

Memorandum 84-26

Subject: Study L-640 - Trusts (Office of Trustee)

This memorandum discusses various matters relating to the office of the trustee, including resignation, removal, and vacancy in the office of trustees, appointment of trustees, actions by cotrustees, and compensation and bond of trustees. Attached as Exhibit 1 is a staff draft of provisions covering these matters that reflects decisions made by the Commission in 1983 and additional staff suggestions. Exhibit 2 sets out California statutes on these subjects.

Resignation of Trustees

Traditionally courts have been reluctant to let trustees escape responsibility by simply resigning. Courts have discretion to accept or reject the trustee's resignation and may refuse to permit resignation if it would be disadvantageous to the beneficiaries. However, it is also recognized that there is little point in forcing an unwilling trustee to remain. Trustees have been permitted to resign for ill health, where the trustee is planning to leave the country, where there is serious friction between the trustee and beneficiaries, and where the burdens of administering the trust have increased since the trust was accepted. See generally G. Bogert, *The Law of Trusts and Trustees* § 511, at 2-9 (rev. 2d ed. 1978) [hereinafter cited as Bogert, *Treatise*]; Restatement (Second) of Trusts § 106(a) & comment c. (1959) [hereinafter cited as Restatement]. Where a trustee has resigned for personal convenience, the trustee has been made liable for costs of the proceeding to obtain court approval, but in other cases, the costs may be payable out of the trust estate. G. Bogert, *Handbook of the Law of Trusts* § 31, at 104 (5th ed. 1973) [hereinafter cited as Bogert, *Handbook*].

A court proceeding is not necessary if the trust instrument provides the manner of resignation, such as by filing a written statement with other trustees. *Id.* at 104-05; Restatement § 106(b) & comment d. A trustee may also be allowed to resign where the consent of all the beneficiaries is obtained. Bogert, *Handbook* § 31, at 105; Restatement § 106(c) & comment e.

California law has several scattered provisions relating to trustee resignation. One procedure, formerly applicable to testatmentary trusts and now applicable to testamentary trusts that remain subject to judicial supervision, provides that the court "shall accept" the trustee's resignation made after distribution of the property, when notice is properly given and petition made. Prob. Code § 1125.1; see also Prob. Code § 1124 (named trustee may decline to act before distribution by filing paper with the court clerk). The procedure applicable to inter vivos trusts, and now also to unsupervised testamentary trusts, permits the trustee to resign at any time unless otherwise provided in the trust instrument. Prob. Code § 1138.8; see also Prob. Code § 1138.1(a)(9). The resignation procedure is governed by the trust instrument, but if no procedure is provided, the trustee may petition the court and the court "shall accept such resignation." Prob. Code § 1138.8. Civil Code Section 2282 also provides for the "discharge" of the trustee by the "consent of the beneficiary, if the beneficiary has capacity to contract." Thus it appears that California statutory law does not evidence any of the common law reluctance to permit a trustee to resign. Rather, the focus is on the resigning trustee's duty to turn over the property to the successor trustee and the trustee's continuing liability until the resignation is properly accomplished. This emphasis is entirely appropriate, although the manner in which it is accomplished by the existing statutes leaves room for improvement. The Commission should consider whether provision should be made for the costs of a proceeding where the trustee resigns for personal reasons. A staff draft of resignation provisions is included in Exhibit 1 as Sections 4570 and 4571. Draft Section 4570 makes clear that the court has discretion to accept the resignation, in place of the apparently mandatory acceptance of existing law.

Removal of Trustee

The court has the inherent power to remove a trustee where it is necessary to preserve the trust and protect beneficiaries. Bogert, Handbook § 160, at 573. Removal is a remedy for breach of trust, as discussed in Memorandum 34-23, but it is also the appropriate remedy where the trustee lacks capacity to administer the trust, has committed a crime involving dishonesty, is unfit due to old age, drunkenness, or

lack of ability, is absent from the jurisdiction, shows favoritism toward some beneficiaries, or unreasonably fails to cooperate with cotrustees. Restatement § 107 & comment b; see also Restatement § 387 (removal of charitable trustee).

California statutory law provides for removal of a trustee where the trustee has an interest adverse to that of the beneficiary and where the trustee "has violated or is unfit to execute the trust". Civil Code §§ 2233, 2283; Prob. Code § 1123.5. In the case of testamentary trusts subject to judicial supervision, the statutes also provide for removal of a cotrustee where "hostility, ill feeling, or continued lack of cooperation among and between cotrustees has impaired the proper administration of the trust." Prob. Code § 1123.5.

There does not appear to be any policy difference between California law and the common law regarding removal of trustees. The California statutory provisions are typically scattered and set up arbitrary differences between inter vivos and testamentary trusts. Compare Civil Code § 2283 and Prob. Code § 1138.1(a)(10), with Prob. Code § 1123.5. Some differences have resulted from jurisdictional technicalities. Until 1969, the probate court did not have authority to remove a trustee; a proceeding had to be brought in the superior court. See discussion in 7 B. Witkin, Summary of California Law Trusts § 33, at 5396 (8th ed. 1974). The staff draft does not propose to continue such jurisdictional distinctions. See Memorandum 84-29 (judicial administration).

Many state statutes refer to the removal of a trustee as provided in the trust, consistent with Restatement Section 107. See, e.g., Ind. Code Ann. § 30-4-3-29 (West 1979); La. Rev. Stat. Ann. § 9-1789 (West 1965); Tex. Prop. Code Ann. § 113.082 (Vernon 19__). The staff recommends a provision along these lines; see draft Section 4572 in Exhibit 1.

Vacation of Trustee's Office

In addition to resignation and removal, California Civil Code Section 2281 provides a number of other occurrences that result in a vacancy in the office of the trustee. These include the trustee's "discharge", insolvency (as evidenced by proceedings in bankruptcy), death, or revocation of corporate charter, where a guardian or conservator is appointed for an individual, or where a receiver is appointed for at least 30 days for a corporate trustee. "Discharge" is amplified in Civil Code Section 2282 which provides that discharge can occur only by

extinction of the trust, completion of duties under the trust, pursuant to the terms of the trust, with the consent of the beneficiary, or by the court. This statute seems to be aimed in several directions at once. Obviously a vacancy occurs if a trustee dies. Just as obviously, a trusteeship ceases when the trust is extinguished, although it is a puzzle why we need be concerned with a vacancy in a nonexistent trust.

Another feature of Section 2281 worthy of note is that it appears to operate without the necessity of any court proceeding in certain circumstances. As noted above, the trustee's insolvency or incompetence have been considered grounds for removal. Under traditional concepts, however, there would need to be some court determination of the insolvency of the trustee made on petition of some interested person before the vacancy would occur. It might also be asked what would happen if a corporate trustee is in receivership for 30 days but continues to act as trustee without objection. The staff suspects that it would be better if parts of Sections 2281 and 2282 were continued as grounds for resignation or removal rather than as automatic vacancy triggers. Corporate or corporal death, of course, may be continued as automatically causing vacancies, although it might be asked whether something so obvious (at least as to individual trustees) need be codified. In sum, the unnecessarily confusing vacancy and discharge provision should be greatly simplified along the lines proposed in the draft statute attached as Exhibit 1. See draft Section 4573.

Appointment of Trustees

If a trust is without a trustee, whether through declination, disclaimer, resignation, removal, or some other factor creating a vacancy, the court may appoint a trustee to fill the vacancy. Restatement § 108 & comments a-e; Bogert, Handbook § 32, at 110-11. The vacancy may be filled by a procedure or person designated in the trust instrument without the need for court action. Restatement § 108(b) & comments f & g. However, the beneficiaries do not have the power to select a new trustee unless that is the method specified in the trust. Restatement § 108 comment i. The wishes of the beneficiaries will be considered by the court in selecting a new trustee although the court is not bound to follow them. Bogert, Handbook § 32, at 112; Restatement § 108 comment i. In some situations the court may decline to appoint a trustee, such

as where the trust can be adequately administered by remaining cotrustees or where the appointment would be superfluous, as when the only duty left is to convey property. See Restatement § 108 comment b; Bogert, Handbook § 32, at 109-110.

California law is in general accord with these principles, but as usual we find the statutes scattered, overlapping, and somewhat contradictory. Civil Code Section 2287 provides for appointment of a trustee by the superior court when there is a vacancy and the "trust does not provide a practical method of appointment" (emphasis added). Civil Code Section 2289 provides for filling vacancies where the trust has no appointed trustee or where all trustees renounce, die, or are discharged, with no mention made of following provisions in the trust instrument. Probate Code Section 1138.8, applicable to inter vivos and nonsupervised testamentary trusts, provides that the appointment of a successor to a resigning trustee "shall be effected as provided in the trust instrument" but if the trust is "silent" a trustee may be appointed by the court. Probate Code Section 1138.9 provides generally for filling vacancies where the trust "does not provide a method for appointing a successor trustee" (emphasis added). Probate Code Section 1125 and 1126 provide two similar procedures applicable now to supervised testamentary trusts depending upon whether the vacancy arises before or after distribution to the trustee. A comparison of these six statutes will reveal many inconsistencies and raise many questions.

Civil Code Section 2287 recognizes that the court should take the wishes of the beneficiaries into account: "Other things being equal, the court shall give preference to the nominee of beneficiaries of the trust who are over fourteen years of age." It is unclear why in 1911 the specific reference to beneficiaries over 14 was added, although provisions in other areas also refer to 14 year olds. See Prob. Code §§ 1510, 1511, 2250 (guardianship). The staff suggests that the Commission consider eliminating this detail from trust law. It appears that the court has broad discretion in any event, since the sentence begins with the qualifying language "other things being equal". A court that wants to ignore the nominee of a 14 year old should have no trouble finding that other things are not equal.

One other aspect of the California statutes deserves special mention. Civil Code Section 2289 permits the court to appoint the original number of cotrustees where all have renounced, died, or are discharged, or to appoint a lesser number. This is consistent with the common law as

outlined above, although under the common law in some circumstances the court can also appoint a greater number of trustees or add trustees if to do so would result in better administration of the trust. See Restatement § 108 comment e. It is unnecessary to continue this provision of Section 2289; in its first part, it is merely a case of the general rule that the court may appoint or decline to appoint cotrustees, and in its concluding part, it is an unnecessary limitation on the power of the court to appoint additional trustees if necessary to accomplish the proper administration of the trust.

In 1983 the Commission also decided that the possibility of selection of a successor by the trustee and all beneficiaries should be considered as part of Professor Gail Bird's study on modification of trusts.

The staff draft of provisions for appointment of trustees is in Exhibit 1 as draft Section 4580.

Compensation of Trustees

Amount of Compensation

The trustee is entitled to the compensation specified in the trust instrument; if the trust instrument does not provide for compensation of the trustee, the trustee is entitled to reasonable compensation. Civil Code § 2274; Prob. Code §§ 1122, 1138.1(a)(7); Restatement § 242. Even where the trust provides for the amount of compensation, the court may allow greater compensation in special circumstances spelled out by statute. See Civil Code § 2274; Prob. Code § 1122; Restatement § 242 comment f. In California, the statutory formulation of these special circumstances is the result of legislative reaction to particular decisions. See 7 B. Witkin, Summary of California Law Trusts § 80, at 5440-41 (8th ed. 1974); Review of Selected 1972 California Legislation, 4 Pac. L.J. 211, 569-70 (1973).

Draft Sections 4500-4502 would continue existing California law. See Exhibit 1. The draft would not continue the provision of existing Civil Code Section 2274 that the "superior court shall have jurisdiction to determine any compensation provided by this section in an action, brought by the trustee, to which all interested persons are made parties." The matter of compensation of the trustee should be determined through the general procedures for petitioning the superior court and are included in those provisions. See Memorandum 84-29.

By combining the provisions relating to supervised testamentary trusts and inter vivos trusts, the staff draft makes the provision permitting the court to fix periodic compensation as to supervised testamentary trusts applicable to all trusts. See Prob. Code § 1122. This appears to be consistent with Probate Code Section 1138.1(a)(7) which permits the court to fix, direct, or allow compensation in accordance with Civil Code Section 2274.

Related Provisions

Draft Section 4470 (attached to Memorandum 84-22) is consistent with the rule that a trustee may pay itself reasonable fees without the necessity of first obtaining court approval. See Estate of Gilfillan, 79 Cal. App.3d. 429, 144 Cal. Rptr. 862 (1978) (interpreting Prob. Code § 1122 and upholding Los Angeles Superior Court policy memorandum). The general procedure for court approval of the trustee's accounts and allowing fees upon petition of an interested person provides the means for passing upon the reasonableness of the compensation. See Memorandum 84-29.

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

As to the problem of allocating the expense of the trustee's compensation between principal and income beneficiaries, see Memorandum 84-32.

Additional Issues Relating to Compensation

We do not propose to codify any additional case law or Restatement rules regarding trustees' compensation. For instance, there may be some question regarding whether a specific bequest in a will is intended as compensation for the trustee. See Ellis, Trustees and Administrative

Provisions, in California Will Drafting Practice § 14.30, at 671 (Cal. Cont. Ed. Bar 1982). Nor do we propose to set a customary rate of compensation, such as has been done by local rules. See id. § 14.28, at 669.

The Restatement gives several rules that we have not undertaken to codify. For example, the amount of compensation to which the trustee would otherwise be entitled may be increased or decreased by agreement between the trustee and the beneficiaries. Restatement § 242 comment i. A trustee may waive compensation. Id. comment j. In the case of successor trustees, each trustee is entitled to compensation for the value of services rendered. Id. comment m; In re Trust of Leavitt, 8 Cal. App. 756, 758-61, 97 P. 916 (1908). Another problem may arise where the same person is executor and trustee. In California, the person is not entitled to compensation as a trustee until the duties as executor are completed. Bemmerly v. Woodward, 136 Cal. 326, 331, 68 P. 1017 (1902). Compare Restatement § 243 comment k (court may award compensation in addition to that under executor's fee schedule).

Compensation may also be affected where the trustee has committed a breach of trust. In such a case the court may deny compensation or reduce the compensation the trustee would otherwise receive. See Restatement § 243. This subject is discussed in connection with remedies for breach in Memorandum 84-23. The Restatement notes in comment a that reduction or denial of compensation is not in the nature of a penalty for breach, but is based on the idea that the trustee has not given proper services which would entitle the trustee for compensation. This power of the court applies even where the compensation is set by the trust or by statute, and even though an exculpatory provision may avoid liability for the breach. Restatement § 243 comments e & g.

Law in Other Jurisdictions

It appears that at least 27 jurisdictions provide a "reasonable compensation" rule, as does California. Bogert, Handbook § 144, at 513 n. 14. About 13 jurisdictions provide a statutory fee schedule. Id. at 514 n. 15. Presumably the remainder follow the reasonable compensation rule as an exercise of equitable power. Of course, to a large extent, trustees' fees will be set by operation of corporate fee schedules. See id. at 511-12.

Trustee's Bond

Under California law, a trustee named in a will or inter vivos trust instrument is not required to give bond unless the instrument otherwise requires. However, bond is required of a testamentary trustee appointed by the court, except in the case of a nonprofit corporation acting within the scope of its charitable purposes. Prob. Code §§ 1127, 1127.5. It has been held that bond may be waived if all creditors and beneficiaries give their consent and there are no minor or unascertained beneficiaries. Estate of Shapiro, 79 Cal. App.2d 731, 181 P.2d 117 (1947). Drafting manuals suggest that bond is ordinarily an unnecessary expense, and that if it is felt that bond is needed, then perhaps a different trustee should be selected. See, e.g., Ellis, Trustees and Administrative Provisions, in California Will Drafting Practice § 14.26, at 666 (Cal. Cont. Ed. Bar 1982). It has been suggested that bond be required of a nonresident trustee. See 3 J. Goddard, Probate Court Practice § 1819 (2d ed. 1977). It has also been suggested that an attorney who drafts a will or trust instrument naming the attorney as trustee should include a provision requiring bond. Moltzen, The Lawyer and Will Drafting, in California Will Drafting § 1.38, at 21-22 (Cal. Cont. Ed. Bar 1965).

All 50 states and the District of Columbia have some legislation relating to trustees bonds, and the schemes are predictably varied. See Bogert, Treatise § 151, at 93-105 n. 70. The most influential scheme is that provided in Uniform Probate Code Section 7-304 which appears to be enacted in at least 10 states. Uniform Probate Code Section 7-304 provides that a bond is not required unless (1) required by the terms of the trust, (2) reasonably requested by a beneficiary, or (3) found by the court to be necessary to protect interests of incapacitated or unrepresented beneficiaries. The general rules governing bonds of personal representatives under UPC Sections 3-604 and 3-606 apply to trustee's bonds, when required. Section 7-304 also permits the court to excuse bond or reduce its amount upon a petition of the trustee or other interested person but no standard is provided.

Draft Section 4551 in Exhibit 1 is drawn from UPC Section 7-304 and reflects decisions made by the Commission in 1983. This section would provide a general rule subject to several exceptions; California law

currently provides only limited and unrelated exceptions to an otherwise unstated rule. Subdivision (a)(4) answers the question whether a bond is required if a will or inter vivos trust nominates rather than appoints a successor trustee. It is unclear under Probate Code Section 1127 whether bond is required of a trustee appointed by the court consistent with the testator's nomination. See California Will Drafting Supplement § 17.21, at 259 (Cal. Cont. Ed. Bar 1981).

The draft section leaves some additional questions unanswered. For example, can the court require bond of a corporate trustee? This question may arise if a corporate trustee is appointed as a successor not named in the trust, where a beneficiary petitions for bond, or where the trust calls for bond. The staff would prefer to leave these questions to the discretion of the court to avoid unnecessary expense while providing protection when needed. The Commission earlier decided to continue the requirement that successor trustees not named in the trust furnish bond. This requirement apparently would not apply to corporate trustees appointed as successor trustees under testamentary trusts. See Prob. Code §§ 451, 1127. However, the law is somewhat confusing since Probate Code Section 1127.5 provides an exception to the bond requirement for nonprofit corporations which would seem to be unnecessary if corporate trustees in general could not be required to give bond by operation of Probate Code Section 541. Trust companies are required to deposit with the State Treasurer money or securities in the amount of \$50,000 or \$100,000 (depending on the size of the city where located) plus \$50,000 for each additional \$500,000 worth of trust assets up to a maximum security of \$500,000. Fin. Code §§ 1540. Hence, there is generally no need for a bond as to a given trust, but the situation could perhaps arise where a court would be justified in requiring additional bond. It is also interesting to note that these amounts were set in 1951.

The staff suggests that the Commission consider making clear either that a corporate trustee is never required to give bond or that the court has discretion in all cases to require corporate trustees to furnish a bond. State statutes generally excuse bond for corporate trustees that have qualified to conduct a trust business under the state's laws. See statutes cited in Bogert, Treatise § 151, at 93-105 n. 70. For example, Section 113.058(a) of the Texas Trust Code provides that a "corporate trustee is not required to provide a bond to secure

performance of its duties as trustee." Section 2171 of the Louisiana Trust Code excuses corporate trustees "unless security is required by the trust instrument," but Section 2172 gives the court authority to require "security adequate to protect the interests of a beneficiary even if the trustee is not otherwise required to furnish security." It would be consistent with the general policy holding fiduciaries accountable to make clear that the court has discretion to require any trustee, corporate or individual, profit or charitable, to furnish adequate security when the circumstances call for it.

Miscellaneous Matters

Actions by Cotrustees

If there are two or more trustees, under the common law they hold their powers jointly and all must unite in the administration of the trust unless the trust provides otherwise. Bogert, Handbook § 91, at 328; Restatement § 194. This rule is codified in California. See Civil Code §§ 860, 2268; see also Civil Code § 2288 (survivorship among cotrustees). However most states having statutes on this subject have adopted the rule that a majority of cotrustees may act unless the trust provides otherwise. See Bogert, Treatise § 554, at 103 n. 2. Section 6(a) of the Uniform Trustees' Powers Act also adopts the rule permitting action by a majority.

California applies the majority rule in the case of multiple executors as provided in Probate Code Section 570. When this matter was considered in 1983, the Commission decided to provide for action by a majority of cotrustees; this decision is implemented in draft Section 4560 in Exhibit 1.

Certificate of Incumbency

Probate Code Section 1130.1 provides for issuance of a certificate by the court clerk showing that the trustee of a testamentary trust is "duly appointed and acting" as trustee under the trust. Although there was some question about the utility of this certificate, and it appears that such certificates are issued only on very rare occasions, the Commission decided in 1983 to continue the existing law, but expand its coverage to inter vivos trusts if the court file provided sufficient information to enable the clerk to issue the certificate. The broadened

provision is included in Exhibit 1 as draft Section 4550. However, the staff urges the Commission to consider eliminating this provision since its purpose is unclear. As to the problems confronted by third persons dealing with trustees, see Memorandum 84-24.

Respectfully submitted,

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EXHIBIT 1

Staff Draft of Provisions Relating to Office of Trustee

CHAPTER 3. COMPENSATION AND EXPENSES OF TRUSTEES

317 79

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

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

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

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

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

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

Comment. Section 4500 continues the substance of the first and second sentences of former Civil Code Section 2274, and the first and second sentences of former Probate Code Section 1122. See Section 4630(b)(9) (petition to fix compensation).

Note. Draft Section 4630 is attached to Memorandum 84-29.

31797

§ 4501. Trustee's compensation where trust silent

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

Comment. Section 4501 continues the substance of the third sentence of former Civil Code Section 2274 and part of the third sentence of former Probate Code Section 1122. The trustee has authority to fix its compensation under Section 4470 subject to court review. See also Section 4630(b)(9) (petition to fix compensation).

Note. Draft Section 4470 is attached to Memorandum 84-22. Draft Section 4630 is attached to Memorandum 84-29.

§ 4502. Compensation of cotrustees

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

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

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CHAPTER 5. OFFICE OF TRUSTEE

Article 1. General Provisions

136 16

§ 4550. Certificate of trustee

4550. Upon application of a trustee, the court clerk shall issue a certificate that the trustee is a duly appointed and acting trustee under the trust if the court file shows the incumbency of the trustee.

Comment. Section 4550 continues the substance of former Section 1130.1, and expands the former provision to cover inter vivos trusts.

14919

§ 4551. Trustee's bond

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

- (1) Where bond is required by the terms of the trust.
- (2) Where bond is reasonably requested by a beneficiary, notwithstanding a waiver of bond in the trust instrument.
- (3) Where bond is found by the court to be necessary to protect the interests of beneficiaries who are not able to protect themselves and whose interests otherwise are not adequately represented.
- (4) Where an individual trustee who is not named in the trust instrument is appointed by the court as successor trustee.

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

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

[(d) Except as otherwise provided in the trust or ordered by the court, the cost of the bond shall be charged against the trust in the amount applicable to executor's bonds under Section 541.5.]

Comment. Section 4551 is drawn from Uniform Probate Code Section 7-304. Subdivision (a)(4) continues the substance of former Section 1127, but makes clear that it applies only to an individual trustee who is not named as successor or nominated as successor in the trust instrument. In other respects this section supersedes former Sections 1127 (bond of trustee named by court) and 1127.5 (exception for substitute or successor trustee that is charitable corporation). [Subdivision (d) supersedes the second sentence of former Section 1127.]

Note. Some material in subdivision (b) may be unnecessary in light of the general bond provisions in Code Civ. Proc. §§ 995.010-996.560.

405/602

§ 4552. Trustee's office not transferable

4552. Except as otherwise provided in the trust, the trustee may not transfer the office of trustee to another person or delegate the entire administration of the trust to another person or to a cotrustee.

Comment. Section 4552 is drawn from Section 4 of the Uniform Trustees' Powers Act (1964), but the introductory clause makes clear that the general rule may be varied by the governing trust instrument.

Article 2. Cotrustees

405/604

§ 4560. Actions by cotrustees

4560. Except as otherwise provided in the trust:

(a) A power vested in three or more trustees may be exercised by a majority of the trustees.

(b) A power vested in two trustees may only be exercised by unanimous action.

Comment. Section 4560 supersedes the first part of former Civil Code Section 860 and former Civil Code Section 2268, which required unanimous action by cotrustees unless the trust otherwise provided. The old rule is retained in subdivision (b) as applied to trusts with only two trustees. Section 4560 is consistent with the rule applicable to co-executors under Section 570, and also Section 6(a) of the Uniform Trustees' Powers Act (1964).

§ 4561. Inability of cotrustee to act

4561. Except as otherwise provided in the trust, if a cotrustee dies, becomes legally incapable of acting, resigns, disclaims, or is discharged, the remaining cotrustees may act.

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

12326

Article 3. Trustees' Resignation, Removal, and Vacancy

§ 4570 Resignation of trustee

4570. (a) A trustee who has accepted the trust may resign only in one of the following manners:

(1) In accordance with the terms of the trust.

(2) With the consent of all the beneficiaries, if they have capacity to give consent.

(3) Pursuant to court order obtained as provided in subdivision (b).

(b) The court may in its discretion, and on petition of the trustee, accept the trustee's resignation. The court may also make any orders necessary for the preservation of the trust property, including the appointment of a receiver or temporary trustee.

Comment. Subdivision (a) of Section 4570 is the same in substance as Section 106 of the Restatement (Second) of Trusts (1959). Subdivision (a)(1) continues the substance of part of the second sentence of former Section 1138.8. Subdivision (a)(2) continues the substance of former Civil Code Section 2282(d). Subdivision (a)(3) continues the authority of the court under former law. See former Civil Code §§ 2282(e), 2283; former Prob. Code §§ 1125.1, 1138.1(a)(9), 1138.8. Under subdivision (a)(3) the court has authority to accept a resignation regardless of whether the trust provides a manner of resignation. Former Section 1138.8 permitted the court to act where the trust was silent.

Subdivision (b) makes clear that the court has discretion to accept the trustee's resignation. See Restatement (Second) of Trusts § 106 comment c. This provision supersedes part of the last sentence of the first paragraph of former Section 1125.1 and part of the third sentence of former Section 1138.8. The authority for protective orders continues the substance of part of the last sentence of the first paragraph of former Section 1125.1, part of the third sentence of former Section 1138.8, and former Section 1138.2. See also Section 4634 (general authority to make necessary orders). For the procedure applicable to proceedings under subdivision (b), see Section 4600 et seq. See also Section 4630(b)(11) (petition to accept resignation of trustee).

Note. Draft Sections 4600, 4630, and 4634 are attached to Memorandum 84-29.

§ 4571. Liability of resigning trustee

4571. The liability of a resigning trustee or the sureties on the trustee's bond, if any, is not released or affected in any manner by the trustee's resignation.

Comment. Section 4571 continues the substance of part of the second paragraph of former Section 1125.1 and part of the last sentence of former Section 1138.8. For provisions governing the discharge of the trustee's liability, see Sections _____.

37968

§ 4572. Removal of trustee

4572(a). A trustee may be removed in accordance with the terms of the trust or by the court on its own motion or on petition of an interested person.

(b) The grounds for removal of a trustee by the court include the following:

(1) Where the trustee has committed a breach of the trust.

(2) Where the trustee is incompetent, insolvent, or otherwise unfit to administer the trust.

(3) In the case of cotrustees, where hostility, ill feeling, or lack of cooperation among cotrustees impairs the administration of the trust.

(4) For other cause, in the discretion of the court.

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

Comment. Subdivision (a) of Section 4572 is the same in substance as Section 107 of the Restatement (Second) of Trusts (1959). The authority of the court to remove trustees continues authority found in former law. See former Civil Code §§ 2233, 2283; former Prob. Code §§ 1123.5, 1138.1 (a)(10). The recognition that the trustee may be removed as provided in the trust instrument is new. See Restatement (Second) of Trusts § 107 comment h (1959). The authority for removal on the court's own motion

is drawn from the third sentence of former Section 1123.5. For the procedure applicable to judicial removal proceedings, see Section 4600 et seq. See also Sections 4630(b)(10) (petition to remove trustee), 48 ("interested person" defined).

The statement of grounds for removal of the trustee by the court is drawn from Texas law and the Restatement. See Tex. Prop. Code Ann. § 113.082(a) (Vernon 19__); Restatement (Second) of Trusts § 107 comments b-d (1959). Paragraphs (1) and (2) of subdivision (b) continue the substance of parts of former Civil Code Sections 2233 and 2283 and of part of the first sentence of former Probate Code Section 1123.5. Paragraph (3) of subdivision (b) continues part of the third sentence of former Probate Code Section 1123.5.

Subdivision (c) is drawn from former Sections 1123.6 and 1138.2. See also Section 4634 (general authority to make necessary orders).

Note. Draft Sections 4600, 4630, and 4634 are attached to Memorandum 84-29. "Interested person" is defined in Section 48 which reads in relevant part as follows:

(a) Subject to subdivision (b), "interested person" includes any of the following:

(1) An heir, devisee, child, spouse, creditor, beneficiary, and any other person having a property right in or claim against a trust estate . . . which may be affected by the proceeding.

. . . .

(3) A fiduciary representing an interested person.

(b) The meaning of "interested person" as it relates to particular persons may vary from time to time and shall be determined according to the particular purposes of, and matter involved in, any proceeding.

405 412

§ 4573. Occurrence of vacancy in office of trustee

4573. The office of a trustee is vacated when the trustee resigns, is removed, or upon the occurrence of any of the following:

(a) The death of an individual trustee.

(b) The appointment of a conservator or guardian of the person or estate of an individual trustee.

(c) The revocation of the charter or suspension of the powers of a corporate trustee if the revocation or suspension remains in effect for a period of 30 days.

(d) The appointment of a receiver for a corporate trustee if the appointment is not vacated within a period of 30 days.

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

Comment. Section 4573 continues the substance of subdivisions (1) and (2) of former Civil Code Section 2281, with the exception of the reference to discharge of the trustee. See also Sections _____ (protection of third persons dealing with trustee whose office is vacated), _____ (release from liability).

405 441

§ 4574. Delivery of property by resigning or removed trustee

4574. A trustee who resigns, is removed or holds property of the trust after a vacancy has otherwise occurred in the office of trustee shall deliver the trust property to the successor trustee or a person appointed by the court to receive the property.

Comment. Section 4574 supersedes part of the second paragraph of former Section 1125.1 and part of the last sentence of former Section 1138.8.

405 756

Article 4. Appointment of Trustees

§ 4580. Appointment of new trustee

4580. (a) If a trust is created without a trustee or if a vacancy in the office of trustee occurs, a new trustee may be appointed in one of the following manners:

(1) In accordance with the terms of the trust, if the trust provides a practical method of appointing a trustee.

(2) Pursuant to court order obtained as provided in subdivision (b).

(b) The court may, in its discretion and on petition of an interested person, appoint a trustee to fill the vacancy. If the trust provides for more than one trustee, the court may, in its discretion, appoint the original number or any lesser number of trustees. In selecting a trustee, the court shall give consideration to the wishes of the beneficiaries.

Comment. Section 4580 continues the general substance of former law. See former Civil Code §§ 2287, 2289; former Prob. Code §§ 1125, 1126, 1138.9. For a provision governing the occurrence of vacancies in the office of trustee, see Section 4573. The provision in subdivision (a)(1) relating to a "practical" method of appointing a trustee continues the substance of the first sentence of former Civil Code Section 2287. See also former Prob. Code § 1138.9.

The authority of the court to appoint the same or a lesser number of trustees in subdivision (b) continues the second sentence of former Civil Code Section 2289. This provision is not intended to limit the authority of the court in appropriate circumstances to appoint an additional trustee or a greater number than provided in the trust. See Restatement (Second) of Trusts § 108 comment e (1959). The provision

requiring the court to give consideration to the wishes of the beneficiaries in subdivision (b) supersedes the second sentence of former Civil Code Section 2287. See Restatement (Second) of Trusts § 108 comment 1 (1959). For the procedure applicable to judicial appointment proceedings, see Section 4600 et seq. See also Sections 4630(b)(10) (petition to appoint trustee), 48 ("interested person" defined).

Note. Draft Sections 4600 and 4630 are attached to Memorandum 84-29.

EXHIBIT 2

Selected Statutes Relating to Office of Trustee

CIVIL CODE

168 88

§ 860 (repealed). Execution of joint powers

Where a power is vested in several persons, all must unite in its execution; but, in case any one or more of them is dead, is legally incapable of exercising the power, or releases the power, the power may be executed by the others, unless otherwise prescribed by the terms of the power.

Comment. The substance of the first part of former Section 860 is not continued. See Prob. Code § 4560 (actions by majority of cotrustees). The second part is superseded by Probate Code Section 4561 (inability of cotrustee to act). See also Civil Code § 1385.4 (joint exercise of powers of appointment).

§ 2260 (repealed). Trustee's care and diligence as to appointment of successor

DUTY OF TRUSTEE AS TO APPOINTMENT OF SUCCESSOR. If a trustee procures or assents to his discharge from his office, before his trust is fully executed, he must use at least ordinary care and diligence to secure the appointment of a trustworthy successor before accepting his own final discharge. (Enacted 1872.)

Comment. Former Section 2260 is not continued because it is unnecessary. See Prob. Code § 4300 (general duty of trustee).

§ 2268 (repealed). Actions by cotrustees

ALL MUST ACT. Where there are several co-trustees, all must unite in any act to bind the trust property, unless the declaration of trust otherwise provides. (Enacted 1872.)

Comment. Former Section 2268 is not continued. See Prob. Code § 4560 (majority of cotrustees may act unless trust otherwise provides).

§ 2274 (repealed). Trustee's compensation

If the declaration of trust contains provisions for a trustee's compensation, the trustee shall be entitled to be compensated in accordance therewith. Upon proper showing, the court may fix or allow greater compensation than could be allowed under the provisions of the trust (1) where the duties of the trustee are substantially greater than those contemplated at the creation of the trust, or (2) where the compensation in accordance with the provisions in the trust would be * * * inequitable or unreasonably low * * *, or (3) in other extraordinary circumstances calling for equitable relief. If a declaration of trust does not specify the trustee's compensation, the trustee shall be entitled to such compensation as may be reasonable under the circumstances. Unless the declaration of trust provides or the trustees agree otherwise, if there are two or more trustees, the compensation shall be apportioned among the trustees according to the services rendered by them respectively. The superior court shall have jurisdiction to determine any compensation provided by this section in an action, brought by the trustee, to which all interested persons are made parties.

Comment. The substance of the first and second sentences of former Section 2274 is continued in Probate Code Section 4500. The substance of the third sentence is continued in Probate Code Section 4501. The substance of the fourth sentence is continued in Probate Code Section 4502. The last sentence is superseded by Probate Code Section 4630(b)(9).

§ 2281 (repealed). Vacation of office of trustee

The office of a trustee is vacated:

(1) In the case of an individual trustee, by—

(a) His discharge;

(b) His death;

(c) Appointment of a conservator or guardian of his person or estate; or

(d) The filing by him of a petition for adjudication of bankruptcy or for approval of an arrangement, composition or other extension under the National Bankruptcy Act, or the approval for a petition filed against him for any of said purposes.

(2) In the case of a corporate trustee by—

(a) Its discharge;

(b) Revocation of its charter or suspension of its corporate powers, if its charter shall remain revoked or its powers remain suspended for a period of thirty (30) days;

(c) Appointment of a receiver for such trustee if such appointment shall not be vacated within a period of thirty (30) days; or

(d) The filing by it of a petition for adjudication of bankruptcy or for approval of an arrangement, composition or other extension under the National Bankruptcy Act, or the approval of a petition filed against it for any of said purposes.

Provided, that any bona fide transaction entered into with such trustee by any person acting without actual knowledge that his or its office has been vacated as herein provided shall be binding on all parties.

The provisions of this section shall extend and apply to trustees under deeds of trust given to secure obligations.

Comment. The substance of the first paragraph of former Section 2281 relating to occurrence of vacancies is continued in Probate Code Section 4573. The substance of the second paragraph is continued in Probate Code Section ____ (protection of third person dealing with former trustee). The substance of the third paragraph is continued in Civil Code Section ____ (application to deeds of trust).

406 124

§ 2282 (repealed). Discharge of trustee

A trustee can be discharged from his or her trust only as follows:

(a) By the extinction of the trust,

(b) By the completion of his or her duties under the trust,

(c) By such means as may be prescribed by the declaration of trust,

(d) By the consent of the beneficiary, if the beneficiary has capacity to contract,

• • •

(e) By the superior court.

Comment. The parts of former Section 2282 relating to discharge from liability are superseded by Probate Code Section _____. The parts of former Section 2282 relating to removal of trustees are continued in Probate Code Section 4572.

§ 2283 (repealed). Removal of trustee by superior court

The superior court may remove any trustee who has violated or is unfit to execute the trust, or may accept the resignation of a trustee. This section shall not, however, apply to a trustee of a trust created by a will admitted to probate in any court of this state.

Comment. The substance of the first sentence of former Section 2283 is continued in Probate Code Sections 4572 (removal of trustee) and 4570 (resignation of trustee). See also Prob. Code § 4601 (jurisdiction in superior court). The second sentence is not continued.

§ 2287 (repealed). Appointment of trustees by superior court

The superior court shall appoint a trustee whenever there is a vacancy and the declaration of trust does not provide a practical method of appointment. Other things being equal, the court shall give preference to the nominee of beneficiaries of the trust who are over fourteen years of age.

Comment. The substance of the first sentence of former Section 2287 is continued in Probate Code Section 4580(a). The second sentence is superseded by the more general language in the last sentence of Probate Code Section 4580(b) (consideration of wishes of beneficiaries).

§ 2288 (repealed). Survivorship among cotrustees

SURVIVORSHIP BETWEEN CO-TRUSTEES. On the death, renunciation, or discharge of one of several co-trustees the trust survives to the others. (Enacted 1872.)

Comment. Former Section 2288 is superseded by Probate Code Section 4561.

§ 2289 (repealed). Appointment of trustees by superior court

When a trust exists without any appointed Trustee, or where all the Trustees renounce, die, or are discharged, the Superior Court of the county where the trust property, or some portion thereof, is situated, must appoint another Trustee, and direct the execution of the trust. The Court may, in its discretion, appoint the original number, or any less number of Trustees.

Comment. The first sentence of former Section 2289 is superseded by Probate Code Section 4580. The substance of the second sentence is continued in Probate Code Section 4580(b).

PROBATE CODE

999 554

§ 1122 (repealed). Compensation of trustee

If the will contains provisions for a trustee's compensation, the trustee shall be entitled to be compensated in accordance therewith. Upon proper showing, the court may in the decree of distribution or thereafter fix or allow greater compensation than could be allowed under the provisions of the will (1) where the duties of the trustee

are substantially greater than those contemplated by the testator at the time of the signing of the will, or (2) where the compensation in accordance with the provisions in the will would be inequitable or unreasonably low, or (3) in other extraordinary circumstances calling for equitable relief. If the will does not specify a trustee's compensation, the trustee shall be entitled to such compensation as may be reasonable under the circumstances and the court may, in the decree of distribution or thereafter, determine such reasonable compensation and, in its discretion, fix or allow a periodic compensation for the trustee or trustees, to continue as long as it may deem proper. Unless the will provides or the trustees agree otherwise, if there are two or more trustees, the compensation shall be apportioned among the trustees according to the services rendered by them respectively. On settlement of each account the court shall allow the testamentary trustee his proper expenses and compensation for services as provided herein.

Comment. The substance of the first and second sentences of former Section 1122 are continued in Section 4500. The reference to the decree of distribution is not continued. See Section 4602 (proper court). The substance of the first part of the third sentence is continued in Section 4501 (compensation where trust silent). The remainder of the third sentence is superseded by Section 4630(b)(9) (petition to fix compensation). The substance of the fourth sentence is continued in Section 4502 (compensation of cotrustees). The last sentence is superseded by Section 4630(b)(5) (petition for approval of accounts). See also Section 4470 (trustee's power to pay compensation and expenses).

999 555

§ 1123.5 (repealed). Removal of trustee

The court in which the administration is pending or, after final distribution, the court sitting in probate which has jurisdiction over a testamentary trust shall have power to remove a trustee of a testamentary trust, whether or not any property has been distributed to him, who has violated or is unfit to execute the trust or has acquired any interest or become charged with any duty adverse to the interest of any beneficiary in the subject of the trust. The court may remove one or all of the cotrustees of a testamentary trust and appoint new trustees where the court determines that hostility, ill feeling, or continued lack of cooperation among and between cotrustees has impaired the proper administration of the trust. The proceeding may be initiated by the court upon its own motion or by verified petition of a beneficiary of, or any other person interested in, the trust, including any person in being who shall or may participate in the corpus or income of the trust. The clerk shall set the matter for hearing and post notice in the manner prescribed by Section 1200. The trustee whose removal is sought shall be personally served with a copy of the motion or petition and with notice of the time and place of the hearing thereon, at least 10 days before the hearing, provided, that if such trustee is not a resident of this state, or has absconded or concealed himself from the state, the court may fix the manner of giving notice to him by mail, publication or otherwise, as the court may determine, and the court may proceed upon such notice as if the

trustee had been personally served. In addition, the petitioner, or the court when acting upon its own motion, shall cause a copy of the petition or motion and of the notice of hearing to be mailed to the personal representative, if any part of the estate remains to be distributed to the trustee, and to each cotrustee and to the beneficiaries, including therein all persons in being who shall or may participate in the corpus or income of the trust, at their last known or other addresses, as provided in Section 1200, whether any of the persons to whom notice is to be given have requested special notice or given notice of appearance, or to be personally served upon such persons.

Comment. Former Section 1123.5 is superseded by Section 4572 (removal of trustee by court). See also Section 4600 et seq. (judicial administration of trusts).

§ 1125 (repealed). Filling vacancies before distribution

The court in which the administration is pending shall have power, at any time before final distribution, to appoint some fit and proper person to fill any vacancy in the office of trustee under the will, whether resulting from such declination, removal, or otherwise, if such appointment is necessary to carry out the trust. Such appointment may be made by the court upon the written application of any person interested in the trust, filed in the probate proceedings, and shall be made only after notice to all parties interested in the trust, given as required by Section 328 upon a petition for the probate of a will.

Comment. Former Section 1125 is superseded by Sections 4580 (court appointment of trustee) and 4630(a), (b)(10) (petition to appoint trustee).

§ 1125.1 (repealed). Petition of resignation of trustee

Any person named or designated as trustee in a will or any successor trustee, may, at any time after the distribution of any of the estate to him, file with the court a petition tendering his resignation as such trustee and setting forth the names and addresses of all living beneficiaries known to said resigning trustee. The clerk shall set the petition for hearing by the court and give notice thereof by causing a notice to be posted at the courthouse of the county where the petition is filed, giving the name of the decedent, the name of the petitioner and the time when the petition will be heard. Such notice must be given at least ten days before the hearing. The clerk shall cause a similar notice to be mailed, postage prepaid, to the beneficiaries named in the petition, at least ten days before the hearing, addressed to them at their respective post-office addresses, as set forth in the petition, otherwise at the county seat of the county where the proceedings are pending. The court shall accept such resignation, making any order which may be necessary for the preservation of the estate.

The liability of the said resigning trustee or of the sureties on his bond shall not in any manner be discharged, released, or affected by such resignation, but shall continue until the said trustee has delivered up all of the estate to the person whom the court shall appoint to receive the same.

Comment. The first paragraph of former Section 1125.1 is superseded by Section 4570 (resignation of trustee). See also Section 4630(b)(11) (petition to accept resignation). The substance of the first part of the second paragraph is continued in Section 4571 (liability of resigning trustee). The remainder of the second paragraph is superseded by Section 4574.

§ 1126 (repealed). Filling vacancies after distribution

If after distribution a trustee of a testamentary trust dies, resigns, fails or declines to act, cannot be identified, or is for any reason incapable of acting, or is removed or a vacancy in the trusteeship is otherwise created or exists, the court which has jurisdiction over the trust shall have the power to declare a vacancy and appoint a trustee to fill the vacancy, upon the petition of anyone interested in the trust estate and notice given for the period and in the manner required by Section 1200 of this code. The petitioner shall cause notice of the hearing to be mailed to the beneficiaries and to any trustee as provided in said Section 1200, whether they have requested special notice or given notice of appearance or not.

Comment. Former Section 1126 is superseded by Sections 4580 (court appointment of trustee) and 4630(a), (b)(10) (petition to appoint trustee). See also Section 48 ("interested person" defined).

§ 1127 (repealed). Trustee's bond

Except as provided in Section 1127.5, the person appointed under Section 1125 or Section 1126 of this code, before acting as trustee, shall give a bond such as is required of a person appointed administrator. He shall be allowed the cost of such bond to the extent provided by Section 541.5.

Comment. The substance of the first sentence of former Section 1127 is continued in Section 4551(a)(4), which is limited to individual trustees who are not named in the trust. The second sentence is superseded by Section 4551(d).

299 0

§ 1127.5 (repealed). Bond not required of certain charitable corporation trustees

Upon the petition of a nonprofit corporation named or designated as trustee in a will or acting as a successor trustee thereunder within the scope of its own charitable purposes and trust, the court may name as substitute or successor trustee a charitable corporation of which the nonprofit corporation is the sole member without requiring any bond not theretofore required of the nonprofit corporation.

Comment. Former Section 1127.5 is superseded by Section 4551.

§ 1130.1 (repealed). Certificate of appointment as trustee

Upon application of the trustee or trustees of a trust created by a will, the clerk shall issue a certificate that the trustee or trustees are duly appointed and acting trustee or trustees under the will.

Comment. The substance of former Section 1130.1 is continued in Section 4550. See also Section 10 (singular includes plural).

446 7

§ 1138.8 (repealed). Resignation of trustee or cotrustee; appointment of successor trustee

Unless otherwise expressly provided in the trust instrument a trustee or cotrustee may resign at any time. Such resignation and the appointment of a successor trustee shall be effected as provided in the trust instrument. If the trust instrument is silent a trustee may file with a court a petition tendering his resignation as such trustee and the court shall accept such resignation making any order appointing a successor trustee and other order which may be necessary for the preservation of the estate. The liability of the resigning trustee or the sureties on his bond, if any, shall not be discharged, released, or affected in any manner by the resignation, but shall continue until the trustee has delivered all of the estate to the person whom the court shall appoint to receive it.

Comment. The substance of the first three sentences of former Section 1138.8 is continued in Section 4570 (resignation of trustee). The substance of the first part of the last sentence is continued in Section 4571 (liability of resigning trustee). The remainder of the last sentence is superseded by Section 4574.

§ 1138.9 (repealed). Appointment of successor trustee

If a trustee of a trust subject to this article dies, resigns, fails or declines to act, cannot be identified, is incapable of acting for any reason, or is removed, or a vacancy in the trusteeship is otherwise created or exists, and the trust instrument does not provide a method for appointing a successor trustee, the court shall have the power to appoint a trustee to fill the vacancy upon the petition of the trustee or anyone interested in the trust estate.

Comment. The substance of former Section 1138.9 is continued in Section 4580.