

Memorandum 85-32

Subject: Study L-640 - Trusts (Comprehensive Statute)

Attached to this memorandum is a draft of the comprehensive trust statute. This draft incorporates Commission decisions to date and also some material that has yet to be approved. New material is noted in the discussion infra. At the March meeting the Commission should consider any areas of controversy in the draft statute, make any desired technical changes, and approve it for printing as a preprint bill subject to any further revisions as necessary.

An appendix showing the disposition of existing statutes that would be repealed is attached to the draft statute (on pink paper). Conforming revisions to be made in other codes and in other parts of the Probate Code will be sent later. Two areas of the draft statute remain uncompleted. Chapter 2 (commencing with Section 620) of Part 2 has been reserved for provisions relating to spendthrift and other protective trusts. This subject will be considered in a separate memorandum. The transitional provisions (see draft Section 520 et seq.) have not been fully drafted and a proposed set of sections will follow in another memorandum. However, as you read through the draft statute, you should keep in mind any rules that should not apply retroactively.

This memorandum supersedes Memorandum 84-92 (duties and powers of trustees), Memorandum 84-93 (breach of trust), and the First Supplement to Memorandum 84-93, which were on the agenda for the last meeting, but not considered.

The staff has the following remarks:

§ 607. Oral trusts of personal property

Subdivisions (a) and (c) of this section implement Commission decisions; subdivision (b) implements a proposal of Professor Niles. This subject is fully discussed in Memorandum 85-21 on the agenda for this meeting.

§ 609. Matters included in declaration of trust

This section would continue Civil Code Section 2254. Should it be continued?

§§ 640-653. Modification and termination of trusts

These sections implement Commission decisions made at the November 1984 meeting. Note especially Section 643(b) which preserves the material purposes doctrine subject to judicial discretion.

§§ 700-713. Trustee's duties in general

These sections reflect the Commission's decision at the June 1984 meeting to codify a set of basic duties of trustees based on general trust law, such as the rules in the Restatement (Second) of Trusts. In some instances, special rules from existing California Law are retained. See, e.g., Section 700(b) (duty of trustee of revocable trust to follow directions of person holding power of revocation). As Section 700(a) makes clear, these general duties are subject to contrary provision in the trust instrument.

§ 707. Duty to dispose of improper investments

An earlier letter from the California Bankers Association points out a conflict between draft Section 707 and Civil Code Section 2261(b) which, in relevant part, reads:

(b) In the absence of express provisions to the contrary in any trust instrument, a trustee may without liability continue to hold property received into a trust at its inception or subsequently added to it or acquired pursuant to proper authority if and as long as the trustee, in the exercise of good faith and of reasonable prudence, discretion and intelligence, may consider that retention is in the best interests of the trust or in furtherance of the goals of the trustor as determined from any trust instrument.

This provision appears to relax the general rule of trust law that the trustee has a duty to dispose of improper investments. However, the meaning of Civil Code Section 2261(b) is unclear. What, for example, is an express provision to the contrary in the trust that would deprive the trustee of the authority to retain property received into the trust at its inception? Would a direction to invest in government bonds but not stock be sufficient to require the trustee to dispose of stock in the estate at the beginning of the trust? On the other hand, if there is no such express provision in the trust, what sort of property can be retained by authority of Civil Code Section 2261(b) in the exercise of good faith and reasonable prudence, discretion, and intelligence? It appears that the standards applicable to retaining the property go most of the way toward making sure that improper investments cannot be retained. For

example, if the estate was comprised almost entirely of some speculative stock or of second mortgages, in what circumstances would Civil Code Section 2261(b) operate to protect the trustee from liability for failure to diversify?

The Commission should consider whether, and to what extent, Section 2261(b) should be continued.

§ 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. 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.

§ 828. Investments

Subdivision (b) preserves a 1984 enactment that the Commission has not previously considered.

§ 951. Liability of trustee for acts of agents

When the Commission considered the question of the extent to which a trustee should be liable for acts of agents, only the introductory general principle of the draft section was approved. This would have the effect of making the trustee liable for acts of agents as if the trustee had committed them even though the trustee has acted reasonably in hiring and directing the agent. We doubt that the Commission intends such a result. Consequently, draft Section 951 proposes adoption of the limiting factors drawn from Restatement (Second) of Trusts Section 225(2).

§ 952. Liability of trustee for acts of cotrustee

This section implements a specific Commission decision to continue Civil Code Section 2239 without the bracketed clause: "A trustee is responsible for the wrongful acts of a co-trustee to which he consented, or which, by his negligence, he enabled the latter to commit, [but for no others]." The equivalent provision from the Restatement (Second) and its comment read as follows:

§ 224. Liability for Breach of Trust of Co-trustee

(1) Except as stated in Subsection (2), a trustee is not liable to the beneficiary for a breach of trust committed by a co-trustee.

(2) A trustee is liable to the beneficiary, if he

(a) participates in a breach of trust committed by his co-trustee; or

(b) improperly delegates the administration of the trust to his co-trustee; or

(c) approves or acquiesces in or conceals a breach of trust committed by his co-trustee; or

(d) by his failure to exercise reasonable care in the administration of the trust has enabled his co-trustee to commit a breach of trust; or

(e) neglects to take proper steps to compel his co-trustee to redress a breach of trust.

Comment:

a. Scope of the rule. Where several trustees are liable for a breach of trust committed by them jointly or for a breach of trust committed by one of them for which the others are liable under the rule stated in Subsection (2), they are jointly and severally liable to the beneficiary for the breach of trust.

Illustration to Clause (a):

1. A and B are co-trustees. By the terms of the trust they are permitted to invest only in bonds. A suggests to B that he invest part of the funds in shares of stock which B does. A as well as B is liable for the breach of trust.

Illustration to Clause (b):

2. A and B are co-trustees. A directs B to invest the trust funds without consulting with A. In breach of trust B invests in shares of stock. A is liable for breach of trust.

Illustration to Clause (c):

3. A and B are co-trustees. B makes an improper investment and tells A that he has done so. A approves of the investment. A is liable for breach of trust.

Illustration to Clause (d):

4. A and B are co-trustees. A improperly permits B to have the sole custody and management of the trust property and makes no inquiry as to his conduct. B is thereby enabled to sell the trust property and embezzle the proceeds. A is liable for breach of trust.

Illustration to Clause (e):

5. A and B are co-trustees. A knows that B has embezzled a part of the trust property but makes no effort to compel him to make restitution. A is liable for breach of trust.

The Restatement rule was not approved by the Commission apparently because of concern that it would be unduly burdensome to make one trustee responsible for overseeing acts of a cotrustee and liable for not taking action to remedy breaches by cotrustees. Further research indicates that in at least one case a California court has with approval cited the first Restatement for the proposition that "each trustee is under a duty to the beneficiary 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." *Estate of Hensel*, 144 Cal. App.2d 429, 438, 301 P.2d 105 (1956).

The staff suggests that the Commission consider replacing draft Section 952 with the substance of Section 224 of the Restatement (Second) of Trusts in light of Estate of Hensel. The staff has several concerns: (1) Civil Code Section 2239 is not an accurate statement of the law; (2) a modified version of Civil Code Section 2239 which omits the limiting clause would not provide sufficient guidance; (3) Section 224 of the Restatement is not inconsistent with California law; and (4) Section 224 of the Restatement provides more guidance through its greater detail. Consequently the staff thinks the Restatement approach is preferable to the revision of Civil Code Section 2239 set out in draft Section 952.

On the other hand, it should be noted that the Restatement is written in the context of the common law approach requiring unanimous action by cotrustees, whereas the Commission has decided to adopt the majority rule approach. In this context, the Commission should consider the following provision from the Texas Trust Code:

114.006. (a) A trustee who does not join in exercising a power held by three or more cotrustees is not liable to a beneficiary of the trust or to others for the consequences of the exercise nor is a dissenting trustee liable for the consequences of an act in which the trustee joins at the direction of the majority trustees if the trustee expressed the dissent in writing to any of the cotrustees at or before the time of joinder.

(b) This section does not excuse a cotrustee from liability for failure to discharge the cotrustee's duties as a trustee.

This section is the same in substance as Section 6(a) & (c) of the Uniform Trustees Powers Act (1964) and Section 11 of the Uniform Trusts Act (1937).

§ 970. Accountability for profits in absence of breach of trust

Draft Section 970 codifies the rule of Restatement (Second) of Trusts Section 203 that the trustee is accountable for profit made from administration of the trust, even though there is no breach of trust. Existing California law provides that a "trustee may not use or deal with the trust property for his own profit, or for any other purpose unconnected with the trust, in any manner." Civil Code § 2229. However, the cases citing this section seem generally to be concerned with whether there was a breach of trust. Restatement Section 203 makes breach an irrelevant consideration in the context of accountability for profits. This is a two-edged sword because it protects a trustee from an unnecessary finding that it has breached the trust just because a profit has

been made, but it also permits an order requiring an accounting for profits where the trustee has not committed any breach.

There is a significant difference between accountability without regard to breach and liability for breach. A trustee who is found to have breached a trust may suffer damage to its reputation, may be removed, may lose commissions, and may be liable in an amount out of proportion to the gravity of its fault. Niles, Trustee Accountability in the Absence of Breach of Trust, 60 Colum. L. Rev. 141, 142 (1960). Restatement Section 203 embodies the notion that the trustee's duty of loyalty extends beyond the ability of the beneficiary to prove a breach of trust.

As an aid to understanding the intended scope of draft Section 970, consider the comment to Restatement Section 203:

Comment:

a. Scope of the rule. If the trustee enters into a transaction in connection with the administration of the trust for the purpose of acquiring a profit for himself in violation of his duty of loyalty to the beneficiary, he commits a breach of trust under the rule stated in § 170, and is liable under the rule stated in § 206. Even if he enters into the transaction without intending to make a profit for himself and commits no breach of trust in so doing, nevertheless he is not permitted to retain the profit. Thus, if the trustee receives a commission or bonus for acts done in connection with the administration of the trust, he is accountable therefor, even if he does not commit a breach of trust in receiving the commission or bonus.

b. Profit made through the use of trust property. If the trustee makes a profit out of the trust property, he is accountable for the profit although he commits no breach of trust in making the profit. Thus, if the trustee receives payment for the use of the trust property, he is accountable for the money received, as for example where the trustee of a farm receives payment from a third person for the privilege of hunting on the farm. If the trustee makes an authorized investment in securities which he sells at a profit, he is of course accountable for the profit.

c. Profit made through sale of trustee's individual property to the trust. If the trustee purchases for the trust property in which he has an individual interest but is not liable for breach of trust because he did not know and had no reason to know that he was purchasing property in which he had such an interest, he is nevertheless accountable for any profit which he makes. Thus, if a trust company as trustee instructs a broker to purchase certain bonds and the broker places the order with a bank which purchases the bonds from the trustee's commercial department, the trustee is accountable for any profit which it makes on the sale, although it had no knowledge or reason to know that it

was purchasing the bonds from itself. The trustee in such a case, however, is not liable for interest at the legal rate or for any loss resulting from the purchase, as he would be if he had known that he was purchasing from himself. See § 206.

d. Profit made through use of trustee's individual property. Even if the profit is made by the use of the trustee's individual property and he does not commit a breach of trust in making the profit, he may be accountable for the profit. Thus, if the trustee with his own funds purchases an encumbrance upon the trust property for the purpose of protecting the trust property, he is accountable for any profit he makes thereby.

Illustration:

1. A devises Blackacre to B in trust. Blackacre is subject to a first mortgage for \$10,000 and a second mortgage for \$5000. In order to prevent a foreclosure of the second mortgage, B with his own money purchases the second mortgage for \$3000. On the foreclosure of the first mortgage Blackacre sells for \$16,000. B is entitled only to \$3000 and interest out of the proceeds of the sale. See § 170, Comment j.

e. Profit unconnected with administration of trust. If the trustee enters into a transaction not connected with the administration of the trust, he is not accountable for a profit which may result merely because the trust property is indirectly affected thereby.

Illustration:

2. A devises his family residence to B in trust to permit C, the widow of A, to reside therein during her lifetime and at her death to convey the property to D. By the terms of the trust B is not authorized to purchase land. During C's lifetime B learns that negotiations are pending for the sale of adjoining land for uses of an objectionable nature. To prevent this, B with his own funds purchases the adjoining land for \$10,000, and after holding it for five years he sells it for \$25,000. B is not accountable for the profit.

f. Cross reference. As to the liability of the trustee for profits made by him through a breach of trust, see § 205.

The impact of Restatement Section 203 should not be exaggerated. Those speaking for institutional trustees which are frequently target defendants have reacted negatively to Section 203. As discussed in earlier meetings, the California Bankers Association is concerned about liability where a bank through its lending operations has a potential conflict of interest with its trust department. See *Estate of Pitzer*, 155 Cal. App.3d 979, 988 (1984). This situation may arise, for example, where a person intending to buy trust property offered for sale by the bank acting as trustee borrows money to finance the purchase from the bank acting in its normal lending functions. The staff does not, however, think that Restatement Section 203 should be the focus of the CBA's concern. The Pitzer case and its companion, Burton v. Security Pacific National Bank, 155 Cal. App.3d 967 (1984), expose institutional trustees to what they find to be unacceptable liabilities as a consequence of confused jurisdictional limitations and procedural practices, mainly involving the role of the jury in assessing punitive damages. The staff believes that disposition of the jurisdictional and procedural questions in draft Sections 1100-1135 should do much to remedy what have been called the "difficulties and severe problems facing fiduciaries in today's pervasive litigation-prone climate." See McLean-Utley, Surcharge Problems of Trustees and Executors, in *Estate Planning* 1983 § 6.7, at 235 (Cal. Cont. Ed. Bar 1984). Adoption of Restatement Sections 203 and 204, as set forth in draft Sections 770 and 771, should aid in making the necessary distinctions between the more severe liabilities for breach (see draft Sections 760, 772, and 773) and the accountability for profits actually made.

Mr. Melvin H. Wilson, expressing the point of view of the institutional trustee, is attached hereto as Exhibit 1. Mr. Wilson objects that Restatement Section 203 is "punitively excessive", that it imposes liability "irrespective of whether the fiduciary acts in bad faith, and irrespective of whether the transaction may have been of benefit to the trust account." Mr. Wilson describes Section 203 as "a very serious inhibition to the effort of California banks to deliver a quality, economical product to the consumers who utilize their fiduciary services." He characterizes the result of Section 203 as a "windfall" to the trust account.

Restatement Section 203 is not inconsistent with California law. Consider the following Field Code principles:

Civil Code § 2228. Obligation of good faith

2228. In all matters connected with his trust, a trustee is bound to act in the highest good faith toward his beneficiary, and may not obtain any advantage therein over the latter by the slightest misrepresentation, concealment, threat, or adverse pressure of any kind.

Civil Code § 2229. Use of property

2229. A trustee may not use or deal with the trust property for his own profit, or for any other purpose unconnected with the trust, in any manner.

The high standard of fiduciary conduct required by these provisions and others is continued in the draft statute, although the language differs considerably.

Restatement Section 203 reflects the idea that the duty of loyalty requires something more than merely avoiding breach of trust. An analogous development has taken place in the law governing insiders' dealings on the part of corporate officers. See Niles, Trustee Accountability in the Absence of Breach of Trust, 60 Colum. L. Rev. 141, 143-44 (1960). However, the limited nature of Section 203 should be kept in mind; its effect or intent should not be exaggerated. Section 203 provides only a liability for profits actually received in recognition of the fact that it applies to innocent as well as guilty trustees. On the other hand, Restatement Section 205, the substance of which was approved by the Commission (see draft Section 972), provides a liability upon breach of trust for loss, depreciation, profit made, or profit that would have been made. Draft Section 973 (drawn from Restatement Section 207) provides additional liability for interest on liability for breach of trust.

Another argument in favor of Restatement Section 203 is that it avoids the need to determine that the trustee has breached the trust, with the consequent damage to reputation and potential loss of commission. Instead, where profits are received in a situation involving some conflict of interest that runs counter to the fiduciary principle, the trustee is accountable for the profit received, and only that amount--no punitive damages, no interest.

As noted by Professor Niles in his 1960 article on trustee accountability:

A comment to [Restatement] § 203 uses the same fact situation to illustrate an instance of trustee accountability as is used in the comment to § 206: Where the trustee purchased for himself for

\$3,000 a \$5,000 second mortgage on a piece of [trust] property that is also subject to a \$10,000 first mortgage, and the property is sold for \$16,000 upon foreclosure of the first mortgage, the trustee is only entitled to \$3,000 plus interest. In the illustration under § 203, however, the trustee's purpose in purchasing the second mortgage was to protect the trust property; the motive of the trustee in the example under § 206 was apparently solely personal.

Niles, supra, at 141 n.5. Would the benefit to the trust be properly characterized as a "windfall"? If it is a windfall, would it be better public policy to allow the fiduciary to gain approximately \$2,000 in speculative profit in this situation? In fact, if the trustee's motive, as suggested in the example under Section 203, was to protect the trust, the benefit of that action should go to the trust, "windfall" or not.

Draft Section 970 (Restatement Section 203) should be read in connection with draft Section 971, which is the same as Restatement Section 204. These two sections are complementary. Draft Section 971 protects the trustee from liability in non-breach situations where there may be a loss or depreciation in the value of trust property or a failure to make a profit. Draft Section 970 is necessarily implied from draft Section 971.

The trustee should look to the compensation provided by the trust or as allowed by the court. For the trustee to profit from situations where there is a potential conflict of interest, even in cases where the conflict is only apparent and did not influence a decision, goes counter to the fiduciary principle. As one commentator puts it, "[t]he determination to prevent corruption of motives by the attraction of personal profit is so strong that the fiduciary will not even need to know that he either had been exposed or had succumbed to temptation in an impermissible way." Dawson, Restitution Without Enrichment, 61 B.U.L. Rev. 563, 618 (1981). It also makes sense to protect the beneficiary in situations where the trustee has profited but the beneficiary is not able to prove a breach of trust. Restitution of profits thus deters disloyal conduct in an efficient manner because the court is not required to "wrestle with difficult issues of breach and causally related damages." See Wellman, Punitive Surcharges Against Disloyal Fiduciaries--Is Rothko Right?, 77 Mich. L. Rev. 95, 97 (1978).

Perhaps some of Mr. Wilson's misgivings might be assuaged if draft Section 970 were explicitly limited to situations where there is a potential conflict of interest, even though the trustee is not shown to

have violated the duty of loyalty to the beneficiary. Other protections are provided in the draft statute. As for the situation where the bank may have a potential conflict of interest because of independent dealings of its trust and lending departments, the draft of Section 803(c) protects the financial institution. The comment to draft Section 970 should contain a reference to this provision. It should also be noted that draft Section 970 only applies to profits made by the trustee "through or arising out of the administration of the trust".

For an additional analysis of the Wilson's remarks, see the Memorandum from Professor Niles attached hereto as Exhibit 2.

§ 973. Trustee's liability for interest

Draft Section 973(a) makes clear that the legal rate of interest is the rate applicable to judgments, that is, 10%. See Code Civ. Proc. § 685.010. This was assumed without discussion in the memorandum on this question considered at the September 1984 meeting. However, it should be noted that Section 1 of Article 15 of the California Constitution establishes a 7% rate of interest "upon the loan or forbearance of any money, goods, or things in action, or on accounts after demand" subject to several exceptions, including by contract of the parties or by statute as to the rate on judgments. It is assumed that the constitutional article on interest rates, characterized as "usury", does not limit the rate of interest that may be applied against a fiduciary as damages for a breach of trust. Cf. *Lynch v. John M. Redfield Found.*, 9 Cal. App.3d 293, 302 n.1, 88 Cal. Rptr. 86 (1970) ("There is authority that the surcharge is at 'the usual rate of return on trust investments, and not for interest at the legal rate' [citing Scott], or 'at the legal rate or such other rate as the court in its sound discretion may determine.' [citing Restatement § 207 and C.J.S.]")

§ 980. Limitations on proceedings against trustees

This section has been approved, but two questions deserve further consideration. The Comment to draft Section 980 states that the one-year rule of the section does not displace the three-year rule applicable to fraud and running from the date of discovery. See Code Civ. Proc. § 338(4). The one-year period in Section 980 also may run from the date of discovery, or the date when the beneficiary should have discovered the breach, or the date of disclosure. It is not clear why the element of fraud should triple the length of the applicable limitations period.

The staff suggests that the Commission consider eliminating the special fraud rule in this area, making the one-year period applicable in all cases.

The second issue relates to the word "limitation" in the introductory clause of Section 980: "Unless previously barred by adjudication, consent, or limitation" It appears that the only way limitation can be relevant is where the subject of the claim for breach has not been disclosed or discovered and the beneficiary would not reasonably have discovered it. The one-year period of Section 980 has not been triggered, so the question is whether the four-year limitations period of Code of Civil Procedure Section 343 would apply. Under existing law the four-year rule applies, but as against a fiduciary it does not begin to run until the beneficiary learns of the breach. See 2 B. Witkin, California Procedure Actions § 354, at 1191 (2d ed. 1970). Accordingly, the claim for breach would never be barred by limitations in this type of case, although laches would ultimately provide some relief. It is thus not clear how limitation would bar a claim, unless there is some special state or federal statute involving trust companies that applies shorter period. It is also possible that a claim might be barred by application of the statute of limitation of another state. Since on balance the reference to "limitation" in the introductory clause of Section 980 does not do any harm, the staff concludes that it should be retained to cover such eventualities.

§ 1102. "Principal place of administration of trust" defined

This section has been redrafted to eliminate the reference to the usual place "of business" and to replace the reference to the place where the "day-to-day records" pertaining to the trust are kept with a reference to "day-to-day activities."

§ 1106. Jury trial

The Commission has not yet considered this section as drafted. This implements a policy decided at the November 1984 meeting.

§ 1130. Grounds for petition

Paragraph (18) has been added to subdivision (b) to reflect the change of venue provision in the procedures applicable to trusts under continuing court jurisdiction.

§§ 1220, 1221. Rights of creditors of trustor

The Commission has not yet considered these sections although the policy was approved at the November 1984 meeting.

Respectfully submitted,

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November 19, 1984

California Law Revision Commission
4000 Middlefield Road, Room D-2
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Re: Study L-640,
Memorandum 84-93

Gentlemen:

Initially I will comment on proposed Probate Code §970 which is based on Restatement §203.

The scope of §203, which would allow a trust account to recover "profits" realized by a fiduciary where it has not committed an intentional breach, is punitively excessive. The example in Comment c to §203 is a definition of the scope of the rule.

The real problem with §203 is that it imposes absolute liability with a resulting windfall to the trust account even when a totally independent intervening agency (person) makes the decision which results in the trust assets indirectly benefitting the fiduciary. It also imposes such liability irrespective of whether the fiduciary acts in bad faith, and irrespective of whether the transaction may have been of benefit to the trust account.

There are a very broad range of scenarios in which the scope of §203 can apply.

1. One is based on the example in §203 c. T, an individual trustee places a purchase order for 200 shares of XYZ Corp. with broker A. XYZ stock is listed on the New York Stock Exchange. Simultaneously, T, acting in his individual capacity, places an order with broker B to sell 100 shares of XYZ Corp. which he individually owns.

a. In one variation, A and B effect their trades through the NYSE trading floor. Broker A obtains the 100 shares owned by T from broker B and an additional 100 shares from broker B's own position in XYZ Corp. Is T liable to the trust account for the "profit" he realizes from indirect sale of the XYZ stock to the trust?

b. In another variation, A and B effect their trades through a "block trade" for 10,000 shares of XYZ Corp. negotiated directly between them. T's 100 shares comprise part of the 10,000 shares block trade and, to some undeterminable extent, may wind up in the trust. Again, is T liable for the "profit" he realized.

2. T, a corporate trustee, sells Acre to C. T and C agree to use T's escrow department to effectuate closing. T prefers to use its own escrow department because the sales and the amount of time T must devote in dealing with escrow instructions and other details is reduced with a consequential reduction in T's charge to the trust account for T's services in effecting the closing. The escrow charges are competitive and do not result in the trust for which T is fiduciary incurring escrow costs in excess of what would be incurred were another escrow service to be used. Must T disgorge to the trust account the "profits" T realized from providing the escrow service.

3. T, a corporate trustee, sells Acre to D for \$100,000 cash. D independently decides to borrow part of the purchase price. D shops for a conventional institutional 80% loan and decides to borrow the funds from T's banking department because T's loan fee ("points") and interest rate is more favorable at that time. Must T disgorge to the trust account the "profits" it will make over the life of the loan because it extended credit to D based on D's credit-worthiness? See the cases contrary to the Restatement position cited in Estate of Pitzer on this issue.

4. T, a corporate trustee, provides a daily automated "sweep" of all uninvested cash over \$1.00 into a money market common (collective) trust fund. The sweep function also operates in reverse by cashing out common trust fund units to cover cash disbursements. The operational priority constraints of the automated sweep require that the computer programs be run in a batch mode after the close of business each day. Funds held by the common trust fund cannot be physically invested with third parties until the next business day, which could result in a four day delay in some circumstances. In order to provide its trust customers with same day investment of uninvested cash, T provides overnight or over-weekend investment through the use of U.S. government securities repurchase agreements between T's commercial banking investment department and its trust department. The repurchase agreements provide the common trust fund with a return which is equal to that obtained from third parties through arms length negotiation. One view of repurchase agreements is that they are the equivalent to a loan to T, and because T is able to generate at least an offsetting amount of earnings from the funds, it "profits." It is arguable whether this scenario comes under Rest. §203, Comment c or d, or e.

Must T disgorge indirectly to the participating trust accounts the "profits" it makes on the repurchase agreements by disgorging them to the collective fund, or must it disgorge directly to each participating trust account.

5. There are other, comparable, scenarios.

The staff comment in the middle of page 6, "The staff does not, however, think that Restatement Section 203 should be the focus of the CBA's concern," does not seem to be supported by the foregoing scenarios. To the contrary, because of the very complex economic system in which we must function, §203 represents a very serious inhibition to the effort of California banks to deliver a quality, economical product to the consumers who utilize their fiduciary services.

Very truly yours,



Melvin H. Wilson
Vice President and
Associate Trust Counsel

MHW:hks

cc: Paulette Leahy
L. B. Norman

EXHIBIT 2

MEMORANDUM

To : California Law Revision Commission

From: Russell D. Niles

Re : First Supplement to Memorandum 84-93 (12/20/84) --
Accountability for Profits in Absence of Breach

Date: January 15, 1985

Mr. Melvin H. Wilson in his letter of November 19, 1984, comments on proposed Probate Code § 970 which is based on the Restatement of Trusts, § 203. I think that Mr. Wilson is needlessly apprehensive about § 203. This section is a very important element in the modern law and is necessary in order to ameliorate and modernize the strict rules of liability which formerly applied to trustees. I am sure that neither Professor Scott or his advisers on the Restatement considered § 203 to be punitive. [See Niles, A Contemporary View of Liability for Breach of Trust, 29 The Record, The Ass'n. of the Bar of the City of New York, 573 (1944), 114 Trusts & Estates, 12, 182 (1975)]. The doctrine

has long been accepted in California in § 2228 and § 2229.

Another section in the Civil Code is even more precisely in point: "§ 2263 Purchase by trustee of claims against trust fund. A trustee cannot enforce any claim against the trust property which he purchased after or in contemplation of his appointment as trustee, but he may be allowed by any competent court to charge to the trust property what he has in good faith paid for the claim, upon discharging the same." This is a classical case of accountability without breach of trust. It is discussed in Comment d under § 203, with an illustration. In such a case the trustee is not guilty of a breach of trust if he purchased the encumbrance to protect the trust from foreclosure but even then he could not make a personal profit. He must give the trust estate any benefit that he might realize.

Even though the Commission retains the principle of § 203 (as I think it must) there are ways that the Commission could be helpful to honorable trust companies.

In the first place, in my judgment, the Court in Estate of Pitzer, has misapplied the Restatement sections, both § 170 and § 203. If the case is appealed it may well be reversed. First, there is no self-dealing when a bank that is a trustee of real property loans its money to a third party, even if the money is later used to buy the property held in trust. In self-dealing cases, the trustee must buy or sell to itself or lend to or borrow from itself. There are breaches of trust involving conflicts of interest other than self dealing of course, for example, if a bank owns Blackacre as trustee for A, and lends money to B to enable B to buy Blackacre and the trustee takes a mortgage on Blackacre, and later acquires Blackacre in foreclosure, and still later sells Blackacre at a profit, the bank might be accountable for the profit. Or a scheme to lend, foreclose, and resell at a profit might be a breach of trust. But I do not believe that the current law in other states (see cases

cited in Pitzer) would consider that a commercial loan to a third party, even though known to be for the purpose of buying trust property, would involve either § 170 or § 203 unless other factors were present. The Commentary to P.C. § 970 could make this point.

I think that the Commission could in due time propose changes in the banking law to make it clear that trust companies would not be liable or accountable for normal rates of interest in cases like Pitzer, or perhaps for certain fees, such as ordinary escrow fees. I would not like, however, to see trust companies back as brokers, mortgage dealers and the like as they were prior to the crash in 1929.

Outline of Draft Trust Statute

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DIVISION 3. TRUSTS

PART 1. GENERAL PROVISIONS

CHAPTER 1. GENERAL PROVISIONS

§ 500. Judicial Council to prescribe forms

500. The Judicial Council may prescribe the form of the applications, notices, orders, and other documents required by this division. Any such form prescribed by the Judicial Council is deemed to comply with this division.

Comment. Section 500 is new and is the same as Section 1456 (forms under guardianship-conservatorship statute).

35062

§ 501. Clerk to set matters for hearing

501. When a petition which requires a hearing is filed with the court clerk pursuant to this division, the clerk shall set the matter for hearing.

Comment. Section 501 continues parts of former Sections 1120(a), 1120.1a(d), 1138.6(a), 1139.3, and 1139.15. Section 501 is comparable to Section 1451 (guardianship-conservatorship statute).

35084

§ 502. Appointment of guardian ad litem

502. (a) The court may, on its own motion or on request of a trustee or other person interested in a trust, appoint a guardian ad litem at any stage of a proceeding concerning a trust. If the court determines that representation of the interest otherwise would be inadequate, a guardian ad litem may be appointed to represent the interest of any of the following:

- (1) A minor.
- (2) An incapacitated person.
- (3) An unborn person.
- (4) An unascertained person.
- (5) A person whose identity or address is unknown.
- (6) A designated class of persons who are not ascertained or are not in being.

(b) If not precluded by a conflict of interest, a guardian ad litem may be appointed to represent several persons or interests.

(c) Sections 373 and 373.5 of the Code of Civil Procedure do not apply to the appointment of a guardian ad litem under this section.

Comment. Section 502 continues the substance of paragraph (2) of subdivision (a) and subdivision (b) of former Section 1215.3 and the substance of subdivision (a) of former Section 1138.7, and supersedes part of the last paragraph of subdivision (b) of former Section 1120. Subdivision (c) continues the substance of subdivision (c) of former Section 1138.7 and the last sentence of subdivision (b) of former Section 1120.

100/932

§ 503. Law applicable to marital deduction gifts in trust

503. (a) Except as provided in subdivision (b), the provisions of [the successor to Article 3 (commencing with Section 1030) of Chapter 16 of Division 3] apply to gifts, whether outright or in trust, made in a trust which is subject to this division.

(b) This section does not apply to any trust if its terms expressly or by necessary implication make this section inapplicable to it.

(c) For purposes of this section, references in [the successor to Article 3 (commencing with Section 1030) of Chapter 16 of Division 3] to a "testator" refer to the trustor and references to a "will" refer to a trust that is subject to this division.

Comment. Section 503 continues the substance of former Probate Code Section 1138.14 and supersedes former Civil Code Section 2264.

38450

§ 504. Constructive and resulting trusts unaffected

504. Nothing in this division affects the law relating to constructive or resulting trusts.

Comment. Section 504 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 504 supersedes the provisions of former law relating to "involuntary" trusts. See former Civil Code §§ 856, 2215, 2217, 2223, 2224, 2275.

CHAPTER 2. TRANSITIONAL PROVISIONS

Article 1. Application of Division 3 and Transitional Provisions

§ 520. Definitions

520. As used in this article:

(a) "Operative date" means July 1, 1987.

(b) "Prior law" means the applicable law in effect on June 30, 1987.

Comment. Section 520 is drafted on the assumption that Division 3 (commencing with Section 500) will become operative on July 1, 1987.

15918

§ 521. General rule concerning application of division

521. Except as otherwise provided by statute:

(a) This division on and after its operative date applies to all trusts regardless of whether they were created before or after the operative date.

(b) This division on and after its operative date applies to all proceedings concerning trusts commenced before the operative date unless in the opinion of the court application of a particular provision of this division would substantially interfere with the effective conduct of the proceedings or the rights of the parties and other interested persons, in which case the particular provision of this division does not apply and prior law applies.

Comment. Section 521 provides the general rule governing the application of this division to existing trusts and pending proceedings. Subdivision (a) continues the substance of the first sentence of subdivision (e) of former Civil Code Section 2261 and the first sentence of former Probate Code Section 1138.13. 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 provisions governing trusts subject to continuing jurisdiction of the court, see Article 2 (commencing with Section 540). See also Section 82 ("trust" defined).

Note. This article will include additional sections as needed to preserve the old law for pre-operative date trusts.

§ 522. Interpretation of trust terms concerning legal investments

522. If a trust created before or after the operative date refers to investments permissible or authorized by law for investments of trust funds or to legal or authorized investments, or uses other words of similar meaning in defining the powers of the trustee relative to investments, such language, in the absence of other controlling or modifying provisions of the trust instrument, shall be construed as authorizing any investment permitted under Chapter 2 (commencing with Section 800) of Part 3.

Comment. Section 522 continues the substance of the second sentence of subdivision (e) of former Civil Code Section 2261.

10362

Article 2. Testamentary Trusts Subject
to Continuing Jurisdiction

§ 540. Application of article

540. This article applies only to the following:

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

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

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

10360

§ 541. Continuing jurisdiction

541. If a trust described in Section 540 continues after distribution of the decedent's estate, the superior court in which the estate

was administered retains jurisdiction over the trust for any of the purposes specified in Section 1130.

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

10357

§ 542. Applicable procedures

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

Comment. Section 542 makes clear that the general procedures governing judicial proceedings relating to trusts apply to proceedings involving trusts that remain subject to the continuing jurisdiction of the court. See Sections 1100-1135; see also Section 501 (clerk to set matters for hearing), 502 (appointment of guardian ad litem). This incorporation of the general provisions continues the substance of much of the law relating to trusts subject to continuing jurisdiction because the general procedures were drawn in part from former Section 1120 et seq. See the comments to Sections 1100-1135. This article has the effect of making inapplicable the alternative venue over testamentary trusts provided in Section 1105. The other distinction between proceedings under this article and those under Section 1130 et seq. is that no filing fee is required when a petition is filed under the continuing jurisdiction provided in this article. In other respects, the procedures are the same.

10355

§ 543. Effect of removal from continuing jurisdiction

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

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

10354

§ 544. Transfer of jurisdiction over trust to different county

544. (a) A trust described in Section 540 may, at any time after final distribution of the decedent's estate, be transferred to the superior court of a different county in this state as provided in this section. Except as otherwise provided in this section, proceedings to transfer the trust are governed by general provisions of this division.

(b) The petition for transfer shall set forth all of the following:

(1) The name of the county to which jurisdiction over the trust is sought to be transferred.

(2) The names, ages, and places of residence of the trustees and all beneficiaries of the trust, so far as known to the petitioner.

(3) A brief description of the character, condition, value, and location of property of the trust.

(4) A brief statement of the reasons for transfer.

(c) If, after hearing, it appears to the court that the transfer of jurisdiction to the court designated in the petition [or to the superior court of any other county in this state] will be in the best interests of the estate, or that economical and convenient administration of the trust will be facilitated by the transfer, the court shall make an order transferring jurisdiction over the trust. Upon such order, the court clerk shall certify to the clerk of the court to which jurisdiction is transferred a copy of the order of transfer, together with copies of the instrument creating the trust, the decree of distribution, and such other documents or matters of record as the court may by its order determine to be necessary to define the powers and duties of the trustee, or otherwise necessary in connection with further administration of the trust.

(d) The court to which jurisdiction is transferred may from time to time require by order the filing of certified copies of such additional papers or matters of record from the court of probate as may be required.

(e) Upon the filing of a certified copy of the order of transfer, together with supporting documents, the court to which jurisdiction is transferred has the same jurisdiction over the trust as the court of probate would have had but for the transfer.

Comment. Section 544 continues the general substance of the transfer provisions of former Sections 1128 and 1129. Subdivision (a) continues the authority provided by the first sentence of former Section 1128. The second sentence of subdivision (a) makes clear that the general procedural provisions apply to a transfer under this section. This supersedes the third paragraph of former Section 1129. See Sections 1110-1118 (notice in trust proceedings), 1130-1135 (proceedings concerning trusts).

Subdivision (b) continues the substance of the contents of the petition set forth in former Section 1128. See also Section 1131 (verified petition).

Subdivision (c) continues the substance of the third and fourth sentences of the first paragraph of former Section 1129. See also Sections 501 (clerk to set matters for hearing), 1110-1118 (notice), 1133 (30 days' notice).

Subdivision (d) continues the substance of the last sentence of the first paragraph of former Section 1129.

Subdivision (e) continues the substance of the second paragraph of former Section 1129.

405/335

Article 3. Removal of Trusts From
Continuing Court Jurisdiction

§ 550. Application of article

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

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

405/348

§ 551. Notice to beneficiaries

551. (a) Except as provided in Section 552, within six months after the initial funding of the trust, the trustee of a trust described in Section 550 shall give a notice of removal of trusts from continuing court jurisdiction to each beneficiary. Notice shall be sent by registered or certified mail or by first class mail to the persons to be notified at their last known addresses. Notice may be sent by first class mail only if an acknowledgment of receipt of notice is signed by the beneficiary and returned to the trustee.

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

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

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

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

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

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

(6) The name and location of the court in the county in which it is appropriate to file a petition pursuant to Section 1130, the name and location of the court that had jurisdiction over the administration of the decedent's estate, and a statement that it is appropriate to file a petition pursuant to Section 1130 with either court.

(c) The trustee shall file with the court that had jurisdiction over the administration of the decedent's estate proof of service of the notice under this section within seven months after the initial funding of the trust.

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

405/374

§ 552. Court approval to remove trust from continuing jurisdiction

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

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

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

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

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

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

Comment. Section 552 continues the substance of subdivision (d) of former Section 1120.1a. See also Section 501 (clerk to set matters for hearing), 1100 (subject-matter jurisdiction of superior court).

405/338

§ 553. Notice to minor, ward, or conservatee

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

(b) In addition to the requirements of subdivision (a), if the trustee, at the time the notice required by Section 551 is sent, has actual knowledge that a beneficiary who is not a minor, ward, or conservatee is being assisted by another individual in the handling of his or her personal affairs, the trustee shall send the notice required by Section 551 to both that person and the beneficiary and, upon the written request of either of them, shall also send the accounting required by Section 731 to both of them.

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

405/385

§ 554. Application of article to charitable trusts

554. (a) If the trust is a charitable trust subject to Article 7 (commencing with Section 12580) of Chapter 6 of Part 2 of Division 3 of Title 2 of the Government Code, and if the trustee is not already filing with the Attorney General a periodic report as required by Section 12586 of the Government Code, upon the vesting of any charitable interest created by the trust, the trustee shall thereafter furnish to the Attorney General without the necessity of any written request a copy of a financial

Statement which reflects, whether singly or in combination with other periodic reports, itemized annual income, expenditures, assets, and liabilities of the trust.

(b) The Attorney General may designate by regulation copies of other summaries, statements, forms, or returns to be furnished instead of those required by this subdivision if such other summaries, statements, forms, or returns are filed by the trustee with a federal or state agency.

(c) This subdivision does not require the preparation of any financial statement that is not prepared by or for the trustee in the ordinary course of business.

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

405/341

§ 555. Removal by trust company as successor trustee

555. If a trust company, as defined in Section 107 of the Financial Code, is appointed as a successor trustee of a trust which, at the time of the appointment, is subject to continuing court jurisdiction because it was not removed pursuant to Section 552, the successor trustee shall send the notice and proof of service required by Section 541 within six months and seven months from the date of appointment, respectively.

Comment. Section 555 continues the substance of the first sentence of subdivision (g) of former Section 1120.1a.

405/339

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

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

Comment. Section 556 continues the substance of the second sentence of subdivision (g) of former Section 1120.1a.

PART 2. CREATION, VALIDITY, MODIFICATION, AND TERMINATION OF TRUSTS

CHAPTER 1. CREATION AND VALIDITY OF TRUSTS

§ 600. Methods of creating trust

600. A trust may be created by any of the following methods:

(a) A declaration by a property owner that the owner holds the property as trustee for another person.

(b) A transfer of property by the owner during the owner's lifetime to another person as trustee for the transferor or for a third person.

(c) A testamentary transfer by a property owner to another person as trustee for a third person.

(d) An exercise of a power of appointment to another person as trustee for the donee of the power or for a third person.

(e) An enforceable promise to another person whose rights under the promise are to be held in trust for a third person.

Comment. Section 600 is the same in substance as Section 17 of the Restatement (Second) of Trusts (1957). Section 600 supersedes parts of former Civil Code Sections 2221 and 2222. A declaration under subdivision (a) must satisfy the requirements of Section 606 (trust relating to real property) or 607 (oral trusts of personal property), if applicable.

§ 601. Intention to create trust

601. A trust is created only if the trustor properly manifests an intention to create a trust.

Comment. Section 601 codifies Section 23 of the Restatement (Second) of Trusts (1957). This section continues the substance of former Civil Code Section 2221(1). Special requirements may apply to the manifestation of the trustor's intent. See Sections 606 (Statute of Frauds as applied to trusts of real property), 607 (oral trusts of personal property).

§ 602. Trust property

602. A trust cannot be created unless there is trust property.

Comment. Section 602 is the same as Section 74 of the Restatement (Second) of Trusts (1957). Section 602 continues the substance of part of former Civil Code Sections 2221 and 2222. See also Section 62 ("property" defined). For additional rules concerning the nature of property required to form a trust, see Restatement (Second) of Trusts §§ 75-86 (1957).

§ 603. Trust purpose

603. A trust can be created for any purpose that is not illegal or against public policy.

Comment. Section 603 continues the substance of former Civil Code Section 2220. See also Civil Code §§ 1667-1669 (unlawful contracts).

405/431

§ 604. Trust for indefinite or general purposes

604. A trust created for an indefinite or general purpose is not invalid for that reason if it can be determined with reasonable certainty that a particular use of the trust property either does or does not come within the stated purpose.

Comment. Section 604 is new. Under this section, a trust for indefinite or general purposes, but not limited to charitable purposes, may be created and enforced. This changes the rule applicable under cases such as In re Estate of Sutro, 155 Cal. 727, 730, 102 P. 920 (1907).

405/418

§ 605. Designation of beneficiary

605. (a) A trust is not created unless there is a beneficiary.

(b) The requirement of subdivision (a) is satisfied by any one of the following provisions in the trust:

(1) A beneficiary or class of beneficiaries that is definitely ascertainable.

(2) A beneficiary or class of beneficiaries that is sufficiently described so that it can be reasonably determined that some person meets the description or is within the class.

(3) A grant of a power to the trustee or some other person to select the beneficiaries based on a standard or in the discretion of the trustee or other person.

Comment. Subdivision (a) of Section 605 continues the requirement that a trust have a beneficiary found in former Civil Code Sections 2221 and 2222. Subdivision (b) supersedes the requirement of former Civil Code Sections 2221 and 2222 that the beneficiary be indicated with "reasonable certainty." Subdivision (b)(3) in particular affords the trustor a greater degree of flexibility in creating a trust. Under subdivision (b)(3), a disposition that would be valid as a power of

appointment will not fail just because it is made in trust. Cf. In re Estate of Davis, 13 Cal. App.2d 64, 68, 56 P.2d 584 (1936) (testamentary disposition in trust to distribute to sons and grandchildren as trustee deemed best upheld as power of appointment).

16968

§ 606. Statute of Frauds

606. No trust in relation to real property is valid unless created or declared in one of the following manners:

(a) By a written instrument subscribed by the trustee, or by the trustee's agent authorized to do so by writing.

(b) By a written instrument conveying the trust estate subscribed by the trustor, or by the trustor's agent authorized to do so by writing.

(c) By operation of law.

Comment. Section 606 continues the substance of former Civil Code Section 852 and the former part of Code of Civil Procedure Section 1971 that related to trusts. See also Section 504 (law relating to constructive and resulting trusts remains unaffected).

405/801

§ 607. Oral trusts of personal property

607. (a) The existence and terms of an oral trust of personal property may be established only by clear and convincing evidence.

(b) The oral declaration of the trustor is not sufficient evidence of creation of the trust unless trust property was transferred, actually or constructively, at the time of the declaration or thereafter.

(c) A reference in this division or elsewhere to a trust instrument or declaration means in the case of an oral trust the terms of the trust as established pursuant to subdivision (a).

Comment. Subdivision (a) of Section 607 codifies the rule requiring clear and convincing evidence of creation of an oral trust in personal property. See, e.g., Lefrooth v. Prentice, 202 Cal. 215, 227, 259 P. 947 (1927); Kobida v. Hinkelmann, 53 Cal. App.2d 186, 188-93, 127 P.2d 657 (1942); Monell v. College of Physicians & Surgeons, 198 Cal. App.2d 38, 48, 17 Cal. Rptr. 744 (1961). Under this rule circumstantial evidence is not sufficient. See Fahrney v. Wilson, 180 Cal. App.2d 694, 696, 4 Cal. Rptr. 670 (1960).

Subdivision (b) provides a new requirement for the validity of oral trusts. Under subdivision (b), a delivery of personal property to another person accompanied by an oral declaration by the transferor that the transferee holds it in trust for a beneficiary creates a valid oral trust. Constructive delivery, such as by earmarking property or recording it in the name of the transferee, is also sufficient to comply with subdivision (b).

Subdivision (c) is intended to facilitate application of trust statutes to properly established oral trusts. By operation of this section, an oral trust may be shown to be irrevocable even though Section 640 provides that a trust is revocable unless it is made expressly irrevocable by the instrument creating the trust.

Nothing in this section affects the law concerning constructive trusts. See Section 504. Hence, in appropriate circumstances, an attempted disposition of property that fails to satisfy the requirements for an oral trust under Section 607 may be remedied through the mechanism of a constructive trust.

Note. Subdivisions (a) and (c) implement Commission decisions made at the September 1984 meeting. Subdivision (b) remains to be considered.

405/983

§ 608. Consideration not required

608. Consideration is not required for the creation of a trust. A promise to create a trust in the future is enforceable only if the requirements for an enforceable contract are satisfied.

Comment. Section 608 is drawn from Section 112.003 of the Texas Trust Code. See Tex. Prop. Code § 112.003 (Vernon 19__). This section supersedes the part of former Civil Code Section 2222(1) which referred to consideration.

38663

§ 609. Matters included in declaration of trust

609. (a) Except as provided in subdivision (b), all declarations of a trustor to the trustees in relation to the trust occurring before acceptance of the trust by any trustee are deemed part of the declaration of trust.

(b) If a declaration of trust is made in writing, all previous declarations by the trustor are merged in the declaration.

Comment. Section 609 continues the substance of former Civil Code Section 2254.

Note. Should this provision be continued?

968/889

CHAPTER 2. SPENDTHRIFT AND OTHER PROTECTIVE TRUSTS

Note. Completion of this chapter (§ 620 et seq.) awaits Commission consideration of Professor Niles' background study.

CHAPTER 3. MODIFICATION AND TERMINATION OF TRUSTS

§ 640. Presumption of revocability

640. (a) Unless expressly made irrevocable by the instrument creating the trust, a trust is revocable by the trustor.

(b) Unless the trust provides otherwise, if a trust was created when the trustor was domiciled in another state, the revocability of the trust is governed by the law of the other state and not by subdivision (a).

Comment. Subdivision (a) of Section 640 continues the substance of part of the first sentence of former Civil Code Section 2280. For the procedure for revoking a trust, see Section 641. See also Section 642 (power to revoke includes power to modify).

Subdivision (b) is a new provision that is intended to avoid the application of the presumption of revocability to a trust created by a nondomiciliary trustor. Subdivision (b) recognizes that a nondomiciliary trustor may not be aware of the rule on revocability in force in California, since most jurisdictions presume trusts to be irrevocable unless the right to revoke is reserved. See 5 A. Scott, *The Law of Trusts* § 581, at 3857 (3d ed. 1967). If the trustor manifests an intention to make California law applicable, however, subdivision (b) does not make inapplicable the presumption of revocability provided in subdivision (a).

37000

§ 641. Manner of termination of revocable trust; disposition of property

641. (a) A trust revocable by the trustor is terminated by its revocation in either of the following manners:

(1) By the trustor's compliance with any method of revocation provided in the trust instrument.

(2) Except as provided in subdivision (b), by a writing (other than a will) signed by the trustor and delivered to the trustee during the lifetime of the trustor.

(b) If the trust instrument explicitly makes the manner of revocation specified in the trust instrument the exclusive manner of revocation, the trust may not be revoked pursuant to paragraph (2) of subdivision (a).

(c) Subject to the terms of the trust, when a trust is revoked by the trustor, the trustee shall transfer to the trustor its full title to the trust property.

Comment. Subdivision (a) of Section 641 supersedes part of the first sentence of former Civil Code Section 2280. The trustor may revoke a revocable trust in the manner provided in subdivision (a)(2), unless there is a contrary provision in the trust. See subdivision (b). This rule differs from the case law rule under the former statute. See *Rosenauer v. Title Ins. & Trust Co.*, 30 Cal. App.3d 300, 304, 106 Cal. Rptr. 321 (1973). The trustor may not revoke a trust by a will under subdivision (a)(2), even if the will purporting to revoke is delivered to the trustee during the lifetime of the trustor. However the trustor may revoke by will if the trust so provides, pursuant to subdivision (a)(1). See Restatement (Second) of Trusts § 330 comment j (1957).

Subdivision (b) is a new provision that makes clear the trust instrument may exclude revocation in the manner provided by subdivision (a)(2).

Subdivision (c) continues the substance of the second sentence of former Civil Code Section 2280, except that the introductory clause recognizes that the trust may provide for a manner of transfer upon revocation. See also Civil Code § 1130.5 (revocable trusts of community property).

The revocability of trusts created under former law is governed by the former rule. See Section ____.

8347

§ 642. Power to revoke includes power to modify

642. Unless the trust instrument provides otherwise, if a trust is revocable by the trustor, the trustor may modify the trust by the same procedure.

Comment. Section 642 is new and codifies the general rule that a power of revocation implies the power of modification. See *Heifetz v. Bank of America Nat'l Trust & Sav. Ass'n*, 147 Cal. App.2d 776, 305 P.2d 979 (1957); Restatement (Second) of Trusts § 331 comment g (1957). If the modification of a trust results in the enlargement of the trustee's duties, the trustee who is unwilling to accept the modified trust under such conditions may resign. An unrestricted power to modify may also include the power to revoke a trust. See *Heifetz v. Bank of America Nat'l Trust & Sav. Ass'n*, supra; Restatement (Second) of Trusts § 331 comment h.

8354

§ 643. Termination by all beneficiaries

643. (a) Except as provided in subdivision (b), if all beneficiaries of a trust consent, they can compel termination of the trust.

(b) If the continuance of the trust is necessary to carry out a material purpose of the trust, the beneficiaries cannot compel its termination, unless the court, in its discretion, determines that the need to terminate the trust under the circumstances is greater than the

interest in accomplishing a material purpose of the trust. The court does not have discretion to permit termination of a trust that is subject to a spendthrift or similar protective provision.

Comment. Section 643 is drawn from Section 337 of the Restatement (Second) of Trusts (1957). Unlike the Restatement section, however, subdivision (b) gives the court some discretion in applying the material purposes doctrine except in situations where a spendthrift or similar protective provision is included in the trust. Subdivision (b) thus introduces a refinement in the California case law rule. See, e.g., *Moxley v. Title Ins. & Trust Co.*, 27 Cal.2d 457, 165 P.2d 15 (1945). Under Section 643 a trust may be terminated with the consent of all beneficiaries where the trust provides for successive beneficiaries or is intended to postpone enjoyment of a beneficiary's interest, but does not prevent the beneficiary from alienating his or her expectancy, if the court in exercise of its discretion approves the termination of the trust. This rule is intended to provide some degree of flexibility in applying the material purposes doctrine in nonspendthrift situations. For provisions relating to obtaining consent of persons under an incapacity, see e.g., Civil Code §§ 2450, 2467 (statutory form of durable power of attorney); Prob. Code §§ 2580 (conservator), 502 & 646 (appointment of guardian ad litem); see also Sections 647, 648.

90864

§ 644. Modification or termination by trustor and all beneficiaries

644. (a) If the trustor and all beneficiaries of a trust consent, they can compel the modification or termination of the trust.

(b) If any beneficiary does not consent to the modification or termination of the trust, the other beneficiaries, with the consent of the trustor, can compel a modification or a partial termination of the trust if the interests of the beneficiaries who do not consent are not prejudiced thereby.

Comment. Section 644 is drawn from Section 338 of the Restatement (Second) of Trusts (1957). In the main, this section applies to irrevocable trusts. Subdivision (a) continues the substance of the rule formerly provided by the second sentence of the second paragraph of Civil Code Section 771 and supersedes part of former Civil Code Section 2258(a). For provisions relating to obtaining consent of persons under an incapacity, see, e.g., Civil Code §§ 2450, 2467 (statutory form of durable power of attorney); Prob. Code §§ 2580 (conservator), 502 & 646 (appointment of guardian ad litem); see also Prob. Code §§ 647, 648. A trust may be modified or terminated under this section regardless of any spendthrift or other protective provision and regardless of whether its purposes have been achieved. See Restatement (Second) of Trusts § 338 comments b-d.

§ 645. Guardian ad litem

645. For the purposes of Section 643 or 644, the consent of a beneficiary who is legally incapacitated, unascertained, or unborn may be given by a guardian ad litem appointed pursuant to Section 502, if it would be appropriate to do so. A guardian ad litem for such a beneficiary may rely on general family benefit accruing to living members of the beneficiary's family as a basis for approving a modification or termination of a trust.

Comment. Section 645 recognizes that, where appropriate, a guardian ad litem may give consent to modification or termination on behalf of certain incapacitated beneficiaries. The second sentence of this section permits a non-pecuniary quid pro quo as a basis for protecting the interests of the beneficiaries represented by the guardian ad litem. This provision is drawn from Wisconsin law. Wis. Stat. Ann. § 701.12(2) (West 1981). For example, the guardian ad litem may rely on the assumption that a benefit conferred on potential parents will ultimately benefit a child born into the family. On the quid pro quo requirement generally, see *Hatch v. Riggs Nat'l Bank*, 361 F.2d 559 (D.C. Cir. 1966).

Note. The suggestion to expand this section to include a substituted judgment standard is still under consideration.

9407

§ 646. No conclusive presumption of fertility

646. In determining the class of beneficiaries whose consent is necessary to modify or terminate a trust pursuant to Section 643 or 644, the presumption of fertility is rebuttable.

Comment. Section 646 abandons the "fertile octogenarian" doctrine as applied in the context of trust termination. Under this section, the way is open for the court to approve a termination where the possibility of the birth of additional beneficiaries is negligible. See Restatement (Second) of Trusts § 340 comment e (1957). Section 646 thus adopts the modern view that fertility may not be a realistic issue or is subject to proof. See 4 A. Scott, *The Law of Trusts* § 340.1, at 2714 (3d ed. 1967). This section rejects the California case law rule. See *Fletcher v. Los Angeles Trust & Sav. Bank*, 182 Cal. 177, 187 P. 425 (1920); *Wogman v. Wells Fargo Bank & Union Trust Co.*, 123 Cal. App.2d 657, 267 P.2d 423 (1954).

9408

§ 647. Effect of disposition in favor of "heirs" or "next of kin" of trustor

647. In determining the class of beneficiaries whose consent is necessary to modify or terminate a trust pursuant to Section 644, a class of persons described only as "heirs" or "next of kin" of the

trustor is closed at the time the living beneficiaries consent to modification or termination of the trust.

Comment. Section 647 is new. Under this section the consent of unborn persons who might constitute the class of heirs or next of kin of the trustor need not be obtained for the trustor to terminate an otherwise irrevocable trust.

36617

§ 648. Termination of trust

648. A trust is terminated when any of the following occurs:

- (a) The term of a trust subject to a fixed term has expired.
- (b) The trust purpose is fulfilled.
- (c) The trust purpose becomes unlawful.
- (d) The trust purpose becomes impossible to fulfill.

Comment. Subdivisions (b), (c), and (d) of Section 649 continue the substance of former Civil Code Section 2279. Subdivision (a) is a new statutory provision that codifies a case-law rule. See In re Estate of Hanson, 159 Cal. 401, 405, 114 P. 810 (1911); Restatement (Second) of Trusts § 334 (1957).

9409

§ 649. Exception to doctrine of merger

649. If a trust provides for one or more successor beneficiaries after the death of the trustor, the trust is not invalid, merged, or terminated in either of the following circumstances:

- (a) Where there is one trustor who is the sole trustee and the sole beneficiary during the trustor's lifetime.
- (b) Where there are two or more trustors, one or more of whom are trustees, and the beneficial interest in the trust is in the trustors during the lifetime of the trustors.

Comment. Section 649 continues the substance of the first sentence of former Civil Code Section 2225. See also In re Estate of Washburn, 11 Cal. App. 735, 746, 106 P. 415 (1909) (merger of legal and equitable estates).

37002

§ 650. Trust with uneconomically low principal

650. (a) If the principal of a trust has become uneconomically low, the trustee or a beneficiary may petition the court for the relief provided by this section.

(b) If the court determines that the fair market value of the principal of a trust has become so low in relation to the cost of administration that continuance of the trust under its existing terms will defeat or substantially impair the accomplishment of its purposes, the court may in its discretion and in a manner that conforms as nearly as possible to the intention of the trustor, order one of the following:

- (1) That the trust be terminated in whole or in part.
- (2) That the terms of the trust be modified.
- (3) That the trustee be changed.

(c) If the court orders the termination of the trust, in whole or in part, it shall direct that the principal and undistributed income be distributed to the beneficiaries in a manner that conforms as nearly as possible to the intention of the trustor. The court may make any other orders it deems necessary or appropriate to protect the interests of the beneficiaries.

(d) The existence of a spendthrift or similar protective provision in the trust does not prevent application of this section.

Comment. Section 650 continues the substance of former Civil Code Section 2279.1 and former Probate Code Section 1120.6. For provisions governing judicial proceedings see Section 1100 et seq.

§ 651. Modification or termination owing to change of circumstances

651. (a) On petition of a trustee or beneficiary, the court may direct or permit the modification of administrative or dispositive provisions or the termination of the trust if, owing to circumstances not known to the trustor and not anticipated by the trustor, the continuation of the trust under its terms would defeat or substantially impair the accomplishment of the purposes of the trust.

(b) If necessary to carry out the purposes of the trust, the court may direct or permit the trustee to do acts which are not authorized or are forbidden by the terms of the trust.

(c) The court shall consider a spendthrift or similar protective provision in the trust as a factor in making its decision whether to modify or terminate the trust, but the court is not precluded from exercising its discretion to modify or terminate the trust solely because of a spendthrift or similar protective provision.

Comment. Subdivisions (a) and (b) of Section 651 are drawn from Sections 167 and 336 of the Restatement (Second) of Trusts (1957). Subdivision (c) is drawn from a provision of the Texas Trust Code. Tex. Prop. Code § 112.054 (Vernon 19__). Modification of the dispositive provisions of a trust for the support of a beneficiary may be appropriate in a case where the beneficiary has become unable to support himself or herself due to poor health or serious injury. See, e.g., *Whittingham v. California Trust Co.*, 214 Cal. 128, 4 P.2d 142 (1931).

405/436

§ 652. Combination of trusts

652. If the terms of two or more trusts are substantially similar, on petition of the trustee, the court may order the trustee to combine the assets and administer them as a single trust if the court determines that administration as a single trust will (1) be consistent with the intent of the trustor and (2) facilitate administration of the trust without defeating or impairing the interests of the beneficiaries.

Comment. Section 652 continues the substance of former Probate Code Section 1133, but it is not limited, like former law, to testamentary trusts. In addition, an inter vivos trust and a testamentary trust may be combined under Section 652. For provisions governing judicial proceedings, see Section 1100 et seq.

8345

§ 653. Division of trusts

653. On petition of a trustee or beneficiary, the court, for good cause shown and with the consent of all interested trustors and beneficiaries, may divide a trust into two or more separate trusts.

Comment. Section 653 is a new provision that permits the division of a trust in appropriate circumstances. This section is drawn from Pennsylvania law. See Pa. Cons. Stat. Ann. tit. 20, § 7181 (Purdon 1975). Division of a trust may be appropriate, for example, in a situation where different parts of the family desire their own separate trusts because of some disagreement or where some beneficiary has moved to a different part of the county. For provisions governing judicial proceedings, see Section 1100 et seq.

PART 3. TRUST ADMINISTRATION

CHAPTER 1. DUTIES OF TRUSTEES

Article 1. Trustee's Duties in General§ 700. Duty to administer trust

700. (a) 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.

(b) The trustee of a revocable trust shall follow all written directions acceptable to the trustee given from time to time (1) by the person then having the power to revoke the trust or the part thereof with respect to which the direction is given or (2) by the person other than the trustee to whom the trustor delegates the right to direct the trustee.

Comment. Subdivision (a) of 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.

Subdivision (b) continues the substance of part of former Civil Code Section 2258(b). See also Section 10 (singular includes plural).

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, 2231, 2232, and 2233. See also Section 700 (duties subject to control by trust instrument).

§ 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). See also Section 700 (duties subject to control by trust instrument).

405/429

§ 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, 2230, and 2233. Subdivision (b) supersedes former Civil Code Section 2232. See also Section 700 (duties subject to control by trust instrument).

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). See also Section 700 (duties subject to control by trust instrument).

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). See also Section 700 (duties subject to control by trust instrument).

§ 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. See also Section 700 (duties subject to control by trust instrument).

§ 707. Duty to dispose of improper investments

707. The trustee has a duty 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 (duties subject to control by trust instrument).

§ 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). See also Section 700 (duties subject to control by trust instrument).

§ 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). See also Section 700 (duties subject to control by trust instrument).

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). See also Section 700 (duties subject to control by trust instrument).

9413

§ 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 and may not transfer the office of trustee to another person nor delegate the entire administration of the trust to a cotrustee or other person.

Comment. Section 711 codifies the substance of Section 171 of the Restatement (Second) of Trusts (1957) and Section 4 of the Uniform Trustees' Powers Act (1964). See also Section 700 (duties subject to control by trust instrument).

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). See also Section 700 (duties subject to control by trust instrument).

Note. Inclusion of the bracketed language may depend on decisions made with regard to draft Section 952.

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" in this section, 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 subdivision (a) of former Civil Code Section 2261, insofar as it provided a standard of care, and supersedes the standard of care in former 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.

406/107

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 1130(b)(5). 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.

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 901, 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 1130 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) As 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 1130.

(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 statute formerly 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 1130.

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.

31789

§ 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).

§ 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.

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 part of former Civil Code Section 2240 and 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).

15789

§ 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).

§ 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 700(a)), where the trustee is directed so to act by a person holding a power to revoke (see Section 700(a)), or where the court authorizes exercise of a power where there is a conflict of interest (see Section 803).

§ 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 part of subdivision (b) of former Civil Code Section 2261 and part of subdivision (2) of former Probate Code Section 1120.2. Section 822 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 in more limited form 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).

§ 828. Investments

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

(b) In the absence of an express provision to the contrary in a trust instrument, whenever the instrument directs, requires, authorizes, or permits investment in obligations of the United States government, the trustee may invest in and hold those obligations directly or in the form of an interest in, either or both a money market mutual fund registered under the Investment Company Act of 1940 (15 U.S.C. Sec. 80a-1 et seq.) or an investment vehicle authorized for the collective investment of trust funds pursuant to Section 9.18 of Part 9, Title 12 of the Code of Federal Regulations, the portfolios of which are limited to United States government obligations maturing not later than five years from the date of investment or reinvestment and to repurchase agreements fully collateralized by United States government obligations. This subdivision applies only to trusts created on or after January 1, 1985.

Comment. Subdivision (a) of 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. Subdivision (a) of 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).

Subdivision (b) continues the first sentence of subdivision (a) and subdivision (b) of former Civil Code Section 2269.1.

Note. Subdivision (b) reflects a 1984 enactment. The staff is not aware of the reason for this provision. It seems unnecessarily detailed, and its prospective operative date is troublesome. It goes counter to the direction of modern trust statutes but is retained here because of its recent enactment.

§ 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 1130.

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).

§ 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).

28848

§ 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 supersedes 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 subdivision (9) of former Probate Code Section 1120.2 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).

§ 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).

§ 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).

§ 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 1040-1042. 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).

31521

§ 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).

§ 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).

31777

§ 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).

12773

CHAPTER 3. REVISED UNIFORM PRINCIPAL AND INCOME ACT

§ 900. Short title

900. This chapter may be cited as the Revised Uniform Principal and Income Act.

Comment. Section 900 continues former Civil Code Section 730.

§ 901. Definitions

901. As used in this chapter:

(a) "Income beneficiary" means the person to whom income is presently payable or for whom it is accumulated for distribution as income.

(b) "Inventory value" means the cost of property purchased by the trustee and the market value of other property at the time it became subject to the trust, but in the case of a testamentary trust the trustee may use any value finally determined for the purposes of an estate or inheritance tax.

(c) "Remainderman" means the person entitled to principal, including income which has been accumulated and added to principal.

Comment. Section 901 continues subdivisions (1)-(3) of former Civil Code Section 730.01. See also Section 84 ("trustee" defined).

§ 902. Duty of trustee as to receipts and expenditures

902. (a) A trust shall be administered with due regard to the respective interests of income beneficiaries and remaindermen. A trust is so administered with respect to the allocation of receipts and expenditures if a receipt is credited or an expenditure is charged to income or principal or partly to each in any of the following ways:

(1) In accordance with the terms of the trust instrument, notwithstanding contrary provisions of this chapter.

(2) In the absence of any contrary terms of the trust instrument, in accordance with the provisions of this chapter.

(3) If neither paragraph (1) nor (2) is applicable, in accordance with the standard of care provided in Section 720 and with what is reasonable and equitable in view of the interests of those entitled to income as well as of those entitled to principal.

(b) If the trust instrument gives the trustee discretion in crediting a receipt or charging an expenditure to income or principal or partly to each, no inference that the trustee has improperly exercised such discretion arises from the fact that the trustee has made an allocation contrary to a provision of this chapter.

Comment. Section 902 continues the substance of former Civil Code Section 730.02 with two changes. Subdivision (a)(3) adopts the revised general standard of care provided in Section 720. Subdivision (b)

replaces the former reference to "imprudence or partiality" with a reference to improper exercise of discretion. This variation of language in Section 2 of the Revised Uniform Principal and Income Act (1962) is drawn from Nebraska Law. Neb. Rev. Stat. § 30-3102 ().

26262

§ 903. Duty to charge expenses

903. After determining income and principal in accordance with the terms of the trust instrument or with this chapter, the trustee shall charge to income or principal expenses and other charges as provided in Section 913.

Comment. Section 903 continues subdivision (c) of former Civil Code Section 730.03.

15783

§ 904. Income and principal

904. (a) Income is the return in money or property derived from the use of principal, including return received as any of the following:

- (1) Rent of real or personal property, including sums received for cancellation or renewal of a lease.
- (2) Interest on money lent, including sums received as consideration for the privilege of prepayment of principal except as provided in Section 908 on bond premium and bond discount.
- (3) Receipts allocated to income as provided in Section 905.
- (4) Income earned during administration of a decedent's estate as provided in Section 906.
- (5) Corporate distributions as provided in Section 907.
- (6) Accrued increment on bonds or other obligations issued at discount as provided in Section 908.
- (7) Receipts from business and farming operations as provided in Section 909.
- (8) Receipts from disposition of natural resources as provided in Section 910.
- (9) Receipts from other principal subject to depletion as provided in Section 911.
- (10) Receipts from disposition of underproductive property as provided in Section 912.

(b) Principal is the property which has been set aside by the owner or the person legally empowered so that it is held in trust eventually to be delivered to a remainderman while the return or use of the principal

is in the meantime taken or received by or held for accumulation for an income beneficiary. Principal includes the following:

- (1) Consideration received by the trustee on the sale or other transfer of principal or on repayment of a loan or as a refund or replacement or change in the form of principal.
- (2) Proceeds of property taken on eminent domain proceedings.
- (3) Proceeds of insurance upon property forming part of the principal except proceeds of insurance upon a separate interest of an income beneficiary.
- (4) Receipts allocated to principal as provided in Section 905.
- (5) Stock dividends, receipts on liquidation of a corporation, and other corporate distributions as provided in Section 907.
- (6) Receipts from the disposition of corporate securities as provided in Section 908.
- (7) Royalties and other receipts from disposition of natural resources as provided in Section 910.
- (8) Receipts from other principal subject to depletion as provided in Section 911.
- (9) Any profit resulting from any change in the form of principal except as provided in Section 912 on underproductive property.
- (10) Receipts from disposition of underproductive property as provided in Section 912.
- (11) Any allowances for depreciation established under Section 909 and paragraph (2) of subdivision (a) of Section 913.

Comment. Section 904 continues subdivisions (a) and (b) of former Civil Code Section 730.03. Subdivisions (a)(3) and (b)(4) are new cross-references but represent no substantive change.

15785

§ 905. When right to income arises; apportionment of income

905. (a) An income beneficiary is entitled to income from the date specified in the trust instrument or, if none is specified, from the date an asset becomes subject to the trust. In the case of an asset becoming subject to a trust by reason of a will, it becomes subject to the trust as of the date of the death of the testator even though there is an intervening period of administration of the testator's estate.

(b) Upon an asset becoming subject to a trust by reason of a will:

(1) Receipts due but not paid at the date of death of the testator are principal.

(2) Receipts in the form of periodic payments (other than corporate distributions to stockholders), including rent, interest, or annuities, not due at the date of the death of the testator shall be treated as accruing from day to day. That portion of the receipt accruing before the date of death is principal and the balance is income.

(c) In all other cases, any receipt from an income-producing asset is income even though the receipt was earned or accrued in whole or in part before the date when the asset became subject to the trust.

(d) If an income beneficiary's right to income ceases by death or in any other manner, all payments actually paid to the income beneficiary or in the hands of the trustee for payment to the income beneficiary before such termination belong to the income beneficiary or to his or her personal representative. All income actually received by the trustee after such termination shall be paid to the person next entitled to income by the terms of the trust. This subdivision does not apply to income received by a trustee under subdivision (c) of Section 906.

(e) Corporate distributions to stockholders shall be treated as due on the day fixed by the corporation for determination of stockholders of record entitled to distribution or, if no date is fixed, on the date of declaration of the distribution by the corporation.

Comment. Section 905 continues former Civil Code Section 730.04, except that subdivision (b)(2) has been conformed to Section 4(b)(2) of the Revised Uniform Principal and Income Act (1962). This change requires apportionment of rent, interest, and annuities, contrary to the former rule.

15788

§ 906. Income earned during administration of decedent's estate

906. (a) Unless the will otherwise provides, income from the assets of a decedent's estate after the death of the testator and before distribution, including income from property used to discharge liabilities, shall be distributed in the manner set forth in Chapter [11] (commencing with Section [660]) of Division 7.

(b) Income received by a trustee under subdivision (a) shall be treated as income of the trust.

(c) When an income beneficiary's right to income, including interest payable under Section [663], ceases by death or in any other manner during the period of probate administration, income attributable to the

period prior to the termination of such right, when subsequently received by the trustee, shall be equitably prorated between the beneficiary or his or her personal representative and the person next entitled to income by the terms of the trust instrument.

Comment. Section 906 continues former Civil Code Section 730.05.

16878

§ 907. Corporate distributions

907. (a) Corporate distributions of shares of the distributing corporation, including distributions in the form of a stock split or stock dividend, are principal. A right to subscribe to shares or other securities issued by the distributing corporation accruing to stockholders on account of their stock ownership and the proceeds of any sale of the right are principal.

(b) Except to the extent that the corporation indicates that some part of a corporate distribution is a settlement of preferred or guaranteed dividends accrued since the trustee became a stockholder or is in lieu of an ordinary cash dividend, a corporate distribution is principal if the distribution is pursuant to any of the following:

(1) A call of shares.

(2) A merger, consolidation, reorganization, or other plan by which assets of the corporation are acquired by another corporation.

(3) A total or partial liquidation of the corporation, including any distribution which the corporation indicates is a distribution in total or partial liquidation or any distribution of assets, other than cash, pursuant to a court decree or final administrative order by a government agency ordering distribution of the particular assets.

(c) Distributions made from ordinary income by a regulated investment company or by a trust qualifying and electing to be taxed under federal law as a real estate investment trust are income. All other distributions made by the company or trust, including distributions from capital gains, depreciation, or depletion, whether in the form of cash or an option to take new stock or cash or an option to purchase additional shares, are principal.

(d) Except as provided in subdivisions (a), (b), and (c), all corporate distributions are income, including cash dividends, distributions of or rights to subscribe to shares or securities or obligations

of corporations other than the distributing corporation, and the proceeds of the rights or property distributions. Except as provided in subdivisions (b) and (c), if the distributing corporation gives a stockholder an option to receive a distribution either in cash or in its own shares, the distribution chosen is income.

(e) The trustee may rely upon any statement of the distributing corporation as to any fact relevant under any provision of this chapter concerning the source or character of dividends or distributions of corporate assets.

Comment. Section 907 continues former Civil Code Section 730.06.

16879

§ 908. Bonds and other obligations for payment of money

908. (a) Bonds or other obligations for the payment of money are principal at their inventory value, except as provided in subdivision (b) for discount bonds. No provision shall be made for amortization of bond premiums or for accumulation for discount. The proceeds of sale, redemption, or other disposition of the bonds or obligations are principal.

(b) The increment in value of a bond or other obligation for the payment of money payable at a future time in accordance with a fixed schedule of appreciation in excess of the price at which it was issued is distributable as income. The increment in value is distributable to the beneficiary who was the income beneficiary at the time of increment from the first principal cash available or, if none is available, when realized by sale, redemption, or other disposition. Whenever unrealized increment is distributed as income but out of principal, the principal shall be reimbursed for the increment when realized.

Comment. Section 908 continues former Civil Code Section 730.07.

16889

§ 909. Business and farming operations

909. (a) If a trustee uses any part of the principal in the continuance of a business of which the trustor was a sole proprietor or a partner, the net profits of the business, computed in accordance with generally accepted accounting principles for a comparable business and subject to the provisions of subdivision (c), are income. If a loss results in any fiscal or calendar year, the loss may be carried into another fiscal or calendar year for purposes of calculating net income.

(b) Generally accepted accounting principles shall be used to determine income from an agricultural or farming operation, including the raising of animals or the operation of a nursery, subject to the provisions of subdivision (c).

(c) Subdivisions (a) and (b) are subject to the provisions of Section 914 and for this purpose any property of such business or agricultural or farming operation shall be deemed to be "property held in such trust" within the meaning of Section 914.

Comment. Section 909 continues former Civil Code Section 730.08 except that 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 (); Wis. Stat. Ann. ____ (West ____).

17008

§ 910. Natural resources

910. (a) If any part of the principal consists of a right to receive royalties, overriding or limited royalties, working interests, production payments, net profit interests, or other interests in minerals or other natural resources in, on, or under land, the receipts from taking the natural resources from the land shall be allocated as follows:

(1) If received as rent on a lease or extension payments on a lease, the receipts are income.

(2) If received from a production payment, the receipts are income to the extent of any factor for interest or its equivalent provided in the governing instrument. There shall be allocated to principal the fraction of the balance of the receipts which the unrecovered cost of the production payment bears to the balance owed on the production payment, exclusive of any factor for interest or its equivalent. The receipts not allocated to principal are income.

(3) If received as a royalty, overriding or limited royalty, or bonus, or from a working, net profit, or any other interest in minerals or other natural resources, receipts not provided for in paragraphs (1) and (2) shall be apportioned on a yearly basis in accordance with this paragraph whether or not any natural resource was being taken from the land at the time the trust was established. The receipts shall be allocated entirely to income or apportioned between income and principal as the trustee in its discretion may determine, but the amount added to principal as an allowance for depletion may not exceed the lesser of (A)

the percentage of gross receipts allowed as a deduction for depletion in computing taxable income for federal income tax purposes or (B) 50 percent of the net receipts remaining after payment of expenses, direct and indirect, computed without allowance for depletion.

(b) This section does not apply to water, soil, sod, dirt, turf, or mosses.

Comment. Section 910 continues former Civil Code Section 730.09 with three changes. In subdivision (a)(3) the reference to "absolute discretion" is revised to read "discretion." See Sections 740-741 (duties with regard to discretionary powers). The former reference to 27-1/2% of gross receipts in subdivision (a)(3) is replaced with a standard tied to federal tax law. The exclusion of timber formerly provided in subdivision (b) is not continued. Hence, subdivision (a) applies to timber.

18321

§ 911. Other property subject to depletion

911. If the principal consists of property subject to depletion (other than property subject to Section 910), including, when subject to depletion or amortization, leaseholds, patents, copyrights, royalty rights, and rights to receive payments on a contract for deferred compensation, receipts from the property shall be allocated entirely to income, or apportioned between income and principal as the trustee in its discretion may determine, but in no event shall the amount allocated to principal exceed a reasonable allowance for depletion or amortization.

Comment. Section 911 continues former Civil Code Section 730.11, except that the reference to "absolute discretion" is revised to read "discretion." See Sections 740-741 (duties with regard to discretionary powers).

18489

§ 912. Underproductive property

912. (a) Except as otherwise provided in this section, a portion of the net proceeds of sale of any part of principal which has not produced an average net income of at least 1 percent per year of its inventory value for more than a year (including as income the value of any beneficial use of the property by the income beneficiary) shall be treated as delayed income to which the income beneficiary is entitled as provided in this section. The net proceeds of sale are the gross proceeds

received, including the value of any property received in substitution for the property disposed of, less the expenses, including capital gains tax, if any, incurred in disposition and less any carrying charges paid while the property was underproductive.

(b) The sum allocated as delayed income is the difference between the net proceeds and the amount which, had it been invested at simple interest at 5 percent per year while the property was underproductive, would have produced the net proceeds. This sum, plus any carrying charges and expenses previously charged against income while the property was underproductive, less any income received by the income beneficiary from the property and less the value of any beneficial use of the property by the income beneficiary, is income, and the balance is principal.

(c) If principal subject to this section is disposed of by conversion into property which cannot be apportioned easily, including land or mortgages (for example, realty acquired by or in lieu of foreclosure), the income beneficiary is entitled to the net income from any property or obligation into which the original principal is converted while the substituted property or obligation is held. If within five years after the conversion the substituted property has not been further converted into easily apportionable property, no allocation as provided in this section shall be made.

Comment. Section 912 continues former Civil Code Section 730.12.

18529

§ 913. Charges against income and principal

913. (a) The following charges shall be made against income:

(1) Ordinary expenses incurred in connection with the administration, management, or preservation of the trust property, including regularly recurring taxes assessed against any portion of the principal, water rates, premiums on insurance taken upon the interests of the income beneficiary, remainderman, or trustee, interest paid by the trustee, and ordinary repairs.

(2) The trustee in its discretion may make a reasonable allowance for depreciation on property subject to depreciation under generally accepted accounting principles, but no allowance shall be made for depreciation of that portion of any real property used by a beneficiary as a residence.

(3) One-half of court costs, attorney's fees, and other fees on periodic judicial accounting, unless the court directs otherwise.

(4) Court costs, attorney's fees, and other fees on other accountings or judicial proceedings if the matter primarily concerns the income interest, unless the court directs otherwise.

(5) One-half of the trustee's regular compensation, whether based on a percentage of principal or income, unless the court directs otherwise.

(6) All expenses reasonably incurred for current management of principal and application of income.

(7) Any tax levied upon receipts defined as income under this part or the trust instrument and payable by the trustee.

(b) If charges against income are of unusual amount, the trustee may by means of reserves or other reasonable means charge them over a reasonable period of time and withhold from distribution sufficient sums to regularize distributions.

(c) The following charges shall be made against principal:

(1) Trustee's compensation not chargeable to income under paragraphs (4) and (5) of subdivision (a), special compensation of trustees, expenses reasonably incurred in connection with principal, court costs and attorney's fees primarily concerning matters of principal, and trustee's compensation computed on principal as an acceptance, distribution, or termination fee.

(2) Charges not provided for in subdivision (a), including the cost of investing and reinvesting principal, the payments on principal of an indebtedness (including a mortgage amortized by periodic payments of principal), expenses for preparation of property for rental or sale, and, unless the court directs otherwise, expenses incurred in maintaining or defending any action or proceeding to construe the trust or protect it or the property or assure the title of any trust property.

(3) Extraordinary repairs or expenses incurred in making a capital improvement to principal, including special assessments, but a trustee may establish an allowance for depreciation out of income to the extent permitted by paragraph (2) of subdivision (a) and by Section 909.

(4) Any tax levied upon profit, gain, or other receipts allocated to principal notwithstanding denomination of the tax as an income tax by the taxing authority.

(5) If an estate or inheritance tax is levied in respect of a trust in which both an income beneficiary and a remainderman have an interest, any amount apportioned to the trust, including penalties, even though the income beneficiary also has rights in the principal.

(d) Regularly recurring charges payable from income shall be apportioned to the same extent and in the same manner that income is apportioned under Section 905.

Comment. Section 913 continues former Civil Code Section 730.13, except that the reference to "absolute discretion" is revised to read "discretion." See Sections 740-741 (duties with regard to discretionary powers). A reference to "proceeding" is included in subdivision (c)(2). See Sections 1100-1135 (judicial proceedings concerning trusts).

§ 914. Reserve or allowance for depreciation or depletion

914. The trustee of any trust created by any will or other instrument is not required to set aside a reserve or allowance from trust income for depreciation or depletion of, or to amortize, any property held in such trust unless the instrument expressly requires such a reserve or allowance. Nothing in this chapter prevents a trustee in its discretion from establishing such reserve or allowance, or from continuing any previous practice of maintaining such reserve or allowance, but the provisions of paragraph (2) of subdivision (a) of Section 913 as to property used as a residence by a beneficiary and the provisions of Sections 910 and 911 and paragraph (2) of subdivision (a) of Section 913 as to the amount of such allowance or reserve, if established, apply regardless of when the trust was created.

Comment. Section 914 continues the substance of former Civil Code Section 730.14.

§ 915. Application of chapter

915. Except as specifically provided in the trust instrument or the will or in this chapter, this chapter applies to any receipt or expense regardless of when it was received or incurred by the trust, regardless of the date the trust was created, and regardless of when the asset involved was acquired by the trustee.

Comment. Section 915 continues the substance of former Civil Code Section 730.15.

Note. The Commission has reserved the question of whether this section will be included since it may be unnecessary when the general operative date provisions are approved.

CHAPTER 4. LIABILITY OF TRUSTEES TO BENEFICIARIES

Article 1. Liability for Breach of Trust

§ 950. Breach of trust

950. A violation by the trustee of any duty that the trustee owes the beneficiary is a breach of trust.

Comment. Section 950 is new and is drawn from Section 201 of the Restatement (Second) of Trusts (1957). Section 950 supersedes former Civil Code Section 2234.

§ 951. Liability of trustee for acts of agents

951. The trustee is liable to the beneficiary for an agent's acts or omissions that would be a breach of the trust if committed by the trustee [under any of the following circumstances:

- (a) Where the trustee directs or permits the act of the agent.
- (b) Where the trustee delegates to the agent the authority to perform an act that the trustee is under a duty not to delegate.
- (c) Where the trustee does not use reasonable care in the selection or retention of the agent.
- (d) Where the trustee does not exercise proper supervision over the agent's conduct.
- (e) Where the trustee approves, acquiesces in, or conceals the act of the agent.
- (f) Where the trustee neglects to take proper steps to compel the agent to redress the wrong.]

Comment. Section 951 [is the same in substance as Section 225(2) of Restatement (Second) of Trusts (1957)]. Nothing in this section limits liability of an agent for acts or omissions that would be a breach of trust if committed by the trustee.

Note. The bracketed language has not been approved by the Commission.

§ 952. Liability of trustee for acts of cotrustee

952. If a trustee consents to a cotrustee's acts or omissions or negligently enables the cotrustee to commit them, the trustee is liable to the beneficiary for the cotrustee's acts that would be a breach of the trust if committed by the trustee.

Comment. Section 952 supersedes former Civil Code Section 2239.

§ 953. Liability of successor trustee

953. (a) A successor trustee is not liable to the beneficiary for a breach of trust committed by a predecessor trustee.

(b) A successor trustee is liable to the beneficiary for breach of trust involving acts of a predecessor trustee in either of the following circumstances:

(1) Where the successor trustee knows or should know of a situation constituting a breach of trust committed by the predecessor trustee and the successor trustee improperly permits it to continue.

(2) Where the successor trustee neglects to take proper steps to compel the predecessor trustee to deliver the trust property to the successor trustee.

Comment. Section 953 is the same in substance as Section 223(1) and (2)(a)-(b) of the Restatement (Second) of Trusts (1957).

Note. This draft omits Restatement Section 223(2)(c) which reads: "neglects to take proper steps to redress a breach of trust committed by the predecessor." This language is omitted to implement the Commission direction that the liability of a successor trustee should be similar to the liability of a trustee for acts of a cotrustee.

Article 2. Remedies for Breach of Trust

§ 960. Remedies for breach of trust

960. If the trustee commits a breach of trust, or threatens to commit a breach, the beneficiary may commence a proceeding for any of the following purposes that is appropriate:

(a) To compel the trustee to perform the trustee's duties.

(b) To enjoin the trustee from committing a breach of trust.

(c) To compel the trustee to redress a breach of trust by payment of money.

(d) To appoint a receiver or temporary trustee to take possession of the trust property and administer the trust.

(e) To remove the trustee.

(f) To set aside acts of the trustee.

(g) To reduce or deny compensation of the trustee.

(h) To impose an equitable lien on, or enforce a constructive trust of, trust property remaining in the hands of the trustee.

(i) To trace trust property that has been wrongfully disposed of and recover the property or its proceeds.

Comment. Section 960 codifies in general terms the remedies available to the beneficiary where the trustee has committed a breach of trust or threatens to do so. For the applicable procedure, see Part 5 (commencing with Section 1100) (Judicial Proceedings Concerning Trusts). This section does not limit the remedies that may be available under the common law. See Section 962.

Subdivision (a) of Section 960 supersedes a part of former Civil Code Sections 863 (beneficiary may "enforce the performance of the trust") and 2251 (beneficiary may "take advantage" of trust). See also Restatement (Second) of Trusts § 199(a) (1957).

Subdivision (b) is consistent with other statutes. See Civil Code § 3422; Code Civ. Proc. § 526(7); see also *St. James Church of Christ Holiness v. Superior Court*, 135 Cal. App.2d 352, 359-62, 287 P.2d 387 (1955); Restatement (Second) of Trusts § 199(b) (1957).

Subdivision (c) continues the general liability provided in former Civil Code Sections 2236-2238 and 2262. See also Restatement (Second) of Trusts § 199(c) (1957). The reference to payment of money in subdivision (c) is comprehensive and includes liability that might be characterized as damages, restitution, or surcharge. For the measure of liability, see Article 3 (commencing with Section 970).

Subdivision (d) makes explicit the authority to appoint a receiver. See Code Civ. Proc. § 564(1), (7); *Bowles v. Superior Court*, 44 Cal.2d 574, 583-84, 283 P.2d 704 (1955) (appointment of receiver pending removal of trustees and as temporary trustee); see also Restatement (Second) of Trusts § 199(d) (1957). Subdivision (d) also permits appointment of a temporary trustee where appointment of a receiver would be appropriate. See Sections 1030 (appointment of new trustees generally), 1134 (authority to make necessary orders and appoint temporary trustee).

Subdivision (e) continues in general terms the authority to remove a trustee for breach of trust provided by former Civil Code Section 2283 and former Probate Code Section 1123.5. See also Restatement (Second) of Trusts § 199(e) (1957). For provisions governing removal of trustees, see Sections 1022 (grounds for removal), 1024 (delivery of property by removed trustee), 1130(b) (petition for removal).

Subdivision (f) is new. The authority to set aside wrongful acts of the trustee is a corollary of the power to enjoin a threatened breach as provided in subdivision (b). The wrongful acts of the trustee may not be set aside if to do so would impair the rights of bona fide purchasers. See G. Bogert, *The Law of Trusts and Trustees* § 861, at 16-17 (rev. 2d ed. 1982).

Subdivision (g) is new and is drawn from Section 243 of the Restatement (Second) of Trusts (1957). Prior California statutes provided only for the determination of reasonable compensation and for the allowance of greater compensation under appropriate circumstances. See former Civil Code § 2274; former Prob. Code § 1122, 1138.1(a)(7).

Subdivision (h) states a general rule recognized in California cases. See, e.g., *Citizens' Bank v. Rucker*, 138 Cal. 606, 609-10, 72 P. 46 (1903); see also Restatement (Second) of Trusts § 202 (1957).

Subdivision (i) is consistent with California case law. See *Noble v. Noble*, 198 Cal. 129, 135, 243 P. 439 (1926); *Keeney v. Bank of Italy*, 33 Cal. App. 515, 517, 165 P. 735 (1917); *Carlin v. Masten*, 118 Cal. App. 373, 376, 5 P.2d 65 (1931); *People v. California Safe Deposit & Trust Co.*, 175 Cal. 756, 759, 167 P. 388 (1917); *Church v. Bailey*, 90 Cal. App.2d 510, 504, 203 P.2d 547 (1949).

968/888

§ 961. Remedies for breach exclusively equitable

961. The remedies of a beneficiary against the trustee are exclusively equitable.

Comment. Section 961 is a new provision that is drawn from Section 197 of the Restatement (Second) of Trusts (1957).

2978

§ 962. Common law applies

962. The availability and application of the remedies for breach of trust described in Section 960 are governed by the common law.

Comment. Section 962 recognizes that the catalogue of remedies for breach of trust provided in Section 960 is a general list that omits the refinements and exceptions developed over many years by the common law. As used in this section and in Section 963, the "common law" does not refer to the common law as it existed in 1850 when the predecessor of Civil Code Section 22.2 was enacted; rather, the reference is to the contemporary and evolving rules of decisions developed by the courts in exercise of their power to adapt the law to new situations and to changing conditions. See, e.g., *Fletcher v. Los Angeles Trust & Sav. Bank*, 182 Cal. 177, 187 P. 425 (1920).

2979

§ 963. Other remedies preserved

963. Nothing in Section 960 is intended to prevent resort to any other remedy for breach of trust available under any other statute or the common law.

Comment. Section 963 makes clear that the remedies prescribed in Section 960 are not necessarily exclusive. See, e.g., Penal Code § 506; *People v. Stanford*, 16 Cal.2d 247, 105 P.2d 969 (1940) (embezzlement). For a discussion of the "common law," see the Comment to Section 962.

Article 3. Accountability and Measure of Liability

§ 970. Accountability for profits in absence of breach of trust

970. The trustee is accountable for any profit made by the trustee through or arising out of the administration of the trust, even if the profit does not result from a breach of trust.

Comment. Section 970 is the same as Section 203 of the Restatement (Second) of Trusts (1957).

§ 971. Nonliability for loss in absence of breach of trust

971. The trustee is not liable to the beneficiary for a loss or depreciation in value of the trust property, or for a failure to make a profit, not resulting from a breach of trust.

Comment. Section 971 is the same as Section 204 of the Restatement (Second) of Trusts (1957).

§ 972. Measure of liability for breach of trust

972. (a) If the trustee commits a breach of trust, the trustee is chargeable with any of the following that is appropriate under the circumstances:

(1) Any loss or depreciation in value of the trust estate resulting from the breach of trust.

(2) Any profit made by the trustee through the breach of trust.

(3) Any profit which would have accrued to the trust estate if there had been no breach of trust.

(b) If the trustee has acted honestly and reasonably, the court, in its discretion, may excuse the trustee in whole or in part from liability under subdivision (a) if it would be fair to do so.

Comment. Subdivision (a) of Section 972 is the same in substance as Section 205 of the Restatement (Second) of Trusts (1957). Subdivision (a) supersedes former Civil Code Sections 2237 and 2238. See also Section 720(b) (propriety of considering investments as part of an overall investment strategy).

Subdivision (b) codifies the good faith exception to the general liability rules found in the Restatement. See Restatement (Second) of Trusts § 205 comment g (1957). In general, this rule is consistent with Estate of Talbot, 141 Cal. App.2d 309, 296 P.2d 848 (1956), and former Civil Code Section 2238(a).

§ 973. Trustee's liability for interest

973. (a) If the trustee commits a breach of trust and thereby incurs a liability for money with interest thereon, the trustee is chargeable with interest at the legal rate on judgments or such other rate as the court in its discretion may determine, but in any event the trustee is chargeable with interest actually received or which should have been received.

(b) If the trustee is chargeable with interest, the trustee is chargeable with simple interest, but the trustee is chargeable with compound interest in any of the following circumstances:

- (1) Where the trustee has received compound interest.
- (2) Where the trustee has received a profit that cannot be ascertained but is presumably at least equal to compound interest.
- (3) Where it was the trustee's duty to accumulate the income.

Comment. Section 973 supersedes former Civil Code Section 2262 which provided a liability for interest upon failure to properly invest trust funds and part of former Civil Code Section 2237 (liability for interest on proceeds). Section 973 is the same in substance as Section 207 of the Restatement (Second) of Trusts (1957). In exercising its discretion under this section, the court should consider the following factors as delineated in the following comments to Section 207 of the Restatement:

a. Interest received. The trustee is chargeable with any interest actually received by him on trust funds, although the amount received is greater than the legal rate or the current rate of return on trust investments.

b. Interest which should have been received. If it was the duty of the trustee to invest trust funds in securities paying interest at a certain rate and in breach of trust he neglects to do so, he is chargeable with that rate of interest, even though it is higher than the legal rate or the current rate of return on trust investments.

c. Interest at legal or other rate. Except under the circumstances mentioned in Comments a and b, the beneficiary is entitled to interest at the legal rate, or at the current rate on trust investments, or at some other rate, as the court may in its sound discretion determine.

In determining the rate of interest with which the trustee is chargeable, the following circumstances may be relevant: (1) whether the breach of trust was committed in bad faith, was intentional although not committed in bad faith, was committed negligently or as a result of a mistake in the interpretation of the trust instrument; (2) whether the breach of trust consisted in action by the trustee or in his failure to act.

Ordinarily if a breach of trust consists only in the failure of the trustee to invest trust money, or in the failure to sell trust property and to invest the proceeds, the trustee is chargeable

with interest at the current rate of return on trust investments and not with interest at the legal rate.

If breach of trust consists in an improper sale of trust property or an improper purchase of property for the trust, the trustee is chargeable with interest at the current rate of return on trust investments, unless the breach of trust was intentionally committed, in which case he is ordinarily chargeable with interest at the legal rate.

If the breach of trust consists in the failure to pay to the beneficiary trust funds to which he is entitled, the trustee is ordinarily chargeable with interest at the legal rate if he intentionally violated his duty to the beneficiary in withholding payment. If, however, his failure to pay was due to a reasonable doubt as to his duty to make payment, he is not liable, during the period while the question of his duty is being litigated, for any interest except such as he has actually received or should have received during that period. In such a case the trustee should ordinarily not invest the money but should deposit it in a [financial institution] in order that he may be in a position to pay it over immediately if the court should so decree.

3031

Article 4. Limitations and Exculpation

§ 980. Limitations on proceedings against trustees

980. (a) Unless previously barred by adjudication, consent, or limitation:

(1) If a beneficiary has received an interim or final account in writing that fully discloses the subject of a claim, a claim against the trustee for breach of trust is barred as to that beneficiary unless a proceeding to assert the claim is commenced within one year after receipt of the account.

(2) If an interim or final account does not fully disclose the subject of a claim, a claim against the trustee for breach of trust is barred as to that beneficiary unless a proceeding to assert the claim is commenced within one year after the beneficiary discovered, or reasonably should have discovered, the subject of the claim.

(b) For the purpose of subdivision (a), a beneficiary is deemed to have received an account if, in the case of an adult, it is received by the adult personally or in the case of a minor or person under legal disability, it is received by the person's representative.

Comment. Section 980 is a new provision and is drawn in part from Uniform Probate Code Section 7-307. 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). [This provision does not displace the statute of limitations applicable to actions for relief on the ground of fraud. See Code Civ. Proc. § 338(4).] A parent of a minor may represent the interest of the minor under subdivision (b) so long as the parent does not have a conflict of interest.

§ 981. Exculpation of trustee

981. (a) Except as provided in subdivisions (b) and (c), the trustee can be relieved of liability for breach of trust by provisions in the terms of the trust.

(b) A provision in the trust instrument is not effective to relieve the trustee of liability (1) for breach of trust committed in bad faith, intentionally, or with reckless indifference to the interest of the beneficiary, or (2) for any profit that the trustee derives from a breach of trust.

(c) To the extent that a provision relieving the trustee of liability for breach of trust is inserted in the trust instrument as the result of an abuse by the trustee of a fiduciary or confidential relationship to the trustor, the provision is ineffective.

Comment. Section 981 is the same in substance as Section 222 of the Restatement (Second) of Trusts (1957). For special provisions applicable to revocable trusts, see Section 982. Although a trust may not exculpate a trustee from liability for a profit from a breach, as provided in clause (2) of subdivision (b), the trust may limit the trustee's duties with the effect that the trustee does not commit a breach in this area. However, it is against public policy to attempt to eliminate liability for profits derived from a breach of a duty that the trustee does have. See Restatement (Second) of Trusts § 222 comments b & c (1957).

§ 982. Nonliability for following instructions under revocable trust

982. (a) Notwithstanding Section 981, a trustee of a revocable trust is not liable to the beneficiary for any act performed pursuant to written directions from the person having the power to revoke, including a person to whom the power to direct the trustee is delegated.

(b) The rule provided in subdivision (a) applies to a trust that is revocable in part with respect to the interest of the beneficiary in that part of the trust property.

Comment. Section 982 continues the substance of subdivision (b) of former Section 2258 insofar as it concerned the trustee's liability under a revocable trust. See also Section 700(b) (trustee's duty to follow written directions under revocable trust).

PART 4. TRUSTEES

CHAPTER 1. GENERAL PROVISIONS

§ 1000. Certificate of trustee

1000. Upon application of the trustee, the court clerk shall issue a certificate that the trustee is a duly appointed and acting trustee under the trust if the court file shows the incumbency of the trustee.

Comment. Section 1000 continues the substance of former Section 1130.1, and expands the former provision to cover living trusts.

14919

§ 1001. Trustee's bond

1001. (a) A trustee is not required to provide bond to secure performance of the trustee's duties, except in any of the following circumstances:

(1) Where bond is required by the terms of the trust.

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

(3) Where bond is found by the court to be necessary to protect the interests of beneficiaries who are not able to protect themselves and whose interests otherwise are not adequately protected.

(4) Where an individual trustee who is not named in the trust instrument is appointed by the court as successor trustee.

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

(c) If bond is required, it shall be filed in the court having jurisdiction over the trust in the amount and with sureties and liabilities as ordered by the court.

(d) Except as otherwise provided in the trust or ordered by the court, the cost of the bond shall be charged against the trust.

(e) Only trustees who are natural persons may be required to give a bond under this section, notwithstanding a contrary provision in the trust instrument.

Comment. Subdivisions (a)-(c) of Section 1001 are drawn from Uniform Probate Code Section 7-304 (1977). Subdivision (a)(4) continues the substance of part of former Section 1127, but makes clear that it

applies only to an individual trustee who is not named as successor or nominated as successor in the trust instrument. In other respects this section supersedes former Sections 1127 (bond of trustee named by court) and 1127.5 (exception for substitute or successor trustee that is charitable corporation). Subdivision (d) supersedes the second sentence of former Section 1127. Subdivision (e) makes clear that corporate trustees are not required to give bond under this section. This continues the substance of part of former Sections 480 and 481.

405/604

CHAPTER 2. COTRUSTEES

§ 1010. Actions by cotrustees

1010. Except as otherwise provided in the trust:

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

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

Comment. Section 1010 supersedes the first part of former Civil Code Section 860 and former Civil Code Section 2268, which required unanimous action by cotrustees unless the trust otherwise provided. The old rule is retained in subdivision (b) as applied to trusts with only two trustees. Section 1010 is consistent with the rule applicable to co-executors under Section [570], and also with Section 6(a) of the Uniform Trustees' Powers Act (1964). See also Section 952 (liability of cotrustees).

405/785

§ 1011. Inability of cotrustee to act

1011. Except as otherwise provided in the trust, if a cotrustee dies, is legally incapable of acting, resigns, disclaims, or is discharged, the remaining cotrustees may act.

Comment. Section 1011 supersedes the second part of former Civil Code Section 860 and former Civil Code Section 2288.

12326

CHAPTER 3. RESIGNATION AND REMOVAL OF TRUSTEES

§ 1020. Resignation of trustee

1020. (a) A trustee who has accepted the trust may resign only in one of the following manners:

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

(2) With the consent of all the beneficiaries.

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

(b).

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

Comment. Subdivision (a) of Section 1020 is the same in substance as Section 106 of the Restatement (Second) of Trusts (1957). Subdivision (a)(1) continues the substance of part of the second sentence of former Section 1138.8. Subdivision (a)(2) supersedes former Civil Code Section 2282(d). For provisions relating to consent by beneficiaries under an incapacity, see e.g., Civil Code §§ 2450, 2467 (statutory form of durable power of attorney); Prob. Code §§ 502 (guardian ad litem), 2580 (conservator). Subdivision (a)(3) continues the authority of the court under former law. See former Civil Code §§ 2282(e), 2283; former Prob. Code §§ 1125.1, 1138.1(a)(9), 1138.8. Under subdivision (a)(3) the court has authority to accept a resignation regardless of whether the trust provides a manner of resignation. Former Section 1138.8 permitted the court to act where the trust was silent. As a general rule, the resignation of a trustee will not be effective until a successor accepts the trust. Section 1020 also supersedes former Section 1124.

Subdivision (b) makes clear that the court has discretion to accept the trustee's resignation. See Restatement (Second) of Trusts § 106 comment c. This provision supersedes part of the last sentence of the first paragraph of former Section 1125.1 and part of the third sentence of former Section 1138.8. The authority for protective orders continues the substance of part of the last sentence of the first paragraph of former Section 1125.1 and part of the third sentence of former Section 1138.8. See also Section 1134 (general authority to make necessary orders). For the procedure applicable to proceedings under subdivision (b), see Section 1100 et seq. See also Section 1130(b)(11) (petition to accept resignation of trustee).

12340

§ 1021. Liability of resigning trustee

1021. The liability of a resigning trustee or the sureties on the trustee's bond, if any, is not released or affected in any manner by the trustee's resignation.

Comment. Section 1021 continues the substance of part of the second paragraph of former Section 1125.1 and part of the last sentence of former Section 1138.8. For provisions governing the discharge of the trustee's liability, see Sections 980-981.

37968

§ 1022. Removal of trustee

1022. (a) A trustee may be removed in accordance with the terms of the trust or by the court on its own motion or on petition of a cotrustee or beneficiary.

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

- (1) Where the trustee has committed a breach of the trust.
- (2) Where the trustee is incompetent, insolvent, or otherwise unfit to administer the trust.
- (3) In the case of cotrustees, where hostility, ill feeling, or lack of cooperation among cotrustees impairs the administration of the trust.
- (4) For other good cause, in the discretion of the court.

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

Comment. Subdivision (a) of Section 1022 is the same in substance as Section 107 of the Restatement (Second) of Trusts (1957). The authority of the court to remove trustees continues authority found in former law. See former Civil Code §§ 2233, 2283; former Prob. Code §§ 1123.5, 1138.1 (a)(10). The recognition that the trustee may be removed as provided in the trust instrument is new. See Restatement (Second) of Trusts § 107 comment h. The authority for removal on the court's own motion is drawn from the third sentence of former Section 1123.5. For the procedure applicable to judicial removal proceedings, see Section 1100 et seq. See also Section 1130(b)(10) (petition to remove trustee).

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

Subdivision (c) is drawn from former Sections 1123.6 and 1138.2. See also Section 1134 (general authority to make necessary orders).

405/412

§ 1023. Occurrence of vacancy in office of trustee

1023. The office of a trustee is vacated when the trustee resigns or is removed, or upon the occurrence of any of the following:

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

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

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

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

Comment. Section 1023 continues the substance of subdivisions (1) and (2) of former Civil Code Section 2281, with the exception of the reference to discharge of the trustee. See also Sections 980 (limitations), 1021 (liability of resigning trustee), 1130(b)(5) (petition to settle trustee's account), 1212 (protection of third persons dealing with trustee whose office is vacated).

405/441

§ 1024. Delivery of property by resigning or removed trustee

1024. A trustee who resigns or is removed, or holds property of the trust after a vacancy has otherwise occurred in the office of trustee, shall deliver the trust property to the successor trustee or a person appointed by the court to receive the property and remains responsible for trust property until it is delivered.

Comment. Section 1024 supersedes part of the second paragraph of former Section 1125.1 and part of the last sentence of former Section 1138.8.

12811

CHAPTER 4. APPOINTMENT OF TRUSTEES

§ 1030. Appointment of new trustee

1030. (a) If a trust is created without a trustee or if a vacancy in the office of trustee occurs, a new trustee may be appointed in one of the following manners:

(1) In accordance with the terms of the trust, if the trust provides a practical method of appointing a trustee or names the person to be appointed.

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

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

Comment. Section 1030 continues the general substance of former law. See former Civil Code §§ 2287, 2289; former Prob. Code §§ 1125, 1126, 1138.9. For a provision governing the occurrence of vacancies in the office of trustee, see Section 1023. The provision in subdivision (a)(1) relating to a "practical" method of appointing a trustee continues the substance of the first sentence of former Civil Code Section 2287. See also former Prob. Code § 1138.9.

The authority of the court to appoint the same or a lesser number of trustees in subdivision (b) continues the second sentence of former Civil Code Section 2289. This provision is not intended to limit the authority of the court in appropriate circumstances to appoint an additional trustee or a greater number than provided in the trust. See Restatement (Second) of Trusts § 108 comment e (1957). The provision requiring the court to give consideration to the wishes of the beneficiaries in subdivision (b) supersedes the second sentence of former Civil Code Section 2287. See Restatement (Second) of Trusts § 108 comment i. For the procedure applicable to judicial proceedings, see Section 1100 et seq. See also Sections 1130(b)(10) (petition to appoint trustee).

31779

CHAPTER 5. COMPENSATION AND INDEMNITY OF TRUSTEES

§ 1040. Trustee's compensation provided under trust terms; different compensation

1040. (a) Subject to subdivision (b), if the trust instrument provides for the trustee's compensation, the trustee is entitled to be compensated in accordance with the terms of the trust.

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

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

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

(3) In extraordinary circumstances calling for equitable relief.

(c) The court may fix an amount of periodic compensation under this section to continue for as long as the court determines is proper.

Comment. Section 1040 continues the substance of the first and second sentences of former Civil Code Section 2274, and the first and second sentences of former Probate Code Section 1122. Subdivision (b) also makes clear that the court can reduce the trustee's compensation when appropriate. Subdivision (c) is a new provision which makes clear that the court may fix compensation prospectively. See also Section 1130(b)(9) (petition to fix compensation).

31797

§ 1041. Trustee's compensation where trust silent

1041. If the trust instrument does not specify the trustee's compensation, the trustee is entitled to reasonable compensation under the circumstances.

Comment. Section 1041 continues the substance of the third sentence of former Civil Code Section 2274 and part of the third sentence of former Probate Code Section 1122. The trustee has authority to fix its compensation under Section 866 subject to court review. See also Section 1130(b)(9) (petition to fix compensation).

31798

§ 1042. Compensation of cotrustees

1042. Unless the trust instrument otherwise provides or the trustees otherwise agree, if the trust has two or more trustees, the compensation shall be apportioned among the cotrustees according to the services rendered by them respectively.

Comment. Section 1042 continues the substance of the fourth sentence of former Civil Code Section 2274 and the fourth sentence of former Probate Code Section 1122. See also Section 1130(b)(9) (petition to fix compensation).

405/779

§ 1043. Repayment of trustee for expenses

1043. A trustee is entitled to the repayment out of the trust estate of all expenses properly incurred by the trustee in the administration of the trust. The trustee is also entitled to repayment of unauthorized expenditures if they benefitted the trust estate.

Comment. Section 1043 continues the substance of former Civil Code Section 2273 and supersedes part of the last sentence of Probate Code Section 1122 relating to proper expenses. Section 1043 also supersedes provisions relating to advancing the trustee's personal funds in former Section 1120.2(14).

§ 1044. Trustee's lien

1044. The trustee has an equitable lien on the trust property as against the beneficiary in the amount of advances, with any interest, made for the protection of the trust or for expenses, losses, and liabilities sustained in the administration of the trust or because of holding or ownership of any trust property.

Comment. Section 1044 continues the substance of part of subdivision (14) of former Section 1120.2 and is the same in substance as part of Section 3(c)(18) of the Uniform Trustees' Powers Act (1964), however the reference to the equitable nature of the lien is new. An equitable lien is not good against a transferee of trust property who gives fair consideration for the property without knowledge of the lien. See generally 1 J. Pomeroy, Equity Jurisprudence §§ 165, 171(4) (5th ed. 1941); see also Restatement (Second) of Trusts § 244 comment c (1957).

PART 5. JUDICIAL PROCEEDINGS CONCERNING TRUSTS

CHAPTER 1. JURISDICTION AND VENUE

§ 1100. Subject matter jurisdiction

1100. (a) The superior court sitting in probate has exclusive jurisdiction of proceedings concerning the internal affairs of trusts as provided in this division.

(b) The superior court sitting in probate has concurrent jurisdiction of the following:

- (1) Actions and proceedings to determine the existence of trusts.
- (2) Actions and proceedings by or against creditors or debtors of trusts.

- (3) Other actions and proceedings involving trustees and third persons.

Comment. Section 1100 is new and is drawn from the first sentence of Uniform Probate Code Section 7-201(a) (1977). Subdivision (a) provides for exclusive jurisdiction in the superior court in matters involving the internal affairs of trusts. See Chapter 3 (commencing with Section 1130). Jurisdiction was in the superior court under former Section 1138.3. Subdivision (a) also supersedes former Section 1123.7.

Subdivision (b) is new and is drawn from Uniform Probate Code Section 7-204.

The reference to the superior court sitting in probate in this section means the department of the court that deals with probate matters; it does not mean a court of limited power. See Section 1101 (superior court sitting in probate is full-power court).

37005

§ 1101. Probate court as full-power court

1101. The superior court sitting in probate has all the powers of the superior court in proceedings brought before it.

Comment. Section 1101 is a new provision that makes clear that the probate court, when considering trust cases brought before it under this division, has all the powers of the superior court exercising its general jurisdiction. Hence, while preserving the division of business among different departments of the superior court, this section rejects the limitation on the powers of the probate court that has been cited in appellate decisions. See, e.g., *Copley v. Copley*, 80 Cal. App.3d 97, 106, 145 Cal. Rptr. 437 (1978).

§ 1102. "Principal place of administration of trust" defined

1102. The "principal place of administration of the trust" is determined as follows:

(a) If the trust has a single trustee, it is the usual place where the day-to-day activity of the trust is carried on by the trustee or its representative who is primarily responsible for the administration of the trust. If such place cannot be determined, the principal place of administration of the trust is the trustee's residence.

(b) If the trust has more than one trustee, it is the usual place where the day-to-day activity of the trust is carried on by the trustee or its representative who is primarily responsible for the administration of the trust. If such place cannot be determined, the principal place of administration of the trust is the usual place of business or residence of any of the cotrustees as agreed upon by them or, if none, the residence or place of business of any of the cotrustees.

Comment. Section 1102 supersedes the second and third sentences of former Section 1138.3(a). Section 1102 substitutes a criterion of day-to-day activity for the former reference to the location of the day-to-day records of the trust.

405/978

§ 1103. Jurisdiction over trustees and beneficiaries

1103. Subject to Section 1104:

(a) By accepting the trusteeship of a trust having its principal place of administration in this state the trustee submits personally to the jurisdiction of the court under this division.

(b) To the extent of their interests in the trust, all beneficiaries of a trust having its principal place of administration in this state are subject to the jurisdiction of the court under this division.

Comment. Section 1103 is a new provision that is intended to facilitate the exercise of the court's power under this chapter. This section is drawn from Uniform Probate Code Section 7-103 (1977). As recognized by the introductory clause, constitutional limitations on assertion of jurisdiction apply to the exercise of jurisdiction under Section 1103. Consequently, appropriate notice must be given to a trustee or beneficiary as a condition of jurisdiction under this section. See, e.g., *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). Section 1103 is not a limitation on the jurisdiction of the court over the trust, trust property, or parties to the trust. See Section 1104 (general basis of probate court jurisdiction).

§ 1104. Basis of jurisdiction over trust, trust property, and trust parties

1104. The superior court sitting in probate may exercise jurisdiction in proceedings under this division on any basis permitted by Section 410.10 of the Code of Civil Procedure.

Comment. Section 1104 is a new provision that recognizes that the probate court may exercise jurisdiction on any basis that is not inconsistent with the California or United States Constitutions, as provided in Code of Civil Procedure Section 410.10. See generally Judicial Council Comment to Code Civ. Proc. § 410.10. In addition, Section 1103 codifies a basis of personal jurisdiction derived from concepts of presence in the state and consent to jurisdiction. However, personal jurisdiction over a trustee may be exercised where the trustee is found, regardless of the location of the trust property. See *Estate of Knox*, 52 Cal. App.2d 338, 344, 126 P.2d 108 (1942). Similarly, jurisdiction may be exercised to determine matters concerning trust property, particularly land, located in California even if the principal place of administration of the trust is not in California. See Restatement (Second) of Conflict of Laws § 276 & comments (1969); 5 A. Scott, *The Law of Trusts* §§ 644-47, at 4074-83 (3d ed. 1967). But as a general rule the courts of one state cannot directly affect the title to land in another state. See *Hardy v. Hardy*, 164 Cal. App.2d 77, 79, 330 P.2d 278 (1958).

A determination that a California court may exercise jurisdiction is not decisive if the exercise would be an undue interference with the jurisdiction of a court of another state which has primary supervision over the administration of the trust. See *Estate of Knox*, 52 Cal. App.2d 338, 344-48, 126 P.2d 108 (1942); *Schuster v. Superior Court*, 98 Cal. App. 619, 623-28, 277 P. 509 (1929); Restatement (Second) of Conflict of Laws § 267 & comments (1969). This concept of primary supervision in the context of trust administration is a special application of the doctrine of *forum non conveniens*, which is recognized generally in Code of Civil Procedure Section 410.30.

Where the court has acquired jurisdiction over parties to a trust, jurisdiction continues over the parties and the subject of the proceeding, notwithstanding the removal of a person or trust property, until the conclusion of the action or proceeding concerning the trust. See Code Civ. Proc. § 410.50(b); cf. *Maloney v. Maloney*, 67 Cal. App.2d 278, 280, 154 P.2d 426 (1945) (jurisdiction over child custody issue).

405/979

§ 1105. Venue

1105. (a) The proper county for commencement of a proceeding pursuant to this division is either of the following:

(1) The county where the principal place of administration of the trust is located.

(2) The county where the decedent's estate is administered, in the case of a testamentary trust, or where the trust was created, in the case of a living trust.

(b) In other cases, venue is determined by the rules applicable to civil actions generally.

Comment. Subdivision (a)(1) of Section 1105 continues the substance of part of the first sentence of former Section 1138.3(a). See Section 1102 ("principal place of administration of trust" defined).

Subdivision (a)(2) continues the substance of former Section 1138.3(b) and extends the former provision to all testamentary trusts. The provision in subdivision (a)(2) for venue in the county where a living trust was created is new.

Subdivision (b) provides venue rules applicable in cases described in Section 1100(b) or where jurisdiction over a trust, trust property, or parties to a trust is based on a factor other than those described in subdivision (a) of this section. See Section 1104 (general basis of jurisdiction). Thus, for example, when the principal place of administration of a trust is in another state, but jurisdiction is proper in California, the general rules governing venue apply. See, e.g., Code Civ. Proc. §§ 392 (real property), 395 (county of defendant's residence). This subdivision is drawn from Uniform Probate Code Section 7-204 (1977).

27632

§ 1106. Jury trial

1106. (a) There is no right to a jury trial in proceedings under this division except where required by the constitution.

(b) If a party has a constitutional right to a jury trial, the party is entitled to a jury trial in a proceeding in which any controverted question of fact arises only if a jury is demanded.

(c) If there is no right to a jury trial or the right is waived, the court in its discretion may call a jury to decide any issue of fact, in which case the verdict is advisory only.

Comment. Section 1106 is new. Subdivision (a) codifies the case law rule. See *People v. One 1941 Chevrolet Coupe*, 37 Cal.2d 283, 286-87, 231 P.2d 832 (1951); *C & K Engineering Contractors v. Amber Steel Co.*, 23 Cal.3d 1, 8, 587 P.2d 1136, 151 Cal. Rptr. 323 (1978); *Estate of Beach*, 15 Cal.3d 623, 642, 542 P.2d 994, 125 Cal. Rptr. 570 (1975); *Burton v. Security Pacific Nat'l Bank*, 155 Cal. App.3d 967, 977, ____ Cal. Rptr. ____ (1984). Subdivisions (b) and (c) are drawn from Section 1-306 of the Uniform Probate Code (1977).

404/996

CHAPTER 2. NOTICE

§ 1110. Application of chapter

1110. This chapter applies to notice in proceedings commenced pursuant to this division.

Comment. Section 1110 supersedes former Section 1215. See also Section 82 ("trust" defined). This article governs notice in proceedings under Chapter 3 (commencing with Section 1130), Chapter 4 (commencing

with Section 1160) (transfer of trust to another jurisdiction), and Chapter 5 (commencing with Section 1180) (transfer to California), and also proceedings as to a trust subject to continuing court jurisdiction for transfer within California under Section 544 or for removal of a trust from continuing jurisdiction under Sections 550-556.

405/000

§ 1111. Form of notice

1111. If notice of the time and place of a hearing is required to be given by this division, the notice shall be in the form prescribed by the Judicial Council or, if the Judicial Council has not prescribed an applicable form, in compliance with Section [1200.1].

Comment. Section 1111 is drawn from Section 1464 (form of notice under guardianship-conservatorship statute). See also Section 500 (Judicial Council may prescribe forms required by division).

405/001

§ 1112. Manner of mailing; when mailing complete

1112. (a) Unless otherwise expressly provided by statute, if a notice or other paper is required or permitted to be mailed to a person pursuant to this division, it shall be sent by:

(1) First-class mail if the person's address is within the United States.

(2) Airmail if the person's address is not within the United States.

(b) Mailing is complete under this division when the notice or other paper is deposited in the mail, postage prepaid, addressed to the person to whom it is mailed.

(c) If the address is not known, notice shall be given as the court may require in the manner provided in Section 413.30 of the Code of Civil Procedure.

Comment. Subdivisions (a) and (b) of Section 1112 are new and are the same as Section 1465. Subdivision (c) continues the substance of part of the second paragraph of subdivision (a) of former Section 1138.6.

32700

§ 1113. Personal delivery instead of mailing

1113. If a notice or other paper is required or permitted to be mailed pursuant to this division (whether by first-class, airmail, certified, or registered mail), it may be delivered personally to the person to whom it is required or permitted to be mailed. Personal

delivery as provided in this section is deemed to satisfy the provision that requires or permits the notice or other paper to be mailed.

Comment. Section 1113 is the same as Section 1466 and continues the substance of the fourth paragraph of subdivision (a) of former Section 1138.6.

405/003

§ 1114. Proof of giving notice; conclusiveness of order

1114. (a) Proof of the giving of notice under this division shall be made at or before the hearing to the satisfaction of the court.

Proof may be made by, but is not limited to, the following means:

(1) Proof of notice by personal delivery may be made by the affidavit of the person making the delivery showing the time and place of delivery and the name of the person to whom delivery was made.

(2) Proof of mailing may be made in the manner prescribed in Section 1013a of the Code of Civil Procedure.

(3) Proof of posting may be made by the affidavit of the person who posted the notice.

(4) Proof of publication may be made by the affidavit of the publisher or printer, or the authorized agent of the publisher or printer, showing the time and place of publication.

(5) Proof of notice, however given, may be made by testimonial evidence presented at the hearing.

(b) If it appears to the satisfaction of the court that notice has been regularly given or that the party entitled to notice has waived it, the court shall so find in its order. When the order becomes final, it is conclusive on all persons.

Comment. Section 1114 is the same as Section 1468 (proof of notice under guardianship-conservatorship statute). Section 1114 supersedes the fifth paragraph of subdivision (a) of former Section 1138.6. This section also supersedes former Section 1123, and subdivision (c) of former Section 1200.5 to the extent it applied to proceedings involving trusts.

405/183

§ 1115. Additional notice

1115. (a) The court may, on its own motion or on request of a trustee or other person interested in a trust, require that further or additional notice be given at any stage of the proceeding. The court may prescribe the form and method of the notice to be given.

(b) A petitioner or other person required to give notice may cause notice to be given to any person interested in the trust without the need for a court order.

Comment. Subdivision (a) of Section 1115 continues the substance of subdivision (a)(1) and subdivision (b) of former Section 1215.3. Section 1115 is comparable to Sections [1204] and 1462.

Subdivision (b) continues the substance of the second sentence of former Section 1215.4.

405/187

§ 1116. Shortening time

1116. The court may for good cause shorten the time for giving any notice required by this division.

Comment. Section 1116 continues the substance of former Section 1138.6(c).

405/190

§ 1117. Notice of postponed hearings

1117. The court may continue or postpone any hearing, from time to time, in the interest of justice, and no further notice of the continued or postponed hearing is required unless otherwise ordered by the court.

Comment. Section 1117 is the same as Sections [1205] and 1463.

405/191

§ 1118. Notice in cases involving future interests

1118. (a) Subject to subdivisions (b) and (c), it is sufficient compliance with a requirement in this division that notice be given to the trust beneficiaries, or to persons interested in the trust, if notice is given as follows:

(1) Where an interest has been limited on any future contingency to persons who will compose a certain class upon the happening of a certain event without further limitation, notice shall be given to the persons in being who would constitute the class if the event had happened immediately before the commencement of the proceedings.

(2) Where an interest has been limited to a living person and the same interest, or a share therein, has been further limited upon the happening of a future event to the surviving spouse or to persons who are or may be the distributees, heirs, issue, or other kindred of the living person, notice shall be given to the living person.

(3) Except as otherwise provided in subdivision (b), where an interest has been limited upon the happening of any future event to a person, or a class of persons, or both, and the interest, or a share of the interest, has been further limited upon the happening of an additional future event to another person, or a class of persons, or both, notice shall be given to the person or persons in being who would take the interest upon the happening of the first of these events.

(b) If a conflict of interest involving the subject matter of the trust proceeding exists between a person to whom notice is given and a person to whom notice is not required to be given under subdivision (a), notice shall be given to persons otherwise not entitled to notice under subdivision (a).

(c) Nothing in this section affects any of the following:

(1) Requirements for notice to a person who has requested special notice, a person who has filed notice of appearance, or a particular person or entity required by statute to be given notice.

(2) Requirements for appointment of a guardian ad litem pursuant to Section 502.

Comment. Subdivision (a) of Section 1118 continues the substance of former Section 1215.1. See also Section 24 ("beneficiary" defined). For provisions where this section applies, see Sections 551 (provisions for removal of certain testamentary trusts from continuing jurisdiction), 1133 (notice of hearing on petitions generally), 1162 (notice of petition for transfer to another jurisdiction), 1184 (notice of petition for transfer to California).

Subdivision (b) continues the substance of former Section 1215.2. Subdivision (c) continues the substance of the first sentence of former Section 1215.4. See Section 1133(b) (request for special notice).

405/942

CHAPTER 3. PROCEEDINGS CONCERNING TRUSTS

§ 1130. Petitioners; grounds for petition

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

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

(1) Determining questions of construction of a trust instrument.

(2) Determining the existence or nonexistence of any immunity, power, privilege, duty, or right.

- (3) Determining the validity of a trust provision.
- (4) Ascertaining beneficiaries and determining to whom property shall pass or be delivered upon final or partial termination of the trust, to the extent the determination is not made by the trust instrument.
- (5) Settling the accounts and passing upon the acts of the trustee, including the exercise of discretionary powers.
- (6) Instructing the trustee.
- (7) Compelling the trustee to submit accounts and report acts as trustee to a beneficiary.
- (8) Granting powers to the trustee.
- (9) Fixing or allowing payment of the trustee's compensation.
- (10) Appointing or removing a trustee.
- (11) Accepting the resignation of a trustee.
- (12) Compelling redress of breach of trust.
- (13) Directing the relief provided in Section 651 in the case of a trust with uneconomically low principal.
- (14) Approving the modification or termination of the trust.
- (15) Combining or dividing trusts.
- (16) Amending or conforming the trust instrument in the manner required to qualify a decedent's estate for the charitable estate tax deduction under federal law, including the addition of mandatory governing instrument requirements for a charitable remainder trust as required by final regulations and rulings of the United States Internal Revenue Service, in any case in which all parties interested in the trust have submitted written agreement to the proposed changes or written disclaimer of interest.
- (17) Authorizing or directing transfer of a trust or trust property to or from another jurisdiction.
- (18) Directing transfer of a testamentary trust subject to continuing jurisdiction of the court from one county to another.

Comment. Section 1130 generally continues the substance of subdivision (a) of former Section 1138.1 and supersedes parts of former Section 1120. The reference to determining the existence of a trust in subdivision (a) is new. Subdivision (a) also continues the substance of part of former Section 1139.1 and the first sentence of former Section 1139.2 (petition for transfer of trust to another jurisdiction) and of former Section 1139.12 (petition for transfer to California).

Paragraphs (1) and (2) of subdivision (b) are new and are drawn from Uniform Probate Code Section 7-201(a) (1977). Paragraph (3) is new. Paragraph (5) continues the substance of parts of subdivisions (b) and (d) of former Civil Code Section 2269 (review of exercise of discretionary powers). See Sections 740-741 (duties in exercise of discretionary powers). Paragraph (9) supersedes the last sentence of former Civil Code Section 2274.

Various provisions elsewhere in this division relate to proceedings under this article. As to compelling the trustee to account under paragraph (7), see Sections 730-731. As to granting powers to the trustee under paragraph (8), see Section 801. As to the trustee's compensation under paragraph (9), see Sections 1040-1042. As to breach of trust involved in paragraph (12), see Sections 950-973. As to modification and termination of trusts under paragraph (14), see Sections 640-651. As to combining or dividing trusts under paragraph (15), see Sections 652 and 653. As to transfers of trusts under paragraph (17), see Sections 1160-1189. As to transfers of certain testamentary trusts within California under paragraph (18), see Section 544.

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

405/946

§ 1131. Commencement of proceeding

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

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

405/948

§ 1132. Dismissal of petition

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

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

405/949

§ 1133. Notice

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

- (1) All trustees.
- (2) Except as provided in Section 1118, all trust beneficiaries.

(b) If a trustee who is not petitioning or a beneficiary, in person or by counsel, has served and filed a notice of appearance directed to the petitioner or the petitioner's counsel in connection with the proceeding or a written request for a copy of the petition, and has given an address to which notice or a copy of the petition may be sent

or delivered, the petitioner shall cause a copy of the petition to be mailed to that person within five days after service of notice of appearance or receipt of the request.

(c) Notice of a petition relating to a charitable trust subject to supervision under Article 7 (commencing with Section 12580) of Chapter 6 of Part 2 of Division 3 of Title 2 of the Government Code shall be given to the Attorney General where the petition is filed on any of the following grounds:

- (1) To modify or terminate the trust.
- (2) To combine trusts or divide a trust.
- (3) To amend or conform a trust as provided in paragraph (16) of subdivision (b) of Section 1130.
- (4) To transfer a trust or trust property to another jurisdiction.

Comment. Subdivision (a) of Section 1133 continues the substance of the second paragraph of subdivision (a) of former Section 1138.6. See also Sections 1110-1118 (manner of notice). Subdivision (b) continues the substance of the third paragraph of subdivision (a) of former Section 1138.6, and supersedes former Section 1120.5. Subdivision (c) continues the substance of subdivision (d) of former Section 1138.6, and also reflects the notice requirements in Section 1163 and in Government Code Section 12591. See also Section 24 ("beneficiary" defined).

Note. Should subdivision (c) be expanded to require notice to the Attorney General in proceedings involving matters other than those listed?

405/951

§ 1134. Authority to make necessary orders; temporary trustee

1134. The court in its discretion may make all orders and take all other action necessary or proper to dispose of the matters presented by the petition, including appointment of a temporary trustee to administer the trust in whole or in part.

Comment. The first part of Section 1134 continues the substance of former Section 1138.2 and part of former Section 1121. The authority to appoint a temporary trustee is new.

405/959

§ 1135. Appeal

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

- (a) Determining the existence of a trust.
- (b) Determining questions of construction of trust instruments.

(c) Determining the existence or nonexistence of any immunity, power, privilege, duty, or right.

(d) Determining the validity of a trust provision.

(e) Ascertaining beneficiaries and determining to whom property shall pass.

(f) Settling the accounts and passing upon the acts of the trustee, including the exercise of discretionary powers.

(g) Instructing the trustee.

(h) Granting powers to the trustee.

(i) Fixing, directing, or allowing payment of compensation.

(j) Appointing or removing a trustee.

(k) Compelling redress of breach of trust.

(l) Approving the modification or termination of the trust.

(m) Approving the combination or division of the trust.

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

(o) Dismissing a petition or denying a motion to dismiss under Section 1132.

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

27644

CHAPTER 4. TRANSFER OF TRUST TO ANOTHER JURISDICTION

§ 1160. Application of chapter

1160. (a) This chapter applies to all of the following:

(1) A written trust.

(2) A trust subject to Chapter 8 (commencing with Section 6320) of Part 1 of Division 6.

(3) Any other trust to which the provisions of this chapter are made applicable by statute or trust instrument.

(b) This chapter does not prevent the transfer of the place of administration of a trust or of trust property to another jurisdiction by any other available means.

Comment. Subdivision (a) of Section 1160 continues the substance of former Section 1139(a). Subdivision (b) supersedes former Section

1139(b). Under the definition of "trust" in Section 82, this chapter also applies to charitable trusts. See also Sections 1105 (venue), 1130(b)(17) (proceedings for transfer of trust).

§ 1161. Transfer of place of administration or property from California

1161. (a) The court may make an order for the transfer of the place of administration of a trust or the transfer of some or all of the trust property to a jurisdiction outside this state as provided in this chapter.

(b) Except as otherwise provided in this chapter, proceedings under this chapter are governed by general provisions of this division.

Comment. Subdivision (a) of Section 1161 continues the substance of the first part of former Section 1139.1 and supersedes former Section 1132. See also Sections 62 ("property" defined), 1100 (subject-matter jurisdiction in superior court).

Subdivision (b) makes clear that the general rules applicable under this division apply unless this chapter provides a different rule. See, e.g., Sections 1106 (jury trial), 1110-1118 (notice), 1130-1135 (proceedings).

§ 1162. Contents of petition

1162. The petition for transfer shall be verified and shall set forth all of the following:

(a) The names and places of residence of:

(1) The trustee administering the trust in this state.

(2) The trustee, including any domiciliary trustee, who will administer the trust or trust property in the other jurisdiction.

(b) The names, ages, and places of residence of the beneficiaries, as far as known to the petitioner.

(c) Whether the trustee who will administer the trust in the other jurisdiction has agreed to accept the trust. If so, the acceptance or a copy shall be attached as an exhibit to the petition or otherwise filed with the court.

(d) A general statement of the qualifications of the trustee who will administer the trust in the other jurisdiction and the amount of fiduciary bond, if any. If the trustee is a natural person, the statement shall include the trustee's age.

(e) A general statement of the nature and value of the property of any trust of the same trustor under administration in the other jurisdiction by the trustee who will administer the trust in the other jurisdiction.

(f) The name of the court, if any, having jurisdiction of the trustee in the other jurisdiction or of its accounts or in which a proceeding may be had with respect to administration of the trust or the trustee's accounts.

(g) A statement of the character, condition, location, and value of the trust property sought to be transferred.

(h) Whether there is any pending civil action in this state against the trustee arising out of the administration of the trust sought to be transferred.

(i) A statement of the reasons for the transfer.

Comment. Section 1162 continues the substance of the part of former Section 1139.2 providing for the contents of the petition for transfer. See also Sections 24 ("beneficiary" defined), 1130(a) (petition by trustee or beneficiary).

27811

§ 1163. Notice and hearing

1163. (a) At least 30 days before the time set for the hearing on the petition, the petitioner shall cause notice of the time and place of the hearing to be mailed to each of the persons named in the petition.

(b) If the trust involves or may involve a charitable disposition of a type described in Section [328], a copy of the notice shall be mailed to or served on the Attorney General at least 30 days before the hearing.

(c) Any person interested in the trust, as trustee, beneficiary, or otherwise, may appear and file written grounds in opposition to the petition.

Comment. Section 1163 continues the substance of the last three sentences of former Section 1139.3, except that 30 days' notice to the Attorney General is required, rather than 20 days' notice. See also Sections 501 (clerk to set petition for hearing), 1112 (manner of mailing notice). If a beneficiary is named in the petition and so is required to be given notice, Section 1118 may apply.

27812

§ 1164. Order granting transfer

1164. The court may, in its discretion, grant the petition and order the trustee to transfer the trust property or to transfer the place of administration of the trust to the other jurisdiction if, after hearing, all of the following appear to the court:

(a) The transfer of the trust property to a trustee in another jurisdiction, or the transfer of the place of administration of the trust to another jurisdiction, will facilitate the economical and convenient administration of the trust and promote the best interests of the trust and those interested in it.

(b) The transfer will not violate the terms of the trust.

(c) Any new trustee to whom the trust property is to be transferred is qualified, willing, and able to administer the trust or trust property under the terms of the trust.

Comment. Section 1164 continues the substance of the introductory clause and subdivisions (1), (3), and (4) of former Section 1139.4 (prerequisites for transfer) and part of former Section 1139.1 (subject to limitation in trust). The requirement in subdivision (c) that the trustee be willing is included for consistency with Section 1185(a)(3).

The discontinuation of subdivision (2) of former Section 1139.4 relating to "substantial rights of residents" is not intended to have any effect on the court's discretion to approve or disapprove a transfer.

27813

§ 1165. Manner of transfer; discharge of trustee

1165. If a transfer is ordered under this chapter, the court may direct the manner of transfer and impose such terms and conditions as may be just, including, but not limited to, a requirement for the substitution of a successor trustee in any pending litigation in this state. The delivery of property in accordance with the order of the court is a full discharge of the trustee in relation to all property embraced in the order.

Comment. Section 1165 continues former Section 1139.5.

24829

CHAPTER 5. TRANSFER OF TRUST FROM ANOTHER JURISDICTION

§ 1180. Application of chapter

1180. (a) This chapter applies to a written trust, or portion thereof, administered in a jurisdiction outside this state.

(b) This chapter does not prevent the transfer of the place of administration of a trust or of trust property to this state by any other available means.

Comment. Subdivision (a) of Section 1180 continues the substance of former Section 1139.10(a). See Section 82 ("trust" defined). Section 1180 makes this chapter applicable to the transfer to California of the place of administration of trusts or trust property administered in a jurisdiction outside California. This chapter applies to trusts administered in foreign countries as well as those administered in other states. Subdivision (b) supersedes former Section 1139.10(b). See also Section 1130(b)(17) (proceedings for transfer of trust).

26255

§ 1181. Transfer of place of administration or property to California

1181. (a) The court may make an order accepting the transfer of the place of administration of a trust from another jurisdiction to this state or the transfer of some or all of the trust property in another jurisdiction to a trustee in this state as provided in this chapter.

(b) Except as otherwise provided in this chapter, proceedings under this chapter are governed by general provisions of this division.

Comment. Subdivision (a) of Section 1181 continues former Section 1139.11 and is comparable to Section 1161(a). See also Sections 62 ("property" defined), 1100 (subject-matter jurisdiction in superior court).

Subdivision (b) makes clear that the general rules applicable under this division apply unless this chapter provides a different rule. See, e.g., Section 1106 (jury trial), 1110-1118 (notice), 1130-1135 (proceedings).

26756

§ 1182. Venue

1182. (a) If the petition requests that a resident of this state be appointed trustee, the petition shall be filed in the superior court of the county where the proposed principal place of administration of the trust pursuant to Section 1102 is located.

(b) If the petition requests that only a nonresident of this state be appointed trustee, the petition shall be filed in the superior court of the county where either (1) any beneficiary resides or (2) a substantial portion of the trust property to be transferred is located or will be located.

Comment. Section 1182 continues the substance of former Section 1139.13.

26757

§ 1183. Contents of petition

1183. The petition for transfer shall be verified and shall set forth all of the following:

(a) The names and places of residence of:

(1) The trustee administering the trust in the other jurisdiction.

(2) The proposed trustee to whom administration of the trust or trust property will be transferred.

(b) The names, ages, and places of residence of all beneficiaries, as far as known to the petitioner.

(c) Whether the trust has been subject to supervision over administration in a jurisdiction outside this state. If so, the petition shall state whether a petition or appropriate request for transfer of place of administration of the trust or trust property to this state has been filed, if necessary, with the court in the other jurisdiction, and the status of the petition or request.

(d) Whether the trustee proposed to administer the trust in this state has agreed to accept the trust in this state. If the trustee has agreed, the acceptance shall be attached as an exhibit to the petition or otherwise filed with the court.

(e) A general statement of the qualifications of the trustee proposed to administer the trust in this state and the amount of fiduciary bond to be requested, if any. If the trustee is a natural person, the statement shall include the trustee's age.

(f) A copy of the trust instrument or a statement of the terms of the trust instrument in effect at the time the petition is filed, including all amendments thereto.

(g) A statement of the character, condition, location, and value of the trust property sought to be transferred.

(h) A statement of the reasons for the transfer.

Comment. Section 1183 generally continues former Section 1139.14, and is comparable to Section 1163. See also Section 24 ("beneficiary" defined).

26817

§ 1184. Notice and hearing

1184. (a) At least 30 days before the time set for the hearing on the petition, the petitioner shall cause notice of the time and place of the hearing to be mailed to each of the persons named in the petition.

(b) Any person interested in the trust, as trustee, beneficiary, or otherwise, may appear and file written grounds in opposition to the petition.

Comment. Section 1184 continues the substance of the second sentence of subdivision (a) and subdivision (b) of former Section 1139.15 and is comparable to subdivisions (a) and (c) of Section 1164. See also Sections 501 (clerk to set petition for hearing), 1112 (manner of mailing notice). If a beneficiary is named in the petition and so is required to be given notice, Section 1118 may apply.

26950

§ 1185. Order accepting transfer and appointing trustee

1185. (a) The court may, in its discretion, grant the petition and issue an order accepting transfer of trust property or the place of administration of the trust to this state and appoint a trustee to administer the trust in this state, if, after hearing, all of the following appear to the court:

(1) The transfer of the trust property to a trustee in this state, or the transfer of the place of administration of the trust to this state, will facilitate the economical and convenient administration of the trust and promote the best interests of the trust and those interested in it.

(2) The transfer will not violate the terms of the trust.

(3) The trustee appointed by the court to administer the trust in this state, and to whom the trust assets are to be transferred, is qualified, willing, and able to administer the trust or trust property under the terms of the trust.

(4) The proper court in the other jurisdiction has approved the transfer if such approval is necessary under the law of the other jurisdiction.

(b) If the court grants the petition under subdivision (a), the court shall require the trustee to post appropriate bond if necessary under the law of the other jurisdiction or of this state.

Comment. Section 1185 continues the substance of former Section 1139.16, but makes clear that a bond is required only if the law of the other jurisdiction or California so provides. See, e.g., Section 1001(a)(4) (bond required of trustee appointed by court).

26952

§ 1186. Conditional order accepting transfer

1186. If appropriate to facilitate transfer of the trust property or the place of administration of a trust to this state, the court may issue a conditional order appointing a trustee to administer the trust

in this state and indicating that transfer to this state will be accepted if transfer is approved by the proper court of the other jurisdiction.

Comment. Section 1186 continues former Section 1139.17. This section provides a method whereby the California court can indicate its willingness to accept jurisdiction over a trust administered in another jurisdiction where the law of the other jurisdiction requires appointment of a trustee in the proposed new place of administration before approving transfer. See, e.g., Mass. Gen. Laws Ann. ch. 206, § 29 (West 1969); N.C. Gen. Stat. §§ 36-6 to 36-8 (1966).

27231

§ 1187. Administration of transferred trust

1187. A trust transferred to this state pursuant to this chapter shall be administered in the same manner as a trust of that type created in this state.

Comment. Section 1187 supersedes former Section 1139.18. Under Section 1187 a transferred trust is treated the same as a trust that was created in California, and so is governed by this division. See also Gov't Code §§ 12580-12597 (supervision of charitable trusts).

PART 6. RIGHTS OF THIRD PERSONS

CHAPTER 1. LIABILITY OF TRUSTEE TO THIRD PERSONS

§ 1200. Personal liability of trustee to third persons on contracts

1200. Unless otherwise provided in the contract, a trustee is not personally liable on a contract properly entered into in the trustee's fiduciary capacity in the course of administration of the trust unless the trustee fails to reveal the trustee's representative capacity and identify the trust in the contract.

Comment. Section 1200 is a new provision and is the same in substance as Uniform Probate Code Section 7-306(a) (1977). The rule provided in Section 1200 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 Section 1200 the trustee's status and the identity of the trust must be revealed. This was not sufficient under prior case law. See *Hall v. Jameson*, supra. Section 1200 also supersedes former Civil Code Section 2267 to the extent it affected liability.

§ 1201. Personal liability of trustee arising from ownership or control of trust estate

1201. A trustee is personally liable for obligations arising from ownership or control of trust property only if the trustee is personally at fault.

Comment. Section 1201 is a new provision and is the same in substance as part of Uniform Probate Code Section 7-306(b) (1977). A trustee is "personally at fault" when the trustee acts, or fails to act, intentionally or negligently. For rules governing the assertion of claims, see Section 1203. The question of ultimate liability as between the trust and the trustee is governed by Section 1204.

§ 1202. Personal liability of trustee for torts

1202. A trustee is personally liable for torts committed in the course of administration of the trust only if the trustee is personally at fault.

Comment. Section 1202 is a new provision and is the same in substance as part of Uniform Probate Code Section 7-306(b) (1977). A trustee is

"personally at fault" when the trustee commits a tort intentionally or negligently. Cf. *Johnston v. Long*, 30 Cal.2d 54, 62-63, 181 P.2d 645 (1947) (liability of fiduciaries for torts committed by agents depends on personal fault). For rules governing the assertion of claims, see Section 1203. The question of ultimate liability as between the trust and the trustee is governed by Section 1204.

32177

§ 1203. Assertion of claims against trust

1203. A claim based on a contract entered into by a trustee in the trustee's fiduciary capacity, on an obligation arising from ownership or control of trust property, or on a tort committed in the course of administration of the trust may be asserted against the trust by proceeding against the trustee in the trustee's fiduciary capacity, whether or not the trustee is personally liable on the claim.

Comment. Section 1203 is a new provision and is the same in substance as Uniform Probate Code Section 7-306(c) (1977). This section supersedes the first and last sentences of former Civil Code Section 2267 (acts of trustee within scope of authority bind trust property). Section 1203 alters the case law rule that the trustee could not be sued in a representative capacity where the trust estate was not liable. See *Purdy v. Bank of America*, 2 Cal.2d 298, 301, 40 P.2d 481 (1935); *Rapaport v. Forer*, 20 Cal. App.2d 271, 278, 66 P.2d 1242 (1937). See also Section 1204 (liability as between trustee and trust estate).

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§ 1204. Liability as between trustee and trust estate

1204. The question of liability as between the trust estate and the trustee personally may be determined in a proceeding for accounting, surcharge, or indemnification, or other appropriate proceeding.

Comment. Section 1204 is new and is the same as Uniform Probate Code Section 7-306(d) (1977). The Comment to Uniform Probate Code Section 7-306 contains the following explanation:

Ultimate liability as between the estate and the fiduciary need not necessarily be determined whenever there is doubt about this question. It should be permissible, and often it will be preferable, for judgment to be entered, for example, against the trustee individually for purposes of determining the claimant's rights without the trustee placing that matter into controversy. The question of his right of reimbursement may be settled informally with beneficiaries or in a separate proceeding in the probate court involving reimbursement. The section does not preclude the possibility, however, that beneficiaries might be permitted to intervene in litigation between the trustee and a claimant and that all questions might be resolved in that action.

For rules governing indemnification of trustees, see Section 1043. See also Section 1130 et seq. (proceedings against trustee by beneficiary).

CHAPTER 2. PROTECTION OF THIRD PERSONS

§ 1210. Protection of third person dealing with trustee

1210. (a) With respect to a third person dealing with a trustee or assisting a trustee in the conduct of a transaction, the existence of a trust power and its proper exercise by the trustee may be assumed without inquiry. The third person is not bound to inquire whether the trustee has power to act or is properly exercising a power.

(b) A third person without actual knowledge that the trustee is exceeding the trustee's powers or improperly exercising them is fully protected in dealing with the trustee just as if the trustee possessed and properly exercised the powers the trustee purports to exercise.

Comment. Section 1210 is drawn from Section 7 of the Uniform Trustees' Powers Act (1964). Section 1210 supersedes former Civil Code Section 2243.

§ 1211. Application of property delivered to trustee by third person

1211. A third person who acts in good faith is not bound to ensure the proper application of trust property paid or delivered to the trustee.

Comment. Section 1211 supersedes former Civil Code Section 2244 and is essentially the same as the last sentence of Section 7 of the Uniform Trustees' Powers Act (1964).

§ 1212. Protection of third person dealing with former trustee

1212. If a third person enters into a good faith transaction with a former trustee without knowledge that the trustee's office has been vacated, the third person is fully protected just as if the trustee's office were not vacant.

Comment. Section 1212 continues the substance of the second paragraph of former Civil Code Section 2281, but is drafted for consistency with Section 1210. See also Section 1023 (vacancy in office of trustee).

§ 1213. Effect on purchaser of omission of trust from grant of real property

1213. If an express trust relating to real property is not contained or declared in the grant to the trustee, or in an instrument signed by

the trustee and recorded in the same office with the grant to the trustee, the grant shall be deemed absolute in favor of purchasers from the trustee without notice and for a valuable consideration.

Comment. Section 1213 continues the substance of former Civil Code Section 869.

§ 1214. Effect on real property transactions where beneficiary undisclosed

1214. (a) If an interest in or lien or encumbrance on real property is conveyed, created, or affected by an instrument in favor of a person in trust but no beneficiary is indicated in the instrument, it is presumed that the person holds the interest, lien, or encumbrance absolutely and free of the trust. This is a presumption affecting the burden of proof. In an action or proceeding involving the interest, lien, or encumbrance instituted against the person, the person shall be deemed the only necessary representative of the undisclosed beneficiary and of the original grantor or trustor and anyone claiming under them. A judgment is binding upon and conclusive against these persons as to all matters finally adjudicated in the judgment.

(b) An instrument executed by the person holding the interest, lien, or encumbrance as described in subdivision (a), whether purporting to be the act of that person in his or her individual right or in the capacity of a trustee, is presumed to affect the interest, lien, or encumbrance according to the tenor of the instrument. This is a presumption affecting the burden of proof. Upon the recording of the instrument in the county where the land affected by the instrument is situated, the presumption becomes conclusive in favor of a purchaser or encumbrancer in good faith and for valuable consideration.

Comment. Section 1214 continues the substance of the first two paragraphs of former Civil Code Section 869a. See Hansen v. G & G Trucking Co., 236 Cal. App.2d 481, 491-94, 46 Cal. Rptr. 186 (1965) (presumption rebuttable, not conclusive). The language relating to the presumptions affecting the burden of proof in both subdivisions (a) and (b) is consistent with Evidence Code Section 605.

CHAPTER 3. RIGHTS OF CREDITORS OF TRUSTOR

§ 1220. Creditor's rights against revocable trust during trustor's lifetime

1220. If the trustor retains the power to revoke the trust in whole or in part, the trust property is subject to the claims of creditors

of the trustor to the extent of the power of revocation during the lifetime of the trustor.

Comment. Section 1220 is new. This section is analogous to the rule applicable to property subject to an unexercised power of appointment created by a donor in favor of himself or herself. See Civil Code § 1390.4. Section 1220 permits the creditor to ignore the trust to the extent that it is revocable.

§ 1221. Creditor's rights against revocable trust after trustor's death

1221. Upon the death of a trustor who had retained the power to revoke the trust in whole or in part, the property that was subject to the power of revocation during the trustor's lifetime is subject to the claims of creditors of the decedent trustor's estate and to the expenses of administration of the estate to the extent that the decedent trustor's estate is inadequate to satisfy such claims and expenses.

Comment. Section 1221 is new. This section is analogous to the rule applicable upon the death of a donee of a general testamentary power of appointment under Civil Code Section 1390.3(b).

Note. The proposal to establish a creditors' claims procedure like that in probate is awaiting the benefit of experience in other jurisdictions, which is being monitored by the State Bar.

APPENDIX

COMMENTS SHOWING DISPOSITION OF EXISTING TRUST PROVISIONS

Note. The following bodies of law relating to trusts would be repealed and superseded by the new trust statute, Division 3 (commencing with Section 500) of the Probate Code:

Civil Code §§ 730-730.17

Civil Code §§ 852-871

Civil Code §§ 2215-2290.12

Probate Code §§ 1120-1139.19

Probate Code §§ 1215-1215.4

045/057

Civil Code §§ 730-730.17 (repealed). Revised Uniform Principal and Income Act

SEC. ____ Chapter 2.5 (commencing with Section 730) of Title 2 of Part 1 of Division 2 of the Civil Code is repealed.

CHAPTER 2.5. PRINCIPAL AND INCOME LAW

§ 730. Short title

Comment. Former Section 730 is continued in Probate Code Section 900.

§ 730a. Effect on personal income tax and bank and corporation tax

Comment. Former Section 730a is not continued because it is unnecessary. The California Revised Uniform Principal and Income Act relates to the administration of trusts and the problem of allocating trust receipts and expenditures between income beneficiaries and remaindermen; it does not deal with characterization of receipts for other purposes.

§ 730.01. Definitions

Comment. Subdivisions (1), (2), and (3) of former Section 730.01 are continued in Probate Code Section 901. Subdivision (4) is superseded by Probate Code Section 84 ("trustee" defined).

§ 730.02. Duty of trustee as to receipts and expenditures

Comment. The substance of former Section 730.02 is continued in Probate Code Section 902, except that the standard of care in former Section 730.02(a)(3) is superseded by a revised standard of care and the wording of subdivision (b) has been revised. See Prob. Code § 902(b) and the Comment thereto.

§ 730.03. Income and principal; charging of expenses

Comment. Subdivisions (a) and (b) of former Section 730.03 are continued in Probate Code Section 904. Subdivision (c) is continued in Probate Code Section 903.

§ 730.04. When right to income arises; apportionment of income

Comment. Former Section 730.04 is continued in Probate Code Section 905, except that the rule in subdivision (b)(2) of former Section 730.04 has been revised to require apportionment of rent, interest, and annuities.

§ 730.05. Income earned during administration of decedent's estate

Comment. Former Section 730.05 is continued in Probate Code Section 906.

§ 730.06. Corporate distributions

Comment. Former Section 730.06 is continued in Probate Code Section 907.

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§ 730.07. Bonds and other obligations for payment of money

Comment. Former Section 730.07 is continued in Probate Code Section 908.

§ 730.08. Business and farming operations

Comment. Former Section 730.08 is continued in Probate Code Section 909, except that the rule in subdivision (a) forbidding carrying losses forward is not continued.

§ 730.09. Natural resources

Comment. Former Section 730.09 is continued in Probate Code Section 910, except that the reference to absolute discretion is not continued, the 27-1/2 percent figure is superseded by a limit based on federal income tax law, and the exclusion of timber from the coverage of the section is deleted.

§ 730.10. Timber

Comment. Former Section 730.10 is not continued. Receipts from timber are governed by Probate Code Section 910 relating to natural resources generally.

§ 730.11. Other property subject to depletion

Comment. Former Section 730.11 is continued in Probate Code Section 911, except that the reference to absolute discretion is not continued.

§ 730.12. Underprotective property

Comment. Former Section 730.12 is continued in Probate Code Section 912.

§ 730.13. Charges against income and principal

Comment. Former Section 730.13 is continued in Probate Code Section 913, except that the reference to absolute discretion is not continued.

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§ 730.14. Reserve or allowance for depreciation or depletion

Comment. The substance of former Section 730.14 is continued in Probate Code Section 914.

§ 730.15. Application of chapter

Comment. The substance of former Section 730.15 is continued in Probate Code Section 915.

§ 730.16. Operative date

Comment. Former Section 730.16 is not continued because it is no longer necessary.

§ 730.17. Severability

Comment. Former Section 730.17 is not continued because it is unnecessary. See Prob. Code § 11 (severability).

045/085

Civil Code §§ 852-871 (repealed). Uses and trusts

SEC. _____. Title 4 (commencing with Section 852) of Part 2 of Division 2 of the Civil Code is repealed.

TITLE 4. USES AND TRUSTS

§ 852 (repealed). Requirements of trusts relating to real estate

Comment. The substance of former Section 852 is continued in Probate Code Section 606.

§ 853 (repealed). Resulting trusts

Comment. Former Section 853 is not continued because it is an incomplete and inadequate statement of the common law purchase money resulting trust. Repeal of Section 853 is not intended to disturb California case law concerning resulting trusts. See Prob. Code § 504 (constructive and resulting trusts unaffected).

§ 856 (repealed). Bona fide purchaser or encumbrancer as to implied or resulting trust

Comment. Former Section 856 is not continued. See Prob. Code § 504 (constructive and resulting trusts).

§ 858 (repealed). Power of sale under assigned instrument

Comment. The substance of former Section 858 is continued in Section 2932.5.

§ 859 (repealed). Trust to receive rents and profits

Comment. Former Section 859 is superseded by Probate Code Sections _____ (spendthrift trusts).

§ 860 (repealed). Execution of joint powers

Comment. The first part of former Section 860 is superseded by Probate Code Section 1010 (actions by cotrustees). The second part is superseded by Probate Code Section 1011 (inability of cotrustee to act). See also Civil Code § 1385.4 (joint exercise of powers of appointment).

§ 863 (repealed). Title vested in trustee; enforcement rights of beneficiaries

Comment. The first sentence of former Section 863 pertaining to the title vested in the trustee is not continued because it is unnecessary. For provisions governing trusts, see Prob. Code § 500 et seq. The second sentence of former Section 863 is also not continued. See Prob. Code § 1130 (petition concerning internal affairs of trust).

10043

§ 864 (repealed). Transfer or devise of property subject to trust

Comment. Former Section 864 is not continued because it is unnecessary.

§ 865 (repealed). Title of grantee or devisee of property subject to trust

Comment. Former Section 865 is not continued because it is unnecessary. See generally Prob. Code § 500 et seq. (trusts).

§ 866 (repealed). Estates remaining in trustor

Comment. Former Section 866 is not continued because it is unnecessary.

§ 867 (repealed). Restraint of disposal of beneficial interest

Comment. Former Section 867 is superseded by Probate Code Section ____ (spendthrift trusts).

§ 869 (repealed). Effect on bona fide purchaser of omission of trust from grant

Comment. The substance of former Section 869 is continued in Probate Code Section 1213.

§ 869a (repealed). Effect of transactions where beneficiary undisclosed

Comment. The substance of the first and second paragraphs of former Section 869a is continued in Probate Code Section 1214. See the Comment to Prob. Code § 1214. See also Prob. Code § 10 (singular includes plural). The last paragraph of former Section 869a is not continued because it is no longer needed.

§ 870 (repealed). Acts in contravention of trust

Comment. Former Section 870 is superseded by Probate Code Sections 800-878 (powers of trustees).

§ 871 (repealed). Termination of trust estate

Comment. Former Section 871 is not continued. See the Comment to former Section 863. See also Prob. Code § 640 et seq. (revocation, modification, termination of trusts).

045/096

Civil Code §§ 2215-2290.12 (repealed). Trusts

SEC. ____ . Title 8 (commencing with Section 2215) of Part 4 of Division 3 of the Civil Code is repealed.

TITLE 8. TRUST

CHAPTER 1. TRUSTS IN GENERAL

Article 1. Nature and Creation of a Trust

§ 2215 (repealed). Classification of trusts

Comment. Former Section 2215 is not continued because it served no useful purpose and was inconsistent with the classifications usually used by the courts. See 7 B. Witkin, Summary of California Law Trusts § 2, at 5367-68 (8th ed. 1974). See also Prob. Code §§ 82 ("trust" defined), 504 (constructive and resulting trusts unaffected).

§ 2216 (repealed). Voluntary trust defined

Comment. Former Section 2216 is not continued. See the Comment to former Section 2215. See also Prob. Code § 82 ("trust" defined).

§ 2217 (repealed). Involuntary trust defined

Comment. Former Section 2217 is not continued. See the Comment to former Section 2215. Repeal of Section 2217 has no effect on the law relating to resulting or constructive trusts. See Prob. Code § 504.

§ 2218 (repealed). Trustor, trustee, beneficiary

Comment. Former Section 2218 is not continued. See Prob. Code §§ 24 ("beneficiary" defined), 84 ("trustee" defined); see also Prob. Code §§ 600-601 (creation of trust).

§ 2219 (repealed). Trustee defined

Comment. Former Section 2219 is not continued. See Prob. Code § 84 ("trustee" defined).

045/083

§ 2220 (repealed). Trust purposes

Comment. The substance of former Section 2220 is continued in Probate Code Section 603 (trust purposes). See also Prob. Code §§ 62 ("property" defined), 602 (trust property).

§ 2221 (repealed). Creation of voluntary trust as to trustor and beneficiary

Comment. Former Section 2221 is superseded by Probate Code Sections 600-607 (creation of trusts).

§ 2222 (repealed). Creation of voluntary trust as to trustee

Comment. Former Section 2222 is superseded by Probate Code Sections 600-607 (creation of trusts) and 700 (duty to administer trust upon acceptance).

§ 2223 (repealed). Involuntary trustee and wrongful detainer

Comment. Former Section 2223 is not continued. See the Comments to former Sections 2215 and 2217.

§ 2224 (repealed). Involuntary trustee and fraud

Comment. Former Section 2224 is not continued. See the Comments to former Sections 2215 and 2217.

§ 2224.1 (repealed). Trust of proceeds from sale of story of convicted felon

Comment. Former Section 2224.1 is continued in new Section 2224.1.

§ 2225 (repealed). Exception to doctrine of merger

Comment. The substance of the first sentence of former Section 2225 is continued in Probate Code Section 649 (exception to doctrine of merger). The substance of the second sentence is continued in Probate Code Sections 521 (application of law) and 606 (Statute of Frauds).

29210

Article 2. Obligations of Trustees

§ 2228 (repealed). Good faith

Comment. The substance of former Section 2228 is continued in general terms in Probate Code Section 701 (duty of loyalty).

§ 2229 (repealed). Use of property

Comment. Former Section 2229 is superseded by Probate Code Sections 701 (duty of loyalty) and 703(a) (duty to avoid conflict of interest).

§ 2230 (repealed). Prohibited transactions

Comment. Former Section 2230 is superseded by Probate Code Section 703(a) (duty to avoid conflict of interest).

§ 2231 (repealed). Influence to obtain advantage from beneficiary

Comment. Former Section 2231 is superseded by Probate Code Section 701 (duty of loyalty).

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

Comment. Former Section 2232 is superseded by Probate Code Section 703(b) (duty to avoid conflict of interest).

§ 2233 (repealed). Trustee's adverse interest

Comment. Former Section 2233 is superseded by Probate Code Sections 701(a) (duty of loyalty), 703(a) (duty to avoid conflict of interest), and 1022(b) (grounds for removal of trustee).

§ 2234 (repealed). Violations as fraud against beneficiary

Comment. Former Section 2234 is not continued. See Prob. Code § 950 (violation of duty is breach of trust).

29215

§ 2235 (repealed). Transactions between trustee and beneficiary

Comment. Former Section 2235 is not continued. See Prob. Code §§ 701 (duty of loyalty), 703 (duty to avoid conflict of interest).

§ 2236 (repealed). Mingling trust property

Comment. Former Section 2236 is superseded by Probate Code Section 708 (duty to keep trust property separate).

§ 2237 (repealed). Measure of liability for breach of trust

Comment. Former Section 2237 is superseded by Probate Code Sections 972(a) (measure of liability for breach of trust), 973 (trustee's liability for interest).

§ 2238 (repealed). Measure of liability for good faith breach

Comment. Former Section 2238 is superseded by Probate Code Section 972 (measure of liability for breach of trust).

§ 2239 (repealed). Liability of cotrustees

Comment. Former Section 2239 is superseded by Probate Code Section 952 (liability of trustee for acts of cotrustee).

§ 2240 (repealed). Deposit of securities in securities depository

Comment. Former Section 2240 is superseded by Probate Code Sections 800 (powers subject to limitations in trust), 858 (power to deposit securities in depository), and 1010 (actions of cotrustees).

Article 3. Obligations of Third Persons

§ 2243 (repealed). Third persons as involuntary trustees

Comment. Former Section 2243 is superseded by Probate Code Section 1210 (protection of third person dealing with trustee).

§ 2244 (repealed). Obligations of third persons

Comment. Former Section 2244 is superseded by Probate Code Section 1211 (application of property delivered to trustee by third person).

29640

CHAPTER 2. TRUSTS FOR THE BENEFIT OF THIRD PERSONS

Article 1. Nature and Creation of the Trust

§ 2250 (repealed). Application of chapter

Comment. Former Section 2250 is superseded by Probate Code Section 82 ("trust" defined). The provision vesting title in the trustee is not continued. See the Comment to former Section 863.

§ 2251 (repealed). Creation of trust by mutual consent

Comment. Former Section 2251 is not continued since it was in conflict with former Sections 2221 and 2222. See Prob. Code §§ 600-607 (successor provisions to former Civil Code §§ 2221, 2222).

§ 2252 (repealed). Trustor when trustee appointed by court or officer

Comment. Former Section 2252 is not continued because it is unnecessary.

§ 2253 (repealed). Declaration of trust

Comment. Former Section 2253 is superseded generally by Probate Code Sections 600 (methods of creating trust), 601 (intention to create trust), and 700 (administration of trust according to its terms).

§ 2254 (repealed). Matters included in declaration of trust

Comment. The substance of former Section 2254 is continued in Probate Code Section 609 (matters included in trust declaration). See also Prob. Code § 82 ("trust" defined).

31481

Article 2. Obligations of Trustees

§ 2258 (repealed). Obedience to declaration of trust

Comment. The substance of the part of subdivision (a) of former Section 2258 relating to control of the trustee's duties by the trust instrument is continued in Probate Code Section 700. The part of subdivision (a) relating to modification is superseded by Probate Code Sections 644 (modification by trustor and all beneficiaries) and 651 (modification by court due to changed circumstances). The substance of subdivision (b) is continued in Probate Code Sections 700(b) (trustee's duty to follow written directions under revocable trust) and 982 (nonliability for following instructions under revocable trust). See also Prob. Code § 10 (singular includes plural).

§ 2259 (repealed). Trustee's degree of care and diligence

Comment. The substance of the part of former Section 2259 relating to the effect of compensation on the standard of care is continued in Probate Code Section 722. The remainder of former Section 2259 is superseded by Probate Code Section 720 (trustee's standard of care).

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

Comment. Former Section 2260 is not continued because it is unnecessary. See Prob. Code § 700 et seq. (trustee's duties).

§ 2261 (repealed). Investments

Comment. The substance of subdivision (a) of former Section 2261 is continued in Probate Code Section 720 (trustee's standard of care in administering trust). See also Prob. Code §§ 62 ("property" defined), 820 (powers of prudent person), 828 (power to invest), and 832 (power to acquire property).

The standard of care provided in the first sentence of subdivision (b) is superseded by Probate Code Sections 720 (trustee's standard of care in administering trust) and 800 (exercise of powers subject to limitations in trust). See also Prob. Code § 822 (power to collect and hold property). The authority to retain property in trust at its inception is superseded by Sections 700 (duties subject to control by trust instrument) and 707 (duty to dispose of improper investments). The substance of the second sentence of subdivision (b) is continued in Probate Code Section 822 (power to hold property in which trustee is interested). See also Prob. Code § 62 ("property" defined).

Subdivision (c) is superseded by Probate Code Sections 800 (exercise of powers subject to limitations in trust) and 830 (power to make deposits). See also Prob. Code § 801 (power of court to relieve trustee from restrictions).

The substance of former subdivision (d) is continued in Probate Code Section 801 (power of court to relieve trustee from restrictions).

The substance of the first sentence of subdivision (e) is continued in Probate Code Section 521 (application of trust law). The substance of the second sentence is continued in Section 522 (interpretation of trust provisions concerning legal investments).

Subdivision (f) is superseded by Probate Code Section 62 ("property" defined to include real and personal property or any interest therein and to mean anything that may be the subject of ownership).

404/205

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

Comment. Former Section 2262 is superseded by Probate Code Section 973 (trustee's liability for interest).

§ 2263 (repealed). Trustee's claims against trust fund

Comment. Former Section 2263 is not continued. See generally Prob. Code §§ 700-713 (general duties of trustees), 1043 (repayment of trustee for expenses).

§ 2264 (repealed). Transfer in trust of pecuniary amount by transfer of property other than money

Comment. Former Section 2264 is not continued. The subject matter of former Section 2264 was superseded by former Probate Code Section 1138.14 which is continued in Probate Code Section 503 (law applicable to marital deduction gifts in trust).

Article 3. Powers of Trustees

§ 2267 (repealed). Trustee as general agent

Comment. The first and third sentences of former Section 2267 are superseded by Probate Code Sections 1200 (personal liability on contracts) and 1203 (assertion of claims against trusts). The substance of the second sentence is continued in Probate Code Section 800 (powers subject to trust instrument). See also Prob. Code §§ 800-878 (trustees' powers).

§ 2268 (repealed). Actions by cotrustees

Comment. Former Section 2268 is superseded by Probate Code Section 1060 (majority of cotrustees may act unless trust otherwise provides).

§ 2269 (repealed). Discretionary powers

Comment. Subdivision (a) of former Section 2269 is continued in Probate Code Section 740 (discretionary powers to be exercised reasonably). The substance of subdivision (b) is continued in Probate Code Sections 1130(b)(5) (review of exercise of discretionary powers). The substance of subdivisions (c) and (d) are continued in Probate Code Section 741. Subdivision (e) is continued in Civil Code Section ____ (exercise of power of appointment).

§ 2269.1 (repealed). Permissible investments

Comment. The first sentence of subdivision (a) and subdivision (b) of former Section 2269.1 are continued in Probate Code Section _____. The second sentence of subdivision (a) is not continued because it is unnecessary. See Prob. Code §§ 720 (standard of care), 802 (exercise of powers subject to duties).

405/334

§ 2270 (repealed). Proxies to vote shares in trust; shareholder's meetings and acts

Comment. Former Section 2270 is superseded by Probate Code Section 848.

§ 2271 (repealed). Distribution of income of private foundation or charitable trust

Comment. The substance of former Section 2271 is continued in Probate Code Sections 750-752 and 754. The substance of the "whenever created" language in the first paragraph is continued in Probate Code Section 521 (application of new trust law).

§ 2271.1 (repealed). Split-interest trust

Comment. The substance of former Section 2271.1 is continued in Probate Code Sections 750 and 752-754. The substance of the "whenever created" (language in subdivision (a) is continued in Probate Code Section 521 (application of new trust law).

§ 2271.2 (repealed). Jurisdiction under Section 101(1)(3) of Tax Reform Act of 1969

Comment. Former Section 2271.2 is continued in Probate Code Section 755.

§ 2272 (repealed). Leases of trust property

Comment. Former Section 2272 is superseded by Probate Code Section 842 (trustee's power to lease). See also Prob. Code §§ 820 (powers available without necessity of court approval), 521 (application of new trust law).

29641

Article 4. Rights of Trustees

§ 2273 (repealed). Repayment of expenses paid by trustee

Comment. The substance of former Section 2273 is continued in Probate Code Section 1043 (repayment of trustee for expenses).

§ 2274 (repealed). Trustee's compensation

Comment. The substance of the first and second sentences of former Section 2274 is continued in Probate Code Section 1040 (trustee's compensation under trust terms). The substance of the third sentence is continued in Probate Code Section 1041 (compensation where trust silent). The substance of the fourth sentence is continued in Probate Code Section 1042 (compensation of cotrustees). The last sentence is superseded by Probate Code Sections 1100 (jurisdiction in superior court) and 1130 (proceedings concerning trusts).

§ 2275 (repealed). Rights of involuntary trustee

Comment. Former Section 2275 is not continued. The rights to compensation and repayment of expenses provided in former Sections 2273 and 2274, as continued in Probate Code Sections 1040-1042, apply only to trustees of express trusts. See Prob. Code § 82 ("trust" defined). See also Prob. Code § 504 (constructive and resulting trusts).

29648

Article 5. Termination of the Trust

§ 2279 (repealed). Extinguishment of trust

Comment. The substance of former Section 2279 is continued in Probate Code Section 648(b)-(d) (termination of trust).

§ 2279.1 (repealed). Uneconomically low principal

Comment. The substance of former Section 2279.1 is continued in Probate Code Section 650 (trust with uneconomically low principal).

§ 2280 (repealed). Revocable trusts

Comment. The substance of part of the first sentence of former Section 2280 is continued in Probate Code Section 640(a) (presumption of revocability). The rule on the manner of revocation is superseded by Probate Code Section 641(a) (manner of termination of revocable trust). The substance of the second sentence is continued in Probate Code Section 641(c) (transfer of property upon revocation). The last sentence is not continued because it is unnecessary.

§ 2281 (repealed). Vacation of office of trustee

Comment. The substance of the first paragraph (subdivisions (1) and (2)) of former Section 2281 relating to occurrence of vacancies is continued in Probate Code Section 1023, subject to some technical variations. The substance of the second paragraph is continued in Probate Code Section 1212 (protection of third person dealing with former trustee). The substance of the third paragraph is continued in Civil Code Section _____ (application to deeds of trust).

§ 2282 (repealed). Discharge of trustee

Comment. The parts of former Section 2282 relating to discharge from liability are superseded by Probate Code Sections 980 (limitations on proceedings against trustees) and 1021 (liability of resigning trustee). The parts of former Section 2282 relating to removal of trustees are superseded by Probate Code Section 1022.

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

Comment. The substance of the first part of the first sentence of former Section 2283 is continued in Probate Code Section 1022 (removal of trustee by court). See also Prob. Code § 1100 (jurisdiction in superior court). The remainder of the first sentence is superseded by Probate Code Section 1020 (court acceptance of resignation). The second sentence is not continued.

29209

Article 6. Succession or Appointment of New Trustees

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

Comment. The substance of the first sentence of former Section 2287 is continued in Probate Code Section 1030(a) (appointment of new trustee). The second sentence is superseded by the more general language in the last sentence of Probate Code Section 1030(b) (consideration of wishes of beneficiaries).

§ 2288 (repealed). Survivorship among cotrustees

Comment. Former Section 2288 is superseded by Probate Code Section 1011 (inability of cotrustee to act).

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

Comment. The first sentence of former Section 2289 is superseded by Probate Code Section 1030 (appointment of new trustee). The substance of the second sentence is continued in Probate Code Section 1030(b) (appointment of different number of trustees).

CHAPTER 3. UNIFORM MANAGEMENT OF INSTITUTIONAL FUNDS ACT

§§ 2290.1-2290.12 (repealed). Uniform Management of Institutional Funds Act

Comment. The Uniform Management of Institutional Funds Act, former Civil Code Sections 2290.1-2290.12, is continued without substantive change in Education Code Sections 94600-94610. For a disposition table, see the Comment to Education Code Section 94600.

32703

Probate Code §§ 1120-1139.19 (repealed). Administration of trusts

SEC. _____. Chapter 19 (commencing with Section 1120) of Division 3 of the Probate Code is repealed.

CHAPTER 19. ADMINISTRATION OF TRUSTS

Article 1. Testamentary Trusts

§ 1120 (repealed). Continuing judicial supervision over trusts

Comment. The substance of former Section 1120 is continued in Article 2 (commencing with Section 540) of Chapter 2 of Division 3 for certain trusts established under former law. See Sections 540-543. Trusts not subject to continuing jurisdiction under Sections 520-543 are subject to the intermittent jurisdiction of the courts when invoked pursuant to Part 5 (commencing with Section 1100). See, e.g., Section 1130 (grounds for petition). The new law contains provisions comparable to parts of former Section 1120 and other sections in former Article 1. See Sections 1100 (jurisdiction in superior court sitting in probate), 1130(b)(5) (petition to settle accounts), 1130(b)(6) (petition for instructions), 1130(b)(16) (amending trust for charitable estate tax deduction), 1133 (notice of hearing on petition), 800-878 (trustees' powers); see also 501 (clerk to set petition for hearing), 502 (appointment of guardian ad litem), 1110-1118 (notice).

§ 1120.1 (repealed). Additions to trust subject to jurisdiction of court

Comment. Former Section 1120.1 is superseded by Section 82 ("trust" defined to include additions to trust).

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

Comment. The substance of former Section 1120.1a is continued in Sections 550-556 (removal of trusts from continuing court supervision) and 501 (clerk to set for hearing). See also Section 731 (duty to account annually). References to "remaindermen" are not continued since they are unnecessary in light of the definition of "beneficiary" in Section 24.

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§ 1120.2 (repealed). Powers of trustee

Comment. The subject matter of former Section 1120.2 is governed by Sections 800-878 (trustees' powers). The provision in the first paragraph of former Section 1120.2 requiring a petition in order to exercise powers not expressed in the trust or otherwise conferred is superseded by Section 820 which grants extensive powers notwithstanding the silence of the trust instrument. See also Section 801 (power of court to relieve trustee from restrictions).

The substance of the first clause of subdivision (1) of former Section 1120.2 is continued in Sections 832 (acquisition and disposition of property) and 834 (management of property). The substance of the second and third clauses of subdivision (1) is continued in Sections 842 (leases) and 844 (mineral leases).

The substance of subdivision (2) is continued in Sections 822 (collecting and holding property) and 828 (investments). The specific reference to stock of the trustee is not continued because it is unnecessary. See Section 62 ("property" defined).

The first clause of subdivision (3) is continued in Section 862 (borrowing money). The remainder of the subdivision is superseded by Section 836 (encumbrances).

Subdivision (4) is superseded by Section 854 (consent to change in form of business, voting trusts, etc.).

The first clause of subdivision (5) is continued in Section 832 (acquisition and disposition of property). The second clause is continued in Section 834 (management of property).

Subdivision (6) is continued in Section 838 (repairs and alterations).

Subdivision (7) is continued in Section 840 (development of land).

Subdivision (8) is continued in Section 846 (options).

Subdivision (9) is superseded by Section 848 (voting rights with respect to corporate shares, memberships, or property).

Subdivision (10) is continued in Section 850 (payment of calls and assessments).

Subdivision (11) is continued in Section 852 (stock subscriptions and conversions).

Subdivision (12) is continued in Section 856 (holding securities in name of nominee).

Subdivision (13) is continued in Section 860 (insurance).

The substance of the first part of subdivision (14) is continued in Sections 864 (payment and settlement of claims) and 866 (payments to protect trust). The part of subdivision (14) relating to the trustee's lien is continued in substance in Section 1044.

The first three clauses of subdivision (15) are continued in Section 864 (payment and settlement of claims). The last clause is superseded by Section 878 (actions and proceedings).

Subdivision (16) is continued in Section 866 (payment of taxes, trustee's compensation, and other expenses).

Subdivision (17) is continued in Section 826 (participation in business; change in form of business).

Subdivision (18) is superseded by Section 820 (general powers without court authorization). See the Comment to Section 820.

The second paragraph is superseded by Section 521 (application of new trust law).

The substance of the last paragraph is continued in Section 11 (severability).

32716

§ 1120.5 (repealed). Request for special notice by beneficiary

Comment. Former Section 1120.5 is superseded by Section 1133(b) (notice to beneficiary who files request). See also Section 1115(a) (additional notice).

§ 1120.6 (repealed). Uneconomically low principal

Comment. The substance of former Section 1120.6 is continued in Section 650 (trust with uneconomically low principal).

§ 1121 (repealed). Accounting

Comment. The first part of former Section 1121 is superseded by Section 1130(b)(7) (petition to compel accounting). The remainder of former Section 1121 is superseded by Sections 730-731 (trustee's duty to account).

§ 1122 (repealed). Compensation of trustee

Comment. The substance of the first and second sentences of former Section 1122 is continued in Section 1040, but the reference to the decree of distribution is not continued since the new law applies to both inter vivos and testamentary trusts. The substance of the first part of the third sentence is continued in Section 1041 (compensation where trust silent). The remainder of the third sentence is superseded by Section 1130(b)(9) (petition to fix compensation). The substance of the fourth sentence is continued in Section 1042 (compensation of cotrustees). The last sentence is superseded by Sections 1043 (repayment for expenses) and 1130(b)(5) (petition to settle accounts). See also Section 866 (trustee's power to pay compensation and expenses).

§ 1123 (repealed). Conclusiveness of decree

Comment. Former Section 1123 is superseded by Section 1114(b).

§ 1123.5 (repealed). Removal of trustee

Comment. Former Section 1123.5 is superseded by Section 1022 (removal of trustee by court). See also Section 1100 et seq. (judicial administration of trusts).

§ 1123.6 (repealed). Custody of assets pending hearing

Comment. The substance of former Section 1123.6 is largely continued in Section 1022(c).

§ 1123.7 (repealed). Exclusive jurisdiction and procedure

Comment. Former Section 1123.7 is superseded by Section 1100 (subject-matter jurisdiction).

§ 1124 (repealed). Declination of designated trustee to act

Comment. Former Section 1124 is superseded by Section 1020 (resignation of trustee). See also Section 700 (duty to administer trust upon acceptance).

§ 1125 (repealed). Filling vacancies before distribution

Comment. Former Section 1125 is superseded by Sections 1030 (court appointment of trustee) and 1130(a), (b)(10) (petition to appoint trustee).

32722

§ 1125.1 (repealed). Petition of resignation of trustee

Comment. The first paragraph of former Section 1125.1 is superseded by Section 1020 (resignation of trustee). See also Section 1130(b)(11) (petition to accept resignation). The substance of the first part of the second paragraph is continued in Section 1021 (liability of resigning trustee). The remainder of the second paragraph is superseded by Section 1024 (delivery of property by resigning trustee).

§ 1126 (repealed). Filling vacancies after distribution

Comment. Former Section 1126 is superseded by Sections 1030 (appointment of new trustee) and 1130(a), (b)(10) (petition to appoint trustee).

§ 1127 (repealed). Trustee's bond

Comment. Former Section 1127 is superseded by Section 1001 (trustee's bond). Section 1001(a)(4) continues the requirement that a successor trustee not named in the trust must give bond.

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

Comment. Former Section 1127.5 is superseded by Section 1001 (trustee's bond).

§ 1128 (repealed). Transfer of trust proceedings to another county

Comment. The substance of former Section 1128 is continued in Section ____.

§ 1129 (repealed). Hearing on transfer of trust proceedings to another county

Comment. The substance of former Section 1129 is continued in Sections ____-____.

§ 1130 (repealed). Vouchers; withdrawal; production; destruction or delivery to trustee or attorney

Comment. Former Section 1130 is not continued.

§ 1130.1 (repealed). Certificate of appointment as trustee

Comment. The substance of former Section 1130.1 is continued in Section 1000 (certificate of trustee). See also Section 10 (singular includes plural).

§ 1132 (repealed). Transfer of testamentary trust to another jurisdiction

Comment. The substance of former Section 1132 is superseded by Section 1161 (transfer of trust from California). See also Sections 82 ("trust" defined), 1160 (application of transfer provisions).

§ 1133 (repealed). Combination of assets and administration of trusts as one trust

Comment. The substance of former Section 1133 is continued and expanded in Section 652 (combination of trusts).

31781

Article 2.5. Inter Vivos and Other Trusts

§ 1138 (repealed). "Trust" defined

Comment. The substance of former Section 1138 is generally continued in Section 82 ("trust" defined). The reference in subdivision (a) of former Section 1138 to "voluntary" trusts is not continued because it is unnecessary. See the Comment to former Civil Code § 2215. The language in subdivision (a) concerning trusts "entirely administered or to be entirely administered in this state" is superseded by the provision in Section 1102 concerning the principal place of administration of the trust.

The substance of subdivision (b) of former Section 1138 is continued in Section 82 except as noted. The former exclusion of trusts subject to court supervision is superseded by Section 542 (general procedures applicable). See also the Comment to former Section 1120. The former

exclusion of business trusts taxed as partnerships or corporations is continued by the reference in Section 82 to business trusts providing for certificates to be issued to beneficiaries. The former exclusion of investment trusts subject to regulation under the laws of this state or any other jurisdiction is included in the reference in Section 82 to business trusts. The former exclusion of deeds of trust and transfers in trust for the purpose of suit or enforcement of a claim or right is continued in Section 82 in the reference to security arrangements. The former exclusion of certain charitable trusts and trusts described in Government Code Section 12583 is not continued. See Section 82 ("trust" defined).

§ 1138.1 (repealed). Grounds for petition by trustee

Comment. The substance of subdivision (a) of former Section 1138.1 is continued in Section 1130 with the following changes: Paragraph (3) is not continued since Section 824 permits additions to trusts without the need for court approval. Paragraph (6) is superseded by Section 1130(b)(8) which is drafted in recognition of the automatic powers available under Sections 820-878. See Section 801 (court order relieving trustee of restrictions); see also Section 731 (duty to account annually). Subdivision (b) is not continued; the trust instrument may not limit the availability of proceedings under Section 1130 et seq.

§ 1138.2 (repealed). Orders and decrees of court

Comment. Former Section 1138.2 is continued in Section 1134.

31782

§ 1138.3 (repealed). Venue

Comment. The substance of the first sentence of subdivision (a) of former Section 1138.3 is continued in Section 1105(a)(1) (venue), but Section 1105(a)(2) provides alternate venue in the county where a living trust was created. See also Section 1100(a) (subject-matter jurisdiction of superior court). The substance of the second and third sentences of subdivision (a) is continued in Section 1102 (principal place of administration of trust).

The substance of subdivision (b) is continued in Section 1105(a). (dual venue for testamentary trusts).

§ 1138.4 (repealed). Petition

Comment. The substance of the first sentence of former Section 1138.4 is continued in Section 1131, except for the provision relating to authorization by the terms of the trust. The second sentence is not continued.

§ 1138.5 (repealed). Dismissal of petition

Comment. The substance of subdivision (a) of former Section 1138.5 is continued in Section 1132. Subdivision (b) is not continued.

§ 1138.6 (repealed). Notice and hearing

Comment. The first paragraph of subdivision (a) of former Section 1138.6 is continued in Section 501 (clerk to set petition for hearing). The substance of the second paragraph is continued in Sections 1133(a) (notice of hearing on petition) and 1112(c) (notice in manner directed by court). The reference to remaindermen is not continued because it is unnecessary in light of the definition of "beneficiary" in Section 24. The substance of the third paragraph is continued in Section 1133(b). The fourth paragraph is continued in Section 1113 (personal delivery). The fifth paragraph is superseded by Section 1114 (proof of giving notice).

Subdivision (b) is not continued. Trust proceedings are governed by new Division 3 (commencing with Section 500). The substance of subdivision (c) is continued in Section 1116 (shortening time for notice). The substance of subdivision (d) is continued in Section 1133(c) (notice to Attorney General).

§ 1138.7 (repealed). Appointment of guardian ad litem; threatened exercise of power not conferred upon trustee

Comment. The substance of subdivisions (a) and (c) of former Section 1138.7 is continued in Section 502 (appointment of guardian ad litem). Subdivision (b) is superseded by Sections 1130 (petition) and 1133 (notice). See also Section 1110 et seq. (general notice provisions).

31783

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

Comment. The first three sentences of former Section 1138.8 are superseded by Section 1020 (resignation of trustee). The substance of the first part of the last sentence is continued in Section 1021 (liability of resigning trustee). The remainder of the last sentence is superseded by Section 1024 (delivery of property by resigning trustee).

§ 1138.9 (repealed). Appointment of successor trustee

Comment. The substance of former Section 1138.9 is continued in Section 1030 (appointment of new trustee).

§ 1138.10 (repealed). Appeal

Comment. The substance of former Section 1138.10 is continued in Section 1135 (appeal).

§ 1138.11 (repealed). Cumulative and nonexclusive remedies

Comment. Former Section 1138.11 is superseded by Sections 960-963 (remedies of beneficiary against trustee), 1100 (exclusive jurisdiction of superior court sitting in probate), 1101 (full-power court), 1134 (authority to make necessary orders).

§ 1138.12 (repealed). Legislative intent

Comment. Former Section 1138.12 is not continued because it is unnecessary.

§ 1138.13 (repealed). Applicability of article

Comment. The substance of the first sentence of former Section 1138.13 is continued in Section 521 (application of new trust law). The second sentence is not continued. See also Section 82 ("trust" defined).

§ 1138.14 (repealed). Transfer in trust of pecuniary amount

Comment. The substance of former Section 1138.14 is continued in Section 503.

045/103

Article 3. Transfer to Another Jurisdiction

§ 1139 (repealed). Application of article

Comment. The substance of subdivision (a) of former Section 1139 is continued in Section 1160(a) (application of chapter). Subdivision (b) is superseded by Section 1160(b) (availability of other means of transfer). Subdivision (c) is not continued because it is no longer needed.

§ 1139.1 (repealed). Transfer of place of administration or assets

Comment. The substance of the introductory clause of Section 1139.1 is continued in Section 1161(a) (authority of court). See also Sections 1100 (subject-matter jurisdiction in superior court), 1130(b)(17) (petition for transfer). Clause (a) pertaining to trusts under continuing jurisdiction of the court is superseded by the more general language of Section 1161(a). The substance of clause (b) is continued in Sections 1130(a) (who may petition) and 1164(b) (order granting transfer if not violative of terms of trust).

§ 1139.2 (repealed). Petition for transfer

Comment. The substance of the first sentence of former Section 1139.2 is continued in Section 1130(a) (who may petition). The substance of the remainder of former Section 1139.2 is continued in Section 1162 (contents of petition), except that a statement of the age of a trustee is required only for a proposed trustee who is a natural person and the statement relating to civil actions is limited to actions arising out of administration of the trust.

§ 1139.3 (repealed). Notice and hearing

Comment. The provision of former Section 1139.3 requiring the clerk to set the petition for hearing is continued in Section 501. The remainder of the first sentence is not continued. The substance of the last three sentences is continued in Section 1163 (notice and hearing), except that 30, rather than 20, days' notice must be given the Attorney General. See also Sections 1112 (manner of mailing notice), 1133(c) (notice to Attorney General).

§ 1139.4 (repealed). Court order

Comment. The substance of the introductory clause and subdivisions (1), (3), and (4) of former Section 1139.4 is continued in Section 1164 (order granting transfer). Subdivision (2) is not continued.

§ 1139.5 (repealed). Manner of transfer; discharge of trustee

Comment. Former Section 1139.5 is continued in Section 1165 (manner and effect of transfer).

§ 1139.6 (repealed). Other trusts

Comment. Former Section 1139.6 is not continued. See Sections 1100 (subject-matter jurisdiction in superior court), 1102 (principal place of administration), 1105 (venue), 1160 (application of transfer procedure).

§ 1139.7 (repealed). "Beneficiary" defined

Comment. Former Section 1139.7 is superseded by Section 24 ("beneficiary" defined).

045/104

Article 4. Transfer From Another Jurisdiction§ 1139.10 (repealed). Application of article

Comment. Subdivision (a) of former Section 1139.10 is continued in Section 1180(a) (application of chapter). Subdivision (b) is superseded by Section 1180(b) (nonexclusive procedure).

§ 1139.11 (repealed). Transfer of place of administration or assets to California

Comment. Former Section 1139.11 is continued in Section 1181(a) (authority of court). See also Section 1130(b)(17) (petition for transfer).

§ 1139.12 (repealed). Petition for transfer

Comment. Former Section 1139.12 is continued in Section 1130(a) (petition for transfer).

§ 1139.13 (repealed). Venue

Comment. The substance of former Section 1139.13 is continued in Section 1182 (venue).

§ 1139.14 (repealed). Contents of petition

Comment. The substance of former Section 1139.14 is continued in Section 1183 (contents of petition), except that a statement of the age of a trustee is required only for a proposed trustee who is a natural person.

§ 1139.15 (repealed). Notice and hearing

Comment. The part of subdivision (a) of former Section 1139.15 requiring the clerk to set the petition for hearing is continued in Section 501. The remainder of the first sentence of subdivision (a) is not continued. The substance of the second sentence of subdivision (a) and subdivision (b) is continued in Section 1184 (notice and hearing). See also Section 1112 (manner of mailing notice).

§ 1139.16 (repealed). Order accepting transfer and appointing trustee

Comment. The substance of former Section 1139.16 is continued in Section 1185 (order accepting transfer and appointing trustee), except that Section 1185(b) makes clear that bond is required only if the law of the other jurisdiction or California so provides.

§ 1139.17 (repealed). Conditional order accepting transfer

Comment. Former Section 1139.17 is continued in Section 1186 (conditional order accepting transfer).

§ 1139.18 (repealed). Administration of transferred trust

Comment. Former Section 1139.18 is superseded by Section 1187 (administration of transferred trust).

§ 1139.19 (repealed). "Beneficiary" defined

Comment. Section 1139.19 is superseded by Section 24 ("beneficiary" defined).

27806

Probate Code §§ 1215-1215.4 (repealed). Notice in trust proceedings

SEC. _____. Article 1.5 (commencing with Section 1215) of Chapter 22 of Division 3 of the Probate Code is repealed.

Article 1.5. Notice in Trust Proceedings

§ 1215 (repealed). Definitions

Comment. Former Section 1215 is superseded by Section 1110 (application of chapter).

§ 1215.1 (repealed). Notice in cases involving future interests

Comment. The substance of former Section 1215.1 is continued in Section 1118(a) (notice in cases involving future interests).

§ 1215.2 (repealed). Conflicts of interest in subject matter

Comment. The substance of former Section 1215.2 is continued in Section 1118(b) (notice where conflict of interest).

§ 1215.3 (repealed). Additional notices; appointment of guardian ad litem

Comment. The substance of former Section 1215.3 is continued in Sections 502 (appointment of guardian ad litem) and 1115(a) (additional notice).

§ 1215.4 (repealed). Effect of article on other notice requirements

Comment. The substance of the first sentence of former Section 1215.4 is continued in Section 1118(c) (other notice requirements). The substance of the second sentence is continued in Section 1115(b) (additional notice).