice of petition for transfer to another jurisdiction), 4675-4676 (notice of petition for transfer to California).

Subdivision (b) continues the substance of former Section 1215.2. Subdivision (c) continues the substance of the first sentence of former Section 1215.4.

100/958

CHAPTER 4. TRANSITIONAL PROVISIONS

Article 1. Application of Division 4.5 and Transitional Provisions

§ 4150. Definitions

4150. As used in this article:

(a) "Operative date" means January 1, 19__.

(b) "Prior law" means the applicable law in effect on December 31, 19__.

Comment. Section 4150 is drafted on the assumption that Division 4.5 (commencing with Section 4000) will become operative on January 1, 19__.

15918

§ 4151. General rule concerning application of division

Except as otherwise provided by statute:

(a) This division on and after its operative date applies to all trusts regardless of whether they were created before or after the operative date.

(b) This division on and after its operative date applies to all proceedings concerning trusts commenced prior to the operative date unless in the opinion of the court application of a particular provision of this division would substantially interfere with the effective conduct of the proceedings or the rights of the parties and other interested persons, in which case the particular provision of this division does not apply and prior law applies.

Comment. Section 4151 provides the general rule governing the application of this division to existing trusts and pending proceedings. Subdivision (a) continues the substance of the first sentence of subdivision (5) of former Civil Code Section 2261 and the first sentence of former Section 1138.13. Subdivision (a) is also comparable to Section 8 of the Uniform Trustees' Powers Act (1964). Subdivision (b) is drawn from Code of Civil Procedure Section 694.020 (application of Enforcement of Judgments Law). For provisions governing trusts subject to continuing judicial supervision prior to January 1, 1977, see Article 2 (commencing with Section 4180). See also Section 82 ("trust" defined).

Note. Any other exceptions to this general principle should be provided in this article.

17024

§ 4152. Interpretation of trust terms concerning legal investments

4152. If a trust created before or after the operative date refers to investments permissible or authorized by law for investments of trust funds or to legal or authorized investments, or uses other words of similar meaning in defining the powers of the trustee relative to investments, such language, in the absence of other controlling or modifying provisions of the trust instrument, shall be construed as authorizing any investment permitted under Chapter 2 (commencing with Section 4400) of Part 3.

Comment. Section 4152 continues the substance of the second sentence of subdivision (5) of former Civil Code Section 2261.

405/335

Article 2. Removal of Trusts From Continuing Court Supervision

§ 4180. Application of article

4180. This article applies only to testamentary trusts created by a will executed before July 1, 1977.

Comment. Section 4180 continues the substance of the first sentence of former Section 1120.1a.

§ 4181. Notice to beneficiaries

4181. (a) Within six months after the initial funding of the trust, the trustee of a trust described in Section 4180 shall give a notice of removal of trusts from continuing supervision to each beneficiary, including all persons in being who shall or may participate in the principal or income of the trust. Notice shall be sent by registered or certified mail to the persons to be notified at their last known addresses.

(b) The notice of removal of trusts from continuing supervision shall contain the following:

(1) A statement that as of January 1, 1983, former Section 1120 of the Probate Code was amended to remove the necessity for mandatory court supervision of the trust.

(2) A statement that, unless the terms of the trust limit or eliminate such authority, Section 4620 of the Probate Code gives any beneficiary the right to petition a court to determine important matters relating to the administration of the trust.

(3) A copy of the text of Section 4620.

(4) A statement that each income beneficiary, as defined in subdivision (a) of Section 4801, is entitled to a statement of the income and principal receipts and disbursements of the trust at least annually and that any other beneficiary, upon written request to the trustee, is entitled to such information at least annually.

(5) A statement that the beneficiary is entitled to petition a court to settle the accounts and pass upon the acts of the trustee.

(6) The name and location of the superior court in the county in which it is appropriate to file a petition pursuant to Section 4620.

(7) If no trustee is a trust company, as defined in Section 107 of the Financial Code, a statement that a hearing will be held by the superior court named in paragraph (6) to obtain approval of the court and determine the conditions, if any, for the removal of the trust from the continuing jurisdiction of the court.

(c) The trustee shall file with the court which previously had jurisdiction over the administration of the trust proof of service of the notice under this section within seven months after the initial funding of the trust.

Comment. Section 4181 continues the substance of subdivision (a) of former Section 1120.1a. See also Section 24 ("beneficiary" defined).

405/356

§ 4182. Duty to furnish annual statement

4182. At least annually and at the termination of the trust, the trustee shall furnish a statement of the income and principal receipts and disbursements that have occurred since the immediately preceding statement to each income beneficiary, as defined in subdivision (a) of Section 4801. The trustee shall also furnish such information to any other beneficiary who has made a written request therefor.

Comment. Section 4182 continues the substance of subdivision (b) of former Section 1120.1a. See also Section 24 ("beneficiary" defined).

405/362

§ 4183. Duty to furnish summary

4183. (a) Within 90 days after the end of each fiscal year of the trust, the trustee shall furnish a summary of information described in subdivision (b) to each income beneficiary, as defined in subdivision (a) of Section 4801, and, upon written request, to any other beneficiary.

(b) The summary shall contain the following:

- (1) The cost of each trust asset.
- (2) The present value of each asset as of the end of the fiscal year of the trust.
- (3) The total present value of all assets as of the end of the current and immediately preceding fiscal year of the trust.
- (4) The net income for the current and immediately preceding fiscal year of the trust.
- (5) Trustee compensation for the current and immediately preceding fiscal year of the trust.
- (6) A statement that the recipient of the summary may petition the court pursuant to Section 4620 to obtain a court review.
- (7) A copy of the text of Section 4620.
- (8) The name and location of the appropriate court in which to file a petition.

Comment. Section 4183 continues the substance of subdivision (c) of former Section 1120.1a. See also Section 24 ("beneficiary" defined).

§ 4184. Court approval to remove trust from continuing jurisdiction

4184. (a) With respect to a trust where no trustee is a trust company, as defined in Section 107 of the Financial Code, the trustee may remove the trust from the continuing jurisdiction of the superior court only with approval of the court.

(b) To obtain the court's approval, the trustee shall file a verified petition with the clerk setting forth the trust accounts in detail, reporting his or her acts as trustee, showing the condition of the trust estate, and attaching a true copy of the trust instrument.

(c) Notice of the hearing shall be given, along with the notice required by Section 4181, at least 30 days before the hearing to all persons entitled to receive notice pursuant to Section 4181.

(d) At the hearing, the court may receive testimony from any interested person and may grant or deny the petition, or may require a bond as a condition of granting the petition, as the court in its discretion deems fit.

Comment. Section 4184 continues the substance of subdivision (d) of former Section 1120.1a.

§ 4185. Notice to minor, ward, or conservatee

4185. (a) If a beneficiary is a minor, ward, or conservatee, any notice, statement, or summary required to be sent to the beneficiary by this article shall be sent to the parent, guardian, or conservator, as the case may be.

(b) In addition to the requirements of subdivision (a), if the trustee, at the time the notice required by Section 4181 is sent, has actual knowledge that a beneficiary who is not a minor, ward, or conservatee is being assisted by another individual in the handling of his or her personal affairs, the trustee shall send the notice required by Section 4181 to both that person and the beneficiary and, upon the written request of either of them, shall also send the statements and summaries required by Sections 4182 and 4183 to both of them.

Comment. Section 4185 continues the substance of subdivision (e) of former Section 1120.1a. See also Section 24 ("beneficiary" defined).

§ 4186. Application of article to charitable trusts

4186. (a) If the trust is a charitable trust subject to Article 7 (commencing with Section 12580) of Chapter 6 of Part 2 of Division 3 of Title 2 of the Government Code, upon the vesting of any charitable interest created by the trust, the trustee shall thereafter furnish to the Attorney General the statements and summaries required by Sections 4182 and 4183 without the necessity of any written request.

(b) A charitable interest is deemed to be vested within the meaning of subdivision (a) as of the time when it is first ascertainable that income or principal is, or in the future will be, paid to a charity or applied for a charitable purpose.

(c) Notwithstanding any other provisions of law, the Attorney General may petition the court to settle the account and pass upon the acts of the trustee as provided in Section 4620.

Comment. Section 4186 continues the substance of subdivision (f) of former Section 1120.1a.

38039

PART 2. CREATION AND TERMINATION OF TRUSTS

CHAPTER 1. GENERAL PROVISIONS

Article 1. General Provisions§ 4200. Trust purpose

4200. A trust may be created for any purpose for which a contract may be made.

Comment. Section 4200 continues the substance of former Civil Code Section 2220.

38048

§ 4201. Presumption of revocability

4201. Unless expressly made irrevocable by the instrument creating the trust, every express trust is revocable by the trustor.

Comment. Section 4201 continues the substance of part of the first sentence of former Civil Code Section 2280. See also Section 4241 (revocation of revocable trust).

§ 4202. Declaration of trust

4202. The nature, extent, and purpose of a trust are expressed in the declaration of trust.

Comment. Section 4202 continues the substance of former Civil Code Section 2253.

Note. This section could be deleted without any loss of understanding of trust law.

§ 4203. Matters included in declaration of trust

4203. (a) Except as provided in subdivision (b), all declarations of a trustor to the trustees in relation to the trust occurring before acceptance of the trust by any trustee are deemed part of the declaration of the trust.

(b) If a declaration of trust is made in writing, all previous declarations by the trustor are merged in the declaration.

Comment. Section 4203 continues the substance of former Civil Code Section 2254.

Article 2. Spendthrift Trusts§ 4210. Spendthrift trusts

4210. A spendthrift trust may be created for the purpose of paying for the beneficiary's education and support and with the effect of restraining the beneficiary from disposing of his or her interest in the trust during the beneficiary's life or for a term of years, as specified in the trust.

Comment. Section 4210 supersedes part of former Civil Code Section 859 and former Civil Code Section 867. Section 4210 does not continue the misleading language of former Civil Code Section 867 which referred to trusts for the receipt of the rents and profits of real property; former Civil Code Section 867 was held to apply to both real and personal property. See *Canfield v. Security-First Nat'l Bank*, 13 Cal.2d 1, 12, 87 P.2d 830 (1939).

§ 4211. Surplus income subject to creditor's claims

4211. If a spendthrift trust or a discretionary trust does not contain a valid direction for accumulation of income, the surplus income,

beyond the sum that is necessary for the education and support of the beneficiary, may be applied to the satisfaction of a money judgment against the beneficiary as provided in Section 709.010 of the Code of Civil Procedure.

Comment. Section 4211 continues the substance of former Civil Code Section 859. See *Canfield v. Security-First Nat'l Bank*, 13 Cal.2d 1, 12, 87 P.2d 830 (1939).

38898

§ 4212. Invalidity of spendthrift trust in favor of trustor

4212. If a trustor attempts to create a spendthrift trust with the trustor as beneficiary, the spendthrift provision is invalid. The invalidity of the spendthrift trust provision does not affect the validity of the trust.

Comment. Section 4212 is new. This section codifies the case-law rule applicable under former law. See, e.g., *Nelson v. California Trust Co.*, 33 Cal.2d 501, 202 P.2d 1021 (1949).

39277

§ 4213. Liability of spendthrift trust for support

4213. Notwithstanding Section 4211, the beneficiary's interest in a spendthrift trust may be applied to the satisfaction of a judgment for child or spousal support pursuant to Section 709.010 of the Code of Civil Procedure. In determining the amount to be applied to the satisfaction of the judgment for child or spousal support under Section 709.010 of the Code of Civil Procedure, the court shall take into account the needs of the judgment creditor, the needs of the beneficiary, and all other relevant circumstances.

Comment. Section 4213 is new. This section is consistent with the policy expressed in *Estate of Johnston*, 252 Cal. App.2d 923, 929-30, 60 Cal. Rptr. 852 (1967). The procedure for reaching assets held in trust is provided in Code of Civil Procedure Section 709.010. The standard for determining the amount that may be applied to the support judgment is drawn from Code of Civil Procedure Section 703.070(c).

CHAPTER 2. CREATION OF TRUSTS

§ 4220. Creation of trust as to trustor and beneficiary

4220. Subject to the provisions of Section 1973 of the Code of Civil Procedure, an express trust is created as to the trustor and beneficiary by any words or acts of the trustor indicating all of the following with reasonable certainty:

- (a) An intention on the part of the trustor to create a trust.
- (b) The property subject to the trust.
- (c) The purpose of the trust.
- (d) The beneficiary of the trust.

Comment. Section 4220 continues the substance of former Civil Code Section 2221. See Section 82 ("trust" defined). See also Code Civ. Proc. § 1973 (statute of frauds).

Note. Code Civ. Proc. § 1973 appears in Exhibit 3 (conforming changes).

40305

§ 4221. Creation of trust as to trustee

4221. Subject to the provisions of Section 1973 of the Code of Civil Procedure, an express trust is created as to the trustee by any words or acts of the trustee indicating all of the following with reasonable certainty:

- (a) The trustee's acceptance or acknowledgment of the trust.
- (b) The trustee's acceptance of the trust, or the trustee's acknowledgment, made upon sufficient consideration, of the existence of the trust.
- (c) The property subject to the trust.
- (d) The purpose of the trust.
- (e) The beneficiary of the trust.

Comment. Section 4221 continues the substance of former Civil Code Section 2222. See Section 82 ("trust" defined). See also Code Civ. Proc. § 1973 (statute of frauds).

CHAPTER 3. TERMINATION OF TRUSTS

§ 4240. Termination of trust

4240. A trust is terminated when any of the following occurs:

- (a) The trust purpose is fulfilled.
- (b) The term of a trust subject to a fixed term has expired.
- (c) The trust purpose becomes unlawful.
- (d) The trust purpose becomes impossible to fulfill.

Comment. Section 4240 continues the substance of former Civil Code Section 2279. Subdivision (b) is a new statutory provision. See In re Estate of Hanson, 159 Cal. 401, 405, 114 P. 810 (1911). Subdivision (b) follows from the rule in Section 4202 that the trust is governed by its creating instrument. This chapter does not provide an exclusive list of the ways in which trusts may terminate. See, e.g., In re Estate of Washburn, 11 Cal. App. 735, 746, 106 P. 415 (1909) (merger of legal and equitable estates); Moor v. Vawter, 84 Cal. App. 678, 682, 258 P. 622 (1927) (suit by all beneficiaries).

37000

§ 4241. Termination of revocable trust

4241. (a) A revocable trust is terminated by its revocation in the manner provided in the trust instrument. If a revocable trust does not provide the manner of revocation, it may be revoked by a writing filed with the trustee.

(b) When a trust is revoked by the trustor, the trustee shall transfer to the trustor its full title to the trust property.

Comment. Section 4241 continues the substance of part of the first sentence and the second sentence of former Civil Code Section 2280. The first sentence of subdivision (a) is new.

37002

§ 4242. Trust with uneconomically low principal

4242. (a) If the principal of a trust has become uneconomically low, the trustee or a beneficiary may petition the court for relief pursuant to this section.

(b) If the court determines that the fair market value of the principal of a trust has become so low in relation to the cost of administration that continuance of the trust under its existing terms will defeat or substantially impair the accomplishment of its purposes, the

court may in its discretion and in a manner that conforms as nearly as possible to the intention of the trustor, order one of the following:

- (1) That the trust be terminated in whole or in part.
- (2) That the terms of the trust be modified.
- (3) That the trustee be changed.

(c) If the court orders the termination of the trust, in whole or in part, it shall direct that the principal and undistributed income be distributed to the beneficiaries in a manner that conforms as nearly as possible to the intention of the trustor. The court may make any other orders it deems necessary or appropriate to protect the interests of the beneficiaries.

(d) Proceedings pursuant to this section shall be conducted in the same manner as proceedings under Article 2 (commencing with Section 4620) of Chapter 1 of Part 4.

(e) The existence of a spendthrift or similar protective provision in the trust does not make this section inapplicable.

Comment. Section 4242 continues the substance of former Civil Code Section 2279.1 and former Probate Code Section 1120.6.

405/395

PART 3. TRUSTEES

CHAPTER 1. DUTIES OF TRUSTEES

Article 1. Trustees' Duties in General

§ 4300. General duty of trustee

4300. A trustee has a general duty to administer the trust expeditiously for the benefit of the trust beneficiaries.

Comment. Section 4300 is a new provision and is drawn from Uniform Probate Code Section 7-301.

405/426

§ 4301. Trustee's duty of good faith

4301. In all matters connected with the trust, a trustee is bound to act in the highest good faith toward the beneficiary and may not obtain any advantage over the beneficiary by the slightest misrepresentation, concealment, threat, or adverse pressure of any kind.

Comment. Section 4301 continues the substance of former Section 2228 of the Civil Code and supersedes former Civil Code Section 2231.

§ 4302. Exercise of powers in regard to taxes

4302. In the exercise of powers, including the powers granted in Chapter 2 (commencing with Section 4300), the trustee has a duty to act with due regard to its obligation as a fiduciary, including the duty not to exercise any power in such a way as to deprive the trust of an otherwise available tax exemption, deduction, or credit for tax purposes, or deprive a donor of trust property of a tax exemption, deduction, or credit, or operate to impose a tax upon a donor or other person as owner of any portion of the trust. As used in this section "tax" includes, but is not limited to, any federal, state, or local income, gift, estate, or inheritance tax.

Comment. Section 4302 is drawn from Section 3(b) of the Uniform Trustees' Powers Act (1964).

§ 4303. Use of property

4303. Unless the beneficiary consents with full knowledge of the facts and without any influence on the part of the trustee, a trustee may not, in any manner, use or deal with trust property for the trustee's own profit or for any other purpose unconnected with the trust, or take part in any transaction in which the trustee has an interest adverse to the beneficiary, except as provided in Section 4402.

Comment. Section 4303 supersedes former Civil Code Sections 2229 and 2230.

§ 4304. Trustee's adverse interest

4304. Except as provided in Section 4402, if a trustee acquires any interest or becomes charged with any duty that is adverse to the interest of or duty to a beneficiary, the trustee shall immediately inform the beneficiary and may be removed as a trustee.

Comment. Section 4304 continues the substance of former Civil Code Section 2233, subject to the exception provided in Section 4402.

§ 4305. Duty to obey trust

4305. (a) Except as modified by the consent of all interested persons or as provided in Section 4401, a trustee shall fulfill the purpose of the trust as declared at its creation, and shall follow all directions of the trustor given at that time, in the same manner and to the same extent as an employee.

(b) In the case of a revocable trust, the trustee shall follow all written instructions acceptable to the trustee given from time to time to the trustee by the person having the power to revoke the trust or the part of the trust with respect to which the instruction is given or by the person other than the trustee to whom the trustor delegates the right to instruct the trustee. In acceding to and carrying out the instruction, the trustee is not liable to any beneficiary of the trust and may follow the instruction regardless of any fiduciary obligations to which the person giving the instruction may also be subject.

Comment. Section 4305 continues the substance of former Civil Code Section 2258 [as proposed to be amended by AB 261 (1983)] subject to the exception provided in Section 4401 (power of court to relieve trustee of trust restrictions).

§ 4306. Trustee of multiple trusts

4306. (a) Except as provided in Section 4402, a trustee of one trust may not become a trustee under another trust adverse in its nature to the interest of the beneficiary of the first trust without the beneficiary's consent.

(b) If a trustee of one trust is appointed as trustee of another trust, and the provisions and terms of the trusts are substantially identical, the court may order the trustee to combine the assets and administer them as a single trust if it determines that administration as a single trust will (1) be consistent with the intent of the trustor and (2) facilitate administration of the trust without defeating or impairing the interests of the beneficiaries. An order under this subdivision may be made without notice upon petition of the trustee.

Comment. Subdivision (a) of Section 4306 continues the substance of former Section 2232 of the Civil Code, subject to the exception provided in Section 4402 (conflict of interest). Subdivision (b) continues the substance of former Section 1133 of the Probate Code.

Article 2. Trustee's Standard of Care

§ 4320. Trustee's standard of care and performance

4320. Except as otherwise provided by the terms of the trust, the trustee shall exercise the judgment and care, under the circumstances then prevailing, which persons of prudence, discretion, and intelligence exercise in the management of their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of their capital.

Comment. Section 4320 continues the substance of the first sentence of subdivision (1) and the first sentence of subdivision (2) of former Civil Code Section 2261.

Note. A new standard is currently before the Legislature in AB 630. This standard reads as follows:

(1) . . . [A] trustee shall act using the judgment and care, under the circumstances then prevailing, specifically including, but not by way of limitation, the general economic conditions and the expected needs of the trust and its beneficiaries, with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, to attain the goals of the trustor as determined from the trust instrument.

(2) The trustor may expand or restrict the standards set forth in paragraph (1) by express provisions in a trust instrument. Any trustee acting for the benefit of another under that instrument shall not be liable to anyone whose interests arise from that trust for the trustee's good faith reliance on those express provisions.

. . .

100/920

§ 4321. Expert trustee's standard of care

4321. If a trustee has special skills or is named as a trustee on the basis of representations of special skills or expertise, the trustee is under a duty to use those skills.

Comment. Section 4321 is the same as part of Uniform Probate Code Section 7-302. This section codifies the rule that a higher standard of care is required of experts which was recognized in California cases. See *Estate of Collins*, 72 Cal. App.3d 663, 673, 139 Cal. Rptr. 644 (1977) (dictum); *Coberly v. Superior Court*, 231 Cal. App.2d 685, 689, 42 Cal. Rptr. 64 (1965); cf. *Estate of Beach*, 15 Cal.3d 623, 635, 542 P.2d 994, 125 Cal. Rptr. 570 (1975) (bank as executor). See also the Comment to Section 2401 (greater standard of care applicable to professional guardian or conservator of estate).

§ 4322. Minimum standard of care

4322. A trustee has a duty to use at least ordinary care and diligence in the execution of the trust whether or not the trustee receives any compensation.

Comment. Section 4322 continues the substance of former Civil Code Section 2259.

Article 3. Trustees' Duty to Account to Beneficiaries

§ 4340. Trustees' duty to inform and account to beneficiaries

4340. (a) The trustee shall keep the beneficiaries of the trust reasonably informed of the trust and its administration.

(b) Upon reasonable request, the trustee shall provide the beneficiary with a copy of the terms of the trust which describe or affect the beneficiary's interest and with relevant information about the assets of the trust and the particulars relating to the administration of the trust.

(c) Upon reasonable request, the trustee shall provide the beneficiary with a statement of the accounts of the trust annually, at the termination of the trust, or upon a change of trustees.

Comment. Section 4340 supersedes parts of former Sections 1121 and 1138.1(a)(5). This section is drawn from Uniform Probate Code Section 7-303. Subdivision (a) is the same as the first sentence of Uniform Probate Code Section 7-303 and is consistent with the duty stated in California case law to give beneficiaries complete and accurate information relative to administration of a trust when requested at reasonable times. See *Strauss v. Superior Court*, 36 Cal.2d 396, 401, 224 P.2d 726 (1950). Subdivision (b) is the same in substance as Uniform Probate Code Section 7-303(b). Subdivision (c) is the same in substance as Uniform Probate Code Section 7-303(c). If the trustee does not comply with the reasonable request of the beneficiary, an accounting may be compelled as provided in Section 4620(b)(4). See also Section 24 ("beneficiary" defined).

Note. California Probate Code Section 1138.1(a)(5) permits a remainderman to petition for an accounting. As used in UPC Section 7-303 "beneficiary" includes "a person who has any present or future interest, vested or contingent." This definition is included in AB 25, the Commission's bill on wills and intestate succession.

Article 4. Duties With Regard to Discretionary Powers§ 4350. Discretionary powers to be exercised reasonably

4350. Except as provided in Section 4351, a discretionary power conferred upon a trustee is presumed not to be left to the trustee's arbitrary discretion but shall be exercised reasonably.

Comment. Section 4350 continues subdivision (a) of former Civil Code Section 2269.

§ 4351. Standard for exercise of absolute, sole, or uncontrolled powers

4351. (a) Subject to the additional requirements of subdivision (b), if a trust instrument confers absolute, sole, or uncontrolled discretion upon a trustee, the trustee shall act in accordance with fiduciary principles and shall not act in bad faith or in disregard of the purposes of the trust.

(b) Notwithstanding the trustor's use of terms such as "absolute", "sole", or "uncontrolled", a person who is a beneficiary of a trust and who, either individually or as trustee or cotrustee, holds a power to take or distribute income or principal to or for the benefit of himself or herself pursuant to a standard, shall exercise that power reasonably and in accordance with the standard. In any case in which the standard governing the exercise of the power does not clearly indicate that a broader power is intended, the holder of the power may exercise it in his or her favor only for his or her health, education, support, or maintenance.

Comment. Section 4351 continues the substance of subdivision (c) and most of subdivision (d) of former Civil Code Section 2269.

§ 4352. Exercise of power to discharge obligations of holder

4352. Unless specifically authorized, a person who holds a power to appoint or distribute income or principal to or for the benefit of others, either individually or in a fiduciary capacity, may not use the power to discharge the person's legal obligations.

Comment. Section 4352 continues subdivision (e) of former Civil Code Section 2269.

§ 4353. Court review

4353. The exercise of a power described in this article is subject to review by a court of competent jurisdiction.

Comment. Section 4353 continues the substance of subdivision (b) and the last clause of subdivision (d) of former Civil Code Section 2269. See Section 4601 (jurisdiction of superior court).

31786

Article 5. Duties of Trustees of Private Foundations, Charitable Trusts, and Split-Interest Trusts

§ 4390. Definitions

4390. As used in this article:

(a) "Charitable trust" means a charitable trust as defined in paragraph (1) of subsection (a) of Section 4947 of the Internal Revenue Code of 1954.

(b) "Internal Revenue Code" means the Internal Revenue Code of 1954 as amended by the Tax Reform Act of 1969.

(c) "Private foundation" means a private foundation as defined in Section 509 of the Internal Revenue Code of 1954, as added by Section 101 of the Tax Reform Act of 1969.

(d) "Split-interest trust" means a split-interest trust as described in paragraph (2) of subsection (a) of Section 4947 of the Internal Revenue Code of 1954.

Comment. Section 4390 defines terms for purposes of this article. Subdivisions (a), (b), and (c) continue parts of former Civil Code Section 2271. Subdivision (d) continues part of subdivision (a) of former Civil Code Section 2271.1.

31789

§ 4391. Distribution under charitable trust or private foundation

4391. During any period when a trust is deemed to be a charitable trust or a private foundation, the trustee shall distribute its income for each taxable year (and principal if necessary) at such time and in such manner as not to subject the assets of such trust to tax under Section 4942 of the Internal Revenue Code.

Comment. Section 4391 continues the substance of part of the first paragraph of former Civil Code Section 2271. See Section 4391 ("charitable

trust" and "private foundation" defined). See also Section 10 (singular includes plural).

31790

§ 4392. Restrictions on trustees

4392. During any period when a trust is deemed to be a charitable trust, a private foundation, or a split-interest trust, the trustee shall not do any of the following:

(a) Engage in any act of self-dealing as defined in subsection (d) of Section 4941 of the Internal Revenue Code.

(b) Retain any excess business holdings as defined in subsection (c) of Section 4943 of the Internal Revenue Code.

(c) Make any investments in such manner as to subject the assets of the trust to tax under Section 4944 of the Internal Revenue Code.

(d) Make any taxable expenditure as defined in subsection (d) of Section 4945 of the Internal Revenue Code.

Comment. Section 4392 continues the substance of part of the first paragraph of former Civil Code Section 2271 (applicable to charitable trusts and private foundations) and part of subdivision (a) of former Civil Code Section 2271.1 (applicable to split-interest trusts). The references in former law to specific amendatory sections of the Tax Reform Act of 1969 are not continued because they are unnecessary in view of Section 4390(b). See also Section 10 (singular includes plural).

31793

§ 4393. Exceptions applicable to split-interest trusts

4393. With respect to split-interest trusts:

(a) Subdivisions (b) and (c) of Section 4392 do not apply to any trust described in paragraph (3) of subsection (b) of Section 4947 of the Internal Revenue Code.

(b) Section 4392 does not apply with respect to any of the following:

(1) Any amounts payable under the terms of such trust to income beneficiaries, unless a deduction was allowed under subparagraph (b) of paragraph (2) of subsection (f) of Section 170, subparagraph (b) of paragraph (2) of subsection (e) of Section 2055, or subparagraph (b) of paragraph (2) of subsection (c) of Section 2522 of the Internal Revenue Code.

(2) Any amounts in trust other than amounts for which a deduction was allowed under Section 170, paragraph (2) of subsection (b) of Section 545, paragraph (2) of subsection (b) of Section 556, subsection (c) of

Section 642, Section 2055, paragraph (2) of subsection (a) of Section 2106, or Section 2522 of the Internal Revenue Code, if such amounts are segregated, as that term is defined in paragraph (3) of subsection (a) of Section 4947 of the Internal Revenue Code, from amounts for which no deduction was allowable.

(3) Any amounts transferred in trust before May 27, 1969.

Comment. Section 4393 continues the substance of subdivisions (b) and (c) of former Civil Code Section 2271.1. See also Section 4390 ("Internal Revenue Code" and "split-interest trust" defined).

31794

§ 4394. Incorporation in trust instruments

4394. The provisions of Sections 4391 and 4392 shall be deemed to be contained in the instrument creating every trust to which this article applies. Any provision of such instrument inconsistent with or contrary to this article is without effect.

Comment. Section 4394 continues the substance of the second paragraph of former Civil Code Section 2271 and subdivision (d) of former Civil Code Section 2271.1.

31795

§ 4395. Jurisdiction; proceedings

4395. (a) The superior court has jurisdiction to hear and determine any proceedings contemplated by paragraph (3) of subsection (1) of Section 101 of the Tax Reform Act of 1969. Such proceedings may be brought by the organization involved. All specifically named beneficiaries of such organization and the Attorney General shall be parties to such proceedings. This provision is not exclusive and is not intended to limit any jurisdiction which otherwise exists.

(b) If an instrument creating any trust affected by this section has been recorded, a notice of pendency of judicial proceedings under this section shall be recorded in a similar manner within 10 days from the commencement of the proceedings. A duly certified copy of any final judgment or decree in the proceedings shall be similarly recorded.

Comment. Section 4395 continues the substance of former Civil Code Section 2271.2.

§ 4396. Application of article

4396. This article applies to a trust regardless of when it was created.

Comment. Section 4396 continues part of the first paragraph of former Civil Code Section 2271 and part of subdivision (a) of former Civil Code Section 2271.1.

CHAPTER 2. POWERS OF TRUSTEES

Article 1. General Provisions§ 4400. Powers subject to trust instrument

4400. A trustee has the powers conferred by the provisions of this chapter unless limited in the trust instrument.

Comment. Section 4400 is a new provision drawn from Section 2(a) of the Uniform Trustees' Powers Act (1964). This section supersedes part of [subdivision (a) of] former Civil Code Section 2258 and part of former Civil Code Section 2267. See also Section 4401 (relief from trust restrictions).

15789

§ 4401. Power of court to relieve trustee from restrictions unaffected

4401. This chapter does not affect the power of a court for good cause shown and upon petition of the trustee or affected beneficiary, and upon appropriate notice to the affected persons, to relieve a trustee from any restrictions on the exercise of powers that would otherwise be given the trustee by the trust or by this chapter.

Comment. Section 4401 continues the substance of subdivision (4) of former Civil Code Section 2261 and is drawn from Section 5(a) of the Uniform Trustees' Powers Act (1964). Section 4401 makes clear that the case law rule permitting deviation from trust restrictions as necessary in unforeseen circumstances is not changed. See, e.g., Estate of Loring, 29 Cal.2d 423, 436-37, 175 P.2d 524 (1946); Adams v. Cook, 15 Cal.2d 352, 359, 101 P.2d 484 (1940); Estate of Mabury, 54 Cal. App.3d 969, 984-85, 127 Cal. Rptr. 233 (1976).

15795

§ 4402. Conflict of interest in exercise of power

4402. (a) Except as provided in subdivision (b), if there is a conflict in the exercise of a trust power between (1) the duty of the trustee under the trust and (2) the trustee's individual interest or

interest as trustee of another trust, the power may be exercised only by court authorization. Under this subdivision, personal profit or advantage to an affiliated or subsidiary company or association is personal profit to a corporate trustee.

(b) The requirement of subdivision (a) does not apply to the exercise of a power provided in Section 4421, 4424, 4426, 4441, 4442, or 4448.

Comment. Section 4402 is a new provision drawn from Section 5(b) of the Uniform Trustees' Powers Act (1964).

15634

§ 4403. Incorporation of powers

4403. (a) An instrument that is not a trust as defined in Section 82 may incorporate any provision in this part by reference.

(b) An instrument that incorporates the powers provided in former Section 1120.2 of the Probate Code shall be deemed to refer to the powers provided in Article 2 (commencing with Section 4420).

Comment. Subdivision (a) of Section 4403 is drawn from Section 2(b) of the Uniform Trustees' Powers Act (1964). Subdivision (b) clarifies the effect of references to the former provision listing trustees' powers.

Note. There appears to be some question whether an instrument may effectively incorporate a statute with its future amendments. See McCarrol, Formal and Technical Aspects of Wills and Testamentary Trusts, in California Will Drafting Practice § 2.26 (Cal. Cont. Ed. Bar 1982); Ellis, Trustees and Administrative Provisions, in California Will Drafting Practice § 14.40 (Cal. Cont. Ed. Bar 1982); 7 B. Witkin, Summary of California Law Wills and Probate §§ 143-146, 5660-63 (8th ed. 1974).

28293

Article 2. Specific Powers of Trustees

§ 4420. General powers without court authorization

4420. Subject to Section 4400, from the time of creation of the trust until final distribution of the trust property, a trustee has the power to perform, without court authorization, every act that a prudent person would perform for the purposes of the trust, including but not limited to the powers specified in this article.

Comment. Section 4420 supersedes the first paragraph of former Section 1120.2 which required court approval to exercise powers not expressed in the trust and subdivision (18) of former Section 1120.2

which gave the court authority to grant necessary or desirable powers. Under this section, the trustee may exercise powers as would a prudent person, without the need for court approval. If there is a need for court approval before exercise of a power or review after exercise, the procedure provided in Sections 4620-4628 is available. As the introductory clause makes clear, the exercise of powers by the trustee is subject to limitations provided in the trust. See also Section 4401 (power of court to relieve trustee from trust restrictions).

28297

§ 4421. Collecting and holding property

4421. The trustee may collect, hold, and retain trust property received from a trustor until, in the judgment of the trustee, disposition of the property should be made. The property may be retained even though it includes property in which the trustee is personally interested.

Comment. Section 4421 supersedes subdivision (2) of former Civil Code Section 2261 and part of subdivision (2) of former Probate Code Section 1120.2. Section 4421 is the same in substance as Section 3(c)(1) of the Uniform Trustees' Powers Act (1964). The specific references to stock in the trustee or in a corporation controlling or controlled by the trustee in former Civil Code Section 2261(2) and in former Probate Code Section 1120.2(2) are not continued in Section 4421 because they are unnecessary; however, the substance of the law is not changed by Section 4421 since stock of the type described by the former provisions is within the general language of the new law. See also Section 62 ("property" defined).

28454

§ 4422. Receiving additions to trust

4422. The trustee may receive additions to the property of the trust.

Comment. Section 4422 supersedes part of subdivision (b) of former Section 1120 and paragraph (3) of subdivision (a) of former Section 1138.1. Section 4422 is the same in substance as Section 3(c)(2) of the Uniform Trustees' Powers Act (1964). See also Section 62 ("property" defined).

28747

§ 4423. Participation in business; change in form of business

4423. The trustee may continue or participate in the operation of any business or other enterprise and may effect incorporation, dissolution, or other change in the form of the organization of the business or enterprise.

Comment. Section 4423 continues subdivision (17) of former Section 1120.2 and is the same in substance as Section 3(c)(3) of the Uniform Trustees' Powers Act (1964).

28750

§ 4424. Acquisition of undivided interest

4424. The trustee may acquire an undivided interest in trust property in which the trustee, in any trust capacity, holds an undivided interest.

Comment. Section 4424 is new and is the same in substance as Section 3(c)(4) of the Uniform Trustees' Powers Act (1964).

28765

§ 4425. Investments

4425. The trustee may invest and reinvest trust property in accordance with the provisions of the trust or as provided by law.

Comment. Section 4425 continues the substance of part of subdivision (2) of former Probate Code Section 1120.2 and part of subdivision (1) of former Civil Code Section 2261. Section 4425 is the same in substance as Section 3(c)(5) of the Uniform Trustees' Powers Act (1964). See also Section 62 ("property" defined).

28767

§ 4426. Deposits in insured accounts

4426. (a) The trustee may deposit trust funds at interest in any of the following:

(1) An account in any bank to the extent that the deposit is insured under any present or future law of the United States.

(2) An account in an insured savings and loan association (as defined in Section 1406).

(3) An account consisting of shares of an insured credit union (as defined in Section 1443).

(b) A trustee may deposit trust funds pursuant to subdivision (a) in a financial institution operated by the trustee.

(c) This section does not limit the power of a trustee in a proper case to deposit trust funds in an account described in subdivision (a) that is subject to notice or other conditions respecting withdrawal prescribed by law or governmental regulation.

(d) The court may authorize the deposit of trust funds in an account described in subdivision (a) in an amount greater than the maximum insured amount.

Comment. Section 4426 continues the substance of part of subdivision (3) of former Civil Code Section 2261 with respect to deposits in banks. Section 4426 is comparable to Section 2453 governing deposits by guardians and conservators with respect to deposits in savings and loan associations and credit unions. The limitation on bank deposits in subdivision (a)(1) is the same as that provided in former Civil Code Section 2261(3). Subdivisions (a)(2) and (a)(3) incorporate limitations applicable under the guardianship-conservatorship statute. See also Fin. Code §§ 764 (fiduciaries' deposits in banks), 6408.5 (fiduciaries' deposits in insured savings and loan associations), 11207 (fiduciaries' deposits in federal savings and loan associations). For other provisions relating to deposits by trustees, see Fin. Code §§ 764, 6407-6408.7, 11207.

Subdivision (b) continues the substance of part of subdivision (3) of former Civil Code Section 2261. See also Uniform Trustees' Powers Act § 3(c)(6) (1964).

Subdivision (c) continues the substance of part of subdivision (3) of former Civil Code Section 2261.

Subdivision (d) continues the substance of part of subdivision (3) of former Civil Code Section 2261.

28768

§ 4427. Acquisition and disposition of property

4427. The trustee may acquire or dispose of property, for cash or on credit, at public or private sale.

Comment. Section 4427 continues part of subdivision (5) of former Section 1120.2 and is the same in substance as part of Section 3(c)(7) of the Uniform Trustees' Powers Act (1964). Section 4427 also supersedes the part of subdivision (1) of former Section 1120.2 pertaining to sale of trust assets on deferred payments. See also Section 62 ("property" defined).

28845

§ 4428. Management of property

4428. The trustee may manage, develop, improve, exchange, partition, change the character of, or abandon trust property or any interest therein.

Comment. Section 4428 continues part of subdivision (5) of former Section 1120.2 and is the same in substance as part of Section 3(c)(7) of the Uniform Trustees' Powers Act (1964). Section 4428 also continues the authority to manage property provided in subdivision (1) of former Section 1120.2. See also Section 62 ("property" defined).

§ 4429. Encumbrances

4429. The trustee may encumber, mortgage, or pledge trust property for a term within or extending beyond the term of the trust in connection with the exercise of any power vested in the trustee.

Comment. Section 4429 supersedes part of subdivision (3) of former Section 1120.2 and is the same in substance as part of Section 3(c)(7) of the Uniform Trustees' Powers Act (1964). See also Section 62 ("property" defined).

29113

§ 4430. Repairs and alterations of property

4430. The trustee may:

- (a) Make ordinary or extraordinary repairs or alterations in buildings or other trust property.
- (b) Demolish any improvements.
- (c) Raze existing or erect new party walls or buildings.

Comment. Section 4430 continues subdivision (6) of former Section 1120.2 and is the same in substance as Section 3(c)(8) of the Uniform Trustees' Powers Act (1964).

29121

§ 4431. Development of land

4431. The trustee may:

- (a) Subdivide, develop, or dedicate land to public use.
- (b) Make or obtain the vacation of plats and adjust boundaries.
- (c) Adjust differences in valuation on exchange or partition by giving or receiving consideration.
- (d) Dedicate easements to public use without consideration.

Comment. Section 4431 continues subdivision (7) of former Section 1120.2 and is the same in substance as Section 3(c)(9) of the Uniform Trustees' Powers Act (1964).

29196

§ 4432. Leases

4432. The trustee may enter into a lease for any purpose as lessor or lessee with or without the option to purchase or renew and for a term within or extending beyond the term of the trust.

Comment. Section 4432 continues the substance of part of subdivision (1) of former Section 1120.2 and is the same in substance as Section 3(c)(10) of the Uniform Trustees' Powers Act (1964). Section 4432 supersedes former Civil Code Section 2272.

29198

§ 4433. Mineral leases

4433. The trustee may enter into a lease or arrangement for exploration and removal of gas, oil, or other minerals, and may enter into a community oil lease or a pooling or unitization agreement.

Comment. Section 4433 continues part of subdivision (1) of former Section 1120.2 and adds the reference to a pooling or unitization agreement drawn from Section 3(c)(11) of the Uniform Trustees' Powers Act (1964).

29199

§ 4434. Options

4434. The trustee may grant an option involving disposition of trust property or may take an option for the acquisition of any property.

Comment. Section 4434 continues subdivision (8) of former Section 1120.2 and is the same in substance as Section 3(c)(12) of the Uniform Trustees' Powers Act (1964). See also Section 62 ("property" defined).

29200

§ 4435. Voting rights with respect to corporate shares, memberships, or property

4435. With respect to any shares of stock of a domestic or foreign corporation, any membership in a nonprofit corporation, or any other property, a trustee may do any or all of the following:

(a) Vote in person, and give proxies to exercise, any voting rights with respect to the shares, memberships, or property.

(b) Waive notice of a meeting or give consent to the holding of a meeting.

(c) Authorize, ratify, approve, or confirm an action that could be taken by shareholders, members, or property owners.

Comment. Section 4435 supersedes subdivision (9) of former Probate Code Section 1120.2 and former Civil Code Section 2270. This section is drawn from Section 2458 (voting rights under guardianship-conservatorship statute). See also Corp. Code §§ 702(a) (voting of shares by trustee), 705 (proxies).

31497

§ 4436. Payment of calls and assessments

4436. The trustee may pay calls, assessments, and any other sums chargeable or accruing against or on account of securities.

Comment. Section 4436 continues subdivision (10) of former Section 1120.2 and is the same as Section 3(c)(14) of the Uniform Trustees' Powers Act (1964).

31499

§ 4437. Stock subscriptions and conversions

4437. The trustee may sell or exercise stock subscription or conversion rights.

Comment. Section 4437 continues subdivision (11) of former Section 1120.2 and is the same as the first part of Section 3(c)(15) of the Uniform Trustees' Powers Act (1964).

31502

§ 4438. Consent to change in form of business; voting trusts

4438. The trustee may consent, directly or through a committee or other agent, to the reorganization, consolidation, merger, dissolution, or liquidation of a corporation or other business enterprise, and may participate in voting trusts, pooling arrangements, and foreclosures.

Comment. Section 4438 supersedes subdivision (4) of former Section 1120.2 and is similar to the second part of Section 3(c)(15) of the Uniform Trustees' Powers Act (1964).

31511

§ 4439. Holding securities in name of nominee

4439. The trustee may hold a security in the name of a nominee or in other form without disclosure of the trust so that title to the security may pass by delivery, but the trustee is liable for any act of the nominee in connection with the security so held.

Comment. Section 4439 continues subdivision (12) of former Section 1120.2 and is the same in substance as Section 3(c)(16) of the Uniform Trustees' Powers Act (1964). See also Corp. Code § 702(a) (trustee not entitled to vote shares without transfer into trustee's name).

§ 4439.5. Deposit of securities in securities depository

4439.5. The trustee may deposit securities in a securities depository, as defined in Section 30004 of the Financial Code, which is licensed under Section 30200 of the Financial Code or is exempt from licensing by Section 30005 or 30006 of the Financial Code. The securities may be held by the securities depository in the manner authorized by Section 775 of the Financial Code.

Comment. Section 4439.5 continues the substance of part of former Civil Code Section 2240.

31514

§ 4440. Insurance

4440. The trustee may insure the property of the trust against damage or loss and may insure the trustee against liability with respect to third persons.

Comment. Section 4440 continues subdivision (13) of former Section 1120.2 and is the same in substance as Section 3(c)(17) of the Uniform Trustees' Powers Act (1964). See also Section 62 ("property" defined).

31515

§ 4441. Borrowing money

4441. The trustee may borrow money to be repaid from trust property or otherwise.

Comment. Section 4441 continues the authority to borrow provided in subdivision (3) of former Section 1120.2 and adds language drawn from Section 3(c)(18) of the Uniform Trustees' Powers Act (1964). See also Section 62 ("property" defined).

31516

§ 4442. Advancing money

4442. The trustee may advance money for the protection of the trust and for all expenses, losses, and liabilities sustained in the administration of the trust or because of the holding or ownership of any trust property.

Comment. Section 4442 continues the first part of subdivision (14) of former Section 1120.2 and is the same in substance as part of Section 3(c)(18) of the Uniform Trustees' Powers Act (1964). See also Section 62 ("property" defined). For provisions relating to the trustee's reimbursement and lien, see Sections 4503-4504.

§ 4443. Payment and settlement of claims

4443. The trustee may:

(a) Pay or contest any claim.

(b) Settle a claim by or against the trust by compromise, arbitration, or otherwise.

(c) Release, in whole or in part, any claim belonging to the trust to the extent that the claim is uncollectible.

Comment. Section 4443 continues part of subdivision (15) of former Section 1120.2 and is the same as Section 3(c)(19) of the Uniform Trustees' Powers Act (1964).

§ 4444. Payment of taxes, trustee's compensation, and other expenses

4444. The trustee may pay taxes, assessments, compensation of the trustee, and other expenses incurred in the collection, care, administration, and protection of the trust.

Comment. Section 4444 continues subdivision (16) of former Section 1120.2 and is the same as Section 3(c)(20) of the Uniform Trustees' Powers Act (1964). For other provisions relating to trustees' compensation, see Sections 4500-4502.

§ 4445. Allocation to principal and income

4445. The trustee may allocate items of income or expense to either trust income or principal as provided by law, including creation of reserves out of income for depreciation, obsolescence, or amortization, or for depletion in mineral or timber properties.

Comment. Section 4445 is a new provision and is the same as Section 3(c)(21) of the Uniform Trustees' Powers Act (1964). For provisions governing the allocation to principal or income, see Sections 4800-4817 (Revised Uniform Principal and Income Act).

§ 4446. Distribution to beneficiaries under legal disability

4446. The trustee may pay any sum distributable to a beneficiary under legal disability, without liability to the trustee, by paying the sum to the beneficiary or by paying the sum for the use of the beneficiary

either to a legal representative appointed by the court, or if none, to a relative.

Comment. Section 4446 is a new provision and is the same as Section 3(c)(22) of the Uniform Trustees' Powers Act (1964). The exercise of this power is subject to other provisions of law.

31524

§ 4447. Nature and value of distributions

4447. The trustee may effect distribution of property and money in divided or undivided interests and to adjust resulting differences in valuation.

Comment. Section 4447 is a new provision and is the same as Section 3(c)(23) of the Uniform Trustees' Powers Act (1964).

31552

§ 4448. Employing persons

4448. The trustee may:

(a) Employ persons, including attorneys, auditors, investment advisors, or agents, even if they are associated with the trustee, to advise or assist the trustee in the performance of administrative duties.

(b) Act without independent investigation upon the recommendations of persons employed.

(c) Employ one or more agents to perform any act of administration, whether or not discretionary, instead of acting personally.

Comment. Section 4448 is new and is the same in substance as Section 3(c)(24) of the Uniform Trustees' Powers Act (1964).

31563

§ 4449. Actions and proceedings

4449. The trustee may prosecute or defend actions, claims, or proceedings for the protection of trust property and of the trustee in the performance of its duties.

Comment. Section 4449 supersedes the last clause of subdivision (15) of former Section 1120.2 and is the same in substance as Section 3(c)(25) of the Uniform Trustees' Powers Act (1964). See also Section 62 ("property" defined).

§ 4450. Execution and delivery of instruments

4450. The trustee may execute and deliver all instruments which will accomplish or facilitate the exercise of the powers vested in the trustee.

Comment. Section 4450 is new and is the same as Section 3(c)(26) of the Uniform Trustees' Powers Act (1964).

CHAPTER 3. COMPENSATION AND EXPENSES OF TRUSTEES

§ 4500. Trustee's compensation provided under trust terms; greater compensation

4500. (a) Except as provided in subdivision (b), if the trust instrument provides for the trustee's compensation, the trustee is entitled to be compensated in accordance with the terms of the trust.

(b) Upon proper showing, the court may fix or allow greater compensation than could be allowed under the terms of the trust in any of the following circumstances:

(1) Where the duties of the trustee are substantially greater than those contemplated when the trust was created.

(2) Where the compensation in accordance with the terms of the trust would be inequitable or unreasonably low.

(3) In other extraordinary circumstances calling for equitable relief.

Comment. Section 4500 continues the substance of the first and second sentences of former Civil Code Section 2274, and the first and second sentences of former Probate Code Section 1122. See Section 4620(b)(6) (petition to fix compensation).

§ 4501. Trustee's compensation where trust silent

4501. If the trust instrument does not specify the trustee's compensation, the trustee is entitled to reasonable compensation under the circumstances.

Comment. Section 4501 continues the substance of the third sentence of former Civil Code Section 2274 and part of the third sentence of

former Probate Code Section 1122. The trustee has authority to fix its compensation under Section 4444 subject to court review. See also Section 4620(b)(6) (petition to fix compensation).

31798

§ 4502. Compensation of cotrustees

4502. Unless the trust instrument provides or the trustees agree otherwise, if there are two or more cotrustees of the same trust, the compensation shall be apportioned among the trustees according to the services rendered by them respectively.

Comment. Section 4502 continues the substance of the fourth sentence of former Civil Code Section 2274 and the fourth sentence of former Probate Code Section 1122.

31799

§ 4503. Repayment of trustee for expenses

4503. A trustee is entitled to the repayment, out of the trust estate, of all expenses properly incurred by the trustee in the administration of the trust. The trustee is also entitled to repayment of unauthorized expenditures if they benefited the trust estate.

Comment. Section 4503 continues the substance of former Civil Code Section 2273 and supersedes part of the last sentence of Probate Code Section 1122 relating to proper expenses.

32110

§ 4504. Trustee's lien

4504. The trustee has a lien on the trust property as against the beneficiary in the amount of advances, with any interest, made for the protection of the trust or for expenses, losses, and liabilities sustained in the administration of the trust or because of holding or ownership of any trust property.

Comment. Section 4504 continues the substance of part of subdivision (14) of former Section 1120.2 and is the same in substance as part of Section 3(c)(18) of the Uniform Trustees' Powers Act (1964).

CHAPTER 4. LIABILITY

§ 4520. Personal liability of trustee to third persons on contracts

4520. Unless otherwise provided in the contract, a trustee is not personally liable on a contract properly entered into in the trustee's fiduciary capacity in the course of administration of the trust unless the trustee fails to reveal the trustee's representative capacity and identify the trust estate in the contract.

Comment. Section 4520 is a new provision and is the same in substance as Uniform Probate Code Section 7-306(a). The rule provided in Section 4520 is the reverse of the case law rule in California that a trustee was personally liable on a contract unless the contract stipulated that the trustee was not liable. See *Hall v. Jameson*, 151 Cal. 606, 611, 91 P. 518 (1907); *Duncan v. Dormer*, 94 Cal. App.218, 221, 270 P. 1003 (1928). However, to fall within this rule the trustee's status and the identity of the trust must be revealed. This was not sufficient under prior case law. See *Hall v. Jameson*, supra.

Note. The staff has some concern about the technical aspects of UPC Section 7-306(a), specifically where it requires the trustee to reveal its representative capacity and identify the trust estate. Read literally, personal liability could not be avoided if the trustee merely signed the contract as trustee. We are uncertain as to the purpose of this requirement and wonder whether it should be retained. It has been suggested that "by the better view, if in any manner it appears from the contract, construed in the light of the attending circumstances, personal liability was not intended," then the trustee should not be personally liable. See Tepper, Liability of the Trust Estate Arising Out of Trustee's Contracts with Third Persons, 2 Hastings L.J. 53, 56 (1950). It seems that identification of the trustee as a trustee should be sufficient in most cases.

32175

§ 4521. Personal liability of trustee arising from ownership or control of trust estate or torts

4521. A trustee is personally liable for obligations arising from ownership or control of property of the trust estate and for torts committed in the course of administration of the trust only if the trustee is personally at fault.

Comment. Section 4521 is a new provision and is the same in substance as Uniform Probate Code Section 7-306(b).

§ 4522. Assertion of claims against trust estate

4522. A claim based on a contract entered into by a trustee in the trustee's fiduciary capacity, on an obligation arising from ownership or control of the trust estate, or on a tort committed in the course of administration of the trust may be asserted against the trust estate by proceeding against the trustee in the trustee's fiduciary capacity, whether or not the trustee is personally liable on the claim.

Comment. Section 4522 is a new provision and is the same in substance as Uniform Probate Code Section 7-306(c). This section supersedes the last sentence of former Civil Code Section 2267 (acts of trustee within scope of authority bind trust property). Section 4522 alters the case law rule that the trustee could not be sued in a representative capacity where the trust estate was not liable. See Purdy v. Bank of Am. Nat'l Trust & Sav. Ass'n, 2 Cal.2d 298, 301, 40 P.2d 481 (1935); Rapaport v. Forer, 20 Cal. App.2d 271, 278, 66 P.2d 1242 (1937). See also Section 4523 (liability as between trustee and trust estate).

32184/NZ

§ 4523. Liability as between trustee and trust estate

4523. The question of liability as between the trust estate and the trustee individually may be determined in a proceeding for accounting, surcharge, or indemnification, or other appropriate proceeding.

Comment. Section 4523 is new and is the same as Uniform Probate Code Section 7-306(d). The Comment to Uniform Probate Code Section 7-306 contains the following explanation:

Ultimate liability as between the estate and the fiduciary need not necessarily be determined whenever there is doubt about this question. It should be permissible, and often it will be preferable, for judgment to be entered, for example, against the trustee individually for purposes of determining the claimant's rights without the trustee placing that matter into controversy. The question of his right of reimbursement may be settled informally with beneficiaries or in a separate proceeding in the probate court involving reimbursement. The section does not preclude the possibility, however, that beneficiaries might be permitted to intervene in litigation between the trustee and a claimant and that all questions might be resolved in that action.

32464

§ 4524. Limitations on proceedings against trustees after final account

4524. (a) Unless previously barred by adjudication, consent, or limitation:

(1) If a beneficiary has received a final account or other statement fully disclosing the subject of a claim and showing termination of the trust relationship between the trustee and the beneficiary, a claim against the trustee for breach of trust is barred as to that beneficiary unless a proceeding to assert the claim is commenced within six months after receipt of the final account or other statement.

(2) Notwithstanding a lack of full disclosure, if a beneficiary has received a final account or other statement and the trustee has informed the beneficiary of the location and availability of records for examination, a claim against the trustee for breach of trust is barred as to that beneficiary unless a proceeding to assert the claim is commenced within three years after receipt of the final account or other statement.

(b) For the purpose of subdivision (a), a beneficiary is deemed to have received a final account or other statement if, in the case of an adult, it is received by the adult personally or, in the case of a minor or disabled person, it is received by the minor's or disabled person's representative.

Comment. Section 4524 is a new provision and is the same in substance as Uniform Probate Code Section 7-307. Under prior law, the four-year limitations period provided in Code of Civil Procedure Section 343 was applied to actions for breach of express trusts. See *Cortelyou v. Imperial Land Co.*, 166 Cal. 14, 20, 134 P. 981 (1913); *Oeth v. Mason*, 247 Cal. App.2d 805, 811-12, 56 Cal. Rptr. 69 (1967). This provision does not displace the statute of limitations applicable to actions for relief on the ground of fraud. See Code Civ. Proc. § 338(4).

15632

§ 4525. Violations of trustee's duty

4525. Every violation of the duties of the trustee is a fraud against the beneficiary of the trust.

Comment. Section 4525 continues the substance of former Civil Code Section 2234. See Sections 4300-4396 (trustees' duties).

Note. This section could be omitted. Civil Code Section 1573 provides in part that a breach of duty through which a person gains an advantage over another is a constructive fraud.

10019

§ 4526. Presumption of undue influence and insufficiency of consideration

4526. (a) Transactions between a trustee and a beneficiary of the trust during the existence of the trust, or while the influence acquired

by the trustee remains, by which the trustee obtains any advantage from the beneficiary, are presumed to be entered into by the beneficiary without sufficient consideration and under undue influence.

(b) The presumptions provided in subdivision (a) do not apply to the provisions of an agreement between a trustee and a beneficiary relating to the hiring or compensation of the trustee.

Comment. Section 4526 continues the substance of former Civil Code Section 2235.

10020

§ 4527. Mingling trust property

4527. A trustee who willfully and unnecessarily mingles the trust property with the trustee's property, making it appear to be solely the trustee's property, is liable for its safety and for the value of its use.

Comment. Section 4527 continues the substance of former Civil Code Section 2236.

10022

§ 4528. Measure of liability for breach of trust

4528. A trustee who uses or disposes of the trust property contrary to Section 4303 may, at the option of the beneficiary, be required to account for all profits so made or pay the value of its use. If the trustee has disposed of the property, the trustee may, at the option of the beneficiary, be required to replace it, with its fruits, or to account for its proceeds, with interest.

Comment. Section 4528 continues the substance of former Civil Code Section 2237.

10023

§ 4529. Measure of liability for breach in good faith

4529. (a) A trustee who uses or disposes of the trust property in any manner not authorized by the trust, but in good faith and with the intent to serve the interests of the beneficiary, is liable only to make good whatever is lost to the beneficiary by the error.

(b) A trustee who uses or disposes of the trust property in any manner not authorized by a revocable trust, but in compliance with subdivision (b) of Section 4305, is not liable to the beneficiary.

Comment. Section 4529 continues former Civil Code Section 2238 [as proposed to be amended in AB 261 (1983)].

10024

§ 4530. Liability of cotrustees

4530. A trustee is liable for the wrongful acts of a cotrustee to which the trustee consented or which by the trustee's negligence, the cotrustee was enabled to commit. A trustee is not liable for other acts of a cotrustee.

Comment. Section 4530 continues the substance of former Civil Code Section 2239.

10025

§ 4531. Liability for interest for failure to invest

4531. If a trustee fails to invest trust money as required by law, the trustee is liable for simple interest on the money, if the failure is only negligent, and is liable for compound interest if the failure is willful.

Comment. Section 4531 continues the substance of former Civil Code Section 2262.

13616

CHAPTER 5. OFFICE OF TRUSTEE

Article 1. General Provisions

§ 4550. Certificate of appointment as trustee

4550. Upon application of a trustee of a trust created by a will, the court clerk shall issue a certificate that the trustee is a duly appointed and acting trustee under the will.

Comment. Section 4550 continues former Section 1130.1.

14919

§ 4551. Trustee's bond

4551. (a) A trustee is not required to provide bond to secure performance of the trustee's duties, except in any of the following circumstances:

(1) Where bond is required by the terms of the trust.

(2) Where bond is reasonably requested by a beneficiary.

(3) Where bond is found by the court to be necessary to protect the interests of beneficiaries who are not able to protect themselves and whose interests otherwise are not adequately represented.

(b) On petition of the trustee or other interested person, the court may excuse a requirement of bond, reduce the amount of the bond, release the surety, or permit the substitution of another bond with the same or different sureties.

(c) If bond is required, it shall be filed in the court having jurisdiction over the trust in the amount and with sureties and liabilities as provided for bonds of personal representatives.

Comment. Section 4551 is the same in substance as Uniform Probate Code Section 7-304. This section supersedes former Sections 1127 (bond of trustee named by court) and 1127.5 (exception for substitute or successor trustee that is charitable corporation).

405/602

§ 4552. Trustee's office not transferable

4552. The trustee may not transfer the office of trustee to another person or delegate the entire administration of the trust to another person or to a cotrustee.

Comment. Section 4552 is drawn from Section 4 of the Uniform Trustees' Powers Act (1964).

405/604

Article 2. Cotrustees

§ 4560. Actions by cotrustees

4560. If a trust has several cotrustees, all are required to unite in any act to bind the trust property, unless the trust otherwise provides.

Comment. Section 4560 continues the substance of former Civil Code Section 2268 and the first part of former Civil Code Section 860.

405/785

§ 4561. Inability of cotrustee to act

4561. If a cotrustee dies, becomes legally incapable of acting, resigns, disclaims trusteeship, or is discharged, the remaining cotrustees may act, unless the trust otherwise provides.

Comment. Section 4561 supersedes the second part of former Civil Code Section 860 and former Civil Code Section 2288.

405/786

Article 3. Appointment of Trustees

§ 4570. Trustee's care and diligence in appointment of successor

4570. If a trustee procures or assents to the trustee's discharge from office before the trust is fully executed, the trustee shall use at least ordinary care and diligence to secure the appointment of a trustworthy successor before accepting final discharge.

Comment. Section 4570 continues the substance of former Civil Code Section 2260.

405/792

§ 4571. Court appointment of trustee

4571. If a trustee dies, resigns, fails or declines to act, cannot be identified, is incapable of acting for any reason, or is removed, or a vacancy in the trusteeship is otherwise created or exists, and if the trust instrument does not provide a practical method for appointing a successor trustee, the court may upon petition appoint a trustee to fill the vacancy. Other things being equal, the court shall give preference to the nominee of beneficiaries of the trust who are over 14 years of age. If the trust provides for more than one trustee, the court may, in its discretion, appoint the original number or any lesser number of trustees.

Comment. Section 4571 continues the substance of former Probate Code Section 1138.9, former Civil Code Section 2287, and the second sentence of former Civil Code Section 2289, and supersedes former Civil Code Sections 1125 and 1126 and the first sentence of former Civil Code Section 2289. See also Section 4620(b)(7) (petition for appointment of trustee).

405/794

Article 4. Resignation and Removal of Trustees

§ 4580. Vacation of office of trustee

4580. The office of a trustee (including a trustee under a deed of trust given to secure an obligation) is vacated:

(a) In the case of an individual trustee, by any of the following:

(1) The trustee's discharge.

(2) The trustee's death.

(3) Appointment of a conservator or guardian of the trustee's person or estate.

(4) The trustee's filing of a petition for adjudication of bankruptcy or for approval of an arrangement, composition, or other extension under the federal Bankruptcy Code, or the approval for a petition filed against the trustee for any of these purposes.

(b) In the case of a corporate trustee, by any of the following:

(1) The trustee's discharge.

(2) Revocation of the trustee's charter or suspension of its corporate powers, if its charter remains revoked or its powers remain suspended for a period of 30 days.

(3) Appointment of a receiver for the trustee if the appointment is not vacated within a period of 30 days.

(4) The trustee's filing of a petition for adjudication or bankruptcy or for approval of an arrangement, composition, or other extension under the federal Bankruptcy Code, or the approval for a petition filed against it for any of these purposes.

Comment. Section 4580 continues the substance of the first and last paragraphs of former Civil Code Section 2281. See also Section 4052 (protection of third persons dealing with trustee whose office is vacated).

405/796

§ 4581. Resignation of trustee

4581. (a) Unless otherwise expressly provided in the trust instrument, a trustee may resign at any time.

(b) The resignation and appointment of a successor trustee shall be effected as provided in the trust instrument. If the trust instrument is silent, a trustee may file with the court a petition tendering the trustee's resignation. The court shall accept the resignation and may make an order appointing a successor trustee or otherwise necessary for the preservation of the trust property.

Comment. Section 4581 continues the substance of the first three sentences of former Section 1138.8 and supersedes former Section 1124, the first paragraph of former Section 1125.1, and part of the first sentence of former Civil Code Section 2283. See also Section 4620(b)(8) (petition to accept resignation of trustee).

§ 4582. Liability of resigning trustee

4582. The liability of a resigning trustee or the sureties on the trustee's bond, if any, is not discharged, released, or affected in any manner by the resignation. The liability continues until the trustee has delivered all of the trust property to the successor trustee or person appointed by the court to receive the property.

Comment. Section 4582 continues the substance of the second paragraph of former Section 1125.1 and the last sentence of former Section 1138.8.

§ 4583. Discharge of trustee

4583. A trustee can be discharged from the trust only in one of the following manners:

- (a) By the extinction of the trust.
- (b) By the completion of the trustee's duties under the trust.
- (c) By such means as may be prescribed by the trust instrument.
- (d) By the consent of the beneficiary, if the beneficiary has the capacity to contract.
- (e) By court order.

Comment. Section 4583 continues the substance of former Civil Code Section 2282. See also Section 4601 (jurisdiction in superior court).

Note. Civil Code Section 2282 is proposed to be amended in AB 261 (1983).

§ 4584. Removal of trustee by court

4584. (a) The court may remove a trustee who has violated or is unfit to execute the trust.

(b) If it appears to the court that trust property or the interests of a beneficiary may suffer loss or injury pending a decision on a petition for removal of a trustee and any appellate review, the court may, on petition of a beneficiary or other interested person or on its own motion, compel the trustee whose removal is sought to surrender trust property in the trustee's possession or control to a custodian designated by the court or to a cotrustee. The court may also suspend the powers of the trustee to the extent the court deems necessary.

Comment. Subdivision (a) of Section 4584 continues the substance of part of the first sentence of former Civil Code Section 2283 and supersedes former Probate Code Section 1123.5. See also Sections 4601 (jurisdiction in superior court), 4620(b)(7) (petition to remove trustee). Subdivision (b) is drawn from former Section 1123.6.

15346

PART 4. JUDICIAL ADMINISTRATION OF TRUSTS

CHAPTER 1. COURT JURISDICTION OVER TRUSTS

Article 1. Jurisdiction and Venue

§ 4600. Principal place of administration of trust

4600. (a) The principal place of administration of a trust is the trustee's usual place of business where the day-to-day records pertaining to the trust are kept or, if none, the trustee's residence.

(b) In the case of cotrustees, the principal place of administration is the usual place of business where the day-to-day records pertaining to the trust are kept or, if none, the usual place of business or residence of any of the cotrustees as agreed upon by them or, if none, the residence or place of business of any of the cotrustees.

Comment. Section 4600 continues the substance of the second and third sentences of former Section 1138.3.

4996

§ 4601. Jurisdiction

4601. (a) The superior court has exclusive jurisdiction of proceedings concerning the internal affairs of trusts as provided in this chapter.

(b) The superior court has concurrent jurisdiction of the following:

(1) Actions and proceedings to determine the existence or nonexistence of trusts.

(2) Actions and proceedings by or against creditors or debtors of trusts.

(3) Other actions and proceedings involving trustees and third persons.

Comment. Section 4601 is new. Subdivision (a) provides for exclusive jurisdiction in the superior court in matters involving the internal affairs of trusts. See Article 2 (commencing with Section 4620). Jurisdiction was in the superior court under former Section 1138.3, but former Section 1138.11 also provided that the remedies under that part

of former law were not exclusive. Subdivision (a) also supersedes former Section 1123.7. Subdivision (a) is drawn from the first sentence of Uniform Probate Code Section 7-201(a).

Subdivision (b) is new and is drawn from Uniform Probate Code Section 7-204.

405/979

§ 4602. Venue

4602. (a) The proper county for commencement of a proceeding pursuant to this chapter is the county in which is located the principal place of administration of the trust.

(b) In other cases, venue is determined by the rules applicable to civil actions generally.

Comment. Subdivision (a) of Section 4602 continues the substance of part of the first sentence of former Section 1138.3. See Sections 4600 (principal place of administration of trust), 4601 (a) jurisdiction of superior court.

Subdivision (b) provides venue rules applicable in cases described in subdivision (b) of Section 4601. This subdivision is drawn from Uniform Probate Code Section 7-204.

405/978

§ 4603. Jurisdiction over parties

4603. (a) By accepting the trusteeship of a trust having its principal place of administration in this state the trustee submits personally to the jurisdiction of the court in the proper county in any proceeding that is properly initiated under this chapter, provided that notice is given the trustee in the manner required by law.

(b) To the extent of their interests in the trust, all beneficiaries of a trust having its principal place of administration in this state are subject to the jurisdiction of the court in the proper county in any proceeding that is properly initiated under this chapter, provided that notice is given the trustee in the manner required by law.

Comment. Section 4603 is a new provision that is intended to facilitate the exercise of the court's power under this chapter when properly invoked. This section is drawn from Uniform Probate Code Section 7-103.

Article 2. Proceedings Concerning Trusts

§ 4620. Petitioners; grounds for petition

4620. (a) Subject to Section 4621, a trustee, beneficiary, or other interested person may petition the court under this article concerning the internal affairs of a trust.

(b) Proceedings concerning the internal affairs of trusts include, but are not limited to, proceedings for any of the following purposes:

(1) Ascertaining beneficiaries and determining to whom property shall pass or be delivered upon final or partial termination of the trust, to the extent such determination is not made by the trust instrument.

(2) Settling the accounts and passing upon the acts of the trustee.

(3) Instructing the trustee.

(4) Compelling the trustee to submit accounts and report acts as trustee to a beneficiary where it appears that the trustee has failed to comply with Section 4340.

(5) Granting powers to the trustee as provided by Section 4401.

(6) Fixing, directing, or allowing payment of compensation in accordance with Chapter 3 (commencing with Section 4500) of Part 3.

(7) Appointing or removing a trustee.

(8) Accepting the resignation of a trustee.

(9) Authorizing or directing transfer of a trust or trust property to another jurisdiction pursuant to Chapter 2 (commencing with Section 4650).

(10) Directing the relief provided in Section 4242 in the case of a trust with uneconomically low principal.

(11) Amending or conforming the trust instrument in the manner required to qualify a decedent's estate for the charitable estate tax deduction under federal law, including the addition of mandatory governing instrument requirements for a charitable remainder trust as required by final regulations and rulings of the United States Internal Revenue Service, in any case in which all parties interested in the trust have submitted written agreement to the proposed changes or written disclaimer of interest.

(12) Determining questions of construction of trust instruments.

(13) Determining the existence or nonexistence of any immunity, power, privilege, duty, or right.

Comment. Section 4620 generally continues the substance of subdivision (a) of former Section 1138.1 and supersedes parts of former Section 1120. Paragraphs (12) and (13) are new and are drawn from Uniform Probate Code Section 7-201(a). See also Sections 24 ("beneficiary" defined), 82 ("trust" defined), 4602(a) (venue). Subdivision (b)(6) supersedes the last sentence of former Civil Code Section 2274.

405/944

§ 4621. Limitations in trust instrument

4621. The trust instrument may expressly or by necessary implication limit or eliminate the authority of any trustee, beneficiary, or other person to petition the court under this article for any one or more of the purposes described in Section 4620.

Comment. Section 4621 continues the substance of subdivision (b) of former Section 1138.1. See also Section 24 ("beneficiary" defined).

405/946

§ 4622. Commencement of proceeding

4622. A proceeding under this article shall be commenced by filing a verified petition stating facts showing that the petition is authorized under this article and under the terms of the trust.

Comment. Section 4622 continues the substance of former Section 1138.4.

405/948

§ 4623. Dismissal of petition

4623. The court may dismiss a petition where either of the following circumstances appears:

(a) That the proceeding is not reasonably necessary for the protection of the interests of the petitioner.

(b) That nondisclosure of the terms, assets, management, and administration of the trust is in the best interests of the purpose of the trust.

Comment. Section 4623 continues the substance of former Section 1138.5. See Section 4620(a) (who may petition).

§ 4624. Notice

4624. (a) At least 30 days before the time set for the hearing on the petition, the petitioner shall cause notice of the time and place of hearing to be mailed to the following persons (if not the petitioner):

(1) The trustee.

(2) Any cotrustee not petitioning.

(3) Except as provided in Section 4078, all beneficiaries of the trust, including all persons in being who may participate in the principal or income of the trust.

(b) If a cotrustee not petitioning or a beneficiary, in person or by counsel, has served and filed a notice of appearance directed to the petitioner or the petitioner's counsel in connection with the proceeding or a written request for a copy of the petition, and has given an address to which notice or a copy of the petition may be sent or delivered, the petitioner shall cause a copy of the petition to be mailed to that person within five days after service of notice of appearance or receipt of the request.

(c) Notice of any petition filed on the grounds of paragraph (11) of subdivision (b) of Section 4620 or to modify or terminate a charitable trust subject to supervision under Article 7 (commencing with Section 12580) of Chapter 6 of Part 2 of Division 3 of Title 2 of the Government Code shall be given to the Attorney General.

Comment. Subdivision (a) of Section 4625 continues the substance of the second paragraph of subdivision (a) of former Section 1138.6. See Section 4070 et seq. (manner of notice). Subdivision (b) continues the substance of the third paragraph of subdivision (a) of former Section 1138.6. Subdivision (c) continues the substance of subdivision (d) of former Section 1138.6, and also reflects the notice requirement provided in Government Code Section 12591. See also Section 24 ("beneficiary" defined).

§ 4625. Orders and decrees

4625. The court may make all orders and take all other action necessary or property to dispose of the matters presented by the petition.

Comment. Section 4625 continues former Section 1138.2.

§ 4626. Appeal

4626. An appeal may be taken from any of the following orders or from the refusal to make any of the following orders:

- (a) Ascertaining beneficiaries and determining to whom property shall pass.
- (b) Settling the accounts and passing upon the acts of the trustee.
- (c) Instructing the trustee.
- (d) Granting powers to the trustee.
- (e) Fixing, directing, or allowing payment of compensation.
- (f) Appointing or removing a trustee.
- (g) Authorizing or directing transfer of a trust or trust property to another jurisdiction.
- (h) Dismissing a petition under this article.

Comment. Section 4626 continues the substance of former Section 1138.10 and parts of Section 1240. See Sections 4620(b) (grounds for petition under this article), 4623 (dismissal of petition).

§ 4627. Cumulative remedies

4627. The remedies provided under this article are cumulative and nonexclusive.

Comment. Section 4627 continues former Section 1138.11.

§ 4628. Legislative intent

4628. It is the intent of the Legislature in enacting this chapter that the administration of trusts proceed expeditiously and free of judicial intervention, subject to the jurisdiction of the courts of this state as invoked pursuant to this chapter or otherwise invoked pursuant to law.

Comment. Section 4628 continues former Section 1138.12. See also Section 82 ("trust" defined).

CHAPTER 2. TRANSFER OF TRUST TO ANOTHER JURISDICTION

§ 4650. Application of chapter

4650. (a) This chapter applies to all of the following:

(1) A written trust as defined in Section 82.

(2) A trust subject to Chapter 8 (commencing with Section 6320) of Part 1 of Division 6.

(3) Any other trust to which the provisions of this article are made applicable by statute or trust instrument.

(b) This chapter shall not be construed to prevent the transfer of the place of administration of a trust or of trust property to another jurisdiction in any case where judicial approval of a transfer was not required under law in effect immediately prior to March 4, 1972.

Comment. Section 4650 continues the substance of subdivisions (a) and (b) of former Section 1139. Under the definition of trust in Section 82, this chapter also applies to charitable trusts. See also Sections 4602 (venue), 4620(b)(9) (proceedings for transfer of trust).

Note. This section assumes the enactment of the wills and intestate succession bill, AB 25 (1983).

27806

§ 4651. "Beneficiary" defined

4651. For the purposes of this chapter, beneficiary means all persons in being who shall or may participate in the principal or income of the trust.

Comment. Section 4651 continues former Section 1139.7. See also Section 4078 (notice in cases involving future interests).

28707

§ 4652. Transfer of place of administration or property from California

4652. Subject to the limitations and requirements of this chapter, an order may be made by the superior court for the transfer of the place of administration of a trust or the transfer of some or all of the trust property to another jurisdiction outside of this state.

Comment. Section 4652 continues the substance of the first part of former Section 1139.1 and supersedes former Section 1132. See also Section 62 ("property" defined).

§ 4653. Petition for transfer

4653. A petition for an order authorizing a transfer may be filed by the trustee or by a trust beneficiary.

Comment. Section 4653 continues the first sentence of former Section 1139.2 and the substance of part of former Section 1139.1.

§ 4654. Contents of petition

4654. The petition shall be verified and shall set forth all of the following:

(a) The names, ages, and places of residence of:

(1) The trustee administering the trust in this state.

(2) The trustee, including any domiciliary trustee, in the other jurisdiction to whom administration of the trust or trust property will be transferred.

(3) All persons who are interested in the trust as beneficiaries as far as known to the petitioner.

(b) Whether the trustee in the other jurisdiction has agreed to accept the trust. If so, the acceptance or a true copy shall be attached as an exhibit to the petition or otherwise filed with the court.

(c) A general statement of the qualifications of the trustee who will administer the trust in the other jurisdiction and the amount of fiduciary bond, if any.

(d) A general statement of the nature and value of the property of any trust of the decedent or trustor under the trustee's administration in the other jurisdiction.

(e) The name of the court, if any, having jurisdiction of the trustee in the other jurisdiction or of its accounts or in which a proceeding may be had with respect to administration of the trust or the trustee's accounts.

(f) A statement of the character, condition, location and value of the trust property sought to be transferred.

(g) Whether there is any pending civil action in this state against the trustee.

(h) A statement of the reasons for the transfer.

Comment. Section 4654 continues the substance of the part of former Section 1139.2 providing for the contents of the petition for transfer. See also Section 4651 ("beneficiary" defined).

27811

§ 4655. Notice and hearing

4655. (a) At least 30 days prior to the time set for the hearing, the petitioner shall cause a copy of the notice of hearing to be mailed to each of the persons named in the petition at their respective places of residence stated in the petition.

(b) If the trust involves or may involve a charitable trust, bequest, or devise of the character specified in Section 328, a copy of the notice shall be mailed or served upon the Attorney General at least 20 days before the hearing.

(c) Any person interested in the trust, as trustee, beneficiary, or otherwise, may appear and file written grounds in opposition to the petition.

Comment. Section 4655 continues the substance of the last three sentences of former Section 1139.3. See also Section 4001 (clerk to set petition for hearing). If a beneficiary is named in the petition and so is required to be given notice, Section 4078 may apply.

27812

§ 4656. Order granting transfer

4656. The court may, in its discretion, grant the petition and order the trustee to transfer the trust property or to change the place of administration to the other jurisdiction if, after hearing, all of the following appear to the court:

(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.

(b) The substantial rights of residents of this state will not be materially affected by the transfer.

(c) The transfer will not violate the terms of the trust.

(d) Any new trustee to whom the trust assets are to be transferred is qualified, willing, and able to administer the trust or trust property upon the same trusts.

Comment. Section 4656 continues former Section 1139.4 and the substance of part of former Section 1139.1.

27813

§ 4657. Manner of transfer; discharge of trustee

4657. If a transfer is ordered under this chapter, the court may direct the manner of transfer and impose such terms and conditions as may be just, including, but not limited to, a requirement for the substitution of a successor trustee in any pending litigation in this state. The delivery in accordance with the order of the court is a full discharge of the trustee in relation to all property embraced in the order.

24829

CHAPTER 3. TRANSFER OF TRUST FROM ANOTHER JURISDICTION

§ 4670. Application of chapter

4670. (a) This chapter applies to any written trust as defined in Section 82, or portion thereof, administered in another jurisdiction outside of this state.

(b) This chapter shall not be construed to prevent transfer of the place of administration of a trust or of trust property to this state from another jurisdiction in any case where judicial approval of the transfer was not required under the law in effect immediately prior to January 1, 1977.

Comment. Section 4670 continues former Section 1139.10 without substantive change. This section makes this chapter applicable to the transfer to California of the place of administration of trusts or trust property administered in another jurisdiction outside of California. This chapter applies to trusts administered in foreign countries as well as those administered in sister states. Subdivision (b) is comparable to subdivision (b) of Section 4650.

15649

§ 4671. "Beneficiary" defined

4671. For purposes of this chapter, "beneficiary" means all persons in being who shall or may participate in the corpus or income of the trust.

Comment. Section 4671 continues former Section 1139.19 and is the same as Section 4651. It eliminates the requirement of appointment of a representative for unborn beneficiaries. See also Section 4078 (notice in cases involving future interests).

§ 4672. Transfer of place of administration or property to California

4672. Subject to the limitations and requirements of this chapter, an order may be made by the superior court accepting the transfer of the place of administration of a trust from another jurisdiction to this state or the transfer of some or all of the trust property in another jurisdiction to a trustee in this state.

Comment. Section 4672 continues former Section 1139.11 and is comparable to a portion of Section 4652. See also Section 62 ("property" defined).

§ 4673. Petition for transfer

4673. A petition for an order accepting a transfer may be filed by the trustee or by a trust beneficiary.

Comment. Section 4673 continues former Section 1139.12 and is comparable to Section 4653.

§ 4674. Venue

4674. (a) If the petition requests that a resident of this state be appointed trustee, the petition shall be filed in the superior court of the county where the proposed principal place of administration of the trust pursuant to Section 4600 is located.

(b) If the petition requests that only a nonresident of this state be appointed trustee, the petition shall be filed in the superior court of the county where either (1) any beneficiary of the trust resides or (2) a substantial portion of the trust property to be transferred is located or will be located.

Comment. Section 4674 continues former Section 1139.13.

§ 4675. Contents of petition

4675. The petition shall be verified and shall set forth all of the following:

- (a) The names, ages, and places of residence of:
 - (1) The trustee administering the trust in the other jurisdiction.
 - (2) The proposed trustee to whom administration of the trust or trust property will be transferred.

(3) All persons who are interested in the trust as beneficiaries as far as known to the petitioner.

(b) Whether the trust has been subject to supervision over administration in another jurisdiction outside of this state. If so, whether a petition or appropriate request for transfer of place of administration of the trust or trust property to this state has been filed, if necessary, with the court in the other jurisdiction and the status of the petition or request.

(c) Whether the trustee proposed to administer the trust in this state has agreed to accept the trust in this state. If the trustee has, the acceptance shall be attached as an exhibit to the petition or otherwise filed with the court.

(d) A general statement of the qualifications of the trustee proposed to administer the trust in this state and the amount of fiduciary bond to be requested, if any.

(e) A copy of the trust instrument or a statement of the terms of the trust instrument in effect at the time the petition is filed, including all amendments thereto.

(f) A statement of the character, condition, location, and value of the trust property sought to be transferred.

(g) A statement of the reasons for the transfer.

Comment. Section 4675 continues former Section 1139.14 and is comparable to Section 4654. See also Section 4671 ("beneficiary" defined).

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§ 4676. Notice and hearing

4676. (a) At least 30 days prior to the time set for the hearing, the petitioner shall cause a copy of the notice of the hearing to be mailed to each of the persons named in the petition at their respective places of residence stated in the petition.

(b) Any person interested in the trust, as trustee, beneficiary, or otherwise, may appear and file written grounds in opposition to the petition.

Comment. Section 4676 continues the second sentence of subdivision (a) and subdivision (b) of former Section 1139.15 and is comparable to subdivisions (a) and (c) of Section 4655. If a beneficiary is named in the petition and so is required to be given notice, Section 4078 may apply.

§ 4677. Order accepting transfer and appointing trustee

4677. The court may, in its discretion, grant the petition and issue an order accepting transfer of place of administration of the trust or trust property to this state, appoint a trustee to administer the trust in this state, and require the trustee to post appropriate bond, if necessary, if, after hearing, all of the following appear to the court:

(a) The transfer of the trust property to a trustee in this state, or the transfer of the place of administration of the trust to this state, will facilitate the economical and convenient administration of the trust and promote the best interests of the trust and those interested in it.

(b) The transfer will not violate the terms of the trust.

(c) The trustee appointed by the court to administer the trust in this state, to whom the trust assets are to be transferred, is qualified, willing, and able to administer the trust or trust property upon the same trusts.

(d) The proper court in the other jurisdiction has approved the transfer if such approval is necessary under the law of the other jurisdiction.

Comment. Section 4677 continues former Section 1139.16. This section does not require the court to issue formal findings.

§ 4678. Conditional order accepting transfer

4678. When appropriate to facilitate transfer of the trust property or the place of administration of a trust to this state, the court may issue a conditional order appointing a trustee to administer the trust in this state and indicating that transfer to this state will be accepted if transfer is approved by the proper court of the other jurisdiction.

Comment. Section 4678 continues former Section 1139.17. This section provides a method whereby the California court can indicate its willingness to accept jurisdiction over a trust presently administered in another jurisdiction where the law of the other jurisdiction requires appointment of a trustee in the proposed new place of administration prior to approving transfer. See, e.g., Mass. Gen. Laws Ann. ch. 206, § 29 (West 1969); N.C. Gen. Stat. §§ 36-6 to 36-8 (1966).

§ 4679. Administration of transferred trust

4679. (a) If the trust transferred to this state pursuant to this article is a trust as defined in Section 82, the trust shall be administered in this state in accordance with this division. Notwithstanding Section 4602, any proceedings with respect to the trust transferred to this state shall be commenced in the superior court of the proper county as described in Section 4674.

(b) If the trust transferred to this state pursuant to this chapter is not covered by subdivision (a), it shall be administered in the same manner as if the trust had been subject to supervision in this state from the time of its creation.

Comment. Section 4679 continues the substance of former Section 1139.18. See Section 82 ("trust" defined).

Subdivision (b) requires that other types of trusts be administered in the same manner as California trusts of the same type. For example, a charitable trust, during the period when no private beneficiary or remainderman has or may claim an interest, would be subject to the supervision of the Attorney General under Article 7 (commencing with Section 12580) of Chapter 6 of Part 2 of Division 3 of Title 2 of the Government Code, and any controversy would be determined by a civil action. See Corp. Code § 9505 for the authority of the Attorney General to institute such actions. See, e.g., *Brown v. Memorial Nat'l Home Found.*, 162 Cal. App.2d 513, 329 P.2d 118 (1958).

Note. This section needs additional work.

PART 5. REVISED UNIFORM PRINCIPAL AND INCOME ACT

§ 4800. Short title

4800. This part may be cited as the Revised Uniform Principal and Income Act.

Comment. Sections 4800-4817 continue former Civil Code Sections 730-730.17 without substantive change. The source of each section in this part is indicated below.

<u>New Probate Code Section</u>	<u>Former Civil Code Section</u>
4800	730
4801	730a
4802	730.01
4803	730.02
4804	730.03
4805	730.04
4806	730.05
4807	730.06
4808	730.07

New Probate Code Section

Former Civil Code Section

4809	730.08
4810	730.09
4811	730.10
4812	730.11
4813	730.12
4814	730.13
4815	730.14, 730.16
4816	730.15, 730.16
4817	730.17

§ 4801. Effect on personal income tax and bank and corporation tax

4801. Nothing in this part affects the provisions of the Personal Income Tax Law and the Bank and Corporation Tax Law.

§ 4802. Definitions

4802. As used in this part:

(a) "Income beneficiary" means the person to whom income is presently payable or for whom it is accumulated for distribution as income.

(b) "Inventory value" means the cost of property purchased by the trustee and the market value of other property at the time it became subject to the trust, but in the case of a testamentary trust the trustee may use any value finally determined for the purposes of an estate or inheritance tax.

(c) "Remainderman" means the person entitled to principal, including income which has been accumulated and added to principal.

(d) "Trustee" means an original trustee and any successor or added trustee.

§ 4803. Trust administration

4803. (a) A trust shall be administered with due regard to the respective interests of income beneficiaries and remaindermen. A trust is so administered with respect to the allocation of receipts and expenditures if a receipt is credited or an expenditure is charged to income or principal or partly to each in any of the following ways:

(1) In accordance with the terms of the trust instrument, notwithstanding contrary provisions of this part.

(2) In the absence of any contrary terms of the trust instrument, in accordance with the provisions of this part.

(3) If neither paragraph (1) nor (2) is applicable, in accordance with what is reasonable and equitable in view of the interests of those entitled to income as well as of those entitled to principal, and in view of the manner in which persons of ordinary prudence, discretion, and judgment would act in the management of their own affairs.

(b) If the trust instrument gives the trustee discretion in crediting a receipt or charging an expenditure to income or principal or partly to each, no inference of imprudence or partiality arises from the fact that the trustee has made an allocation contrary to a provision of this part.

§ 4804. Principal and income

4804. (a) Income is the return in money or property derived from the use of principal, including return received as any of the following:

(1) Rent of real or personal property, including sums received for cancellation or renewal of a lease.

(2) Interest on money lent, including sums received as consideration for the privilege of repayment of principal except as provided in Section 4808 on bond premium and bond discount.

(3) Income earned during administration of a decedent's estate as provided in Section 4806.

(4) Corporate distributions as provided in Section 4807.

(5) Accrued increment on bonds or other obligations issued at discount as provided in Section 4808.

(6) Receipts from business and farming operations as provided in Section 4809.

(7) Receipts from disposition of natural resources as provided in Sections 4810 and 4811.

(8) Receipts from other principal subject to depletion as provided in Section 4812.

(9) Receipts from disposition of underproductive property as provided in Section 4813.

(b) Principal is the property which has been set aside by the owner or the person legally empowered so that it is held in trust eventually to be delivered to a remainderman while the return or use of the principal is in the meantime taken or received by or held for accumulation for an income beneficiary. Principal includes the following:

(1) Consideration received by the trustee on the sale or other transfer of principal or on repayment of a loan or as a refund or replacement or change in the form of principal.

(2) Proceeds of property taken on eminent domain proceedings.

(3) Proceeds of insurance upon property forming part of the principal except proceeds of insurance upon a separate interest of an income beneficiary.

(4) Stock dividends, receipts on liquidation of a corporation, and other corporate distributions as provided in Section 4807.

(5) Receipts from the disposition of corporate securities as provided in Section 4808.

(6) Royalties and other receipts from disposition of natural resources as provided in Sections 4810 and 4811.

(7) Receipts from other principal subject to depletion as provided in Section 4812.

(8) Any profit resulting from any change in the form of principal except as provided in Section 4813 on underproductive property.

(9) Receipts from disposition of underproductive property as provided in Section 4813.

(10) Any allowances for depreciation established under Section 4809 and paragraph (2) of subdivision (a) of Section 4814.

(c) After determining income and principal in accordance with the terms of the trust instrument or of this part, the trustee shall charge to income or principal expenses and other charges as provided in Section 4814.

§ 4805. Time during which income beneficiary entitled to income

4805. (a) An income beneficiary is entitled to income from the date specified in the trust instrument or, if none is specified, from the date an asset becomes subject to the trust. In the case of an asset becoming subject to a trust by reason of a will, it becomes subject to the trust as of the date of the death of the testator even though there is an intervening period of administration of the testator's estate.

(b) Upon an asset becoming subject to a trust by reason of a will.

(1) Receipts due but not paid at the date of death of the testator are principal.

(2) Receipts in the form of periodic payments not due at the date of the death of the testator (other than rents, annuities, interest on bank savings accounts, interest on savings and loan association accounts, and corporate distributions to stockholders) shall be treated as accruing from day to day. That portion of the receipt accruing before the date of death is principal and the balance is income.

(c) In all other cases, any receipt from an income-producing asset is income even though the receipt was earned or accrued in whole or in part before the date when the asset became subject to the trust.

(d) If an income beneficiary's right to income ceases by death or in any other manner, all payments actually paid to the income beneficiary or in the hands of the trustee for payment to the income beneficiary before such termination belong to the income beneficiary or to his or her personal representative. All income actually received by the trustee after such termination shall be paid to the person next entitled to income by the terms of the trust. This subdivision does not apply to income received by a trustee under subdivision (c) of Section 4806.

(e) Corporate distributions to stockholders shall be treated as due on the day fixed by the corporation for determination of stockholders of record entitled to distribution or, if no date is fixed, on the date of declaration of the distribution by the corporation.

§ 4806. Income from a decedent's estate

4806. (a) Unless the will otherwise provides, income from the assets of a decedent's estate after the death of the testator and before distribution, including income from property used to discharge liabilities, shall be distributed in the manner set forth in Chapter 11 (commencing with Section 600) of Division 3.

(b) Income received by a trustee under subdivision (a) shall be treated as income of the trust.

(c) When an income beneficiary's right to income, including interest payable under Section 663 ceases by death or in any other manner, during the period of probate administration, income attributable to the period prior to the termination of such right, when subsequently received by the trustee, shall be equitably prorated between the beneficiary or his or her personal representative and the person next entitled to income by the terms of the trust instrument.

§ 4807. Corporate distributions

4807. (a) Corporate distributions of shares of the distributing corporation, including distributions in the form of a stock split or stock dividend, are principal. A right to subscribe to shares or other securities issued by the distributing corporation accruing to stockholders on account of their stock ownership and the proceeds of any sale of the right are principal.

(b) Except to the extent that the corporation indicates that some part of a corporate distribution is a settlement of preferred or guaranteed dividends accrued since the trustee became a stockholder or is in lieu of an ordinary cash dividend, a corporate distribution is principal if the distribution is pursuant to any of the following:

(1) A call of shares.

(2) A merger, consolidation, reorganization, or other plan by which assets of the corporation are acquired by another corporation.

(3) A total or partial liquidation of the corporation, including any distribution which the corporation indicates is a distribution in total or partial liquidation or any distribution of assets, other than cash, pursuant to a court decree or final administrative order by a government agency ordering distribution of the particular assets.

(c) Distributions made from ordinary income by a regulated investment company or by a trust qualifying and electing to be taxed under federal law as a real estate investment trust are income. All other distributions made by the company or trust, including distributions from capital gains, depreciation, or depletion, whether in the form of cash or an option to take new stock or cash or an option to purchase additional shares, are principal.

(d) Except as provided in subdivisions (a), (b), and (c), all corporate distributions are income, including cash dividends, distributions of or rights to subscribe to shares or securities or obligations of corporations other than the distributing corporation, and the proceeds of the rights or property distributions. Except as provided in subdivisions (b) and (c), if the distributing corporation gives a stockholder an option to receive a distribution either in cash or in its own shares, the distribution chosen is income.

(e) The trustee may rely upon any statement of the distributing corporation as to any fact relevant under any provision of this part

concerning the source or character of dividends or distributions of corporate assets.

§ 4808. Bonds and other obligations for payment of money

4808. (a) Bonds or other obligations for the payment of money are principal at their inventory value, except as provided in subdivision (b) for discount bonds. No provision shall be made for amortization of bond premiums or for accumulation for discount. The proceeds of sale, redemption, or other disposition of the bonds or obligations are principal.

(b) The increment in value of a bond or other obligation for the payment of money payable at a future time in accordance with a fixed schedule of appreciation in excess of the price at which it was issued is distributable as income. The increment in value is distributable to the beneficiary who was the income beneficiary at the time of increment from the first principal cash available or, if none is available, when realized by sale, redemption, or other disposition. Whenever unrealized increment is distributed as income but out of principal, the principal shall be reimbursed for the increment when realized.

§ 4809. Profit and loss of business; farming

4809. (a) If a trustee uses any part of the principal in the continuance of a business of which the trustor was a sole proprietor or a partner, the net profits of the business, computed in accordance with generally accepted accounting principles for a comparable business and subject to the provisions of subdivision (c), are income. If a loss results in any fiscal or calendar year, the loss falls on principal and shall not be carried into any other fiscal or calendar year for purposes of calculating net income.

(b) Generally accepted accounting principles shall be used to determine income from an agricultural or farming operation, including the raising of animals or the operation of a nursery, subject to the provisions of subdivision (c).

(c) Subdivisions (a) and (b) are subject to the provisions of Section 4815 and for this purpose any property of such business or agricultural or farming operation shall be deemed to be "property held in such trust" within the meaning of Section 4815.

§ 4810. Royalties

4810. (a) If any part of the principal consists of a right to receive royalties, overriding or limited royalties, working interests, production payments, net profit interests, or other interests in minerals or other natural resources in, on, or under land, the receipts from taking the natural resources from the land shall be allocated as follows:

(1) If received as rent on a lease or extension payments on a lease, the receipts are income.

(2) If 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. There shall be allocated to principal the fraction of the balance of the receipts which the unrecovered cost of the production payment bears to the balance owed on the production payment, exclusive of any factor for interest or its equivalent. The receipts not allocated to principal are income.

(3) If received as a royalty, overriding or limited royalty, or bonus, or from a working, net profit, or any other interest in minerals or other natural resources, receipts not provided for in paragraphs (1) and (2) shall be apportioned on a yearly basis in accordance with this paragraph whether or not any natural resource was being taken from the land at the time the trust was established. The receipts shall be allocated entirely to income or apportioned between income and principal as the trustee in its absolute discretion may determine, but in no event shall more than 27-1/2 percent of the gross receipts (but not to exceed 50 percent of the net receipts remaining after payment of expenses, direct and indirect, computed without allowance for depletion) be added to principal as an allowance for depletion.

(b) This section does not apply to timber, water, soil, sod, dirt, turf, or mosses.

§ 4811. Timber

4811. If any part of the principal consists of land from which merchantable timber may be removed, the receipts from taking the timber from the land shall be allocated entirely to income or apportioned between income and principal as the trustee in its absolute discretion may determine, but in no event shall the amount allocated to principal exceed a reasonable allowance for depletion.

§ 4812. Property subject to depletion

4812. If the principal consists of property subject to depletion (other than property subject to Section 4810 or 4811), including, when subject to depletion or amortization, leaseholds, patents, copyrights, royalty rights, and rights to receive payments on a contract for deferred compensation, receipts from the property shall be allocated entirely to income, or apportioned between income and principal as the trustee in its absolute discretion may determine, but in no event shall the amount allocated to principal exceed a reasonable allowance for depletion or amortization.

§ 4813. Delayed income

4813. (a) Except as otherwise provided in this section, a portion of the net proceeds of sale of any part of principal which has not produced an average net income of at least 1 percent per year of its inventory value for more than a year (including as income the value of any beneficial use of the property by the income beneficiary) shall be treated as delayed income to which the income beneficiary is entitled as provided in this section. The net proceeds of sale are the gross proceeds received, including the value of any property received in substitution for the property disposed of, less the expenses, including capital gains tax, if any, incurred in disposition and less any carrying charges paid while the property was underproductive.

(b) The sum allocated as delayed income is the difference between the net proceeds and the amount which, had it been invested at simple interest at 5 percent per year while the property was underproductive, would have produced the net proceeds. This sum, plus any carrying charges and expenses previously charged against income while the property was underproductive, less any income received by the income beneficiary from the property and less the value of any beneficial use of the property by the income beneficiary, is income, and the balance is principal.

(c) If principal subject to this section is disposed of by conversion into property which cannot be apportioned easily, including land or mortgages (for example, realty acquired by or in lieu of foreclosure), the income beneficiary is entitled to the net income from any property or obligation into which the original principal is converted while the

substituted property or obligation is held. If within five years after the conversion the substituted property has not been further converted into easily apportionable property, no allocation as provided in this section shall be made.

§ 4814. Charges

4814. (a) The following charges shall be made against income:

(1) Ordinary expenses incurred in connection with the administration, management, or preservation of the trust property, including regularly recurring taxes assessed against any portion of the principal, water rates, premiums on insurance taken upon the interests of the income beneficiary, remainderman, or trustee, interest paid by the trustee, and ordinary repairs.

(2) The trustee in its absolute discretion may make a reasonable allowance for depreciation on property subject to depreciation under generally accepted accounting principles, but no allowance shall be made for depreciation of that portion of any real property used by a beneficiary as a residence.

(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 or judicial proceedings if the matter primarily concerns the income interest, unless the court directs otherwise.

(5) One-half of the trustee's regular compensation, whether based on a percentage of principal or income, unless the court directs otherwise.

(6) All expenses reasonably incurred for current management of principal and application of income.

(7) Any tax levied upon receipts defined as income under this part or the trust instrument and payable by the trustee.

(b) 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 and withhold from distribution sufficient sums to regularize distributions.

(c) The following charges shall be made against principal:

(1) Trustee's compensation not chargeable to income under paragraphs (4) and (5) of subdivision (a), special compensation of trustees, expenses

reasonably incurred in connection with principal, court costs and attorney's fees primarily concerning matters of principal, and trustee's compensation computed on principal as an acceptance, distribution, or termination fee.

(2) Charges not provided for in subdivision (a), including the cost of investing and reinvesting principal, the payments on principal of an indebtedness (including a mortgage amortized by periodic payments of principal), expenses for preparation of property for rental or sale, and, unless the court directs otherwise, expenses incurred in maintaining or defending any action to construe the trust or protect it or the property or assure the title of any trust property.

(3) Extraordinary repairs or expenses incurred in making a capital improvement to principal, including special assessments, but a trustee may establish an allowance for depreciation out of income to the extent permitted by paragraph (2) of subdivision (a) and by Section 4809.

(4) Any tax levied upon profit, gain, or other receipts allocated to principal notwithstanding denomination of the tax as an income tax by the taxing authority.

(5) If an estate or inheritance tax is levied in respect of a trust in which both an income beneficiary and a remainderman have an interest, any amount apportioned to the trust, including penalties, even though the income beneficiary also has rights in the principal.

(d) Regularly recurring charges payable from income shall be apportioned to the same extent and in the same manner that income is apportioned under Section 4805.

Note. In subdivision (c)(2), the last "or" appears where "to" appears in Section 730.13 to correct a typographical error.

§ 4815. Reserve or allowance for depreciation or depletion

4815. (a) The trustee of any trust created by any will or other instrument is not required to set aside a reserve or allowance from trust income for depreciation or depletion of, or to amortize, any property held in such trust unless the instrument expressly requires such a reserve or allowance. Nothing in this part prevents a trustee in its absolute discretion from establishing such reserve or allowance, or from continuing any previous practice of maintaining such reserve or

allowance, but the provisions of paragraph (2) of subdivision (a) of Section 4814 as to property used as a residence by a beneficiary and the provisions of Sections 4810, 4811, and 4812 and paragraph (2) of subdivision (a) of Section 4814 as to the amount of such allowance or reserve, if established, apply on and after July 1, 1968.

(b) This section applies to any trust created by a will or instrument executed before, on, or after July 1, 1968.

§ 4816. Application of part

4816. Except as specifically provided in the trust instrument or the will or in this part, this part applies to any receipt or expense received or incurred on or after July 1, 1968, by any trust whether established before, on, or after such date and whether the asset involved was acquired by the trustee before or after such date.

§ 4817. Severability

4817. If any provision of this part or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions of applications of this part which can be given effect without the invalid provision or application, and to this end the provisions of this part are severable.

100/892

PART 6. UNIFORM MANAGEMENT OF INSTITUTIONAL FUNDS ACT

§ 4850. Short title

4850. This part may be cited as the Uniform Management of Institutional Funds Act.

Comment. Sections 4850-4860 continue former Civil Code Sections 2290.1-2290.12 without substantive change. The source of each section in this part is indicated below.

<u>New Probate Code Section</u>	<u>Former Civil Code Section</u>
4850	2290.12
4851	2290.1
4852	2290.2
4853	2290.3
4854	2290.4
4855	2290.5
4856	2290.6
4857	2290.7
4858	2290.8
4859	2290.9
4860	2290.11

§ 4851. Definitions

4851. As used in this part:

(a) "Institution" means a private incorporated or unincorporated organization organized and operated exclusively for educational purposes and accredited by the Association of Western Colleges and Universities to the extent that it holds funds exclusively for any of such purposes.

(b) "Institutional fund" means a fund held by an institution for its exclusive use, benefit, or purposes, but does not include (1) a fund held for an institution by a trustee that is not an institution or (2) a fund in which a beneficiary that is not an institution has an interest, other than possible rights that could arise upon violation or failure of the purposes of the fund.

(c) "Endowment fund" means an institutional fund, or any part thereof, not wholly expendable by the institution on a current basis under the terms of the applicable gift instrument.

(d) "Governing board" means the body responsible for the management of an institution or of an institutional fund.

(e) "Historic dollar value" means the aggregate fair value in dollars of (1) an endowment fund at the time it became an endowment fund, (2) each subsequent donation to the fund at the time it is made, and (3) each accumulation made pursuant to a direction in the applicable gift instrument at the time the accumulation is added to the fund.

(f) "Gift instrument" means a will, deed, grant, conveyance, agreement, memorandum, writing, or other governing document (including the terms of any institutional solicitations from which an institutional fund resulted) under which property is transferred to or held by an institution as an institutional fund.

405/376

§ 4852. Expenditure of asset net appreciation for current use

4852. The governing board may appropriate for expenditure for the uses and purposes for which an endowment fund is established so much of the net appreciation, realized in the fair value of the assets of an endowment fund over the historic dollar value of the fund as is prudent under the standard established by Section 4856. Appropriations shall be based upon an average fair value covering a period of up to the five

preceding fiscal years of the institution and shall be set at any reasonable date prior to each fiscal year. This section does not limit the authority of the governing board to expend funds as permitted under other law, the terms of the applicable gift instrument, or the charter of the institution.

405/377

§ 4853. Construction of gift instruments

4853. (a) Section 4852 does not apply if the applicable gift instrument indicates the donor's intention that net appreciation shall not be expended.

(b) With respect to gift instruments in effect prior to January 1, 1974, a restriction upon the expenditure of net appreciation need not be implied solely from a designation of a gift as an endowment, or from a direction or authorization in the applicable gift instrument to use only "income," "dividends," or "rents, issues or profits," or "to preserve the principal intact," or a direction which contains other words of similar import.

(c) With respect to gift instruments executed or becoming effective on or after a restriction upon the expenditure of net appreciation may not be implied from a designation of a gift as an endowment or from a direction or authorization in the applicable gift instrument to use only "income," "interest," "dividends," or "rents, issues or profits," or "to preserve the principal intact," or a direction which contains other words of similar import.

405/378

§ 4854. Authority of board to invest and reinvest

4854. In addition to an investment otherwise authorized by law or by the applicable gift instrument, the governing board, subject to any specific limitations set forth in the applicable gift instrument, may do any or all of the following:

(a) Invest and reinvest an institutional fund in any real or personal property deemed advisable by the governing board, whether or not it produces a current return, including mortgages, stocks, bonds, debentures, and other securities of profit or nonprofit corporations, shares in or obligations of associations, or partnerships, and obligations of any government or subdivision or instrumentality thereof.

(b) Retain property contributed by a donor to an institutional fund for as long as the governing board deems advisable.

(c) Include all or any part of an institutional fund in any pooled or common fund maintained by the institution.

(d) Invest all or any part of an institutional fund in any other pooled or common fund available for investment, including shares or interests in regulated investment companies, mutual funds, common trust funds, investment partnerships, real estate investment trusts, or similar organizations in which funds are commingled and investment determinations are made by persons other than the governing board.

968/995

§ 4855. Delegation of authority

4855. Except as otherwise provided by the applicable gift instrument or by applicable law relating to governmental institutions or funds, the governing board may (1) delegate to its committees, officers, or employees of the institution or the fund, or agents, including investment counsel, the authority to act in place of the board in investment and reinvestment of institutional funds, (2) contract with independent investment advisors, investment counsel or managers, banks, or trust companies, so to act, and (3) authorize the payment of compensation for investment advisory or management services.

992/946

§ 4856. Standard of care

4856. In investing, reinvesting, purchasing, acquiring, exchanging, selling, and managing property, appropriating appreciation, and delegating investment management for the benefit of an institution, the members of the governing board shall exercise the judgment, care, and prudence, under the circumstances then prevailing, which persons of discretion and intelligence exercise in the management of their affairs. In exercising judgment under this section, the members of the governing board shall consider the long and short term needs of the institution in carrying out its purposes, its present and anticipated financial requirements, expected total return on its investments, general economic conditions, the appropriateness of a reasonable proportion of higher risk investment with respect to institutional funds as a whole, income, growth, and long term net appreciation, as well as the probable safety of funds.

§ 4857. Release of restriction in gift instruments

4857. (a) With the written consent of the donor, the governing board may release, in whole or in part, a restriction imposed by the applicable gift instrument on the use or investment of an institutional fund.

(b) If written consent of the donor cannot be obtained by reason of the donor's death, disability, unavailability, or impossibility of identification, the governing board may apply in the name of the institution to the superior court of the county in which the principal activities of the institution are conducted, or other court of competent jurisdiction, for release of a restriction imposed by the applicable gift instrument on the use or investment of an institutional fund. No court has jurisdiction to modify any use of an institutional fund under this part unless the Attorney General is a party to the proceedings. If the court finds that the restriction is obsolete or impracticable, it may by order release the restriction in whole or in part. A release under this subdivision may not change an endowment fund to a fund that is not an endowment fund.

(c) A release under this section may not allow a fund to be used for purposes other than the educational, religious, charitable, or other eleemosynary purposes of the institution affected.

(d) This section does not limit the application of the doctrine of cy pres.

§ 4858. Severability

4858. If any provision of this part or the application thereof to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of this part which can be given effect without the invalid provision or application, and to this end the provisions of this part are severable.

§ 4859. Application and construction

4859. This part shall be so applied and construed as to effectuate its general purpose to make uniform the law with respect to the subject of this part among those states which enact it.

§ 4860. Status of governing boards

4860. Nothing in this part alters the status of governing boards under other laws of this state.

EXHIBIT 2

STAFF DRAFT

COMMENTS SHOWING DISPOSITION OF EXISTING TRUST PROVISIONS

Note. The following bodies of law relating to trusts would be repealed and superseded by the draft statute set out in Exhibit 1:

Civil Code §§ 730-730.17

Civil Code §§ 852-871

Civil Code §§ 2215-2290.12

Probate Code §§ 1120-1139.19

Probate Code §§ 1215-1215.4

045/057

Civil Code §§ 730-730.17 (repealed). Revised Uniform Principal and Income Act

SEC. __. Chapter 2.5 (commencing with Section 730) of Title 2 of Part 1 of Division 2 of the Civil Code is repealed.

Comment. The Revised Uniform Principal and Income Act, Civil Code Sections 730-730.17, is continued without substantive change in Probate Code Sections 4800-4817. For a disposition table, see the Comment to Probate Code Section 4800.

045/085

Civil Code §§ 852-871 (repealed). Uses and trusts

SEC. __. Title 4 (commencing with Section 852) of Part 2 of Division 2 of the Civil Code is repealed.

TITLE 4. USES AND TRUSTS

§ 852 (repealed). Requirements of trusts relating to real estate

Comment. Former Section 852 is continued in Code of Civil Procedure Section 1973.

§ 853 (repealed). Resulting trusts

Comment. Former Section 853 is not continued because it is an incomplete and inadequate statement of the common law purchase money resulting trust. Repeal of Section 853 is not intended to disturb California case law concerning resulting trusts.

§ 856 (repealed). Bona fide purchaser or encumbrancer as to implied or resulting trust

Comment. Former Section 856 is not continued. See Prob. Code § 4050 (protection of third person dealing with trustee).

§ 858 (repealed). Power of sale under assigned instrument

Comment. The substance of former Section 858 is continued in Section 2932.5.

§ 859 (repealed). Trust to receive rents and profits

Comment. Former Section 859 is superseded by Probate Code Sections 4210 (spendthrift trusts) and 4211 (surplus income subject to creditor's claims).

§ 860 (repealed). Execution of joint powers

Comment. The substance of the first part of former Section 860 is continued in Probate Code Section 4560 (actions by cotrustees). The second part is superseded by Probate Code Section 4561 (inability of cotrustee to act). See also Civil Code § 1385.4 (joint exercise of powers of appointment).

§ 863 (repealed). Title vested in trustee; enforcement rights of beneficiaries

Comment. The first sentence of former Section 863 pertaining to the title vested in the trustee is not continued because it is unnecessary. For provisions governing trusts, see Prob. Code § 4000 et seq. The second sentence of former Section 863 is also not continued. See Prob. Code § 4620 (petition concerning internal affairs of trust).

§ 864 (repealed). Transfer or devise of property subject to trust

Comment. Former Section 864 is not continued because it is unnecessary.

§ 865 (repealed). Title of grantee or devisee of property subject to trust

Comment. Former Section 865 is not continued because it is unnecessary. See generally Prob. Code § 4000 et seq. (trusts).

§ 866 (repealed). Estates remaining in trustor

Comment. Former Section 866 is not continued because it is unnecessary.

§ 867 (repealed). Restraint of disposal of beneficial interest

Comment. Former Section 867 is superseded by Probate Code Section 4210 (spendthrift trusts).

§ 869 (repealed). Effect on bona fide purchaser of omission of trust from grant

Comment. The substance of former Section 869 is continued in Probate Code Section 4053.

§ 869a (repealed). Effect of transactions where beneficiary undisclosed

Comment. The substance of the first and second paragraphs of former Section 869a is continued in Probate Code Section 4054. See the Comment to Prob. Code § 4054. See also Prob. Code § 10 (singular includes plural). The last paragraph of former Section 869a is not continued because it is no longer needed.

§ 870 (repealed). Acts in contravention of trust

Comment. Former Section 870 is superseded by Probate Code Sections 4400-4450 (powers of trustees).

§ 871 (repealed). Termination of trust estate

Comment. Former Section 871 is not continued. See the Comment to former Section 863.

045/096

Civil Code §§ 2215-2290.12 (repealed). Trusts

SEC. _____. Title 8 (commencing with Section 2215) of Part 4 of Division 3 of the Civil Code is repealed.

TITLE 8. TRUST

CHAPTER 1. TRUSTS IN GENERAL

Article 1. Nature and Creation of a Trust

§ 2215 (repealed). Classification of trusts

Comment. Former Section 2215 is not continued because it served no useful purpose and was inconsistent with the classifications usually used by the courts. See 7 B. Witkin, Summary of California Law Trusts § 2, at 5367-68 (8th ed. 1974). See also Prob. Code § 82 ("trust" defined).

Note. Probate Code § 82 would be enacted by AB 25 (1983).

§ 2216 (repealed). Voluntary trust defined

Comment. Former Section 2216 is not continued. See the Comment to former Section 2215. See also Prob. Code § 82 ("trust" defined).

Note. Probate Code § 82 would be enacted by AB 25 (1983).

§ 2217 (repealed). Involuntary trust defined

Comment. Former Section 2217 is not continued. See the Comment to former Section 2215. Repeal of Section 2217 has no effect on the law relating to resulting or constructive trusts.

§ 2218 (repealed). Trustor, trustee, beneficiary

Comment. Former Section 2218 is not continued. See Prob. Code §§ 24 ("beneficiary" defined), 84 ("trustee" defined).

Note. Probate Code §§ 24 and 84 would be enacted by AB 25 (1983).

§ 2219 (repealed). Trustee defined

Comment. Former Section 2219 is not continued. See Prob. Code § 84 ("trustee" defined).

§ 2220 (repealed). Trust purposes

Comment. The substance of former Section 2220 is continued in Probate Code Section 4200 (trust purposes).

§ 2221 (repealed). Creation of voluntary trust as to trustor and beneficiary

Comment. The substance of former Section 2221 is continued in Probate Code Section 4220.

§ 2222 (repealed). Creation of voluntary trust as to trustee

Comment. The substance of former Section 2222 is continued in Probate Code Section 4221.

§ 2223 (repealed). Involuntary trustee and wrongful detainer

Comment. Former Section 2223 is not continued. See the Comments to former Sections 2215 and 2217.

§ 2224 (repealed). Involuntary trustee and fraud

Comment. Former Section 2224 is not continued. See the Comments to former Sections 2215 and 2217.

Article 2. Obligations of Trustees

§ 2228 (repealed). Good faith

Comment. The substance of former Section 2228 is continued in Probate Code Section 4301.

§ 2229 (repealed). Use of property

Comment. Former Section 2229 is superseded by Probate Code Section 4303.

§ 2230 (repealed). Prohibited transactions

Comment. Former Section 2230 is superseded by Probate Code Section 4303.

§ 2231 (repealed). Influence to obtain advantage from beneficiary

Comment. Former Section 2231 is superseded by Probate Code Section 4301.

§ 2232 (repealed). Undertaking trust adverse to interest of beneficiary

Comment. The substance of former Section 2232 is continued in Probate Code Section 4306(a).

§ 2233 (repealed). Trustee's adverse interest

Comment. The substance of former Section 2233 is continued in Probate Code Section 4304. See also Prob. Code § 4584 (grounds for removal of trustee).

§ 2234 (repealed). Violations as fraud against beneficiary

Comment. The substance of former Section 2234 is continued in Probate Code Section 4325.

§ 2235 (repealed). Transactions between trustee and beneficiary

Comment. The substance of former Section 2235 is continued in Probate Code Section 4526.

§ 2236 (repealed). Mingling trust property

Comment. The substance of former Section 2236 is continued in Probate Code Section 4527.

§ 2237 (repealed). Measure of liability for breach of trust

Comment. The substance of former Section 2237 is continued in Probate Code Section 4528.

§ 2238 (repealed). Measure of liability for good faith breach [AB 261]

Comment. Former Section 2238 is continued in Probate Code Section 4529.

§ 2239 (repealed). Liability of cotrustees

Comment. The substance of former Section 2239 is continued in Probate Code Section 4530.

§ 2240 (repealed). Deposit of securities in securities depository

Comment. The substance of former Section 2240 is continued in Probate Code Sections 4400 (powers subject to limitations in trust), 4439.5 (power to deposit securities in depository), and 4560 (actions of cotrustees).

Article 3. Obligations of Third Persons

§ 2243 (repealed). Third persons as involuntary trustees

Comment. Former Section 2243 is superseded by Probate Code Section 4050.

§ 2244 (repealed). Obligations of third persons

Comment. Former Section 2244 is superseded by Probate Code Section 4051.

CHAPTER 2. TRUSTS FOR THE BENEFIT OF THIRD PERSONS

Article 1. Nature and Creation of the Trust

§ 2250 (repealed). Trustees defined

Comment. Former Section 2250 is superseded by Probate Code Section 82 ("trust" defined). The provision vesting title in the trustee is not continued. See the Comment to former Section 863.

§ 2251 (repealed). Creation of trust by mutual consent

Comment. Former Section 2251 is not continued since it was in conflict with former Sections 2221 and 2222. See Prob. Code §§ 4220, 4221 (successor provisions to former Civil Code §§ 2221, 2222).

§ 2252 (repealed). Trustor when trustee appointed by court or officer

Comment. Former Section 2252 is not continued.

§ 2253 (repealed). Declaration of trust

Comment. The substance of former Section 2253 is continued in Probate Code Section 4202.

§ 2254 (repealed). Matters included in declaration of trust

Comment. The substance of former Section 2254 is continued in Probate Code Section 4203. See also Prob. Code § 82 ("trust" defined).

Article 2. Obligations of Trustees

§ 2258 (repealed). Obedience to declaration of trust [AB 261]

Comment. The substance of former Section 2258 is continued in Probate Code Section 4305.

§ 2259 (repealed). Trustee's degree of care and diligence

Comment. The substance of former Section 2259 is continued in Probate Code Section 4322.

§ 2260 (repealed). Trustee's care and diligence as to appointment of successor

Comment. The substance of former Section 2260 is continued in Probate Code Section 4570.

§ 2261 (repealed). Investments [See AB 630]

Comment. The substance of the first sentence of subdivision (1) of former Section 2261 is continued in Probate Code Section 4320 (trustee's standard of care in administering trust). See also Section 4420 (powers of prudent person). The substance of the second sentence of subdivision (1) is continued in Probate Code Sections 4400 (exercise of powers subject to limitations in trust), 4420 (general powers of prudent person), 4425 (power to invest), and 4427 (power to acquire property). See also Prob. Code § 62 ("property" defined).

The substance of the first sentence of subdivision (2) is continued in Probate Code Sections 4320 (trustee's standard of care in administering trust), 4400 (exercise of powers subject to limitations in trust), 4420 (general powers of prudent person), 4421 (power to retain property). See also Prob. Code § 62 ("property" defined). The substance of the second sentence of subdivision (2) is continued in Probate Code Section 4421.

Subdivision (3) is superseded by Probate Code Sections 4400 (exercise of powers subject to limitations in trust) and 4426 (power to make deposits). See also Prob. Code § 4401 (power of court to relieve trustee from restrictions).

The substance of former subdivision (4) is continued in Probate Code Section 4401.

The substance of the first sentence of subdivision (5) is continued in Probate Code Section 4151 (transitional provision). The substance of the second sentence is continued in Section 4152 (trust provisions concerning legal investments).

Subdivision (6) is superseded by Probate Code Section 62 ("property" defined to include real and personal property or any interest therein and to mean anything that may be the subject of ownership).

§ 2262 (repealed). Trustee's liability for interest for failure to invest

Comment. The substance of former Section 2262 is continued in Probate Code Section 4531.

§ 2263 (repealed). Trustee's claims against trust fund

Comment. Former Section 2263 is not continued. See generally Prob. Code §§ 4300-4306 (general duties of trustees).

§ 2264 (repealed). Transfer in trust of pecuniary amount by transfer of property other than money

Comment. Former Section 2264 is not continued. The subject matter of former Section 2264 was superseded by former Probate Code Section 1138.14 which is continued in Probate Code Section 4003.

Article 3. Powers of Trustees

§ 2267 (repealed). Trustee as general agent

Comment. Former Section 2267 is not continued. See Probate Code Sections 4400-4450 (trustees' powers). See also Prob. Code § 4522 (claims based on contract made by trustee in fiduciary capacity).

§ 2268 (repealed). Actions by cotrustees

Comment. The substance of former Section 2268 is continued in Probate Code Section 4560.

§ 2269 (repealed). Discretionary powers [AB 261]

Comment. Subdivision (a) of former Section 2269 is continued in Probate Code Section 4350. Subdivision (b) is continued in Probate Code Section 4353. Subdivisions (c) and (d) are continued in Probate Code Sections 4351 and 4353. Subdivision (e) is continued in Probate Code Section 4352.

§ 2270 (repealed). Proxies to vote shares in trust; shareholder's meetings and acts

Comment. Former Section 2270 is superseded by Probate Code Section 4435.

§ 2271 (repealed). Distribution of income of private foundation or charitable trust

Comment. The substance of former Section 2271 is continued in Probate Code Sections 4390-4392, 4394, and 4396.

§ 2271.1 (repealed). Split-interest trust

Comment. The substance of former Section 2271.1 is continued in Probate Code Sections 4390, 4392-4394, and 4396.

§ 2271.2 (repealed). Jurisdiction under Section 101(1)(3) of Tax Reform Act of 1969

Comment. Former Section 2271.2 is continued in Probate Code Section 4395.

§ 2272 (repealed). Leases of trust property

Comment. Former Section 2272 is superseded by Probate Code Section 4432 (trustee's power to lease). See also Prob. Code §§ 4420 (powers available without necessity of court approval), 4151 (application of law to existing trusts).

Article 4. Rights of Trustees

§ 2273 (repealed). Repayment of expenses paid by trustee

Comment. The substance of former Section 2273 is continued in Probate Code Section 4503.

§ 2274 (repealed). Trustee's compensation

Comment. The substance of the first and second sentences of former Section 2274 is continued in Probate Code Section 4500. The substance of the third sentence is continued in Probate Code Section 4501. The substance of the fourth sentence is continued in Probate Code Section 4502. The last sentence is superseded by Probate Code Section 4620(b)(6).

§ 2275 (repealed). Rights of involuntary trustee

Comment. Former Section 2275 is not continued. The rights to compensation and repayment of expenses provided in former Sections 2273 and 2274, as continued in Probate Code Sections 4500-4503, apply only to trustees of express trusts. See Prob. Code § 82 ("trust" defined).

Article 5. Termination of the Trust

§ 2279 (repealed). Extinguishment of trust

Comment. The substance of former Section 2279 is continued in Probate Code Section 4240 (termination of trust).

§ 2279.1 (repealed). Uneconomically low principal

Comment. The substance of former Section 2279.1 is continued in Probate Code Section 4242.

§ 2280 (repealed). Revocable trusts

Comment. The substance of the first sentence of former Section 2280 is continued in Probate Code Sections 4201 (presumption of revocability) and 4241(a) (manner of revoking revocable trust). The substance of the second sentence is continued in Probate Code Section 4241(b). The last sentence is not continued because it is unnecessary.

§ 2281 (repealed). Vacation of office of trustee

Comment. The substance of the first and last paragraphs of former Section 2281 is continued in Probate Code Section 4580 (vacation of office of trustee). The substance of the second paragraph is continued in Probate Code Section 4052 (protection of third person dealing with former trustee).

§ 2282 (repealed). Discharge of trustee [AB 261]

Comment. The substance of former Section 2282 is continued in Probate Code Section 4583.

§ 2283 (repealed). Removal of trustee by superior court

Comment. The substance of the first part of the first sentence of former Section 2283 is continued in Probate Code Section 4584 (removal of trustee by court). See also Prob. Code § 4601 (jurisdiction in superior court). The remainder of the first sentence is superseded by Probate Code Section 4581(b) (court acceptance of resignation). The second sentence is not continued.

Article 6. Succession or Appointment of New Trustees

§ 2287 (repealed). Appointment of trustees by superior court

Comment. The substance of former Section 2287 is continued in Probate Code Section 4571.

§ 2288 (repealed). Survivorship among cotrustees

Comment. Former Section 2288 is superseded by Probate Code Section 4561.

§ 2289 (repealed). Appointment of trustees by superior court

Comment. The first sentence of former Section 2289 is superseded by Probate Code Section 4571. The substance of the second sentence is continued in Probate Code Section 4571.

CHAPTER 3. UNIFORM MANAGEMENT OF INSTITUTIONAL FUNDS ACT

§§ 2290.1-2290.12 (repealed). Uniform Management of Institutional Funds Act

Comment. The Uniform Management of Institutional Funds Act, former Civil Code Sections 2290.1-2290.12, is continued without substantive change in Probate Code Sections 4850-4860. For a disposition table, see the Comment to Probate Code Section 4850.

Probate Code §§ 1120-1139.19 (repealed). Administration of trusts

SEC. ____ . Chapter 19 (commencing with Section 1120) of Division 3 of the Probate Code is repealed.

CHAPTER 19. ADMINISTRATION OF TRUSTS

Article 1. Testamentary Trusts§ 1120 (repealed). Continuing judicial supervision over trusts

Comment. Former Section 1120 is not continued since trusts are no longer required or permitted to be subject to the continuing jurisdiction of the court. Trusts are now subject to the intermittent jurisdiction of the courts when invoked pursuant to Division 4.5 (commencing with Section 4000). See, e.g., Section 4620 (grounds for petition). The new law, however, contains provisions comparable to parts of former Section 1120 and other sections in former Article 1. See Sections 4601 (jurisdiction in superior court), 4620(b)(2) (petition to settle accounts), 4620(b)(3) (petition for instructions), 4420-4450 (trustees' powers), 4624 (notice of hearing on petition), 4001 (clerk to set petition for hearing), 4070-4078 (notice), 4002 (appointment of guardian ad litem), 4620(b)(11) (amending trust for charitable estate tax deduction).

§ 1120.1 (repealed). Additions to trust subject to jurisdiction of court

Comment. Former Section 1120.1 is superseded by Section 82 ("trust" defined to include additions to trust).

§ 1120.1a (repealed). Removal of trusts from continuing court supervision

Comment. The substance of former Section 1120.1a is continued in Sections 4180-4186 (removal of trusts from continuing court supervision) and 4001 (clerk to set for hearing). References to remaindermen are not continued since they are unnecessary in light of the definition of "beneficiary" in Section 82.

Note. The version of Section 1120.1a, as proposed to be amended in AB 482 (1983), has been used.

§ 1120.2 (repealed). Powers of trustee

Comment. The subject matter of former Section 1120.2 is governed by Sections 4400-4450 (trustees' powers). The provision in the first paragraph of former Section 1120.2 requiring a petition in order to exercise powers not expressed in the trust or otherwise conferred is superseded by Section 4420 which grants extensive powers notwithstanding the silence of the trust instrument. See also Section 4401 (power of court to relieve trustee from restrictions).

The substance of the first clause of subdivision (1) of former Section 1120.2 is continued in Sections 4427 (acquiring and disposing of property) and 4428 (management). The substance of the second and third clauses of subdivision (1) is continued in Sections 4432 (leases) and 4433 (mineral leases).

The substance of subdivision (2) is continued in Sections 4421 (collecting and holding property) and 4425 (investments). The specific reference to stock of the trustee is not continued because it is unnecessary. See Section 62 ("property" defined).

The first clause of subdivision (3) is continued in Section 4441 (borrowing money). The remainder of the subdivision is superseded by Section 4429 (encumbrances).

Subdivision (4) is superseded by Section 4438 (change in form of business, voting trusts, etc.).

The first clause of subdivision (5) is continued in Section 4427 (acquisition and disposition of property). The second clause is continued in Section 4428 (management of property).

Subdivision (6) is continued in Section 4430 (repairs and alterations).

Subdivision (7) is continued in Section 4421 (development of land).

Subdivision (8) is continued in Section 4434 (options).

Subdivision (9) is superseded by Section 4435 (voting rights with respect to corporate shares, memberships, or property).

Subdivision (10) is continued in Section 4436 (payment of calls and assessments).

Subdivision (11) is continued in Section 4437 (stock subscriptions and conversions).

Subdivision (12) is continued in Section 4439 (holding securities in name of nominee).

Subdivision (13) is continued in Section 4440 (insurance).

The first part of subdivision (14) is continued in Section 4442 (advancing money). The part of subdivision (14) relating to the trustee's lien is continued in substance in Section 4504.

The first three clauses of subdivision (15) are continued in Section 4443 (payment and settlement of claims). The last clause is superseded by Section 4449 (actions and proceedings).

Subdivision (16) is continued in Section 4444 (payment of taxes, trustee's compensation, and other expenses).

Subdivision (17) is continued in Section 4423 (participation in business; change in form of business).

Subdivision (18) is superseded by Section 4420 (general powers without court authorization). See the Comment to Section 4420.

The second paragraph is superseded by Section 4151 (application of Division 4.5).

The substance of the last paragraph is continued in Section 11 (severability).

§ 1120.5 (repealed). Request for special notice by beneficiary

Comment. Former Section 1120.5 is superseded by Section 4624(b) (request for notice in trust proceedings).

§ 1120.6 (repealed). Uneconomically low principal

Comment. The substance of former Section 1120.6 is continued in Section 4242.

§ 1121 (repealed). Accounting

Comment. The first part of former Section 1121 is superseded by Section 4620(b)(4) (petition to compel accounting). The remainder of former Section 1121 is superseded by Section 4340 (trustee's duty to account).

§ 1122 (repealed). Compensation of trustee

Comment. The substance of the first and second sentences of former Section 1122 are continued in Section 4500. The reference to the decree of distribution is not continued. See Section 4602 (proper court). The substance of the first part of the third sentence is continued in Section 4501 (compensation where trust silent). The remainder of the third sentence is superseded by Section 4620(b)(6) (petition to fix compensation). The substance of the fourth sentence is continued in Section 4502 (compensation of cotrustees). The last sentence is superseded by Section 4620(b)(2) (petition for approval of accounts). See also Section 4444 (trustee's power to pay compensation and expenses).

§ 1123 (repealed). Conclusiveness of decree

Comment. Former Section 1123 is superseded by Section 4074(b).

§ 1123.5 (repealed). Removal of trustee

Comment. Former Section 1123.5 is superseded by Section 4584 (removal of trustee by court). See also Section 4600 et seq. (judicial administration of trusts).

§ 1123.6 (repealed). Custody of assets pending hearing

Comment. The substance of former Section 1123.6 is largely continued in Section 4584(b).

§ 123.7 (repealed). Exclusive jurisdiction and procedure

Comment. Former Section 1123.7 is superseded by Section 4601.

§ 1124 (repealed). Declination of designated trustee to act

Comment. Former Section 1124 is superseded by Section 4581.

§ 1125 (repealed). Filling vacancies before distribution

Comment. Former Section 1125 is superseded by Sections 4571 (court appointment of trustee) and 4620(a), (b)(7) (petition to appoint trustee).

§ 1125.1 (repealed). Petition of resignation of trustee

Comment. The first paragraph of former Section 1125.1 is superseded by Section 4581 (resignation of trustee). See also Section 4620(b)(8) (petition to accept resignation). The substance of the second paragraph is continued in Section 4582 (liability of trustee).

§ 1126 (repealed). Filling vacancies after distribution

Comment. Former Section 1126 is superseded by Sections 4571 (court appointment of trustee) and 4620(a), (b)(7) (petition to appoint trustee).

§ 1127 (repealed). Trustee's bond

Comment. Former Section 1127 is superseded by Section 4551.

§ 1127.5 (repealed). Bond not required of certain charitable corporation trustees

Comment. Former Section 1127.5 is superseded by Section 4551.

§ 1128 (repealed). Transfer of trust proceedings to another county

Comment. Former Section 1128 is not continued since the law no longer provides for retention of jurisdiction over testamentary trusts. See the Comment to former Section 1120.

§ 1129 (repealed). Hearing on transfer of trust proceedings to another county

Comment. Former Section 1129 is not continued. See the Comment to former Section 1128.

§ 1130 (repealed). Vouchers; withdrawal; production; destruction or delivery to trustee or attorney

Comment. Former Section 1130 is not continued.

§ 1130.1 (repealed). Certificate of appointment as trustee

Comment. Former Section 1130.1 is continued in Section 4550. See also Section 10 (singular includes plural).

§ 1132 (repealed). Transfer of testamentary trust to another jurisdiction

Comment. Former Section 1132 is superseded by Section 4652 (transfer of trust from California). See also Section 4650 (application of transfer provisions).

§ 1133 (repealed). Combination of assets and administration of trusts as one trust

Comment. The substance of former Section 1133 is continued in Section 4306(b).

Article 2.5. Inter Vivos and Other Trusts

§ 1138 (repealed). "Trust" defined

Comment. The substance of former Section 1138 is generally continued in Section 82 ("trust" defined). The reference in subdivision (a) of former Section 1138 to "voluntary" trusts is not continued because it is unnecessary. See the Comment to former Civil Code § 2215. The language in subdivision (a) concerning trusts "entirely administered or to be entirely administered in this state" is superseded by the provision in Section 4600 concerning the principal place of administration of the trust. See Section 4620(a) (application of procedure).

The substance of subdivision (b) of former Section 1138 is continued in Section 82 except as noted. The former exclusion of trusts subject to court supervision is not continued since trust administration has been unified. See the Comment to former Section 1120. The former exclusion of business trusts taxed as partnerships or corporations is continued by the reference in Section 82 to business trusts providing for certificates to be issued to beneficiaries. The former exclusion of investment trusts subject to regulation under the laws of this state or any other jurisdiction is included in the reference in Section 82 to business trusts. The former exclusion of deeds of trust and transfers in trust for the purpose of suit or enforcement of a claim or right is continued in Section 82 in the reference to security arrangements. The former exclusion of certain charitable trusts and trusts described in Government Code Section 12583 is not continued. See Sections 82 ("trust" defined), 4620(a) (application of procedure).

§ 1138.1 (repealed). Grounds for petition by trustee

Comment. The substance of subdivision (a) of former Section 1138.1 is continued in Section 4620 with the following changes: Paragraph (3) is not continued since Section 4422 permits additions to trusts without the need for court approval. Paragraph (6) is superseded by Section 4620(b)(5) which is drafted in recognition of the automatic powers available under Sections 4420-4450. See Section 4401 (court order relieving trustee of restrictions). The substance of subdivision (b) is continued in Section 4621.

§ 1138.2 (repealed). Orders and decrees of court

Comment. Former Section 1138.2 is continued in Section 4625.

§ 1138.3 (repealed). Venue

Comment. The substance of the first sentence of former Section 1138.3 is continued in Section 4602(a) (venue). See also Section 4601(a) (jurisdiction in superior court). The substance of the second and third sentences is continued in Section 4600.

§ 1138.4 (repealed). Petition

Comment. The substance of former Section 1138.4 is continued in Section 4622.

§ 1138.5 (repealed). Dismissal of petition

Comment. The substance of former Section 1138.5 is continued in Section 4623.

§ 1138.6 (repealed). Notice and hearing

Comment. The first paragraph of subdivision (a) of former Section 1138.6 is continued in Section 4001 (clerk to set petition for hearing). The substance of the second paragraph is continued in Sections 4624(a) (notice of hearing on petition) and 4072(c) (notice in manner directed by court). The reference to remaindermen is not continued because it is unnecessary in light of the definition of "beneficiary" in Section 24. The substance of the third paragraph is continued in Section 4624(b). The fourth paragraph is continued in Section 4073 (personal delivery). The fifth paragraph is superseded by Section 4074 (proof of giving notice).

Subdivision (b) is not continued. Trust proceedings are governed by Division 4.5 (commencing with Section 4000). The substance of subdivision (c) is continued in Section 4076. The substance of subdivision (d) is continued in Section 4624(c).

§ 1138.7 (repealed). Appointment of guardian ad litem; threatened exercise of power not conferred upon trustee

Comment. The substance of subdivisions (a) and (c) of former Section 1138.7 is continued in Section 4002 (appointment of guardian ad litem). Subdivision (b) is superseded by Sections 4622 (petition) and 4624 (notice). See also Section 4070 et seq. (general notice provisions).

§ 1138.8 (repealed). Resignation of trustee or cotrustee; appointment of successor trustee

Comment. The substance of the first three sentences of former Section 1138.8 is continued in Section 4581 (resignation of trustee). The substance of the last sentence is continued in Section 4582 (liability of resigning trustee).

§ 1138.9 (repealed). Appointment of successor trustee

Comment. The substance of former Section 1138.9 is continued in Section 4571.

§ 1138.10 (repealed). Appeal

Comment. The substance of former Section 1138.10 is continued in Section 4626 (appeal).

§ 1138.11 (repealed). Cumulative and nonexclusive remedies

Comment. Former Section 1138.11 is continued in Section 4627.

§ 1138.12 (repealed). Legislative intent

Comment. Former Section 1138.12 is continued in Section 4628.

§ 1138.13 (repealed). Applicability of article

Comment. The substance of the first sentence of former Section 1138.13 is continued in Section 4151 (transitional provision). The second sentence is superseded by Section 4620(a) (petition concerning internal affairs of trust). See also Sections 82 ("trust" defined), 4621 (limitations in trust instrument).

§ 1138.14 (repealed). Transfer in trust of pecuniary amount

Comment. The substance of former Section 1138.14 is continued in Section 4003.

Article 3. Transfer to Another Jurisdiction

§ 1139 (repealed). Application of article

Comment. The substance of subdivisions (a) and (b) of former Section 1139 is continued in Section 4650. Subdivision (c) is not continued because it is no longer needed.

§ 1139.1 (repealed). Transfer of place of administration or assets

Comment. The substance of the introductory clause of Section 1139.1 is continued in Section 4652. Clause (a) pertaining to supervised trusts is not continued. See the Comment to former Section 1120. The substance of clause (b) is continued in Sections 4653 (who may petition) and 4656(c) (order granting transfer if not violative of terms of trust).

§ 1139.2 (repealed). Petition for transfer

Comment. The first sentence of former Section 1139.2 is continued in Section 4653. The remainder of former Section 1139.2 is continued in Section 4654.

§ 1139.3 (repealed). Notice and hearing

Comment. The provision of former Section 1139.3 requiring the clerk to set the petition for hearing is continued in Section 4001. The remainder of the first sentence is not continued. The substance of the last three sentences is continued in Section 4655.

§ 1139.4 (repealed). Court order

Comment. Former Section 1139.4 is continued in Section 4656.

§ 1139.5 (repealed). Manner of transfer; discharge of trustee

Comment. Former Section 1139.5 is continued in Section 4657.

§ 1139.6 (repealed). Other trusts

Comment. Former Section 1139.6 is not continued. See Sections 4600 (principal place of administration), 4601 (jurisdiction), 4602 (venue), 4650 (application of transfer procedure).

§ 1139.7 (repealed). "Beneficiary" defined

Comment. Former Section 1139.7 is continued in Section 4651.

Article 4. Transfer From Another Jurisdiction

§ 1139.10 (repealed). Application of article

Comment. Former Section 1139.10 is continued in Section 4670.

§ 1139.11 (repealed). Transfer of place of administration or assets to California

Comment. Former Section 1139.11 is continued in Section 4672.

§ 1139.12 (repealed). Petition for transfer

Comment. Former Section 1139.12 is continued in Section 4673.

§ 1139.13 (repealed). Venue

Comment. The substance of former Section 1139.13 is continued in Section 4674.

§ 1139.14 (repealed). Contents of petition

Comment. Former Section 1139.14 is continued in Section 4675.

§ 1139.15 (repealed). Notice and hearing

Comment. The part of subdivision (a) of former Section 1139.15 requiring the clerk to set the petition for hearing is continued in Section 4001. The remainder of the first sentence of subdivision (a) is not continued. The substance of the second sentence of subdivision (a) and subdivision (b) is continued in Section 4676.

§ 1139.16 (repealed). Order accepting transfer and appointing trustee

Comment. Former Section 1139.16 is continued in Section 4677.

§ 1139.17 (repealed). Conditional order accepting transfer

Comment. Former Section 1139.17 is continued in Section 4678.

§ 1139.18 (repealed). Administration of transferred trust

Comment. The substance of former Section 1139.18 is continued in Section 4679.

§ 1139.19 (repealed). "Beneficiary" defined

Comment. Section 1139.19 is continued in Section 4671.

Probate Code §§ 1215-1215.4 (repealed). Notice in trust proceedings

SEC. ____ . Article 1.5 (commencing with Section 1215) of Chapter 22 of Division 3 of the Probate Code is repealed.

Article 1.5. Notice in Trust Proceedings

§ 1215 (repealed). Definitions [AB 68]

Comment. Former Section 1215 is superseded by Section 4070.

§ 1215.1 (repealed). Notice in cases involving future interests

Comment. The substance of former Section 1215.1 is continued in Section 4078(a).

§ 1215.2 (repealed). Conflicts of interest in subject matter

Comment. The substance of former Section 1215.2 is continued in Section 4078(b).

§ 1215.3 (repealed). Additional notices; appointment of guardian ad litem

Comment. The substance of former Section 1215.3 is continued in Sections 4002 (appointment of guardian ad litem) and 4075 (a) (additional notice).

§ 1215.4 (repealed). Effect of article on other notice requirements

Comment. The substance of the first sentence of former Section 1215.4 is continued in Section 4078(c). The substance of the second sentence is continued in Section 4075(b).

EXHIBIT 3

STAFF DRAFT

CONFORMING REVISIONS RELATING TO TRUST LAW

045/058

Civil Code § 731.02 (technical amendment). Application of Legal Estates Principal and Income Law

SEC. ____ . Section 731.02 of the Civil Code is amended to read:

731.02. This chapter shall apply to all transactions by which a principal was established without the interposition of a trust on or after September 13, 1941, or is hereafter so established. Transactions by which a principal is held in trust are governed by ~~Chapter 2-5 (commencing with Section 730)~~ Part 1 of Division 2 Part 5 (commencing with Section 4800 of Division 4.5 of the Probate Code.

Comment. Section 731.02 is amended to correct a cross-reference to the Revised Uniform Principal and Income Act. Prob. Code §§ 4800-4819.

045/208

Civil Code § 1392.1 (technical amendment). Revocability of power of appointment

SEC. ____ . Section 1392.1 of the Civil Code is amended to read:

1392.1. (a) Unless the power to revoke is reserved in the instrument creating the power or exists pursuant to ~~Section 2280~~ 4201 of the Probate Code, the creation of a power of appointment is irrevocable.

(b) Unless made expressly irrevocable by the creating instrument or the instrument of exercise, an exercise of a power of appointment is revocable if the power to revoke exists pursuant to ~~Section 2280~~ 4201 of the Probate Code or so long as the interest to the appointive property, whether present or future, has not been transferred or become distributable pursuant to such appointment.

(c) Unless the power to revoke is reserved in the instrument releasing the power, a release of a power of appointment is irrevocable.

Comment. Section 1392.1 is amended to correct cross-references.

Civil Code § 2932.5 (added). Power of sale under assigned mortgage

SEC. ____ . Section 2932.5 is added to the Civil Code, to read:

2932.5. Where a power to sell real property is given to a mortgagee, or other encumbrancer, in an instrument intended to secure the payment of money, the power is part of the security and vests in any person who by assignment becomes entitled to payment of the money secured by the instrument. The power of sale may be exercised by the assignee if the assignment is duly acknowledged and recorded.

Comment. Section 2932.5 continues the substance of former Section 858.

27408

Code of Civil Procedure § 1973 (added). Statute of frauds relating to trusts

SEC. ____ . Section 1973 is added to the Code of Civil Procedure, to read:

1973. No trust in relation to real property is valid unless created or declared in one of the following manners:

(a) By a written instrument, subscribed by the trustee, or by the trustee's agent thereto authorized by writing.

(b) By the instrument under which the trustee claims the estate affected.

(c) By operation of law.

Comment. Section 1973 continues former Civil Code Section 852 without substantive change.

27409

Corporations Code § 10251 (technical amendment). Common trust funds

SEC. ____ . Section 10251 of the Corporations Code is amended to read:

10251. (a) "Educational institution," as used in this section, means any nonprofit corporation organized under the provisions of Chapter 3 (commencing with Section 94300) or Chapter 4 (commencing with Section 94400) of Part 59 of Division 10 of the Education Code or organized under the provisions of Part 1 (commencing with Section 9000) of this division in effect on December 31, 1979, and designated on or after

January 1, 1980, as a nonprofit public benefit corporation, or organized for charitable or eleemosynary purposes under the provisions of Part 2 (commencing with Section 5110) of this division, or Part 3 (commencing with Section 10200) of this division in effect on December 31, 1979, and designated on or after January 1, 1980, as a nonprofit public benefit corporation for the purpose of establishing, conducting or maintaining an institution offering courses beyond high school and issuing or conferring a diploma or for the purpose of offering or conducting private school instruction on the high school or elementary school level and any charitable trust organized for such purpose or purposes. "Educational institution," as used in this section, also means the University of California, the state colleges, the state community colleges and any auxiliary organization, as defined in Section 89901 of the Education Code, established for the purpose of receiving gifts, property and funds to be used for the benefits of a state college.

(b) It shall be lawful for any educational institution to become a member of a nonprofit corporation incorporated under the laws of any state for the purpose of maintaining a common trust fund or similar common fund in which nonprofit organizations may commingle their funds and property for investment and to invest any and all of its funds, whenever and however acquired, in such common fund or funds; provided, that, in the case of funds or property held as fiduciary, such investment is not prohibited by the wording of the will, deed or other instrument creating such fiduciary relationship.

(c) An educational institution electing to invest in a common fund or funds under the provisions of this section may elect to receive distributions from each such fund in an amount not to exceed for each fiscal year the greater of the income, as defined in Section ~~730-03~~ 4804 of the ~~Civil~~ Probate Code, accrued on its interest in such fund or 10 percent of the value of its interest in such fund as of the last day of its next preceding fiscal year. The educational institution may expend such distribution or distributions for any lawful purpose notwithstanding the provisions of any general or special law characterizing such distribution, or any part thereof, as principal or income; provided, that, in the case of funds or property invested as fiduciary, such expenditure is not prohibited by the wording of the will, deed or other instrument creating such fiduciary relationship. No such prohibition of expenditure shall be deemed to exist solely because a will, deed or

other such instrument, whether executed or in effect before or after the effective date of this section, directs or authorizes the use of only the "income," or "interest," or "dividends" or "rents, issues or profits," or contains words of similar import.

(d) The provisions of the Corporate Securities Law of 1968 shall not apply to the creation, administration or termination of common trust funds authorized under this section, or to participation therein.

Comment. Subdivision (c) of Section 10251 is amended to correct a cross-reference.

404/121

Financial Code § 1561 (technical amendment). Trust funds

1561. Trust funds received by any trust company in connection with its trust business, if invested, shall be invested as provided in ~~the Civil Code, subject to such provisions as may be contained in any trust instrument~~ Part 3 (commencing with Section 4300) of Division 4.5 of the Probate Code.

Comment. Section 1561 is amended to reflect the consolidation of trust law in the Probate Code and to eliminate unnecessary language.

045/102

Probate Code § 20 (amended). Application of definitions

SEC. ____ . Section 20 of the Probate Code [as proposed in AB 25, 1983] is amended to read:

20. Unless the provision or context otherwise requires, the words and phrases defined in this part govern the construction of Divisions 1 (commencing with Section 1), 2 (commencing with Section 100), 4.5 (commencing with Section 4000), and 6 (commencing with Section 6100).

Comment. Section 20 is amended to make the definitions in this part applicable to the division on trusts.

405/899

Probate Code § 1200 (amended). Manner of notice under Probate Code

SEC. ____ . Section 1200 of the Probate Code is amended to read:

1200. (a) Upon the filing of:

(1) A petition for the sale of stocks or bonds;

(2) A petition for confirmation of a sale or a petition to grant an option to purchase real property;

(3) A petition for leave to enter into an agreement to sell or give an option to purchase a mining claim or real property worked as a mine; or

(4) A petition for leave to lease or to exchange property, or to institute an action for the partition of property, the clerk shall set the same for hearing by the court and shall give notice of the proceeding by causing a notice of the time and place of hearing thereof to be posted at the courthouse of the county where the proceedings are pending, at least 10 days before the day of hearing, giving the name of the estate, the name of the petitioner and the nature of the application, referring to the petition for further particulars, and stating the time at which the application will be heard.

(b) Proof of the giving of notice shall be made at the hearing; and, if it appears to the satisfaction of the court that the notice has been regularly given, the court shall so find in its order, and the order shall be conclusive upon all persons when it becomes final.

(c) This section does not apply to proceedings under Division 4 (commencing with Section 1400). When a provision of Division 4 applies the provisions of this code applicable to executors or administrators to proceedings under Division 4, a reference to this section in the provisions applicable to executors or administrators shall be deemed to be a reference to Chapter 3 (commencing with Section 1460) of Part 1 of Division 4.

(d) This section does not apply to proceedings under Division 4.5 (commencing with Section 4000).

~~(d)~~ (e) Notwithstanding any other provision of this code which requires the clerk to post notice of a hearing in accordance with this section, the posting shall not be required, except as to those matters specifically enumerated in subdivision (a).

Comment. Subdivision (d) is added to Section 1200 to make clear that the general notice provisions do not apply to the division on trusts. See Section 4070 et seq. (notice in trust proceedings).

405/905

Probate Code § 1200.5 (amended). Manner of notice in certain cases

SEC. ____ . Section 1200.5 of the Probate is amended to read:

1200.5. (a) Notice shall be given in the manner prescribed in subdivision (b) upon the filing of any of the following:

(1) A petition under Section 641 of this code for the setting aside of an estate.

(2) A petition to set apart a homestead or exempt property.

(3) A petition relating to the family allowance filed after the return of the inventory.

(4) A petition for leave to settle or compromise a claim against a debtor of the decedent or a claim against the estate or a suit against the executor or administrator as such.

(5) A petition for the sale of stocks or bonds.

(6) A petition for confirmation of a sale or a petition to grant an option to purchase real property.

(7) A petition for leave to enter into an agreement to sell or give an option to purchase a mining claim or real property worked as a mine.

(8) A petition for leave to execute a promissory note or mortgage or deed of trust or give other security.

(9) A petition for leave to lease or to exchange property, or to institute an action for the partition of property.

(10) A petition for an order authorizing or directing the investment of money.

(11) An account of an executor or administrator or trustee.

(12) A petition for partial or ratable or preliminary or final distribution.

(13) A petition for the delivery of the estate of a nonresident.

(14) A petition for determination of heirship or interests in an estate.

~~(15) A petition of a trustee for instructions.~~

~~(16) A petition for the appointment of a trustee.~~

~~(17)~~ (15) Any petition for letters of administration or for probate of will, or for letters of administration-with-will annexed, which is filed after letters of administration or letters testamentary have once been issued.

~~(18)~~ (16) A report of status of administration.

~~(19)~~ (17) A petition for family allowance.

(b) At least 10 days before the time set for the hearing of the petition or account, the petitioner or person filing the account shall

cause notice of the time and place of hearing to be mailed to the executor or administrator, when he or she is not the petitioner, to any coexecutor or coadministrator not petitioning, and to all persons (or to their attorneys, if they have appeared by attorney), who have requested notice or who have given notice of appearance in the estate in person or by attorney, as heir, devisee, legatee or creditor, or as otherwise interested, addressed to them at their respective post office addresses given in their request for special notice, if any, otherwise at their respective offices or places of residence, if known, and if not, at the county seat of the county where the proceedings are pending, or to be personally served upon such person.

(c) Proof of the giving of notice shall be made at the hearing; and, if it appears to the satisfaction of the court that the notice has been regularly given, the court shall so find in its order, and the order shall be conclusive upon all persons when it becomes final.

(d) This section ~~shall~~ does not apply to proceedings under Division 4 (commencing with Section 1400). When a provision of Division 4 applies the provisions of this code applicable to executors or administrators to proceedings under Division 4, a reference to this section in the provisions applicable to executors or administrators shall be deemed to be a reference to Chapter 3 (commencing with Section 1460) of Part 1 of Division 4.

(e) This section does not apply to proceedings under Division 4.5 (commencing with Section 4000).

~~(e)~~ (f) The notice required by this section shall be in addition to the notice, if any, required to be given in the manner specified in Section 1200.

Comment. A new subdivision (e) is added to Section 1200.5 to make clear that the general notice provisions of this section do not apply to the division on trusts. See Section 4070 et seq. (notice in trust proceedings).

405/941

Probate Code § 1240 (amended). Appeals

SEC. ____ . Section 1240 of the Probate Code is amended to read:

1240. An appeal may be taken from an order or the refusal to make an order:

- (a) Granting or revoking letters testamentary or of administration.
- ~~(b) Removing a trustee of a testamentary trust.~~

- ~~(e)~~ (b) Admitting a will to probate or revoking the probate thereof.
- ~~(d)~~ (c) Setting aside an estate claimed not to exceed twenty thousand dollars (\$20,000) in value.
- ~~(e)~~ (d) Setting apart property as a homestead or claimed to be exempt from execution.
- ~~(f)~~ (e) Granting or modifying a family allowance.
- ~~(g)~~ (f) Directing or authorizing the sale or conveyance or confirming the sale of property.
- ~~(h)~~ (g) Directing or authorizing the granting of an option to purchase real property.
- ~~(i)~~ (h) Adjudicating the merits of any claim under Section 851.5, 852 or 853.
- ~~(j)~~ (i) Allocating debts under Section 980.
- ~~(k)~~ (j) Settling an account of an executor or administrator ~~or trustee, or instructing or appointing a trustee.~~
- ~~(l)~~ (k) Instructing or directing an executor or administrator.
- ~~(m)~~ (l) Directing or allowing the payment of a debt, claim, legacy, or attorney's fee.
- ~~(n)~~ (m) ~~Fixing, directing, or allowing payment of a trustee's compensation.~~
- ~~(o)~~ (n) Determining heirship or the persons to whom distribution should be made ~~or trust property should pass.~~
- ~~(p)~~ (o) Distributing property.
- ~~(q)~~ (p) Determining that property is community property passing or belonging to the surviving spouse pursuant to Section 655.
- ~~(r)~~ (q) Fixing an inheritance tax or determining that none is due.
- ~~(s)~~ (r) Authorizing a personal representative to invest or reinvest any surplus moneys pursuant to Section 584.5.

Comment. Section 1240 is amended to delete references to orders involving trusts. The substance of the deleted language is continued in Section 4626.

31784

Probate Code § 6325 (technical amendment). Jurisdiction over trusts for insurance or other employee benefits

SEC. ____ . Section 6325 of the Probate Code is amended to read:
 6325. (a) The court in which the proceedings are pending for administration of the estate of the decedent has jurisdiction, before or

after payment or transfer of benefits and rights or their proceeds to the trustee, to:

(1) Determine the validity of the trust.

(2) Determine the terms of the trust.

(3) Fill vacancies in the office of trustee.

(4) Require an undertaking of a trustee ~~or successor trustee~~ in its discretion and in such amount as the court may determine for the faithful performance of duties as trustee, subject to the provisions of Article 3 (commencing with Section 1540) of Chapter 12 of Division 1 of the Financial Code and Section ~~1127.5~~ 4551 of this code.

(5) Grant additional powers to the trustee, as provided in Section ~~1120.2~~ 4401.

(6) Instruct the trustee.

(7) Determine, fix, or allow payment of compensation of a trustee as provided in ~~Section 1122~~ Sections 4500 and 4501.

(8) Hear and determine adverse claims to the subject of the trust by the personal representative, surviving spouse, or other third person.

(9) Determine the identity of the trustee and the trustee's acceptance or rejection of the office and, upon request, furnish evidence of trusteeship to a trustee.

(10) Order postponement of the payment or transfer of the benefits and rights or their proceeds.

(11) Authorize or direct removal of the trust or assets of the trust to another jurisdiction pursuant to the procedure provided in ~~Article 3 Chapter 2~~ (commencing with Section ~~1139~~ 4550) of ~~Chapter 19 Part 4~~ of Division 3 4.5.

(12) Make any order incident to the foregoing or to the accomplishment of the purposes of this chapter.

(b) The personal representative of the designator's estate, any trustee named in the will or designation or successor to such trustee, or any person interested in the estate or trust may petition the court for an order under this section. Notice of hearing of the petition shall be given in the manner provided in Section 1120, except as the court may otherwise order.

Comment. Section 6325 is amended to correct cross-references. For changes in the law applicable to trust administration, see the Comments to the new sections.

Note. Section 6325 appears in AB 25 (1983); however, the staff thinks that this procedure should be supplanted by the general procedure proposed for trust administration. This section is an aspect of the dual trust administration scheme of existing law.

31785

Probate Code § 6326 (technical amendment). Applicability of trust administration provisions

SEC. ____ . Section 6326 of the Probate Code is amended to read:

6326. As to matters not specifically provided in Section 6325, the provisions of ~~Chapter 19~~ Division 4.5 (commencing with Section ~~1120~~) ~~of Division 3~~ 4000) apply to the trust.

Comment. Section 6326 is amended to refer to the statute governing trust administration.

Note. Section 6326 appears in AB 25 (1983).

Exhibit 4

Sections 1-8 of the
UNIFORM TRUSTEES' POWERS ACT

UNIFORM TRUSTEES' POWERS ACT

§ 1. [Definitions]

As used in this Act:

(1) "trust" means an express trust created by a trust instrument including a will, whereby a trustee has the duty to administer a trust asset for the benefit of a named or otherwise described income or principal beneficiary, or both; "trust" does not include a resulting or constructive trust, a business trust which provides for certificates to be issued to the beneficiary, an investment trust, a voting trust, a security instrument, a trust created by the judgment or decree of a court, a liquidation trust, or a trust for the primary purpose of paying dividends, interest, interest coupons, salaries, wages, pensions or profits, or employee benefits of any kind, an instrument wherein a person is nominee or escrowee for another, a trust created in deposits in any financial institution, or other trust the nature of which does not admit of general trust administration;

(2) "trustee" means an original, added, or successor trustee;

(3) "prudent man" means a trustee whose exercise of trust powers is reasonable and equitable in view of the interests of income or principal beneficiaries, or both, and in view of the manner in which men of ordinary prudence, diligence, discretion, and judgment would act in the management of their own affairs.

Commissioners' Note

What is "reasonable and equitable" powers will be determined as of table" in the exercise of trust the time of exercise.

§ 2. [Powers of Trustee Conferred by Trust or by Law]

(a) The trustee has all powers conferred upon him by the provisions of this Act unless limited in the trust instrument [and except as is otherwise provided in _____].

(b) An instrument which is not a trust under section 1(1) may incorporate any part of this Act by reference.

§ 3. [Powers of Trustees Conferred by this Act]

(a) From time of creation of the trust until final distribution of the assets of the trust, a trustee has the power to perform, without court authorization, every act which a prudent man would perform for the purposes of the trust including but not limited to the powers specified in subsection (c).

(b) In the exercise of his powers including the powers granted by this Act, a trustee has a duty to act with due regard to his obligation as a fiduciary, including a duty not to exercise any power under this Act in such a way as to deprive the trust of an otherwise available tax exemption, deduction, or credit for tax purposes or deprive a donor of a trust asset of a tax exemption, deduction, or credit or operate to impose a tax upon a donor or other person as owner of any portion of the trust. "Tax" includes, but is not limited to, any federal, state, or local income, gift, estate, or inheritance tax.

(c) A trustee has the power, subject to subsections (a) and (b):

(1) to collect, hold, and retain trust assets received from a trustor until, in the judgment of the trustee, disposition of the assets should be made; and the assets may be retained even though they include an asset in which the trustee is personally interested;

(2) to receive additions to the assets of the trust;

(3) to continue or participate in the operation of any business or other enterprise, and to effect incorporation, dissolution, or other change in the form of the organization of the business or enterprise;

(4) to acquire an undivided interest in a trust asset in which the trustee, in any trust capacity, holds an undivided interest;

(5) to invest and reinvest trust assets in accordance with the provisions of the trust or as provided by law;

(6) to deposit trust funds in a bank, including a bank operated by the trustee;

(7) to acquire or dispose of an asset, for cash or on credit, at public or private sale; and to manage, develop, improve, exchange, partition, change the character of, or abandon a trust asset or any interest therein; and to encumber, mortgage, or pledge a trust asset for a term within or extending beyond the term of the trust, in connection with the exercise of any power vested in the trustee;

(8) to make ordinary or extraordinary repairs or alterations in buildings or other structures, to demolish any improvements, to raze existing or erect new party walls or buildings;

(9) to subdivide, develop, or dedicate land to public use; or to make or obtain the vacation of plats and adjust boundaries; or to adjust differences in valuation on exchange or partition by giving or receiving consideration; or to dedicate easements to public use without consideration;

(10) to enter for any purpose into a lease as lessor or lessee with or without option to purchase or renew for a term within or extending beyond the term of the trust;

(11) to enter into a lease or arrangement for exploration and removal of minerals or other natural resources or enter into a pooling or unitization agreement;

(12) to grant an option involving disposition of a trust asset, or to take an option for the acquisition of any asset;

(13) to vote a security, in person or by general or limited proxy;

(14) to pay calls, assessments, and any other sums chargeable or accruing against or on account of securities;

(15) to sell or exercise stock subscription or conversion rights; to consent, directly or through a committee or other agent, to the reorganization, consolidation, merger, dissolution, or liquidation of a corporation or other business enterprise;

(16) to hold a security in the name of a nominee or in other form without disclosure of the trust, so that title to the security may pass by delivery, but the trustee is liable for any act of the nominee in connection with the stock so held;

(17) to insure the assets of the trust against damage or loss, and the trustee against liability with respect to third persons;

(18) to borrow money to be repaid from trust assets or otherwise; to advance money for the protection of the trust, and for all expenses, losses, and liabilities sustained in the administration of the trust or because of the holding or ownership of any trust assets, for which advances with any interest the trustee has a lien on the trust assets as against the beneficiary;

(19) to pay or contest any claim; to settle a claim by or against the trust by compromise, arbitration, or otherwise; and to release, in whole or in part, any claim belonging to the trust to the extent that the claim is uncollectible;

(20) to pay taxes, assessments, compensation of the trustee, and other expenses incurred in the collection, care, administration, and protection of the trust;

(21) to allocate items of income or expense to either trust income or principal, as provided by law, including creation of reserves out of income for depreciation, obsolescence, or amortization, or for depletion in mineral or timber properties;

(22) to pay any sum distributable to a beneficiary under legal disability, without liability to the trustee, by paying the sum to the beneficiary or by paying the sum for the use of the beneficiary either to a legal representative appointed by the court, or if none, to a relative;

(23) to effect distribution of property and money in divided or undivided interests and to adjust resulting differences in valuation;

(24) to employ persons, including attorneys, auditors, investment advisors, or agents, even if they are associated with the trustee, to advise or assist the trustee in the performance of his administrative duties; to act without independent investigation upon their recommendations; and instead of acting personally, to employ one or more agents to perform any act of administration, whether or not discretionary;

(25) to prosecute or defend actions, claims, or proceedings for the protection of trust assets and of the trustee in the performance of his duties;

(26) to execute and deliver all instruments which will accomplish or facilitate the exercise of the powers vested in the trustee.

§ 4. [Trustee's Office not Transferable]

The trustee shall not transfer his office to another or delegate the entire administration of the trust to a cotrustee or another.

§ 5. [Power of Court to Permit Deviation or to Approve Transactions Involving Conflict of Interest]

(a) This Act does not affect the power of a court of competent jurisdiction for cause shown and upon petition of the trustee or affected beneficiary and upon appropriate notice to the affected parties to relieve a trustee from any restrictions on his power that would otherwise be placed upon him by the trust or by this Act.

(b) If the duty of the trustee and his individual interest or his interest as trustee of another trust, conflict in the exercise of a trust power, the power may be exercised only by court authorization (except as provided in sections 3(c)(1), (4), (6), (18), and (24)) upon petition of the trustee. Under this section, personal profit or advantage to an affiliated or subsidiary company or association is personal profit to any corporate trustee.

§ 6. [Powers Exercisable by Joint Trustees—Liability]

(a) Any power vested in 3 or more trustees may be exercised by a majority, but a trustee who has not joined in exercising a power is not liable to the beneficiaries or to others for the consequences of the exercise; and a dissenting trustee is not liable for the consequences of an act in which he joins at the direction of the majority of the trustees, if he expressed his dissent in writing to any of his cotrustees at or before the time of the joinder.

(b) If 2 or more trustees are appointed to perform a trust, and if any of them is unable or refuses to accept the appointment, or, having accepted, ceases to be a trustee, the surviving or remaining trustees shall perform the trust and succeed to all the powers, duties, and discretionary authority given to the trustees jointly.

(c) This section does not excuse a cotrustee from liability for failure either to participate in the administration of the trust or to attempt to prevent a breach of trust.

§ 7. [Third Persons Protected in Dealing with Trustee]

With respect to a third person dealing with a trustee or assisting a trustee in the conduct of a transaction, the existence of trust power and their proper exercise by the trustee may be assumed without inquiry. The third person is not bound to inquire whether the trustee has power to act or is properly exercising the power; and a third person, without actual knowledge that the trustee is exceeding his powers or improperly exercising them, is fully protected in dealing with the trustee as if the trustee possessed and properly exercised the powers he purports to exercise. A third person is not bound to assure the proper application of trust assets paid or delivered to the trustee.

§ 8. [Application of Act]

Except as specifically provided in the trust, the provisions of this Act apply to any trust established [before or] after the effective date of this Act [and to any trust asset acquired by the trustee [before or] after the effective date of this Act].

Commissioners' Note

If the bracketed provisions are not affect the validity of any fact included in the Act as adopted, of the trustee performed prior to the provisions of this section will its enactment.

Exhibit 5

UNIFORM PROBATE CODE

ARTICLE VII
TRUST ADMINISTRATION

PART 1

TRUST REGISTRATION

Section

- 7-101. [Duty to Register Trusts.]
- 7-102. [Registration Procedures.]
- 7-103. [Effect of Registration.]
- 7-104. [Effect of Failure to Register.]
- 7-105. [Registration, Qualification of Foreign Trustee.]

PART 2

JURISDICTION OF COURT CONCERNING TRUSTS

- 7-201. [Court; Exclusive Jurisdiction of Trusts.]
- 7-202. [Trust Proceedings; Venue.]
- 7-203. [Trust Proceedings; Dismissal of Matters Relating to Foreign Trusts.]
- 7-204. [Court; Concurrent Jurisdiction of Litigation Involving Trusts and Third Parties.]
- 7-205. [Proceedings for Review of Employment of Agents and Review of Compensation of Trustee and Employees of Trust.]
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PART 3

DUTIES AND LIABILITIES OF TRUSTEES

- 7-301. [General Duties Not Limited.]
- 7-302. [Trustee's Standard of Care and Performance.]
- 7-303. [Duty to Inform and Account to Beneficiaries.]
- 7-304. [Duty to Provide Bond.]
- 7-305. [Trustee's Duties; Appropriate Place of Administration; Deviation.]
- 7-306. [Personal Liability of Trustee to Third Parties.]
- 7-307. [Limitations on Proceedings Against Trustees After Final Account.]

GENERAL COMMENT

Several considerations explain the presence in the Uniform Probate Code of procedures applicable to inter vivos and testament-

ary trusts. The most important is that the Court assumed by the Code is a full power court which appropriately may receive jurisdiction over trustees. Another is that personal representatives under Articles III and IV and conservators under Article V, have the status of trustees. It follows naturally that these fiduciaries and regular trustees should bear a similar relationship to the Court. Also, the general move of the Code away from the concept of supervisory jurisdiction over any fiduciary is compatible with the kinds of procedural provisions which are believed to be desirable for trustees.

The relevance of trust procedures to those relating to settlement of decedents' estates is apparent in many situations. Many trusts are created by will. In a substantial number of states, statutes now extend probate court control over decedents' estates to testamentary trustees, but the same procedures rarely apply to inter vivos trusts. For example, eleven states appear to require testamentary trustees to qualify and account in much the same manner as executors, though quite different requirements relate to trustees of inter vivos trusts in these same states. Twenty-four states impose some form of mandatory court accountings on testamentary trustees, while only three seem to have comparable requirements for inter vivos trustees.

From an estate planning viewpoint, probate court supervision of testamentary trustees causes many problems. In some states, testamentary trusts cannot be re-

leased to be administered in another state. This requires complicated planning if inconvenience to interested persons is to be avoided when the beneficiaries move elsewhere. Also, some states preclude foreign trust companies from serving as trustees of local testamentary trusts without complying with onerous or prohibitive qualification requirements. Regular accountings in court have proved to be more expensive than useful in relation to the vast majority of trusts and sometimes have led to the ill-advised use of legal life estates to avoid these burdens.

The various restrictions applicable to testamentary trusts have caused many planners to recommend use of revocable inter vivos trusts. The widely adopted Uniform Testamentary Addition to Trusts Act has accelerated this tendency by permitting testators to devise estates to trustees of previously established receptacle trusts which have and retain the characteristics of inter vivos trusts for purpose of procedural requirements.

The popularity of this legislation and the widespread use of pour-over wills indicates rather vividly the obsolescence and irrelevance of statutes contemplating supervisory jurisdiction.

One of the problems with inter vivos and receptacle trusts at the present time, however, is that persons interested in these arrangements as trustees or beneficiaries frequently discover that there are no simple and efficient statutory or judicial remedies available to them to meet the

special needs of the trust relationship. Proceedings in equity before courts of general jurisdiction are possible, of course, but the difficulties of obtaining jurisdiction over all interested persons on each occasion when a judicial order may be necessary or desirable are commonly formidable. A few states offer simplified procedures on a voluntary basis for inter vivos as well as testamentary trusts. In some of these, however, the legislation forces inter vivos trusts into unpopular patterns involving supervisory control. Nevertheless, it remains true of the legislation in most states that there is too little for inter vivos trusts and too much for trusts created by will.

Other developments suggest that enactment of useful, uniform legislation on trust procedures is a matter of considerable social importance. For one thing, accelerating mobility of persons and estates is steadily increasing the pressure on locally oriented property institutions. The drafting and technical problems created by lack of uniformity of trust procedures in the several states are quite serious. If people cannot obtain efficient trust service to preserve and direct wealth because of state property rules, they will turn in time to national arrangements that eliminate property law problems. A general shift away from local management of trustee wealth and increased reliance on various contractual claims against national funds seems the most likely consequence if the local law of trusts remains nonuniform and provincial.

Modestly endowed persons who are turning to inter vivos trusts to avoid probate are of more immediate concern. Lawyers in all parts of the country are aware of the trend toward reliance on revocable trusts as total substitutes for wills which recent controversies about probate procedures have stimulated. There would be little need for concern about this development if it could be assumed also that the people involved are seeking and getting competent advice and fiduciary assistance. But there are indications that many people are neither seeking nor receiving adequate information about trusts they are using. Moreover, professional fiduciaries are often not available as trustees for small estates. Consequently, neither settlors nor trustees of "do-it-yourself" trusts have much idea of what they are getting into. As a result, there are corresponding dangers to beneficiaries who are frequently uninformed or baffled by formidable difficulties in obtaining relief or information.

Enactment of clear statutory procedures creating simple remedies for persons involved in trust problems will not prevent disappointment for many of these persons but should help minimize their losses.

Several objectives of the Code are suggested by the preceding discussion. They may be summarized as follows:

1. To eliminate procedural distinctions between testamentary and inter vivos trusts.
2. To strengthen the ability of owners to select trustees by elim-

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Art. 7

inating formal qualification of trustees and restrictions on the place of administration.

3. To locate nonmandatory judicial proceedings for trustees and beneficiaries in a convenient court fully competent to handle all problems that may arise.

4. To facilitate judicial proceedings concerning trusts by comprehensive provisions for obtaining jurisdiction over interested persons by notice.

5. To protect beneficiaries by having trustees file written statements of acceptance of trusts with suitable courts, thereby acknowledging jurisdiction and providing some evidence of the trust's existence for future beneficiaries.

6. To eliminate routinely required court accountings, substituting clear remedies and statutory duties to inform beneficiaries.

PART 1

TRUST REGISTRATION

GENERAL COMMENT

Registration of trusts is a new concept and differs importantly from common arrangements for retained supervisory jurisdiction of courts of probate over testamentary trusts. It applies alike to inter vivos and testamentary trusts, and is available to foreign-created trusts as well as those locally created. The place of registration is related not to the place where the trust was created, which may lose its significance to the parties concerned, but is related to the place where the trust is primarily administered, which in turn is required (Section 7-305) to be at a location appropriate to the purposes of the trust and the interests of its beneficiaries. Sections 7-102 and 7-305 provide for transfer of registration. The procedure is more flexible than the typical retained jurisdiction in that it permits registration or submission to other appropriate procedures at another place, even in another state, in order to accommodate relocation of the trust at a place which becomes more convenient for its administration. (Cf. 20 [Purdon's] Pa.Stat. § 2080.309.) In addition, the registration acknowledges that a particular court will be accessible to the parties on a permissive basis with-

out subjecting the trust to compulsory, continuing supervision by the court.

The process of registration requires no judicial action or determination but is accomplished routinely by simple acts on the part of the trustee which will place certain information on file with the court (Section 7-102). Although proceedings involving a registered trust will not be continuous but will be separate each time an interested party initiates a proceeding, it is contemplated that a court will maintain a single file for each registered trust as a record available to interested persons. Proceedings are facilitated by the broad jurisdiction of the court (Section 7-201) and the Code's representation and notice provisions (Section 1-403).

Section 7-201 provides complete jurisdiction over trust proceedings in the court of registration. Section 7-103 above provides for jurisdiction over parties. Section 7-104 should facilitate use of trusts involving assets in several states by providing for a single principal place of administration and reducing concern about qualification of foreign trust companies.

Section 7-101. [Duty to Register Trusts.]

The trustee of a trust having its principal place of administration in this state shall register the trust in the Court of this state at the principal place of administration. Unless otherwise designated in the trust instrument, the principal place

of administration of a trust is the trustee's usual place of business where the records pertaining to the trust are kept, or at the trustee's residence if he has no such place of business. In the case of co-trustees, the principal place of administration, if not otherwise designated in the trust instrument, is (1) the usual place of business of the corporate trustee if there is but one corporate co-trustee, or (2) the usual place of business or residence of the individual trustee who is a professional fiduciary if there is but one such person and no corporate co-trustee, and otherwise (3) the usual place of business or residence of any of the co-trustees as agreed upon by them. The duty to register under this Part does not apply to the trustee of a trust if registration would be inconsistent with the retained jurisdiction of a foreign court from which the trustee cannot obtain release.

COMMENT

This section rests on the assumption that a central "filing office" will be designated in each county where the Court may sit in more than one place.

The scope of this section and of Article VII is tied to the definition of "trustee" in section 1-201. It was suggested that the definition should be expanded to include "land trusts." It was con-

cluded, however, that the inclusion of this term, which has special meaning principally in Illinois, should be left for decision by enacting states. Under the definition of "trust" in this Code, custodial arrangements as contemplated by legislation dealing with gifts to minors, are excluded, as are "trust accounts" as defined in Article VI.

Section 7-102. [Registration Procedures.]

Registration shall be accomplished by filing a statement indicating the name and address of the trustee in which it acknowledges the trusteeship. The statement shall indicate whether the trust has been registered elsewhere. The statement shall identify the trust: (1) in the case of a testamentary trust, by the name of the testator and the date and place of domiciliary probate; (2) in the case of a written inter vivos trust, by the name of each settlor and the original trustee and the date of the trust instrument; or (3) in the case of an oral trust, by information identifying the settlor or other source of funds and describing the time and manner of the trust's creation and the terms of the trust, including the subject matter, beneficiaries and time of performance. If a trust has been registered elsewhere, registration in this state is ineffective until the earlier registration is released by order of the Court where prior registration occurred, or an instrument

executed by the trustee and all beneficiaries, filed with the registration in this state.

COMMENT

Additional duties of the clerk register trusts is stated in Section of the Court are provided in tion 7-101. Section 1-305. The duty to

Section 7-103. [Effect of Registration.]

(a) By registering a trust, or accepting the trusteeship of a registered trust, the trustee submits personally to the jurisdiction of the Court in any proceeding under 7-201 of this Code relating to the trust that may be initiated by any interested person while the trust remains registered. Notice of any proceeding shall be delivered to the trustee, or mailed to him by ordinary first class mail at his address as listed in the registration or as thereafter reported to the Court and to his address as then known to the petitioner.

(b) To the extent of their interests in the trust, all beneficiaries of a trust properly registered in this state are subject to the jurisdiction of the court of registration for the purposes of proceedings under Section 7-201, provided notice is given pursuant to Section 1-401.

COMMENT

This section provides for jurisdiction over the parties. Subject matter jurisdiction for proceedings involving trusts is described in Section 7-201 and 7-202. The basic jurisdictional concept in Section 7-103 is that reflected in widely adopted long-arm statutes, that a state may properly entertain proceedings when it is a reasonable forum under all the circumstances, provided adequate notice is given. Clearly the trustee can be deemed to consent to jurisdiction by virtue of registration. This basis for consent jurisdiction is in addition to and not in lieu of other bases of jurisdiction during or after registration. Also, incident to an order releasing registration under Section 7-305, the Court could condition the release on registration of the trust in another state or court. It also seems reasonable to require beneficiaries to go to the seat of the trust when litigation has been initiated there concerning a trust in which they claim beneficial interests, much as the rights of shareholders of a corporation can be determined at a corporate seat. The settlor has indicated a principal place of administration by his selection of a trustee or otherwise, and it is reasonable to subject rights under the trust to the jurisdiction of the Court where the trust is properly administered. Although most cases will fit within traditional concepts of jurisdiction, this section goes beyond established doctrines of in personam or quasi in rem jurisdiction as regards a nonres-

ident beneficiary's interests in section affords due process and foreign land of chattels, but the represents a worthwhile step for- National Conference believes the ward in trust proceedings.

Section 7-104. [Effect of Failure to Register.]

A trustee who fails to register a trust in a proper place as required by this Part, for purposes of any proceedings initiated by a beneficiary of the trust prior to registration, is subject to the personal jurisdiction of any Court in which the trust could have been registered. In addition, any trustee who, within 30 days after receipt of a written demand by a settlor or beneficiary of the trust, fails to register a trust as required by this Part is subject to removal and denial of compensation or to surcharge as the Court may direct. A provision in the terms of the trust purporting to excuse the trustee from the duty to register, or directing that the trust or trustee shall not be subject to the jurisdiction of the Court, is ineffective.

COMMENT

Under Section 1-108, the holder of a presently exercisable general power of appointment can control all duties of a fiduciary to beneficiaries who may be changed by exercise of the power. Hence, if the settlor of a revocable inter vivos trust directs the trustee to refrain from registering a trust, no liability would follow even though another beneficiary demanded registration. The ability of the general power holder to control the trustee ends when the power is terminated.

Section 7-105. [Registration, Qualification of Foreign Trustee.]

A foreign corporate trustee is required to qualify as a foreign corporation doing business in this state if it maintains the principal place of administration of any trust within the state. A foreign co-trustee is not required to qualify in this state solely because its co-trustee maintains the principal place of administration in this state. Unless otherwise doing business in this state, local qualification by a foreign trustee, corporate or individual, is not required in order for the trustee to receive distribution from a local estate or to hold, invest in, manage or acquire property located in this state, or maintain litigation. Nothing in this section affects a determination of what other acts require qualification as doing business in this state.

COMMENT

Section 7-105 deals with non-resident trustees in a fashion which should correct a widespread deficiency in present regulation of trust activity. Provisions limiting business of foreign corporate trustees constitute an unnecessary limitation on the ability of a trustee to function away from its principal place of business. These restrictions properly relate more to continuous pursuit of general trust business by foreign corporations than to isolated instances of litigation and management of the assets of a particular trust. The ease of avoiding foreign corporation qualifi-

cation statutes by the common use of local nominees or sub-trustees, and the acceptance of these practices, are evidence of the futility and undesirability of more restrictive legislation of the sort commonly existing today. The position embodied in this section has been recommended by important segments of the banking and trust industry through a proposed model statute, and the failure to adopt this reform has been characterized as unfortunate by a leading trust authority. See 5 Scott on Trusts § 558 (3rd ed. 1967).

PART 2

JURISDICTION OF COURT CONCERNING TRUSTS

Section 7-201. [Court; Exclusive Jurisdiction of Trusts.]

(a) The Court has exclusive jurisdiction of proceedings initiated by interested parties concerning the internal affairs of trusts. Proceedings which may be maintained under this section are those concerning the administration and distribution of trusts, the declaration of rights and the determination of other matters involving trustees and beneficiaries of trusts. These include, but are not limited to, proceedings to:

- (1) appoint or remove a trustee;
- (2) review trustees' fees and to review and settle interim or final accounts;
- (3) ascertain beneficiaries, determine any question arising in the administration or distribution of any trust including questions of construction of trust instruments, to instruct trustees, and determine the existence or non-existence of any immunity, power, privilege, duty or right; and
- (4) release registration of a trust.

(b) Neither registration of a trust nor a proceeding under this section result in continuing supervisory proceedings. The management and distribution of a trust estate, submission of accounts and reports to beneficiaries, payment of trustee's fees and other obligations of a trust, acceptance and change of trusteeship, and other aspects of the administration of a trust shall proceed expeditiously consistent with the terms of the trust, free of judicial intervention and without order, approval or other action of any court, subject to the jurisdiction of the Court as invoked by interested parties or as otherwise exercised as provided by law.

COMMENT

Derived in small part from Statutes, (Purdon) 32080.101 et Florida Statutes 1965, Chapters seq. 737 and 87, and Title 20, Penna.

Section 7-202. [Trust Proceedings; Venue.]

Venue for proceedings under Section 7-201 involving registered trusts is in the place of registration. Venue for proceedings under Section 7-201 involving trusts not registered

in this state is in any place where the trust properly could have been registered, and otherwise by the rules of civil procedure.

Section 7-203. [Trust Proceedings; Dismissal of Matters Relating to Foreign Trusts.]

The Court will not, over the objection of a party, entertain proceedings under Section 7-201 involving a trust registered or having its principal place of administration in another state, unless (1) when all appropriate parties could not be bound by litigation in the courts of the state where the trust is registered or has its principal place of administration or (2) when the interests of justice otherwise would seriously be impaired. The Court may condition a stay or dismissal of a proceeding under this section on the consent of any party to jurisdiction of the state in which the trust is registered or has its principal place of business, or the Court may grant a continuance or enter any other appropriate order.

COMMENT

While recognizing that trusts which are essentially foreign can be the subject of proceedings in this state, this section employs the concept of forum non conveniens to center litigation involving the trustee and beneficiaries at the principal place of administration of the trust but leaves open the possibility of suit elsewhere when necessary in the interests of justice. It is assumed that under this section a court would refuse to entertain litigation involving the foreign registered trust unless for jurisdictional or other reasons, such as the nature and location of the property or unusual interests of the parties, it is manifest that substantial injustice would result if the parties were referred to the court of registration. As regards litigation involving third parties, the trustee may sue and be sued as any owner and manager of property under the usually applicable rules of civil procedure and also as provided in Section 7-203.

The concepts of res judicata and full faith and credit applicable to any managing owner of property have generally been applicable to trustees. Consequently, litigation by trustees has not involved the artificial problems historically found when personal representatives maintain litigation away from the state of their appointment, and a prior adjudication for or against a trustee rendered in a foreign court having jurisdiction is viewed as conclusive and entitled to full faith and credit. Because of this, provisions changing the law, analogous to those relating to personal representatives in Section 4-401 do not appear necessary. See also Section 3-408. In light of the foregoing, the issue is essentially only one of forum non conveniens in having litigation proceed in the most appropriate forum. This is the function of this section.

Section 7-204. [Court; Concurrent Jurisdiction of Litigation Involving Trusts and Third Parties.]

The Court of the place in which the trust is registered has concurrent jurisdiction with other courts of this state of actions and proceedings to determine the existence or nonexistence of trusts created other than by will, of actions by or against creditors or debtors of trusts, and of other actions and proceedings involving trustees and third parties. Venue is determined by the rules generally applicable to civil actions.

Section 7-205. [Proceedings for Review of Employment of Agents and Review of Compensation of Trustee and Employees of Trust.]

On petition of an interested person, after notice to all interested persons, the Court may review the propriety of employment of any person by a trustee including any attorney, auditor, investment advisor or other specialized agent or assistant, and the reasonableness of the compensation of any person so employed, and the reasonableness of the compensation determined by the trustee for his own services. Any person who has received excessive compensation from a trust may be ordered to make appropriate refunds.

COMMENT

In view of the broad jurisdiction conferred on the probate court, description of the special proceeding authorized by this section might be unnecessary. But the Code's theory that trustees may fix their own fees and those of their attorneys marks an important departure from much existing practice under which fees are determined by the Court in

the first instance. Hence, it seems wise to emphasize that any interested person can get judicial review of fees if he desires it. Also, if excessive fees have been paid, this section provides a quick and efficient remedy. This review would meet in part the criticism of the broad powers given in the Uniform Trustees' Powers Act.

Section 7-206. [Trust Proceedings; Initiation by Notice; Necessary Parties.]

Proceedings under Section 7-201 are initiated by filing a petition in the Court and giving notice pursuant to Section 1-401 to interested parties. The Court may order notification of additional persons. A decree is valid as to all who are given notice of the proceeding though fewer than all interested parties are notified.

PART 3

DUTIES AND LIABILITIES OF TRUSTEES

Section 7-301. [General Duties Not Limited.]

Except as specifically provided, the general duty of the trustee to administer a trust expeditiously for the benefit of the beneficiaries is not altered by this Code.

Section 7-302. [Trustee's Standard of Care and Performance.]

Except as otherwise provided by the terms of the trust, the trustee shall observe the standards in dealing with the trust assets that would be observed by a prudent man dealing with the property of another, and if the trustee has special skills or is named trustee on the basis of representations of special skills or expertise, he is under a duty to use those skills.

COMMENT

This is a new general provision designed to make clear the standard of skill expected from trustees both individual and corporate, nonprofessional and professional. It differs somewhat from the standard stated in § 174 of the Restatement of Trusts, Second, which is as follows:

"The trustee is under a duty to the beneficiary in administering the trust to exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property; and if the trustee has or procures his appointment as trustee by representing that he has greater skill than that of a rea-

sonable man of ordinary prudence, he is under a duty to exercise such skill."

By making the basic standard align to that observed by a prudent man in dealing with the property of another, the section accepts a standard as it has been articulated in some decisions regarding the duty of a trustee concerning investments. See *Estate of Cook*, (Del.Chanc.1934) 20 Del.Ch. 123, 171 A. 730. Also, the duty as described by the above section more clearly conveys the idea that a trustee must comply with an external, rather than with a personal, standard of care.

Section 7-303. [Duty to Inform and Account to Beneficiaries.]

The trustee shall keep the beneficiaries of the trust reasonably informed of the trust and its administration. In addition:

- (a) Within 30 days after his acceptance of the trust, the trustee shall inform in writing the current beneficiaries and if possible, one or more persons who under Section 1-403 may

represent beneficiaries with future interests, of the Court in which the trust is registered and of his name and address.

(b) Upon reasonable request, the trustee shall provide the beneficiary with a copy of the terms of the trust which describe or affect his interest and with relevant information about the assets of the trust and the particulars relating to the administration.

(c) Upon reasonable request, a beneficiary is entitled to a statement of the accounts of the trust annually and on termination of the trust or change of the trustee.

COMMENT

Analogous provisions are found in Section 3-705.

This provision does not require regular accounting to the Court nor are copies of statements furnished beneficiaries required to be filed with the Court. The parties are expected to assume the usual ownership responsibility for their interests including their own record keeping. Under Section 1-108, the holder of a general power of appointment or of revocation can negate the trustee's duties to any other person.

This section requires that a reasonable selection of beneficiaries is entitled to information so that the interests of the future beneficiaries may adequately be protected. After mandatory notification of registration by the trustee to the beneficiaries, further information may be obtained by the beneficiary upon request.

This is to avoid extensive mandatory formal accounts and yet provide the beneficiary with adequate protection and sources of information. In most instances, the trustee will provide beneficiaries with copies of annual tax returns or tax statements that must be filed. Usually this will be accompanied by a narrative explanation by the trustee. In the case of the charitable trust, notice need be given only to the attorney general or other state officer supervising charitable trusts and in the event that the charitable trust has, as its primary beneficiary, a charitable corporation or institution, notice should be given to that charitable corporation or institution. It is not contemplated that all of the individuals who may receive some benefit as a result of a charitable trust be informed.

Section 7-304. [Duty to Provide Bond.]

A trustee need not provide bond to secure performance of his duties unless required by the terms of the trust, reasonably requested by a beneficiary or found by the Court to be necessary to protect the interests of the beneficiaries who are not able to protect themselves and whose interests otherwise are not adequately represented. On petition of the trustee or other interested person the Court may excuse a requirement of

bond, reduce the amount of the bond, release the surety, or permit the substitution of another bond with the same or different sureties. If bond is required, it shall be filed in the Court of registration or other appropriate Court in amounts and with sureties and liabilities as provided in Sections 3-604 and 3-606 relating to bonds of personal representatives.

COMMENT

See Sections 3-603 and 3-604; 1949, § 390.911(b) [20 Purdon's 60 Okla.Stats.1961, § 175.24 [60 Pa.Stat. § 390.911(b)]; cf. Tenn. Okl.St. Ann. § 175.24]; Pa.Fid.Act, Code Ann. § 35-113.

Section 7-305. [Trustee's Duties; Appropriate Place of Administration; Deviation.]

A trustee is under a continuing duty to administer the trust at a place appropriate to the purposes of the trust and to its sound, efficient management. If the principal place of administration becomes inappropriate for any reason, the Court may enter any order furthering efficient administration and the interests of beneficiaries, including, if appropriate, release of registration, removal of the trustee and appointment of a trustee in another state. Trust provisions relating to the place of administration and to changes in the place of administration or of trustee control unless compliance would be contrary to efficient administration or the purposes of the trust. Views of adult beneficiaries shall be given weight in determining the suitability of the trustee and the place of administration.

COMMENT

This section and 7-102 are related. The latter section makes it clear that registration may be released without Court order if the trustee and beneficiaries can agree on the matter. Section 1-108 may be relevant, also.

The primary thrust of Article VII is to relate trust administration to the jurisdiction of courts, rather than to deal with substantive matters of trust law. An aspect of deviation, however, is touched here.

Section 7-306. [Personal Liability of Trustee to Third Parties.]

(a) Unless otherwise provided in the contract, a trustee is not personally liable on contracts properly entered into in his fiduciary capacity in the course of administration of the trust estate unless he fails to reveal his representative capacity and identify the trust estate in the contract.

(b) A trustee is personally liable for obligations arising from ownership or control of property of the trust estate or for torts committed in the course of administration of the trust estate only if he is personally at fault.

(c) Claims based on contracts entered into by a trustee in his fiduciary capacity, on obligations arising from ownership or control of the trust estate, or on torts committed in the course of trust administration may be asserted against the trust estate by proceeding against the trustee in his fiduciary capacity, whether or not the trustee is personally liable therefor.

(d) The question of liability as between the trust estate and the trustee individually may be determined in a proceeding for accounting, surcharge or indemnification or other appropriate proceeding.

COMMENT

The purpose of this section is to make the liability of the trust and trustee the same as that of the decedent's estate and personal representative.

Ultimate liability as between the estate and the fiduciary need not necessarily be determined whenever there is doubt about this question. It should be permissible, and often it will be preferable, for judgment to be entered, for example, against the trustee individually for purposes

of determining the claimant's rights without the trustee placing that matter into controversy. The question of his right of reimbursement may be settled informally with beneficiaries or in a separate proceeding in the probate court involving reimbursement. The section does not preclude the possibility, however, that beneficiaries might be permitted to intervene in litigation between the trustee and a claimant and that all questions might be resolved in that action.

Section 7-307. [Limitations on Proceedings Against Trustees After Final Account.]

Unless previously barred by adjudication, consent or limitation, any claim against a trustee for breach of trust is barred as to any beneficiary who has received a final account or other statement fully disclosing the matter and showing termination of the trust relationship between the trustee and the beneficiary unless a proceeding to assert the claim is commenced within [6 months] after receipt of the final account or statement. In any event and notwithstanding lack of full disclosure a trustee who has issued a final account or statement received by the beneficiary and has informed the beneficiary of

the location and availability of records for his examination is protected after 3 years. A beneficiary is deemed to have received a final account or statement if, being an adult, it is received by him personally or if, being a minor or disabled person, it is received by his representative as described in Section 1-403(1) and (2).

COMMENT

Final accounts terminating the trustee's obligations to the trust beneficiaries may be formal or informal. Formal judicial accountings may be initiated by the petition of any trustee or beneficiary. Informal accounts may be conclusive by consent or by limitation. This section provides a special limitation supporting informal accounts. With regard to facilitating distribution see Section 5-103.

Section 1-108 makes approval of an informal account or settlement with a trustee by the holder of a presently exercisable general power of appointment binding on all beneficiaries. In addition, the equitable principles of estoppel and laches, as well as general statutes of limitation, will apply in many cases to terminate trust liabilities.

PART 4
POWERS OF TRUSTEES

GENERAL COMMENT

There has been considerable interest in recent years in legislation giving trustees extensive powers. The Uniform Trustees' Powers Act, approved by the National Conference in 1964 has been adopted in Idaho, Kansas, Mississippi and Wyoming. New York and New Jersey have adopted similar statutes which differ somewhat from the Uniform Trustees' Powers Act, and Arkansas, California, Colorado, Florida, Iowa, Louisiana, Oklahoma, Penn-

sylvania, Virginia and Washington have comprehensive legislation which differ in various respects from other models. The legislation in Connecticut, North Carolina and Tennessee provides lists of powers to be incorporated by reference as draftsmen wish.

Comprehensive legislation dealing with trustees' powers appropriately may be included in the Code package at this point.

Exhibit 6

SELECTED CALIFORNIA TRUST STATUTES

Civil Code §§ 852-871

TITLE 4

Uses and Trusts

- § 852. Trusts must be in writing.
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 § 870. Certain sales, etc., by trustees, void.
 § 871. When estate of trustee to cease.

Cal Forms-42:21.

§ 852. Trusts must be in writing. No trust in relation to real property is valid unless created or declared:

1. By a written instrument, subscribed by the trustee, or by his agent thereto authorized by writing;
2. By the instrument under which the trustee claims the estate affected; or,
3. By operation of law. [1872.] *Cal Jur 3d Agency § 152, Deeds of Trust §§ 4, 10, Limitation of Actions § 112, Trusts §§ 4, 34; Cal Practice § 138:4; Cal Forms-42:22, 42:79, 42:291; Witkin Summary (8th ed) p 5377.*

§ 853. [Transfer to one for money paid by another.] When a transfer of real property is made to one person, and the consideration therefor is paid by or for another, a trust is presumed to result in favor of the person by or for whom such payment is made. [1872; 1873-74 ch 612 § 114.] *Cal Jur 3d Trusts §§ 4, 263, 272, 278, 335, Wills § 201; Witkin Summary (8th ed) p 5484.*

§ 856. Purchasers protected. No implied or resulting trust can prejudice the rights of

a purchaser or encumbrancer of real property for value and without notice of the trust. [1872.] *Cal Jur 3d Trusts §§ 4, 361; Witkin Summary (8th ed) p 5450.*

§ 858. [Vesting of mortgage powers.] Where a power to sell real property is given to a mortgagee, or other encumbrancer, in an instrument intended to secure the payment of money, the power is to be deemed a part of the security, and vests in any person who, by assignment, becomes entitled to the money so secured to be paid, and may be executed by him whenever the assignment is duly acknowledged and recorded. [1873-74 ch 612 § 117.] *Cal Jur 3d Acknowledgments §§ 4-6, Deeds of Trusts §§ 108, 198, 231, Trusts § 4.*

§ 859. [(Effective until July 1, 1983) Rents and profits liable to creditors in certain cases.] Where a trust is created to receive the rents and profits of real or personal property, and no valid direction for accumulation is given, the surplus of such rents and profits, beyond the sum that may

be necessary for the education and support of the person for whose benefit the trust is created, is liable to the claims of the creditors of such persons, in the same manner as personal property which cannot be reached by execution. [1872; 1935 ch 408 § 1.]

§ 859. [(Operative July 1, 1983) Surplus of rents and profits; Satisfaction of money judgment] Where a trust is created to receive the rents and profits of real or personal property, and no valid direction for accumulation is given, the surplus of such rents and profits, beyond the sum that may be necessary for the education and support of the person for whose benefit the trust is created, may be applied to the satisfaction of a money judgment against the person as provided in Section 709.010 of the Code of Civil Procedure. [1872; 1935 ch 408 § 1; 1982 ch 497 § 3, operative July 1, 1983.] *Cal Jur 3d Trusts* §§ 4, 91, 96, 97, 98; *19 Cal Practice Rev, Ch 422C, Action Against Beneficiary of Spend-thrift Trust for Breach of Contract To Assign Funds; Cal Forms-41:634, 42:191, 42:194; Witkin Summary (8th ed) p 5458.*

§ 860. [Exercise of vested powers.] Where a power is vested in several persons, all must unite in its execution; but, in case any one or more of them is dead, is legally incapable of exercising the power, or releases the power, the power may be executed by the others, unless otherwise prescribed by the terms of the power. [1873-74 ch 612 § 118; 1969 ch 113 § 1.] *Cal Jur 3d Trusts* §§ 4, 63, 109; *Witkin Summary (8th ed) p 1984.*

§ 863. Trustees of express trusts to have whole estate. Except as hereinafter otherwise provided, every express trust in real property, valid as such in its creation, vests the whole estate in the trustees, subject only to the execution of the trust. The beneficiaries take no estate or interest in the property, but may enforce the performance of the trust. [1872.] *Cal Jur 3d Estates* § 30, *Mortgages* § 11, *Trusts* §§ 4, 74, 76, 77, 80, 82; *19 Cal Practice Rev, Ch 422, Action To Enforce Performance of Express Trust in Real Property, Ch 422A, Action by Beneficiary To Enforce Rights by Following Trust Property, Ch 422C, Action Against Beneficiary of Spend-thrift Trust for Breach of Contract To Assign Funds, Ch 425B, Proceeding To Remove Trustee; Witkin Summary (8th ed) pp 5418, 5419, 5445.*

§ 864. Author of trust may devise, etc. Notwithstanding anything contained in the last section, the author of a trust may, in its

creation, prescribe to whom the real property to which the trust relates shall belong, in the event of the failure or termination of the trust, and may transfer or devise such property, subject to the execution of the trust. [1872.] *Cal Jur 3d Trusts* §§ 4, 75.

§ 865. Title of grantee [or devisee] of trust property. The grantee or devisee of real property subject to a trust acquires a legal estate in the property, as against all persons except the trustees and those lawfully claiming under them. [1872.] *Cal Jur 3d Trusts* §§ 4, 75.

§ 866. Interests remaining in grantor of express trust. Where an express trust is created in relation to real property, every estate not embraced in the trust, and not otherwise disposed of, is left in the author of the trust or his successors. [1872.] *Cal Jur 3d Trusts* §§ 4, 74.

§ 867. [Restraining disposition of trusts.] The beneficiary of a trust for the receipt of the rents and profits of real property, or for the payment of an annuity out of such rents and profits, may be restrained from disposing of his interest in such trust, during his life or for a term of years, by the instrument creating the trust. [1872; 1873-74 ch 612 § 120.] *Cal Jur 3d Annuities* §§ 7, 10, *Trusts* §§ 4, 80, 91; *Cal Forms-42:191; Witkin Summary (8th ed) pp 5452, 5453.*

§ 869. [Effect of omitting trust in conveyance.] Where an express trust is created in relation to real property, but is not contained or declared in the grant to the trustee, or in an instrument signed by him, and recorded in the same office with the grant to the trustee, such grant must be deemed absolute in favor of purchasers from such trustees without notice, and for a valuable consideration. [1872; 1873-74 ch 612 § 122.] *Cal Jur 3d Trusts* §§ 4, 361; *Cal Forms-42:291.*

§ 869a. [Conveyance in trust, not indicating or naming beneficiary.] Whenever any estate or interest in, or lien on or encumbrance on real property is conveyed, created, aliened, mortgaged, encumbered or affected by an instrument in writing to or in favor of a person or persons in trust, or (a) where such person is designated "trustee" or "as trustee," or (b) where such persons are designated "trustees" or "as trustees," and regardless of whether a joint tenancy or right of survivorship as between such persons is expressed or not, then, if no beneficiary be indicated or named in said instru-

ment, it shall be presumed that said person or persons, as the case may be, holds or hold the title to the estate, interest, lien or encumbrance absolutely in his or their own individual right and free from any trust, and an instrument executed by such person or persons, whether purporting to be the act of such person or persons in his or their individual right, or in his or their capacity as trustee or trustees, shall prima facie affect such estate, interest, lien, or encumbrance according to the tenor of such instrument. As to such instrument last mentioned and any judgment against such person affecting the title, such presumption shall be and become conclusive as to such undisclosed beneficiary and the original grantor or trustor and anyone claiming under them in favor of a purchaser or encumbrancer in good faith and for valuable consideration upon the filing of such instrument last mentioned for record in the office of the recorder of the county wherein the land affected thereby is situated.

In any action or proceeding involving the estate, interest, lien or encumbrance affected by the instrument first mentioned instituted against such person or persons, he or they shall be deemed the only necessary representative of such undisclosed beneficiary and of the original grantor or trustor and anyone claiming under them, and any judgment or decree shall be binding upon and conclusive against them as to all matters finally adjudicated therein.

Provided, however, that as to such instruments so filed for record prior to the taking

effect of this act, such presumption shall not become conclusive except in favor of a purchaser or encumbrancer in good faith and for a valuable consideration until one year after the taking effect of this act when it shall become conclusive without any qualification whatsoever and no action to avoid or impugn any such instrument last mentioned shall be commenced after the time when such presumption becomes conclusive as hereinbefore provided; and further provided, that nothing herein contained shall be construed as depriving such original grantor or trustor or undisclosed beneficiary, or anyone claiming under them, from commencing and maintaining actions other than actions affecting the land the subject of such instruments. [1923 ch 134 § 1; 1943 ch 312 § 1.] *Cal Jur 3d Trusts §§ 4, 30, 362; Cal Forms-42:293; Witkin Summary (8th ed) p 5451.*

§ 870. Certain sales, etc., by trustees, void. Where a trust in relation to real property is expressed in the instrument creating the estate every transfer or other act of the trustees, in contravention of the trust, is absolutely void. [1872.] *Cal Jur 3d Deeds of Trust § 277, Trusts §§ 4, 106, 152, 361; Cal Forms-42:117; Witkin Summary (8th ed) pp 5418, 5429, 5436.*

§ 871. When estate of trustee to cease. When the purpose for which an express trust was created ceases, the estate of the trustee also ceases. [1872.] *Cal Jur 3d Deeds of Trust §§ 77, 158, Homesteads § 29, Trusts §§ 4, 77, 243, 249; Witkin Summary (8th ed) pp 5471, 5472.*

Civil Code §§ 2215-2289

TITLE 8

Trust[s]

Chapter

1. Trusts in General. §§ 2215-2244.
2. Trusts for the Benefit of Third Persons. §§ 2250-2289.
3. Uniform Management of Institutional Funds Act. §§ 2290.1-2290.12.

CHAPTER 1

Trusts in General

Article

1. Nature and Creation of a Trust. §§ 2215-2224.
2. Obligations of Trustees. §§ 2228-2240.
3. Obligations of Third Persons. §§ 2243, 2244.

ARTICLE 1

Nature and Creation of a Trust

- § 2215. Trusts classified.
- § 2216. Voluntary trust, what.
- § 2217. Involuntary trust, what.
- § 2218. Parties to the contract.
- § 2219. What constitutes one a trustee.
- § 2220. Purpose of trust
- § 2221. Voluntary trust, how created as to trustor.
- § 2222. How created as to trustee.
- § 2223. Involuntary trustee, who is.
- § 2224. Involuntary trusts of wrongful gains

Cal Forms-42:21.

§ 2215. Trusts classified. A trust is either:

1. Voluntary; or,
2. Involuntary. [1872.] *Cal Jur 3d Family Law § 492, Trusts §§ 1, 2; 19 Cal Practice Rev, Ch 422B, Proceeding To Establish Membership in Class of Beneficiaries.*

§ 2216. Voluntary trust, what. A voluntary trust is an obligation arising out of a personal confidence reposed in, and volunta-

rily accepted by, one for the benefit of another. [1872.] *Cal Jur 3d Trusts §§ 1, 2; Cal Forms-42:1; Witkin Summary (8th ed) pp 5367, 5368.*

§ 2217. Involuntary trust, what. An involuntary trust is one which is created by operation of law. [1872.] *Cal Jur 3d Trusts §§ 1, 2; Cal Forms-42:1; Witkin Summary (8th ed) p 5367.*

§ 2218. Parties to the contract. The per-

son whose confidence creates a trust is called the trustor; the person in whom the confidence is reposed is called the trustee; and the person for whose benefit the trust is created is called the beneficiary. [1872.] *Cal Jur 3d Trusts § 1; Cal Forms-42:1; Witkin Summary (8th ed) p 5375.*

§ 2219. What constitutes one a trustee. Everyone who voluntarily assumes a relation of personal confidence with another is deemed a trustee, within the meaning of this chapter, not only as to the person who reposes such confidence, but also as to all persons of whose affairs he thus acquires information which was given to such person in the like confidence, or over whose affairs he, by such confidence, obtains any control. [1872.] *Cal Jur 3d Trusts §§ 1, 3; Witkin Procedure 2d, p 56; Summary (8th ed) p 5368.*

§ 2220. [Purpose of trust] A trust in relation to real and personal property, or either of them, may be created for any purpose or purposes for which a contract may be made. [1872; 1929 ch 146 § 1.] *Cal Jur 3d Trusts §§ 1, 15; Cal Forms-42:23; Witkin Summary (8th ed) pp 5389, 5472.*

§ 2221. Voluntary trust, how created as to trustor. Subject to the provisions of section eight hundred and fifty-two, a voluntary trust is created, as to the trustor and beneficiary, by any words or acts of the trustor, indicating with reasonable certainty:

1. An intention on the part of the trustor to create a trust, and,

2. The subject, purpose and beneficiary of the trust. [1872.] *Cal Jur 3d Charities §§ 26, 28, Trusts §§ 1, 13, 17, 20, 341; Cal Forms-42:22, 42:79; Witkin Summary (8th ed) pp 5375, 5376, 5383, 5384.*

§ 2222. How created as to trustee. Subject to the provisions of section eight hundred and fifty-two, a voluntary trust is created, as to the trustee, by any words or acts of his indicating, with reasonable certainty:

1. His acceptance of the trust, or his acknowledgment, made upon sufficient consideration, of its existence; and,

2. The subject, purpose, and beneficiary of the trust. [1872.] *Cal Jur 3d Trusts §§ 1, 20, 39, 53; Cal Forms-42:79; Witkin Summary (8th ed) p 5376.*

§ 2223. Involuntary trustee, who is. One who wrongfully detains a thing is an involuntary trustee thereof, for the benefit of the owner. [1872.] *Cal Jur 3d Trusts §§ 1, 289, 291; Witkin Summary (8th ed) 5488, 5491.*

§ 2224. [Involuntary trusts of wrongful gains] 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. [1872.] *Cal Jur 3d Decedents' Estates § 57, Logs and Timber § 12, Trusts §§ 1, 289, 291, 295, 296, 305, Wills § 221; Cal Practice § 239:6; Witkin Summary (8th ed) p 5488, 5491.*

ARTICLE 2

Obligations of Trustees

§ 2228. Trustee's obligation to good faith.

§ 2229. Trustee not to use property for his own profit.

§ 2230. Certain transactions forbidden.

§ 2231. Trustee's influence not to be used for his advantage.

§ 2232. Trustee not to assume a trust adverse to interest of beneficiary.

§ 2233. To disclose adverse interest.

§ 2234. Trustee guilty of fraud, when.

§ 2235. Presumption against trustee

§ 2236. Commingling of trust property

§ 2237. Measure of liability for breach of trust.

§ 2238. Same.

§ 2239. Co-trustees, how far liable for each other.

§ 2240. Depositing and holding in securities depository.

§ 2228. Trustee's obligation to good faith. In all matters connected with his trust, a trustee is bound to act in the highest good faith toward his beneficiary, and may not obtain any advantage therein over the latter by the slightest misrepresentation, concealment, threat, or adverse pressure of any kind. [1872.] *Cal Jur 3d Corporations* § 225, *Trusts* §§ 116, 128; *19 Cal Practice Rev, Ch 422A, Action by Beneficiary To Enforce Rights by Following Trust Property, Ch 424, Action Against Trustee for Commingling Personal and Trust Funds, Ch 425, Action Against Trustee To Enjoin Breach of Trust, Ch 425A, Action Against Trustee for Damages or Restitution for Breach of Trust, Ch 425B, Proceeding To Remove Trustee; Cal Forms-37:64; Witkin Summary (8th ed) p 731.*

§ 2229. Trustee not to use property for his own profit. A trustee may not use or deal with the trust property for his own profit, or for any other purpose unconnected with the trust, in any manner. [1872.] *Cal Jur 3d Corporations* § 238, *Trusts* §§ 120, 122, 185; *Cal Practice* § 56:83.

§ 2230. Certain transactions forbidden. Neither a trustee nor any of his agents may take part in any transaction concerning the trust in which he or anyone for whom he acts as agent has an interest, present or contingent, adverse to that of his beneficiary, except as follows:

1. When the beneficiary, having capacity to contract, with a full knowledge of the motives of the trustee, and of all other facts concerning the transaction which might affect his own decision, and without the use of any influence on the part of the trustee, permits him to do so;

2. When the beneficiary not having capacity to contract, the proper court, upon the like information of the facts, grants the like permission; or,

3. When some of the beneficiaries having capacity to contract, and some not having it, the former grant permission for themselves, and the proper court for the latter, in the manner above prescribed. [1872.] *Cal Jur 3d Corporations* § 230, *Trusts* §§ 106, 117, 119, 120, 184; *Cal Practice* § 56:83; *Witkin Summary (8th ed) p 279.*

§ 2231. Trustee's influence not to be used for his advantage. A trustee may not use the influence which his position gives him to obtain any advantage from his beneficiary. [1872.] *Cal Jur 3d Trusts* § 128; *Cal Practice* § 56:83; *Cal Forms-37:64.*

§ 2232. Trustee not to assume a trust adverse to interest of beneficiary. No trustee, so long as he remains in the trust, may undertake another trust adverse in its nature to the interest of his beneficiary in the subject of the trust, without the consent of the latter. [1872.] *Cal Jur 3d Trusts* § 121.

§ 2233. To disclose adverse interest. If a trustee acquires any interest, or becomes charged with any duty, adverse to the interest of his beneficiary in the subject of the trust, he must immediately inform the latter thereof, and may be at once removed. [1872.] *Cal Jur 3d Trusts* §§ 66, 68, 117, 121; *Cal Forms-37:64, 42:24; Witkin Summary (8th ed) p 5394.*

§ 2234. Trustee guilty of fraud, when. Every violation of the provisions of the preceding sections of this article is a fraud against the beneficiary of a trust. [1872.] *Cal Jur 3d Trusts* §§ 116, 117, 121, 122, 128.

§ 2235. [Presumption against trustee] All transactions between a trustee and his beneficiary during the existence of the trust, or while the influence acquired by the trustee remains, by which he obtains any advantage from his beneficiary, are presumed to be entered into by the latter without sufficient consideration, and under undue influence. The presumptions established by this section do not apply to the provisions of an agreement between a trustee and his beneficiary relating to the hiring or compensation of the trustee. [1872; 1963 ch 1215 § 1.] *Cal Jur 3d Attorneys at Law* §§ 294, 205, *Evidence* § 100, *Trusts* §§ 130, 131, 133, 134, *Wills* § 212; *Cal Practice* §§ 56:83, 79:17, 79:23, 239:20; *Cal Forms-37:64, 42:144; Witkin Criminal Procedure p 337; Evidence pp 194, 217, 254; Procedure 2d pp 56, 58, 59, 60, 61, 62; Summary (8th ed) pp 279, 280, 5419.*

§ 2236. [Commingling of trust property] A trustee who willfully and unnecessarily mingles the trust property with his own, so as to constitute himself in appearance its absolute owner, is liable for its safety in all events, and for the value of its use. [1872; 1905 ch 456 § 1.] *Cal Jur 3d Trusts* § 123; *Cal Practice* §§ 12:142, 56:83; *Witkin Summary (8th ed) pp 5420, 5421.*

§ 2237. Measure of liability for breach of trust. A trustee who uses or disposes of the trust property, contrary to section two thousand two hundred and twenty-nine, may, at the option of the beneficiary, be required to account for all profits so made,

or to pay the value of its use, and, if he has disposed thereof, to replace it, with its fruits, or to account for its proceeds with interest. [1872.] *Cal Jur 3d Accounts and Accounting* § 60, *Trusts* §§ 185, 186, 350, 352; *Witkin Summary (8th ed)* pp 5421, 5427, 5445.

§ 2238. Same. A trustee who uses or disposes of the trust property in any manner not authorized by the trust, but in good faith, and with intent to serve the interests of the beneficiary, is liable only to make good whatever is lost to the beneficiary by his error. [1872.] *Cal Jur 3d Trusts* §§ 185, 186; *Witkin Summary (8th ed)* pp 5421, 5427, 5445.

§ 2239. Co-trustees, how far liable for each other. A trustee is responsible for the wrongful acts of a co-trustee to which he consented, or which, by his negligence, he

enabled the latter to commit, but for no others. [1872.] *Cal Jur 3d Trusts* § 183; *Cal Forms-42:123*; *Witkin Summary (8th ed)* p 5421.

§ 2240. [Depositing and holding in securities depository.] Unless the instrument creating the trust contains a provision to the contrary, securities held by any trustee may, with the consent of any cofiduciary or cofiduciaries, be deposited in a securities depository, as defined in Section 30004 of the Financial Code, which is licensed under Section 30200 of the Financial Code or exempted from licensing thereunder by Section 30005 or 30006 of the Financial Code, and such securities may be held by such securities depository in the manner authorized by Section 775 of the Financial Code. [1972 ch 1057 § 8.] *Cal Jur 3d Trusts* § 143.

ARTICLE 3

Obligations of Third Persons

§ 2243. Third persons, when involuntary trustee.

§ 2244. When third person must see to application of trust property.

§ 2243. Third persons, when involuntary trustee. Everyone to whom property is transferred in violation of a trust, holds the same as an involuntary trustee under such trust, unless he purchased it in good faith, and for a valuable consideration. [1872.] *Cal Jur 3d Trusts* §§ 291, 360, 361; *Witkin Summary (8th ed)* p 5449.

§ 2244. When third person must see to

application of trust property. One who actually and in good faith transfers any money or other property to a trustee, as such, is not bound to see to the application thereof, and his rights can in no way be prejudiced by a misapplication thereof by the trustee. Other persons must, at their peril, see to the proper application of money or other property paid or delivered by them. [1872.] *Cal Jur 3d Trusts* § 153.

CHAPTER 2

Trusts for the Benefit of Third Persons

Article

1. Nature and Creation of the Trust. §§ 2250–2254.
2. Obligations of Trustees. §§ 2258–2264.
3. Powers of Trustees. §§ 2267–2272.
4. Rights of Trustees. §§ 2273–2275.
5. Termination of the Trust. §§ 2279–2283.
6. Succession or Appointment of New Trustees. §§ 2287–2289.

ARTICLE 1

Nature and Creation of the Trust

§ 2250. Who are trustees within scope of this chapter.

§ 2251. Creation of trust.

§ 2252. Trustees appointed by court.

§ 2253. Declaration of trust.
§ 2254. Same.

Cal Forms-41:21.

§ 2250. Who are trustees within scope of this chapter. The provisions of this chapter apply only to express trusts, created for the benefit of another than the trustor, and in which the title to the trust property is vested in the trustee; not including, however, those of executors, administrators, and guardians, as such. [1872.] *Cal Jur 3d Decedents' Estates* § 392, *Trusts* §§ 73, 105; *19 Cal Practice Rev, Ch 422A, Action by Beneficiary To Enforce Rights by Following Trust Property, Ch 422B, Proceeding To Establish Membership in Class of Beneficiaries.*

§ 2251. Creation of trust. The mutual consent of a trustor and trustee creates a trust of which the beneficiary may take advantage at any time prior to its rescission. [1872.] *Cal Jur 3d Trusts* §§ 31, 55, 73, 105; *Witkin Summary (8th ed) pp 5376, 5377, 5445.*

Trusts created by a trustor and trustee are subject to the provisions of this chapter, whether the trust is created by a will or otherwise, and whether the trust is created by a trustor and trustee or by a trustor and a public officer, as such, such court or officer is the trustor, within the meaning of the last section. [1872.] *Cal Jur 3d Trusts* §§ 55, 73, 105.

§ 2252. Trustees appointed by court. When a trustee is appointed by a court or public officer, as such, such court or officer is the trustor, within the meaning of the last section. [1872.] *Cal Jur 3d Trusts* §§ 55, 73, 105.

§ 2253. Declaration of trust. The nature, extent, and object of a trust are expressed in the declaration of trust. [1872.] *Cal Jur 3d Trusts* §§ 13, 73, 105; *Cal Forms-42:22.*

§ 2254. Same. All declarations of a trustor to his trustees, in relation to the trust, before its acceptance by the trustees, or any of them, are to be deemed part of the declaration of the trust, except that when a declaration of trust is made in writing, all previous declarations by the same trustor are merged therein. [1872.] *Cal Jur 3d Trusts* §§ 73, 105, 337.

ARTICLE 2

Obligations of Trustees

§ 2258. Trustees must obey declaration of trust.

§ 2259. Degree of care and diligence in execution of trust.

§ 2260. Duty of trustee as to appointment of successor.

§ 2261. Investment of funds.

§ 2262. Interest, simple or compound, on omission to invest trust moneys.

§ 2263. Purchase by trustee of claims against trust fund.

§ 2264. "Transfer in trust of a pecuniary amount"; Valuation of property other than money

Cal Forms-42:1, 42:111.

§ 2258. Trustees must obey declaration of trust. A trustee must fulfill the purpose of the trust, as declared at its creation, and must follow all the directions of the trustor given at that time except as modified by the consent of all parties interested, in the same manner, and to the same extent, as an employee. [1872.] *Cal Jur 3d Trusts* §§ 105, 110, 184, 254; *19 Cal Practice Rev, Ch 425, Action Against Trustee To Enjoin Breach of Trust, Ch 425A, Action Against Trustee for Damages or Restitution for Breach of Trust, Ch 425B, Proceeding To Remove Trustee; Cal Forms-42:79, 42:111, 42:183, 42:103, 42:301; Witkin Summary (8th ed) p 5429.*

§ 2259. Degree of care and diligence in execution of trust. A trustee, whether he receives any compensation or not, must use

at least ordinary care and diligence in the execution of his trust. [1872.] *Cal Jur 3d Trusts* § 112; *Cal Forms-42:121; Witkin Summary (8th ed) p 5420.*

§ 2260. Duty of trustee as to appointment of successor. If a trustee procures or assents to his discharge from his office, before his trust is fully executed, he must use at least ordinary care and diligence to secure the appointment of a trustworthy successor before accepting his own final discharge. [1872.] *Cal Jur 3d Trusts* § 64; *Cal Forms-42:24.*

§ 2261. [Investment of funds.] (1) In investing, reinvesting, purchasing, acquiring, exchanging, selling and managing property for the benefit of another, a trustee shall exercise the judgment and care, under the

circumstances then prevailing, which men of prudence, discretion and intelligence exercise in the management of their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income, as well as the probable safety of their capital. Within the limitations of the foregoing standard, and subject to any express provisions or limitations contained in any particular trust instrument, a trustee is authorized to acquire every kind of property, real, personal or mixed, and every kind of investment, specifically including, but not by way of limitation, corporate obligations of every kind, and stock, preferred or common, which men of prudence, discretion and intelligence acquire for their own account.

(2) In the absence of express provisions to the contrary in the trust instrument, a trustee may continue to hold property received into a trust at its inception or subsequently added to it or acquired pursuant to proper authority if and as long as the trustee, in the exercise of good faith and of reasonable prudence, discretion and intelligence, may consider that retention is in the best interests of the trust. Such property may include stock in the trustee, if a corporation, and stock in any corporation controlling, controlled by, or under common control with such trustee.

(3) In the absence of express provisions to the contrary in the trust instrument, a deposit of trust funds at interest in any bank (including the trustee, if a bank) shall be a qualified investment to the extent that such deposit is insured under any present or future law of the United States, or to such greater extent as a court of competent jurisdiction may authorize. Nothing in this section shall be construed as limiting the right of trustees in proper (sic) cases to make deposits of trust moneys in banks, subject, in the case of interest-bearing deposits, to such notice or other conditions respecting withdrawal as may be prescribed by law or governmental regulation affecting such deposits.

(4) Nothing in this section shall abrogate or restrict the power of the appropriate court in proper cases to direct or permit the trustee to deviate from the terms of the trust regarding the making or retention of investments.

(5) The provisions of this section shall apply to all trusts now existing or hereafter created. Where, in trusts now existing or

hereafter created, the term "investments permissible by law for investment of trust funds," or "authorized by law for investment of trust funds," "legal investments," or "authorized investments," or other words of similar import are used in defining the powers of the trustee relative to investments, such language, in the absence of other controlling or modifying provisions of the trust instrument, shall be construed as authorizing any investment permitted by the terms of subdivision (1) of this section.

(6) The term "property" as used in this section includes life insurance, endowment and annuity contracts issued by legal reserve companies authorized to do business in this state. [1872; 1943 ch 811 § 1; 1967 chs 688 § 1, 1706 § 1; 1968 ch 161 § 1; 1969 ch 259 § 1.] *Cal Jur 3d Cemeteries § 41, Trusts §§ 112, 156 et. seq.; Cal Forms-42:122, 42:141, 42:164, 42:165; Witkin Summary (8th ed) pp 5423-5426, 5436.*

§ 2262. **Interest, simple or compound, on omission to invest trust moneys.** If a trustee omits to invest the trust moneys according to the last section, he must pay simple interest thereon, if such omission is negligent merely, and compound interest if it is willful. [1872.] *Cal Jur 3d Trusts § 156; Witkin Summary (8th ed) p 5423.*

§ 2263. **Purchase by trustee of claims against trust fund.** A trustee cannot enforce any claim against the trust property which he purchases after or in contemplation of his appointment as trustee; but he may be allowed, by any competent court, to charge to the trust property what he has in good faith paid for the claim, upon discharging the same. [1872.] *Cal Jur 3d Trusts § 119.*

§ 2264. ["Transfer in trust of a pecuniary amount"; Valuation of property other than money] As used in this section, the term "transfer in trust of a pecuniary amount" means a transfer under a trust instrument of a fixed amount, is either expressly stated in the instrument or determinable by the provisions of the instrument. Whether a transfer in trust is a transfer in trust of a pecuniary amount depends upon the intention of the trustor.

Where a trust instrument authorizes the trustee to satisfy a transfer in trust of a pecuniary amount wholly or partly by transfer of property other than money, then, unless the instrument otherwise expressly provides, the assets selected for that purpose shall be valued at their respective fair mar-

ket values on the date or dates of transfer. If the trustee is allowed by the provisions of the instrument to value the assets selected for such transfer as of a date other than the date of transfer, then, unless the instrument otherwise expressly provides, the assets selected by the trustee for that purpose shall have an aggregate fair market value on the date or dates of transfer which, when added to any cash transferred, will amount to no

less than the amount of such transfer in trust, as stated in, or determined by, the provisions of the instrument.

This section shall apply to any transfer, including any division, allocation or distribution, after the effective date hereof, whether the trust instrument was executed before or after such date. No inference shall be drawn from the enactment of this section as to heretofore existing law. [1st Ex Sess 1966 ch 50 § 2.] *Cal Jur 3d Trusts § 163.*

ARTICLE 3

Powers of Trustees

- § 2267. Trustee's powers as agent.
- § 2268. All must act.
- § 2269. Discretionary powers.
- § 2270. Powers with respect to shares of stock
- § 2271. Private foundation or charitable trust
- § 2271.1. Split-interest trust
- § 2271.2. Tax proceedings; Lis pendens
- § 2272. Leasing trust property

Cal Forms-41:601, 41:612.

§ 2267. Trustee's powers as agent. A trustee is a general agent for the trust property. His authority is such as is conferred upon him by the declaration of trust and by this chapter, and none other. His acts, within the scope of his authority, bind the trust property to the same extent as the acts of an agent bind his principal. [1872.] *Cal Jur 3d Corporations § 537, Trusts §§ 105, 108, 190; 19 Cal Practice Rev, Ch 425C, Proceeding for Modification of Terms of a Trust; Cal Forms-42:141; Witkin Summary (8th ed) pp 5429, 5436, 5460.*

§ 2268. All must act. Where there are several co-trustees, all must unite in any act to bind the trust property, unless the declaration of trust otherwise provides. [1872.] *Cal Jur 3d Trusts § 109; Cal Forms-42:116, 42:141, 42:169, 42:172; Witkin Summary (8th ed) p 5430.*

§ 2269. [Discretionary powers].
(a) Except as provided in subdivision (c), a discretionary power conferred upon a trustee is presumed not to be left to his or her arbitrary discretion, but shall be exercised reasonably.

(b) The exercise of a discretionary power is subject to review by a court of competent jurisdiction.

(c) Except as provided in subdivision (d), where a trust instrument confers absolute,

sole, or uncontrolled discretion upon a trustee, the trustee shall act in accordance with fiduciary principles and shall not act in bad faith or in disregard of the purposes of the trust.

(d) Notwithstanding the trustor's use of terms such as "absolute", "sole", or "uncontrolled", a person who is the beneficiary of the trust, either individually or as trustee or cotrustee, and who holds a power to take or distribute income or principal to or for the benefit of himself or herself pursuant to a standard shall exercise that power reasonably and in accordance with the standard. In any case in which the standard governing the exercise of the power does not clearly indicate that a broader power is intended, such a holder of the power may exercise it in his or her favor only for his or her health, education, support, or maintenance, and the exercise of the power shall be subject to review by a court of competent jurisdiction.

(e) Unless specifically so authorized, a person who holds a power to appoint or distribute income or principal to or for the benefit of others, either individually or in a fiduciary capacity, may not use the power to discharge his or her legal obligations. [1872; 1981 ch 1046 § 1.] *Cal Jur 3d Trusts §§ 103, 104; Cal Forms-42:120, 42:141, 42:142; Witkin Summary (8th ed) pp 5432, 5433.*

§ 2270. [Powers with respect to shares

of stock} A trustee may give proxies to vote any shares of stock of a corporation, whether domestic or foreign, held in trust, or to exercise any voting rights attaching to or arising from property held in trust. He may waive notice of and consent to any meeting of shareholders or property owners or authorize by a writing any action which could be taken by shareholders. [1939 ch 538 § 3.] *Cal Jur 3d Trusts § 162; Cal Forms-42:141, 42:165; Witkin Summary (8th ed) pp 4424, 4427.*

§ 2271. [Private foundation or charitable trust] The trustee or trustees of every trust (whenever created), during any period or periods such trust is deemed to be a "private foundation" as defined in Section 509 of the Internal Revenue Code of 1954, as added by Section 101 of the Tax Reform Act of 1969 (all references in this article to the Internal Revenue Code shall refer to such code as amended by such act), or a "charitable trust" as defined in paragraph (1) of subsection (a) of Section 4947 of such code, shall distribute its income for each taxable year (and principal if necessary) at such time and in such manner as not to subject the assets of such trust to tax under Section 4942 of such code (as modified by paragraph (3) of subsection (1) of Section 101 of the Tax Reform Act of 1969). The trustee or trustees of every such trust shall not engage in any act of self-dealing as defined in subsection (d) of Section 4941 of such code (as modified by paragraph (2) of subsection (1) of Section 101 of the Tax Reform Act of 1969), retain any excess business holdings as defined in subsection (c) of Section 4943 of such code, make any investments in such manner as to subject the assets of said trust to tax under Section 4944 of such code, or make any taxable expenditure as defined in subsection (d) of Section 4945 of such code (as modified by paragraph (5) of subsection (1) of Section 101 of the Tax Reform Act of 1969).

The provisions of this section shall be deemed to be contained in the instrument or instruments creating every trust to which this section applies, and any provision of such instrument or instruments inconsistent therewith or to the contrary thereof shall be without effect. [1971 ch 717 § 1, effective August 24, 1971.] *Cal Forms-42:141, 42:243.*

§ 2271.1. [Split-interest trust] (a) The trustee or trustees of every trust (whenever created), during any period or periods such trust is deemed to be a "split-interest trust"

as described in paragraph (2) of subsection (a) of Section 4947 of the Internal Revenue Code of 1954, shall not:

(1) Engage in any act of self-dealing as defined in subsection (d) of Section 4941 of such code (as modified by paragraph (2) of subsection (1) of Section 101 of the Tax Reform Act of 1969).

(2) Retain any excess business holdings as defined in subsection (c) of Section 4943 of such code.

(3) Make any investments in such manner as to subject the assets of such trust to tax under Section 4944 of such code.

(4) Make any taxable expenditure as defined in subsection (d) of Section 4945 of such code (as modified by paragraph (5) of subsection (1) of Section 101 of the Tax Reform Act of 1969).

(b) Paragraphs (2) and (3) of subdivision (a) shall not apply to any trust described in paragraph (3) of subsection (b) of Section 4947 of the Internal Revenue Code of 1954.

(c) This section shall not apply with respect to:

(1) Any amounts payable under the terms of such trust to income beneficiaries, unless a deduction was allowed under subparagraph (b) of paragraph (2) of subsection (f) of Section 170, subparagraph (b) of paragraph (2) of subsection (e) of Section 2055, or subparagraph (b) of paragraph (2) of subsection (c) of Section 2522 of such code; or

(2) Any amounts in trust other than amounts for which a deduction was allowed under Section 170, paragraph (2) of subsection (b) of Section 545, paragraph (2) of subsection (b) of Section 556, subsection (c) of Section 642, Section 2055, paragraph (2) of subsection (a) of Section 2106, or Section 2522 of such code, if such amounts are segregated, as that term is defined in paragraph (3) of subsection (a) of Section 4947 of such code, from amounts for which no deduction was allowable; or

(3) Any amounts transferred in trust before May 27, 1969.

(d) The provisions of this section shall be deemed to be contained in the instrument or instruments creating every trust to which this section applies, and any existing provision of such instrument or instruments inconsistent therewith or to the contrary thereof shall be without further effect. [1971 ch 717 § 2, effective August 24, 1971.]

§ 2271.2. [Tax proceedings; Lis pendens] (a) The superior court shall have jurisdiction

to hear and determine any proceedings contemplated by paragraph (3) of subsection (j) of Section 101 of the Tax Reform Act of 1969. Such proceedings may be brought by the organization involved. All specifically named beneficiaries of such organization and the Attorney General shall be parties to such proceedings. This provision shall not be exclusive, and is not intended to limit any jurisdiction which otherwise exists.

(b) Whenever the instrument or instruments creating any trust affected by this section have been recorded, a notice of pendency of such judicial proceedings shall be recorded in a similar manner within 10 days from the commencement thereof. A duly certified copy of any final judgment or decree in such proceedings shall be similarly recorded. [1971 ch 717 § 3, effective August 24, 1971.]

§ 2272. [Leasing trust property] When the term of a trust is of uncertain or indefi-

nite duration or is terminable on the death of one or more persons and the trustee is given the power, expressly or by implication, to lease the trust property, and the instrument creating the trust contains no provision to the contrary, the trustee may lease the trust property for any reasonable period of time and such lease shall not be impaired by reason of the termination of the trust prior to the expiration of the lease. As to the lessee, his successors in interest and holders of encumbrances or charges on the leasehold estate, the reasonableness of the term of the lease shall be conclusively presumed; provided, that in the case of testamentary trusts such presumption shall only apply if an order of court is obtained pursuant to Section 1120 of the Probate Code authorizing or confirming the making of the lease by the trustee. [1947 ch 506 § 1.] *Cal Jur 3d Evidence § 104, Trusts § 154; Cal Forms-22:241, 42:141, 42:160; Witkin Summary (8th ed) pp 2113, 5431.*

ARTICLE 4

Rights of Trustees

§ 2273. Indemnification of trustee.

§ 2274. Compensation of trustee.

§ 2275. Involuntary trustee.

Cal Forms-42:141.

§ 2273. Indemnification of trustee. A trustee is entitled to the repayment, out of the trust property, of all expenses actually and properly incurred by him in the performance of his trust. He is entitled to the repayment of even unlawful expenditures, if they were productive of actual benefit to the estate. [1872.] *Cal Jur 3d Deeds of Trust § 244, Trusts §§ 201, 202, 203; Cal Forms-42:131, 42:134; Witkin Procedure 2d, p 3269; Summary (8th ed) pp 5441, 5442.*

§ 2274. [Compensation of trustee.] If the declaration of trust contains provisions for a trustee's compensation, the trustee shall be entitled to be compensated in accordance therewith. Upon proper showing, the court may fix or allow greater compensation than could be allowed under the provisions of the trust (1) where the duties of the trustee are substantially greater than those contemplated at the creation of the trust, or (2) where the compensation in accordance with the provisions of the trust would be inequitable or unreasonably low or (3) in other extraordinary circumstances calling for equi-

table relief. If a declaration of trust does not specify the trustee's compensation, the trustee shall be entitled to such compensation as may be reasonable under the circumstances. Unless the declaration of trust provides or the trustees agree otherwise, if there are two or more trustees, the compensation shall be apportioned among the trustees according to the services rendered by them respectively. The superior court shall have jurisdiction to determine any compensation provided by this section in an action, brought by the trustee, to which all interested persons are made parties. [1872; 1889 ch 224 § 1; 1909 ch 151 § 1; 1937 ch 536 § 1; 1967 ch 661 § 1; 1972 ch 937 § 1.] *Cal Jur 3d Trusts §§ 194, 195, 196, 197, 224; Cal Forms-42:41, 42:131; Witkin Summary (8th ed) pp 5373, 5439-5441, 5757, 5658.*

§ 2275. Involuntary trustee. An involuntary trustee, who becomes such through his own fault, has none of the rights mentioned in this article. [1872.] *Cal Jur 3d Trusts §§ 194, 200, 202.*

ARTICLE 5

Termination of the Trust

§ 2279. Trust, how extinguished.

§ 2279.1. Defeat or substantial impairment of trust purpose

§ 2280. Revocation of trusts.

§ 2281. Trustee's office, how vacated.

§ 2282. Discharge of trustee

§ 2283. Removal by superior court.

§ 2279. Trust, how extinguished. A trust is extinguished by the entire fulfillment of its object, or by such object becoming impossible or unlawful. [1872.] *Cal Jur 3d Deeds of Trust* § 158, *Trusts* §§ 243, 244; *19 Cal Practice Rev, Ch 425D, Proceeding To Terminate a Trust; Witkin Summary (8th ed) p 5471.*

§ 2279.1. [Defeat or substantial impairment of trust purpose] (a) If the superior court shall at any time determine that the fair market value of the principal of a trust has become so low, in relation to the costs of administration thereof, that continuance of the trust pursuant to its existing terms will defeat or substantially impair the accomplishment of the purposes of the trust, the court may, in its discretion in a manner which conforms as nearly as possible to the intention of the trustor, order that the trustee be changed, that the terms of the trust be modified, or that the trust be terminated, in whole or in part.

(b) If the court orders termination of the trust, in whole or in part, it shall direct that the principal and undistributed income be distributed to the beneficiaries in a manner which conforms as nearly as possible to the intention of the trustor; and may make such other and further orders as it deems necessary or appropriate to protect the interests of the beneficiaries.

(c) Nothing in this section shall limit any power of the court to permit modification or termination of any trust, as such power existed before the adoption of this section.

(d) The existence of a spendthrift or similar protective provision in the trust, shall not make this section inapplicable. [1973 ch 506 § 1.] *Cal Jur 3d Trusts* § 245; *19 Cal Practice Rev, Ch 425C, Proceeding for Modification of Terms of a Trust; Cal Forms-42:26, 42:175; Witkin Summary (8th ed) pp 5373, 5471, 5472, 5754.*

§ 2280. [Revocation of trusts.] Unless expressly made irrevocable by the instru-

ment creating the trust, every voluntary trust shall be revocable by the trustor by writing filed with the trustee. When a voluntary trust is revoked by the trustor, the trustee shall transfer to the trustor its full title to the trust estate. Trusts created prior to the date when this act shall become a law shall not be affected hereby. [1872; 1931 ch 950 § 1.] *Cal Jur 3d Deeds of Trust* § 4, *Powers* §§ 34, 35, *Trusts* §§ 250, 251, 252; *Cal Forms-42:26, 42:301, 42:315, 42:317; Witkin Summary (8th ed) pp 1497, 1988, 1992, 5474.*

§ 2281. Trustee's office, how vacated. The office of a trustee is vacated:

(1) In the case of an individual trustee, by—

(a) His discharge;

(b) His death;

(c) Appointment of a conservator or guardian of his person or estate; or

(d) The filing by him of a petition for adjudication of bankruptcy or for approval of an arrangement, composition or other extension under the National Bankruptcy Act, or the approval for a petition filed against him for any of said purposes.

(2) In the case of a corporate trustee by—

(a) Its discharge;

(b) Revocation of its charter or suspension of its corporate powers, if its charter shall remain revoked or its powers remain suspended for a period of thirty (30) days;

(c) Appointment of a receiver for such trustee if such appointment shall not be vacated within a period of thirty (30) days; or

(d) The filing by it of a petition for adjudication of bankruptcy or for approval of an arrangement, composition or other extension under the National Bankruptcy Act, or the approval of a petition filed against it for any of said purposes.

Provided, that any bona fide transaction entered into with such trustee by any person acting without actual knowledge that his or its office has been vacated as herein provided shall be binding on all parties.

The provisions of this section shall extend and apply to trustees under deeds of trust given to secure obligations. [1872; 1961 ch 1042 § 1.] *Cal Jur 3d Trusts* § 58; *Cal Forms-42:24*; *Witkin Summary (8th ed)* p 5396.

§ 2282. [Discharge of trustee] A trustee can be discharged from his trust only as follows:

1. By the extinction of the trust;
2. By the completion of his duties under the trust;
3. By such means as may be prescribed by the declaration of trust;
4. By the consent of the beneficiary, if he have capacity to contract.
5. By the judgment of a competent tribunal, in a direct proceeding for that purpose,

that he is an incompetent as defined by Section 1435.2 of the Probate Code; or,

6. By the superior court. [1872; 1883 ch 5 § 1; 1961 ch 1042 § 2.] *Cal Jur 3d Trusts* §§ 59, 60; *Cal Forms-42:95*; *Witkin Summary (8th ed)* p 5393.

§ 2283. [Removal by superior court.] The superior court may remove any trustee who has violated or is unfit to execute the trust, or may accept the resignation of a trustee. This section shall not, however, apply to a trustee of a trust created by a will admitted to probate in any court of this state. [1872; 1880 ch 41 § 23; 1969 ch 272 § 1.] *Cal Jur 3d Trusts* §§ 66, 67, 70; *19 Cal Practice Rev, Ch 425B, Proceeding To Remove Trustee*; *Cal Forms-42:24*; *Witkin Summary (8th ed)* pp 5393, 5394, 5396, 5446.

ARTICLE 6

Succession or Appointment of New Trustees

§ 2287. Appointment to fill vacancy

§ 2288. Survivorship between co-trustees.

§ 2289. Appointment by court

§ 2287. [Appointment to fill vacancy] The superior court shall appoint a trustee whenever there is a vacancy and the declaration of trust does not provide a practical method of appointment. Other things being equal, the court shall give preference to the nominee of beneficiaries of the trust who are over fourteen years of age. [1872; 1880 ch 41 § 24; 1911 ch 67 § 1; 1913 ch 237 § 1; 1933 ch 970 § 1.] *Cal Jur 3d Deeds of Trust* § 12, *Trusts* §§ 55, 56, 57; *19 Cal Practice Rev, Ch 425B, Proceeding To Remove Trustee*; *Cal Forms-42:24, 42:96*; *Witkin Summary (8th ed)* p 5393.

§ 2288. Survivorship between co-trustees. On the death, renunciation, or discharge of one of several co-trustees the trust sur-

vives to the others. [1872.] *Cal Jur 3d Trusts* § 63; *Cal Forms-42:24, 42:170*; *Witkin Summary (8th ed)* p 5393.

§ 2289. [Appointment by court] When a trust exists without any appointed trustee, or where all the trustees renounce, die, or are discharged, the superior court of the county where the trust property, or some portion thereof, is situated, must appoint another trustee, and direct the execution of the trust. The court may, in its discretion, appoint the original number, or any less number of trustees. [1872; 1880 ch 41 § 25.] *Cal Jur 3d Trusts* §§ 55, 56; *Cal Forms-42:22, 42:24, 42:72*; *Witkin Summary (8th ed)* pp 5376, 5393.

CHAPTER 19

Administration of Trusts

ARTICLE 1

Testamentary Trusts

- § 1120. Continuing jurisdiction; Accounting; Petition for instructions and authority; Hearing; Appointment of guardian ad litem
- § 1120.1. Same: Additions to trust.
- § 1120.1a. Notices to beneficiaries; Annual statement; Summary; Petition to remove court's jurisdiction
- § 1120.2. Court discretion to confer powers not expressly contained in will.
- § 1120.5. Request for special notice by beneficiary.
- § 1120.6. Modification or termination if trust purpose defeated or impaired by corpus deficiencies.
- § 1121. Accounting; Application; Order.
- § 1122. Compensation of trustee.
- § 1123. Conclusiveness of decree: Persons not in being.
- § 1123.5. Removal of trustee: Procedure.
- § 1123.6. Same: Preliminary surrender of trust assets and suspension of powers of trustee.
- § 1123.7. Same: Exclusiveness of jurisdiction and procedure.
- § 1124. Declination of trustee named in will: Procedure.
- § 1125. Appointment of trustee to fill vacancy: Application; Notice.
- § 1125.1. Resignation after distribution: Petition; Notice of hearing; Liability on bond.
- § 1126. Trusteeship vacancy.
- § 1127. Bond of trustee.
- § 1127.5. Designating charitable corporation as substitute or successor trustee without requiring bond.
- § 1128. Transfer of trust proceedings to other county: Petition.
- § 1129. Hearing and notice: Who may appear and oppose: Order for transfer: Duties of clerk: Jurisdiction of court to which proceedings are transferred: Practice.
- § 1130. Vouchers in support of trustee's account: Withdrawal on leaving certified copy on file: To be produced on demand: When may be destroyed or delivered to trustee.
- § 1130.1. Certificate of appointment.
- § 1132. Order for transfer of places of administration or trust assets.
- § 1133. Administration of more than one trust as a single trust.

§ 1120. Continuing jurisdiction; Accounting; Petition for instructions and authority; Hearing; Appointment of guardian ad litem. (a) A trust created by a will is not subject to the continuing jurisdiction of the superior court, unless the testator provides otherwise. Article 2 (commencing with Section 1138) shall be applicable to the trust to the extent that the will or article does not provide otherwise.

(b) When a trust created by a will continues after distribution, and the testator provides that the superior court shall not lose jurisdiction of the estate by final distribution, the superior court 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 the 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. Any trustee appointed by will, or appointed

to execute a trust created by will, may, from time to time pending the execution of the trust, or at the termination thereof, render for settlement his or her accounts and report his or her acts as trustee, before the superior court in which the will was probated. For that purpose, the trustee shall present to the court a verified account and report, setting forth the accounts in detail, reporting his or her acts as trustee, and showing the condition of the trust estate. If the trustee dies or becomes incompetent, the account and report shall be presented by the trustee's executor, administrator, guardian, or conservator. In the event the trustee dies or becomes incompetent, and there is no executor, administrator, guardian, or conservator appointed for the trustee's estate, or in the event the trustee absconds, the court may compel the attorney for the deceased, incompetent, or absconding trustee to present the account and report to the extent that the attorney has information or records available for that purpose. The account and report of the attorney need not be verified. A fee shall

be allowed to the attorney by the court for this service.

The trustee may also petition such court, from time to time, for instructions as to the administration of the trust for authority to accept additions to the trust from any source or sources other than the estate of the decedent, and for authority to exercise the powers authorized by Section 1120.2 of this code. The court may hear the petition and instruct or authorize the trustee by order rendered before or after any distribution to the trustee. When the trustee files the petition before any distribution of the estate to the trustee, the trustee shall, in addition to any other notice required, cause notice of the hearing to be mailed to the personal representative and shall further cause notice of the hearing to be mailed to all persons, including heirs, legatees, and devisees, at their last known address, to whom the court may order notice to be given, and shall, upon filing the petition and before giving notice thereof, secure from the court an order designating the persons in addition to the personal representative and the beneficiaries to whom the court requires that notice be given, or an order that notice to the personal representative and the beneficiaries is the only notice that shall be required.

When it appears from the allegations of the petition that the trustee seeks instructions to exercise a power not conferred upon the trustee or seeks authority to exercise the powers authorized by Section 1120.2, the petition shall set forth the particulars of and the necessity for the action sought to be taken.

The clerk shall set the hearing upon the account and report or petition for settlement or instructions. The trustee shall cause notice of the hearing to be given to the beneficiaries, including all persons in being who shall or may participate in the corpus or income of the trust, at their last known addresses, as provided in Section 1200.5, whether they have requested special notice or given notice of appearance or not. In addition to the above notice, when the petition relates to the exercise of a power not conferred or seeks authority to exercise the powers authorized by Section 1120.2, a copy of the petition shall be attached to and mailed with copies of the notice which are mailed and the court or judge shall, at least 10 days before the return day, appoint a suitable person who shall appear and act as guardian ad litem of any person or persons of a designated class, who are not ascer-

tained, or who are not in being, and who may become beneficiaries or may so participate in the trust. None of the provisions of Section 373 of the Code of Civil Procedure shall apply to the appointment.

(c) In addition to the provisions of subdivision (b), the personal representative of the decedent's estate, prior to final distribution, or the trustee, beneficiary, or remainderman, before or after final distribution, may petition the superior court to amend or conform the trust provisions of the decedent's will in the manner required to qualify the decedent's estate for the charitable estate tax deduction permitted by federal law. The petition may include a request to add to the trust provisions of the decedent's will the mandatory governing instrument requirements for a charitable remainder trust, as required by final regulations and rulings of the United States Internal Revenue Service. Notice of the petition shall be given to the Attorney General. No amendment or conformation may be ordered by the court without having first received written agreement to the proposed changes or disclaimer of interest from all interested parties in the trust. The execution of an agreement shall not be construed to be a contest under any provisions of the will prohibiting will contests. The existence of a spendthrift or similar protective provision in the trust shall not make this subdivision inapplicable to that trust. [1931; 1933 ch 969 § 14; 1953 ch 696 § 1; 1959 ch 864 § 1; 1963 ch 863 § 1; 1965 ch 1477 § 1; 1967 ch 1219 § 1; 1975 ch 474 § 1.5, effective August 30, 1975, operative January 1, 1976; 1976 ch 860 § 3; 1980 ch 955 § 25.3; 1982 ch 1199 § 1.] *Cal Jur 3d Accounts and Accounting* § 60, *Actions* § 19, *Decedents' Estates* §§ 102, 110, 899, *Jury* § 15, *Mandamus and Prohibition* § 100, *Trusts* §§ 4, 57 et seq., 154, 167, 210, 228 et seq.; *Cal Practice Rev Ch 423 Action Against Trustee to Compel Accounting*; *Cal Forms-22:241, 41:642*; *Witkin Procedure 2d*, pp 710, 1264, 2913, 4193; *Summary (8th ed)* pp 5372, 5751-5753, 5755, 5757, 5760, 5761, 5820.

§ 1120.1. Same: Additions to trust. Whenever a trustee receives additions to the trust in accordance with a decree rendered pursuant to Section 1120 of this code, such additions shall be subject to the jurisdiction of the court in the same respects as property received by the trustee from the decedent's estate. [1959 ch 864 § 2.] *Cal Jur 3d Decedents' Estates* § 110, *Trusts* § 232; *Cal*

Forms 37:312; Witkin Summary (8th ed) p 5753.

§ 1120.1a. Notices to beneficiaries; Annual statement; Summary; Petition to remove court's jurisdiction. This section shall only apply to trusts described in subdivision (a) of Section 1120 which were created by a will executed before July 1, 1977.

(a) The trustee of such a trust shall give notice on or before July 1, 1983, or within six months after the initial funding of the trust, whichever occurs later, by registered or certified mail to each beneficiary, including all persons in being who shall or may participate in the corpus or income of the trust, at their last known addresses, containing the following information:

(1) A statement that as of January 1, 1983, Section 1120 of the Probate Code was amended to remove the necessity for mandatory court supervision of the trust.

(2) A statement that, unless the terms of trust limit or eliminate such authority, Section 1138.1 of the Probate Code gives the beneficiary and remainderman the right to petition a court to determine important matters relating to the administration of the trust, and a copy of the text of Section 1138.1.

(3) A statement that each income beneficiary, as defined in subdivision (1) of Section 730.01 of the Civil Code, and any other beneficiary or remainderman upon written request to the trustee, is entitled to a statement of the income and principal receipts and disbursements of the trust at least annually.

(4) A statement that the beneficiary or remainderman is entitled to petition a court to settle the accounts and pass upon the acts of the trustee.

(5) The name and location of the superior court in the county in which it is appropriate to file a petition pursuant to Section 1138.1.

(6) When no trustee is a trust company, as defined in Section 107 of the Financial Code, a statement that a hearing will be held by the superior court named in paragraph (5) to obtain approval of the court and determine the conditions, if any, for the removal of the trust from the continuing jurisdiction of the court.

The trustee shall file with the court which previously had jurisdiction over the administration of the trust proof of service of the notice set forth in this subdivision on or before August 1, 1983, or within seven

months after the initial funding of the trust, whichever occurs later.

(b) The trustee shall furnish, at least annually, and at termination of the trust, a statement of the income and principal receipts and disbursements that have occurred since the immediately preceding statement to each income beneficiary, as defined in subdivision (1) of Section 730.01 of the Civil Code, and to each other beneficiary or remainderman who has made written request therefor.

(c) Within 90 days after the end of each fiscal year of the trust, the trustee shall furnish to each of the persons described in subdivision (b) a summary setting forth the following:

(1) The cost of each trust asset.

(2) The present value of each asset as of the end of the fiscal year of the trust.

(3) The total present value of all assets as of the end of the current and immediately preceding fiscal year of the trust.

(4) The net income for the current and immediately preceding fiscal year of the trust.

(5) Trustee compensation for the current and immediately preceding fiscal year of the trust.

The summary shall also state that the recipient may petition a court pursuant to Section 1138.1 to obtain a court review, shall set forth a copy of the text of Section 1138.1, and shall give the name and location of the appropriate court in which to file a petition.

(d) Notwithstanding the provisions of subdivision (a) of Section 1120, with respect to a trust where no trustee is a trust company, as defined in Section 107 of the Financial Code, the trustee may only remove the trust from the continuing jurisdiction of the superior court with the approval of the court. To obtain such approval the trustee shall file a verified petition with the clerk setting forth the trust accounts in detail, reporting his or her acts as trustee, showing the condition of the trust estate, and attaching a true copy of the trust instrument. Thereupon the clerk shall set the petition for hearing by the court. Notice of the hearing shall be given, along with the notice required by subdivision (a), at least 30 days before the hearing to all those persons who are entitled to receive the notice required by subdivision (a). At the hearing the court may receive testimony from any interested person and may grant or deny the petition, or require a bond as a condition of granting

the petition, as the court in its discretion deems fit.

(e) When a beneficiary or remainderman is a minor, ward or conservatee, any notice, statement, or summary required to be sent to the beneficiary or remainderman by this section shall be sent to the parent, guardian, or conservator, as the case may be, of the beneficiary or remainderman. In addition, if the trustee, at the time the notice required by subdivision (a) is sent, has actual knowledge that a beneficiary or remainderman who is not a minor, ward, or conservatee is being assisted by another individual in the handling of his or her personal affairs, the trustee shall send the notice required by subdivision (a) to both that individual and the beneficiary or remainderman and, upon the written request of either of them, shall also send the statements and summaries required by subdivisions (b) and (c) to both of them.

(f) Where the trust is a charitable trust subject to Article 7 (commencing with Section 12580) of Chapter 6 of Part 2 of Division 3 of Title 2 of the Government Code, upon the vesting of any charitable interest created by the trust the trustee shall thereafter furnish to the Attorney General the statements and summaries required by subdivisions (b) and (c) without the necessity of any written request. A charitable interest is deemed to be vested within the meaning of this subdivision as of the time when it is first ascertainable that income or corpus is, or in the future will be, paid to a charity or applied for a charitable purpose. Notwithstanding the provisions of Section 1138, the Attorney General may petition the court to settle the account and pass upon the acts of the trustee as provided in Section 1138.1. [1982 ch 1199 § 2.]

§ 1120.2. Court discretion to confer powers not expressly contained in will. On petition of the trustee, made at any time, or on petition of the executor or administrator included in a petition for preliminary or final distribution, where after hearing it appears to be necessary or desirable in order to carry out the purposes of the trust that the trustee be given powers not expressly contained in the will or otherwise conferred by law, the court may in its discretion confer upon the trustee any or all of the following powers when it appears to the court that such powers are not inconsistent with the provisions or purposes of the trust; such powers conferred may be of a continuing nature or

may be exercised only in specific instances, as the court may determine:

(1) To manage, control, sell, convey, divide, and to sell upon deferred payments; to lease for terms within or extending beyond the duration of the trust for any purpose including exploration for and removal of gas, oil, or other minerals; to enter into community oil leases.

(2) To retain property, including stock of the trustee, and invest and reinvest as provided by law from time to time existing, including investments in any common trust fund now or hereafter established by the trustee.

(3) To borrow; to place, replace, renew or extend any encumbrance upon any trust property.

(4) To participate in voting trusts, pooling agreements, foreclosures, reorganization, consolidation, mergers, and liquidations and in connection therewith, to deposit securities with and transfer title and delegate discretions to any protective or other committee as the trustee may deem advisable.

(5) To acquire or dispose of an asset, for cash or on credit, at public or private sale; and to exchange, partition, change the character of, or abandon a trust asset or any interest therein.

(6) To make ordinary or extraordinary repairs or alterations in buildings or other trust property, to demolish any improvements, to raze existing or erect new party walls or buildings.

(7) To subdivide, develop, or dedicate land to public use; or to make or obtain the vacation of plats and adjust boundaries; or to adjust differences in valuation on exchange or partition by giving or receiving consideration; or to dedicate easements to public use without consideration.

(8) To grant an option involving disposition of a trust asset, or to take an option for the acquisition of any asset.

(9) To vote a security, in person or by general or limited proxy.

(10) To pay calls, assessments, and any other sums chargeable or accruing against or on account of securities.

(11) To sell or exercise stock subscription or conversion rights.

(12) To hold a security in the name of a nominee or in other form without disclosure of the trust, so that title to the security may pass by delivery, but the trustee is liable for any act of the nominee in connection with the security so held.

(13) To insure the assets of the trust

against damage or loss, and the trustee against liability with respect to third persons.

(14) To advance money for the protection of the trust, and for all expenses, losses, and liabilities sustained in the administration of the trust or because of the holding or ownership of any trust assets, for which advances with any interest the trustee has a lien on the trust assets as against the beneficiary.

(15) To pay or contest any claim; to settle a claim by or against the trust by compromise, arbitration, or otherwise; and to release, in whole or in part, any claim belonging to the trust to the extent that the claim is uncollectible; to institute, compromise and defend actions and proceedings.

(16) To pay taxes, assessments, compensation of the trustee, and other expenses incurred in the collection, care, administration, and protection of the trust.

(17) To continue or participate in any business or other enterprise and to effect incorporation, dissolution, or other change in the form of organization of the business or enterprise.

(18) To exercise any other power or powers which to the court appear necessary or desirable.

Except as specifically provided in the will, the provisions of this section apply to any will executed before or after the effective date of this section and to any trust asset acquired by the trustee of the trust created by such will, before or after the effective date of this section.

If any provision of this section or the application thereof to any person, property or circumstance is held invalid, the invalidity does not affect other provisions or applications of the section which can be given effect without the invalid provision or application, and to this end the provisions of this section are severable. [1967 ch 1219 § 2.] *Cal Jur 3d Decedents' Estates § 110, Trusts §§ 224, 233; Cal Forms-41:638; Witkin Summary (8th ed) pp 5373, 5429, 5755, 5756.*

§ 1120.5. Request for special notice by beneficiary. When any beneficiary under a trust shall have made a request for special notice pursuant to Section 1202, a copy of the petition and a copy of the account and report provided for in Section 1120 shall be attached to the notice of hearing required to be mailed by the trustee to such beneficiary pursuant to Section 1120. [1965 ch 1944 § 1.] *Cal Jur 3d Decedents' Estates § 110, Trusts § 234; Witkin Summary (8th ed) p 5757.*

§ 1120.6. Modification or termination if trust purpose defeated or impaired by corpus deficiencies. (a) If upon petition of the trustee or any beneficiary of a trust, the superior court shall at any time determine that the fair market value of the principal of a trust has become so low, in relation to the costs of administration thereof, that continuance of the trust pursuant to its existing terms will defeat or substantially impair the accomplishment of the purposes of the trust, the court may, in its discretion in a manner which conforms as nearly as possible to the intention of the trustor, order that the trustee be changed, that the terms of the trust be modified, or that the trust be terminated, in whole or in part.

(b) If the court orders termination of the trust, in whole or in part, it shall direct that the principal and undistributed income be distributed to the beneficiaries in a manner which conforms as nearly as possible to the intention of the trustor; and may make such other and further orders as it deems necessary or appropriate to protect the interests of the beneficiaries.

(c) Nothing in this section shall limit any power of the court to permit modification or termination of any trust, as such power existed before the adoption of this section.

(d) The existence of a spendthrift or similar protective provision in the trust shall not make this section inapplicable to such trust. [1973 ch 506 § 2.] *Cal Jur 3d Trusts-§ 245; Cal Practice Rev Ch 425C Proceeding to Remove Trustee, Ch 425D Proceeding for Modification of Terms of Trust. Witkin Summary (8th ed) pp 5754, 5755.*

§ 1121. Accounting: Application: Order. Upon application of any beneficiary of the trust, or the guardian or conservator of a beneficiary, the court, in its discretion, or a judge thereof, may order the trustee, after citation, to render his account; and such application shall not be denied where no account has been rendered to the court within six months. [1931; 1967 ch 719 § 5.5] *Cal Jur 3d Accounts and Accounting § 60, Decedents' Estates § 110, Trusts §§ 228, 230; Cal Practice Rev Ch 423 Action Against Trustee to Compel Accounting; Witkin Summary (8th ed) pp 5444, 5757.*

§ 1122. Compensation of trustee. If the will contains provisions for a trustee's compensation, the trustee shall be entitled to be compensated in accordance therewith. Upon proper showing, the court may in the decree of distribution or thereafter fix or allow

greater compensation than could be allowed under the provisions of the will (1) where the duties of the trustee are substantially greater than those contemplated by the testator at the time of the signing of the will, or (2) where the compensation in accordance with the provisions in the will would be inequitable or unreasonably low or (3) in other extraordinary circumstances calling for equitable relief. If the will does not specify a trustee's compensation, the trustee shall be entitled to such compensation as may be reasonable under the circumstances and the court may, in the decree of distribution or thereafter, determine such reasonable compensation and, in its discretion, fix or allow a periodic compensation for the trustee or trustees, to continue as long as it may deem proper. Unless the will provides or the trustees agree otherwise, if there are two or more trustees, the compensation shall be apportioned among the trustees according to the services rendered by them respectively. On settlement of each account the court shall allow the testamentary trustee his proper expenses and compensation for services as provided herein. [1967 ch 661 § 3; 1972 ch 937 § 2.] *Cal Jur 3d Decedents' Estates § 110, Trusts §§ 194 et seq., 204; Witkin Summary (8th ed) pp 5439-5441, 5757, 5836.*

§ 1123. **Conclusiveness of decree: Persons not in being.** A decree rendered under the provisions of this chapter, when it becomes final, shall be conclusive upon all persons in interest, whether or not they are in being. [1931.] *Cal Jur 3d Decedents' Estates § 110, Judgments § 285, Trusts §§ 222, 227, 225; Witkin Summary (8th ed) p 5752.*

§ 1123.5. **Removal of trustee: Procedure.** The court in which the administration is pending or, after final distribution, the court sitting in probate which has jurisdiction over a testamentary trust shall have power to remove a trustee of a testamentary trust, whether or not any property has been distributed to him or her, who has violated or is unfit to execute the trust or has acquired any interest or become charged with any duty adverse to the interest of any beneficiary in the subject of the trust. The court may remove one or all of the cotrustees of a testamentary trust and appoint new trustees where the court determines that hostility, ill feeling, or continued lack of cooperation among and between cotrustees has impaired

the proper administration of the trust. The proceeding may be initiated by the court upon its own motion or by verified petition of a beneficiary of, or any other person interested in, the trust, including any person in being who shall or may participate in the corpus or income of the trust. The clerk shall set the matter for hearing. The trustee whose removal is sought shall be personally served with a copy of the motion or petition and with notice of the time and place of the hearing thereon, at least 10 days before the hearing, provided, that if the trustee is not a resident of this state, or has absconded or concealed himself or herself from the state, the court may fix the manner of giving notice to him or her by mail, publication or otherwise, as the court may determine, and the court may proceed upon the notice as if the trustee had been personally served. In addition, the petitioner, or the court when acting upon its own motion, shall cause a copy of the petition or motion and of the notice of hearing to be mailed to the personal representative, if any part of the estate remains to be distributed to the trustee, and to each cotrustee and to the beneficiaries, including therein all persons in being who shall or may participate in the corpus or income of the trust, at their last known or other addresses, as provided in Section 1200, whether any of the persons to whom notice is to be given have requested special notice or given notice of appearance, or to be personally served upon those persons. [1969 ch 272 § 2; 1976 ch 553 § 1; 1982 ch 1543 § 11.] *Cal Jur 3d Decedents' Estates § 110, Trusts §§ 66 et seq.; Cal Practice Rev Ch 425B Proceeding To Remove Trustee; Witkin Summary (8th ed) pp 5396, 5742, 5753.*

§ 1123.6. **Same: Preliminary surrender of trust assets and suspension of powers of trustee.** The court, whenever it appears from the verified petition of a beneficiary of the trust or other person interested in the trust, or from facts coming to its attention, that the assets of the trust or the interests of a beneficiary may suffer loss or injury during the time required for hearing and decision by the trial court under Section 1123.5 and appellate review, if any, may compel the trustee whose removal is sought to surrender any assets of the trust in his possession or subject to his control to a custodian designated by the court or to a cotrustee and may suspend the powers of the trustee to such extent as the court deems necessary. [1969 ch 272 § 3.] *Cal Jur 3d Decedents' Estates*

§ 110, *Trusts* § 70; *Cal Practice Rev Ch 425B Proceeding To Remove Trustee; Witkin Summary (8th ed)* p 5396.

§ 1123.7. Same: Exclusiveness of jurisdiction and procedure. The jurisdiction and procedure provided by Sections 1123.5 and 1123.6 shall be exclusive. [1969 ch 272 § 4.] *Cal Jur 3d Decedents' Estates* § 110, *Trusts* § 70; *Witkin Summary (8th ed)* p 5396.

§ 1124. Declination of trustee named in will: Procedure. Any person named or designated as a trustee in a will may, at any time before distribution of any of the estate to him, decline to act as such trustee, by a writing filed with the clerk of the court where the estate proceedings are pending and within five days from the filing of said writing, shall mail a copy thereof, postage prepaid, from a post office within this State, addressed to the executor or administrator at his place of residence, if known to the person declining, if not, at the county seat of the county where the proceedings are pending. [1931; 1939 ch 537 § 1.] *Cal Jur 3d Decedents' Estates* § 110, *Trusts* § 53; *Witkin Summary (8th ed)* pp 5340, 5376, 5393, 5754.

§ 1125. Appointment of trustee to fill vacancy: Application: Notice. The court in which the administration is pending shall have power, at any time before final distribution, to appoint some fit and proper person to fill any vacancy in the office of trustee under the will, whether resulting from such declination, removal, or otherwise, if such appointment is necessary to carry out the trust. Such appointment may be made by the court upon the written application of any person interested in the trust, filed in the probate proceedings, and shall be made only after notice to all parties interested in the trust, given as required by Section 328 upon a petition for the probate of a will. [1931; 1933 ch 969 § 15; 1977 ch 88 § 1.] *Cal Jur 3d Charities* § 27, *Decedents' Estates* § 110, *Trusts* §§ 55, 57, 58; *Witkin Summary (8th ed)* p 5754.

§ 1125.1. Resignation after distribution: Petition: Notice of hearing: Liability on bond. Any person named or designated as trustee in a will or any successor trustee, may, at any time after the distribution of any of the estate to him, file with the court a petition tendering his resignation as such trustee and setting forth the names and addresses of all living beneficiaries known to said resigning trustee. The clerk shall set the

petition for hearing by the court and give notice thereof by causing a notice to be posted at the courthouse of the county where the petition is filed, giving the name of the decedent, the name of the petitioner and the time when the petition will be heard. Such notice must be given at least ten days before the hearing. The clerk shall cause a similar notice to be mailed, postage prepaid, to the beneficiaries named in the petition, at least ten days before the hearing, addressed to them at their respective post office addresses, as set forth in the petition, otherwise at the county seat of the county where the proceedings are pending. The court shall accept such resignation, making any order which may be necessary for the preservation of the estate.

The liability of the said resigning trustee or of the sureties on his bond shall not in any manner be discharged, released, or affected by such resignation, but shall continue until the said trustee has delivered up all of the estate to the person whom the court shall appoint to receive the same. [1939 ch 537 § 2.] *Cal Jur 3d Decedents' Estates* § 110, *Trusts* §§ 60, 64; *Witkin Summary (8th ed)* pp 5394, 5754.

§ 1126. Trusteeship vacancy. If after distribution a trustee of a testamentary trust dies, resigns, fails or declines to act, cannot be identified, or is for any reason incapable of acting, or is removed or a vacancy in the trusteeship is otherwise created or exists, the court which has jurisdiction over the trust shall have the power to declare a vacancy and appoint a trustee to fill the vacancy, upon the petition of anyone interested in the trust estate and notice given for the period and in the manner required by Section 1200 of this code. The petitioner shall cause notice of the hearing to be mailed to the beneficiaries and to any trustee as provided in said Section 1200, whether they have requested special notice or given notice of appearance or not. [1931; 1933 ch 969 § 16; 1949 ch 452 § 1.] *Cal Jur 3d Charities* § 27, *Decedents' Estates* § 110, *Trusts* §§ 55, 56, 57, 58, 66; *Witkin Summary (8th ed)* pp 5376, 5754.

§ 1127. Bond of trustee. Except as provided in Section 1127.5, the person appointed under Section 1125 or Section 1126 of this code, before acting as trustee, shall give a bond such as is required of a person appointed administrator. He shall be allowed the cost of such bond to the extent provided by Section 541.5. [1933 ch 969 § 17; 1965 ch

1116 § 1.] *Cal Jur 3d Decedents' Estates § 110, Trusts §§ 54, 56, 181, 203; Cal Forms-42:24; Witkin Summary (8th ed) p 5754.*

§ 1127.5. Designating charitable corporation as substitute or successor trustee without requiring bond. Upon the petition of a nonprofit corporation named or designated as trustee in a will or acting as a successor trustee thereunder within the scope of its own charitable purposes and trust, the court may name as substitute or successor trustee, a charitable corporation of which the nonprofit corporation is the sole member without requiring any bond not theretofore required of the nonprofit corporation. [1965 ch 1116 § 1.] *Cal Jur 3d Decedents' Estates § 110, Trusts §§ 56, 62.*

§ 1128. Transfer of trust proceedings to other county: Petition. Where, in accordance with the provisions of section 1120 of this code, jurisdiction is retained of any trust created by will, the superior court in which such proceeding is pending, may, at any time after final distribution, on petition of the trustee, or of any other interested party, make an order transferring further proceedings in reference to such trust, to the superior court of any other county of this State. To obtain such transfer, the person applying therefor shall file in the court in which the proceeding is pending, a verified petition which shall set forth the following:

1. The name of the county to which it is sought to transfer proceedings;

2. The names, ages and places of residence of all trustees and of all persons who are interested as beneficiaries in the trust, so far as the same are known to petitioner;

3. A brief description of the character, condition, value and location of the property included in the trust estate;

4. A brief statement of the reasons for transfer. [1937 ch 549 § 1.] *Cal Jur 3d Decedents' Estates § 110, Trusts §§ 236, 237; Witkin Summary (8th ed) p 5752.*

§ 1129. Hearing and notice: Who may appear and oppose: Order for transfer: Duties of clerk: Jurisdiction of court to which proceedings are transferred: Practice. Upon the filing of such petition, the clerk shall set the same for hearing upon a date not less than 10, nor more than 30 days thereafter and shall cause notice thereof to be given for the time and in the manner specified in Section 1200 of this code. Petitioner shall, at least 10 days prior to the time set for hearing, cause to be mailed to

each of the persons named in such petition, at their respective places of residence as therein set forth, a copy of the notice of hearing. Any person interested in the trust, either as trustee or as beneficiary, may appear and file written grounds in opposition thereto. If, after hearing, it appears to the court that the transfer of proceedings to the court designated in the petition or to the superior court of any other county in this State, will be for the best interests of the estate, or that economical and convenient administration of the trust will be facilitated thereby, the court shall make an order transferring proceedings to such court. Thereupon the clerk shall certify to the clerk of the court to which the proceeding is transferred, a copy of the order of transfer, together with copies of the will or other instrument creating the trust, the decree of distribution, and such other documents or matters of record therein as the court may by its order determine to be necessary to define the powers and obligations of the trustee, or otherwise necessary in connection with the further administration of the trust. The court to which the proceeding is transferred may from time to time require by its order, the filing of certified copies of such additional papers or matters of record from the court of probate, as may be required.

Upon filing of a certified copy of the order of transfer, together with supporting documents, the court to which the proceeding is transferred, shall have with respect to such trust, the same jurisdiction as the court of probate would have retained under the provisions of Section 1120 of this code, but for the transfer.

Except as otherwise specified herein, practice on the presentation and hearing of such petition and of all other matters in relation thereto, shall be in accordance with the provisions of Division 3 of this code, so far as the same may be applicable. [1937 ch 549 § 2; 1951 ch 888 § 1.] *Cal Jur 3d Decedents' Estates § 110, Trusts §§ 236, 237; Witkin Summary (8th ed) p 5752.*

§ 1130. Vouchers in support of trustee's account: Withdrawal on leaving certified copy on file: To be produced on demand: When may be destroyed or delivered to trustee. Any voucher which may have been filed in support of the account of a trustee may be withdrawn on leaving a certified copy on file, but must be produced on demand, unless permanently withdrawn with the permission of the court. Five years from

the date of settlement of the account in support of which a voucher was filed the clerk of the court may destroy the voucher or deliver it to the trustee or to his attorney. [1951 ch 852 § 1.] *Cal Jur 3d Decedents' Estates* § 110, *Trusts* §§ 212 et seq.

§ 1130.1. **Certificate of appointment.** Upon application of the trustee or trustees of a trust created by a will, the clerk shall issue a certificate that the trustee or trustees are duly appointed and acting trustee or trustees under the will. [1976 ch 717 § 1.] *Cal Jur 3d Trusts* § 55; *Witkin Summary (8th ed) Trusts* § 245.

§ 1132. **Order for transfer of places of administration or trust assets.** Where, under Section 1120, jurisdiction is retained of any trust created by the will of a decedent, the court may order that the place of administration or assets of the trust be transferred to another jurisdiction, pursuant to the procedure provided by Article 3 (commencing with section 1139) of this chapter. [1971 ch 958 § 3.] *Cal Jur 3d Decedents' Estates*

§ 110, *Trusts* § 238; *Witkin Summary (8th ed) p 5752.*

§ 1133. **Administration of more than one trust as a single trust.** When a trustee who has already been appointed by a will or appointed by the court to execute a trust created by a will is appointed by another will or appointed by the court to execute a trust created by another will, and the provisions and terms of the decree establishing each trust are substantially identical, the court may upon the petition of the trustee and without notice order the trustee to combine the assets and administer them as a single trust, if it determines that administration as a single trust will (1) be consistent with the intent of the trustor, and (2) facilitate administration of the trust without defeating or impairing the interests of the beneficiaries. [1974 ch 551 § 1.] *Cal Jur 3d Decedents' Estates* § 110, *Trusts* §§ 100 et seq., 135.

§§ 1134-1136. [Repealed by Stats 1971 ch 958.]

ARTICLE 2 [REPEALED]

§§ 1137-1137.14. [Repealed by Stats 1970 ch 849.]

ARTICLE 2.5

Inter Vivos and Other Trusts

§ 1138. "Trust".

§ 1138.1. **Petition to superior court: Purposes: Who may file: Express limitation on right to petition.**

§ 1138.2. **Scope of court orders and decrees.**

§ 1138.3. **Where to commence proceedings: "Principal place of administration of the trust."**

§ 1138.4. **Contents of petition.**

§ 1138.5. **Grounds to dismiss petition.**

§ 1138.6. **Procedure: Notice: Hearing.**

§ 1138.7. **Grounds to appoint guardian ad litem: Representation of unascertained class: Applicability of Code of Civil Procedure §§ 373, 373.5.**

§ 1138.8. **Trustee: Resignation: Appointment of successor.**

§ 1138.9. **Same: Vacancy: Petition to appoint trustee.**

§ 1138.10. **Appealable orders.**

§ 1138.11. **Remedies as cumulative and nonexclusive.**

§ 1138.12. **Legislative intent.**

§ 1138.13. **Trusts subject to article.**

§ 1138.14. **Applicability of provisions governing distributions in satisfaction of bequests**

Cal Jur 3d Trusts §§ 57 et seq., 223 et seq., 240; *Cal Forms-42:78, 42:112, 42:141.*

§ 1138. "Trust". (a) As used in this article, "trust" means a written voluntary express trust, with additions thereto, whether created by will or other than by will which

is entirely administered or to be entirely administered in this state.

(b) As used in this article, "trust" does not mean a trust subject to court supervision

under Article 1 (commencing with Section 1120) of this chapter, a Totten trust, a business trust which is taxed as a partnership or corporation, an investment trust subject to regulation under the laws of this state or any other jurisdiction, a common trust fund, a voting trust, a deed of trust, a transfer in trust for purpose of suit or enforcement of a claim or right, a trust for the primary purpose of paying debts, dividends, interest, salaries, wages, pensions, or employee benefits of any kind, an arrangement under which a person is a nominee or escrow holder for another, a trust subject to supervision of the Attorney General under Article 7 (commencing with Section 12580) of Chapter 6 of Part 2 of Division 3 of Title 2 of the Government Code during the period when no private beneficiary or remainderman has or may claim an interest therein, nor a trust declared exempt from supervision under Section 12583 of the Government Code. [1970 ch 849 § 2.5; 1976 ch 144 § 1.] *Cal Jur 3d Decedents' Estates § 110; 19 Cal Practice Rev, Ch 422A, Action by Beneficiary To Enforce Rights by Following Trust Property, Ch 422B, Proceeding To Establish Membership in Class of Beneficiaries, Ch 423, Action Against Trustee To Compel Accounting, Ch 424, Action Against Trustee for Commingling Personal and Trust Funds, Ch 425B, Proceeding To Remove Trustee, Ch 425C, Proceeding for Modification of Terms of a Trust; Cal Forms-42:78; Witkin Summary (8th ed) Trusts §§ 8, 10.*

§ 1138.1. Petition to superior court: Purposes: Who may file: Express limitation on right to petition. (a) A trustee, beneficiary, or remainderman may petition the superior court for any of the following purposes:

(1) Determining to whom the property shall pass or be delivered upon final or partial termination of the trust, to the extent such determination is not concluded by the trust instrument.

(2) Settling the accounts and passing upon the acts of the trustee.

(3) Authorizing the trustee to accept additions to the trust when the trust instrument does not prohibit such additions.

(4) Instructing the trustee.

(5) Compelling the trustee to submit his accounts and report his acts as trustee to a beneficiary or remainderman when it appears that the trustee has failed to submit an accounting and report within 60 days after written request of a beneficiary or remainderman and no accounting and report has

been made within six months preceding such request.

(6) Granting to the trustee powers not expressly contained in the trust instrument to the extent provided in Section 1120.2.

(7) Fixing, directing, or allowing payment of compensation to the trustee in accordance with Section 2274 of the Civil Code.

(8) Appointing a trustee.

(9) Accepting the resignation of a trustee.

(10) Removing a trustee.

(11) Authorizing or directing removal of the trusts or assets of the trust to another jurisdiction pursuant to the procedure provided in Article 3 (commencing with Section 1139) Chapter 19, Division 3.

(12) Directing the relief provided in Section 2279.1 of the Civil Code.

(13) Amending or conforming the trust instrument in the manner required to qualify the decedent's estate for the charitable estate tax deduction permitted by federal law, including the addition of mandatory governing instrument requirements for a charitable remainder trust as required by final regulations and rulings of the United States Internal Revenue Service, in any case in which all parties interested in the trust have submitted written agreement to the proposed changes or written disclaimer of interest.

(b) The terms of a trust subject to this article may expressly or by necessary implication limit or eliminate the authority of any trustee, beneficiary, remainderman or other person to petition the court under this article for any one or more of the purposes enumerated in subdivision (a). [1970 ch 849 § 2; 1971 ch 958 § 8; 1973 ch 506 § 3; 1975 ch 474 § 2, effective August 30, 1975.] *Cal Jur 3d Decedents' Estates § 110, Trusts §§ 57 et seq., 223 et seq.; Cal Forms-41:642, 42:112, 42:141; Witkin Summary (8th ed) p 5373.*

§ 1138.2. Scope of court orders and decrees. The court may make all orders and decrees and take all other action necessary or proper to dispose of the matters presented by the petition. [1970 ch 849 § 2; 1971 ch 958 § 8.] *Cal Jur 3d Trusts §§ 220, 227, 235; Witkin Summary (8th ed) p 5374.*

§ 1138.3. Where to commence proceedings: "Principal place of administration of the trust". Proceedings under this article shall be commenced in the superior court of the county in which is located the principal place of administration of the trust. As used in this section, the "principal place of administration of the trust" is the trustee's usual place of business where the day-to-day

records pertaining to the trust are kept or the trustee's residence if he has no such place of business. In the case of co-trustees, the principal place of administration is the usual place of business where such records are kept, or, if none, the usual place of business or residence of any of the cotrustees as agreed upon by them, or, if none, the county in which any trustee resides or maintains a place of business. [1970 ch 849 § 2.] *Cal Jur 3d Decedents' Estates § 110, Trusts §§ 70, 216, 223, 225, 228, 239, 241; Witkin Summary (8th ed) p 5373.*

§ 1138.4. Contents of petition. Each proceeding under this article shall be commenced by filing a verified petition which shall state facts showing that the petition is authorized under this article and the terms of the trust. [1970 ch 849 § 2.] *Cal Jur 3d Decedents' Estates § 110, Trusts § 225; Witkin Summary (8th ed) p 5374.*

§ 1138.5. Grounds to dismiss petition. The court may dismiss a petition when it appears:

(a) That the proceeding is not reasonably necessary for the protection of the interests of a trustee or for the protection of the interests of beneficiaries or remaindermen; or

(b) That nondisclosure of the terms, assets, management, and administration of the trust is in the best interests of the objects of the trust. [1970 ch 849 § 2.] *Cal Jur 3d Trusts §§ 227, 235; Witkin Summary (8th ed) p 5374.*

§ 1138.6. Procedure; Notice; Hearing.

(a) Upon the filing of a petition provided for in this article, the clerk shall set the petition for hearing.

At least 30 days before the time set for the hearing of the petition, the petitioner shall cause notice of the time and place of hearing thereof to be mailed to the trustee of the trust when he or she is not the petitioner, to any cotrustee not petitioning, and to all beneficiaries and remaindermen of the trust, including all persons in being who may participate in the corpus or income of the trust, addressed to them at their respective offices or places of residence, if known, and if not known such notice shall be given as the court may require in the manner provided in Section 413.30 of the Code of Civil Procedure.

When a cotrustee not petitioning, a beneficiary, or a remainderman, in person or by counsel, has served and filed a notice of appearance directed to the petitioner or his

or her counsel in connection with the particular petition and proceeding, or a written request for a copy of the petition, and given an address to which notices or a copy may be sent or delivered, the petitioner shall cause a copy of the petition to be sent by mail to the cotrustee or person or counsel within five days after service of notice of appearance or receipt of the request.

Personal delivery is the equivalent of mailing.

Proof of the giving of notice and of mailing or personal delivery of a copy of the petition shall be made at the hearing. If it appears to the satisfaction of the court that the notice has been given as required, the court shall so find in its order, and the order, when it becomes final, shall be conclusive upon all persons.

(b) Proceedings under this article shall be governed, whenever possible, by the provisions of this article, and when the provisions of this article do not appear applicable, the provisions of Division 3 (commencing with Section 300) shall apply.

(c) The court for good cause may shorten the time required for performance of any act required by this section.

(d) Notice of any petition filed pursuant to paragraph (13) of subdivision (a) of Section 1138.1 shall be given to the Attorney General. [1970 ch 849 § 2; 1975 ch 474 § 3, effective August 30, 1975; 1982 ch 1543 § 12.] *Cal Jur 3d Decedents' Estates § 110, Trusts §§ 60, 225, 226; Witkin Summary (8th ed) Trusts § 10.*

§ 1138.7. Grounds to appoint guardian ad litem: Representation of unascertained class: Applicability of Code of Civil Procedure §§ 373, 373.5. (a) At any stage of a proceeding under this article the court may appoint a guardian ad litem to represent the interest of a minor, an incapacitated, unborn, or unascertained person, or a person whose identity or address is unknown, if the court determines that representation of the interest otherwise would be inadequate. Where not precluded by conflict of interests, a guardian ad litem may be appointed to represent several persons or interests.

(b) When it appears from the petition that the trustee seeks or is to be given instructions to exercise a power not conferred upon him, the petition shall set forth the particulars of, and the necessity for, the action sought to be taken. In addition to the notice required by Section 1138.6, when the peti-

tion relates to the exercise of a power not conferred or where the petition relates to determining to whom the property shall pass or be delivered upon final or partial termination of the trust, a copy of the petition shall be attached to, and mailed with, copies of the notice, and, at least 10 days before the time set for the hearing of the petition, the court or judge shall appoint a suitable person or persons who shall appear and act as guardian ad litem of any person or persons of a designated class who are not ascertained or in being or who may become beneficiaries or may participate in the trust.

(c) Sections 373 and 373.5 of the Code of Civil Procedure shall not apply to the appointment of a guardian ad litem under the provisions of this article. [1970 ch 849 § 2.] *Cal Jur 3d Decedents' Estates § 110, Guardianship and Conservatorship §§ 99 et seq., Trusts §§ 217, 225, 226, 323; Cal Practice Rev Ch 10 Guardian Ad Litem; Witkin Summary (8th ed) p 5374.*

§ 1138.8. **Trustee: Resignation: Appointment of successor.** Unless otherwise expressly provided in the trust instrument a trustee or cotrustee may resign at any time. Such resignation and the appointment of a successor trustee shall be effected as provided in the trust instrument. If the trust instrument is silent a trustee may file with a court a petition tendering his resignation as such trustee and the court shall accept such resignation making any order appointing a successor trustee and other order which may be necessary for the preservation of the estate. The liability of the resigning trustee or the sureties on his bond, if any, shall not be discharged, released, or affected in any manner by the resignation, but shall continue until the trustee has delivered all of the estate to the person whom the court shall appoint to receive it. [1970 ch 849 § 2.] *Cal Jur 3d Decedents' Estates § 110, Trusts §§ 56, 60; Witkin Summary (8th ed) p 5373.*

§ 1138.9. **Same: Vacancy: Petition to appoint trustee.** If a trustee of a trust subject to this article dies, resigns, fails or declines to act, cannot be identified, is incapable of acting for any reason, or is removed, or a vacancy in the trusteeship is otherwise created or exists, and the trust instrument does not provide a method for appointing a successor trustee, the court shall have the power to appoint a trustee to fill the vacancy upon the petition of the trustee or anyone interested in the trust estate. [1970 ch 849

§ 2.] *Cal Jur 3d Decedents' Estates § 110, Trusts §§ 55, 57, 58; Witkin Summary (8th ed) p 5373.*

§ 1138.10. **Appealable orders.** An appeal may be taken from any final order or decree made pursuant to paragraph (1), (2), (4), (6), (7), (8), (10), or (11) of subdivision (a) of Section 1138.1, or from an order dismissing the petition or denying a motion to dismiss under Section 1138.5. [1970 ch 849 § 2.] *Cal Jur 3d Trusts §§ 49, 57, 71, 221, 227, 235; Witkin Summary (8th ed) p 5375.*

§ 1138.11. **Remedies as cumulative and nonexclusive.** The remedies provided under this article are cumulative and nonexclusive. [1970 ch 849 § 2.] *Cal Jur 3d Decedents' Estates § 110, Trusts § 224; Witkin Summary (8th ed) p 5372.*

§ 1138.12. **Legislative intent.** It is the intent of the Legislature in enacting this article that the administration of trusts subject to this article proceed expeditiously and free of judicial intervention subject to the jurisdiction of the courts of this state as invoked pursuant to this article or otherwise invoked pursuant to law. [1970 ch 849 § 2.] *Cal Jur 3d Decedents' Estates § 110, Trusts § 223.*

§ 1138.13. **Trusts subject to article.** This article shall apply to all trusts created prior to, or on, or after the operative date of this article. However, this article shall not apply to any trust the terms and provisions of which expressly or by necessary implication make this article inapplicable to such trust. [1970 ch 849 § 2; 1976 ch 860 § 4.] *Cal Jur 3d Decedents' Estates § 110, Trusts § 223; Cal Forms-42:78, 42:141; Witkin Summary (8th ed) p 5372.*

§ 1138.14. **Applicability of provisions governing distributions in satisfaction of bequests.** The provisions of Article 3 (commencing with Section 1030) of Chapter 16 shall apply to gifts, whether outright or in trust, made in a trust which is subject to this article and is executed or amended after or before the effective date of this section. However, this section shall not apply to any trust the terms of which expressly or by necessary implication make this section inapplicable to it. For purposes of this section, all references in Article 3 (commencing with Section 1030) of Chapter 16 to a "testator" shall refer to the trustor and all references to a "will" shall refer to a trust which is subject to this article. [1982 ch 41 § 4.]

ARTICLE 3

Transfer to Another Jurisdiction

§ 1139. Application and construction of article.

§ 1139.1. When order for transfer permitted.

§ 1139.2. Petition for transfer: Contents.

§ 1139.3. Setting hearing and giving notice thereof: Appearance in opposition.

§ 1139.4. Order for transfer: Prerequisites.

§ 1139.5. Same: Provisions: Delivery as discharge of trustee.

§ 1139.6. Place for commencing proceeding.

§ 1139.7. "Beneficiary."

§ 1139. Application and construction of article. (a) This article applies to (1) a trust over which jurisdiction continues after distribution, as provided by Section 1120; (2) a trust subject to Chapter 10 (commencing with Section 175) of Division 1; (3) a trust subject to Article 2.5 (commencing with Section 1138) of this chapter; and (4) any other trust to which the provisions of this article are made applicable by statute or trust instrument.

(b) This chapter shall not be construed to prevent the transfer of the place of administration of a trust or of trust assets to another jurisdiction in any case where judicial approval of a transfer was not required under law in effect immediately prior to the effective date of this article.

(c) This article shall not apply to any proceeding or action pending on the effective date of this article. [1971 ch 958 § 9.] *Cal Jur 3d Decedents' Estates §§ 102, 110, Trusts §§ 224, 237, 238 Witkin Summary (8th ed) pp 5373, 5374, 5752.*

§ 1139.1. When order for transfer permitted. An order may be made by the superior court for the transfer of the place of administration of a trust or the transfer of some or all of the assets of a trust to another jurisdiction outside of California: (a) where, under Section 1120 of this code, jurisdiction is retained over any trust created by the will of a nonresident decedent, which will has been probated in the state of his residence and a duly appointed, qualified and acting domiciliary trustee has entered upon and is engaged in the administration of the same trust with respect to the assets situated in that state; or (b) where the trustee or beneficiary of a trust to which this article applies desires to transfer the place of administration of a trust to another jurisdiction outside of California, unless the trust instrument precludes the transfer of the place of administration to another jurisdiction outside of

California. [1971 ch 958 § 9.] *Cal Jur 3d Decedents' Estates §§ 102, 110, Trusts §§ 224, 237, 238.*

§ 1139.2. Petition for transfer: Contents.

A petition for an order authorizing a transfer may be filed by the trustee or by a beneficiary of a trust. The petition shall be verified and shall set forth:

(1) The names, ages and places of residence of the trustee administering the trust in this state, the trustee, including any domiciliary trustee, in the other jurisdiction to whom administration of the trust or such trust assets will be transferred, and all persons who are interested in the trust as beneficiaries, so far as known to petitioner.

(2) Whether the trustee in the other jurisdiction has agreed to accept the trust. If he has, the acceptance or a true copy shall be attached as an exhibit to the petition, or otherwise filed with the court.

(3) A statement of the character, condition, location and value of the property comprising the assets sought to be transferred.

(4) A general statement of the qualifications of the trustee who will administer the trust in the other jurisdiction; the amount of his bond, if any; the nature and value of the assets of any trust of the decedent or trustor under his administration in the other jurisdiction; and the name of the court, if any, having jurisdiction of such trustee or of his accounts or in which a proceeding may be had, with respect to administration of the trust or the trustee's accounts.

(5) Whether there is any pending civil action in this state against the trustee.

(6) A statement of the reasons for the transfer. [1971 ch 958 § 9.] *Cal Jur 3d Decedents' Estates §§ 102, 110, Trusts §§ 224, 237, 238, 239.*

§ 1139.3. Setting hearing and giving notice thereof: Appearance in opposition. Upon the filing of such petition the clerk shall set

the same for hearing and shall give notice of such hearing as provided in Section 1200 of this code at least 30 days before the time set for the hearing of the petition. Petitioner, at least 30 days prior to the time so set for hearing, shall cause to be mailed to each of the persons named in the petition, at their respective places of residence therein stated, a copy of such notice. If the trust involves or may involve a charitable trust, bequest or devise of the character specified in Section 328, a copy of the notice shall be mailed to or served upon the attorney general at least 20 days before the hearing. Any person interested in the trust, either as trustee, beneficiary or otherwise, may appear and file written grounds in opposition thereto. [1971 ch 958 § 9.] *Cal Jur 3d Decedents' Estates §§ 102, 110, Trusts §§ 224, 237, 238, 239.*

§ 1139.4. Order for transfer: Prerequisites. The court may, in its discretion, grant the petition and order the trustee to transfer the trust assets or to change the place of administration to the other jurisdiction, if, after hearing, it appears to the court:

(1) That the transfer of the trust assets to a trustee in another jurisdiction, or that the transfer of the place of administration of the trust to another jurisdiction, would facilitate the economical and convenient administration of the trust and promote the best interests of the trust and those interested therein.

(2) That the substantial rights of residents of this state will not be materially affected thereby.

(3) That transfer will not violate the terms of the trust.

(4) That any new trustee, to whom the trust assets are to be transferred, is qualified

and able to administer the trust or such assets upon the same trusts. [1971 ch 958 § 9.] *Cal Jur 3d Decedents' Estates §§ 102, 110, Trusts §§ 224, 237, 238, 239.*

§ 1139.5. Same: Provisions: Delivery as discharge of trustee. If a transfer is ordered, the court may direct the manner of transfer and impose such terms and conditions as may be just, including but not by limitation, a requirement for the substitution of a successor trustee in any pending litigation in this state. The delivery in accordance with the order of the court is a full discharge of the trustee in relation to all property embraced in the order. [1971 ch 958 § 9.] *Cal Jur 3d Trusts §§ 224, 237, 238, 239.*

§ 1139.6. Place for commencing proceeding. In the case of trusts not subject to Chapter 10 (commencing with Section 175) of Division 1, or Article 1 (commencing with Section 1120) or Article 2.5 (commencing with Section 1138) of this chapter, a proceeding pursuant to this article shall be commenced in the superior court of the county in which is located the principal place of administration of the trust, as defined in Section 1138.3, unless the statute providing for the proceeding otherwise provides. [1971 ch 958 § 9.] *Cal Jur 3d Decedents' Estates §§ 102, 110, Trusts §§ 224, 237, 238, 239.*

§ 1139.7. "Beneficiary." For the purposes of this article, beneficiary means all persons in being who shall or may participate in the corpus or income of the trust. [1971 ch 958 § 9.] *Cal Jur 3d Decedents' Estates §§ 102, 110, Trusts §§ 224, 237, 238, 239.*

ARTICLE 4

Transfer from Another Jurisdiction

[Added by Stats 1976 ch 144 § 2.]

- § 1139.10. Application of article.
- § 1139.11. Transfer of place of administration or assets to California.
- § 1139.12. Petition for transfer.
- § 1139.13. Venue.
- § 1139.14. Contents of petition.
- § 1139.15. Notice of hearing.
- § 1139.16. Order accepting transfer and appointing trustee.
- § 1139.17. Conditional order accepting transfer.
- § 1139.18. Administration of transferred trust.
- § 1139.19. "Beneficiary" defined.

§ 1139.10. Application of article. (a) This article applies to any written voluntary express trust or portion thereof, whether created by will or otherwise, administered in another jurisdiction outside of this state.

(b) This article shall not be construed to prevent transfer of place of administration of a trust or of trust assets to this state from another jurisdiction in any case where judicial approval of the transfer was not required under the law in effect immediately prior to the effective date of this article. [1976 ch 144 § 2.] *Cal Jur 3d Decedents' Estates §§ 102, 110, Trusts §§ 238 et seq.; Witkin Summary (8th ed) Trusts § 10.*

§ 1139.11. Transfer of place of administration or assets to California. Subject to the limitations and requirements of this article, an order may be made by the superior court accepting the transfer of the place of administration of a trust from another jurisdiction to this state or the transfer of some or all of the assets of a trust in another jurisdiction to a trustee in this state. [1976 ch 144 § 2.] *Cal Jur 3d Trusts § 240.*

§ 1139.12. Petition for transfer. A petition for an order accepting a transfer may be filed by the trustee or by a beneficiary of the trust. [1976 ch 144 § 2.] *Cal Jur 3d Trusts §§ 240, 241.*

§ 1139.13. Venue. (a) If the petition requests that a resident of this state be appointed trustee, the petition shall be filed in the superior court of the county where the proposed "principal place of administration of the trust" (as defined by Section 1138.3 of the Probate Code) is located.

(b) If the petition requests that only a nonresident of this state be appointed trustee, the petition shall be filed in the superior court of the county where either (1) any beneficiary of the trust resides or (2) a substantial portion of the trust assets to be transferred are located or will be located. [1976 ch 144 § 2.] *Cal Jur 3d Trusts §§ 240, 241.*

§ 1139.14. Contents of petition. The petition shall be verified and shall set forth:

(a) The names, ages, and places of residence of:

(1) The trustee administering the trust in the other jurisdiction.

(2) The proposed trustee to whom administration of the trust or such trust assets will be transferred.

(3) All persons who are interested in the

trust as beneficiaries as far as known to petitioner.

(b) Whether the trust has been subject to supervision over administration in another jurisdiction outside of California. If so, whether a petition or appropriate request for transfer of place of administration of the trust or such trust assets to this state has been filed, if necessary, with the court in the other jurisdiction and the status of such petition or request.

(c) Whether the trustee proposed to administer the trust in this state has agreed to accept the trust in this state. If he has, the acceptance shall be attached as an exhibit to the petition or otherwise filed with the court.

(d) A general statement of the qualifications of the trustee proposed to administer the trust in this state and the amount of fiduciary bond to be requested, if any.

(e) A copy of the trust instrument or a statement of the terms of the trust instrument in effect at the time the petition is filed, including all amendments thereto.

(f) A statement of the character, condition, location, and value of the property comprising the assets sought to be transferred.

(g) A statement of the reasons for the transfer. [1976 ch 144 § 2.] *Cal Jur 3d Trusts §§ 240, 241.*

§ 1139.15. Notice and hearing. (a) Upon the filing of the petition, the clerk shall set the petition for hearing and shall give notice of the hearing as provided in Section 1200 at least 30 days before the time set for the hearing. Petitioner, at least 30 days prior to the time set for the hearing, shall cause to be mailed to each of the persons named in the petition, at their respective places of residence therein stated, a copy of the notice of the hearing.

(b) Any person interested in the trust, either as trustee, beneficiary, or otherwise, may appear and file written grounds in opposition to the petition. [1976 ch 144 § 2.] *Cal Jur 3d Trusts §§ 240, 241; Witkin Summary (8th ed) Wills and Probate § 249B.*

§ 1139.16. Order accepting transfer and appointing trustee. The court may, in its discretion, grant the petition and issue an order accepting transfer of place of administration of the trust or trust assets to this state, appoint a trustee to administer the trust in this state, and require the trustee to post appropriate bond, if necessary, if after hearing it appears to the court that:

(a) The transfer of the trust assets to a

trustee in this state, or the transfer of place of administration of the trust to this state, will facilitate the economical and convenient administration of the trust and promote the best interests of the trust and those interested therein.

(b) The transfer will not violate the terms of the trust.

(c) The trustee appointed by the court to administer the trust in this state, to whom the trust assets are to be transferred, is qualified, willing, and able to administer the trust or trust assets upon the same trusts.

(d) The proper court in the other jurisdiction has approved the transfer if such approval is necessary under the law of the other jurisdiction. [1976 ch 144 § 2.] *Cal Jur 3d Trusts* §§ 240, 241.

§ 1139.17. **Conditional order accepting transfer.** When appropriate to facilitate transfer of the trust assets or the place of administration of a trust to this state, the court may issue a conditional order appointing a trustee to administer the trust in this state and indicating that transfer to this state will be accepted if transfer is approved by the proper court of the other jurisdiction. [1976 ch 144 § 2.] *Cal Jur 3d Trusts* §§ 240, 241.

§ 1139.18. **Administration of transferred trust.** (a) If the trust transferred to this state pursuant to this article is a written voluntary express trust, including additions thereto, whether created by will or other than by will, and is not one excluded by subdivision (b) of Section 1138, the trust shall be administered in this state in accordance with Article 2.5 (commencing with Section 1138) of Chapter 19 of Division 3. Notwithstanding Section 1138.3, any proceedings under that article with respect to the trust transferred to this state shall be commenced in the superior court of the proper county as described in Section 1139.13.

(b) If the trust transferred to this state pursuant to this article is not one covered by subdivision (a), it shall be administered in the same manner as if the trust had been subject to supervision in this state from the time of its creation. [1976 ch 144 § 2.] *Cal Jur 3d Trusts* § 240.

§ 1139.19. **"Beneficiary" defined.** For purposes of this article, "beneficiary" means all persons in being who shall or may participate in the corpus or income of the trust. [1976 ch 144 § 2.] *Cal Jur 3d Trusts* §§ 30, 240, 241; *Witkin Summary (8th ed) Trusts* § 35.