

#L-640

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First Supplement to Memorandum 85-32

Subject: Study L-640 - Trusts (Comments on Draft Statute)

Attached to this supplement are comments just received from the California Bankers Association (see Exhibit 1) and an Ad Hoc Committee on Trusts of the Executive Committee of the State Bar Estate Planning, Trust and Probate Law Section (see Exhibit 2). We are sending you this material without first analyzing it because of the shortness of time available before the meeting. When we consider this material at the March meeting, we will consider these comments as we proceed section by section through the comprehensive draft statute.

Respectfully submitted,

Stan G. Ulrich  
Staff Counsel

EXHIBIT 1



LEGAL DEPARTMENT 530 BROADWAY | SUITE 1208 | SAN DIEGO, CA 92101 | (619) 238-2119

March 5, 1985

Mr. John DeMouilly  
California Law Revision Commission  
4000 Middlefield Road, Suite D-2  
Palo Alto, California 94303-4739

Dear Mr. DeMouilly:

Attached are comments from the California Bankers Association regarding the Study L-640-Trust, which contains the comprehensive statute on Trust Law. The California Bankers Association hopes that these comments will be of assistance in determining the goals and objectives of the California Law Revision Commission when finalizing its Trust statutes.

One major area of concern is the general approach incorporating the Restatement of Trusts into the Code. This is not California Law, as repeatedly asserted by the Staff. Rather, if California statutes and cases do not specifically address an issue, the Restatement of Trusts is a source of reference. It should not be included in the statute unless the Commission is assured that California has adopted its provisions through case law or statute.

The second concern relates to the general tenor of the statute as proposed. The CBA strongly urges that some certainly be introduced into the area of trust and probate administration. The Commission is doing this in detailing the duties of the trustee, which are not presently identified by statute. However, the CBA urges that the Commission go further, and specify the remedies available to beneficiaries when the Trustee breaches its fiduciary duty or the terms of the trust.

A third area of concern is the internal inconsistency between the Powers and the Duties of the Trustee. This inconsistency creates a potential pitfall to individual Trustees. An example is the Power to hire agents found in §874, as compared to §711, Duty not to delegate, and as compared to the Liability of the Trustee for acts of agents found in §951. In the powers section, the Trustee is enabled to "Act without independent investigation upon the recommendations of persons hired." §874(b). An example would be acting in reliance of counsel's advice. This is

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directly contrary to the provisions of §951 which holds the Trustee liable for acts of the agent, or for acting on the advice of the agent if proper retention procedures were not used.

One Resolution of this conflict would be to delete §874 subsection (b). Another might be to specifically allow the trustee to rely upon expert advice if the trustee has used reasonable care in selecting the Agent. Absent some qualification to §874(b), an individual trustee will mistakenly believe he or she can simply delegate discretionary acts to an agent with no liability for such acts.

The CBA is very concerned with three proposed sections:

§721 imposes a special skills standard. This is not the law in California. This section would lower the standard of care of individual trustees to the detriment of beneficiaries. The CBA strongly opposes inclusion of this section.

§970 is totally unacceptable to the CBA. This is not currently the law in California. This section requires a Trustee to account for, and presumably disgorge any profit even when there has been no breach. Taking this section to its logical conclusion, should the individual trustee not be liable for failing to make a profit to give the beneficiaries?

The costs of accounting for a 34¢ "profit" on funds waiting in a checking account be invested would far exceed the recovery, and would be charged to the trust. This section is a disservice to trusts.

§972 is not acceptable as drafted. The section describes the measure of liability for Breach of Trust. However, subsection (a)(3) does not establish an acceptable "measure." The provision is speculative, and impossible to interpret in any fair sense. It does not take into account unrelated intervening factors such as appreciation. There is no way to know with certainty what a trustee's liability will be. Additionally, the beneficiary gets a windfall. He can choose the value of the property at the time of breach or upon obtaining judgment, whichever is higher. If the property depreciates, his damages are not decreased. This is a totally unfair remedy.

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A fair measure of liability would be the proceeds of sale plus interest at the legal rate. This measure should replace Section 972(a)(3).

Please review the attached specific comments and if you have any questions, please contact me at (619) 238-2118.

Sincerely,

A handwritten signature in cursive script, appearing to read "Paulette Leahy".

Paulette E. Leahy  
Chair, Trust State Governmental Affairs Committee

PEL:map

cc: Committee Members  
Jerald P. Lewis  
Blair Reynolds  
Estelle Depper  
Sandra Fowler

**Section 521. General Rule Concerning Application of Division**

This section appears to apply all provisions of the revised trust law retroactively to trusts already in existence at the date of enactment. Unless existing law provides otherwise, no new duties should be imposed retroactively. This section should include provisions indicating that the old law is preserved for preoperative date trusts. Additionally, any new responsibilities and duties imposed upon Trustees should not be imposed retroactively. Such retroactive imposition of new duties would be unfair to the Trustee, and would go far beyond protecting the expectations of the Trustors when they established the Trust.

**Section 522. Interpretation of Trust Terms Concerning Legal Investments**

This section does not conform with the provisions of Civil Code §2261 as amended by AB630. This section should be modified, as there is no longer a "legal list" limitation for investments under §2261. Rather, a portfolio theory investment standard was substituted by the legislature in 1984.

**Sections 540. Application of Article**

The continuing dual jurisdiction over pre-1977 Testamentary Trusts and post-1977 Trusts does not appear necessary. Rather, one set of rules should be applied to all trusts. There appears to be no real purpose in continuing court accountings, if all beneficiaries of a trust receive monthly, quarterly, or annual statements from the Trustee. The beneficiaries of Inter Vivos trusts which are not subject to court accountings have the same rights to judicial review of actions by the Trustee as beneficiaries of a testamentary trust now subject to continuing court

"jurisdiction." Therefore, such continuing jurisdiction, requiring annual court accountings is merely an additional burden to the Trustee and expense to the Trust.

**Section 541. Continuing Jurisdiction**

Again, one set of rules would be more appropriate as applied to all trusts, rather than the dual jurisdiction contemplated by this section.

**Section 550. Application of Article**

This section purports to require specific notices to beneficiaries of private trusts created by will executed before July 1, 1977, and to charitable trusts created by will. However, this section should not apply to those trusts subject to §§540, et seq. If the Probate Court continues to peruse the accountings of trusts subject to §540, the additional notice requirements under §550 et seq. do not appear appropriate.

**Section 551. Notice to Beneficiaries**

Subsection (b)(4) should be corrected, and the reference to "income beneficiary" as defined in subsection (a) of §901(a) should be inserted. The concern is to identify which beneficiaries should receive notice. Remaindermen of a Revocable Inter Vivos Trust are not entitled to notice, nor to any information about the trust.

**Comment On Incorporation of Restatement of Trusts.**

The comments to many sections within the new Trust Statute state that the Restatement of Trusts is incorporated by reference. The problem with this is that the comments go further, and specify that additional rules besides those specifically indicated are boot-strapped and incorporated from the Restatement. No defined Restatement section is referred to. It appears that California is adopting the Restatement of Trusts instead of clarifying its own law. An example appears in §602, which generally incorporates the Restatement of Trusts.

**Section 609. Matters Included in Declaration of Trusts**

This section should only apply to oral trusts. The Trustee should be able to rely upon a written Trust Document.

**Section 641. Manner of Termination of Revocable Trusts:  
Disposition of Property**

Language should be added to this section indicating that a trust is revoked as to any specific assets withdrawn from that trust. This language is commonly found within trust documents. However the statute should make clear that the Trustee has no further responsibility for any assets withdrawn by the Trustor.

**Section 643. Termination By All Beneficiaries**

This section contradicts §§650 and 651. The Court should have the discretion to terminate a trust, even with spendthrift provisions, if all of the beneficiaries agree. Perhaps this section

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should include language limiting its effect, to the extent that §651 applies. The Court's discretion in this matter should not be limited.

**Section 650. Trust With Uneconomically Low Principal**

The Court should be given some statutory guidance to determine when a Trust's principal is uneconomically low. Perhaps the Law Revision Commission should indicate that a trust corpus of \$60,000 or less should be terminated as the principal is uneconomically low, subject to considerations such as an incompetent beneficiary. The California Bankers Association feels strongly that Courts should be encouraged to terminate small trusts, taking into consideration the general familial benefit, despite any potential unborn beneficiaries. The Trustee's fees in many instances will be a large burden to the Trust, sometimes even exceeding the amount of trust income. Often the trust document requires a Corporate Trustee. In those instances, the court has refused to terminate a trust. This is a disservice to the beneficiaries.

The \$60,000 floor conforms to the summary probate procedures.

**Section 701. Duty of Loyalty**

Subsection (a) incorporates a very vague standard of notice to beneficiaries. There should be certainly imposed by the statute of what information will constitute sufficient information so that the beneficiary is on notice of actions taken by the Trustee. Perhaps utilizing the Probate Code provisions under the Independent Administration of Estates Act, in providing "advice" to the beneficiaries, would be appropriate. This section should be subject to §803, allowing other services to be provided for compensation.



Subsection (b) is not reasonable and should be deleted. Just because a person is a beneficiary of a Trust should not cloak him with added protection. Arms length transactions not involving the trust should not be affected.

**Section 704. Duty to Take and Keep Control**

This provision should be made subject to the exceptions found in the California Financial Code, as follows:

Section 2240 of the Civil Code and §775 of the Financial Code allow a trustee to place securities in a Depository. Section 1563 of the Financial Code allows the Trustee to place assets in its nominee name. These provisions should be incorporated in the Probate Code, so as to clarify that such action is not an impermissible delegation. A cross reference to the new proposed provisions should appear in the statute, qualifying this section.

**Section 706. Duty to Make the Trust Property Productive**

This section does not take into account the provisions of Civil Code §2261, as amended by AB630. That section specifically allows the Trustee to use the portfolio theory of investments. The section anticipates that the Trustee will hold assets for appreciation, as well as to earn income.

Additionally, this section would cause great problems due to other circumstances. An asset might have a very low income tax basis, which would result in an enormous capital gains tax if the asset were sold. The Trustor may have a business in the Trust, which is not necessarily "productive" but which should be retained at least for a period of time. A distress sale might be

forced if this section is not modified to give the Trustee flexibility in order to deal with each situation.

This section should also state specifically that it is subject to §700, which requires the Trustee to follow the terms of the Trust Document. If the Trust Document states that an asset is to be retained by the Trustee, the Trustee should be entitled to retain that asset whether it earns income or not. It would be a breach of trust to do otherwise.

One way to resolve this difficulty is to define "productive." Perhaps the inclusion of the words "income and appreciation," and "other circumstances" as well as the portfolio theory of investments under §2261 of the Civil Code would clarify the trustees' powers.

#### **Section 707. Duty to Dispose of Improper Investments**

This is not the current law. Civil Code §2261(b) should be retained. All factors within a portfolio should be taken into account by a Trustee in managing assets. The Trustor may not have specified to keep an asset, but there may be a tax problem in selling the asset. Additionally, this section contradicts §822, which allows the Trustee to hold assets.

The Trustee should be given flexibility to manage the trust assets, and should not be placed under a duty which will cause undue hardship to the trust beneficiaries through loss of favored tax status or for some other reason, and which would be contrary to the wishes of the Trustor or the beneficiaries.

**Section 709. Duty to Enforce Claims**

This duty is stated so simply that it appears reasonable. However, there are many instances where enforcing a claim may require excessive attorneys' fees or other fees far in excess of the return realized. A very good example of this is the Windfall Profits Tax refund procedure. The Trust may spend hundreds of dollars in accountants, fees in order to claim a windfall profits tax refund, and realize a \$50.00 refund. The Trustee should be allowed to abandon a claim if the cost is too high.

Additionally, the asset claimed may impose additional liabilities upon the trust which exceed the value of the claim. A good example of this is the ownership of a partnership interest in a gas well. The income stream from the gas well could be minimal, and yet the requirements of the partnership for contributions to continue working the well could be major expenditures. Additionally, owning a partnership asset imposes potential liability upon all of the Trust assets as well as the Trustee's own assets.

Again, the Trustee should be entitled to abandon a claim if the acquisition of that claim would be an onerous burden upon the Trust.

**Section 711. Duty Not to Delegate**

Ministerial duties should be delegable if the Trustee uses reasonable care in selecting the agent. However, discretionary duties should not be delegable, unless there are special circumstances. An example of appropriate delegation of discretionary duties is if there are two co-trustees. If one of the co-trustees is temporarily absent, perhaps on vacation, the other trustee should be able to act. Temporary absence should be defined as "continuous absence for a period not to exceed 6

months.

This section should be cross referenced to §1010, which should allow a co-trustee to act in the temporary absence of the trustee.

**Section 712. Duty With Respect to Co-Trustees**

The bracketed portion of this section should not be added to the statute. There is another provision in the Code which already requires the Co-Trustees to administer the Trust and to compel a Co-Trustee to redress a breach. This bracketed information is not necessary.

**Section 713. Duties Under Common Law**

This section should be deleted. The Trustee should be given certainty with respect to duties described by the sections. If there are additional duties imposed upon the Trustee, they should be enumerated by the Code. This will give certainty to all trustees regarding responsibilities assumed. This is critical to individual trustees, who will be able to look at the provisions of the Code, and know exactly what their responsibilities are. Again, this section should be deleted.

**Section 720. Trustees Standard of Care in Administering Trust**

This section should conform to the provisions of Civil Code §2261, as amended by AB630. The Law Revision Commission apparently wants the provisions applied to all acts of the Trustee, in the administration and management of trust assets. The section should be clarified, so that all trustees are placed on the same level.

It is not appropriate to lower the standard of care required of an individual Trustee.

The duty to diversify trust assets should be added.

**Section 721. Trustees Duty to Use Skills**

This section does not reflect the law in California. Civil Code §2259 imposes an ordinary care standard on all Trustees. The cases cited in the comment only refer in dictum to a special skills standard. The California Bankers Association opposes inclusion of this section. The net effect of the section would be to lower the standard of skill required of an individual fiduciary, to the ultimate detriment of beneficiaries of trusts administered by them. This question was resolved in discussions between the California Bar Association and the California Bankers Association during the negotiations over AB630. The Bar and CBA determined that there is no bifurcated standard of trustee duties and skills. The California Bankers Association cannot agree to inclusion of this section.

**Section 730. Trustees General Duty to Inform and Account to Beneficiaries**

This section should be consistent with Financial Code §1582, which specifies to whom information can be disclosed concerning a private trust. Information cannot be disclosed to the remainder beneficiaries of a revocable Inter Vivos trust under Financial Code §1582. The provisions of Financial Code §1582 should probably be included in §730, so that all trustees are subject to the confidentiality requirements.

The grantor of a trust which is revocable is normally adamant that information about the Trust not be given to the remaindermen. He or she desires privacy, and usually demands that any person seeking information be referred to the grantor. Since the provision purports to set out the trustee's duty to inform beneficiaries, remaindermen of revocable inter vivos trusts should be excepted from this section.

**Section 731. Duty to Account Annually to Income Beneficiary**

This section is not acceptable in its present form. It imposes extra burdens on the Trustee which are not currently the law. Any private trusts established do not require the notice provisions which are incorporated herein. This additional burden and expense to the trust is not appropriate. This section is unacceptable to the California Bankers Association in its present form.

The Trustees should be required to keep the beneficiaries reasonably informed, but the extent of this provision is much too onerous. Annual or quarterly statements are currently sent to beneficiaries by corporate trustees, with additional explanations as requested. Individual Trustees' practices vary widely. To require this formal "Court Notice" is not appropriate.

**Section 803. Conflict of Interest in Exercise of Power**

A conflict of interest should be overcome by:

1. Consent of the beneficiaries;
2. Terms of the Trust Document;
3. Order of the Probate Court.

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In each situation, an act should be allowed with full disclosure by the trustee.

Subsection (c) allows the provision of other services by a regulated financial institution. It appears that the section should state:

"(c) The requirement of obtaining court authorization under subdivision (a) does not apply to a regulated financial institution or its affiliate which provides services in the ordinary course of business to a trust of which it also acts as a trustee, or to a person dealing with the trust. The provision of such services and the receipt of compensation therefor does not constitute an impermissible act of self-dealing or conflict of interest."

The comment should clarify that the "affiliate" is any corporation required to file consolidated income tax returns with the Trustee. This would mean that parent, sister and subcorporations could offer services to the Trust.

The regulated financial institution is continually attempting to provide better service to its trusts and beneficiaries. Services such as brokerage, escrow, loans to the trust and money market sweep accounts are all of benefit to the trust, and should not be prohibited. The trust benefits by receiving rapid service at competitive rates, with direct accountability by the service provider to the trustee.

New services and products are constantly being introduced. Therefore, the section should be liberal enough to allow the trust to use any service which the regulated financial institution offers.

**Section 822. Collecting and Holding Property**

§822 should conform to §707, allowing retention of assets if in the best interests of the trust and beneficiaries.

**Section 826. Participation in Business; Change in Form of Business**

The California Bankers Association believes that a Trustee should be able to continue operating the business of a trust without obtaining court approval. The more basic question is whether prohibition against this activity would cause a distress sale of the assets, thus netting a loss to the Trust. The one-month lag time between petitioning for and obtaining court approval could prove very costly to the trust.

**Section 828. Investments**

The staff questioned the source of §828(b). A mutual fund company requested this legislation in 1984, in order to enable trustees to invest in mutual funds when a trust document requires investment in direct obligations of the United States government.

**Section 830. Deposits in Insured Accounts**

This section should be clarified so that the trustee may deposit trust funds in a financial institution operated by or affiliated with the trustee. Again, the comment should define "affiliated"



to include all corporations which must file consolidated income tax returns with the Trustee

**Section 836. Encumbrances**

Trustors should be able to secure loans with trust property as collateral for a trust purpose or to secure debts of the trustor personally.

**Section 862. Borrowing Money**

This section allows the trustee to borrow money for any trust purpose to be repaid from trust property. One frequently recurring problem in trust administration is the situation where the Trustor of a revocable trust wishes to borrow money, collateralizing the loan with trust assets. The loan is authorized under the trust document, if the proceeds are used for "a trust purpose." However, the Trustor wants to use the funds for some outside purpose. The normal procedure is to require the Trustor to amend the trust document, so that the Trustee is given the ability to borrow, collateralizing the loan with trust assets, for any purpose. This seems an unnecessary requirement, which could be alleviated by legislation.

Section 862 should be augmented to allow the Trustor of a revocable inter vivos trust to borrow money for any purpose, to be collateralized by trust property and to be repaid from trust property.

**Section 864. Payment and Settlement of Claims**

Subsection (c) allows the trustee to release, in whole or in part, any claim belonging to the trust "to the extent that the claim is uncollectable." The term "to the extent the claim is uncollectible" should be deleted. A trustee should be able to release or abandon a claim as appropriate under the circumstances. An example of other reasons to abandon a claim are if the liability associated with the claim is greater than the value of the claim, or if the cost of collecting the claim exceeds the value of the claim.

**Section 874. Hiring Persons**

The California Bankers Association believes that subsection (b) should be subject to the duty to use reasonable care in selection or retention of an agent. The Trustee should not be able to act without independent investigation upon the recommendations of a hired agent if not chosen with due care. Only if the trustee has complied with his or her fiduciary duty in hiring such agents under §951 should they be able to follow the recommendations of the agent.

The CBA's concern with this section is that the individual trustee will look at the section, and determine that it can hire persons without regard to expertise. The individual will believe him or herself exculpated by following such agent's recommendations merely because an independent agent was retained. The individual trustee should be warned that fiduciary responsibility requires careful analysis of the agent's expertise prior to being allowed to rely upon that agent's advice. (See §951.)

**Section 951. Liability of Trustee for Acts of Agents**

This section should be amended to reflect the situation where the trustee does not hire the agent, and does not control the acts of the agent. If the trust document or the Trustor directs that a certain investment advisor is to control investments in the trust, the trustee should not be liable for acts of that investment advisor. The trustee does not control the investment advisor, nor did the trustee hire that investment advisor. There should be some sort of discrimination between agents hired by the trustee and subject to the trustee's control, and agents hired by the Trustor, or by direction of the trust document.

In addition, the trustee should not be liable for the acts of an agent if the trustee used reasonable care in choosing the agent. This should be made consistent with §874, which allows the trustee to hire agents.

The bracketed language should not be included in the statute. The trustee should be required to use reasonable care in selecting the agent, but if he or she does so, should be entitled to rely upon the expert advice of such agent.

**Section 952. Liability of Trustee for Acts of Co-Trustee**

The limitation of liability contained in Civil Code §2239 should be retained. That section only makes the trustee liable for co-trustee's acts if they constituted a breach.

The section should be amended as follows:

952. If a trustee consents to a co-trustee's acts or omissions or negligently enables the co-trustee to commit them,

the trustee is liable to the beneficiary for the co-trustee's acts that would be a breach of the trust if committed by the trustee, but for no other acts of a co-trustee.

**Section 960. Remedies for Breach of Trust**

The comment to this section should state that these remedies are exclusive. If additional remedies are appropriate, they should be listed in the Code Section. The trustee should be able to know with certainty what the liabilities are in any circumstance. As an example of an enumerated remedies system, the remedies available under the Restatement are exclusive.

**Section 962. Common Law Applies**

This section should be deleted. The remedies for breach of trust should be enumerated in the statute. This will give trustees certainty in dealing with the trust. It will allow the trustee to evaluate a case against it for breach of trust on a realistic basis.

**Section 963. Other Remedies Preserved**

This section should be eliminated. All remedies should be enumerated in the statute, to give certainty to trust administration.

**Section 970. Accountability for Profits in Absence of Breach of Trust**

This section must be deleted. There is no justification for penalizing corporate fiduciaries for having the creativity to generate a "profit" in the absence of a breach of trust.

Inasmuch as the beneficiaries are not harmed, they would obtain a

windfall. If the section is enacted, should not the individual Trustee then be surcharged for not making the profit for which he must account?

Trustees should not be forced to disgorge profits in absence of breach of trust.

The cost of accounting for such indirect profit would be prohibitive, and such charges would necessarily be passed through to the Trust.

This section is not acceptable in its present form.

**Section 972. Measure of Liability for Breach of Trust**

This section is not acceptable as drafted. Section 972(a)(3) should be deleted as it is too speculative. It awards to the beneficiaries any profit which would have accrued to the trust estate if there had been no breach. However, it does not take into account non-related acts and circumstances. It will not properly replace what should be in the trust account. It does not provide any measure of certainty with respect to a trustee's liability. The speculative nature of this remedy is not acceptable to the CBA.

It is fair to give the beneficiaries the proceeds of sale plus interest at the legal rate. The section should be amended to state:

§972(a)(3) The proceeds of sale plus interest at the legal rate.

**Section 980. Limitations on Proceedings Against Trustees**

This section provides for a statutory period, after which the beneficiary cannot assert a claim. However, the terms used in the section are not defined, and do not provide certainty to the trustees so that it can be protected. The term "fully disclosed" is not defined. The section should incorporate the "Advice" provisions under the Independent Administration of Estates Act. The necessary information to "inform" a beneficiary should be delineated within the Code Section. The Trustee will then be able to comply with the Code Section to inform its beneficiaries, and will have some measure of certainty and protection under the section.

A letter explaining the facts or other written notice should also qualify as adequate notice. As a practical matter, the "Account" of the trustee may not give as much information as other written notice would.

**Section 981. Exculpation of Trustee**

The Trustor, beneficiaries or court should have the power to exculpate the trustee even if there is a breach of trust. Beneficiary ratification on full disclosure should permit the trustee to make a profit.

A typical situation affected by this section is the individual Trustee who enters into an equity investment with the Trustor. The Trustor will typically direct the trustee to retain the investment even after he becomes trustee. The Trustor should be able to agree that the Trustee can make and retain a profit.

The section should allow exculpation of the trustee:

1. If the Trust Agreements so provide.
2. If all of the beneficiaries agree.
3. If the court so approves.

The beneficiaries of a trust should have the burden to prove that the language exculpating the trustee was placed in the trust document under undue influence by the trustee. This should be cross-referenced to §701, which allows the trustee to communicate information to the beneficiaries and obtain the beneficiaries' approval to deal for the trustee's own account.

The minority trustee should be exculpated. A trustee will often be out-voted by several other co-trustees in an action. The non-acquiescing or objecting co-trustee should not be liable for actions taken by the majority co-trustees. This is consistent with §1010, which allows the majority of the co-trustees to exercise a power. The section should be amended to exculpate the out-voted Trustee.

**Section 1010. Actions by Co-Trustees**

The section should exculpate the co-trustee who is outvoted by a majority of co-trustees.

This section should also allow one co-trustee to act if the other co-trustee is temporarily absent. Temporary absence should be defined as "continuously absent for a period not exceeding 6 months."

**Section 1106. Jury Trial**

Section (a) should be amended to state:

(a) "There is no right to a jury trial in proceedings under this division."

Subdivisions (b) and (c) should be deleted. There is no constitutional right to a jury trial in equitable proceedings. Therefore, to state that the constitution requires a jury trial in some instances is confusing to the practitioner. It allows the plaintiff to bring a spurious suit, and to incur the expense of a jury trial, when the court will eventually find that no jury was available in the first instance. This is a disservice to the trust, as well as to the trustee, is costly to defend, and will unnecessarily cause additional litigation in the court system.

**Section 1130. Petitioners; Grounds for Petition**

This section should define "beneficiary," excluding remaindermen of revocable inter vivos trusts. These people are not entitled to information about trusts. (See Financial Code §1582.) They should not have the power to interfere in the operation of a trust to which they have no right.

**Section 1204. Liability as Between Trustee and Trust Estate**

This section should be amended to delete the provision that "other appropriate proceedings" may be instituted to determine the internal affairs of a trust. The provisions of §1130 should be exclusive. The trustee or beneficiaries may only bring an action regarding the internal affairs of the trust in the Probate



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Court. The Commission has already decided on a policy basis that the Probate Court has the expertise to determine matters involving the internal affairs of trusts and the exclusive jurisdiction over trusts. This section should be amended to so reflect.

The last sentence of the comment should be deleted, so that it is clear that the Probate Court has exclusive jurisdiction over any questions regarding the internal affairs of trusts.

The California Bankers Association thanks the Law Revision Commission for allowing its input regarding the comprehensive statute. If the Commission desires further clarification of any of the above points raised, a representative of the CBA will be present at the March meeting in order to discuss these questions.

ESTATE PLANNING, TRUST AND  
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THE STATE BAR OF CALIFORNIA

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March 11, 1985

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California Law Revision Commission  
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Palo Alto, California 94303

Re: Memorandum 85-32 - Comprehensive Trust Statute

Dear John:

We have had an Ad Hoc Committee of the Executive Committee of the Estate Planning, Trust and Probate Law Section, State Bar, review the Comprehensive Statute on Trusts. Members of that Committee have made some preliminary observations which are set forth in this letter.

Members of the Ad Hoc Committee would be pleased to meet with Stan Ulrich and with other staff members as appropriate to review the overall statute. We believe such a meeting could be arranged some time within the next month. If this is of interest, please let me know and I will arrange such a meeting which presumably would take place at the Commission headquarters. We believe such a meeting would be productive in reviewing the overall statute and the possible inconsistencies between various portions of the statute.

The comments which follow are of necessity preliminary in nature, as the Ad Hoc Committee has not itself had a chance to meet and discuss the statute. However, the comments are those of several of the Committee members which have been submitted in writing.

We hope this will be of assistance to the Commission and staff. These comments and observations are as follows:

John H. DeMouilly, Esq.  
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§ 540:

A continuing jurisdiction over testamentary trusts, we believe, is limited to trusts with individual trustees. See 1120.1a. Section 540 does not make this clear.

§ 550:

The sections in this article (§ 550-556) would relate only to trusts where court jurisdiction has been retained and where there is no corporate trustee. Only those trusts where no corporate trustee was involved continued court jurisdiction. Several members of the Executive Committee of the State Bar worked with the California Bankers Association in making the amendments to 1120.1a relating to individual trustees. It is felt that these sections require some clarification.

§ 551:

We believe this section should have a subdivision (d) which provides as follows:

"The provisions of this section shall not apply to a trust in which there is no corporate trustee."

Section 551 also requires certain notice "except as provided in Section 552." The cross-reference does not seem appropriate as it doesn't contain a notice provision.

§ 643:

This section does not seem entirely consistent with § 650 and § 651 as to terminations and modifications of trusts, spendthrifts, etc. Some redrafting may be appropriate.

§ 701:

This appears to conflict with § 803 dealing with conflicts of interest and self-dealing.

§ 706:

The duty to make trust property productive may not be applicable, for example, to the family residence which is often placed in a trust for the surviving spouse. Clearly the surviving spouse should not have to pay rent, for example.

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§ 707:

This appears inconsistent with § 822 and also seems to be inconsistent with present Civil Code § 2261b.

§ 711:

This appears to conflict with § 874 and § 951 relating to the hiring and relying on the advice of agents.

§ 731:

The concept of annual accounting from existing § 1120.1a referred only to corporate trustees or those individual trustees who withdrew from continuing court supervision. Section 731 does not appear to be so limited. The proposed accounting in 731(b) is unduly complicated for many individual trustees. Providing a copy of an income tax return may be a practical way to provide the accounting information to beneficiaries where there is an individual trustee.

§ 804:

If the instrument provides that it incorporates § 1120.2 as amended from time to time, the incorporation would be somewhat broader than provided by § 804. Perhaps the language in § 700 would solve the problem.

§ 730:

Does this require information to be given to contingent beneficiaries of revocable trusts?

§ 803:

Guidance might be obtained from the ERISA prohibited transaction exemption set forth in § 4975(d)(2) of the Internal Revenue Code.

§ 826:

Should the trustee be personally liable for liabilities arising out of the business if there is not court approval?

§ 862:

This might be expanded to clarify the right of the trustee to borrow money or pledge trust assets for the benefit of the trustor individually or for the individual benefit of one of the beneficiaries.

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§ 874:

We believe a trustee has a duty to exercise reasonable care in both hiring and supervising an agent. Subsection (b) empowering the trustee to act without independent investigation upon the recommendation of persons hired does not seem to be sound policy. Perhaps this should be limited to situations where the governing instrument specifically so provides. This section also seems inconsistent with § 951(d). Perhaps the words "and no others" now found in § 2239 should be restored to this section.

§ 963:

Query whether other remedies outside of the Probate Court need to be preserved in connection with breach of trust.

§ 972(b):

At present we believe good faith only protects the trustee from punitive damages. This language is somewhat broader.

§ 970:

This appears inconsistent with § 803 and appears inconsistent with the trial court decision in Van de Kamp.

§ 973:

Perhaps this can be made more explicit as to the computation of interest on breaches of trust.

§ 980:

This section does not seem to consider the doctrine of virtual representation to bind the successors of a contingent beneficiary who receives full disclosure. The subject of a claim is not clear.

§ 982:

The language of Civil Code § 2258(b) is deemed preferable to this language.

§ 1020(b):

The court now must accept the resignation. As rewritten, this becomes permissive with the court.

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§ 1106:

Does the Constitution actually require any jury trials in connection with trust matters?

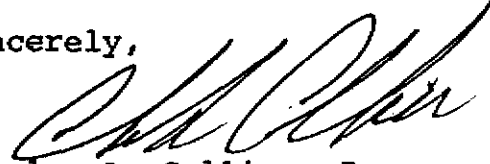
§§ 522, 706, 707 and 720:

These do not reflect the impact of AB 630 which revised Civil Code § 2261 in 1984.

The above are preliminary comments received from members of the Ad Hoc Committee. I am sure there are other comments that will be made as other persons review the Comprehensive Statute.

As noted above, members of the Ad Hoc Committee would be pleased to meet with Stan Ulrich and with you, if appropriate, to review the overall statute.

Sincerely,



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