

Memorandum 85-20

Subject: Study L-640 - Trusts (Judicial Proceedings Concerning Trusts)

At the November 1984 meeting the Commission decided to retain the existing law which provides for continuing jurisdiction over certain testamentary trusts. Attached to this memorandum as Exhibit 1 is a draft of provisions that would retain the substance of existing law, including the procedure through which pre-1977 trusts may be removed from continuing jurisdiction. Exhibit 2 sets out the general provisions governing court proceedings concerning trusts; this material reflects decisions made at the November 1984 meeting when Memorandum 84-29 was considered. Exhibit 3 sets out the existing statutes relating to continuing jurisdiction, Probate Code Sections 1120 and 1120.1a, and shows their proposed disposition. A brief discussion of the policy issues involved in these provisions follows.

Draft §§ 540-543. Continuing jurisdiction over certain testamentary trusts

What policy is sought to be achieved by draft Sections 540-543? The answer to this question depends upon the distinction between continuing jurisdiction (derived from existing Probate Code Section 1120) and intermittent jurisdiction (derived from existing Probate Code Section 1138.1). The analysis is not benefited by calling the old scheme of Probate Code Section 1120 "mandatory court supervision". See Prob. Code § 1120.1a(a)(1). Similarly, the common reference to judicial supervision of trusts may be misleading.

It is useful to keep the history of California's trust administration statutes in mind, because it made some sense to speak of supervision in the years before Probate Code Section 1138.1 was enacted. However, even then California did not have a fully supervisory scheme that required the trustee to qualify before the probate court. California law did not require accountings to be made directly to the court on a periodic basis, nor did the law impose on the court the responsibility of ferreting out fiduciary improprieties on its own motion. Nor did California law require trustees to apply to the court for instructions before taking

actions with respect to trust property. The statutory scheme relating to administration of testamentary trusts has been described as follows:

Section 1120 does not expressly require that the trustee file periodic accountings or seek instructions, nor does it direct the court to require the trustee to bring matters of administration before the court if the trustee and the beneficiaries choose not to do so. Instead, the judicial supervision contemplated is supervision sought by the trustee or by a beneficiary. Thus the concept of judicial supervision in California is not one of unnecessary judicial intervention, but rather one of supervision or assistance based upon the request of a party in interest. The result is that both the trustee and the beneficiaries are provided with a simple, inexpensive procedure by which to obtain both judicial assistance on doubtful matters of trust administration and also the periodic settlement of accounts which will protect the trustee with respect to past administration.

Wile, Judicial Assistance in the Administration of California Trusts, 14 Stan. L. Rev. 231, 238-39 (1962) (footnotes omitted). When this description of the scheme for testamentary trusts was written, there was no such statutory procedure available for inter vivos trusts: "Relief must be sought, if at all, from the superior court to which general equity jurisdiction is given by the state constitution. But efforts by trustees and beneficiaries to obtain assistance in this manner have been surprisingly unsuccessful." Id., at 239. Consequently, judicial "supervision" in California before 1970 meant the jurisdiction of the court to hear a broad range of questions arising in administration of a testamentary trust, when invoked by a trustee or beneficiary.

The problem of obtaining judicial assistance in administration of inter vivos trusts was largely solved beginning in 1971 when Probate Code Section 1138 et seq. made a comprehensive procedure available on petition of trustees or a beneficiary. The grounds for petitioning the court under the two procedures are the same, as the following table shows:

| | | |
|--|-----------|-----------------|
| (1) Determine recipients of property on termination of trust | § 1120(b) | § 1138.1(a)(1) |
| (2) Settle accounts | § 1120(b) | § 1138.1(a)(2) |
| (3) Pass on acts of trustee | § 1120(b) | § 1138.1(a)(2) |
| (4) Instruct the trustee | § 1120(b) | § 1138.1(a)(4) |
| (5) Accept additions to trust | § 1120(b) | § 1138.1(a)(3) |
| (6) Grant powers provided in § 1120.2 | § 1120(b) | § 1138.1(a)(6) |
| (7) Amend trust for charitable estate tax deduction | § 1120(b) | § 1138.1(a)(13) |

| | | |
|--|-----------------|-----------------|
| (8) Compel trustee to submit accounts* | § 1121 | § 1138.1(a)(5) |
| (9) Fix compensation | § 1122 | § 1138.1(a)(7) |
| (10) Appoint trustee | § 1125, 1126 | § 1138.1(a)(8) |
| (11) Accept resignation of trustee | § 1125.1 | § 1138.1(a)(9) |
| (12) Remove trustee | § 1123.5 | § 1138.1(a)(10) |
| (13) Modify trust with low principal | § 1120.6 | § 1138.1(a)(12) |

*Section 1121 implicitly requires the account to be rendered to the court. Section 1138.1(a)(5) provides for submitting an account to a beneficiary or remainderman. However, the authority in Section 1138.1(a)(2) for settling the accounts and passing upon the acts of the trustee is sufficient to require an accounting to the court.

As of July 1, 1977, testamentary trusts under wills executed or republished after that date and all inter vivos trusts are made subject to the provisions of Probate Code Section 1138 et seq. A procedure has also been enacted providing for removing trusts from continuing jurisdiction as provided by Section 1120. See Prob. Code § 1120.1a. This procedure is mandatory for trusts with institutional trustees and optional for trusts with only individual trustees. See Prob. Code § 1120.1a(a), (d).

What differences remain in the law governing testamentary and inter vivos trusts? Continuing jurisdiction in the probate court where the estate was administered has the benefit of eliminating filing fees for petitions to determine questions arising in administration of the trust. This is a benefit to the trust, but not so beneficial for the court system. Continuing jurisdiction also eliminates the alternate venue at the principal place of administration of the trust which would otherwise be available under the draft statute. This may or may not be beneficial to the trustee or one or more beneficiaries. Beyond these two differences, the staff finds no substantive difference reflected in the statutes. It should be noted that we have been told that by tradition an accounting under Section 1120 may be more detailed than an accounting under Section 1138.1, but this practice is not supported by any language appearing in the statutes. There is certainly adequate authority in the draft statute, as well as in existing Section 1138.1, to require a full accounting by the trustee if the case calls for it.

Continuation of the existing dual system would preserve a complication for testamentary trusts which deserves further discussion. Section

1130(a) provides that a testamentary trust is not subject to the continuing jurisdiction of the court "unless the testator provides otherwise." It further states that Section 1138 et seq. apply to the trust "to the extent that the will or article does not provide otherwise" (emphasis added). It appears that a testator may make the trust subject to continuing jurisdiction under Section 1120 only as to certain questions, may make Section 1138.1 apply as to others, and perhaps may require a civil action as to a third set of questions by operation of Section 1138.1(b). Section 1138.1(b) provides in effect that the special proceeding under Section 1138.1 may be made unavailable for one or more purposes by an express provision or necessary implication. It is doubtful that any convincing policy argument can be made to support this hodge-podge of procedural fussiness. In the end, by some procedure, whether under Section 1120 et seq., Section 1138 et seq., or by a full dress civil action, a trustee or beneficiary may have a question heard and determined. What is the point of allowing testators to set up a procedural labyrinth?

In recognition of the implicit injustice and inefficiency of forcing trustees and beneficiaries to resort to a formal action to resolve questions involving the internal affairs of a trust, the Commission decided not to continue the power of the trustor to eliminate the availability of the special procedure. By parity of reasoning, the Commission should consider whether the provision of draft Section 520(b) permitting a trustor of a testamentary trust to opt for continuing jurisdiction should be retained. At a maximum, the staff would retain the continuing jurisdiction scheme only for pre-1977 trusts that have not been removed from continuing jurisdiction and for trusts from 1977 to the operative date of the new trust statute that explicitly provides for continuing jurisdiction. However, the same effect could be attained if such trusts are excused from a filing fee (as is done in Section 1138.4 for trusts removed pursuant to Section 1120.1a) and if the venue is restricted to the county where the estate was administered. These two features are the only real difference between the continuing jurisdiction scheme of Section 1120 et seq. and the intermittent jurisdiction scheme of Section 1138 et seq.

Draft §§ 550-556. Removal of trusts from continuing court jurisdiction

This set of sections is a revised version of material that was before the Commission at the November 1984 meeting, attached to Memorandum 84-29. These sections continue the substance of the existing procedure

in Probate Code Section 1120.1a for removing trusts from "mandatory court supervision". As mentioned supra, this procedure is mandatory for trusts with a corporate trustee, but permissive for trusts with no corporate trustees. The position of the staff, as set out in Memorandum 84-29 and the First Supplement thereto, is that it would be best to dispense with this procedure entirely, and make all trusts subject to the general procedure providing for intermittent intervention by the court in trust administration upon petition of the trustee or a beneficiary. This conclusion follows from the analysis showing the essential identity of the old procedure in Section 1120 et seq. and the new procedure in Section 1138 et seq. We also recognize that the legislative history of Section 1120.1a indicates that it may not be politically feasible to dispense with this removal procedure. In any event, if the continuing jurisdiction scheme of Section 1120 is retained in some form, the removal scheme should also be retained.

For a dissenting view, see the letter from Mr. Willard R. Campbell, attached hereto as Exhibit 4. Mr. Campbell argues that large trusts with corporate trustees "need just as much supervision by the Court as the smaller ones being handled by individuals." The staff is convinced, however, that there is no essential difference between the two available schemes, as discussed supra. The particular situation outlined in Mr. Campbell's letter involved a low return on a common trust fund. The staff is not convinced that continuing jurisdiction under Section 1120 would protect against low returns. Perhaps more directly relevant is Mr. Campbell's suggestion that corporate trustees should be prohibited from investing in their own common funds or in that of any similar institution. (See Exhibit 4, p. 1, last paragraph) Common trust funds are authorized by Financial Code Section 1564, the Uniform Common Trust Fund Act. It appears that 35 states have such legislation. The staff thinks that the problem of inadequate return on trust investments is a question of breach of trust rather than a problem with the common trust fund legislation.

Respectfully submitted,

Stan G. Ulrich
Staff Counsel

EXHIBIT 1

Staff Draft

Probate Code §§ 540-556

CHAPTER 2. TRANSITIONAL PROVISIONS

Article 1. Application of Division 3

. . . .

Article 2. Testamentary Trusts Subject to Continuing Jurisdiction

10362

§ 540. Application of article

540. This article applies only to the following:

(a) A trust created by a will executed before July 1, 1977, and not republished thereafter.

(b) A trust created by a will which provides that the trust is subject to the continuing jurisdiction of the superior court.

Comment. Section 540 continues the substance of part of subdivision (a) of former Section 1120 and the exception thereto provided in the first sentence of subdivision (d) of former Section 1120.1a. The effect of this section is to limit the application of provisions for continuing jurisdiction of the court over two classes of trusts: (1) trusts created by a will executed before July 1, 1977, when the provisions for continuing jurisdiction were made inapplicable unless the trust otherwise provided (see 1976 Cal. Stats. ch. 960, § 3), and not republished thereafter, and (2) trusts that are specifically made subject to the continuing jurisdiction of the court by a provision in the trust or the will. A trust created by a will executed before July 1, 1977, which is republished thereafter, but that contains a provision making it subject to the continuing jurisdiction of the court, will fall into the second class.

10360

§ 541. Continuing jurisdiction

541. If a trust described in Section 540 continues after distribution, the superior court in which the estate was administered retains jurisdiction over the trust for any of the purposes specified in Section 1130.

Comment. Section 541 preserves the continuing jurisdiction over a testamentary trust of the superior court where the estate is administered as provided in subdivision (b) of former Section 1120. The incorporation of the grounds for a petition under Section 1130 continues the various grounds for invoking the court's continuing jurisdiction provided in subdivision (b) of former Section 1120.

§ 542. Applicable procedures

542. Proceedings commenced under the continuing jurisdiction of the superior court as provided by this article are governed by Part 5 (commencing with Section 1100).

Comment. Section 542 makes clear that the general procedures governing judicial proceedings relating to trusts apply to proceedings involving trusts that remain subject to the continuing jurisdiction of the court. See Sections 1100-____; see also Section 501 (clerk to set matters for hearing), 502 (appointment of guardian ad litem). This incorporation of the general provisions continues the substance of much of the law relating to trusts subject to continuing jurisdiction because the general procedures were drawn in part from former Section 1120 et seq. See the comments to Sections 1100-____. This article has the effect of making inapplicable the alternative venue over testamentary trusts provided in Section 1105. The other distinction between proceedings under this article and those under Section 1130 et seq. is that no filing fee is required when a petition is filed under the continuing jurisdiction provided in this article. In other respects, the procedures are the same.

10355

§ 543. Effect of removal from continuing jurisdiction

543. This article does not apply to a trust described in Section 540 that has been removed from the continuing jurisdiction of the superior court pursuant to Article 3 (commencing with Section 550).

Comment. Section 543 makes clear the relation between this article and Article 3.

405/335

Article 3. Removal of Trusts From
Continuing Court Jurisdiction

§ 550. Application of article

550. This article applies only to trusts created by a will executed before July 1, 1977, and not republished thereafter.

Comment. Section 550 continues the substance of the first sentence of former Section 1120.1a.

405/348

§ 551. Notice to beneficiaries

551. (a) Except as provided in Section 552, within six months after the initial funding of the trust, the trustee of a trust described in Section 550 shall give a notice of removal of trusts from continuing

jurisdiction to each beneficiary, [including all persons in being who shall or may participate in the principal or income of the trust]. Notice shall be sent by registered or certified mail or by first class mail to the persons to be notified at their last known addresses. Notice may be sent by first class mail only if an acknowledgment of receipt of notice is signed by the beneficiary and returned to the trustee.

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

(1) A statement that as of January 1, 1983, the Probate Code was amended to remove the necessity for continuing court jurisdiction over the trust.

(2) A statement that Section 1130 of the Probate Code gives any beneficiary the right to petition a court to determine important matters relating to the administration of the trust.

(3) A copy of the text of Sections 1130 and 1131.

(4) A statement that each income beneficiary, as defined in subdivision (a) of Section 4802 [902], is entitled to an annual statement of the principal and income receipts and disbursements of the trust and that any other beneficiary is entitled to such information upon written request to the trustee.

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

(6) The name and location of the superior court in the county in which it is appropriate to file a petition pursuant to Section 1130, the name and location of the superior court that 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 1130 with either court.

(c) The trustee shall file with the court that had jurisdiction over the administration of the estate pursuant to Section [301] proof of service of the notice under this section within seven months after the initial funding of the trust.

Comment. Section 551 continues the substance of subdivision (a) of former Section 1120.1a. See also Section 24 ("beneficiary" defined).

Note. Draft Sections 1130 and 1131 are in the material relating to judicial proceedings concerning trusts. Draft Section 4802 is attached to Memorandum 84-32.

§ 552. Court approval to remove trust from continuing jurisdiction

552. (a) Notwithstanding Section 551, with respect to a trust where no trustee is a trust company, as defined in Section 107 of the Financial Code, the trustee may remove the trust from the continuing jurisdiction of the superior court only with approval of the court. The trustee may seek court approval pursuant to this section at any time, and from time to time, in the trustee's discretion.

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

(c) Notice of the hearing shall be given, along with a copy of the petition, at least 30 days before the hearing to all persons entitled to receive notice pursuant to Section 551.

(d) At the hearing the court may receive testimony from any interested person and may grant or deny the petition, or may grant the petition upon such conditions as the court in its discretion deems proper.

(e) If the petition is granted, the trustee shall send the notice and proof of service required by Section 551 within six months and seven months, respectively, from the date the petition is granted. A copy of the court order granting the petition shall be attached to such notice.

(f) If the petition is not granted, the trust shall continue to be administered under Article 2 (commencing with Section 540) as if the testator had provided in the will that the superior court shall not lose jurisdiction of the estate by final distribution.

Comment. Section 552 continues the substance of subdivision (d) of former Section 1120.1a. See also Section 501 (clerk to set matters for hearing).

405/338

§ 553. Notice to minor, ward, or conservatee

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

(b) In addition to the requirements of subdivision (a), if the trustee, at the time the notice required by Section 551 is sent, has

actual knowledge that a beneficiary who is not a minor, ward, or conservatee is being assisted by another individual in the handling of his or her personal affairs, the trustee shall send the notice required by Section 551 to both that person and the beneficiary and, upon the written request of either of them, shall also send the accounting required by Section 731 to both of them.

Comment. Section 553 continues the substance of subdivision (e) of former Section 1120.1a. The contents of the accounting required by Section 731 differs from that required by subdivisions (b) and (c) of former Probate Code § 1120.1a. See also Section 24 ("beneficiary" defined).

Note. Draft Section 731 is attached to Memorandum 84-92.

405/385

§ 554. Application of article to charitable trusts

554. (a) If the trust is a charitable trust subject to Article 7 (commencing with Section 12580) of Chapter 6 of Part 2 of Division 3 of Title 2 of the Government Code, upon the vesting of any charitable interest created by the trust, the trustee shall thereafter furnish to the Attorney General the accounting required by Section 731 without the necessity of any written request.

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

(c) Notwithstanding any other provisions of law, the Attorney General may petition the court to settle the account and pass upon the acts of the trustee as provided in Section 1130.

Comment. Section 554 continues the substance of subdivision (f) of former Section 1120.1a.

Note. Draft Section 731 is attached to Memorandum 84-92. Draft Section 1130 is in Exhibit 2.

405/341

§ 555. Removal by trust company as successor trustee

555. 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 court because it was not removed pursuant to Section 552, the successor

trustee shall send the notice and proof of service required by Section 541 within six months and seven months from the date of appointment, respectively.

Comment. Section 555 continues the substance of the first sentence of subdivision (g) of former Section 1120.la.

405/339

§ 556. Effect of change in trustees or other event on removal

556. After a trust is no longer subject to the continuing jurisdiction of the court, whether by operation of law or by removal pursuant to Section 552, neither a change in trustees nor any other event causes the trust to be subject to continuing jurisdiction under Article 2 (commencing with Section 540).

Comment. Section 556 continues the substance of the second sentence of subdivision (g) of former Section 1120.la.

EXHIBIT 2

Draft

Probate Code §§ 1130-1135

CHAPTER 3. PROCEEDINGS CONCERNING TRUSTS

405/942

§ 1130. Petitioners; grounds for petition

1130. (a) A trustee or beneficiary of a trust may petition the court under this chapter concerning the internal affairs of the trust or to determine the existence of the trust.

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

- (1) Determining questions of construction of a trust instrument.
- (2) Determining the existence or nonexistence of any immunity, power, privilege, duty, or right.
- (3) Determining the validity of a trust provision.
- (4) Ascertaining beneficiaries and determining to whom property shall pass or be delivered upon final or partial termination of the trust, to the extent the determination is not made by the trust instrument.
- (5) Settling the accounts and passing upon the acts of the trustee, including the exercise of discretionary powers.
- (6) Instructing the trustee.
- (7) Compelling the trustee to submit accounts and report acts as trustee to a beneficiary.
- (8) Granting powers to the trustee.
- (9) Fixing, directing, or allowing payment of the trustee's compensation.
- (10) Appointing or removing a trustee.
- (11) Accepting the resignation of a trustee.
- (12) Compelling redress of breach of trust.
- (13) Directing the relief provided in Section [4242] in the case of a trust with uneconomically low principal.
- (14) Approving the modification or termination of the trust.
- (15) Amending or conforming the trust instrument in the manner required to qualify a decedent's estate for the charitable estate tax deduction under federal law, including the addition of mandatory govern-

ing 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.

(16) Authorizing or directing transfer of a trust or trust property to or from another jurisdiction.

Comment. Section 1130 generally continues the substance of subdivision (a) of former Section 1138.1 and supersedes parts of former Section 1120. The reference to determining the existence of a trust in subdivision (a) is new.

Paragraphs (1) and (2) of subdivision (b) are new and are drawn from Uniform Probate Code Section 7-201(a). Paragraph (3) is new. Paragraph (5) continues the substance of parts of subdivisions (b) and (d) of former Civil Code Section 2269 (review of exercise of discretionary powers). See Sections 740-741 (duties in exercise of discretionary powers). Paragraph (9) supersedes the last sentence of former Civil Code Section 2274.

Various provisions elsewhere in this division relate to proceedings under this article. As to compelling the trustee to account under paragraph (7), see Sections 730-731. As to granting powers to the trustee under paragraph (8), see Section 801. As to the trustee's compensation under paragraph (9), see Sections 1000-1002. As to breach of trust involved in paragraph (12), see Sections 950-____. As to modification and termination of trusts, see Sections 640-____. As to authorizing transfers of trusts under paragraph (16), see Sections 1160-1189.

See also Sections 24 ("beneficiary" defined), 82 ("trust" defined), 1105(a) (venue).

405/946

§ 1131. Commencement of proceeding

1131. A proceeding under this chapter is commenced by filing a verified petition stating facts showing that the petition is authorized under this chapter.

Comment. Section 1131 continues the substance of the first sentence of former Section 1138.4, except for the provision relating to authorization by the terms of the trust.

405/948

§ 1132. Dismissal of petition

1132. The court may dismiss a petition if it appears that the proceeding is not reasonably necessary for the protection of the interests of the petitioner.

Comment. Section 1132 continues the substance of former Section 1138.5(a). See also Section 1130(a) (who may petition).

405/949

§ 1133. Notice

1133. (a) At least 30 days before the time set for the hearing on the petition, the petitioner shall cause notice of the time and place of hearing to be mailed to any of the following persons who are not petitioners:

(1) All trustees.

(2) Except as provided in Section 1118, all trust beneficiaries, [including all persons in being who may participate in the principal or income of the trust].

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

(c) Notice of any petition filed on the grounds specified in paragraph (15) of subdivision (b) of Section 1130 or to modify or terminate a charitable trust subject to supervision under Article 7 (commencing with Section 12580) of Chapter 6 of Part 2 of Division 3 of Title 2 of the Government Code shall be given to the Attorney General.

Comment. Subdivision (a) of Section 1133 continues the substance of the second paragraph of subdivision (a) of former Section 1138.6. See also Sections 1110-1118 (manner of notice). Subdivision (b) continues the substance of the third paragraph of subdivision (a) of former Section 1138.6. Subdivision (c) continues the substance of subdivision (d) of former Section 1138.6, and also reflects the notice requirement provided in Government Code Section 12591. See also Section 24 ("beneficiary" defined).

Note. Subdivision (c) might be more useful if it required notice to the Attorney General in any proceeding involving a charitable trust or a charitable disposition.

405/951

§ 1134. Orders and decrees

1134. The court in its discretion may make all orders and take all other action necessary or proper to dispose of the matters presented by the petition.

Comment. Section 1134 continues the substance of former Section 1138.2 and part of former Section 1121.

405/959

§ 1135. Appeal

1135. An appeal may be taken from any of the following orders when final:

- (a) Determining the existence of a trust.
- (b) Determining questions of construction of trust instruments.
- (c) Determining the existence or nonexistence of any immunity, power, privilege, duty, or right.
- (d) Determining the validity of a trust provision.
- (e) Ascertaining beneficiaries and determining to whom property shall pass.
- (f) Settling the accounts and passing upon the acts of the trustee, including the exercise of discretionary powers.
- (g) Instructing the trustee.
- (h) Granting powers to the trustee.
- (i) Fixing, directing, or allowing payment of compensation.
- (j) Appointing or removing a trustee.
- (k) Compelling redress of breach of trust.
- (l) Approving the modification or termination of the trust.
- (m) Authorizing or directing transfer of a trust or trust property to another jurisdiction.
- (n) Dismissing a petition or denying a motion to dismiss under Section 1132.

Comment. Section 1135 continues the substance of former Section 1138.10 and parts of Section 1240. Subdivisions (a)-(d), (k), and (l) are new and reflect new material in Section 1130. See Sections 1130 (grounds for petition under this chapter), 1132 (dismissal of petition).

EXHIBIT 3

Disposition of Probate Code §§ 1120-1120.1a
(to be repealed)

CHAPTER 19. ADMINISTRATION OF TRUSTS

Article 1. Testamentary Trusts§ 1120 (repealed). Continuing judicial jurisdiction over trusts

(a) A trust created by a will is not subject to the continuing jurisdiction of the superior court, unless the testator provides otherwise. Article 2 (commencing with Section 1138) shall be applicable to the trust to the extent that the will or article does not provide otherwise.

(b) When a trust created by a will continues after distribution, and the testator provides that the superior court shall not lose jurisdiction of the estate by final distribution, the superior court shall retain jurisdiction for the purpose of determining to whom the property shall pass and be delivered upon final or partial termination of the trust, to the extent that the determination is not concluded by the decree of distribution, of settling the accounts and passing upon the acts of the trustee, of authorizing the trustee to accept additions to the trust from sources other than the estate of the decedent, and for the other purposes hereinafter set forth. Any trustee appointed by will, or appointed to execute a trust created by will, may, from time to time pending the execution of the trust, or at the termination thereof, render for settlement his or her accounts and report his or her acts as trustee, before the superior court in which the will was probated. For that purpose, the trustee shall present to the court a verified account and report, setting forth the accounts in detail, reporting his or her acts as trustee, and showing the condition of the trust estate. If the trustee dies or becomes incompetent, the account and report shall be presented by the trustee's executor, administrator, guardian, or conservator. In the event the trustee dies or becomes incompetent, and there is no executor, administrator, guardian, or conservator appointed for the trustee's estate, or in the event the trustee absconds, the court may compel the attorney for the deceased, incompetent, or absconding trustee to present the account and report to the extent that the attorney has information or records available for that purpose. The account and report of the attorney need not be verified. A fee shall be allowed to the attorney by the court for this service.

The trustee may also petition such court, from time to time, for instructions as to the administration of the trust for authority to accept additions to the trust from any source or sources other than the estate of the decedent, and for authority to exercise the powers authorized by Section 1120.2 of this code. The court may hear the petition and instruct or authorize the trustee by order rendered before or after any distribution to the trustee. When the trustee files the petition before any distribution of the estate to the trustee, the trustee shall, in addition to any other notice required, cause notice of the hearing to be mailed to the personal representative and shall further cause notice of the hearing to be mailed to all persons, including heirs, legatees, and devisees, at their last known address, to whom the court may order notice to be given, and shall, upon filing the petition and before giving notice thereof, secure from the court an order designating the persons in addition to the personal representative and the beneficiaries to whom the court requires that notice be given, or an order that notice to the personal representative and the beneficiaries is the only notice that shall be required.

When it appears from the allegations of the petition that the trustee seeks instructions to exercise a power not conferred upon the trustee or seeks authority to exercise the powers authorized by Section 1120.2, the petition shall set forth the particulars of and the necessity for the action sought to be taken.

The clerk shall set the hearing upon the account and report or petition for settlement or instructions. The trustee shall cause notice of the hearing to be given to the beneficiaries, including all persons in being who shall or may participate in the corpus or income of the trust, at their last known addresses, as provided in Section 1200.5, whether they have requested special notice or given notice of appearance or not. In addition to the above notice, when the petition relates to the exercise of a power not conferred or seeks authority to exercise the powers authorized by Section 1120.2, a copy of the petition shall be attached to and mailed with copies of the notice which are mailed and the court or judge shall, at least 10 days before the return day, appoint a suitable person who shall appear and act as guardian ad litem of any person or persons of a designated class, who are not ascertained, or who are not in being, and who may become beneficiaries or may so participate in the trust. None of the provisions of Section 373 of the Code of Civil Procedure shall apply to the appointment.

(c) In addition to the provisions of subdivision (b), the personal representative of the decedent's estate, prior to final distribution, or the trustee, beneficiary, or remainderman, before or after final distribution, may petition the superior court to amend or conform the trust provisions of the decedent's will in the manner required to qualify the decedent's estate for the charitable estate tax deduction permitted by federal law. The petition may include a request to add to the trust provisions of the decedent's will the mandatory governing instrument requirements for a charitable remainder trust, as required by final regulations and rulings of the United States Internal Revenue Service. Notice of the petition shall be given to the Attorney General. No amendment or conformation may be ordered by the court without having first received written agreement to the proposed changes or disclaimer of interest from all interested parties in the trust. The execution of an agreement shall not be construed to be a contest under any provisions of the will prohibiting will contests. The existence of a spendthrift or similar protective provision in the trust shall not make this subdivision inapplicable to that trust.

Comment. The substance of former Section 1120 is continued in Article 2 (commencing with Section 540) of Chapter 2 of Division 3 for certain trusts established under former law. See Sections 540-543. Trusts not subject to continuing jurisdiction under Sections 520-543 are subject to the intermittent jurisdiction of the courts when invoked pursuant to Part 5 (commencing with Section 1100). See, e.g., Section 1130 (grounds for petition). The new law contains provisions comparable to parts of former Section 1120 and other sections in former Article 1. See Sections 1100 (jurisdiction in superior court sitting in probate), 1130(b)(5) (petition to settle accounts), 1130(b)(6) (petition for instructions), 1130(b)(15) (amending trust for charitable estate tax deduction), 1133 (notice of hearing on petition), 800-878 (trustees' powers); see also 501 (clerk to set petition for hearing), 502 (appointment of guardian ad litem), 1110-1118 (notice).

. . . .

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

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 disbursements 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 1133, inclusive.

Comment. The substance of former Section 1120.1a is continued in Sections 550-556 (removal of trusts from continuing court supervision) and 501 (clerk to set for hearing). See also Section 731 (duty to account annually). References to remaindermen are not continued since they are unnecessary in light of the definition of "beneficiary" in Section 29.

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NICHOLAS PASTORE

November 29, 1984

California Law Revision Commission
400 Middlefield Road, Suite D-2
Palo Alto, CA 94303

Gentlemen:

I notice that you are preparing a new probate code for submission to the Legislature in 1986. I would like to suggest that the provisions of Probate Code Sections 1120, 1120.1, 1120.1a and other related code sections should be modified. Unfortunately the enactment of these sections created a great deal of confusion and released from the Court's jurisdiction mainly those testamentary trusts which had corporate trustees. Undoubtedly, this involves the more substantial testamentary trusts for the corporate trustees would not be interested in handling smaller ones. Unfortunately, these trusts need just as much supervision by the Court as the smaller ones being handled by individuals.

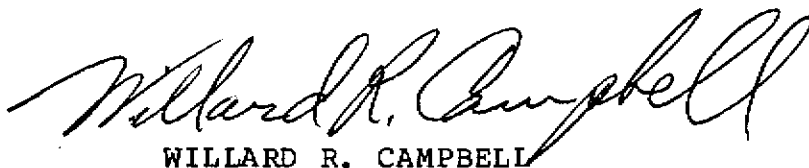
There have been numerous cases where the corporate trustees have mismanaged the properties entrusted to them. One of the worst offenses committed has been the usual practice of the corporate trustees to convert the assets into their "common funds" - a sort of "mutual fund" handled by the corporate trustee. The usual result of this is a substantial reduction in the value of the assets in the hands of the trustee and the beneficiaries have no way of controlling it because it is usually accomplished before the beneficiary is even aware that such a fund exists. Within my own experience, I have observed one such fund producing an average income of 5% over a five year period at a time when bank passbook accounts were paying more than 5%. When I asked the trust officer about this, the response was that it was a growth fund. Looking at the bank's own estimates of the fair market value showed that there was virtually no growth.

In the event corporate trustees continue unsupervised by the Court, there should be a prohibition against their investing in their own common funds or in that of any other similar institution to prevent this type of abuse.

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I believe that many attorneys involved in probate have been dismayed at this legislation which has not only confused the beneficiaries but has allowed a rather deleterious tendency to escape the control of a supervising court. In some jurisdictions, the supervision may be somewhat limited but nevertheless the fact that there is supervision, I am sure, has some beneficial effect.

Sincerely,

A handwritten signature in cursive script, reading "Willard R. Campbell". The signature is written in black ink and is positioned above the printed name.

WILLARD R. CAMPBELL

WRC/cl