

Memorandum 86-45

Subject: Study L-640 - Assembly Bill 2652--Trust Bill

The proposed Trust Law, AB 2652, was approved by the Assembly Judiciary Committee on April 15, with amendments in three areas. A copy of the bill, as amended on April 17, is attached to this memorandum. A copy of all the comments that have been revised to reflect amendments to the bill since its introduction is also attached.

As discussed at the April Commission meeting, the bill was held in committee when it was first heard because of problems concerning the trustee's liability for exemplary damages on breach of trust. (See the old and new versions of Section 16442 set out on page 82 of AB 2652.) There were also objections to the rule on the trustee's liability for acts of agents (see Section 16401, AB 2652 p. 79) and to the elimination of the right of general creditors to reach up to 25% of the beneficiary's interest in a spendthrift trust (see new Section 15306.5, AB 2652 pp. 41-42).

These amendments are the same as those discussed at the April Commission meeting with one exception. We had proposed to simply delete Section 16442 on exemplary damages, thus leaving this issue to the common law. However, it was necessary to accept a new Section 16442 to remove the objection of the California Trial Lawyers' Association. This section makes it explicit that the rules governing the measure of damages do not affect whatever the law may be on exemplary damages. Thus it accomplishes directly what we had intended to accomplish by removing the original version of Section 16442.

Respectfully submitted,

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COMMUNICATION FROM
CALIFORNIA LAW REVISION COMMISSION
Concerning
ASSEMBLY BILL 2652

Assembly Bill 2652 was introduced to effectuate the California Law Revision Commission's Recommendation Proposing the Trust Law, 18 Cal. L. Revision Comm'n Reports 501 (1985). The comments in the Commission's recommendation to the sections contained in Assembly Bill 2652 remain applicable except to the extent they are replaced or supplemented by the revised and new comments set out below.

Civil Code § 2225 (added). Involuntary trust of proceeds of felon's story

Comment. Section 2225 continues former Section 2224.1 without change.

Civil Code § 5110.150 (added). Revocable living trust of community property

Comment. Section 5110.150 replaces former Section 5113.5. It should be noted that a transfer in trust by a married person is not exempt from the general limitations on transfers and transmutations by married persons acting alone. See Sections 5125 and 5127 (joinder or consent) and Sections 5110.710-5110.740 (transmutation).

Subdivision (a) states the rule that a revocable living trust of community property retains its community character regardless of the lack of other trust provisions referred to in former Section 5113.5. Although subdivision (a) is intended to be consistent with Revenue Ruling 66-283 in order to obtain community property income tax treatment for the trust property under Internal Revenue Code Section 1014(b)(6), whether the terms of a particular trust are sufficient to obtain such treatment is ultimately a matter of federal law.

One consequence of retention of its community character is that the trust property is subject to claims of creditors and to division at dissolution to the same extent as any other community property. See Civil Code § 5120.010 et seq. Likewise, the interest of the decedent in the community property is subject to testamentary disposition at death unless a contrary method of disposition is provided in the trust instrument, as is typically the case. Prob. Code § 104. In this situation, the spouses' powers of testamentary disposition are substantially preserved through the power of revocation. However, the trustee may manage the community property in trust in the same manner as other trust property, free from the general limitations on disposition of community property imposed on spouses, unless the trust expressly provides such limitations.

Subdivision (b) establishes the presumption that either spouse acting alone may revoke the trust as to the community property. Prior law was not clear. The statute makes clear, however, that a unilateral revocation does not change the community property character of property received by the revoking spouse.

The statute requires joint action for modification of a community property trust that affects the interests of the spouses during marriage. The statute also authorizes a community property trust to require joint action for revocation. If the trust includes such a requirement without otherwise preserving the right of testamentary disposition, a spouse would lose the ability, acting alone, to make a disposition of the spouse's share of the community property at death. A trust instrument that requires joint action for revocation could preserve the traditional community property right of testamentary disposition by granting the first spouse to die a testamentary power of modification, appointment, or disposition as to the spouse's share of the community property.

Subdivision (d) makes clear that Section 5110.150 is not restrictive and does not provide the exclusive means by which community property may be held in trust without loss of its community character.

Probate Code § 82 (amended). "Trust" defined

Comment. Section 82 is amended to eliminate from the general definition of trusts those charitable trusts that are not subject to the jurisdiction of the Attorney General. See Section 15004 (application of Trust Law to charitable trusts). Section 82 is also amended to include descriptions of various arrangements that appeared in former Section 1138. Section 82 has also been divided into subdivisions.

Probate Code § 83 (added). "Trust company" defined

Comment. Section 83 is drawn from parts of Probate Code Sections 480 and 1120.1a. See also Section 15643 (vacancy in office of trustee), 17351-17353 (removal of trust from continuing court jurisdiction). Entities that may qualify to conduct a trust business in this state include state chartered commercial banks (see Fin. Code §§ 107, 1500.1) and national banking associations (see Fin. Code §§ 1502, 1503), corporations authorized to conduct a trust business (see Fin. Code § 107), trust departments of title insurance companies (see Fin. Code §§ 107, 1501; Ins. Code §§ 12392, 12395), and state and federal savings and loan associations (see Fin. Code §§ 5102, 6515). See also Fin. Code § 106 ("trust business" defined). Whether an entity has qualified to engage in and conduct a trust business in this state depends on other law. In order to fall within the definition of "trust company" in Section 83, a corporation, association, or other entity must satisfy the requirements of state or federal law that apply to the particular type of entity.

Probate Code § 2574 (technical amendment). Investment in securities and governmental obligations

Comment. Section 2574 is amended to correct a cross-reference.

Probate Code § 6325 (technical amendment). Jurisdiction over trusts for insurance or other employee benefits

Comment. Section 6325 is amended to correct cross-references. For changes in the law applicable to trust administration, see the Comments to the new sections referred to in Section 6325. Subdivision (a)(11) is amended to replace the reference to "assets" with "property"; this is a non-substantive change. See Section 62 ("property" defined).

Probate Code § 15001 (added). General rule concerning application of division

Comment. Section 15001 provides the general rule governing the application of this division to administration of existing trusts and pending proceedings involving trusts. Subdivision (a) continues without substantive change the second sentence of former Civil Code Section 2225 (application of doctrine of merger), the first sentence of subdivision (e) of former Civil Code Section 2261 (application of rules governing investments), and the first sentence of former Probate Code Section 1138.13 (application of provisions governing court proceedings involving trusts), and supersedes the second paragraph of former Probate Code Section 1120.2. Subdivision (a) is also comparable to Section 8 of the Uniform Trustees' Powers Act (1964).

Subdivision (b) is drawn from Code of Civil Procedure Section 694.020 (application of Enforcement of Judgments Law).

For special transitional provisions, see Sections 15401(d) (application of rules governing method of revocation by settlor), 16042 (interpretation of trust terms concerning legal investments), 16062(b) (application of duty to account annually to beneficiaries), 16203 (application of rules governing trustee's powers), 16401(c) (application of rules governing trustee's liability to beneficiary for acts of agent), 16402(c) (application of rules governing trustee's liability to beneficiary for acts of cotrustee), 16403(c) (application of rules governing trustee's liability to beneficiary for acts of predecessor trustee), 16460(c) (application of limitations period in proceedings by beneficiaries against trustees), 18000(b) (application of rule governing personal liability of trustee to third persons on contracts).

Probate Code § 15003 (added). Constructive and resulting trusts and fiduciary relationships not affected

Comment. Subdivision (a) of Section 15003 makes clear that the provisions in this division, relating as they do to express trusts, have no effect on the law relating to constructive and resulting trusts. See Section 82 ("trust" defined). Thus Section 15003 supersedes various provisions of former law relating to "involuntary" trusts. See former Civil Code §§ 856, 2215, 2217, 2275. For provisions relating to "involuntary trusts," see Civil Code Sections 2223-2225.

Subdivision (b) makes clear that the repeal of the Civil Code provisions relating to trusts, particularly former Civil Code Sections 2215-2244, is not intended to affect the general fiduciary principles applicable to confidential relationships. Over the years, courts have cited these provisions in cases involving different types of

confidential and fiduciary relationships. See, e.g., *Baker v. Baker*, 260 Cal. App. 2d 583, 586, 67 Cal. Rptr. 523 (1968) (husband and wife); *Bone v. Hayes*, 154 Cal. 759, 763, 99 P. 172 (1908) (agent and principal); *Wickersham v. Crittenden*, 93 Cal. 17, 29-30, 28 P. 788 (1892) (corporate officers); *City of Fort Bragg v. Brandon*, 41 Cal. App. 227, 229, 82 P. 454 (1919) (municipalities); *Cooley v. Miller & Lux*, 168 Cal. 120, 131, 142 P. 83 (1914) (attorney and client). On the other hand, courts have also decided cases in this area on the basis of general equitable principles without citing the former Civil Code provisions. See, e.g., *Estate of Kromey*, 98 Cal. App. 2d 639, 645-46, 220 P.2d 805 (1950) (attorney and client); *Committee of Missions v. Pacific Synod*, 157 Cal. 105, 127, 106 P. 395 (1909) (church); *Schwab v. Schwab-Wilson Machine Corp.*, 13 Cal. App. 2d 1, 3, 55 P.2d 1268 (1936) (corporate directors). See also Civil Code §§ 2322 (authority of agent), 5103 (spouses' duty in transactions with each other); Corp. Code § 309 (performance of duties by corporate director).

Subdivision (b) is also intended to recognize that the courts have the inherent power to fashion appropriate remedies under the circumstances and that this power in the area of confidential relationships does not depend upon the particular language of former Civil Code Sections 2215-2244. See Civil Code § 22.2 (common law as law of state); see also Prob. Code § 15002 (common law as law of state). Of course, trusts now governed by the new Trust Law are no longer subject to the repealed statutes. See Sections 82 ("trust" defined), 15001 (application of Trust Law).

Probate Code § 15300 (added). Restraint on transfer of income

Comment. Section 15300 continues the power of a settlor to restrain transfer of the beneficiary's interest in income that was provided in former Civil Code Section 867. The reference in former Civil Code Section 867 to restraints during the life of the beneficiary or for a term of years is not continued because it is unnecessary. The settlor is free to impose a restraint for a term of years under Section 15300.

For qualifications of the protection provided by Section 15300, see Sections 15304 (settlor as beneficiary), 15305 (claim for child or spousal support), 15306 (claim for reimbursement of public support), 15306.5 (right of general creditors to reach maximum of one-fourth of payments due beneficiary), 15307 (amount of income in excess of amount needed for education and support subject to creditors' claims). Once the income is paid to the beneficiary, it is subject to claims of creditors. *Kelly v. Kelly*, 11 Cal. 2d 356, 362-65, 79 P.2d 1059 (1938).

Probate Code § 15301 (added). Restraint on transfer of principal

Comment. Subdivision (a) of Section 15301 makes clear that a restraint on voluntary or involuntary transfer of principal is valid. This rule is consistent with the result in several California cases. See *Seymour v. McAvoy*, 121 Cal. 438, 444, 53 P. 946 (1898) (creditor could not reach contingent remainder); *San Diego Trust & Sav. Bank v. Heustis*, 121 Cal. App. 675, 683-84, 694-97, 10 P.2d 158 (1932) (where husband was income and remainder beneficiary, estranged wife could not reach trust funds for support); *Coughran v. First Nat'l Bank*, 19 Cal.

App. 2d 152, 64 P.2d 1013 (1937) (in an action to quiet title, attachment levied against beneficiary's contingent fractional interest in trust property was held invalid). There was no clear holding under former California law as to the validity of disabling restraints on transfer of trust principal by a vested remainder beneficiary.

Subdivision (b) permits a creditor to reach principal that is due or payable to the beneficiary, notwithstanding a spendthrift provision in the trust. Under former California law, there was no decision determining whether a judgment creditor could reach principal held by the trustee that was due or payable where the beneficiary's interest was subject to a restraint on transfer.

For qualifications of the protection provided by Section 15301, see Sections 15304 (settlor as beneficiary), 15305 (claim for child or spousal support), 15306 (claim for reimbursement of public support), 15306.5 (right of general creditors to reach maximum of one-fourth of payments due beneficiary), 15307 (amount of income in excess of amount needed for education and support subject to creditors' claims). Where trust principal that was subject to a restraint on transfer has been paid to the beneficiary, it is subject to the claims against the beneficiary. See *Kelly v. Kelly*, 11 Cal. 2d 356, 362-65, 79 P.2d 1059 (1938).

Probate Code § 15302 (added). Trust for support

Comment. Section 15302 is the same in substance as Section 154 of the Restatement (Second) of Trusts (1957), but is drafted to make clear that the protection applies to the extent that a trust provides for the education or support of the beneficiary and not only where the trust provides solely for the payment of an amount for education or support. Section 15302 is consistent with prior California law. See former Civil Code § 859; *Seymour v. McAvoy*, 121 Cal. 438, 442-44, 53 P. 946 (1898).

For qualifications of the protection provided by Section 15302, see Sections 15304 (settlor as beneficiary), 15305 (claim for child or spousal support), 15306 (claim for reimbursement of public support), 15306.5 (right of general creditors to reach maximum of one-fourth of payments due beneficiary), 15307 (amount of income in excess of amount needed for education and support subject to creditors' claims).

Probate Code § 15306.5 (added). Rights of general creditors

Comment. Section 15306.5 restates the substance of former provisions of Code of Civil Procedure Section 709.010. Subdivision (a) permits general creditors to seek to satisfy a money judgment from payments that are to be made to a trust beneficiary. This right applies to payments that are required by the terms of the trust, or that are determined by the trustee in the exercise of the trustee's discretion under the trust. Subdivision (e), however, makes clear that the right of the creditor does not affect any discretion the trustee may have under the trust instrument to change the amount of the payment, or even to cease payment altogether. See also Section 15307 (creditor's right to reach income in excess of amount for education and support). As provided in the introductory clause, this creditor's right applies regardless of a restraint on transfer provided in the trust instrument.

The creditor's right under subdivision (a) is subject to important limitations provided in subdivisions (b) and (c). Subdivision (b) provides a maximum amount that the creditor can reach, equal to 25% of each payment. This provision is comparable to the rule that applied under former subdivision (c) of Code of Civil Procedure Section 709.010 (incorporating the wage garnishment withholding standard of Code of Civil Procedure Section 706.050). See Code Civ. Proc. § 706.050 and the Comment thereto.

Subdivision (c) protects part or all of the payment that otherwise would be applied to the judgment where the amount is necessary for the support of the beneficiary and persons the beneficiary is required to support. This provision is comparable to Code of Civil Procedure Section 706.051 (wage garnishment exemption) which was incorporated by former subdivision (c) of Code of Civil Procedure Section 709.010 for purposes of enforcement of money judgments against trust payments.

Subdivision (d) makes clear that an order in favor of a creditor under this section is subject to the claim of a creditor who has obtained an order for enforcement of a support judgment, i.e., a minor child, spouse, or former spouse. The second sentence of subdivision (d) makes clear that the priority of support judgments does not depend on the time of issuance of the order for enforcement. This scheme is comparable to the priority that applies to earnings withholding orders under the Wage Garnishment Law. See Code Civ. Proc. § 706.030(b)(2). It should also be noted that while a spouse, former spouse, or minor child enforcing a support judgment may use this section, in the normal case, support creditors will apply under Section 15305. The limitations provided in this section do not apply to enforcement of a support judgment under Section 15305.

Subdivision (e) continues former subdivision (e) of Code of Civil Procedure Section 709.010 without substantive change.

Probate Code § 15307 (added). Income in excess of amount for education and support subject to creditors' claims

Comment. Section 15307 replaces former Civil Code Section 859. While Sections 15305 and 15306 permit only certain preferred creditors to reach the beneficiary's interest in the trust, Section 15307 permits an ordinary creditor to reach income under limited circumstances. To obtain relief under Section 15307, the judgment creditor must file a petition under Section 709.010 of the Code of Civil Procedure. See Code Civ. Proc. § 709.010(b). Under Code of Civil Procedure Section 709.010, the court may make a continuing order for application of future payments to the satisfaction of the judgment. It should also be noted, however, that a creditor does not have the power to compel the trustee to exercise discretion. See Section 15303.

The introductory clause of Section 15307 makes clear that this section applies only to a trust in which transfer of the beneficiary's interest is restrained. Section 15307 does not apply to enforcement against a trust that does not restrain transfer of the beneficiary's interest; the entire interest of a beneficiary under such a trust may be applied to the satisfaction of a money judgment under Code of Civil Procedure Section 709.010.

A station-in-life test is used to determine the amount necessary for education and support under this section. See *Canfield v. Security-First Nat'l Bank*, 13 Cal. 2d 1, 21-24, 87 P.2d 830 (1939);

Magner v. Crooks, 139 Cal. 640, 642, 73 P. 585 (1903); Smith v. Smith, 51 Cal. App. 2d 29, 35-38, 124 P.2d 117 (1942); cf. Alvis v. Bank of America, 95 Cal. App. 2d 118, 122-24, 212 P.2d 608 (1949) (beneficiary who had disappeared). The California Supreme Court has rejected the more extreme New York cases, but has continued to embrace the station-in-life test which considers factors such as the social background of the beneficiary. See, e.g., Canfield v. Security-First Nat'l Bank, 13 Cal. 2d 1, 24-28, 87 P.2d 830 (1939). If the trustee has discretion to determine the disposition of the trust income, the trustee may be able to defeat the creditor's attempt to reach the excess income under this section by reducing the amount to be paid to the beneficiary to the amount determined by the court to be necessary for the support and education of the beneficiary. See Estate of Canfield, 80 Cal. App. 2d 443, 450-52, 181 P.2d 732 (1947); E. Griswold, Spendthrift Trusts § 428 (2d ed. 1947).

Other provisions may permit a creditor of the beneficiary to satisfy all or part of the creditor's claim out of all or part of the payments of the income or principal as they fall due, presently or in the future. See Sections 15305 (child or spousal support), 15306 (public support); see also Section 15304 (settlor as beneficiary).

Probate Code § 15400 (added). Presumption of revocability

Comment. The first sentence of Section 15400 restates part of the first sentence of former Civil Code Section 2280 without substantive change. For the procedure for revoking a trust, see Section 15401. See also Section 15402 (power to revoke includes power to modify). The second sentence of Section 15400 is a new provision that limits the application of the California rule presuming revocability.

Probate Code § 15643 (added). Vacancy in office of trustee

Comment. Section 15643 restates the first paragraph (including subdivisions (1) and (2)) of former Civil Code Section 2281 without substantive change, except that the reference in former law to discharge of the trustee is omitted as unnecessary. Section 15643 also restates part of the first sentence of former Probate Code Section 1126 and part of the first sentence of former Probate Code Section 1138.9 without substantive change. Section 15643 supersedes part of former Civil Code Section 860 to the extent it related to the occurrence of a vacancy in the office of a trustee. For rules concerning filling a vacancy, see Section 15660. See also Sections 83 ("trust company" defined), 15601 (rejection of trust), 15640 (resignation of trustee), 15641 (liability of resigning trustee), 15642 (removal of trustee), 16460 (limitations on proceedings against trustee), 17200(b)(5) (petition to settle trustee's account), 18102 (protection of third person dealing with former trustee).

Probate Code § 15644 (added). Delivery of property by former trustee upon occurrence of vacancy

Comment. The first sentence of Section 15644 restates part of the second paragraph of former Probate Code Section 1125.1 and part of the last sentence of former Probate Code Section 1138.8 without

substantive change. See Section 15643 (vacancy in office of trustee); see also Sections 16420(a)(4) (appointment of receiver or temporary trustee upon breach of trust), 17206 (authority to make necessary orders and appoint temporary trustee). The second sentence makes clear that a trustee who has resigned or is removed has the powers needed to complete the trustee's remaining duties. The trustee who has resigned remains liable for actions or omissions during his or her term as trustee even after the property is delivered to the successor until liability is barred. See Section 16460 (limitations on proceedings against trustee).

Probate Code § 15801 (added). Consent by beneficiary of revocable trust

Comment. Section 15801 is new. Subdivision (a) recognizes the principle that the consent of a beneficiary of a revocable trust should not have any effect during the time that the trust is presently revocable, since the power over the trust is held by the settlor or other person holding the power to revoke. See the Comment to Section 15800. See also Section 15803 (holder of general power of appointment or power to withdraw property from trust treated as settlor). Under the rule provided in Section 15801, the consent of the person holding the power to revoke, rather than the beneficiaries, excuses the trustee from liability as provided in Section 16460(a) (limitations on proceedings against trustee). For provisions permitting a trustee to be relieved of liability by the beneficiaries, see Sections 16463 (prior consent), 16464 (release), 16465 (subsequent affirmance). Subdivision (b) makes clear that this section does not eliminate the requirement of obtaining the consent of beneficiaries in cases where the consent of the settlor and all beneficiaries is required. See Section 15404 (modification or termination by settlor and all beneficiaries).

Probate Code § 16000 (added). Duty to administer trust

Comment. Section 16000 is drawn in part from Sections 164 and 169 of the Restatement (Second) of Trusts (1957). Section 16000 restates the part of former Civil Code Section 2258 requiring the trustee to "fulfill the purpose of the trust" and also supersedes former Civil Code Section 2253 insofar as it related to control of the trustee's duties by the trust instrument. See also Sections 15600 (acceptance of trust by trustee), 15800 (duties owed to person holding power to revoke), 15803 (duties owed to person with general power of appointment or power to withdraw trust property), 16001 (duties of trustee of revocable trust), 16040 (trustee's standard of care in performing duties). For provisions permitting the beneficiaries to relieve the trustee from liability, see Sections 16463 (consent), 16464 (release), 16465 (affirmance).

Probate Code § 16001 (added). Duties of trustee of revocable trust

Comment. Subdivision (a) of Section 16001 continues the first sentence of former Civil Code Section 2258(b) without substantive change. The qualification that a direction be acceptable to the trustee does not mean that the trustee is required to determine the

propriety of the direction. For the rule protecting the trustee from liability for following directions under this section, see Section 16462. See also Sections 15800 (duties owed to person holding power to revoke), 16000 (duties subject to control in trust instrument), 16040 (standard of care in performing duties).

Subdivision (b) is a new provision that clarifies the relationship between the duty to follow directions provided in subdivision (a) and the rules governing modification of trusts. See Sections 15401 (method of revocation by settlor), 15402 (power to revoke includes power to modify).

Probate Code § 16002 (added). Duty of loyalty

Comment. Subdivision (a) of Section 16002 codifies the substance of Section 170(1) of the Restatement (Second) of Trusts (1957). Section 16002 restates the general duty of loyalty expressed in former Civil Code Sections 2228 (trustee to act in "highest good faith"), 2229 (not to use property for trustee's profit), 2231 (influence not to be used for trustee's advantage), 2232 (trustee not to undertake adverse trust), 2233 (trustee to disclose adverse interest), 2235 (transactions between trustee and beneficiary presumed under undue influence), and 2263 (trustee cannot enforce claim against trust purchased after becoming trustee). See also Sections 16000 (duties subject to control by trust instrument), 16040 (trustee's standard of care in performing duties). This article does not attempt to state all aspects of the trustee's duty of loyalty, nor does this article seek to cover all duties that may exist. See Section 15002 (common law as law of state). See also Section 16015 (certain actions not violations of duties). For provisions permitting the beneficiaries to relieve the trustee from liability, see Sections 16463 (consent), 16464 (release), 16465 (affirmance).

Subdivision (b) is a new provision drawn from Indiana law. See Ind. Code Ann. § 30-4-3-7(c) (West Supp. 1983-84). This subdivision permits sales or exchanges between two or more trusts that have the same trustee without running afoul of the duty of loyalty. See Restatement (Second) of Trusts § 170 comment r (1957). Subdivision (b) does not require the trustee to give notice to all beneficiaries of both trusts; for limitations on the need to give notice, see Sections 15802 (notice to beneficiary of revocable trust) and 15804 (notice in case involving future interest of beneficiary). See also Sections 15800 (limits on rights of beneficiary of revocable trust), 15801 (consent of beneficiary of revocable trust).

Probate Code § 16003 (added). Duty to deal impartially with beneficiaries

Comment. Section 16003 codifies the substance of Section 183 of the Restatement (Second) of Trusts (1957). This section is in accord with case law. See Estate of Miller, 107 Cal. App. 438, 290 P. 528 (1930). For provisions permitting the beneficiaries to relieve the trustee from liability, see Sections 16463 (consent), 16464 (release), 16465 (affirmance). See also Sections 16000 (duties subject to control by trust instrument), 16040 (trustee's standard of care in performing duties).

Probate Code § 16004 (added). Duty to avoid conflict of interest

Comment. Subdivision (a) of Section 16004 restates former Civil Code Section 2229 and part of the introductory provision of former Civil Code Section 2230 without substantive change. For provisions permitting the beneficiaries to relieve the trustee from liability, see Sections 16463 (consent), 16464 (release), 16465 (affirmance). See also Sections 16000 (duties subject to control by trust instrument), 16040 (trustee's standard of care in performing duties), 16015 (certain actions not violations of duties).

Subdivision (b) restates former Civil Code Section 2263 without substantive change. The court referred to in subdivision (b) may be the court where the trust is administered, such as where the trustee seeks reimbursement for the claim under Section 17200(b), or the court where enforcement of the claim is sought, such as where the trustee seeks to foreclose a lien or seeks recognition of the claim in proceedings commenced by some other creditor.

The first sentence of subdivision (c) restates the presumption of former Civil Code Section 2235, but the presumption is phrased in terms of a violation of the trustee's fiduciary duties, rather than a presumption of insufficient consideration and undue influence. The second sentence relating to the nature of the presumption is consistent with case law. See, e.g., *McDonald v. Hewlett*, 102 Cal. App. 2d 680, 687-88, 228 P.2d 83 (1951); see also Evid. Code §§ 605 (presumption affecting burden of proof defined), 606 (effect of presumption affecting burden of proof). The exception to the burden of proof provided in the last sentence of subdivision (c) restates the second sentence of former Civil Code Section 2235 without substantive change.

Probate Code § 16005 (added). Duty not to undertake adverse trust

Comment. Section 16005 supersedes former Civil Code Section 2232. For provisions permitting the beneficiaries to relieve the trustee from liability, see Sections 16463 (consent), 16464 (release), 16465 (affirmance). See also Sections 16000 (duties subject to control by trust instrument), 16040 (trustee's standard of care in performing duties).

Probate Code § 16006 (added). Duty to take control of and preserve trust property

Comment. Section 16006 codifies the substance of Sections 175 and 176 of the Restatement (Second) of Trusts (1957). This section is in accord with case law. See, e.g., *Purdy v. Bank of America Nat'l Tr. & Sav. Ass'n*, 2 Cal. 2d 298, 303, 40 P.2d 481 (1935); *Estate of Duffill*, 188 Cal. 536, 547, 206 P. 42 (1922); *Martin v. Bank of America Nat'l Tr. & Sav. Ass'n*, 4 Cal. App. 2d 431, 41 P.2d 200 (1935). For provisions permitting the beneficiaries to relieve the trustee from liability, see Sections 16463 (consent), 16464 (release), 16465 (affirmance). See also Sections 16000 (duties subject to control by trust instrument), 16040 (trustee's standard of care in performing duties).

Probate Code § 16007 (added). Duty to make trust property productive

Comment. Section 16007 codifies the substance of Section 181 of the Restatement (Second) of Trusts (1957). For the trustee's standard of care governing investments and management of trust property, see Section 16040(b). In appropriate circumstances under Section 16007, property may be made productive by appreciation in value rather than by production of income. If the trust instrument imposes a duty on the trustee to hold property and give possession of it to a beneficiary at a later date, this duty would override the general duty to make the property productive. See Restatement (Second) of Trusts § 181 comment a (1957). Similarly, if a beneficiary has the right under the trust instrument to occupy a home, the trustee would have no duty to make the property productive of income. For provisions permitting the beneficiaries to relieve the trustee from liability, see Sections 16463 (consent), 16464 (release), 16465 (affirmance). See also Section 16000 (duties subject to control by trust instrument).

Probate Code § 16008 (added). Duty to dispose of improper investments

Comment. Subdivision (a) of Section 16008 codifies the substance of Section 230 of the Restatement (Second) of Trusts (1957), subject to the exception provided in subdivision (b). In contrast with the Restatement rule, subdivision (a) is not limited to property received in the trust at the time of its creation, but applies as well to property added or acquired later. For provisions permitting the beneficiaries to relieve the trustee from liability, see Sections 16463 (consent), 16464 (release), 16465 (affirmance). See also Sections 16000 (duties subject to control by trust instrument), 16040 (trustee's standard of care in performing duties).

Subdivision (b) restates the exception to the traditional duty to dispose of "improper investments" which was provided in the first sentence of former Civil Code Section 2261(b). Subdivision (b) does not continue the standard of care provided in former Civil Code Section 2261(b). Exercise of the discretion under subdivision (b) is governed by the general standard of care provided in Section 16040. See also Sections 16220 (power to collect and hold property), 16221 (power to receive additions to trust).

Probate Code § 16009 (added). Duty to keep trust property separate and identified

Comment. Section 16009 codifies the substance of Section 179 of the Restatement (Second) of Trusts (1957), but the Restatement provision for keeping trust property separate from the trustee's individual property is omitted since it is redundant with subdivision (a). Section 16009 supersedes the rule against commingling provided in former Civil Code Section 2236. For exceptions to this general duty, see, e.g., Fin. Code §§ 1563 (securities registered in name of nominee), 1564 (Uniform Common Trust Fund Act). For provisions permitting the beneficiaries to relieve the trustee from liability, see Sections 16463 (consent), 16464 (release), 16465 (affirmance). See also Sections 16000 (duties subject to control by trust instrument), 16040 (trustee's standard of care in performing duties).

Probate Code § 16010 (added). Duty to enforce claims

Comment. Section 16010 codifies the substance of Section 177 of the Restatement (Second) of Trusts (1957). This section is in accord with case law. See *Ellig v. Naglee*, 9 Cal. 683, 695-96 (1858). Under this section, it may not be reasonable to enforce a claim depending upon the likelihood of recovery and the cost of suit and enforcement. For provisions permitting the beneficiaries to relieve the trustee from liability, see Sections 16463 (consent), 16464 (release), 16465 (affirmance). See also Sections 16000 (duties subject to control by trust instrument), 16040 (trustee's standard of care in performing duties).

Probate Code § 16011 (added). Duty to defend actions

Comment. Section 16011 codifies the substance of the first part of Section 178 of the Restatement (Second) of Trusts (1957). This section is in accord with case law. See, e.g., *Estate of Duffill*, 188 Cal. 536, 554-55, 206 P. 42 (1922). Depending on the circumstances of the case, it might be reasonable to settle an action or suffer a default rather than to defend an action. For provisions permitting the beneficiaries to relieve the trustee from liability, see Sections 16463 (consent), 16464 (release), 16465 (affirmance). See also Sections 16000 (duties subject to control by trust instrument), 16040 (trustee's standard of care in performing duties).

Probate Code § 16012 (added). Duty not to delegate

Comment. The first part of subdivision (a) of Section 16012 codifies the substance of Section 171 of the Restatement (Second) of Trusts (1957). The second part of subdivision (a) codifies the substance of Section 4 of the Uniform Trustees' Powers Act (1964). The duty not to delegate administration of the trust does not preclude employment of an agent in a proper case. A trust company may delegate matters involved in trust administration to its affiliates. For provisions permitting the beneficiaries to relieve the trustee from liability, see Sections 16463 (consent), 16464 (release), 16465 (affirmance). See also Sections 15620 (actions by cotrustees), 15621 (vacancy in office of cotrustee), 15622 (temporary incapacity of cotrustee), 16000 (duties subject to control by trust instrument), 16040 (trustee's standard of care in performing duties), 16247 (power to hire agents of trust).

Subdivision (b) is drawn from comment k to Section 171 of the Restatement (Second) of Trusts (1957).

Probate Code § 16013 (added). Duty with respect to cotrustees

Comment. Section 16013 codifies the substance of Section 184 of the Restatement (Second) of Trusts (1957). This section is in accord with case law. See *Bemmerly v. Woodward*, 124 Cal. 568, 57 P. 561 (1899). For provisions permitting the beneficiaries to relieve the trustee from liability, see Sections 16463 (consent), 16464 (release), 16465 (affirmance). See also Sections 16000 (duties subject to control by trust instrument), 16040 (trustee's standard of care in performing duties), 16402 (trustee's liability to beneficiary for acts of cotrustee). If a cotrustee is also a settlor under a revocable

trust, a cotrustee who is not a settlor has a duty to follow the directions of the settlor-cotrustee pursuant to Section 16001. That duty supersedes the general duty under this section.

Probate Code § 16014 (added). Duty to use special skills

Comment. Subdivision (a) of Section 16014 codifies a duty set forth in *Coberly v. Superior Court*, 231 Cal. App. 2d 685, 689, 42 Cal. Rptr. 64 (1965).

Subdivision (b) is similar to the last part of Section 7-302 of the Uniform Probate Code (1977) and the last part of Section 174 of the Restatement (Second) of Trusts (1957). Subdivision (b) does not limit the duty provided in subdivision (a). Thus, the nature of the trustee's representations to the settlor leading up to the selection of the trustee does not affect the trustee's duty to use the full extent of his or her skills.

For provisions permitting the beneficiaries to relieve the trustee from liability, see Sections 16463 (consent), 16464 (release), 16465 (affirmance). See also Sections 16000 (duties subject to control by trust instrument), 16040 (trustee's standard of care in performing duties).

Probate Code § 16040. Trustee's standard of care in administering trust

Comment. Subdivision (a) of Section 16040 provides a general standard of care drawn from subdivision (a)(1) of former Civil Code Section 2261 which applied to investment and management decisions. Subdivision (a) supersedes the "ordinary care and diligence" standard that was provided in former Civil Code Section 2259.

Subdivision (b) of Section 16040 provides the standard of care applicable to investment and management of trust property. Subdivision (b) restates subdivision (a)(1) of former Civil Code Section 2261 without substantive change. The former reference to attaining the goals of the settlor has been changed to refer to accomplishing the purposes of the trust. An expert trustee is held to the standard of care of other experts. See the discussions in *Estate of Collins*, 72 Cal. App. 3d 663, 673, 139 Cal. Rptr. 644 (1977); *Coberly v. Superior Court*, 231 Cal. App. 2d 685, 689, 42 Cal. Rptr. 64 (1965); *Estate of Beach*, 15 Cal. 3d 623, 635, 542 P.2d 994, 125 Cal. Rptr. 570 (1975) (bank as executor); see also the Comment to Section 2401 (standard of care applicable to professional guardian or conservator of estate) and the Comment to Section 3912 (standard of care applicable to professional fiduciary acting as custodian under Uniform Transfers to Minors Act). The last sentence of subdivision (b) reflects the portfolio approach for judging investment decisions.

Subdivision (c) restates subdivision (a)(2) of former Civil Code Section 2261 without substantive change.

Probate Code § 16062 (added). Duty to account to beneficiaries

Comment. Subdivision (a) of Section 16062 supersedes parts of subdivisions (b) and (c) of former Probate Code Section 1120.1a and parts of former Probate Code Sections 1121 and 1138.1(a)(5). The requirement of an annual account is drawn from the statute formerly applicable to testamentary trusts created before July 1, 1977. See

former Prob. Code § 1120.1a. The duty to provide information under Section 16060 is not necessarily satisfied by compliance with Section 16062.

Subdivision (b) makes clear that the requirement of furnishing an annual account under subdivision (a) does not apply to pre-operative date trusts. This section does not affect any requirement for an account that may exist under prior law, whether pursuant to a statute, trust instrument, or court order. See, e.g., former Prob. Code § 1120.1a(b). However, under subdivision (b), the accounting requirement may be satisfied by furnishing an accounting in the form provided by Section 16063. A trust created by a will executed before July 1, 1987, is governed by prior law regardless of whether any codicils are executed after the operative date.

Probate Code § 16304 (added). When right to income arises; apportionment of income

Comment. Section 16304 continues former Civil Code Section 730.04 without substantive change, except that subdivision (b)(2) has been conformed to Section 4(b)(2) of the Revised Uniform Principal and Income Act (1962) and references to the testator and the will have been replaced. The first change requires apportionment of rent, interest, and annuities, contrary to the former rule. The effect of the last change is to make the principles of this section applicable to the problem of apportionment of income following the death of a settlor of a revocable living trust. The references to "assets" in former Civil Code Section 730.04 have been replaced with references to "property"; these are non-substantive changes. See Section 62 ("property" defined).

Probate Code § 16305 (added). Income earned during administration of decedent's estate

Comment. Subdivision (a) of Section 16305 continues former Civil Code Section 730.05(a) and (b) without change. The reference to "assets" in former Civil Code Section 730.05 has been replaced with a reference to "property"; this is a non-substantive change. See Section 62 ("property" defined). Subdivision (b) continues former Civil Code Section 730.05(c) without change.

Probate Code § 16308 (added). Business and farming operations

Comment. Section 16308 continues former Civil Code Section 730.08(a) and (c) without substantive change, except for two important changes: (1) The last sentence of subdivision (a) reverses the former rule against carrying losses forward. This revision is drawn from statutes in Nebraska and Wisconsin. Neb. Rev. Stat. § 30-3109 (Cum. Supp. 1982); Wis. Stat. Ann. 701.20(8) (West 1981). (2) The reference in former law to "generally accepted accounting principles" is replaced with a reference to "recognized methods of accounting." This change avoids use of the term of art "generally accepted accounting principles" which may be inappropriate as applied to certain types of businesses, such as agricultural and farming operations. This revision is drawn from the Nebraska statute. Neb. Rev. Stat. § 30-3109 (Cum. Supp. 1982).

Probate Code § 16311 (added). Underproductive property

Comment. Subdivisions (a), (b), and (c) of Section 16311 continue former Civil Code Section 730.12 without change. Subdivision (d) is a new provision that resolves a conflict between the portfolio approach to investment decisions provided in Section 16040(b) and the underproductive property provisions of this section as it applies to securities.

Probate Code § 16312 (added). Charges against income and principal

Comment. Subdivision (a) of Section 16312 continues subdivision (c) of former Civil Code Section 730.03 without substantive change. Subdivisions (b)-(e) continue former Civil Code Section 730.13 with the following changes: The reference to "absolute discretion" is revised to read "discretion"; this revision makes no substantive change. See Sections 16080-16081 (duties with regard to discretionary powers). A reference to "proceeding" has been added to subdivision (d)(2). See Section 17200 et seq. (judicial proceedings concerning trusts).

Probate Code § 16401 (added). Trustee's liability to beneficiary for acts of agent

Comment. Subdivisions (a) and (b) of Section 16401 are new and are drawn from Section 225 of the Restatement (Second) of Trusts (1957). The former statutes did not provide a rule governing the trustee's liability for the acts or omissions of agents of the trust. Whether a trustee has acted reasonably under this section depends upon application of the standard of care provided in Section 16040. The trustee of a revocable trust is not liable where the agent's act is performed or omitted pursuant to the written instructions of the person having the power to revoke the trust. See Section 16462. Similarly, the trustee of a revocable trust is not liable for hiring an agent where the trustee is directed to do so in writing by the person having the power to revoke. See Section 16462. It should also be noted that the liability to beneficiaries does not include beneficiaries under a revocable trust during the time that the trust can be revoked. See Section 15800; see also Sections 15803 (holder of general power of appointment or power to withdraw property from trust treated as settlor), 16000 (duty to administer trust).

The six paragraphs of subdivision (b) state independent bases for imposition of liability on the trustee. For example, if the trustee has not used reasonable care in selecting or retaining an agent, the trustee may be held liable for the agent's breach under paragraph (3); but even if the trustee has no control over selection or retention of the agent, the trustee may still be held liable for the agent's breach if the trustee has the power to direct the agent's actions. It should also be noted that paragraphs (2), (5), and (6) of subdivision (b) apply regardless of whether the trustee has any control over the agent.

Subdivision (c) preserves the prior law governing the trustee's liability for acts or omissions of agents occurring before the operative date.

Probate Code § 16402 (added). Trustee's liability to beneficiary for acts of cotrustee

Comment. Section 16402 is drawn from Section 224 of the Restatement (Second) of Trusts (1957). Section 16402 restates the substance of former Civil Code Section 2239 as follows: the substance of the former liability for consenting to wrongful acts of the cotrustee is restated in subdivision (b)(3), the substance of the former liability for negligently enabling the cotrustee to commit a breach is restated in subdivision (b)(4), and the substance of the former statement that the trustee was liable "for no others" is restated in subdivision (a). Subdivision (b)(5) is consistent with the case-law rule under former law. See Estate of Hensel, 144 Cal. App. 2d 429, 438, 301 P.2d 105 (1956) (citing the rule from the first Restatement). See also Blackmon v. Hale, 1 Cal. 3d 548, 559, 463 P.2d 418, 83 Cal. Rptr. 194 (1970) (negligent inattention to duties). For the duty of a trustee with respect to cotrustees, see Section 16013. It should also be noted that the liability to beneficiaries does not include beneficiaries under revocable trusts during the time that the trust can be revoked. See Section 15800; see also Sections 15803 (holder of general power of appointment or power to withdraw property from trust treated as settlor), 16000 (duty to administer trust).

Subdivision (c) preserves the prior law governing the trustee's liability for acts or omissions of cotrustees occurring before the operative date.

Probate Code § 16403. Trustee's liability to beneficiary for acts of predecessor

Comment. Section 16403 is new and is the same in substance as Section 223 of the Restatement (Second) of Trusts (1957), except that the language in subdivision (b)(3) relating to what the trustee should have known in subdivisions (b)(1) and (b)(3) differs from the Restatement. In certain circumstances it may not be reasonable to enforce a claim against a former trustee, depending upon the likelihood of recovery and the cost of suit and enforcement. It should also be noted that the liability to beneficiaries does not include beneficiaries under revocable trusts during the time that the trust can be revoked. See Section 15800; see also Section 15803 (holder of general power of appointment or power to withdraw property from trust treated as settlor). For provisions permitting a trustee to be relieved of liability for acts of a predecessor trustee, see Sections 16463 (consent), 16464 (release), 16465 (affirmance).

Subdivision (c) preserves the prior law governing the trustee's liability for acts or omissions of a predecessor trustee occurring before the operative date.

Probate Code § 16421 (added). Remedies for breach exclusively equitable

Comment. Section 16421 is a new provision that is drawn from Section 197 of the Restatement (Second) of Trusts (1957). For a list of remedies, see Section 16420. Under this section, for example, the beneficiary may not commence an action against the trustee for breach of contract. See Restatement (Second) of Trusts § 197 comment b (1957). However, the trustee may be found liable for the payment of money on account of the breach. See Sections 16420(a)(3) (compelling payment of money for breach of trust), 16440-16441 (measure of liability for breach of trust).

Probate Code § 16442 (added). Other remedies not affected

Comment. Section 16442 makes clear that Sections 16440 and 16441 do not prevent resort to any other remedy available against the trustee under the statutory or common law. See Section 15002 (common law as law of state); see also 16420 (remedies for breach of trust).

Probate Code § 16460 (added). Limitations on proceedings against trustee

Comment. Section 16460 is a new provision drawn in part from Section 7-307 of the Uniform Probate Code (1977). Section 16460 supersedes the provisions of former Civil Code Section 2282 relating to discharge of trustees. For a provision governing consent, release, and affirmance by beneficiaries to relieve the trustee of liability, see Sections 16463-16465. The reference in the introductory clause to claims "otherwise" barred also includes principles such as estoppel and laches that apply under the common law. See Section 15002 (common law as law of state). See also Sections 16461 (exculpation of trustee by provision in trust instrument), 16462 (nonliability for following instructions under revocable trust). During the time that a trust is revocable, the person holding the power to revoke is the one who must receive the account or report in order to commence the running of the limitations period provided in this section. See Sections 15800 (limits on rights of beneficiary of revocable trust), 16064(b) (exceptions to duty to account). Under prior law, the four-year limitations period provided in Code of Civil Procedure Section 343 was applied to actions for breach of express trusts. See *Cortelyou v. Imperial Land Co.*, 166 Cal. 14, 20, 134 P. 981 (1913); *Oeth v. Mason*, 247 Cal. App. 2d 805, 811-12, 56 Cal. Rptr. 69 (1967). Section 16460 is an exception to the four-year rule provided in Code of Civil Procedure Section 343.

Subdivision (b) provides special rules concerning who must receive the account or report for it to have the effect of barring claims based on the information disclosed. Under subdivision (b)(2) it may be appropriate to seek the appointment of a guardian ad litem or some other person to receive accounts and reports where no conservator has been appointed for the person and there is serious doubt that the beneficiary can understand the account or report.

Subdivision (c) applies the three-year statute of limitations provided by subdivision (a) to claims arising prior to the operative date, but also provides a one-year grace period before such claims are barred by application of this section.

For provisions relating to the duty to report information and account to beneficiaries, see Sections 16060-16064.

Probate Code § 16463. Consent of beneficiary to relieve trustee of liability for breach of trust

Comment. Section 16463 is a new provision that is the same in substance as Section 216 of the Restatement (Second) of Trusts (1957). Section 16463 supersedes provisions relating to beneficiaries' consent to relieve a trustee of liability that appeared in former Civil Code Sections 2230, 2232, and 2282(d). See also Sections 16460 (limitations on proceedings against trustee), 16464 (release), 16465 (affirmance). As to other rules that may limit the trustee's liability, see the Comment to Section 16460.

Probate Code § 16464 (added). Discharge of trustee's liability by release of contract

Comment. Section 16464 is a new provision that is the same in substance as Section 217 of the Restatement (Second) of Trusts (1957). Section 16464 supersedes former Civil Code Section 2230 to the extent that section governed release. See also Sections 16460 (limitations on proceedings against trustee), 16463 (consent), 16465 (affirmance). As to other rules that may limit the trustee's liability, see the Comment to Section 16460.

Probate Code § 16465 (added). Discharge of trustee's liability by subsequent affirmance

Comment. Section 16465 is a new provision that is the same in substance as Section 218 of the Restatement (Second) of Trusts (1957). See also Sections 16460 (limitations on proceedings against trustee), 16463 (consent), 16464 (release). As to other rules that may limit the trustee's liability, see the Comment to Section 16460.

Probate Code § 17208 (added). Appointment of guardian ad litem

Comment. Section 17208 continues without substantive change paragraph (2) of subdivision (a) and subdivision (b) of former Probate Code Section 1215.3 and subdivision (a) of former Probate Code Section 1138.7, and supersedes part of the last paragraph of subdivision (b) of former Probate Code Section 1120. Subdivision (c) is drawn from the third paragraph of Code of Civil Procedure Section 373.5. Subdivision (d) supersedes subdivision (c) of former Probate Code Section 1138.7 and the last sentence of subdivision (b) of former Probate Code Section 1120. A guardian ad litem may be appointed in situations where a guardian or conservator has already been appointed, if the need for a guardian ad litem exists. This section is not intended to limit any power the court may have to appoint an attorney to represent the interests of an incapacitated person.

Probate Code § 17455 (added). Order accepting transfer and appointing trustee

Comment. Section 17455 restates former Probate Code Section 1139.16 without substantive change, except that (1) the court is required to take into account the interest in economical and convenient administration rather than to find that it would necessarily result from the transfer, (2) a bond is required only if the law of the other jurisdiction or California so provides, and (3) the court's authority to require bond under general provisions is recognized. See, e.g., Section 15602(a)(3) (bond required of trustee appointed by court). The reference to "assets" in former Probate Code Section 1139.16 has been replaced with a reference to "property"; this is a non-substantive change. See Section 62 ("property" defined).

Probate Code § 18000 (added). Personal liability of trustee to third persons on contracts

Comment. Subdivision (a) of Section 18000 is new and is drawn from Section 7-306(a) of the Uniform Probate Code (1977). However,

unlike the Uniform Probate Code, this section excuses the trustee from personal liability on a contract where either the trustee's representative capacity or the identity of the trust is revealed in the contract. Under Section 18000, it is assumed that either one of these statements in a contract puts the person contracted with on notice of the fact that the other person is a trustee. The protection afforded the trustee by this section applies only to contracts that are properly entered into in the trustee's fiduciary capacity, meaning that the trustee is exercising an available power and is not violating a duty. This section does not excuse any liability the trustee may have for breach of trust. See Section 18005 (liability as between trustee and trust estate).

The rule provided in subdivision (a) is the reverse of the case-law rule in California that a trustee was personally liable on a contract unless the contract stipulated that the trustee was not liable. See *Hall v. Jameson*, 151 Cal. 606, 611, 91 P. 518 (1907); *Duncan v. Dormer*, 94 Cal. App. 218, 221, 270 P. 1003 (1928); but cf. *Purdy v. Bank of America*, 2 Cal. 2d 298, 301-02, 40 P.2d, 481 (1935) (trust estate also liable when properly bound by acts of trustee). However, to fall within the rule of subdivision (a) of Section 18000, either the trustee's status or the identity of the trust must be revealed. This was not sufficient under prior case law. See *Hall v. Jameson*, supra. Subdivision (a) also supersedes former Civil Code Section 2267 to the extent it affected liability.

Subdivision (b) preserves the case-law rule governing a trustee's personal liability for pre-operative date contracts.

COMMENTS TO REPEALED SECTIONS

Civil Code § 2230 (repealed). Prohibited transactions

Comment. The introductory provision of former Section 2230 is restated in Probate Code Section 16004(a) without substantive change, subject to the exceptions provided in Probate Code Section 16015 (certain actions not violations of duties). The remainder of former Section 2230 relating to consent by beneficiaries is replaced by Probate Code Section 16463 (consent of beneficiary to relieve trustee of liability for breach of trust). See also Prob. Code §§ 16464 (release by beneficiary), 16465 (affirmance by beneficiary).

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

Comment. Former Section 2232 is superseded by Probate Code Section 16005 (duty not to knowingly undertake adverse trust). See also Prob. Code § 16002 (duty of loyalty). The last part of former Section 2232 relating to consent by beneficiaries is replaced by Probate Code Section 16463 (consent of beneficiary to relieve trustee of liability for breach of trust). See also Prob. Code §§ 16464 (release by beneficiary), 16465 (affirmance by beneficiary).

Civil Code § 2234 (repealed). Violations as fraud against beneficiary

Comment. Former Section 2234 is superseded by Probate Code Section 16400 (violation of duty is breach of trust). The liability

for breach is governed by statute. See Prob. Code §§ 16440 (measure of liability for breach of trust), 16441 (measure of liability for interest).

Civil Code § 2262 (repealed). Trustee's liability for interest for failure to invest

Comment. Former Section 2262 is superseded by Probate Code Sections 16440 (measure of liability for breach of trust) and 16441 (measure of liability for interest). See also Prob. Code § 16420(a)(3) (redress of breach by payment of money).

Civil Code § 2282 (repealed). Discharge of trustee

Comment. The parts of former Section 2282 relating to discharge from liability are superseded by Probate Code Sections 15641 (liability of resigning trustee) and 16460 (limitations on proceedings against trustees). Subdivision (d) is superseded by Probate Code Sections 15640(a)(3) (resignation with consent of beneficiaries), 16463 (consent of beneficiary), 16464 (release by beneficiary), 16465 (affirmance by beneficiary). Subdivision (e) is restated in Probate Code Section 15640(a)(4) (resignation with approval of court) without substantive change. See also Prob. Code §§ 15407 (trustee's powers on termination), 15641 (liability of resigning trustee), 16460(a) (limitations based on consent), 16461 (exculpation of trustee).