#L-640 4/21/83

First Supplement to Memorandum 83-17

Subject: Study L-640 - Trusts

This supplement considers comments we have received relating to the staff draft of trust law (proposed Division 4.5 of the Probate Code) attached as Exhibit 1 to Memorandum 83-17 (sent 3/11/83). We will take up the various comments at the appropriate time as we proceed through the draft statute. Accordingly, the following discussion is organized on a section by section basis.

The following letters of comment are attached as exhibits to this supplement:

-- Exhibit 1: Preliminary comments from members of the Executive Committee of the Estate Planning, Trust and Probate Law Section of the State Bar, March 18, 1983. (These comments are directed to an earlier memorandum, but to the extent relevant to the staff draft, they are discussed below.)
-- Exhibit 2: Comments of Charles A. Collier, Jr., April 4, 1983.

§§ 4180-4186. Removal of trusts from continuing court supervision

Mr. Charles Collier notes that the provisions of existing law that would be continued in draft Sections 4180-4186 are the subject of a bill in the current legislative session. (See Exhibit 2, items 1 and 2.) Assembly Bill 482 would revise the transitional procedure provided in Probate Code Section 1120.1a to make largely technical changes. Senate Bill 1026 would repeal Section 1120.2a and enact a new Section 1134 that makes numerous changes, the most important of which is that the removal procedure is made optional. The staff will keep track of these bills, and proposes to continue whatever eventually emerges from the Legislature.

[§ 4204. Exception to doctrine of merger]

Assembly Bill 638 would add Section 2225 to the Civil Code to provide that a trust does not terminate where the trustor is also the sole trustee and beneficiary during the trustor's lifetime if the trust provides for a successor beneficiary after the trustor's death. Similarly, the bill would preserve trusts having two or more trustors, one or more of whom are trustees, where the trustors are the beneficiaries, so long as there is a successor beneficiary after death. This bill is on the consent calendar.

The staff proposes the addition of Section 4204 to the draft statute to preserve the substance of AB 638:

> 4204. If a trust provides for one or more successor beneficiaries after the death of the trustor, the trust is not invalid, merged, or terminated in either of the following circumstances:
>
> (a) Where there is one trustor who is the sole trustee and the sole beneficiary during the trustor's lifetime.
>
> (b) Where there are two or more trustors, one or more of whom are trustees, and the beneficial interest in the trust is in the trustors during the lifetime of the trustors.

§ 4300. General duty of trustee

The Executive Committee does not support the addition of this section to existing law. (See Exhibit 1, item 7.) Section 4300 is proposed in the staff draft to make clear that the statutory statement of specific duties is not exclusive. It provides a general, affirmative statement, whereas California law tends to state rules as limitations or negative statements. Section 4300 is akin to the Restatement rules that "upon acceptance of the trust by the trustee, he is under a duty to the beneficiary to administer the trust" and that "the trustee is under a duty to the beneficiary to administer the trust solely in the interest of the beneficiary." Restatement (Second) of Trusts §§ 169, 170 (1959).

The staff does not feel strongly about Section 4300; it makes no change in the law and it is the law whether or not statutorily recognized in this form.

§ 4305. Duty to obey trust (modification of trust terms)

Mr. Collier suggests that the reference in draft Section 4305 to modifying a trust with the consent of all interested persons be made more explicit. (See Exhibit 2, item 3.) He suggests Section 7-1.9 of the New York Estates, Powers and Trusts Law as a reference. This section provides for revocation or amendment of a trust by the creator of the trust upon the acknowledged, written consent of all persons beneficially interested in a trust.

Draft Section 4305(a) is intended to continue the substance of existing Civil Code Section 2258, which refers to "modification by the consent of all parties interested." On further consideration, the staff is uncertain as to the meaning of this language. It could probably be omitted with no loss of understanding. Section 4305(a) would be superior if it read as follows:

> 4305. (a) Except as provided in Section 4401, a trustee shall fulfill the purpose of the trust and follow the directions in the trust.

The best solution might be to eliminate the provision altogether.

The staff has misgivings about trying to pin down the law relating to modification of trusts. The approach of the staff draft is to avoid attempts at codifying complex "common equity" rules, particularly where California law is sketchy. The reference to modification in Civil Code Section 2258 has been ignored as far as we are aware. A trust may be terminated by consent of all beneficiaries if its purpose has been accomplished and all interests under it have vested. Moor v. Vawter, 84 Cal. App. 678, 682-85, 258 P. 622 (1927). Without referring to Section 2258, another case decided that the beneficiaries could not modify the terms of a trust to add two beneficiaries in an effort to "remove an obvious inequality in the trust." Childs v. Gross, 41 Cal. App.2d 680, 692-93, 107 P.2d 424 (1940). The Restatement (Second) of Trusts § 338 (1959) states the following rule:

> (1) If the settlor and all of the beneficiaries of a trust consent and none of them is under an incapacity, they can compel the termination or modification of the trust, although the purposes of the trust have not been accomplished.
>
> (2) Although one or more of the beneficiaries of a trust do not consent to its modification or termination or are under an incapacity, the other beneficiaries with the consent of the settlor can compel a modification or a partial termination of the trust if the interests of the beneficiaries who do not consent or are under an incapacity are not prejudiced thereby.

There does not appear to be a generally recognized power in the beneficiaries acting alone to alter the trust, short of a disclaimer. See G. Bogert & G. Bogert, Handbook of the Law of Trusts § 145, at 519 (5th ed. 1973). Case law in this area has relied on estoppel to find that where all interested parties including the trustor and trustee have consented, there is no one who will be heard to complain of the administration of the trust in a manner consistent with the modification. See id.

§ 4306. Trustee of multiple trusts

Mr. Collier suggests that draft Section 4306 be clarified to allow combination of inter vivos and testamentary trusts, two or more testamentary trusts, or two or more inter vivos trusts. (See Exhibit 2, item

4.) He notes that only testamentary trusts are covered by the existing statute. See Prob. Code § 1133.

The intent of Section 4306 is to permit combination of any type of trust that meets its requirements. Trust is defined in proposed Section 82 (in AB 25, the Commission's bill on wills and intestate succession) to include all express trusts, wherever and however created. In order to clarify the coverage of draft Section 4306(b), the staff proposes to revise the last sentence of the Comment as follows:

> Subdivision (b) continues the substance of former Probate Code Section 1133 (combination of testamentary trusts). Subdivision (b) also permits the combination of two or more inter vivos trusts and of a testamentary trust and inter vivos trust. See Section 82 ("trust" defined).

§ 4320. Trustee's standard of care and performance

The Executive Committee refers to AB 630 which would revise the prudent man rule and would support whatever results from consideration of this bill. (See Exhibit 1, item 8.) The standard of care proposed in AB 630 is set out in the note following draft Section 4320. The approach of the staff in this section is to track existing law in preference to the UPC. See the discussion in Memorandum 83-17 at pages 5-6. The staff proposes to continue in this fashion and adopt the substance of AB 630 when its final form is determined.

The Commission may be interested in some background on the revision in the basic standard of care as proposed in AB 630. The source of the bill is the California Bankers Association. According to the Assembly Judiciary Committee consultant's analysis, this bill would provide a standard under which a trustee would be judged as a trustee rather than a prudent person. This is intended to bring the law into closer conformity with the modern investment world. According to the consultant's analysis:

> Under existing law, as interpreted by the courts, each investment of a trustee is separately examined with respect to its conformance to the standard of a hypothetical prudent man investing his own funds. With hindsight, courts have sometimes surcharged trustees for particular investments in a portfolio notwithstanding the fact that the portfolio as a whole performed well and in conformity with the needs of the trust as determined from the trust instrument. This bill, with respect to trust acquisitions, would make each investment subject to, among other things, consideration as part of an overall investment strategy. The bill would give trustees

greater flexibility in making investments since each investment would be reviewed against the total picture of investments made and the goals of the trustor. Trustees would be less vulnerable to having to repay losses on single investments.

§ 4321. Expert trustee's standard of care

The Executive Commitee supports spelling out the higher standard of care for corporate and professional fiduciaries. (See Exhibit 1, item 9.) The staff assumes from this that the Executive Committee would support draft Section 4321. However, it should be noted that this section is not limited to corporate or professional trustees; it applies to any trustee who has special skills, as well as one who is appointed trustee on the basis of representations of special skills.

§ 4340. Trustee's duty to inform and account to beneficiaries

The Executive Committee does not find that an automatic annual accounting would be justified, but supports the idea of permitting the beneficiary to request an informal accounting at least annually, with the right to compel an accounting if the trustee does not comply or if the beneficiary is not satisfied with the accounting. (See Exhibit 1, item 10.) This position of the Executive Committee seems consistent with draft Section 4340. See also draft Section 4620(b)(4) (petition for order compelling trustee to submit accounts where trustee failed to comply with Section 4340).

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

Mr. Collier notes that draft Section 4351 should be considered in light of AB 261 which would amend Civil Code Section 2269, the source for this provision. (See Exhibit 2, item 5.) The staff is aware of AB 261 and is following its progress. Draft Section 4351 reflects the substance of Civil Code Section 2269 as it would be amended in AB 261.

§ 4403. Incorporation of powers

Mr. Collier asks whether subdivision (b) of Section 4403 should be limited to incorporation of powers that are provided in Section 1120.2. (See Exhibit 2, item 6.) His concern is that subdivision (b) will result in incorporation of "additional powers through inadvertence" since the powers provided in the draft statute are somewhat more extensive than those provided in existing Section 1120.2.

Section 4403(b) deems a reference to Section 1120.2 to be a reference to Article 2 (Sections 4420-4450). For the most part, Article 2 continues the substance of existing Section 1120.2. However, the following draft sections provide powers that are not specifically enumerated in Section 1120.2: Sections 4424 (acquisition of undivided interest), 4426 (deposits in insured accounts), 4439.5 (deposit of securities in securities depository), 4445 (allocation to principal and income), 4446 (distribution to beneficiaries under legal disability), 4447 (nature and value of distributions), 4448 (employing persons), and 4450 (execution and delivery of instruments). Additional features of other provisions in Article 2 also differ from the language of Section 1120.2.

The approach of the staff draft is to make powers automatic for all trusts, regardless of when they are created. See draft Sections 4151, 4400, 4420. This approach is based on the principle supporting modern trustees' powers legislation that broad powers should be generally available to avoid the need to seek relief from the courts. The basic core of powers are those judged to be desirable for most trusts in foreseeable circumstances. Consistent with this approach, the staff would prefer not to restrict Section 4403(b) to incorporate only the powers like those of Section 1120.2. We assume that unless a trust instrument provides express limits on the exercise of certain powers, the drafter who resorts to an incorporation of the statutory powers of Section 1120.2 wants the broadest generally accepted powers available and so would have wanted the full set of powers listed in draft Sections 4420-4450.

§ 4441. Borrowing money

Mr. Collier asks whether there is a section authorizing the trustee to loan money on adequate security to any party, including a beneficiary. (See Exhibit 2, item 7.) There is no specific provision to this effect. Draft Section 4425 empowers the trustee to invest and reinvest trust property, but makes no specific reference to making loans. In this respect the staff draft does not differ from existing law.

§ 4445. Allocation to principal and income

Mr. Collier notes that draft Section 4445 pertaining to allocation to principal and income does not seem necessary. (See Exhibit 2, item 8.) He is correct, this section is not strictly necessary since the

Revised Uniform Principal and Income Act is part of the draft statute at Sections 4800-4817 and acts on its own. Section 4445 is a cross-reference provision and the staff believes it is useful. The aim is to state all known statutory powers in Article 2 (commencing with Section 4420).

§ 4448. Employing persons

Mr. Collier notes that draft Section 4448 does not relate to compensation and asks if compensation of employees is covered in some other section. (See Exhibit 2, item 9.) Draft Section 4444 provides for compensation of the trustee and other expenses incurred in the administration of the trust, which would include payment of compensation to employees. Section 7-205 of the Uniform Probate Code provides explicitly for judicial review of the propriety of employment of a person by the trustee and the reasonableness of the compensation of any person so employed. (For the full text of UPC § 7-205, see p. 322 in Exhibit 5 attached to Memorandum 83-17.)

§§ 4520-4523. Liability of trustee and trust

The Executive Committee is divided on the issue of the liability of the trustee and the trust to third persons. (See Exhibit 1, item 12.) A majority voted to support existing law and six persons voted in favor of UPC concepts, which are embodied in draft Sections 4520-4523. The staff has nothing to add to the discussion in Memorandum 83-17 at pages 14-16.

§ 4524. Limitations on proceedings against trustees after final account

The Executive Committee considered the issue of limitations on actions against a trustee and suggested further study. (See Exhibit 1, item 13.) The Executive Committee felt that the UPC provisions from which draft Section 4524 is drawn have ambiguities, but these were not indicated. The Commission should consider draft Section 4524 and the discussion in Memorandum 83-17 at pages 16-17 along with the Executive Committee's comments.

§ 4550. Certificate of appointment of trustee

Mr. Collier notes that draft Section 4550 relating to the court clerk issuing a certificate of appointment of a trustee would require some kind of petition to the court before a certificate could be issued to a successor trustee. (See Exhibit 2, item 11.) The staff assumes

this to be true. We are informed that in Santa Clara County only about one request for a certificate of a trustee's appointment is made a year. The procedure is to check the certificate prepared by the trustee with the file and certify it if the information matches. In San Francisco the probate court will require the trustee to get a certificate as a means of enforcing the bond requirement, particularly in the case of a successor trustee. Efforts to get information out of Los Angeles County were unsuccessful; no one on the front lines was aware of the certificate provision, and it appears that everyone else was being held incommunicado.

Probate Code Section 1130.1, which is continued in draft Section 4450, applies only to testamentary trusts. There does not appear to be a unique need for a certificate of trustee's appointment and incumbency in testamentary as distinct from inter vivos trusts. Although we have found no background material on Probate Code Section 1130.1, it is assumed that the certificate is intended to facilitate dealing with third persons in relation to trust property. The staff would prefer not to add detail to this statute, other than to make a certificate available to trustees of inter vivos trusts. Perhaps it is necessary to make clear in the statute that the trustee is to supply sufficient information on oath to enable the issuance of a certificate. Or the certificate could be limited to situations here the file in that jurisdiction showed the trustee's appointment. In the case of an inter vivos trust, the trustee would have to petition the court in the principal place of administration of the trust before a certificate of appointment and incumbency would be available. What does the Commission wish to do?

The Commission should also be aware of Commercial Code Section 8402 which permits the issuer of a security to require assurance that an indorsement is genuine. In the case of a fiduciary, this may mean a court certificate (dated within 60 days before the date of presentation for transfer of the security) or a document or certificate showing the incumbency of the fiduciary that is sufficient in the judgment of the issuer. Com. Code § 8402(3). This provision suggests that the best way of dealing with the problem is to leave third persons conducting business with the trustees to their own devices. Mr. Collier has supplied the staff with a form for a certificate of appointment and incumbency of a trustee that is being developed by groups within the bar. (See

Exhibit 3, attached to this supplement.) This certificate would be executed by the trustee and acknowledged. Without mandating its effect, the staff does not see any advantage of providing statutory affidavit of this type.

§ 4551. Trustee's bond

The Executive Committee thinks bond should be required of a successor trustee not named in the trust instrument. (See Exhibit 1, item 11.) Draft Section 4551 does not distinguish between original and successor trustees, or between trustees named in the instrument or appointed by the court. However, Section 4551 permits beneficiaries to require bond and also permits the court to require bond where it is necessary to protect the interests of beneficiaries who are unable to protect themselves. The staff prefers the policy of Section 4551 which relies on the beneficiary's estimation of the need for a bond. The Executive Committee's argument in favor of requiring bond for a successor trustee not named in the trust--that the cost of a bond is minimal when contrasted with the protection it provides--would seem to apply in every case and support the conclusion that bond should always be required.

The Executive Committee also suggests that the beneficiary should have the right to require bond even if the trustor has waived bond in the instrument. This would appear to be the meaning of subdivision (a)(2) of Section 4551. This could be made clearer by adding a clause so that this provision would read:

> (2) Where bond is reasonably requested by a beneficiary, notwithstanding a waiver of bond in the trust instrument.

§ 4560. Actions by cotrustees

The Commission shall consider whether the general rule governing actions by cotrustees should be changed. Existing law, continued in draft Section 4560, requires the cotrustees to act unanimously unless the trust otherwise provides. The California statutory rule is consistent with the common law rule that powers are held jointly by cotrustees who must all unite in their exercise. See G. Bogert & G. Bogert, Handbook of the Law of Trusts § 91, at 328 (5th ed. 1973). It appears that most states having statutes on this subject have adopted the rule that a majority of cotrustees may act, unless the trust provides otherwise. See G. Bogert & G. Bogert, Trusts and Trustees § 554, at 103 n. 2 (2d

rev. ed. 1980). Sections 6(a) of the Uniform Trustees' Powers Act also adopts the rule permitting action by a majority. (See UTPA § 6(a) in Exhibit 4 attached to Memorandum 83-17.) The staff recommends adoption of this rule.

Mr. Collier notes that the requirement of unanimity of cotrustees is inconsistent with the rule under Probate Code Section 570 governing actions by co-executors. (See Exhibit 2, item 12.) He argues that the rule should be consistent, without suggesting which rule should be preferred. The staff agrees that they should be consistent, and prefers the rule applicable to actions by executors and administrators.

§ 4582. Liability of resigning trustee

Mr. Collier questions whether the liability of a resigning trustee ceases upon delivery of trust property to the successor or rather upon approval of an accounting which provides the basis for a transfer of assets. (See Exhibit 2, item 13.) Draft Section 4582 continues existing law. Its most important aspect seems to be the first sentence providing that the resignation of the trustee does not affect the trustee's liability. The second sentence which provides that liability continues until the trustee has delivered the trust property to the successor is probably unnecessary. It would be better to state affirmatively a duty in a resigning trustee to deliver trust property to the successor. The liability rules generally applicable would then apply to the resigning trustee in light of the provision that resignation does not affect liability. Accordingly, the staff proposes to delete the second sentence of draft Section 4582 and add the following provision:

> § 4585. Delivery of property by resigning or removed trustee
>
> 4585. A trustee who resigns or is removed shall deliver the trust property to the successor trustee or a person appointed by the court to receive the property.
>
> Comment. Section 4585 supersedes part of the second paragraph of former Section 1125.1 and part of the last sentence of former Section 1138.8.

§ 4620. Grounds for petition

The Executive Committee finds that broad authority of the kind provided in draft Section 4620(b)(1), (12), and (13) would be a useful addition to the list of court powers. (See Exhibit 1, item 6.) These

provisions deal with distributions, construction of trust instruments, and determining the existence or nonexistence of any immunity, power, privilege, duty, or right.

Mr. Collier suggests that draft Section 4620 be expanded to make clear that the court may also determine the validity of any trust. (See Exhibit 2, item 14.) The question of the existence or nonexistence of trusts is covered in draft Section 4601(b) which provides that the superior court has concurrent jurisdiction of such matters. The matters listed in draft Section 4620 are matters concerning the internal affairs of a trust over which the superior court has exclusive jurisdiction. Determining the existence of a trust is not an internal matter, and so is not listed in Section 4620.

Respectfully submitted,

Stan G. Ulrich
Staff Counsel

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March 18, 1983

TO: CALIFORNIA LAW REVISION COMMISSION:

RE: Trusts - Memorandum 83-4 and First Supplement to Memorandum 83-4

By letter of January 21, 1983, certain preliminary comments from members of the Executive Committee of the Estate Planning, Trust and Probate Law Section, State Bar, were presented to the Commission

The Executive Committee at its meeting on March 12, 1983 gave further consideration to that letter of January 21 and to the proposals set forth in the First Supplement to Memorandum 83-4.

The purpose of this letter is to set forth the views of the Executive Committee on the various matters which were discussed. Those views are as follows:

1. The Executive Committee unanimously supported the concept of consolidating all statutory trust provisions in California in the Probate Code.

2. The Executive Committee supported the combination of Section 1120 et seq (Testamentary Trusts) and Section 1138 et seq (Inter vivos Trusts) into a single integrated system.

3. The Executive Committee supported retention of the detailed Code Sections in California dealing with trusts rather than the more generalized type of language found in the UPC.

4. The provisions of the UPC dealing with trust registration (Sections 7-101 through 7-104) were unanimously opposed by the Executive Committee.

5 The provisions of UPC Section 7-105 dealing with foreign trustees would not be supported unless various matters were clarified, such as, foreign trustees automatically submitting themselves to California jurisdiction, tax ramifications of doing business in California, and full reciprocity for a California corporate fiduciary doing business in another jurisdiction, etc.

6. As to Court jurisdiction over trusts (UPC Section 7-201 to 7-206), it was felt that any jurisdictional ambiguities in California law could be dealt with when the 1120 series and the 1138 series of Sections under the Probate Code were combined. Where the UPC concepts are more precise, the addition of those concepts to clarify jurisdiction would be acceptable. It was felt that the rather broadly worded language from UPC Section 7-201(a) which includes proceedings to "determine any question arising in the administration or distribution of any trust including questions of construction of trusts instruments... and determine the existence or non-existence of any immunity, power, privilege, duty or right" would be a useful addition to the California listing of court powers. It is also not clear that California specifically covers the validity of the trust under the language of Section 1138.1. That should be perhaps added.

7. As to the general duty of a trustee as set forth in UCP Section 7-301, it seems to add little, if anything, to existing law. No one supported its addition to existing law.

8. The "prudent man" rule as it now exists in California is favored over the more general language of the UPC. However, AB 630 which is being sponsored by the California Banker's Association, seeks to clarify and modernize the

prudent man rule in California. The Executive Committee has been workinq on that bill with the California Banker's Association and would support whatever modificatfons of language grow out of that bill now pending in the leqislature.

9. The Executive Committee also unamimously supports spelling out the higher standard of care for a corporate and professional fiduciary, that is codification of the California case Law in this area

10. As to the trustees duty to inform and account to beneficiaries it is felt that this area could be clarified as a result of the combination of Section 1120 et seq, and Section 1138 et seq. There was a discussion of venue on trusts. It was the consensus of the Executive Committee that the area needs further study. A reasonable approach seemed to be that a beneficiary could request an informal accounting at least annually and if the beneficiary was not satisfied with the informal accounting, or did not get the accounting, within a reasonable time, the beneficiary would have the right to seek a court order to compel an accounting by the trustee. Because of varying sizes of estates, any automatic accounting on an annual basis did not seem to be justified.

11. As to requirements of bond, the Executive Committee felt that a bond should be required of a successor trustee who was not named in the instrument. The Executive Committee also thought that the beneficiary should have the right to require a bond even if the bond had been waived in the instrument. The cost of a bond was deemed minimal when contrasted with the protection it provides. It was felt that the bonding requirement should be considered together for executors, trustees, guardians and conservators so that there is some uniformity.

12. As to liability of the trust estate and the trustees to third persons, the majority of the Executive Committee voted to support the existing California law in this area. However, 6 members of the Executive Committee voted in favor of the UPC concepts regarding liability. It was felt it required further discussion and consideration. There was concern that the beneficiaries might be dissatisfied if their

claims against a trustee were limited to trust assets and non-tort situations.

13. Limitations on actions against a trustee for breach of trusts were discussed. It was felt that the UPC sections have ambiguities. It was suggested this area requires further study. There was general support for the existing California law in this area but a feeling by a number of members of the Executive Committee that the area did require further clarification particularly with reference to interim accountings, informal accountings and other proceedings short of a final accounting. Of course, when there is a court accounting, there is a short statute, namely the time for appeal.

The above summarizes the views of the Executfve Committee on the various issues raised in our prior letter of January 21, 1983 and the First Supplement to Memorandum 83-4.

The Trust Committee of the Section will be working on this matter and will be pleased to discuss any aspects of the Commission's work with it. Bruce Friedman, of San Francisco, is the Chairman of the Trust Committee.

EXHIBIT 2

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April 4, 1983

Stan G. Ulrich
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Re: Memorandum 83-17

Dear Stan:

The following are some initial comments on your draft of a new Division 4.5 of the Probate Code based upon my initial reading of that draft. These are personal comments not those of the Section of the State Bar. I hope they will be of some assistance.

These comments are as follows:

1. Proposed Section 4181 dealing with notice of removal of trusts from court jurisdiction may not apply to individual trustees. We anticipate there will be legislation this year to exempt the individual trustees from such procedures.

2. Proposed Section 4182 dealing with an annual accounting should perhaps be considered particularly in light of small trusts or trusts with individual trustees. In many cases we have in the past filed accountings with the court only every two, three or four years. The annual accounting does not seem necessary for all trusts. The same comment also applies to Section 4183.

3. Proposed Section 4305 might be made more explicit as to how a trust can be amended with the consent of interested

persons. Section 2258 of the Civil Code recognizes that power to amend but it is not very explicit in its language. In this regard, you might take a look at New York EPTL Section 7-1.09. Also Civil Code Section 2280 prior to its 1931 amendment read: "A trust cannot be revoked by the trustor after its acceptance, actual or presumed, by the trustees and beneficiaries, except by the consent of all of the beneficiaries, unless the declaration of trust reserves the power of revocation to the trustor. In that case the power must be strictly construed".

You might also note the language found in Section 771 of the Civil Code which states in part "A provision, express or implied, in an instrument creating an inter vivos trust, that the trust may not be terminated, shall not prevent termination by the joint action of all of the creators of the trust and all of the beneficiaries thereunder, if all concerned are competent and if the beneficiaries are all of the age and majority". (This Section generally deals with the rule against perpetuities.)

4. Proposed Section 4306 might be clarified to specifically allow the combination of an inter vivos and testamentary trust, two testamentary trusts or two inter vivos trusts. We believe the law at the present time only allows on a statutory basis a combination of testamentary trusts.

5. Proposed Section 4351 should be looked at in light of a bill presently in the Legislature to clarify some of the language of Section 2269.

6. Proposed Section 4403(B) is desirable except that I believe you are proposing to expand the powers that are now included in Section 1120.2 to pick up additional powers from the Uniform Trustee Powers Act. Perhaps the language has to be limited to refer to the same powers now provided in Article 2 commencing with Section 4420 so that there is not an incorporation of additional powers through inadvertence.

7. Proposed Section 4441 relates to borrowing money. Perhaps I missed it but is there a section authorizing the trustees to loan money on adequate security to any party including a bene-

ficiary?

8. Proposed Section 4445 dealing with the allocation of principal and income would not seem necessary so long as the revised Uniform Principal and Income Act is incorporated in the Bill.

9. Proposed Section 4448 dealing with the employment of various persons does not relate to compensation. Is that covered in some other section?

10. Proposed Section 4530 and Section 4552 raise a question of the ability of a trustee to delegate authority to another trustee and the liability of that trustee in case of delegation. Perhaps this needs some clarification.

11. Proposed Section 4550 which relates to the court clerk issuing a certificate of appointment would apparently require some kind of petition being filed with the court to appoint successor trustees for a successor who is acting to have a valid certificate issued by the clerk.

12. Proposed Section 4560 requires all trustees to act. I have always wondered why the provisions of Probate Code Section 570, dealing with co-executors, is not the same. That is, either all co-executors and co-trustees should act unanimously or should act by majority rule. There seems to be no logic in having the co-executors act by majority rule while the trustees must act unanimously by statute.

13. Proposed Section 4582 raises a question of whether the liability of the resigning trustee terminates on delivery of assets or only on approval of some kind of an accounting which provides the basis for transfer of assets.

14. Proposed Section 4620 should perhaps be expanded in paragraph (13) to make it clear that the court may also determine the validity of any trust. This is not presently clear under Section 1138.1.

Although this is apart from what has been discussed

above, my understanding is that the law does not provide transfers from an inter vivos trust to a custodian for a minor under the Uniform Gifts to Minors Act. Perhaps some provision should be made to allow this kind of transfer on termination of a trust.

The above comments are random comments in my review of the documents. Our Trust Committee is working on Memorandum 83-17 and we hope to have additional comments for you by the May 5 meeting.

In general, I was very impressed by your draft of Division 4.5 and feel it will represent a substantial improvement in California law.

Kindest regards.

Sincerely,

Charles A. Collier, Jr.

CAC/a

cc: Harley Spitler
Mary Yen
Kenneth Klug
Theodore Cranston
Bruce Friedman

EXHIBIT 3

Certificate of Appointment and Incumbency of Trustee

The undersigned certifies (certify) as follows:

1. The name of the trust is: _____
_____.

2. The trust is dated _____.

3. The trust is administered under the laws of the state of _____.

4. The trust as described above is in full force and effect as of the date hereof.

5. There is no vacancy in the office of the trustee requiring the appointment of any successor or additional trustees.

6. The undersigned is (are) the duly qualified and acting trustee(s) of the above described trust.

7. The trust grants to the trustee(s) the authority to take the actions to which this certificate relates.

Dated this _____ day of _____, 19__.

_____

_____
TRUSTEE(S)

ACKNOWLEDGMENT

STATE OF _____)
)
COUNTY OF _____)

On this _____ day of _____ in the year _____, before me personally appeared _____ personally known to me or proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is (are) subscribed to this instrument and acknowledged that he (she or they) executed it as the duly qualified and acting trustee(s).

_____
SIGNATURE LINE

_____
TITLE

(Notary seal or stamp--if signed by notary)

_____
OFFICE ADDRESS (if not a notary)

_____

Acknowledgement may be executed by a notary, or by an accountant, attorney, bank officer, or broker.