

Memorandum 84-92

Subject: Study L-640 - Trusts (Duties and Powers of Trustees)

This memorandum presents a draft statute that implements Commission decisions concerning the duties and powers of trustees. The draft statute is attached hereto as Exhibit 1.

The provisions on the duties of trustees reflect decisions made at the June 1984 meeting. (See draft Sections 700-756 in Exhibit 1.) In general, the Commission decided to codify a set of basic duties of trustees based on general law, such as the provisions in the Restatement (Second) of Trusts, and to retain special provisions derived from existing California law.

The provisions on trustees' powers reflect decisions made at the June and September 1984 meetings. (See draft Sections 800-878 in Exhibit 1.) This draft reflects the automatic powers approach, subject to some minor exceptions.

The staff has a few points to raise concerning this material:

§ 802. Exercise of powers subject to trustee's duties

Draft Section 802 is included to make crystal clear that the existence of a power does not excuse its exercise if such exercise would violate a duty owed by the trustee to the beneficiary. The comment to each section that grants a power (see draft Sections 820-878) contains a cross-reference to this section as a reminder to the reader not to forget the overriding nature of the trustee's duties.

§ 803. Conflict of interest in exercise of power

Subdivision (c) has been added to this provision in response to a request from the California Bankers Association. (See the letter from CBA attached hereto as Exhibit 2.) At the September 1984 meeting the Commission expressed sympathy for the bank which finds itself in a potential conflict of interest situation because of the independent operations of its lending department and its trust department. Subdivision (c) is intended to eliminate the possibility of such technical breaches of trust.

§ 820. General powers without court authorization

§ 826. Participation in business

Draft Section 820, which was approved by the Commission at the June 1984 meeting, provides a set of basic powers without the need for the trust instrument to provide them. The decision was made to except from this general approach any particularly sensitive powers and limit their exercise to situations where the power is granted in the trust or by court order. As we proceeded through the sections on powers during the June and September 1984 meetings, only one power was found to be sensitive enough to require restriction. That power is provided in draft Section 826, relating to operation of a business by the trustee. The staff wants to make sure this is the only power the Commission wants to except from the automatic powers scheme.

Respectfully submitted,

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Staff Counsel

EXHIBIT 1

Staff Draft

4637

PART 3. TRUST ADMINISTRATION
(Chapters 1 and 2 of 4 in Part 3)

CHAPTER 1. DUTIES OF TRUSTEES

Article 1. Trustee's Duties in General

§ 700. Duty to administer trust

700. Upon acceptance of the trust, the trustee, has a duty to the beneficiary to administer the trust according to its terms and, except to the extent the trust provides otherwise, according to this chapter.

Comment. Section 700 is drawn in part from Section 169 of the Restatement (Second) of Trusts (1957). Section 700 supersedes Civil Code Section 2253 and part of subdivision (a) of former Civil Code Section 2258 insofar as they related to control of the trustee's duties by the trust instrument.

7837

§ 701. Duty of loyalty

701. (a) The trustee has a duty to administer the trust solely in the interest of the beneficiary.

(b) In dealing with the beneficiary on the trustee's own account, the trustee has a duty to deal fairly with the beneficiary and to communicate to the beneficiary all material facts in connection with the transaction that the trustee knows or should know.

Comment. Section 701 codifies the substance of Section 170 of the Restatement (Second) of Trusts (1957). Section 701 supersedes former Civil Code Sections 2228, 2229, and 2231.

8331

§ 702. Duty to deal impartially with beneficiaries

702. If a trust has two or more beneficiaries, the trustee has a duty to deal impartially with them.

Comment. Section 702 codifies the substance of Section 183 of the Restatement (Second) of Trusts (1957).

§ 703. Duty to avoid conflict of interest

703. Unless the beneficiaries consent with full knowledge of the facts and without any influence on the part of the trustee:

(a) A trustee has a duty not to use or deal with trust property for the trustee's own profit or for any other purpose unconnected with the trust, nor to take part in any transaction in which the trustee has an interest adverse to the beneficiary, except as provided in Section 803.

(b) A trustee of one trust has a duty not to become a trustee under another trust adverse in its nature to the interest of the beneficiary of the first trust, except as provided in Section 803.

Comment. Subdivision (a) of Section 703 supersedes former Civil Code Sections 2229 and 2230. Subdivision (b) supersedes former Civil Code Section 2232.

8348

§ 704. Duty to take and keep control

704. The trustee has a duty to take reasonable steps to take and keep control of the trust property.

Comment. Section 704 codifies the substance of Section 175 of the Restatement (Second) of Trusts (1957).

8352

§ 705. Duty to preserve the trust property

705. The trustee has a duty to use reasonable care and skill to preserve the trust property.

Comment. Section 705 codifies the substance of Section 176 of the Restatement (Second) of Trusts (1957).

8357

§ 706. Duty to make the trust property productive

706. The trustee has a duty to make the trust property productive.

Comment. Section 706 codifies the substance of Section 181 of the Restatement (Second) of Trusts (1957). For the trustee's standard of care, see Sections 720-722.

8372

§ 707. Duty to dispose of improper investments

707. The trustee has a duty to the beneficiary within a reasonable time after the creation of the trust to dispose of any part of the trust

property included in the trust at the time of its creation that would not be a proper investment for the trustee to make.

Comment. Section 707 codifies the substance of Section 230 of the Restatement (Second) of Trusts (1957). See also Section 700 (duty to administer trust according to terms of trust).

8380

§ 708. Duty to keep trust property separate

708. The trustee has a duty to do the following:

(1) To keep the trust property separate from the trustee's individual property.

(2) So far as it is reasonable to do so, to keep trust property separate from other property not subject to the trust.

(3) To see that the property is designated as property of the trust.

Comment. Section 708 codifies the substance of Section 179 of the Restatement (Second) of Trusts (1957). Section 708 supersedes the rule against comingling 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).

8388

§ 709. Duty to enforce claims

709. The trustee has a duty to take reasonable steps to realize on claims that are part of the trust property.

Comment. Section 709 codifies the substance of Section 177 of the Restatement (Second) of Trusts (1957).

8397

§ 710. Duty to defend actions

710. The trustee has a duty to defend actions that may result in a loss to the trust estate, unless under all the circumstances it is reasonable not to make such defense.

Comment. Section 710 codifies the substance of Section 178 of the Restatement (Second) of Trusts (1957).

§ 711. Duty not to delegate

711. The trustee has a duty not to delegate to others the doing of acts that the trustee can reasonably be required personally to perform.

Comment. Section 711 codifies the substance of Section 171 of the Restatement (Second) of Trusts (1957).

9416

§ 712. Duty with respect to cotrustees

712. If a trust has more than one trustee, each trustee has a duty to participate in the administration of the trust [and to use reasonable care to prevent a cotrustee from committing a breach of trust or to compel a cotrustee to redress a breach of trust].

Comment. Section 712 codifies the substance of Section 184 of the Restatement (Second) of Trusts (1957).

Note. Inclusion of the bracketed language may depend on decisions made with regard to draft Section 952 in Memorandum 84-93.

9417

§ 713. Duties under common law

713. The provision of duties in this chapter is not intended to displace duties imposed on trustees by the common law, except to the extent that duties under the common law are inconsistent with this chapter.

Comment. Section 713 makes clear that the duties provided by this chapter are not necessarily exclusive. As to the meaning of the term "common law", see the Comment to Section 961.

405/442

Article 2. Trustee's Standard of Care

§ 720. Trustee's standard of care in administering trust

720. (a) Subject to subdivisions (b) and (c), the trustee shall administer the trust with the care, skill, prudence, and diligence under the circumstances then prevailing, including but not limited to the general economic conditions and the anticipated needs of the trust and its beneficiaries, that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims, to attain the goals of the trustor as determined from the trust instrument.

(b) In the course of administering the trust pursuant to the standard provided in subdivision (a), individual investments shall be considered as part of an overall investment strategy.

(c) The trustor may expand or restrict the standard set forth in subdivision (a) by express provisions in a trust instrument. A trustee acting for the benefit of another under a trust that expands or restricts such standards is not liable to a beneficiary under the trust for the trustee's good faith reliance on such express provisions.

Comment. Section 720 continues the substance of former Civil Code Section 2261 (a) [as amended by A.B. 630, 1984 Cal. Stats. ch. 1372] insofar as it provided a standard of care and supersedes the standard of care in Civil Code Section 2261(b). Subdivision (b) of Section 720 reflects the portfolio approach for judging investment decisions.

100/920

§ 721. Expert trustee's duty to use skills

721. If a trustee has special skills or is named as a trustee on the basis of special skills, the trustee has a duty to use those skills.

Comment. Section 721 is the same in substance as part of Uniform Probate Code Section 7-302 (1977) and is similar to part of Section 174 of the Restatement (Second) of Trusts (1957). This section codifies the rule that a higher standard of care is required of experts which was recognized in California cases. See Estate of Collins, 72 Cal. App.3d 663, 673, 139 Cal. Rptr. 644 (1977) (dictum); Coberly v. Superior Court, 231 Cal. App.2d 685, 689, 42 Cal. Rptr. 64 (1965); cf. 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 (higher standard of care applicable to professional guardian or conservator of estate).

100/922

§ 722. Standard of care not affected by compensation

722. A trustee's standard of care and performance in administering the trust is not affected by whether or not the trustee receives any compensation.

Comment. Section 722 continues the substance of part of former Civil Code Section 2259.

Article 3. Trustee's Duty to Account to Beneficiaries

§ 730. Trustee's general duty to inform and account to beneficiaries

730. (a) The trustee shall keep the beneficiaries of the trust reasonably informed of the trust and its administration.

(b) Upon reasonable request by a beneficiary, the trustee shall provide the beneficiary with a copy of the terms of the trust which describe or affect the beneficiary's interest and with relevant information about the assets of the trust and the particulars relating to the administration of the trust.

Comment. Subdivision (a) of Section 730 is the same as the first sentence of Uniform Probate Code Section 7-303 (1977) and is consistent with the duty stated in California case law to give beneficiaries complete and accurate information relative to the administration of a trust when requested at reasonable times. See *Strauss v. Superior Court*, 36 Cal.2d 396, 401, 224 P.2d 726 (1950).

Subdivision (b) is the same in substance as Uniform Probate Code Section 7-303(b). If the trustee does not comply with the reasonable request of the beneficiary, an accounting may be compelled as provided in Section [4630(b)(7)]. See also Section 24 ("beneficiary" defined). In an appropriate case, more information may be required under Section 730 than under the annual accounting required by Section 731.

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

406/108

§ 731. Duty to account annually to income beneficiary

731. (a) At least annually, at the termination of the trust, and upon a change of trustees, the trustee shall furnish an accounting to each income beneficiary, as defined in subdivision (a) of Section [4802], and upon written request to any other beneficiary.

(b) The annual accounting shall contain the following:

(1) A statement of receipts and disbursements of principal and income that have occurred during the last complete fiscal year of the trust.

(2) An inventory of trust property as of the end of the last complete fiscal year of the trust.

(3) The trustee's compensation for the last complete fiscal year of the trust.

(4) A statement that the recipient of the accounting may petition the court pursuant to Section [4630] to obtain a court review of the accounting.

(5) The name and location of the appropriate court in which to file a petition for court review of the accounting.

(c) The trustee is not required to furnish an annual accounting in any of the following circumstances:

(1) To the extent the trust instrument waives the annual accounting.

(2) If the trust is a revocable inter vivos trust.

(3) To any beneficiary who has waived the right to an annual accounting in writing, but a waiver of rights under this paragraph may be withdrawn in writing at any time and has no effect on the beneficiary's right to request information pursuant to Section 730 or to petition for an accounting pursuant to Section [4630].

(d) A trustee who is an income beneficiary is not required to account to himself or herself.

Comment. Section 731 supersedes subdivisions (b) and (c) of former Section 1120.1a, and parts of former Sections 1121 and 1138.1(a)(5). The requirement of an annual accounting is drawn from the former statute applicable to testamentary trusts created before July 1, 1977. See former Section 1120.1a. Subdivision (c) permits waiver of the annual accounting, but not the accounting required on termination or change of trustees. A beneficiary who has received an accounting that satisfies this section may request additional information under Section 730 and may petition for an additional accounting under Section [4630].

Note. The definition of income beneficiary incorporated in subdivision (a) is in the Revised Uniform Principal and Income Act. See draft attached to Memorandum 84-32. The RUPIA will become Chapter 3 (commencing with Section 900) of this part.

100/926

Article 4. Duties With Regard to Discretionary Powers

§ 740. Discretionary powers to be exercised reasonably

740. Except as provided in Section 741, a discretionary power conferred upon a trustee is not left to the trustee's arbitrary discretion, but shall be exercised reasonably.

Comment. Section 740 continues the substance of former Civil Code Section 2269(a).

100/927

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

741. (a) Subject to the additional requirements of subdivision (b), if a trust instrument confers absolute, sole, or uncontrolled

discretion upon a trustee, the trustee shall act in accordance with fiduciary principles and shall not act in bad faith or in disregard of the purposes of the trust.

(b) Notwithstanding the trustor's use of terms such as "absolute", "sole", or "uncontrolled", a person who is a beneficiary of a trust and who, either individually or as trustee or cotrustee, holds a power to take or distribute income or principal to or for the benefit of himself or herself pursuant to a standard, shall exercise that power reasonably and in accordance with the standard. In any case in which the standard governing the exercise of the power does not clearly indicate that a broader power is intended, the holder of the power may exercise it in his or her favor only for his or her health, education, support, or maintenance.

Comment. Section 741 continues the substance of subdivision (c) and most of subdivision (d) of former Civil Code Section 2269.

31786

Article 5. Duties of Trustees of Private
Foundations, Charitable Trusts, and Split-Interest Trusts

§ 750. Definitions

750. As used in this article:

(a) "Charitable trust" means a charitable trust as described in paragraph (1) of subsection (a) of Section 4947 of the Internal Revenue Code.

(b) "Private foundation" means a private foundation as defined in Section 509 of the Internal Revenue Code.

(c) "Split-interest trust" means a split-interest trust as described in paragraph (2) of subsection (a) of Section 4947 of the Internal Revenue Code.

Comment. Section 750 defines terms for purposes of this article. Subdivisions (a) and (b) continue parts of former Civil Code Section 2271. Subdivision (c) continues part of subdivision (a) of former Civil Code Section 2271.1. The references in these former sections to the Tax Reform Act of 1969 have not been continued because they are superfluous.

§ 751. Distribution under charitable trust or private foundation

751. During any period when a trust is deemed to be a charitable trust or a private foundation, the trustee shall distribute its income for each taxable year (and principal if necessary) at such time and in such manner as not to subject the assets of such trust to tax under Section 4942 of the Internal Revenue Code.

Comment. Section 751 continues the substance of part of the first paragraph of former Civil Code Section 2271. See Section 750 ("charitable trust" and "private foundation" defined). See also Section 10 (singular includes plural).

31790

§ 752. Restrictions on trustees under charitable trust, private foundation, or split interest trust

752. During any period when a trust is deemed to be a charitable trust, a private foundation, or a split-interest trust, the trustee shall not do any of the following:

(a) Engage in any act of self-dealing as defined in subsection (d) of Section 4941 of the Internal Revenue Code.

(b) Retain any excess business holdings as defined in subsection (c) of Section 4943 of the Internal Revenue Code.

(c) Make any investments in such manner as to subject the assets of the trust to tax under Section 4944 of the Internal Revenue Code.

(d) Make any taxable expenditure as defined in subsection (d) of Section 4945 of the Internal Revenue Code.

Comment. Section 752 continues the substance of part of the first paragraph of former Civil Code Section 2271 (applicable to charitable trusts and private foundations) and part of subdivision (a) of former Civil Code Section 2271.1 (applicable to split-interest trusts). The references in former law to specific amendatory sections of the Tax Reform Act of 1969 are not continued because they are unnecessary in view of Section 750(b). See also Section 10 (singular includes plural).

31793

§ 753. Exceptions applicable to split-interest trusts

753. With respect to split-interest trusts:

(a) Subdivisions (b) and (c) of Section 752 do not apply to any trust described in paragraph (3) of subsection (b) of Section 4947 of the Internal Revenue Code.

(b) Section 752 does not apply with respect to any of the following:

(1) Any amounts payable under the terms of such trust to income beneficiaries, unless a deduction was allowed under subparagraph (b) of paragraph (2) of subsection (f) of Section 170, subparagraph (b) of paragraph (2) of subsection (e) of Section 2055, or subparagraph (b) of paragraph (2) of subsection (c) of Section 2522 of the Internal Revenue Code.

(2) Any amounts in trust other than amounts for which a deduction was allowed under Section 170, paragraph (2) of subsection (b) of Section 545, paragraph (2) of subsection (b) of Section 556, subsection (c) of Section 642, Section 2055, paragraph (2) of subsection (a) of Section 2106, or Section 2522 of the Internal Revenue Code, if such amounts are segregated, as that term is defined in paragraph (3) of subsection (a) of Section 4947 of the Internal Revenue Code, from amounts for which no deduction was allowable.

(3) Any amounts transferred in trust before May 27, 1969.

Comment. Section 753 continues the substance of subdivisions (b) and (c) of former Civil Code Section 2271.1. See also Section 750 ("split-interest trust" defined).

31794

§ 754. Incorporation in trust instruments

754. The provisions of Sections 751, 752, and 753 shall be deemed to be contained in the instrument creating every trust to which this article applies. Any provision of such instrument inconsistent with or contrary to this article is without effect.

Comment. Section 754 continues the substance of the second paragraph of former Civil Code Section 2271 and subdivision (d) of former Civil Code Section 2271.1.

31795

§ 755. Jurisdiction; proceedings

755. (a) The superior court has jurisdiction to hear and determine any proceedings contemplated by paragraph (3) of subsection (1) of Section 101 of the Tax Reform Act of 1969. Such proceedings may be brought by the organization involved. All specifically named beneficiaries of such organization and the Attorney General shall be parties to

such proceedings. This provision is not exclusive and is not intended to limit any jurisdiction which otherwise exists.

(b) If an instrument creating any trust affected by this section has been recorded, a notice of pendency of judicial proceedings under this section shall be recorded in a similar manner within 10 days from the commencement of the proceedings. A duly certified copy of any final judgment or decree in the proceedings shall be similarly recorded.

Comment. Section 755 continues the substance of former Civil Code Section 2271.2.

31796

§ 756. Application of article

756. This article applies to a trust regardless of when it was created.

Comment. Section 756 continues part of the first paragraph of former Civil Code Section 2271 and part of subdivision (a) of former Civil Code Section 2271.1.

Note. This section may be unnecessary if the general transitional provisions make the new law applicable to all trusts, except as otherwise provided.

15919

CHAPTER 2. POWERS OF TRUSTEES

Article 1. General Provisions

§ 800. Powers subject to trust instrument

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

Comment. Section 800 continues the substance of the second sentence of former Civil Code Section 2267 and supersedes part of subdivision (a) of former Civil Code Section 2258. Section 800 also supersedes part of the first sentence of former Probate Code Section 1120.2 (judicial grant of additional powers). Section 800 is drawn in part from Section 2(a) of the Uniform Trustees' Powers Act (1964). See also Sections 801 (relief from trust restrictions), 820 (automatic powers). Additional powers may be provided by statutes outside this chapter. See, e.g., Section 900 et seq. (Revised Uniform Principal and Income Act).

§ 801. Power of court to relieve trustee from restrictions

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

Comment. Section 801 continues the substance of and generalizes subdivision (d) of former Civil Code Section 2261. Section 801 makes clear that the case law rule permitting deviation from trust restrictions as necessary in unforeseen circumstances is not changed. See, e.g., Estate of Loring, 29 Cal.2d 423, 436-37, 175 P.2d 524 (1946); Adams v. Cook, 15 Cal.2d 352, 359, 101 P.2d 484 (1940); Estate of Mabury, 54 Cal. App.3d 969, 984-85, 127 Cal. Rptr. 233 (1976); see also Restatement (Second) of Trusts § 167 (1957).

9419

§ 802. Exercise of powers subject to trustee's duties

802. The grant of a power to the trustee, whether by the trust instrument, by statute, or by the court, does not in itself authorize the exercise of the power. The exercise of a trustee's power is subject to the overriding duties owed by the trustee to the beneficiaries of the trust.

Comment. Section 802 recognizes that the exercise of a power granted to the trustee from any source is subject to the trustee's duties. See Section 700 et seq. (trustee's duties). This section does not mean that a power may not be exercised in a manner that conflicts with a duty where the trust so permits (see Section ____), where the trustee is directed so to act by a person holding a power to revoke (see Section ____), or where the court authorizes exercise of a power where there is a conflict of interest (see Section 803).

15795

§ 803. Conflict of interest in exercise of power

803. (a) Except as provided in subdivisions (b) and (c), if in the exercise of a trust power there is a conflict between (1) the duty of the trustee under the trust and (2) the trustee's individual interest or interest as trustee of another trust, the power may be exercised only by court authorization. For the purpose of applying this subdivision, personal profit or advantage to an affiliated or subsidiary company or association is personal profit to a corporate trustee.

(b) The requirement of obtaining court authorization under subdivision (a) does not apply to the exercise of a power provided in Section 822, 830, 862, or 874.

(c) The requirement of obtaining court authorization under subdivision (a) does not apply to the provision of ancillary services by a regulated financial institution or its affiliate to a trust of which it also acts as a trustee, or to a person dealing with the trust. The provision of such services in itself does not constitute an impermissible act of self-dealing or conflict of interest.

Comment. Section 803 is a new provision. Subdivisions (a) and (b) are drawn from Section 5(b) of the Uniform Trustees' Powers Act (1964). [Subdivision (c) is consistent with the rule stated in Estate of Pitzer, 155 Cal. App.3d 979, 988, ____ Cal. Rptr. ____ (1984).]

15634

§ 804. Incorporation of powers

804. An instrument that incorporates the powers provided in former Section 1120.2 of the Probate Code shall be deemed to refer to the powers provided in Article 2 (commencing with Section 820) to the extent these powers were provided by former Section 1120.2.

Comment. Section 804 clarifies the effect of references in instruments to the former provision listing trustees' powers.

28293

Article 2. Specific Powers of Trustees

§ 820. General powers without court authorization

820. Subject to limitations provided in Article 1 (commencing with Section 800), from the time of creation of the trust until final distribution of the trust property, a trustee has the power to perform, without court authorization, every act that a prudent person would perform for the purposes of the trust, including but not limited to the powers specified in this article.

Comment. Subdivision (a) of Section 820 supersedes the first paragraph of former Section 1120.2 which required court approval to exercise powers not expressed in the trust and subdivision (18) of former Section 1120.2 which gave the court authority to grant necessary or desirable powers. Under this section, the trustee may as a general rule exercise powers as would a prudent person, without the need for obtaining prior court approval. If there is a need for court approval before exercise of a power or for court review after exercise, the procedure provided in Section 1130 et seq. is available. This section is drawn from Section 3(a) of the Uniform Trustees' Powers Act (1964). As the introductory clause makes clear, the exercise of powers by the trustee is subject to various limitations. See Sections 800 (limitations

provided in the trust), 803 (conflict of interest in exercise of powers); see also Sections 801 (power of court to relieve trustee from trust restrictions), 802 (exercise of powers subject to trustee's duties).

28297

§ 822. Collecting and holding property

822. The trustee has the power to collect, hold, and retain trust property received from a trustor until, in the judgment of the trustee, disposition of the property should be made. The property may be retained even though it includes property in which the trustee is personally interested.

Comment. Section 822 supersedes subdivision (b) of former Civil Code Section 2261 and part of subdivision (2) of former Probate Code Section 1120.2. Section 821 is the same in substance as Section 3(c)(1) of the Uniform Trustees' Powers Act (1964). The specific references to stock in the trustee or in a corporation controlling or controlled by the trustee in former Civil Code Section 2261(2) and in former Probate Code Section 1120.2(2) are not continued in Section 822 because they are unnecessary; however, the substance of the law is not changed by Section 822 since stock of the type described by the former provisions is within the general language of the new law. See Section 62 ("property" defined). The exercise of the power to hold property under this section is subject to the limitation provided in Section [1035(d)] in the case of a marital deduction trust. See also Section 802 (exercise of powers is subject to duties).

28454

§ 824. Receiving additions to trust

824. The trustee has the power to receive additions to the property of the trust.

Comment. Section 824 supersedes part of subdivision (b) of former Section 1120 and paragraph (3) of subdivision (a) of former Section 1138.1. Section 824 is the same in substance as Section 3(c)(2) of the Uniform Trustees' Powers Act (1964). See also Sections 62 ("property" defined), 802 (exercise of powers is subject to duties).

28747

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

826. (a) The trustee has the power to continue the operation of any business or other enterprise that is part of the trust property and may effect incorporation, dissolution, or other change in the form of the organization of the business or enterprise.

(b) Notwithstanding subdivision (a) and Section 820, the trustee may continue the operation of a business or other enterprise only as authorized by the trust or by the court.

Comment. Subdivision (a) of Section 826 continues subdivision (17) of former Section 1120.2 and is similar to Section 3(c)(3) of the Uniform Trustees' Powers Act (1964). Under Section 826 the trustee may have the power to continue a business that is made part of the trust, but may not enter into a new business. See also Section 802 (exercise of powers is subject to duties).

28765

§ 828. Investments

828. The trustee has the power to invest and reinvest trust property.

Comment. Section 828 continues the substance of part of subdivision (2) of former Probate Code Section 1120.2 and part of subdivision (1) of former Civil Code Section 2261. Statutes pertaining to legal investments appear in other codes. See, e.g., Gov't Code §§ 971.2, 17202, 61673; Harb. & Nav. Code §§ 6331, 6931; Health & Safety Code §§ 33663, 34369, 37649, 52040, 52053.5; Pub. Res. Code § 26026; Sts. & Hy. Code §§ 8210, 25371, 30241, 30242, 31173; Water Code §§ 9526, 20064. Section 828 is the same in substance as Section 3(c)(5) of the Uniform Trustees' Powers Act (1964), except that surplus language has been omitted. See also Sections 62 ("property" defined), 802 (exercise of powers is subject to duties).

28767

§ 830. Deposits in insured accounts

830. (a) The trustee has the power to deposit trust funds at reasonable interest in any of the following:

(1) An account in any bank to the extent that the deposit is insured or collateralized under any present or future law of the United States.

(2) An account in an insured savings and loan association (as defined in Section 1406).

(3) An account consisting of shares of an insured credit union (as defined in Section 1443).

(b) A trustee may deposit trust funds pursuant to subdivision (a) in a financial institution operated by the trustee.

(c) This section does not limit the power of a trustee in a proper case to deposit trust funds in an account described in subdivision (a) that is subject to notice or other conditions respecting withdrawal prescribed by law or governmental regulation.

(d) The court may authorize the deposit of trust funds in an account described in subdivision (a) in an amount greater than the maximum insured or collateralized amount.

Comment. Section 830 continues the substance of part of subdivision (c) of former Civil Code Section 2261 with respect to deposits in banks. The requirement that the funds be deposited at reasonable interest is new to the statute. Section 830 is comparable to Section 2453 governing deposits by guardians and conservators with respect to deposits in savings and loan associations and credit unions. The limitation on bank deposits in subdivision (a)(1) is the same as that provided in former Civil Code Section 2261(c). Subdivisions (a)(2) and (a)(3) incorporate limitations applicable under the guardianship-conservatorship statute. See also Fin. Code §§ 764 (fiduciaries' deposits in banks), 6408.5 (fiduciaries' deposits in insured savings and loan associations), 11207 (fiduciaries' deposits in federal savings and loan associations). For other provisions relating to deposits by trustees, see Fin. Code §§ 6407-6408.7.

Subdivisions (b)-(d) continue the substance of part of subdivision (c) of former Civil Code Section 2261. See also Uniform Trustees' Powers Act § 3(c)(6) (1964). Court authorization under subdivision (d) may be obtained as provided in Section [4630].

See also Section 802 (exercise of powers is subject to duties).

28768

§ 832. Acquisition and disposition of property

832. The trustee has the power to acquire or dispose of property, for cash or on credit, at public or private sale, or by exchange.

Comment. Section 832 continues part of subdivision (5) of former Section 1120.2 and is the same in substance as part of Section 3(c)(7) of the Uniform Trustees' Powers Act (1964). Section 832 also supersedes the part of subdivision (1) of former Section 1120.2 pertaining to sale of trust assets on deferred payments. See also Sections 62 ("property" defined), 802 (exercise of powers is subject to duties).

28845

§ 834. Management of property

834. The trustee has the power to manage, develop, improve, exchange, partition, change the character of, or abandon trust property or any interest therein.

Comment. Section 834 continues part of subdivision (5) of former Section 1120.2 and is the same in substance as part of Section 3(c)(7) of the Uniform Trustees' Powers Act (1964). Section 834 also continues the authority to manage property provided in subdivision (1) of former Section 1120.2. See also Sections 62 ("property" defined), 802 (exercise of powers is subject to duties).

§ 836. Encumbrances

836. The trustee has the power to encumber, mortgage, or pledge trust property for a term within or extending beyond the term of the trust in connection with the exercise of any power vested in the trustee.

Comment. Section 836 supersedes part of subdivision (3) of former Section 1120.2 and is the same in substance as part of Section 3(c)(7) of the Uniform Trustees' Powers Act (1964). See also Sections 62 ("property" defined), 802 (exercise of powers is subject to duties).

29113

§ 838. Repairs and alterations of property

838. The trustee has the power to do any of the following:

- (a) Make ordinary or extraordinary repairs or alterations in buildings or other trust property.
- (b) Demolish any improvements.
- (c) Raze existing or erect new party walls or buildings.

Comment. Section 838 continues subdivision (6) of former Section 1120.2 and is the same in substance as Section 3(c)(8) of the Uniform Trustees' Powers Act (1964). See also Section 802 (exercise of powers is subject to duties).

29121

§ 840. Development of land

840. The trustee has the power to do any of the following:

- (a) Subdivide, develop, or dedicate land to public use.
- (b) Make or obtain the vacation of plats and adjust boundaries.
- (c) Adjust differences in valuation on exchange or partition by giving or receiving consideration.
- (d) Dedicate easements to public use without consideration.

Comment. Section 840 continues subdivision (7) of former Section 1120.2 and is the same in substance as Section 3(c)(9) of the Uniform Trustees' Powers Act (1964). See also Section 802 (exercise of powers is subject to duties).

29196

§ 842. Leases

842. The trustee has the power to enter into a lease for any purpose as lessor or lessee with or without the option to purchase or renew and for a term within or extending beyond the term of the trust.

Comment. Section 842 continues the substance of part of subdivision (1) of former Section 1120.2 and is the same in substance as Section 3(c)(10) of the Uniform Trustees' Powers Act (1964). Section 842 supercedes former Civil Code Section 2272. See also Section 802 (exercise of powers is subject to duties).

29198

§ 844. Mineral leases

844. The trustee has the power to enter into a lease or arrangement for exploration and removal of gas, oil, or other minerals, and to enter into a community oil lease or a pooling or unitization agreement, and for a term within or extending beyond the term of the trust.

Comment. Section 844 continues part of subdivision (1) of former Section 1120.2 and adds the reference to a pooling or unitization agreement drawn from Section 3(c)(11) of the Uniform Trustees' Powers Act (1964). The authority to make leases or agreements extending beyond the term of the trust is consistent with Section 842 (general power to lease). See also Section 802 (exercise of powers is subject to duties).

29199

§ 846. Options

846. The trustee has the power to grant an option involving disposition of trust property or to take an option for the acquisition of any property, and an option may be granted or taken that is exercisable beyond the term of the trust.

Comment. Section 846 continues subdivision (8) of former Section 1120.2 and is the same in substance as Section 3(c)(12) of the Uniform Trustees' Powers Act (1964). The authority to grant or take options exercisable beyond the term of the trust is new and is consistent with Section 842 (general power to lease). An option under this section includes a right of first refusal. See also Sections 62 ("property" defined), 802 (exercise of powers is subject to duties).

29200/NZ

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

848. With respect to any shares of stock of a domestic or foreign corporation, any membership in a nonprofit corporation, or any other property, a trustee has the power to do any of the following:

(a) Vote in person, and give proxies to exercise, any voting rights with respect to the shares, memberships, or property.

(b) Waive notice of a meeting or give consent to the holding of a meeting.

(c) Authorize, ratify, approve, or confirm any action that could be taken by shareholders, members, or property owners.

Comment. Section 848 supersedes former Probate Code Section 1120.2(9) and former Civil Code Section 2270. This section is drawn from Section 2458 (voting rights under guardianship-conservatorship statute). See also Corp. Code §§ 702(a) (voting of shares by trustee), 705 (proxies); Prob. Code § 802 (exercise of powers is subject to duties).

31497

§ 850. Payment of calls and assessments

850. The trustee has the power to pay calls, assessments, and any other sums chargeable or accruing against or on account of securities.

Comment. Section 850 continues subdivision (10) of former Section 1120.2 and is the same as Section 3(c)(14) of the Uniform Trustees' Powers Act (1964). See also Section 802 (exercise of powers is subject to duties).

31499

§ 852. Stock subscriptions and conversions

852. The trustee has the power to sell or exercise stock subscription or conversion rights.

Comment. Section 852 continues subdivision (11) of former Section 1120.2 and is the same as the first part of Section 3(c)(15) of the Uniform Trustees' Powers Act (1964). See also Section 802 (exercise of powers is subject to duties).

31502

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

854. The trustee has the power to consent, directly or through a committee or other agent, to the reorganization, consolidation, merger, dissolution, or liquidation of a corporation or other business enterprise, and to participate in voting trusts, pooling arrangements, and foreclosures.

Comment. Section 854 supersedes subdivision (4) of former Section 1120.2 and is similar to the second part of Section 3(c)(15) of the Uniform Trustees' Powers Act (1964). See also Section 802 (exercise of powers is subject to duties).

§ 856. Holding securities in name of nominee

856. The trustee has the power to hold a security in the name of a nominee or in other form without disclosure of the trust so that title to the security may pass by delivery, but the trustee is liable for any act of the nominee in connection with the security so held.

Comment. Section 856 continues subdivision (12) of former Section 1120.2 and is the same in substance as Section 3(c)(16) of the Uniform Trustees' Powers Act (1964). See also Corp. Code § 702(a) (trustee not entitled to vote shares without transfer into trustee's name); Fin. Code § 1563 (trust company may register securities in name of nominee); Prob. Code § 802 (exercise of powers is subject to duties).

15633

§ 858. Deposit of securities in securities depository

858. The trustee has the power to deposit securities in a securities depository, as defined in Section 30004 of the Financial Code, which is licensed under Section 30200 of the Financial Code or is exempt from licensing by Section 30005 or 30006 of the Financial Code. The securities may be held by the securities depository in the manner authorized by Section 775 of the Financial Code.

Comment. Section 858 continues the substance of part of former Civil Code Section 2240. See also Section 802 (exercise of powers is subject to duties).

31514

§ 860. Insurance

860. The trustee has the power to insure the property of the trust against damage or loss and to insure the trustee against liability with respect to third persons.

Comment. Section 860 continues subdivision (13) of former Section 1120.2 and is the same in substance as Section 3(c)(17) of the Uniform Trustees' Powers Act (1964). See also Sections 62 ("property" defined), 802 (exercise of powers is subject to duties).

31515

§ 862. Borrowing money

862. The trustee has the power to borrow money for any trust purpose to be repaid from trust property.

Comment. Section 862 continues the authority to borrow provided in subdivision (3) of former Section 1120.2 and is similar to Section 3(c)(18) of the Uniform Trustees' Powers Act (1964). See also Sections 62 ("property" defined), 802 (exercise of powers is subject to duties).

31518

§ 864. Payment and settlement of claims

864. The trustee has the power to do any of the following:

(a) Pay or contest any claim.

(b) Settle a claim by or against the trust by compromise, arbitration, or otherwise.

(c) Release, in whole or in part, any claim belonging to the trust to the extent that the claim is uncollectible.

Comment. Section 864 continues part of subdivision (15) of former Section 1120.2 and is the same as Section 3(c)(19) of the Uniform Trustees' Powers Act (1964). See also Section 802 (exercise of powers is subject to duties).

31519

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

866. The trustee has the power to pay taxes, assessments, reasonable compensation of the trustee and of employees and agents of the trust, and other expenses incurred in the collection, care, administration, and protection of the trust.

Comment. Section 866 continues subdivision (16) of former Section 1120.2 and is drawn from Section 3(c)(20) of the Uniform Trustees' Powers Act (1964). For other provisions relating to trustees' compensation, see Sections 1000-____. See also Section 802 (exercise of powers is subject to duties).

31520

§ 868. Loans to beneficiary

868. The trustee has the power to make loans out of trust funds to the beneficiary on adequate security and at a rate of interest that is fair under the circumstances.

Comment. Section 868 is new. Adequate security under this section may consist of a charge on the beneficiary's interest in the trust. See Restatement (Second) of Trusts § 255 (1957); see also Section 802 (exercise of powers is subject to duties).

§ 870. Distribution to beneficiaries under legal disability

870. The trustee has the power to pay any sum distributable to a beneficiary under legal disability by paying the sum to the beneficiary or by paying the sum for the use or benefit of the beneficiary.

Comment. Section 870 is a new provision and is drawn from Section 3(c)(22) of the Uniform Trustees' Powers Act (1964). The exercise of the power to distribute property under this section is subject to the limitation provided in Section [1035(d)] in the case of a marital deduction trust. See also Section 802 (exercise of powers is subject to duties).

31524

§ 872. Nature and value of distributions

872. The trustee has the power to effect distribution of property and money in divided or undivided interests and to adjust resulting differences in valuation. The distribution may be made pro rata or non-pro rata.

Comment. Section 872 is a new provision. The first sentence is the same as Section 3(c)(23) of the Uniform Trustees' Powers Act (1964). The second sentence recognizes the authority to take gains and losses into account for tax purposes when making distributions. See also Section 802 (exercise of powers is subject to duties).

31552

§ 874. Hiring persons

874. The trustee has the power to do any of the following:

(a) Hire persons, including accountants, attorneys, auditors, investment advisors, or agents, even if they are associated with the trustee, to advise or assist the trustee in the performance of administrative duties.

(b) Act without independent investigation upon the recommendations of persons hired.

Comment. Section 874 is new and is the same in substance as part of Section 3(c)(24) of the Uniform Trustees' Powers Act (1964). See also Sections 802 (exercise of powers is subject to duties), 951 (liability of trustee for acts of agents).

§ 876. Execution and delivery of instruments

876. The trustee has the power to execute and deliver all instruments which are needed to accomplish or facilitate the exercise of the powers vested in the trustee.

Comment. Section 876 is new and is the same as Section 3(c)(26) of the Uniform Trustees' Powers Act (1964). See also Section 802 (exercise of powers is subject to duties).

31563

§ 878. Actions and proceedings

878. The trustee has the power to prosecute or defend actions, claims, or proceedings for the protection of trust property and of the trustee in the performance of the trustee's duties.

Comment. Section 878 supersedes the last clause of subdivision (15) of former Section 1120.2 and is the same in substance as Section 3(c)(25) of the Uniform Trustees' Powers Act (1964). See also Sections 62 ("property" defined), 802 (exercise of powers is subject to duties).



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October 11, 1984

Mr. John DeMouilly
Executive Secretary
California Law Revision
4000 Middlefield Road, Room D02
Palo Alto, California 94303-4739

Re: Memorandum 84-22

Dear Mr. DeMouilly:

The Trust State Governmental Affairs Committee of the California Bankers Association has met to discuss the provisions of §4402. Conflict of Interest and Exercise of Power. The CBA strongly urges that this section be amended as follows:

§ 4402. Conflict of Interest and Exercise of Power

4402. (a) Except as provided in subdivisions (b) and (c) if in the exercise of a trust power the trustee will obtain a personal profit or advantage, that power may be exercised only by court authorization, approval of trust beneficiaries, or as authorized in the trust document. For the purpose of applying this subdivision, a personal profit or advantage to an affiliated or subsidiary company or association is personal profit to a corporate trustee.

(b) The requirement of subdivision (a) does not apply to the provision of ancillary services by a regulated financial institution or its affiliate to a trust of which it also acts as trustee (fiduciary), or to any person dealing with that trust, and that provision of services alone does not constitute an impermissible act of self dealing or conflict of interest.

(c) The requirement of subdivision (a) does not apply to the exercise of a power provided in §§4422, 4428, 4432, 4464, 4466, 4472 or 4478.

Mr. John DeMouilly
October 11, 1984
Page Two

The purpose of the amendment to proposed §4402 is to allow regulated institutions to provide ancillary services to trusts.

The California Bankers Association also requests the California Law Revision Commission to add in its comment references to the Pitzer/Burton case, and to discuss the provision of a loan as an example of a service which is not an "impermissible act of self dealing." State and Federal Regulators extensively review and regulate financial institutions' services. The public is protected from harm in this manner. Provision of ancillary services is already allowed in the context of savings and checking accounts under the financial code.

Absent some additional egregious fact, the mere provision of ancillary services appears to be beneficial to a trust or its beneficiaries. The offering of ancillary services may provide a trust with a less expensive product than if the services must all be bought from independent third parties. The service will also be better, in most instances, as no time delay occurs through necessary outside communications and directions, and transactions are more rapidly accomplished in-house.

The California Bankers Association further urges that the provision of loans and other services be discussed in the comments to the section. Specific mention of the Pitzer/Burton case should be made clarifying that these ancillary services are appropriate when offered by a regulated financial institution.

Respectfully submitted,



PAULETTE E. LEAHY

Chair, CBA Trust State Governmental Relations Committee

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