

Memorandum 84-21

Subject: Study L-640 - Trusts (Trustees' Duties)

This memorandum concerns the statutory treatment of the duties of trustees. Attached as Exhibit 1 is a staff draft of trustees' duties provisions that reflects decisions made in 1983. This material is included for reference; the Commission may want to reconsider the policy issues in light of the decision to conduct a thorough review of trust law. Also attached as Exhibit 3 is a copy of relevant sections of existing law and comments showing their disposition in the draft statute.

An important decision to be made in this area is the extent to which trustees' duties should be codified. Statutory duties may range from general statements of the duty of loyalty to very specific requirements concerning things such as the duty to account. One very detailed area concerns the duty of the trustee to allocate receipts and expenditures between income beneficiaries and remaindermen. This subject is considered separately in Memorandum 84-32.

General Duty of Trustee

Civil Code Section 2228 sets forth the duty of loyalty in the following terms:

2228. 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.

Other sections set forth various aspects of the general duty of loyalty. For example, Civil Code Section 2231 provides: "A trustee may not use the influence which his position gives him to obtain any advantage from his beneficiary." Section 2232 forbids the trustee undertaking another trust that is adverse to the beneficiary's interest without the beneficiary's consent. And Section 2233 imposes a duty on the trustee to inform the beneficiary of the existence of any duty adverse to the beneficiary's interest.

The basic duty to administer the trust is provided in Civil Code Section 2258(a):

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.

The traditional fiduciary principle is expressed in Civil Code Section 2259: "A trustee, whether he receives any compensation or not, must use at least ordinary care and diligence in the execution of his trust." A specific application of this rule is set forth in Civil Code Section 2260 which requires the trustee to use at least ordinary care and diligence in securing the appointment of a successor trustee before being discharged.

Any number of formulations of the basic trustees' duties would probably be equally effective. The California statutory language is largely that of the Field Code. One might also comb the cases to find appealing statements of these rules. The Restatement (Second) of Trusts could be used as a basis for drafting a set of statutory duties. (See Exhibit 2 for the language of the Restatement sections on duties.) Uniform acts, including the Uniform Probate Code, also offer provisions bearing on trustees' duties. The extent to which general duties are to be codified and the language used to do so are largely a matter of taste. The staff does not recommend continuing the sometimes awkward Field Code provisions. The staff also thinks that there is not a great need to provide very much detail in the area of general duties. We would prefer to make brief reference to the common law; consider the following provision from the Uniform Probate Code:

§ 7-301. 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 version set out in Section 113.051 of the new Texas Trust Code appeals to the staff:

The trustee shall administer the trust according to its terms and this subtitle. In the absence of any contrary terms in the trust instrument or contrary provisions of this subtitle, in administering the trust the trustee shall perform all of the duties imposed on trustees by the common law.

Unless the Commission feels strongly otherwise, the staff suggests a general statement like Texas Trust Code Section 113.051. We would not go to the lengths of codifying most or all of the duties set forth in the Restatement (see Exhibit 2).

"Prudent Man" Standard of Care

Existing California law provides a prudent man standard governing the investing and management of trust property. As set forth in Civil Code Section 2261, this standard currently reads 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.

As an investment and management standard, the prudent man rule is the subject of legislation in the current session. Assembly Bill 630 (as amended in Assembly April 27, 1983, currently before the Senate Judiciary Committee) would revise this standard to read as follows:

(a)(1) . . . [A] trustee shall act with the care, skill, prudence, and diligence under the circumstances then prevailing, specifically including, but not by way of limitation, the general economic conditions and the anticipated needs of the trust and its beneficiaries, that a prudent person 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. Within the limitations of the foregoing and considering individual investments as part of an overall investment strategy, a trustee is authorized to acquire every kind of property, real, personal or mixed, and every kind of investment.

(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.

. . .

The prudent man standard is also provided in Civil Code Section 730.02(a)(3) (Revised Uniform Principal and Income Act) and in Civil Code Section 2290.6 (Uniform Management of Institutional Funds Act).

The existing standard of Civil Code Section 2261 refers to the care that prudent persons would give their own affairs. This is consistent with the Restatement standard which refers to the "care and skill . . . a man of ordinary prudence would exercise in dealing with his own property." Restatement (Second) of Trusts § 174 (1959). Section 7-302 of the Uniform Probate Code, however, adopts what is called an external, rather than a personal, standard of care:

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

This formulation has been well received in states that have enacted the UPC trust administration provisions. The staff wonders, however, whether the choice of an external or personal standard results in any difference in practice. The more specific language of existing California law appears to achieve the same purpose as UPC Section 7-302. The staff assumes that if AB 630 passes, the Commission may want to continue the substance of the new standard, making further consideration of the intricacies of external versus personal standards superfluous. Draft Section 4320 in Exhibit 1 provides a standard of care drawn from AB 630.

Expert Standard of Care

Section 174 of the Restatement (Second) of Trusts provides a higher standard of care "if the trustee has or procures his appointment as trustee by representing that he has greater skill than that of a man of ordinary prudence." Similarly, UPC 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." 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). This rule should be codified; the Commission approved draft Section 4321 in Exhibit 1 when it was considered in 1983.

Trustee's Duty to Inform and Account to Beneficiaries

With one exception, California does not impose on trustees any 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 exception noted above occurs in the case of testamentary trusts created by a will executed before July 1, 1977, and not republished thereafter. See Prob. Code § 1120.1a. This provision requires an annual accounting to income beneficiaries. See Prob. Code § 1120.1a(b).

The 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 a 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.

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 noncourt 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.

When the Commission considered this issue in 1983, the decision was made to propose an annual accounting requirement. See draft Section 4341 in Exhibit 1. The staff notes that the trend in California law and elsewhere is to avoid mechanical accounting requirements. See, e.g., Tex. Trust Code § 113.151. Underlying this development is the recognition that the trustor may require whatever accounting is desired in the trust instrument. The staff is aligned with the UPC view, and would not require annual accountings. As a transitional matter, it may be best to continue the requirements of Probate Code Section 1120.1a for testamentary trusts unchanged since July 1, 1977.

Duties as to Discretionary Powers

Draft Sections 4350-4352 in Exhibit 1 would continue the recently revised provisions concerning the exercise of discretionary powers. See Civil Code § 2269. This law seems to be in general accord with common law principles. Section 187 of the Restatement (Second) of Trusts provides: "Where discretion is conferred upon the trustee with respect to the exercise of a power, its exercise is not subject to control by the court, except to prevent an abuse by the trustee of his discretion." The factors that determine whether there is an abuse of discretion include:

- (1) the extent of the discretion conferred upon the trustee by the terms of the trust;
- (2) the purposes of the trust;
- (3) the nature of the power;
- (4) the existence or non-existence, the definiteness or indefiniteness, of an external standard by which the reasonableness of the trustee's conduct can be judged;
- (5) the motives of the trustee in exercising or refraining from exercising the power;
- (6) the existence or non-existence of an interest in the trustee conflicting with that of the beneficiaries.

Restatement (Second) of Trusts § 187 comment d (1959). Comment e states that "the court will not interfere unless the trustee in exercising or failing to exercise the power acts dishonestly, or with an improper even though not a dishonest motive, or fails to use his judgment, or acts beyond the bounds of a reasonable judgment." Comment j asserts that "absolute" discretion may dispense with the standard of reasonableness, but the accuracy of this statement has been questioned. See Halbach, Problems of Discretion in Discretionary Trusts, 61 Colum. L. Rev. 1425, 1431 (1961). In any event it is clear that the trustee's actions are subject to review regardless of the degree of discretion conferred.

Before its amendment in 1981, Civil Code Section 2269 read: "A discretionary power conferred upon a trustee is presumed not to be left to his arbitrary discretion, but may be controlled by the proper Court if not reasonably exercised, unless an absolute discretion is clearly conferred by the declaration of trust." The amended version makes clear that absolute discretion is still subject to fiduciary principles. It would seem that fiduciary principles necessarily involve some degree of reasonableness. These are vague concepts that provide a lot of room for the arguments of ingenious counsel; this may be unavoidable.

Civil Code Section 2269 was apparently amended in response to the decision in Estate of Friedman, 94 Cal. App.3d 667, 156 Cal. Rptr. 597 (1979), which involved the application of the inheritance tax to an inter vivos trust. The issue in the case was whether the trust created a general power of appointment or, as argued by the controller, made a transfer subject to a contingency. The court treated this issue as hinging on whether the power to invade principal was subject to an ascertainable standard. If the power was not subject to such a standard, then the power was a general power of appointment and not a transfer subject to a contingency and the court so found. Id., at 670.

This case involved the intricacies of the variant rules for taxation of a general power of appointment, a limited power of appointment, and a transfer subject to a contingency. It is unfortunate that general trust law has to be shaped by doctrines hatched in this context, particularly now that the inheritance tax has been abolished. We have found no useful legislative history of the recent amendments of Civil Code Section 2269. It may be that its provisions relating to "absolute" discretion and powers of appointment are now justified as being beneficial in relation to the federal estate tax. However, this would appear to be a matter for the trust instrument, rather than the statute. See generally Farrell, Powers of Appointment, in California Will Drafting Practice § 10.60, at 470-71 (Cal. Cont. Ed. Bar 1982).

The staff is also puzzled about the provision continued as draft Section 4352 (the same as Civil Code § 2269(e)). This provision applies to powers of appointment generally, and should be relocated in the powers of appointment statutes. It is intended to "avoid the grantor trust problems" under federal law. Collier, Unscrambling Pre-ERTA Estate Plans, in Estate Planning 1982 § 7.12, at 195 (Cal. Cont. Ed. Bar 1983).

Private Foundations, Charitable Trusts, and Split-Interest Trusts

Sections 4390-4396 of the staff draft continue Civil Code Sections 2271 and 2271.1. The staff has not reexamined these provisions since they appear in the statutes to facilitate beneficial tax treatment and thus are a reflection of federal law. It may be asked whether this is the appropriate location for these provisions. The staff has approached this project as being almost exclusively concerned with private express trusts. This is largely due to the fact that the existing statutes in the Civil Code and Probate Code deal for the most part with private trusts. We have not undertaken to consider whether a separate treatment of charitable trusts would be beneficial.

Respectfully submitted,

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EXHIBIT 1

Staff Draft

PART 3. TRUSTEES

CHAPTER 1. DUTIES OF TRUSTEES

Article 1. Trustee's Duties in General

405/426

§ 4300. General duty of trustee

4300. A trustee has a general duty to administer the trust for the benefit of the trust beneficiaries. 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 4300 continues the substance of former Civil Code Section 2228 and supersedes former Civil Code Section 2231. The first sentence is drawn from Uniform Probate Code Section 7-301.

405/429

§ 4301. Use of property

4301. Unless the beneficiary consents with full knowledge of the facts and without any influence on the part of the trustee, a trustee may not 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 4301 supersedes former Civil Code Sections 2229 and 2230.

Note. Draft Section 4402 is attached to Memorandum 84-22.

405/430

§ 4302. Trustee's duty to inform beneficiary of adverse interest

4302. Except as provided in Section 4301 or 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.

Comment. Section 4302 continues the substance of part of former Civil Code Section 2233, subject to the exceptions provided in Sections 4301 (use of property) and 4402 (conflict of interest in exercise of power).

Note. Draft Section 4402 is attached to Memorandum 84-22.

405/435

§ 4303. Duty to obey trust

4303. (a) Except as provided in Section 4401, a trustee shall fulfill the purpose of the trust and follow the directions in the trust.

(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. Subdivision (a) of Section 4303 supersedes former Civil Code Section 2258(a). The reference to Section 4401 in the introductory clause recognizes the power of court to relieve the trustee of trust restrictions. See also Section _____ (modification of trust). Subdivision (b) continues the substance of former Civil Code Section 2258(b).

Note. Draft Section 4401 is attached to Memorandum 84-22.

405/436

§ 4304. Trustee of multiple trusts

4304. (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 the court 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 4304 continues the substance of former Civil Code Section 2232, subject to the exception provided in Section 4402 (conflict of interest). Subdivision (b) continues the substance of former Probate Code Section 1133. Subdivision (b) is not limited, like former law, to testamentary trusts. For provisions governing judicial proceedings, see Section 4600 et seq.

Note. Draft Sections 4600-4627 are attached to Memorandum 84-29.

405/442

Article 2. Trustee's Standard of Care

§ 4320. Trustee's standard of care in administering trust

4320. (a) Subject to subdivisions (b) and (c), the trustee shall administer the trust with the care, skill, prudence, and diligence under the circumstances then prevailing, including but not limited to the general economic conditions and the anticipated needs of the trust and its beneficiaries, that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims, to attain the goals of the trustor as determined from the trust instrument.

(b) In the course of administering the trust pursuant to the standard provided in subdivision (a), individual investments shall be considered as part of an overall investment strategy.

(c) The trustor may expand or restrict the standards set forth in subdivision (a) by express provisions in a trust instrument. A trustee acting for the benefit of another under a trust that expands or restricts such standards is not liable to anyone whose interests arise from the trust for the trustee's good faith reliance on express provisions.

Comment. Section 4320 continues the substance of former Civil Code Section 2261 (a) insofar as it provided a standard of care and supersedes the standard of care in Civil Code Section 2261(b).

Note. This section assumes the enactment of AB 630, as amended in Assembly, April 27, 1983.

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 has 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 (higher standard of care applicable to professional guardian or conservator of estate).

100/922

§ 4322. Standard of care not affected by compensation

4322. A trustee's standard of care and performance in administering the trust is not affected by whether or not the trustee receives any compensation.

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

406107

Article 3. Trustee's Duty to Account to Beneficiaries

§ 4340. Trustee's general 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.

Comment. Subdivision (a) of Section 4340 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 the 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). 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). In an appropriate case, more information may be required under Section 4340 than under the annual accounting required by Section 4341.

Note. Draft Section 4620 is attached to Memorandum 84-29.

§ 4341. Duty to account annually to income beneficiary

4341. (a) At least annually, at the termination of the trust, and upon a change of trustees, the trustee shall furnish an accounting to each income beneficiary, as defined in subdivision (a) of Section 4802, and upon written request to any other beneficiary.

(b) The annual accounting shall contain the following:

(1) A statement of receipts and disbursements of principal and income that have occurred during the last complete fiscal year of the trust.

(2) An inventory of trust property as of the end of the last complete fiscal year of the trust.

(3) The trustee's compensation for the last complete fiscal year of the trust.

(4) A statement that the recipient of the accounting may petition the court pursuant to Section 4620 to obtain a court review of the accounting.

(5) The name and location of the appropriate court in which to file a petition for court review of the accounting.

(c) The trustee may satisfy the requirement of an annual accounting under this section by furnishing a copy of income tax returns pertaining to the trust.

(d) The trustee is not required to furnish an annual accounting or income tax returns to any beneficiary who has waived the right to an annual accounting in writing, but a waiver of rights under this section may be withdrawn in writing at any time and has no effect on the beneficiary's right to request information pursuant to Section 4340.

(e) A trustee who is an income beneficiary is not required to account to himself or herself.

Comment. Section 4341 supersedes subdivisions (b) and (c) of former Section 1120.1a, and parts of former Sections 1121 and 1138.1(a)(5). The requirement of an annual accounting is drawn from the former statute applicable to testamentary trusts created before July 1, 1977. See former Section 1120.1a. Subdivision (c) provides an alternative to providing an accounting that satisfies subdivision (b). Subdivision (d) permits waiver of the annual accounting, but not the accounting required on termination or change of trustees. A beneficiary who has received an accounting or tax returns that satisfy this section may request additional information under Section 4340.

Note. The definition of income beneficiary incorporated in subdivision (a) is in the Revised Uniform Principal and Income Act. See draft attached to Memorandum 84-32.

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 former Civil Code Section 2269(a).

100/927

§ 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.

100/928

§ 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.

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 described in paragraph (1) of subsection (a) of Section 4947 of the Internal Revenue Code.

(b) "Internal Revenue Code" means the Internal Revenue Code of 1954.

(c) "Private foundation" means a private foundation as defined in Section 509 of the Internal Revenue Code.

(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.

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. The references in these former sections to the Tax Reform Act of 1969 have not been continued because they are superfluous.

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 4390 ("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.

31796

§ 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.

Exhibit 2

RESTATEMENT (SECOND) OF TRUSTS
§§ 169-185, 230

TRUSTEES' DUTIES

§ 169. Duty to Administer the Trust

Upon acceptance of the trust by the trustee, he is under a duty to the beneficiary to administer the trust.

§ 170. Duty of Loyalty

(1) The trustee is under a duty to the beneficiary to administer the trust solely in the interest of the beneficiary.

(2) The trustee in dealing with the beneficiary on the trustee's own account is under a duty to the beneficiary to deal fairly with him and to communicate to him all material facts in connection with the transaction which the trustee knows or should know.

§ 171. Duty Not to Delegate

The trustee is under a duty to the beneficiary not to delegate to others the doing of acts which the trustee can reasonably be required personally to perform.

§ 172. Duty to Keep and Render Accounts

The trustee is under a duty to the beneficiary to keep and render clear and accurate accounts with respect to the administration of the trust.

§ 173. Duty to Furnish Information

The trustee is under a duty to the beneficiary to give him upon his request at reasonable times complete and accurate information as to the nature and amount of the trust property, and to permit him or a person duly authorized by him to inspect the subject matter of the trust and the accounts and vouchers and other documents relating to the trust.

§ 174. Duty to Exercise Reasonable Care and Skill

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 man of ordinary prudence, he is under a duty to exercise such skill.

§ 175. Duty to Take and Keep Control

The trustee is under a duty to the beneficiary to take reasonable steps to take and keep control of the trust property.

§ 176. Duty to Preserve the Trust Property

The trustee is under a duty to the beneficiary to use reasonable care and skill to preserve the trust property.

§ 177. Duty to Enforce Claims

The trustee is under a duty to the beneficiary to take reasonable steps to realize on claims which he holds in trust.

§ 178. Duty to Defend Actions

The trustee is under a duty to the beneficiary to defend actions which may result in a loss to the trust estate, unless under all the circumstances it is reasonable not to make such defense.

§ 179. Duty to Keep Trust Property Separate

The trustee is under a duty to the beneficiary to keep the trust property separate from his individual property, and, so far as it is reasonable that he should do so, to keep it separate from other property not subject to the trust, and to see that the property is designated as property of the trust.

§ 180. Duty with Respect to Bank Deposits

While a trustee can properly make general deposits of trust money in a bank, it is his duty to the beneficiary in making such a deposit to use reasonable care in selecting the bank, and properly to earmark the deposit as a deposit by him as trustee.

§ 181. Duty to Make the Trust Property Productive

The trustee is under a duty to the beneficiary to use reasonable care and skill to make the trust property productive.

§ 182. Duty to Pay Income to Beneficiary

Where a trust is created to pay the income to a beneficiary for a designated period, the trustee is under a duty to the beneficiary to pay to him at reasonable intervals the net income of the trust property.

§ 183. Duty to Deal Impartially with Beneficiaries

When there are two or more beneficiaries of a trust, the trustee is under a duty to deal impartially with them.

§ 184. Duty with Respect to Co-trustees

If there are several trustees, each trustee is under a duty to the beneficiary to participate in the administration of the trust and to use reasonable care to prevent a co-trustee from committing a breach of trust or to compel a co-trustee to redress a breach of trust.

§ 185. Duty with Respect to Person Holding Power of Control

If under the terms of the trust a person has power to control the action of the trustee in certain respects, the trustee is under a duty to act in accordance with the exercise of such power, unless the attempted exercise of the power violates the terms of the trust or is a violation of a fiduciary duty to which such person is subject in the exercise of the power.

§ 230. Duty to Dispose of Improper Investments

Except as otherwise provided by the terms of the trust, the trustee is under a duty to the beneficiary within a reasonable time after the creation of the trust to dispose of any part of the trust property included in the trust at the time of its creation which would not be a proper investment for the trustee to make.

EXHIBIT 3

Disposition of Existing Law on Trustees' DutiesCIVIL CODE§ 2228 (repealed). Good faith

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. (Enacted 1872.)

Comment. The substance of former Section 2228 is continued in Probate Code Section 4300.

§ 2229 (repealed). Use of property

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. (Enacted 1872.)

Comment. Former Section 2229 is superseded by Probate Code Section 4301.

§ 2230 (repealed). Prohibited transactions

CERTAIN TRANSACTIONS FORBIDDEN. SAME. Neither a trustee nor any of his agents may take part in any transaction concerning the trust in which he or any one 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. (Enacted 1872.)

Comment. Former Section 2230 is superseded by Probate Code Section 4301.

§ 2231 (repealed). Influence to obtain advantage from beneficiary

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. (Enacted 1872.)

Comment. Former Section 2231 is superseded by Probate Code Section 4300.

§ 2232 (repealed). Undertaking trust adverse to interest of beneficiary

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. (Enacted 1872.)

Comment. The substance of former Section 2232 is continued in Probate Code Section 4304(a).

§ 2233 (repealed). Trustee's adverse interest

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. (Enacted 1872.)

Comment. The substance of former Section 2233 is continued in Probate Code Sections 4302 (duty to inform beneficiary of adverse interest) and 4584 (grounds for removal of trustee).

§ 2258 (repealed). Obedience to declaration of trust [AB 261]

(a) 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.

(b) With respect to a revocable trust, the trustee shall follow all written directions acceptable to the trustee given from time to time to the trustee by the person or persons then having the power to revoke the trust or that portion thereof with respect to which the direction is given or by the person or persons other than the trustee to whom the trustor delegates the right to direct the trustee. In acceding to and carrying out such direction, the trustee shall incur no liability to any person having a vested or contingent interest in the trust and may follow such instructions regardless of any fiduciary obligations to which the directing party may also be subject.

(Amended by Stats. 1983, c. 99, p. ---, § 2.)

Comment. Subdivision (a) of former Section 2258 is superseded by Probate Code Section 4303(a). The substance of subdivision (b) of former Section 2258 is continued in Probate Code Section 4303(b).

§ 2259 (repealed). Trustee's degree of care and diligence

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. (Enacted 1872.)

Comment. Former Section 2259 is superseded by Probate Code Section 4322 (standard of care not affected by compensation).

§ 2261 (repealed). Investments [See AB 630, as amended in Assembly, April 27, 1983]

2261. (a) (1) Subject to paragraph (2), when investing, reinvesting, purchasing, acquiring, exchanging, selling and managing property for the benefit of another, 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,~~ *with the care, skill,* prudence, and diligence under the circumstances then prevailing, *specifically including, but not by way of limitation, the general economic conditions and the anticipated needs of the trust and its beneficiaries,* that a prudent ~~man~~ *person* 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. Within the limitations of the foregoing and considering individual investments as part of an overall investment strategy, 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.~~ *and every kind of investment.*

(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.

(b) In the absence of express provisions to the contrary in any trust instrument, a trustee may without liability 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 or in furtherance of the goals of the trustor as determined from any trust instrument. 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.

(c) In the absence of express provisions to the contrary ~~in the~~ *any* 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, is collateralized pursuant to any present or future law of this state or 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 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.

(d) 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.

(e) 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.

(f) 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.

Comment. The substance of the first sentence of subdivision (a)(1) of former Section 2261 is continued in Probate Code Section 4320(a) (trustee's standard of care in administering trust). See also Section 4420 (powers of prudent person). The substance of the second sentence of subdivision (a)(1) is continued in Probate Code Sections 4400 (exercise of powers subject to limitations in trust), 4420 (general powers of prudent person), 4430 (power to invest), and 4434 (power to acquire property). See also Prob. Code § 62 ("property" defined). Subdivision (a)(2) is continued in Probate Code Section 4320(c).

The substance of the first sentence of subdivision (b) 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), 4422 (power to retain property). See also Prob. Code § 62 ("property" defined). The substance of the second sentence of subdivision (b) is continued in Probate Code Section 4422.

Subdivision (c) is superseded by Probate Code Sections 4400 (exercise of powers subject to limitations in trust) and 4432 (power to make deposits). See also Prob. Code § 4401 (power of court to relieve trustee from restrictions).

The substance of former subdivision (d) is continued in Probate Code Section 4401.

The substance of the first sentence of subdivision (e) 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 (f) 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).

Note. Draft Sections 4400-4482 are attached to Memorandum 84-22.

§ 2269 (repealed). 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) * * * Subject to the additional requirements of 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 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, 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.

Comment. Subdivision (a) of former Section 2269 is continued in Probate Code Section 4350. Subdivision (b) is superseded by Probate Code Sections 4601 (jurisdiction over trusts) and 4620 (grounds for petition). Subdivisions (c) and (d) are continued in Probate Code Sections 4351 (standard for exercise of powers), 4601 (jurisdiction over trusts), and 4620 (grounds for petition). Subdivision (e) is continued in Probate Code Section 4352.

Note. Draft Sections 4601 and 4620 are attached to Memorandum 84-29.

§ 2271 (repealed). Distribution of income of 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 1969¹ (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,² 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 code³ (as modified by paragraph (3) of subsection (1) of Section 101 of the Tax Reform Act of 1969).⁴ 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 code⁵ (as modified by paragraph (2) of subsection (1) of Section 101 of the Tax Reform Act of 1969),⁶ retain any excess business holdings as defined in subsection (c) of Section 4943 of such code,⁷ make any

investments in such manner as to subject the assets of said trust to tax under Section 4944 of such code,⁸ or make any taxable expenditure as defined in subsection (d) of Section 4945 of such code⁹ (as modified by paragraph (5) of subsection (1) of Section 101 of the Tax Reform Act of 1969).¹⁰

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.

Comment. The substance of former Section 2271 is continued in Probate Code Sections 4390-4392, 4394, and 4396.

§ 2271.1 (repealed). 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 1954,¹ shall not:

(1) Engage in any act of self-dealing as defined in subsection (d) of Section 4941 of such code² (as modified by paragraph (2) of subsection (1) of Section 101 of the Tax Reform Act of 1969).³

(2) Retain any excess business holdings as defined in subsection (c) of Section 4943 of such code.⁴

(3) Make any investments in such manner as to subject the assets of such trust to tax under Section 4944 of such code.⁵

(4) Make any taxable expenditure as defined in subsection (d) of Section 4945 of such code⁶ (as modified by paragraph (5) of subsection (1) of Section 101 of the Tax Reform Act of 1969).⁷

(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 1954.⁸

(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 170,⁹ subparagraph (b) of paragraph (2) of subsection (e) of Section 2055,¹⁰ or subparagraph (b) of paragraph (2) of subsection (c) of Section 2522 of such code¹¹; or

(2) Any amounts in trust other than amounts for which a deduction was allowed under Section 170,¹² paragraph (2) of subsection (b) of Section 545,¹³ paragraph (2) of subsection (b) of Section 556,¹⁴ subsection (c) of Section 642,¹⁵ Section 2055,¹⁶ paragraph (2) of subsection (a) of Section 2106,¹⁷ or Section 2522 of such code,¹⁸ if such amounts are segregated, as that term is defined in paragraph (3) of subsection (a) of Section 4947 of such code,¹⁹ 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.

Comment. The substance of former Section 2271.1 is continued in Probate Code Sections 4390, 4392-4394, and 4396.

PROBATE CODE

§ 1120.1a (repealed). Removal of trusts from continuing court supervision

This section shall * * * apply only to trusts * * * which were created by a will executed before July 1, 1977, and not republished thereafter.

(a) Except as provided in subdivision (d), 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, * * * 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 * * *. Notice shall be given by registered or certified mail or, in the alternative, by first-class mail on the condition that an acknowledgment of receipt of notice is signed by the beneficiary and returned to the trustee. The notice shall contain 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, * * * is entitled to a statement of the income and principal receipts and disbursement of the trust at least annually and that any other beneficiary or remainderman, upon written request to the trustee, is entitled to such information 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, the name and location of the superior court which had jurisdiction over the administration of the estate pursuant to Section 301, and a statement that it is appropriate to file a petition pursuant to Section 1138.1 with either court.

* * *

The trustee shall file with the court which previously had jurisdiction over the administration of the * * * estate, pursuant to Section 301, 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, * * * The trustee shall also furnish such information to any other beneficiary or remainderman who has made a written request therefor.

(c) Within 90 days after the end of each fiscal year of the trust, the trustee shall furnish * * * the * * * summary of information described in this subdivision * * * to each income beneficiary, as defined in subdivision (1) of Section 730.01 of the Civil Code, and, upon written request, to any other beneficiary or remainderman. The summary shall set forth the following:

- (1) The cost of each trust asset.
- (2) The present value of each asset as of the end of the current fiscal year of the trust.
- (3) The total present value of all assets as of the end of the current fiscal year and the immediately preceding fiscal year of the trust.
- (4) The net income for the current fiscal year and the immediately preceding fiscal year of the trust.
- (5) Trustee compensation for the current fiscal year and the 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 or courts 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 * * * remove the trust from the continuing jurisdiction of the superior court only with the approval of the court which has jurisdiction over the administration of the trust pursuant to Section 1120. Unless the trust is so removed, the trustee is not required to comply with the requirements of subdivisions (a), (b), and (c). To obtain such approval the trustee may file at any time and from time to time, in his or her discretion, a verified petition with the clerk setting forth the trust accounts in detail, reporting his or her acts as trustee, and showing the condition of the trust estate. * * * Unless the petition is filed with the court which has jurisdiction over the administration of the trust pursuant to Section 1120, the trustees shall attach to the petition a certified copy of the decree setting forth all of the trust provisions. Thereupon the clerk shall set the petition for hearing by the court. Notice of the hearing shall be given, along with * * * a copy of the petition, 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 * * * grant the petition * * * upon such conditions as the court in its discretion deems proper. In the event the petition is granted, the trustee shall send the notice and file the proof of service required by subdivision (a) within six months and seven months, respectively, from the date the petition is granted. Such notice shall have attached to it a copy of the order of the court granting the petition. If no such petition is granted, the trust shall continue to be administered under subdivisions (b) and (c) of Section 1120 as if the testator had provided in the will that the superior court shall not lose jurisdiction of the estate by final distribution and subdivisions (b) and (c) of this section shall not apply to the trust. Nothing provided in this subdivision shall be interpreted to require any trustee to file a petition authorized by this subdivision.

(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.

(g) If a trust company, as defined in Section 107 of the Financial Code, is appointed as a successor trustee of a trust which, at the time of the appointment, is subject to the continuing jurisdiction of the superior court because it was not removed pursuant to the provisions of subdivision (d), the successor trustee shall send the notice and proof of service required by subdivision (a) within six months and seven months from the date of appointment, respectively. After a trust is no longer subject to the continuing jurisdiction of the superior court, whether by operation of law or by removal pursuant to subdivision (d), neither a change in trustees nor any other event shall cause the trust to be subject to the provisions of Sections 1120 to 1138, inclusive.

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). See also Section 4341 (duty to account annually). References to remaindermen are not continued since they are unnecessary in light of the definition of "beneficiary" in Section 82.

Note. Draft Sections 4180-4186 will appear in a memorandum on transitional provisions.

§ 1121 (repealed). Accounting

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.

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).

Note. Draft Section 4620 is attached to Memorandum 84-29.

§ 1133 (repealed). Combination of assets and administration of trusts as one 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.

Comment. The substance of former Section 1133 is continued in Section 4304(b).

§ 1138.1 (repealed). Grounds for petition by trustee

(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).

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 4424 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 4420-4482. See Section 4401 (court order relieving trustee of restrictions); see also Section 4341 (duty to account annually). The substance of subdivision (b) is continued in Section 4621.

Note. Draft Sections 4420-4482 are attached to Memorandum 84-22. Draft Sections 4620 and 4621 are attached to Memorandum 84-29.