

Memorandum 84-22

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

California has a relatively modern statutory list of trustees' powers in Probate Code Section 1120.2. (See copy attached as Exhibit 1.) These powers may be incorporated in the trust or granted by a court on petition. See Prob. Code §§ 1120.2, 1138.1(a)(6). This legislation was sponsored by the State Bar in 1967 and was drawn from the Uniform Trustees' Powers Act (1964) (hereinafter cited as UTPA; copy attached as Exhibit 2). See Estate of Gilliland, 44 Cal. App.3d 32, 39, 118 Cal. Rptr. 447 (1974). Certain automatic powers relating to investments are provided in Civil Code Section 2261.

Automatic Powers

A major policy question to be considered by the Commission is whether Section 3(a) of the UTPA should be adopted. This provision grants trustees the powers of a prudent person and the entire statutory list of powers by virtue of the trustee's office, just as powers are granted to executors, administrators, guardians, and conservators virtute officii, subject to limitations expressed in the trust instrument. UTPA Section 3(a) provides:

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) [wherein there are 26 paragraphs providing specific powers].

Under California law, if the statutory list is not incorporated by reference in the trust instrument, a trustee who does not find a needed power in the trust must petition the court for approval of the exercise of a power in Section 1120.2. This scheme represents an expansion of the common law doctrine of implied powers. See 7 B. Witkin, Summary of California Law Trusts §§ 76-78, at 5436-38 (8th ed. 1974). In some instances, California law provides automatic powers. For example, Civil Code Section 2261(3) permits deposit of funds in a bank in the absence of an express provision to the contrary in the trust instrument.

The advantage of an automatic powers statute is that there is no need to petition to court where a needed power is lacking in the trust instrument. There may not even be a question as to whether the court will approve the power, but because of the wariness of third persons who deal with the trustee, a specific grant of power by the court is required. A well-drafted trust instrument under existing law should anticipate all powers the trustee will need and avoid the powers that are not desired. Under an automatic powers scheme, the detailed trust may still provide specific powers or incorporate the statutory list, but it could provide only for limitations on the statutory powers. The less well-drafted trust will benefit the most from automatic powers since broad, useful powers provided by statute will fill the gaps.

These benefits have convinced at least 14 states to substantially adopt the scheme of the UTPA--Florida, Idaho, Kansas, Kentucky, Maine, Mississippi, Montana, Nebraska, New Hampshire, New Mexico, Oregon, Texas, Utah, and Wyoming. See generally Minzner, Article VII of the New Probate Code: In Pursuit of Uniform Trust Administration, 6 N.M.L. Rev. 213, 231-46 (1976); Volkmer, Nebraska's Trustees' Powers Act and Principal and Income Act: The New Look in Nebraska Trust Law, 14 Creighton L. Rev. 121, 123-33 (1980); Comment, The Utah Trustees' Powers Provisions--New Flexibility for Trustees and New Risks for Beneficiaries, 1977 Utah L. Rev. 265.

In 1967, when the UTPA was considered for enactment in California, the trust administration statutes dealt almost entirely with 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 by virtue of office was not adopted in this context. 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).

The views of the California bar on the necessity of continuing supervisory court jurisdiction has changed since 1967, just as it has throughout the country as reflected in the enactment of the UTPA in a substantial number of states. In 1970 when the statutory list of

powers provided in Section 1120.2 was made available on petition to trustees of inter vivos trusts, this change was justified on the ground that it eliminated the need for time-consuming plenary suits. See Review of Selected 1970 California Legislation, 2 Pac. L.J. 289 (1971). 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 otherwise provides. See 1982 Cal. Stats. ch. 1199. A new Section 1120.1a was also added to terminate the mandatory court supervision of testamentary trusts created by wills executed before July 1, 1977. (See also 1983 Cal. Stats. ch. 137, amending Section 1120.1a.)

In light of this development of California law, the staff recommends that trustees of inter vivos and testamentary trusts be granted automatic statutory powers unless otherwise provided in the trust. A draft statute that accomplishes this purpose, in language drawn from the UTPA, is attached as Exhibit 3. See draft Sections 4400 and 4420.

When this subject was considered at the May 1983 Commission meeting, the automatic powers approach was rejected. The staff urges reconsideration for two reasons. First, the makeup of the Commission has changed, and the new members should have an opportunity to consider this important question. Second, an essential point concerning the interplay of powers and duties was not adequately stressed at the May 1983 meeting.

There was concern expressed at the earlier meeting that a grant of automatic powers would open the door to abuse of powers by the trustee. What must be remembered is that the exercise of any power--whether granted in the trust instrument, by statute, or by court authorization--is subject to the overriding duty of loyalty--the trustee's duty to administer the trust for the benefit of the beneficiary. See Fratcher, Trustee's Powers Legislation, 37 N.Y.U.L. Rev. 627, 639, 660 (1962); Minzner, supra, at 234; Volkmer, supra, at 125. Hence, the basic fiduciary principle inherent to trust law polices the parade of horrors that might otherwise issue from the uncontrolled exercise of trustees' powers. It may be argued that the existence of certain powers necessarily limits the restriction on self-dealing that is a part of common law fiduciary principles; for example, the power of a bank to deposit money with itself is a direct contradiction of common law fiduciary principles. This problem should not be blown out of proportion, however, since California law already authorizes forms of self-dealing in the absence

of express provisions to the contrary in the trust. See Civil Code §§ 2261(3) (deposit in bank operated by trustee), 2261(2) (retention of property in which trustee is interested). Objections that have been raised to specific powers will be discussed below.

The Commission should also keep in mind that if a particular power is felt to be too subject to abuse to be a part of the set of automatic powers, such a power may be put in a separate category requiring prior court approval. The staff favors this approach only in an effort to salvage as much of an automatic powers scheme as possible.

Application to Existing Trusts

Another aspect of the question of whether to provide automatic powers is the transitional problem. If an automatic powers scheme is made applicable only to trusts created after the operative date, two bodies of slightly inconsistent law exist for many years. If the scheme is made applicable to existing trusts, some have argued that the expectations of trustors may be violated to a degree raising the spectre of unconstitutionality.

There is a good precedent for making the law applicable to existing trusts. When Civil Code Section 2261 was amended to provide the automatic powers of retention of property and deposit of funds in banks, these provisions were made applicable to all trusts then in existence. See 1943 Cal. Stats. ch. 811, § 1.

Section 8 of the UTPA presents alternative versions because of doubts about the constitutional issue. See Horowitz, Uniform Trustees' Powers Act, 41 Wash. L. Rev. 1, 30 (1966). There is no consensus on the permissibility or desirability of making UTPA-type legislation applicable to preexisting trusts. The new Texas Trust Code applies to all transactions occurring after its operative date relating to trusts already in existence. See Section 111.006, in 1983 Tex. Sess. Law Serv. ch. 567, art. 2, § 2 (Vernon). The Nebraska Trustees' Powers Act was also made as retroactive as possible. See Neb. Rev. Stat. § 30-2825 (Supp. 1980); Volkmer, supra, at 132-33. Utah applies its Trustees' Powers Act to assets acquired after the effective date as to existing trusts. Utah Code Ann. § 75-7-407 (1977). This approach has been criticized because a trust with assets acquired both before and after the operative date will be subject to two sets of rules. Comment, supra, 1977 Utah L. Rev. at 289. Idaho, Kansas, Mississippi, and Montana apparently restrict the

application of their respective trustees' powers acts to trusts created after the operative date. See 7A Uniform Laws Annotated 775 (master ed. 1978). Kansas, however, applies its act to trusts that are amended or modified after the operative date. Id. The conclusion of a majority of states with automatic powers appears to be that the legislation should apply fully to existing trusts.

The staff does not think there would be any significant problems in California if an automatic powers scheme were applied to existing trusts since California has made most of the UTPA powers available through Probate Code Section 1120.2 and has made the investment powers of Civil Code Section 2261 retroactive since 1943. The new powers that would be available under the attached draft statute (see Exhibit 3) do not add significantly to those powers listed in Sections 2261 and 1120.2. Of course, where a trust limits the exercise of powers by language granting "only" the powers provided in Section 1120.2, for example, then the new powers would not be available. A transitional provision could also recognize that the powers provided in a preexisting trust (or a new trust) would prevail over the statutory powers if they are contradictory.

Specific Powers

As noted earlier, Probate Code Section 1120.2 contains much of the language of Section 3(c) of the UTPA. (Compare materials in Exhibit 1 and Exhibit 2.) The staff draft of Sections 4420-4482 attached as Exhibit 3 is based on the UTPA, but makes some drafting and organizational changes for clarity. As one commentator has noted, the UTPA "grouping reveals some redundancy in the list and a lack of strong organization." Minzner, supra, at 234 n.109. The suggestion is that a particular form was used to develop the statutory list without "serious thought to an internal organization." Id. The attached staff draft attempts to make improvements without undertaking a complete overhaul.

With the exception of Section 4420, which provides automatic powers, the draft of specific powers provisions reflects Commission decisions made at the May 1983 meeting. The following discussion considers draft Sections 4420-4482 in order.

§ 4420. General powers without court authorization [UTPA § 3(a)]

In addition to the automatic powers feature of this section, Section 4420 grants trustees the power to perform every act that a prudent person would perform for the purposes of the trust. This provision is

drawn from Section 3(a) of the UTPA. California law provides a prudent man rule insofar as investments are concerned. See Civil Code § 2261(1); see also AB 630, which would revise this standard.

The success of the prudent man rule in the investment area was the inspiration for Professor Fratcher's proposal that was ultimately embodied in the UTPA. See Fratcher, supra, at 660; Horowitz, supra, at 7. The chairman of the committee that drafted the UTPA discusses the extension of the prudent man rule 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 courts should be precluded from substituting their judgment for that of the trustee. Id. (footnotes omitted).

The general grant of prudent man powers has received universal approval of those states that have adopted the UTPA. See 7A Uniform Laws Annotated 768-69 (master ed. 1978).

§ 4422. Collecting and holding property [UTPA § 3(c)(1)]

The power to retain an asset in which the trustee is personally interested goes beyond the common law. Horowitz, supra, at 17. California law already provides an automatic power to retain property in the form of stock in the trustee or stock in a corporation controlling or controlled by the trustee. Civil Code § 2261(2).

Professor Haskell expressed concern over this aspect of self-dealing, suggesting that there is no reason to allow a large bank to retain such assets, though there may be a reason for retaining shares of a closely-held small town bank. Haskell, Some Problems With the Uniform Trustees' Powers Act, 32 Law & Contemp. Probs. 168, 174 (1967). In view of California's acceptance of this form of self-dealing under existing law, the staff sees no reason to limit draft Section 4422. See also draft Section 4402 (conflict of interest in exercise of power).

§ 4424. Receiving additions to trust [UTPA § 3(c)(2)]

This is a noncontroversial power.

§ 4426. Participation in business; change in form of business [UTPA § 3(c)(3)]

This is noncontroversial and is the same as Probate Code Section 1120.2(17).

§ 4428. Acquisition of undivided interest [UTPA § 3(c)(4)]

This power would be new to California. It is not a model of clarity. Texas has rewritten this power as follows: "A trustee may acquire all or a portion of the remaining undivided interest in property in which the trust holds an undivided interest." Section 113.005, in 1983 Tex. Sess. Law Serv. ch. 567, art 2, § 2 (Vernon). This appears to the staff to be preferable, and we would substitute this language for draft Section 4428.

§ 4430. Investments [UTPA § 3(c)(5)]

This continues the existing prudent man investment rule. See Civil Code § 2261(1); Prob. Code § 1120.2(2). The language "in accordance with the provisions of the trust or as provided by law" seems to be surplus, however, since these conditions could be tacked on to every power. Perhaps it should be deleted. On the other hand, this language may serve as notice that there are legal investment provisions in other codes. See, e.g., Ins. Code § 12528 (mortgage participation certificates).

§ 4432. Deposits in insured accounts [UTPA § 3(c)(6)]

This section expands the UTPA rule which refers only to banks. See the Comment to draft Section 4432. California law already provides automatic powers of this sort.

Professor Haskell objects to the authorization of self-dealing in the UTPA and in subdivision (b) of the draft section:

Is there any serious practical problem in requiring that deposits of trust funds be made with another bank? . . . The law certainly should not make it any easier for the fiduciary to serve his interests instead of the beneficiaries', unless there is some advantage to the trust which outweighs the risk of abuse. This does not seem to be the case here.

Haskell, supra, at 174-75. Other commentators do not seem concerned, particularly in light of the usual requirement of insurance or security. See Minzner, supra, at 235-36; Volkmer, supra, at 129-30.

§ 4434. Acquisition and disposition of property [UTPA § 3(c)(7) in part]

This provision alters the common law, but is in accord with California law. See the Comment to draft Section 4434; Horowitz, supra, at 19.

§ 4436. Management of property [UTPA § 3(c)(7) in part]

This section makes no significant change. See the Comment to draft Section 4436.

§ 4438. Encumbrances [UTPA § 3(c)(7) in part]

This section alters the common law, but is in accord with California law. See the Comment to draft Section 4438; Horowitz, supra, at 19.

§ 4440. Repairs and alterations of property [UTPA § 3(c)(8)]

The authorization for extraordinary repairs changes the common law, but is consistent with California law. See the Comment to draft Section 4430; Horowitz, supra, at 19.

§ 4442. Development of land [UTPA § 3(c)(9)]

This section makes no significant change. See the Comment to draft Section 4442.

§ 4444. Leases [UTPA § 3(c)(10)]

This section broadens the common law and is consistent with existing law. See the Comment to Section 4444; Horowitz, supra, at 20.

§ 4446. Mineral leases [UTPA § 3(c)(11)]

This section makes no significant change. See the Comment to draft Section 4446. As might be expected, Texas law provides a much more extensive provision concerning minerals:

Section 113.012. MINERALS. (a) A trustee may enter into mineral transactions, including:

(1) negotiating and making oil, gas, and other mineral leases covering any land, mineral, or royalty interest at any time forming a part of a trust;

(2) pooling and unitizing part or all of the land, mineral leasehold, mineral, royalty, or other interest of one or more persons or entities for the purpose of developing and producing oil, gas, or other minerals, and making leases or assignments granting the right to pool and unitize;

(3) entering into contracts and agreements concerning the installation and operation of plants or other facilities for the cycling, repressuring, processing, or other treating or handling of oil, gas, or other minerals;

(4) conducting or contracting for the conducting of seismic evaluation operations;

(5) drilling or contracting for the drilling of wells for oil, gas, or other minerals;

(6) contracting for and making 'dry hole' and 'bottom hole' contributions of cash, leasehold interests, or other interests towards the drilling of wells;

(7) using or contracting for the use of any method of secondary or tertiary recovery of any mineral, including the injection of water, gas, air, or other substances;

(8) purchasing oil, gas, or other mineral leases, leasehold interests, or other interests for any type of consideration, including farmout agreements requiring the drilling or reworking of wells or participation therein;

(9) entering into farmout contracts or agreements committing a trust estate to assign, oil, gas, or other mineral leases or interests in consideration for the drilling of wells or other oil, gas, or mineral operation;

(10) negotiating the transfer of and transferring oil, gas, or other mineral leases or interests for any consideration, such as retained overriding royalty interests of any nature, drilling or reworking commitments, or production interests; and

(11) executing and entering into contracts, conveyances, and other agreements or transfers considered necessary or desirable to carry out the powers granted in this section, whether or not the action is now or subsequently recognized or considered as a common or proper practice by those engaged in the business of prospecting for, developing, producing, processing, transporting, or marketing minerals, including entering into and executing division orders, oil, gas, or other mineral sales contracts, exploration agreements, processing agreements, and other contracts relating to the processing, handling, treating, transporting, and marketing of oil, gas, or other mineral production from or accruing to a trust and receiving and receipting for the proceeds thereof on behalf of a trust.

1983 Tex. Sess. Law Serv. ch. 567, art. 2, § 2 (Vernon). This provision is included as an extreme example of the detail that could be included in a trustees' powers statute. The staff does not recommend enactment of such a provision.

§ 4448. Options [UTPA § 3(c)(12)]

This section changes the common law, but is already enconced in California law. See the Comment to draft Section 4448; Horowitz, supra, at 20.

§ 4450. Voting rights with respect to corporate shares, memberships, or property [UTPA § 3(c)(13)]

This changes the common law, but is already part of California law. See the Comment to draft Section 4450; Horowitz, supra, at 20-21. As the Comment notes, the staff has adopted the drafting of the guardianship-conservatorship statute.

§ 4452. Payment of calls and assessments [UTPA § 3(c)(14)]

This section makes no substantive change.

§ 4454. Stock subscriptions and conversions [UTPA § 3(c)(15) in part]

This section makes no substantive change.

§ 4456. Consent to change in form of business; voting trusts [UTPA § 3(c)(15) in part]

This section makes no substantive change.

§ 4458. Holding securities in name of nominee [UTPA § 3(c)(16)]

This section makes no substantive change. However, it has been subject to some criticism. Under the common law, trust assets had to be earmarked as such. See Haskell, *supra*, at 179. The modern rule reflected in the UTPA is justified as a matter of convenience. Horowitz, *supra*, at 21. It does not seem to be a controversial matter in California. Protection is provided by the provision for liability on the part of the trustee for acts of the nominee.

§ 4460. Deposit of securities in securities depository

This section continues existing California law. See the Comment to draft Section 4460. It is not a part of the UTPA.

§ 4462. Insurance [UTPA § 3(c)(17)]

This section makes no substantive change.

§ 4464. Borrowing money [UTPA § 3(c)(18) in part]

This section makes no substantive change. Nebraska has added language to this power to the effect that the trustee may borrow from the trustee itself. Professor Volkmer remarks that this "raises the spectre of self-dealing but, in the nature of things, this power is not likely to be abused." Volkmer, *supra*, at 131. The staff does not suggest adding this language.

§ 4466. Advancing money [UTPA § 3(c)(18) in part]

This section continues existing law. The UTPA provision for reimbursement is dealt with elsewhere in the staff draft.

§ 4468. Payment and settlement of claims [UTPA § 3(c)(19)]

This section makes no substantive change.

§ 4470. Payment of taxes, trustee's compensation, and other expenses [UTPA § 3(c)(20)]

This section makes no substantive change, except that the draft makes clear that the trustee can pay the compensation of employees and agents of the trust. This decision was made at the May 1983 meeting. Professor Horowitz notes that at common law the trustee could not fix

his or her own compensation and that the power is subject to fiduciary accountability. Horowitz, supra, at 23.

§ 4472. Loans to beneficiary

This section implements a Commission decision made at the May 1983 meeting. See the Comment to draft Section 4472.

§ 4474. Distribution to beneficiaries under legal disability [UTPA § 3(c)(22)]

This is a new provision drawn from the UTPA. The Commission previously decided, however, to omit the excuse from liability provided in UTPA Section 3(c)(22). Trustee liability should be governed by the general rules applicable where the trustee's duties have been breached. Texas has also omitted this language. Section 113.021, in 1983 Tex. Sess. Law Serv. ch. 567, art. 2, § 2 (Vernon). If desired, more detail could be added, such as references to guardians, conservators, and custodians under the Uniform Gifts to Minors Act.

§ 4476. Nature and value of distributions [UTPA § 3(c)(23)]

This is a new power to California law, but it seems a useful and unobjectionable one. It is probably implied by other powers such as the powers to manage and to partition property.

§ 4478. Hiring persons [UTPA § 3(c)(24)]

This is a new power. It expands common law powers by allowing employment of persons associated with the trustee, permitting delegation of discretion to agents, and permitting the trustee to act on an agent's recommendations without independent investigation. See Horowitz, supra, at 24. In May 1983, the Commission approved the addition of this power to the California list, with the change of the word "employ" to "hire." This was done to avoid the implication that an employer-employee relationship is necessarily created when a person is engaged to assist in administration of the trust.

This provision, more than any other, has been subject to variations in several enacting states. Kansas omits the permission to act without independent investigation and the language "whether or not discretionary" that appears in the staff draft in subdivision (c). Oregon omits the entire provision appearing as subdivision (c) in the staff draft. See 7A Uniform Laws Annotated 769 (master ed. 1978). Texas law states simply that a trustee "may employ attorneys, accountants, agents, and brokers reasonably necessary in the administration of the trust estate."

Tex. Prop. Code § 113.018, 1983 Tex. Sess. Law Serv. ch. 567, art. 2, § 2 (Vernon).

Professor Haskell is highly critical of this provision. He wonders why a professional fiduciary, in a time when trusts are used for the purpose of obtaining the benefits of investment skill and flexibility, can spend trust assets to get investment advice and, to make matters worse, accept such advice without any obligation to assess its worth. It seems that if the professional fiduciary feels unsure of its investment competence it should go out and hire people for its staff who possess such competence, or pay for consultant services out of its own funds; and it seems that under any and all circumstances it should be liable for investment action which falls below the fiduciary standard as adjusted for skills actually possessed or impliedly or expressly represented to be possessed.

Haskell, supra, at 176-77. He is also disturbed by the authorization for self-dealing in the selection of investment advisors from associated persons. Id. at 177. He is less disturbed by the power to employ the services of attorneys. Id. at 178-79. Professor Minzner is also critical of this provision, which was enacted in New Mexico, and she suggests that attorneys consider limiting the trustee's authority in this area by appropriate terms in the trust. Minzner, supra, at 242.

In defense of these powers, Professor Horowitz sets up the duty to act prudently and notes that the trustee is not permitted to delegate the entire administration of the trust to another. Horowitz, supra, at 24. He also notes that there are cases where an individual trustee will be absent and so find it necessary to delegate discretion. Id.

Although this provision was approved by the Commission at the May 1983 meeting, there was little discussion of the objections that have been made to it by Professor Haskell and others. The staff is not certain that the usefulness of this power does not outweigh its potential for abuse. The concerns about banks hiring outside experts, when they should be providing expert management for their basic fee, may be more theoretical than practical problems. On the other hand, the chief proponent of the UTPA section seems to focus on the need of individual trustees for the power to hire experts and delegate aspects of trust administration. If the Commission shares the concerns of critics of this provision, perhaps it should be limited in some fashion to answer the specific objections raised by Professor Haskell.

§ 4480. Actions and proceedings [UTPA § 3(c)(25)]

This section makes no substantive change.

§ 4482. Execution and delivery of instruments [UTPA § 3(c)(26)]

This provision does not appear in California law but appears minimally useful and not at variance with the common law. See Horowitz, supra, at 25.

UTPA § 3(c)(21). Allocation to principal and income

The Commission decided to omit this provision as an unnecessary cross-reference. As it appeared in the earlier staff draft, it read:

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.

The staff thinks this may be a useful provision if only for the sake of its cross-reference function. However, it is not really necessary and we have added a reference to the Revised Uniform Principal and Income Act to the Comment to draft Section 4420, which should satisfy the need for a cross-reference in this part of the law.

Broad Powers and Tax Exemptions

The drafters of the UTPA were concerned that the broad grant of powers would have adverse tax consequences. To meet this problem, as they saw it, Section 3(b) was included:

(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.

See generally Horowitz, supra, at 13-16.

When the Commission considered this provision at the May 1983 meeting, there was general doubt about how it would be interpreted in practice. This criticism has also been made elsewhere. See Haskell, supra, at 181; Volkmer, supra, at 125. Many states have omitted this provision, e.g., Kansas, Mississippi, Montana, Nebraska, Texas, and Utah. See 7A Uniform Laws Annotated 769 (master ed. 1978); 1983 Tex. Sess. Law Serv. ch. 567, art. 2, § 2 (Vernon). Professor Volkmer gives the following reasons for not adopting Section 3(b):

(1) the Uniform Trustees' Powers Act is an act dealing with powers not duties and the duty imposed upon a trustee by section 3(b)

seems out of place in an act listing trustees' powers; (2) . . . the implementation of the fiduciary rule enunciated in section 3(b) is extremely complex and difficult to apply in practice; (3) it can be argued that the duty imposed under section 3(b) is already encompassed by the trustees' overriding duties of impartiality and fairness, and no further delineation of this duty is required.

Volkmer, supra, at 125.

The staff concludes that there is no need to enact UTPA Section 3(b) in light of the actions in other states that have examined the problem.

Respectfully submitted,

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EXHIBIT 1

Probate Code § 1120.2

§ 1120.2. Powers of trustee

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.

Note. The comment following reflects the disposition of Section 1120.2 as reflected in the staff draft in Exhibit 3.

Comment. The subject matter of former Section 1120.2 is governed by Sections 4400-4482 (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 4434 (acquiring and disposing of property) and 4436 (management). The substance of the second and third clauses of subdivision (1) is continued in Sections 4444 (leases) and 4446 (mineral leases).

The substance of subdivision (2) is continued in Sections 4422 (collecting and holding property) and 4430 (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 4464 (borrowing money). The remainder of the subdivision is superseded by Section 4438 (encumbrances).

Subdivision (4) is superseded by Section 4456 (change in form of business, voting trusts, etc.).

The first clause of subdivision (5) is continued in Section 4434 (acquisition and disposition of property). The second clause is continued in Section 4436 (management of property).

Subdivision (6) is continued in Section 4440 (repairs and alterations).

Subdivision (7) is continued in Section 4422 (development of land).

Subdivision (8) is continued in Section 4448 (options).

Subdivision (9) is superseded by Section 4450 (voting rights with respect to corporate shares, memberships, or property).

Subdivision (10) is continued in Section 4452 (payment of calls and assessments).

Subdivision (11) is continued in Section 4454 (stock subscriptions and conversions).

Subdivision (12) is continued in Section 4458 (holding securities in name of nominee).

Subdivision (13) is continued in Section 4462 (insurance).

The first part of subdivision (14) is continued in Section 4466 (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 4468 (payment and settlement of claims). The last clause is superseded by Section 4480 (actions and proceedings).

Subdivision (16) is continued in Section 4470 (payment of taxes, trustee's compensation, and other expenses).

Subdivision (17) is continued in Section 4426 (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).

EXHIBIT 2

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 3

Staff Draft

Probate Code §§ 4400 - 4482

15919

CHAPTER 2. POWERS OF TRUSTEES

Article 1. General Provisions

§ 4400. Powers subject to trust instrument

4400. A trustee has the powers conferred by the trust instrument, and the powers conferred by statute except as limited in the trust instrument.

Comment. Section 4400 continues the substance of the second sentence of former Civil Code Section 2267 and supersedes part of subdivision (a) of former Civil Code Section 2258. Section 4400 also supersedes part of the first sentence of former Section 1120.2 (judicial grant of additional powers). Section 4400 is drawn in part from Section 2(a) of the Uniform Trustees' Powers Act (1964). See also Sections 4401 (relief from trust restrictions), 4420 (automatic powers). Additional powers may be provided by statutes outside this chapter. See, e.g., Sections 4800-4817 (Revised Uniform Principal and Income Act).

15789

§ 4401. Power of court to relieve trustee from restrictions

4401. This chapter does not affect the power of a court to relieve a trustee from restrictions on the exercise of powers under the trust.

Comment. Section 4401 continues the substance of and generalizes subdivision (4) of former Civil Code Section 2261. 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); see also Section _____ (equitable power preserved).

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. For the purpose of applying 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 4422, 4428, 4432, 4464, 4466, or 4478.

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) to the extent these powers were provided by former Section 1120.2.

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.

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. This section is drawn from Section 3(a) of the Uniform Trustees' Powers Act (1964). 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).

§ 4422. Collecting and holding property

4422. 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 4422 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 4422 since stock of the type described by the former provisions is within the general language of the new law. See Section 62 ("property" defined).

28454

§ 4424. Receiving additions to trust

4424. The trustee may receive additions to the property of the trust.

Comment. Section 4424 supersedes part of subdivision (b) of former Section 1120 and paragraph (3) of subdivision (a) of former Section 1138.1. Section 4424 is the same in substance as Section 3(c)(2) of the Uniform Trustees' Powers Act (1964). See also Section 62 ("property" defined).

28747

§ 4426. Participation in business; change in form of business

4426. 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 4426 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

§ 4428. Acquisition of undivided interest

4428. The trustee may acquire an undivided interest in trust property in which the trustee, in any trust capacity, holds an undivided interest.

Comment. Section 4428 is new and is the same in substance as Section 3(c)(4) of the Uniform Trustees' Powers Act (1964).

28765

§ 4430. Investments

4430. The trustee may invest and reinvest trust property in accordance with the provisions of the trust or as provided by law.

Comment. Section 4430 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. Statutes pertaining to legal investments appear in other codes. See, e.g., Gov't Code §§ 971.2, 17202, 61673; Harb. & Nav. Code §§ 6331, 6931; Health & Safety Code §§ 33663, 34369, 37649, 52040, 52053.5; Pub. Res. Code § 26026; Sts. & Hy. Code §§ 8210, 25371, 30241, 30242, 31173; Water Code §§ 9526, 20064. Section 4430 is the same in substance as Section 3(c)(5) of the Uniform Trustees' Powers Act (1964). See also Section 62 ("property" defined).

28767

§ 4432. Deposits in insured accounts

4432. (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 4432 continues the substance of part of subdivision (3) of former Civil Code Section 2261 with respect to deposits in banks. Section 4432 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 §§ 6407-6408.7.

Subdivisions (b)-(d) continue the substance of part of subdivision (3) of former Civil Code Section 2261. See also Uniform Trustees' Powers Act § 3(c)(6) (1964). Court authorization under subdivision (d) may be obtained as provided in Section 4620.

28768

§ 4434. Acquisition and disposition of property

4434. The trustee may acquire or dispose of property, for cash or on credit, at public or private sale.

Comment. Section 4434 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 4434 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

§ 4436. Management of property

4436. The trustee may manage, develop, improve, exchange, partition, change the character of, or abandon trust property or any interest therein.

Comment. Section 4436 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 4436 also continues the authority to manage property provided in subdivision (1) of former Section 1120.2. See also Section 62 ("property" defined).

28848

§ 4438. Encumbrances

4438. 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 4438 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).

§ 4440. Repairs and alterations of property

4440. 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 4440 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

§ 4442. Development of land

4442. 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 4442 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

§ 4444. Leases

4444. 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 4444 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 4444 supersedes former Civil Code Section 2272.

29198

§ 4446. Mineral leases

4446. 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 4446 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

§ 4448. Options

4448. The trustee may grant an option involving disposition of trust property or may take an option for the acquisition of any property.

Comment. Section 4448 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). An option under this section includes a right of first refusal.

29200/NZ

§ 4450. Voting rights with respect to corporate shares, memberships, or property

4450. 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 any action that could be taken by shareholders, members, or property owners.

Comment. Section 4450 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

§ 4452. Payment of calls and assessments

4452. The trustee may pay calls, assessments, and any other sums chargeable or accruing against or on account of securities.

Comment. Section 4452 continues subdivision (10) of former Section 1120.2 and is the same as Section 3(c)(14) of the Uniform Trustees' Powers Act (1964).

§ 4454. Stock subscriptions and conversions

4454. The trustee may sell or exercise stock subscription or conversion rights.

Comment. Section 4454 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

§ 4456. Consent to change in form of business; voting trusts

4456. 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 4456 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

§ 4458. Holding securities in name of nominee

4458. 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 4458 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); Fin. Code § 1563 (trust company may register securities in name of nominee).

15633

§ 4460. Deposit of securities in securities depository

4460. 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 4460 continues the substance of part of former Civil Code Section 2240.

§ 4462. Insurance

4462. 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 4462 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

§ 4464. Borrowing money

4464. The trustee may borrow money to be repaid from trust property or otherwise.

Comment. Section 4464 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

§ 4466. Advancing money

4466. 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 4466 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.]

31518

§ 4468. Payment and settlement of claims

4468. 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 4468 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).

§ 4470. Payment of taxes, trustee's compensation, and other expenses

4470. The trustee may pay taxes, assessments, compensation of the trustee and of employees and agents of the trust, and other expenses incurred in the collection, care, administration, and protection of the trust.

Comment. Section 4470 continues subdivision (16) of former Section 1120.2 and is drawn from Section 3(c)(20) of the Uniform Trustees' Powers Act (1964). [For other provisions relating to trustees' compensation, see Sections 4500-4502.]

31520

§ 4472. Loans to beneficiary

4472. The trustee may make loans to the beneficiary on adequate security and at a fair rate of interest.

Comment. Section 4472 is new. Adequate security under this section may consist of a charge on the beneficiary's interest in the trust. See Restatement (Second) of Trusts § 255 (1959).

31521

§ 4474. Distribution to beneficiaries under legal disability

4474. The trustee may pay any sum distributable to a beneficiary under legal disability 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 4474 is a new provision and is drawn from Section 3(c)(22) of the Uniform Trustees' Powers Act (1964).

31524

§ 4476. Nature and value of distributions

4476. The trustee may effect distribution of property and money in divided or undivided interests and adjust resulting differences in valuation.

Comment. Section 4476 is a new provision and is the same as Section 3(c)(23) of the Uniform Trustees' Powers Act (1964).

§ 4478. Hiring persons

4478. The trustee may:

(a) Hire 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 hired.

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

Comment. Section 4478 is new and is the same in substance as Section 3(c)(24) of the Uniform Trustees' Powers Act (1964).

31563

§ 4480. Actions and proceedings

4480. The trustee may prosecute or defend actions, claims, or proceedings for the protection of trust property and of the trustee in the performance of the trustee's duties.

Comment. Section 4480 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).

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§ 4482. Execution and delivery of instruments

4482. The trustee may execute and deliver all instruments which will accomplish or facilitate the exercise of the powers vested in the trustee.

Comment. Section 4482 is new and is the same as Section 3(c)(26) of the Uniform Trustees' Powers Act (1964).