

Memorandum 85-86

Subject: L-640 - Probate Code (Comprehensive Trust Law--Revised
Sections of Draft Statute)

At the September meeting the Commission reviewed Sections 15000 through 16420 of the draft Trust Law. Attached to this memorandum as Exhibit 1 are the sections which the Commission revised. See the Minutes of the September meeting for a complete list of the decisions made. The sections in which changes were made or proposed are included in Exhibit 1 for your review. In many cases, the changes are minor or noncontroversial; these revisions are not discussed in this memorandum. In other cases, the revisions entail important policy considerations and there may not have been agreement on specific language; these sections are briefly noted in the following discussion. At the October meeting, we plan to discuss only the sections with which someone has a problem.

§ 15004. Application of division to charitable trusts

This section has been revised to reflect Commission decisions, but since the Attorney General's staff is currently reviewing the draft statute, we have not completed the process of clarifying the application of the trust statute to charitable trusts. This will be done when we receive their comments.

§ 15407. Effect of disposition in favor of "heirs" or "next of kin" of settlor

The Commission decided to omit this section because of a concern that it might defeat the intention of the settlor. Professor Halbach and the staff think it would be better to limit this section, rather than omit it. This is done in the draft included in Exhibit 1 by providing that the rule eliminating the need to get the consent of beneficiaries described as "heirs" or "next of kin" does not apply as to any beneficiary whose interest is likely to vest. The section

would avoid the need to get the consent of remote, unknown, and unborn beneficiaries whose interests are not likely to vest, while preserving the rights of beneficiaries whose interest are more immediate, but who also fall into the general class of heirs.

§ 15600. Acceptance of trust by trustee

§ 15601. Rejection of trust

These sections have been significantly modified to implement the decision to apply the rules on acceptance and rejection of trusts to take account of modifications.

§ 15660. Appointment of trustee to fill vacancy

This section has been revised to sort out when a vacancy is required to be filled, and when it is discretionary. The question of the existence and filling of vacancies should be separated from the question of who can act for the trust when there is a vacancy. This is covered in Section 15621 and its comment.

§§ 15800-15802. Limits on rights of beneficiary of revocable trusts

At the last meeting, it was suggested that the staff compare this provision with Uniform Probate Code Section 1-108, which reads as follows:

Section 1-108. [Acts by Holder of General Power]

For the purpose of granting consent or approval with regard to the acts or accounts of a personal representative or trustee, including relief from liability or penalty for failure to post bond, to register a trust, or to perform other duties, and for purposes of consenting to modification or termination of a trust or to deviation from its terms, the sole holder or all co-holders of a presently exercisable general power of appointment, including one in the form of a power of amendment or revocation, are deemed to act for beneficiaries to the extent their interests (as objects, takers in default, or otherwise) are subject to the power.

Comment

The status of a holder of a general power in estate litigation is dealt with by section 1-403.

This section permits the settlor of a revocable trust to excuse the trustee from registering the trust so long as the power of revocation continues.

"General power," as used in this section, is intended to refer to the common law concept, rather than to tax or other statutory meanings. A general power, as used herein, is one which enables the power holder to draw absolute ownership to himself.

This section is, of course, drafted in light of the particular provisions relating to trusts in the UPC. In terms of policy, it accomplishes the same things as draft Sections 15800-15802. Section 15802.5 has been added to the draft for the purpose of treating holders of a power of appointment or power to withdraw property the same as a holder of a power to revoke. If this provision is approved, we will renumber the following section to eliminate the need for the decimal.

§ 16004. Duty to avoid conflict of interest

The comment has been revised to recognize that the trustee may be reimbursed for the amount paid for the claim in either the probate court or the court where the lien is sought to be enforced. There is no case law on this subject under Civil Code Section 2263.

§ 16304 [formerly § 16305]. When right to income arises; apportionment of income

This provision has been revised as set out in the minutes. However, the staff has some reservations about this change. The second sentence of subdivision (a) refers to an asset becoming subject to a trust by reason of a person's death, but in the case of a living trust (other than a pour-over situation), the asset will already be subject to the trust--the situation is better described as the asset becoming subject to the interest of the beneficiary by reason of the person's death. Yet the comment refers to this change as dealing with the problem of apportioning income following the death of a settlor of a revocable living trust. This type of problem illustrates the difficulty of tinkering with the Revised Uniform Principal and Income Act on an ad hoc basis. The staff believes that a comprehensive review of the RUPIA is needed and should be done by experts in this area. This suggestion has been forwarded to the Uniform Laws Commissioners, but it is assumed that it will be years before such a

project would be undertaken, if at all. As a general approach, then, the staff recommends that the Commission deal only with problems for which there is a clearly acceptable solution in this area until such time as a comprehensive revision of the RUPIA can be conducted.

§ 16312 [formerly § 16313]. Charges against income and principal

Subdivision (a) is what was formerly Section 16303. In subdivision (d)(5) a reference to interest has been added to conform to the uniform act and to deal with the problem discussed at the last meeting concerning interest on an estate tax delinquency. This approach provides a default rule (that such interest is charged to principal) which the trust instrument can avoid by a specific provision. However, as discussed at the September meeting, it can also be argued that such interest should be charged against the interest of the income beneficiary. (See the letter from Richard Kinyon in Exhibit 1 attached to the Second Supplement to Memorandum 85-73.)

It does not seem necessary to adopt Section 5(a) of the RUPIA to deal with this problem, so the staff suggests that we do not do so. For your information, Section 5(a) provides as follows:

Unless the will otherwise provides and subject to subsection (b) [see draft Section 16306 attached to Memorandum 85-73], all expenses incurred in connection with the settlement of a decedent's estate, including debts, funeral expenses, estate taxes, interest and penalties concerning taxes, family allowances, fees of attorneys and personal representatives, and court costs shall be charged against the principal of the estate.

§ 16401. Trustee's liability to beneficiary for acts of agent

The major objection to this section has involved the lack of relation between liability and the control of the trustee over the agent. The staff implemented the specific decisions made with regard to this section at the last meeting, but we also propose that new subdivision (a) be adopted. This section, from the Restatement, limits liability to situations where the trustee has employed the agent, and thus avoids the problem that could arise where the settlor under a revocable trust has employed an agent.

§ 16402. Trustee's liability to beneficiary for acts of cotrustee

This section has been substantially revised in order to preserve the substance of former draft Section 16402 and make it consistent with Section 16013 (duty of trustee with respect to cotrustees). The staff has also revised this section along the lines determined with regard to liability for acts of agents.

[Former draft § 16403]. Liability of dissenting cotrustee to beneficiary

This section has been omitted in the material in Exhibit 1; what was formerly numbered as Section 16404 (liability for acts of predecessor) is now Section 16403. The former provision relating to dissenting cotrustees was identified as being inconsistent with the section on the trustee's duty (§ 16013) and liability for breach of cotrustee (§ 16402). In light of the comprehensive coverage in Section 16402 in Exhibit 1, and the objection that former draft Section 16403 seemed to permit the minority trustee to join in a breach and escape liability, it seems best to eliminate this section.

§ 16421. Remedies for breach exclusively equitable

A question was raised about this provision at the close of the last meeting, particularly with regard to how it might relate to the assessment of punitive damages in the case of fraud. Section 16421 was drawn from Section 197 of the Restatement (Second) of Trusts, which, along with Sections 198 and 199 of the Restatement is set out in Exhibit 2. A reading of these sections and their comments should provide useful background information. Trust proceedings are classed as equitable for the purpose of determining the right to a jury trial as well. See, e.g., the sources cited in note 309, on page 92 of the explanatory text accompanying the draft statute.

In any event, the staff does not see that Section 16421 bears on the question of whether a trustee may be liable for punitive damages or a punitive surcharge. Existing law is a mess. It is not clear whether or under what circumstances trustees may be held liable for punitive damages arising out of a breach of trust. Compare *Vale v. Union Bank*, 88 Cal. App.3d 330, 151 Cal. Rptr. 784 (1979) (exemplary

damages awarded against bank as trustee of pension fund in action by fund participants), with Burton v. Security Pacific Nat'l Bank, 155 Cal. App.3d 967 (1984) (\$3,000,000 punitive damages award by jury reversed since it was improper to empanel jury to award damages for breach of trust). The policy of the draft statute is to clarify and make consistent the provisions relating to remedies, jurisdiction, jury trial, and the power of the court. The beneficiary will lose nothing by being restricted to equitable remedies as provided in draft Section 16421, since at best any actions at law would be concurrent with equitable remedies. This approach avoids wasteful disputes such as in Burton, supra, and in Edgar v. Bank of America Nat'l Trust and Savings Ass'n, 50 Cal. App.2d 827, 831 (1942), where the parties were in doubt about whether the action was in equity or at law but were willing to retain the jury in an advisory capacity.

Respectfully submitted,

Stan G. Ulrich
Staff Counsel

EXHIBIT 1

Revised Sections of Draft Trust Law

Note. The following material implements decisions made at September 1985 meeting. Some of the more important revisions are discussed in Memorandum 85-86; revisions not discussed in the memorandum are noted in the Minutes for the September meeting.

* * * * *

§ 15001. General rule concerning application of division

15001. Except as otherwise provided by statute:

(a) On and after July 1, 1987, this division applies to all trusts regardless of whether they were created before, on, or after July 1, 1987.

(b) On and after July 1, 1987, this division applies to all proceedings concerning trusts commenced before July 1, 1987, 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 15001 provides the general rule governing the application of this division to administration of existing trusts and pending proceedings involving trusts. Subdivision (a) continues without substantive change the second sentence of former Civil Code Section 2225 (application of doctrine of merger), the first sentence of subdivision (e) of former Civil Code Section 2261 (application of rules governing investments), and the first sentence of former Probate Code Section 1138.13 (application of provisions governing court proceedings involving trusts). Subdivision (a) is also comparable to Section 8 of the Uniform Trustees' Powers Act (1964).

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

For special transitional provisions, see Sections 15401(d) (application of rules governing method of revocation by settlor),

15620(c) (application of rule governing actions by cotrustees), 16042 (interpretation of trust terms concerning legal investments), 16062(b) (application of duty to account annually to beneficiaries), 16203 (application of rules governing trustee's powers), 16401(b) (application of rules governing trustee's liability to beneficiary for acts of agent), 16460(c) (application of limitations period in proceedings by beneficiaries against trustees), 18000(b) (application of rule governing personal liability of trustee to third persons on contracts).

Note. This section has been revised to supply the delayed operative date. Other sections in the draft have also been revised to reflect this decision, but are not set out in this exhibit.

* * * * *

§ 15004. Application of division to charitable trusts

15004. Unless otherwise provided by statute, this division applies to charitable trusts that are subject to supervision by the Attorney General to the extent that the application of the provision is not in conflict with the Uniform Supervision of Trustees for Charitable Purposes Act, Article 7 (commencing with Section 12580) of Chapter 6 of Part 2 of Division 3 of Title 2 of the Government Code.

Comment. Section 15004 is a new provision that recognizes that special rules may apply to charitable trusts. See generally 7 B. Witkin, Summary of California Law Trusts §§ 37-55, at 5398-418 (8th ed. 1974); Restatement (Second) of Trusts §§ 348-403 (1957). Thus the rules of this division are subordinate to contrary provisions provided in this division and in the Uniform Supervision of Trustees for Charitable Purposes Act, Government Code Sections 12580-12597, as to trusts that are subject to supervision by the Attorney General. See Gov't Code §§ 12582 ("trustee" defined for purposes of uniform act), 12583 (charitable trustees excluded from coverage of uniform act); see also Sections 15205 (designation of beneficiary rule not applicable to charitable trusts), 16105 (Attorney General as party in proceedings involving certain private foundations), 17203(b) (notice to Attorney General of proceedings involving charitable trust subject to supervision), 17209 (enforcement of beneficiary's rights under charitable trust by Attorney General).

* * * * *

§ 15006. Judicial Council to prescribe forms

15006. The Judicial Council may prescribe the form of the petitions, 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 15006 is new and is drawn from Section 1456 (forms under guardianship-conservatorship statute).

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

CHAPTER 1. CREATION AND VALIDITY OF TRUSTS

§ 15200. Methods of creating trust

15200. Subject to other provisions of this chapter, a trust may be created by any of the following methods:

(a) A declaration by the owner of property that the owner holds the property as trustee.

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

(c) A testamentary transfer of property by the owner to another person as trustee.

(d) An exercise of a power of appointment to another person as trustee.

(e) An enforceable promise to create a trust.

Comment. Section 15200 is drawn from Section 17 of the Restatement (Second) of Trusts (1957). Section 15200 supersedes parts of former Civil Code Sections 2221 and 2222. A declaration under subdivision (a) must satisfy the requirements of Section 15206 (Statute of Frauds as applied to trust of real property) or 15207 (oral trust of personal property), if applicable. A trust may be created for the benefit of the settlor or of a third person (including the trustee). See Sections 15205 (designation of beneficiary), 15209 (exception to doctrine of merger). Consideration is not required to create a trust. See Section 15208. Subdivision (e) is worded differently from the corresponding provision in the Restatement to avoid the implication that it deals with question of the time of creation of such a trust.

* * * * *

§ 15204. Trust for indefinite or general purposes

15204. 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 comes within that purpose.

Comment. Section 15204 is new. Under this section, a trust for indefinite or general purposes may be created and enforced, even though it is not limited to charitable purposes. This changes the rule applicable under cases such as In re Estate of Sutro, 155 Cal.

727, 730, 102 P. 920 (1907)). This section is not intended to affect the law relating to the purposes for which a charitable trust may be created.

§ 15205. Designation of beneficiary

15205. (a) A trust, other than a charitable trust, is created only if there is a beneficiary.

(b) The requirement of subdivision (a) is satisfied if the trust instrument provides for either of the following:

(1) A beneficiary or class of beneficiaries that is ascertainable with reasonable certainty or that is sufficiently described so it can be determined that some person meets the description or is within the class.

(2) 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 15205 restates a requirement in former Civil Code Sections 2221 and 2222 as it applied to private (i.e., noncharitable) trusts. Subdivision (b) continues the requirement of former Civil Code Sections 2221 and 2222 that the beneficiary be indicated with "reasonable certainty", but also permits trusts to describe a beneficiary or class of beneficiaries in a less strict fashion so long as it can be determined that someone satisfies the criteria in the trust instrument. Under subdivision (b)(1) the determination of the class of beneficiaries can satisfy the requirements of this section if the class is ascertainable presently or in the future. Subdivision (b)(2) affords the settlor a greater degree of flexibility in creating a trust. Under subdivision (b)(2), 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 upheld as power of appointment).

§ 15206. Statute of Frauds

15206. A trust in relation to real property is not valid unless evidenced by one of the following methods:

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

(b) By a written instrument conveying the trust property signed by the settlor, or by the settlor's agent if authorized in writing to do so.

(c) By operation of law.

Comment. Section 15206 restates former Civil Code Section 852 without substantive change. Section 15206 also restates without substantive change the former part of Code of Civil Procedure Section 1971 that related to trusts. See also Section 15003 (law relating to constructive and resulting trusts remains unaffected).

* * * * *

§ 15208. Consideration

15208. Consideration is not required to create a trust, but a promise to create a trust in the future is enforceable only if the requirements for an enforceable contract are satisfied.

Comment. Section 15208 is drawn from Section 112.003 of the Texas Trust Code. See Tex. Prop. Code Ann. § 112.003 (Vernon 1984). This section supersedes the part of former Civil Code Section 2222(1) which referred to consideration. For a provision relating to an enforceable promise to create a trust, see Section 15200(e).

§ 15209. Exception to doctrine of merger

15209. If a trust provides for one or more successor beneficiaries after the death of the settlor, the trust is not invalid, merged, or terminated in either of the following circumstances:

(a) Where there is one settlor who is the sole trustee and the sole beneficiary during the settlor's lifetime.

(b) Where there are two or more settlors, one or more of whom are trustees, and the beneficial interest in the trust is in one or more of the settlors during the lifetime of the settlors.

Comment. Section 15209 continues the first sentence of former Civil Code Section 2225 without substantive change. See also In re Estate of Washburn, 11 Cal. App. 735, 746, 106 P. 415 (1909) (merger of legal and equitable estates).

* * * * *

§ 15401. Method of revocation by settlor

15401. (a) A trust that is revocable by the settlor may be revoked in whole or in part by any of the following methods:

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

(2) By a writing (other than a will) signed by the settlor and

delivered to the trustee during the lifetime of the settlor. If the trust instrument explicitly makes the method of revocation provided in the trust instrument the exclusive method of revocation, the trust may not be revoked pursuant to this paragraph.

(b) A trust may not be revoked by an attorney in fact under a power of attorney unless it is expressly permitted by the trust instrument.

(c) Nothing in this section limits the authority to modify or terminate a trust pursuant to Section 15403 or 15404 in an appropriate case.

(d) The manner of revocation of a trust revocable by the settlor that was created by an instrument executed before July 1, 1987, is governed by prior law and not by this section.

Comment. Subdivision (a) of Section 15401 supersedes part of the first sentence of former Civil Code Section 2280. The settlor may revoke a revocable trust in the manner provided in subdivision (a)(2), unless there is a contrary provision in the trust. 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 settlor 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 settlor. However the settlor 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 new. See also Civil Code §§ 2400-2407 (Uniform Durable Power of Attorney Act), 2450-2473 (statutory short form power of attorney). Under subdivision (b), a provision in the power of attorney permitting the attorney in fact to revoke the trust is ineffective unless the trust instrument expressly authorizes revocation by the attorney in fact. See, e.g., Civil Code § 2467(a)(5) (provision in statutory power of attorney form permitting exercise of principal's power to revoke).

Subdivision (c) clarifies the relation of this section to other sections permitting modification and termination of trusts.

Subdivision (d) preserves the prior law governing the manner of revocation. Hence, if the trust provides the manner of revocation, the statutory method provided in subdivision (a) is not available.

§ 15402. Power to revoke includes power to modify

15402. Unless the trust instrument provides otherwise, if a trust is revocable by the settlor, the settlor may modify the trust by the procedure for revocation.

Comment. Section 15402 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). 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. See also Section 15600 (trustee's acceptance of modification of trust).

§ 15403. Modification or termination of irrevocable trust by all beneficiaries

15403. (a) Except as provided in subdivision (b), if all beneficiaries of an irrevocable trust consent, they can compel modification or termination of the trust upon petition to the court.

(b) If the continuance of the trust is necessary to carry out a material purpose of the trust, the trust cannot be modified or terminated unless the court, in its discretion, determines that the reason for doing so under the circumstances outweighs the interest in accomplishing a material purpose of the trust. Under this section, the court does not have discretion to permit termination of a trust that is subject to a valid restraint on transfer of the beneficiary's interest as provided in Chapter 2 (commencing with Section 15300).

Comment. Section 15403 is drawn from Section 337 of the Restatement (Second) of Trusts (1957). Unlike the Restatement, however, subdivision (b) gives the court some discretion in applying the material purposes doctrine except in situations where transfer of the beneficiary's interest is restrained, such as by a spendthrift provision. See Section 15300 (restraint on transfer of beneficiary's interest). Section 15403 permits termination of an irrevocable trust with the consent of all beneficiaries where the trust provides for successive beneficiaries or postpones enjoyment of a beneficiary's interest. The discretionary power provided in subdivision (b) also represents a change in the California case-law rule. See, e.g., *Moxley v. Title Ins. & Trust Co.*, 27 Cal.2d 457, 165 P.2d 15 (1945). Section 15403 is intended to provide some degree of flexibility in applying the material purposes doctrine in situations where transfer of the beneficiary's interest is not restrained. For provisions governing judicial proceedings, see Section 17200 *et seq.* 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), 15405 & 17207 (appointment of guardian ad litem). See also Sections 15406 (no conclusive presumption of fertility), 15407 (effect of disposition in favor of heirs or next of kin of settlor). For provisions governing modification and termination of trusts where the consent of all beneficiaries cannot be obtained, see Sections 15409 (trust with

uneconomically low principal) and 15410 (modification or termination by court order in changed circumstances). Subdivision (a) limits the application of this section to irrevocable trusts since if the trust is revocable by the settlor, the method of revocation is governed by Section 15401. Compare Section 15404 (modification or termination by settlor and all beneficiaries).

§ 15404. Modification or termination by settlor and all beneficiaries

15404. (a) If the settlor 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, upon petition to the court the other beneficiaries, with the consent of the settlor, can compel a modification or a partial termination of the trust if the interests of the beneficiaries who do not consent are not substantially impaired.

Comment. Section 15404 is drawn from Section 338 of the Restatement (Second) of Trusts (1957). Subdivision (a) restates 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). A trust may be modified or terminated pursuant to this section without court approval, but a court order may be sought by petition under Section 17200. A revocable trust may be modified or terminated pursuant to this section, as in a case where the method of modification or revocation specified in the trust is found to be overly restrictive. See Section 15401; compare Section 15801 (consent by beneficiary of revocable trust). However, nothing in this section affects the right of a settlor to revoke or modify a revocable trust under Section 15401. 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), 15405 & 17207 (appointment of guardian ad litem). See also §§ 15406, 15407. A trust may be modified or terminated under this section regardless of any provision in the trust restraining transfer of the beneficiary's interest and regardless of whether its purposes have been achieved. See Restatement (Second) of Trusts § 338 comments b-d.

* * * * *

§ 15407. Effect of disposition in favor of "heirs" or "next of kin" of settlor

15407. (a) Except as provided in subdivision (b), in determining the class of beneficiaries whose consent is necessary to modify or terminate a trust pursuant to Section 15404, a disposition in favor of a class of persons described only as "heirs" or "next of kin" of the settlor, or a disposition using other words that describe the class of all persons who would take under the rules of intestacy, does not create a beneficial interest in such persons.

(b) Subdivision (a) does not apply to a beneficiary who would be entitled to receive a distribution of principal if the settlor died on the date the trust is sought to be modified or terminated.

Comment. Section 15407 reinstates a limited form of the doctrine of worthier title. This section is drawn from New York law. See N.Y. Est. Powers & Trusts Law § 7-1.9(b) (McKinney 1985). Under this section the consent of unborn persons who might constitute the class of heirs or next of kin of the settlor need not be obtained for the settlor to terminate an otherwise irrevocable trust. The limitation in subdivision (b) is designed to protect beneficiaries in the class of heirs or next of kin whose interests are likely to materialize.

§ 15408. Termination of trust; trustee's powers on termination

15408. (a) A trust terminates when any of the following occurs:

- (1) The term of the trust expires.
- (2) The trust purpose is fulfilled.
- (3) The trust purpose becomes unlawful.
- (4) The trust purpose becomes impossible to fulfill.
- (5) The trust is revoked.

(b) On termination of the trust, the trustee continues to have the powers needed to wind up the affairs of the trust.

Comment. Subdivision (a) of Section 15408 lists the ways in which trusts typically may terminate. Paragraph (1) 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). Paragraphs (2), (3), and (4) continue former Civil Code Section 2279 without substantive change. Paragraph (5) is a new statutory provision.

Subdivision (b) is a new provision that makes clear that even though the trust has terminated, the trustee retains limited powers needed to wind up the affairs of the trust. For other provisions relating to trustees' powers, see Section 16200 et seq.

§ 15409. Trust with uneconomically low principal

15409. (a) On petition by a trustee or a beneficiary, 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 continuation 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 settlor, order any of the following:

- (1) Termination of the trust.
- (2) Modification of the trust.
- (3) Appointment of a new trustee.

(b) Notwithstanding subdivision (a), if the trust principal does not exceed \$20,000 in value, the trustee has the power to terminate the trust.

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

Comment. Subdivisions (a) and (c) of Section 15409 restate subdivisions (a) and (d) of former Civil Code Section 2279.1 and subdivisions (a) and (d) of former Probate Code Section 1120.6 without substantive change. For provisions governing judicial proceedings see Section 17200 et seq. See also Section 15800 (limits on rights of beneficiary of revocable trust).

Subdivision (b) is a new provision that gives the trustee the power to terminate a trust with a principal value of \$20,000 or less. In such case, the trustee need not seek court approval for termination of the trust; the presumption is established that a \$20,000 trust is inherently uneconomical. A trustee has discretion, however, to seek court approval under subdivision (a), and even in a case where the trustee has determined to terminate the trust under subdivision (b), the trustee may seek instructions on the correct manner of distributing the trust property. See Sections 15411 (disposition of property upon termination), 17200(b)(4) (determining to whom property passes on termination).

* * * * *

§ 15411. Disposition of property upon termination

15411. At the termination of a trust, the trust property shall be disposed of as follows:

(a) In the case of a trust that is revoked by the settlor, as directed by the settlor.

(b) In the case of a trust that is terminated by the consent of the settlor and all beneficiaries, as agreed by the settlor and all beneficiaries.

(c) In any other case, as provided in the trust instrument or in a manner directed by the court that conforms as nearly as possible to the intention of the settlor as expressed in the trust instrument. If a trust is terminated by the trustee pursuant to subdivision (b) of Section 15409, the trust property shall be distributed as determined by the trustee pursuant to this subdivision.

Comment. Section 15411 is new. Subdivisions (a) and (b) recognize that the persons holding the power to modify a trust have the power to direct the manner of distribution of property upon termination. See Section 15402 (power to revoke includes power to modify), 15403 (termination by all beneficiaries), 15404 (termination

by settlor and all beneficiaries). Subdivision (a) supersedes the part of former Civil Code Section 2280 relating to disposition of property upon revocation.

Subdivision (c) applies to the cases not described in subdivisions (a) and (b). Subdivision (c) is drawn in part from former Civil Code Section 2279.1(b) and former Probate Code Section 1120.6(b), which applied to termination of trusts with uneconomically low principal. Subdivision (c) applies to cases where the trust terminates under its own terms, such as the expiration of a term of years or the occurrence of an event. See Section 15408(a)(1)-(2). Subdivision (c) also applies to cases where the trust is terminated pursuant to court order without the consent of the settlor and beneficiaries. See, e.g., Sections 15408(a)(3) (termination where trust purpose becomes unlawful), 15408(a)(4) (termination where trust purpose becomes impossible to fulfill), 15409 (termination of trust with uneconomically low principal), 15410 (termination in changed circumstances). The last sentence of subdivision (c) provides for its application in a case where a trustee has terminated a trust having a principal value of \$20,000 or less pursuant to Section 15409(b).

In appropriate circumstances, distributions on termination of a trust may be made to a custodian for a minor under the Uniform Transfers to Minors Act. See Sections 3905 (transfer authorized in trust), 3906 (other transfer by trustee).

* * * * *

§ 15600. Acceptance of trust by trustee

15600. (a) The person named as trustee may accept the trust, or a modification of the trust, by one of the following methods:

(1) Signing the trust instrument or the trust instrument as modified, or signing a separate written acceptance.

(2) Exercising powers or performing duties under the trust instrument or the trust instrument as modified, except as provided in subdivision (b).

(b) In a case where there is an immediate risk of damage to the trust property, the person named as trustee may act to preserve the trust property without accepting the trust or a modification of the trust, if within a reasonable time after acting the person delivers a written rejection of the trust or the modification of the trust to the settlor or, if the settlor is dead or incompetent, to a beneficiary. This subdivision does not impose a duty on the person named as trustee to act.

Comment. Subdivision (a) of Section 15600 is a new provision drawn from the Indiana Trust Code. See Ind. Code Ann. § 30-4-2-2(a)-(b) (West 1979). Subdivision (a) supersedes part of the introductory clause and subdivision (1) of former Civil Code Section 2222 and part of former Civil Code Section 2251. The provision in subdivision (a)(2) for acceptance of the trust by acts of the person named as trustee is consistent with case law. See, e.g., Heitman v. Cutting, 37 Cal. App. 236, 238, 174 P. 675 (1918).

Subdivision (b) is a new provision drawn from the Indiana Trust Code. See Ind. Code Ann. § 30-4-2-2(d) (West 1979). The last sentence makes clear that the authority to act in an emergency does not impose a duty to act. The intention of this subdivision is to permit the person named as trustee to act in an emergency without being considered to have accepted the trust under the rule set out in subdivision (a)(2). See also Section 15601 (rejection of trust).

The rules governing acceptance of the trust at the commencement of the trust apply by analogy to acceptance of a modification of the trust. Thus, for example, a trustee is not subject to liability for breach of a new duty imposed through a modification of the trust unless the trustee signs the trust as modified or a separate acceptance under subdivision (a)(1) or performs the new duty under subdivision (a)(2).

§ 15601. Rejection of trust; nonliability of person who rejects trust

15601. (a) A person named as trustee may in writing reject the trust or a modification of the trust.

(b) If the person named as trustee does not accept the trust or a modification of the trust by a method provided in subdivision (a) of Section 15600 within a reasonable time after learning of being named as trustee or of the modification, the person has rejected the trust or the modification.

(c) A person named as trustee who rejects the trust or a modification of the trust is not liable with respect to the rejected trust or modification.

Comment. Section 15601 is a new provision drawn from the Indiana Trust Code. See Ind. Code Ann. § 30-4-2-2(c). Section 15601 supersedes former Probate Code Section 1124 which provided for rejection of certain testamentary trusts by filing a writing with the court clerk. Under this section, a trustee may reject new duties without having to resign as trustee. However, if a modification is rejected, the trustee remains subject to the duties and liabilities under the trust as it existed before the modification. The provision in subdivision (c) that a trustee who rejects the trust is not liable is consistent with Sections 16000 (duty to administer trust upon

acceptance) and 16400 (violation of duty is breach of trust). See also Sections 15660 (appointment of trustee to fill vacancy), 17200(b)(10) (petition to appoint trustee).

§ 15602. Trustee's bond

15602. (a) A trustee is not required to give a bond to secure performance of the trustee's duties, unless any of the following circumstances occurs:

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

(2) Notwithstanding a waiver of a bond in the trust instrument, a bond is found by the court to be necessary to protect the interests of beneficiaries.

(3) An individual who is not named as a trustee in the trust instrument is appointed as a trustee by the court.

(b) Notwithstanding a provision in the trust instrument, the court may excuse a requirement of a bond, reduce or increase the amount of a bond, release a surety, or permit the substitution of another bond with the same or different sureties.

(c) If a bond is required by the court, it shall be filed or served and shall be in the amount and with sureties and liabilities ordered by the court.

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

(e) Only trustees who are individuals may be required to give a bond, notwithstanding a contrary provision in the trust instrument.

Comment. Subdivisions (a)-(c) of Section 15602 are drawn from Uniform Probate Code Section 7-304 (1977). Subdivision (a)(3) restates the substance of part of former Probate Code Section 1127, but subdivision (a)(3) applies only to an individual trustee who is not named or nominated as an original or successor trustee in the trust instrument. See also Sections 15643 (vacancy in office of trustee), 15660 (appointment of trustee to fill vacancy). In other respects this section supersedes former Probate Code 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 Probate Code Section 1127. Subdivision (e) makes clear that corporate trustees are not required to give a bond. This continues the substance of part of former Probate Code Sections 480 and 481.

* * * * *

§ 15621. Vacancy in office of cotrustee

15621. Unless otherwise provided in the trust instrument, if a vacancy occurs in the office of a cotrustee, the remaining cotrustee or cotrustees may act for the trust as if they are the only trustees.

Comment. Section 15621 supersedes the second part of former Civil Code Section 860 and former Civil Code Section 2288. Under this section, a vacancy is disregarded in the operation of the trust. Hence, if the trustees are subject to the rule permitting action by majority vote, the remaining trustees act by majority vote of their number, even though the number of trustees constituting a majority is now less than before the vacancy occurred. In effect, the vacant positions are not counted in determining a quorum or in determining the number constituting a majority. See also Sections 15643 (vacancy in office of trustee), 15660 (appointment of trustee to fill vacancy).

§ 15622. Temporary incapacity of cotrustee

15622. Unless otherwise provided in the trust instrument, if a cotrustee is unavailable to perform the duties of the cotrustee because of absence, illness, or other temporary incapacity, the remaining cotrustee or cotrustees may act for the trust when necessary to accomplish the purposes of the trust or to avoid irreparable injury to the trust property as if they are the only trustees.

Comment. Section 15622 is a new provision that is intended to deal with the problem that may arise where a cotrustee is temporarily unable to fulfill its duties but the office of trustee is not vacant as under Section 15621. See also Section 17200(b)(2) (court determination of existence or nonexistence of power, duty, or right), (b)(6) (court instructions to trustee).

Article 3. Resignation and Removal of Trustees

§ 15640. Resignation of trustee

15640. (a) A trustee who has accepted the trust may resign only by one of the following methods:

(1) As provided in the trust instrument.

(2) In the case of a revocable trust, with the consent of the person holding the power to revoke the trust.

(3) In the case of a trust that is not revocable, with the consent of all adult beneficiaries who are receiving or are entitled to receive income under the trust or to receive a distribution of principal if the trust were terminated at the time consent is sought.

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

(b) On petition of the trustee, the court shall 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. Subdivisions (a)(1), (a)(3), and (a)(4) of Section 15640 are similar to Section 106 of the Restatement (Second) of Trusts (1957), except that the class of persons whose consent is needed under subdivision (a)(3) is more restricted. For a provision governing acceptance of the trust, see Section 15600. Subdivision (a)(1) continues part of the second sentence of former Probate Code Section 1138.8 without substantive change. Subdivision (a)(2) is a new provision that recognizes that the person holding the power to revoke a revocable trust has control over the trust rather than the beneficiaries. See Section 15800. Subdivision (a)(3) supersedes former Civil Code Section 2282(d) which permitted discharge from the trust with the consent of "the beneficiary, if the beneficiary has capacity to contract.". 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 §§ 2580 (conservator), 17207 (guardian ad litem). Subdivision (a)(4) 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)(4) the court has authority to accept a resignation regardless of whether the trust provides a manner of resignation. Former Probate Code Section 1138.8 permitted the court to act where the trust was silent.

The provision that the trustee's resignation shall be accepted by the court in subdivision (b) continues part of the last sentence of the first paragraph of former Probate Code Section 1125.1 and part of the third sentence of former Probate Code Section 1138.8. The authority for protective orders in subdivision (b) continues the substance of part of the last sentence of the first paragraph of former Probate Code Section 1125.1 and part of the third sentence of former Probate Code Section 1138.8. See also Section 17205 (general authority to make necessary orders). For the procedure applicable to proceedings under subdivision (b), see Section 17200 et seq. See also Section 17200(b)(11) (petition to accept resignation of trustee).

§ 15641. Liability of resigning trustee

15641. The liability for acts or omissions of a resigning trustee or of the sureties on the trustee's bond, if any, is not released or affected in any manner by the trustee's resignation.

Comment. Section 15641 restates part of the second paragraph of former Probate Code Section 1125.1 and part of the last sentence of former Probate Code Section 1138.8 without substantive change.

Section 15641 also supersedes the provisions of former Civil Code Section 2282 relating to discharge of trustees from liability. See also Sections 16460 (limitations on proceedings against trustee), 16461 (exculpation of trustee).

§ 15642. Removal of trustee

15642. (a) A trustee may be removed in accordance with the trust instrument 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 insolvent or otherwise unfit to administer the trust.

(3) Where hostility or lack of cooperation among cotrustees impairs the administration of the trust.

(4) Where the trustee fails or declines to act.

(5) For other good cause.

(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 15642 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 (1957). The authority for removal on the court's own motion is drawn from the third sentence of former Probate Code Section 1123.5. For the procedure applicable to judicial removal proceedings, see Section 17200 et seq. See also Section 17200(b)(10) (petition to remove trustee).

The statement of grounds for removal of the trustee by the court is drawn from the Texas Trust Code and the Restatement. See Tex. Prop. Code Ann. § 113.082(a) (Vernon 1984); Restatement (Second) of Trusts § 107 comments b-d (1957). 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. The general language relating to a trustee being otherwise unfit to administer the trust subsumes the reference in former Section 1126 to a trustee who is incapable of acting. Paragraph (3) of subdivision (b) continues part of the third sentence of former Probate Code Section 1123.5 without substantive change, except that the reference to "ill feeling" is omitted as redundant with "hostility," and the word "continued" has been omitted since the test is whether the administration of the trust is impaired. Paragraph (4) of subdivision (b) continues part of the first sentence of former Probate Code Section 1126 and part of the first sentence of former Probate Code Section 1138.9 without substantive change. Paragraph (5) of subdivision (b) continues authority found in former Probate Code Sections 1126 and 1138.9.

Subdivision (c) is drawn from former Probate Code Sections 1123.6 and 1138.2. See also Section 17205 (general authority to make necessary orders).

* * * * *

§ 15644. Delivery of property by former trustee upon occurrence of vacancy

15644. When a vacancy has occurred in the office of trustee, the former trustee who holds property of the trust shall deliver the trust property to the successor trustee or a person appointed by the court to receive the property and remains responsible for the trust property until it is delivered.

Comment. Section 15644 restates part of the second paragraph of former Probate Code Section 1125.1 and part of the last sentence of former Probate Code Section 1138.8 without substantive change. See Section 15643 (vacancy in office of trustee); see also Sections 16420(d) (appointment of receiver or temporary trustee upon breach of trust), 17205 (authority to make necessary orders and appoint temporary trustee). The trustee who has resigned remains liable for actions or omissions during his or her term as trustee even after the property is delivered to the successor until liability is barred. See Section 16460 (limitations on proceedings against trustee).

Article 4. Appointment of Trustees

§ 15660. Appointment of trustee to fill vacancy

15660. (a) If the trust instrument requires a vacancy in the office of trustee to be filled and provides a practical method of appointing a trustee or names the person to be appointed, the vacancy shall be filled as provided in the trust instrument.

(b) If the vacancy in the office of trustee is not filled as provided in subdivision (a), 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 who are 14 years of age or older.

Comment. Section 15660 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 15643. However, subdivision (a) makes clear that the vacancy must be filled only if the trust so requires. Where the vacancy is not filled, any remaining cotrustees may continue to administer the trust under Section 15621, unless the trust instrument provides otherwise. The provision in subdivision (a) 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 without substantive change. 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. Subdivision (b) gives the court discretion to fill a vacancy in a case where the trust does not name a successor who is willing to accept the trust, where the trust does not provide a practical method of appointment, or where the trust does not require the vacancy to be filled. For a limitation on the rights of certain beneficiaries, see Section 15800. For the procedure applicable to judicial proceedings, see Section 17200 et seq. See also Section 17200(b)(10) (petition to appoint trustee).

Article 5. Compensation and Indemnification of Trustees

§ 15680. Trustee's compensation provided under trust terms; different compensation

15680. (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 trust instrument.

(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) An order fixing or allowing greater or lesser compensation under subdivision (b) applies only prospectively to actions taken in administration of the trust after the order is made.

Comment. Subdivisions (a) and (b) of Section 15680 restate the first and second sentences of former Civil Code Section 2274 and the first and second sentences of former Probate Code Section 1122 without substantive change, except that subdivision (b) makes clear that the court can reduce the trustee's compensation when appropriate. Subdivision (c) makes clear that an order changing the amount of compensation cannot be applied retroactively to actions already taken. See also Sections 15682 (court determination of prospective compensation), 17200(b)(9) (petition to fix compensation).

* * * * *

§ 15684. Repayment of trustee for expenditures

15684. A trustee is entitled to the repayment out of the trust property for the following:

(a) Expenditures that were properly incurred in the administration of the trust.

(b) To the extent that they benefited the trust, expenditures that were not properly incurred in the administration of the trust.

Comment. Section 15684 continues former Civil Code Section 2273 without substantive change and supersedes part of the last sentence of Probate Code Section 1122 relating to proper expenses. Section 15684 also supersedes provisions relating to advancing the trustee's personal funds in former Probate Code Section 1120.2(14). Under this section, a trustee is not entitled to attorney's fees and expenses of a proceeding where it is determined that the trustee breached the trust, unless the court otherwise orders as provided in subdivision (b). See, e.g., Estate of Gilmaker, 226 Cal. App.2d 658, 662-65, 38 Cal. Rptr. 270 (1964); Estate of Vokal, 121 Cal. App.2d 252, 258-61, 262 P.2d 13 (1953).

§ 15685. Trustee's lien

15685. 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, and for expenses, losses, and liabilities sustained in the administration of the trust or because of ownership or control of any trust property.

Comment. Section 15685 continues the substance of part of subdivision (14) of former Probate Code 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). The reference in Section 15685 to liabilities because of ownership or control of trust property involves liability for taxes and assessments on trust property and tort liability arising out of trust property. See also Section 18001 (personal liability of trustee arising out of ownership or control of trust property).

CHAPTER 2. BENEFICIARIES

§ 15800. Limits on rights of beneficiary of revocable trust

15800. Except to the extent that the trust instrument otherwise provides or where the joint action of the settlor and all beneficiaries is required, during the time that a trust is revocable and the person holding the power to revoke the trust is competent:

(a) The person holding the power to revoke, and not the beneficiary, has the rights afforded beneficiaries under this division.

(b) The duties of the trustee are owed to the person holding the power to revoke.

Comment. Section 15800 is new. This section has the effect of postponing the enjoyment of rights of beneficiaries of revocable trusts until the death or incompetence of the settlor or other person holding the power to revoke the trust. See also Section 15802.5 (holder of general power of appointment or power to withdraw property from trust treated as settlor). Section 15800 thus recognizes that the holder of a power of revocation is in control of the trust and should have the rights to enforce the trust. See Section 17200 et seq. (judicial proceedings concerning trusts). A corollary principle is that the holder of the power of revocation may direct the actions of the trustee. See Section 16001 (duties of trustee of revocable trust); see also Sections 15401 (method of revocation by settlor), 15402 (power to revoke includes power to modify). Under this section, the duty to inform and account to beneficiaries is owed to the person holding the power to revoke during the time that the trust is presently revocable. See Section 16060 et seq. (trustee's duty to inform and account to beneficiaries). The introductory clause

recognizes that the trust instrument may provide rights to beneficiaries of revocable trusts which must be honored until such time as the trust is modified to alter those rights. See Sections 16001 (duties of trustee of revocable trust), 16080-16081 (duties with regard to discretionary trusts). The introductory clause also makes clear that this section does not eliminate the rights of beneficiaries of revocable trusts in situations where the joint action of the settlor and all beneficiaries is required. See Sections 15404 (modification or termination by settlor and all beneficiaries), 15411(b) (disposition of property on termination of trust with consent of settlor and all beneficiaries).

§ 15801. Consent by beneficiary of revocable trust

15801. (a) in any case where the consent of a beneficiary may be given or is required to be given before an action may be taken, during the time that a trust is revocable and the person holding the power to revoke the trust is competent, the person holding the power to revoke, and not the beneficiary, has the power to consent or withhold consent.

(b) This section does not apply where the joint consent of the settlor and all beneficiaries is required by statute.

Comment. Section 15801 is new. Subdivision (a) recognizes the principle that the consent of a beneficiary of a revocable trust should not have any effect during the time that the trust is presently revocable, since the power over the trust is held by the settlor or other person holding the power to revoke. See the Comment to Section 15800. See also Section 15802.5 (holder of general power of appointment or power to withdraw property from trust treated as settlor). Under the rule provided in Section 15801, the consent of the person holding the power to revoke, rather than the beneficiaries, excuses the trustee from liability as provided in Section 16460(a). Subdivision (b) makes clear that this section does not eliminate the requirement of obtaining the consent of beneficiaries in cases where the consent of the settlor and all beneficiaries is required. See Section 15404 (modification or termination by settlor and all beneficiaries).

§ 15802. Notice to beneficiary of revocable trust

15802. Notwithstanding any other statute, during the time that a trust is revocable and the person holding the power to revoke the trust is competent, a notice that is to be given to a beneficiary shall be given to the person holding the power to revoke and not to the beneficiary.

Comment. Section 15802 is new. This section recognizes that notice to the beneficiary of a revocable trust would be an idle act in

the case of a revocable trust since the beneficiary is powerless to act. See Section 15800 (limits on rights of beneficiary of revocable trust). See also Section 15802.5 (holder of general power of appointment or power to withdraw property from trust treated as settlor). For notice provisions, see Sections 17100-17107, 17203, 17403, 17504.

§ 15802.5. Rights of holder of power of appointment or withdrawal

15802.5. The holder of a general power of appointment or a power to withdraw property from the trust has the rights of a settlor provided by Sections 15800 to 15802, inclusive.

Comment. Section 15802.5 makes clear that a holder of a power of appointment or a power of withdrawal is treated as a settlor for purposes of Sections 15800-15802 in recognition of the fact that the holder of such power is in an equivalent position to control the trust as it relates to the property covered by the power.

§ 15803. Notice in case involving future interest of beneficiary

15803. (a) Subject to subdivisions (b) and (c), it is sufficient compliance with a requirement in this division that notice be given to a beneficiary, or to a person 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) 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 required to be given and a person to whom notice is not otherwise required to be given under subdivision (a), notice shall also be given to persons not otherwise entitled to notice under subdivision (a) with respect to whom the conflict of interest exists.

(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 17207.

Comment. Subdivision (a) of Section 15803 continues the substance of former Probate Code Section 1215.1. See also Section 24 ("beneficiary" defined). For provisions where this section applies, see Sections 17203 (notice of hearing on petitions generally), 17351 (provisions for removal of certain testamentary trusts from continuing jurisdiction), 17403 (notice of petition for transfer to another jurisdiction), 17504 (notice of petition for transfer to California).

Subdivision (b) continues the substance of former Probate Code Section 1215.2. Subdivision (c) continues the substance of the first sentence of former Probate Code Section 1215.4. See Section 17204 (request for notice and copy of petition).

PART 4. TRUST ADMINISTRATION

CHAPTER 1. DUTIES OF TRUSTEES

Article 1. Trustee's Duties in General

§ 16000. Duty to administer trust

16000. On acceptance of the trust, the trustee has a duty to administer the trust according to the trust instrument and, except to the extent the trust instrument provides otherwise, according to this division.

Comment. Section 16000 is drawn in part from Sections 164 and 169 of the Restatement (Second) of Trusts (1957). Section 16000 continues the part of former Civil Code Section 2258 requiring the trustee to "fulfill the purpose of the trust" and also continues former Civil Code Section 2253 insofar as it related to control of the trustee's duties by the trust instrument. See also Sections 15600 (acceptance of trust by trustee), 15800 (duties owed to person holding power to revoke), 15802.5 (duties owed to person with general power of appointment or power to withdraw trust property), 16001 (duties of trustee of revocable trust), 16040 (trustee's standard of care in performing duties).

* * * * *

§ 16002. Duty of loyalty

16002. (a) The trustee has a duty to administer the trust solely in the interest of the beneficiaries.

(b) It is not a violation of the duty provided in subdivision (a) for a trustee who administers two trusts to sell, exchange, or participate in the sale or exchange of trust property between the trusts, if the sale or exchange is fair and reasonable with respect to the beneficiaries of both trusts.

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

Subdivision (b) is a new provision drawn from Indiana law. See Ind. Code Ann. § 30-4-3-7(c) (West Supp. 1983-84). This subdivision permits sales or exchanges between two or more trusts that have the same trustee without running afoul of the duty of loyalty. This type of transaction would be prohibited under the Restatement. See Restatement (Second) of Trusts § 170 comment r (1957). See also Sections 15800 (limits on rights of beneficiary of revocable trust), 15801 (consent of beneficiary of revocable trust).

* * * * *

§ 16004. Duty to avoid conflict of interest

16004. (a) The 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.

(b) The trustee may not enforce any claim against the trust property that the trustee purchased after or in contemplation of appointment as trustee, but a court may allow the trustee to be reimbursed from trust property the amount that the trustee paid in good faith for the claim.

Comment. Subdivision (a) of Section 16004 restates former Civil Code Section 2229 and part of the introductory provision of former Civil Code Section 2230 without substantive change. See also Sections 16000 (duties subject to control by trust instrument), 16040 (trustee's standard of care in performing duties), 16015 (certain actions not violations of duties).

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

§ 16005. Duty not to undertake adverse trust

16005. The trustee of one trust has a duty not to knowingly become a trustee of another trust adverse in its nature to the interest of the beneficiary of the first trust, and a duty to eliminate the conflict or resign as trustee when the conflict is discovered.

Comment. Section 16005 supersedes former Civil Code Section 2232. See also Sections 16000 (duties subject to control by trust instrument), 16040 (trustee's standard of care in performing duties).

* * * * *

§ 16007. Duty to make trust property productive

16007. The trustee has a duty to make the trust property productive under the circumstances and in furtherance of the purposes of the trust.

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

§ 16008. Duty to dispose of improper investments

16008. (a) Except as provided in subdivision (b), the trustee has a duty within a reasonable time to dispose of any part of the

trust property included in the trust at the time of its creation, or later acquired by or added to the trust, that would not be a proper investment for the trustee to make.

(b) Unless the trust instrument expressly provides otherwise, the trustee may without liability continue to hold property included in the trust at its creation or later added to the trust or acquired pursuant to proper authority, if retention is in the best interests of the trust or in furtherance of the purposes of the trust.

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

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

§ 16009. Duty to keep trust property separate and identified

16009. The trustee has a duty to do the following:

(a) To keep the trust property separate from other property not subject to the trust.

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

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

* * * * *

§ 16012. Duty not to delegate

16012. The trustee has a duty not to delegate to others the performance 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. The first part of Section 16012 codifies the substance of Section 171 of the Restatement (Second) of Trusts (1957). The second part of Section 16012 codifies the substance of Section 4 of the Uniform Trustees' Powers Act (1964). See also Sections 15620 (actions by cotrustees), 15621 (vacancy in office of cotrustee), 15622 (temporary incapacity of cotrustee), 16000 (duties subject to control by trust instrument), 16040 (trustee's standard of care in performing duties), 16247 (power to hire agents of trust).

§ 16013. Duty with respect to cotrustees

16013. If a trust has more than one trustee:

(a) Each trustee has a duty to participate in the administration of the trust.

(b) Each trustee has a duty to take reasonable steps to prevent a cotrustee from committing a breach of trust or to compel a cotrustee to redress a breach of trust.

Comment. Section 16013 codifies the substance of Section 184 of the Restatement (Second) of Trusts (1957). This section is in accord with case law. See Bemmerly v. Woodward, 124 Cal. 568, 57 P. 561 (1899). See also Sections 16000 (duties subject to control by trust instrument), 16040 (trustee's standard of care in performing duties), 16402 (trustee's liability to beneficiary for acts of cotrustee). If a cotrustee is also a settlor under a revocable trust, a cotrustee who is not a settlor has a duty to follow the directions of the settlor-cotrustee pursuant to Section 16001. That duty supersedes the general duty under this section.

§ 16014. Duty to use special skills

16014. If the trustee has special skills or if the settlor has relied on the trustee's representation of having special skills, the trustee has a duty to use those skills.

Comment. Section 16014 is the same in substance as part of Uniform Probate Code Section 7-302 (1977) and is similar to the second part of Section 174 of the Restatement (Second) of Trusts (1957). See also Sections 16000 (duties subject to control by trust instrument), 16040 (trustee's standard of care in performing duties).

§ 16015. Certain actions not violations of duties

16015. The provision of services for compensation by a regulated financial institution or its affiliates in the ordinary course of business either to a trust of which it also acts as trustee or to a person dealing with the trust is not a violation of the duty provided in Section 16002 or 16004. For the purposes of this section, "affiliate" means a corporation that directly or indirectly through one or more intermediaries controls, is controlled by, or is under common control with another domestic or foreign corporation.

Comment. Section 16015 is new. This section is consistent with the rule stated in Estate of Pitzer, 155 Cal. App.3d 979, 988, 202 Cal. Rptr. 855 (1984). The definition of "affiliate" is the same as that provided in Corporations Code Section 150, with the addition of the reference to "domestic or foreign" corporations.

* * * * *

§ 16041. Standard of care not affected by compensation

16041. 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 16041 continues without substantive change the part of former Civil Code Section 2259 relating to the effect of compensation on the standard of care. A different rule applies to a custodian under the Uniform Transfers to Minors Act. See Section 3912(b)(1).

* * * * *

Article 3. Trustee's Duty to Report Information
and Account to Beneficiaries

§ 16060. Trustee's general duty to report information to beneficiaries

16060. The trustee has a duty to keep the beneficiaries of the trust reasonably informed of the trust and its administration.

Comment. Section 16060 is drawn from 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). The trustee is under a duty to communicate to the beneficiary material facts affecting the beneficiary's interest that the trustee knows (or has reason to know) the beneficiary does not know and that the beneficiary needs to know. See Restatement (Second) of Trusts § 173 comment d (1957). Thus, the

general duty provided in this section is ordinarily satisfied by compliance with Sections 16061 and 16062 unless there are special circumstances requiring particular information to be reported to beneficiaries. During the time that a revocable trust can be revoked, the duty provided by this section is not owed to the beneficiaries but only to the settlor or other person having the power to revoke. See Section 15800. See also Sections 24 ("beneficiary" defined), 16000 (duties subject to control in trust instrument), 16001 (duties of trustee of revocable trust), 16460 (limitations on proceedings against trustee).

§ 16061. Duty to report information about trust on request

16061. Except as provided in Section 16064, on reasonable request by a beneficiary, the trustee shall provide the beneficiary with a report of information about the assets, liabilities, receipts, and disbursements of the trust, the acts of the trustee, and the particulars relating to the administration of the trust relevant to the beneficiary's interest, including the terms of the trust that describe or affect the beneficiary's interest.

Comment. Section 16061 is drawn from Uniform Probate Code Section 7-303(b). The reference to the acts of the trustee is drawn from former Probate Code Section 1138.1(a)(5). If the trustee does not comply with the reasonable request of the beneficiary, information may be sought on petition pursuant to Section 17200(b)(7). Note that the right to petition for a report or account under Section 17200(b)(7) is limited to one report or account every six months and after a trustee has failed to furnish the report or account within 60 days after a written request. A beneficiary who is not entitled to an annual account under Section 16062 may be entitled to information or a particular account under this section. The availability of information on request under this section does not negate the affirmative duty of the trustee to provide information under Section 16060. During the time that a revocable trust can be revoked, the right to request information pursuant to this section does not belong to the beneficiaries but only to the settlor or other person having the power to revoke. See Section 15800. See also Sections 24 ("beneficiary" defined), 16064 (exceptions to duty to report and account). In an appropriate case, more information may be required under this section than through the duty to account annually. See Section 16063 (contents of annual account).

§ 16062. Duty to account to beneficiaries

16062. (a) Except as provided in Section 16064, the trustee shall account at least annually, at the termination of the trust, and upon a change of trustees, to each beneficiary to whom income or

principal is required or authorized in the trustee's discretion to be currently distributed.

(b) A trustee of a living trust created by an instrument executed before July 1, 1987, or of a trust created by a will executed before July 1, 1987, and not incorporated by reference in a will on or after July 1, 1987, is not subject to the duty to account provided in this section.

Comment. Subdivision (a) of Section 16062 supersedes parts of subdivisions (b) and (c) of former Probate Code Section 1120.1a and parts of former Probate Code Sections 1121 and 1138.1(a)(5). The requirement of an annual account is drawn from the statute formerly applicable to testamentary trusts created before July 1, 1977. See former Prob. Code § 1120.1a. The duty to provide information under Section 16060 is not necessarily satisfied by compliance with this section.

Subdivision (b) makes clear that the annual account required by subdivision (a) does not apply to pre-operative date trusts. This rule does not affect any requirement for an account that may exist under prior law, whether pursuant to statute or court order. See, e.g., former Prob. Code § 1120.1a(b).

§ 16063. Contents of account

16063. An account furnished pursuant to Section 16062 shall contain the following information:

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

(b) A statement of the assets and liabilities of the trust as of the end of the last complete fiscal year of the trust or since the last account.

(c) The trustee's compensation for the last complete fiscal year of the trust or since the last account.

(d) The agents hired by the trustee, their relationship to the trustee, if any, and their compensation, for the last complete fiscal year of the trust or since the last account.

(e) A statement that the recipient of the account may petition the court pursuant to Section 17200 to obtain a court review of the account and of the acts of the trustee.

(f) A statement that claims against the trustee for breach of trust may not be made after the expiration of one year from the date

the beneficiary receives an account disclosing facts giving rise to the claim.

Comment. Subdivisions (a)-(c) and (e) of Section 16063 are drawn from former Probate Code Section 1120.1a which applied to testamentary trusts created before July 1, 1977, that were removed from continuing jurisdiction. Subdivision (d) is a new provision. See also Section 16247 (power to hire agents) and the Comment thereto. Subdivision (f) is a new requirement intended to give beneficiaries notice of the one-year statute of limitations applicable to claims for breach of trust. See Section 16460. A beneficiary who has received an accounting that satisfies this section may also request additional information under Section 16061 and may petition for another accounting under Section 17200(a) and (b)(7) in appropriate circumstances.

§ 16064. Exceptions to duty to report information and account

16064. The trustee is not required to report information or account to a beneficiary in any of the following circumstances:

(a) To the extent the trust instrument waives the report or account.

(b) In the case of a beneficiary of a revocable trust, as provided in Section 15800.

(c) As to a beneficiary who has waived in writing the right to a report or account. A waiver of rights under this subdivision may be withdrawn in writing at any time as to the most recent account. A waiver has no effect on the beneficiary's right to petition for a report or account pursuant to Section 17200.

(d) Where the beneficiary and the trustee are the same person.

Comment. Section 16064 provides several limitations on the duty to report under Section 16061 and the duty to account under Section 16062. See also Sections 24 ("beneficiary" defined), 15800 (limits on rights of beneficiary of revocable trust). Notwithstanding being excused from the duty to report information, the trustee may want to provide information to the beneficiaries in order to start the running of the statute of limitations pursuant to Section 16460.

Article 4. Duties With Regard to Discretionary Powers

§ 16080. Discretionary powers to be exercised reasonably

16080. Except as provided in Section 16081, a discretionary power conferred upon a trustee is not left to the trustee's arbitrary discretion, but shall be exercised reasonably.

Comment. Section 16080 continues former Civil Code Section 2269(a) without substantive change.

* * * * *

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

§ 16100. Definitions

16100. As used in this article:

(a) "Charitable trust" means a charitable trust as described in Section 4947(a)(1) 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 Section 4947(a)(2) of the Internal Revenue Code.

Comment. Section 16100 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. See also Section 7 (reference to law includes later amendments or additions).

* * * * *

§ 16103. Exceptions applicable to split-interest trusts

16103. With respect to split-interest trusts:

(a) Subdivisions (b) and (c) of Section 16102 do not apply to any trust described in Section 4947(b)(3) of the Internal Revenue Code.

(b) Section 16102 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 Section 170(f)(2)(B), 2055(e)(2)(B), or 2522(c)(2)(B) of the Internal Revenue Code.

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

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

Comment. Section 16103 restates the substance of subdivisions (b) and (c) of former Civil Code Section 2271.1. See also Section 16100 ("split-interest trust" defined).

* * * * *

§ 16202. Exercise of powers subject to trustee's duties

16202. The grant of a power to the trustee, whether by the trust instrument, by statute, or by the court, does not in itself require or permit the exercise of the power. The exercise of a power by a trustee is subject to the trustee's fiduciary duties.

Comment. Section 16202 recognizes that a power granted to the trustee from any source does not necessarily permit the exercise of the power, nor does it mean that a power may not be exercised in a manner than conflicts with a general duty where the trust instrument so directs (see Section 16000) or where the trustee is directed so to act by a person holding the power to revoke the trust (see Section 16001). For example, the trust instrument may give the trustee discretion to favor one beneficiary over others, in apparent conflict with the general duty to deal with beneficiaries impartially under Section 16003. See also Section 16000 et seq. (trustee's fiduciary duties).

* * * * *

§ 16222. Participation in business; change in form of business

16222. (a) The trustee has the power to continue or participate in 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), the trustee may continue the operation of a business or other enterprise only as authorized by the trust or by the court, but the trustee may continue the operation of a business or other enterprise for a reasonable time pending a court hearing on the matter or a reasonable time pending a sale of the business or other enterprise.

Comment. Section 16222 supersedes subdivision (17) of former Probate Code Section 1120.2. Subdivision (a) is similar to Section 3(c)(3) of the Uniform Trustees' Powers Act (1964). Subdivision (b) is a new. Under Section 16222 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 16202 (exercise of powers is subject to duties).

§ 16223. Investments

16223. The trustee has the power to invest in any kind of property, whether real, personal, or mixed.

Comment. Section 16223 continues without substantive change 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., Fin. Code § 1564 (common trust funds); Gov't Code §§ 971.2, 17202, 61673; Harb. & Nav. Code §§ 6331, 6931; Health & Safety Code §§ 33663, 34369, 37649, 52040, 52053.5; Pub. Res. Code § 26026; Sts. & Hy. Code §§ 8210, 25371, 30241, 30242, 31173; Water Code §§ 9526, 20064. Section 16223 is the same in substance as Section 3(c)(5) of the Uniform Trustees' Powers Act (1964), except that surplus language has been omitted. Under this section any form of investment is permissible in the absence of a prohibition in the trust instrument or an overriding duty. This section is intended to permit investment in investment company shares, mutual funds, index funds, and other modern vehicles for collective investments. While investment in these funds is not forbidden merely because discretion over the fund is delegated to others, the trustee is ultimately subject to general fiduciary standards of care in making the investment. See Section 16040 (standard of care). See also Sections 62 ("property" defined), 16202 (exercise of powers is subject to duties).

* * * * *

§ 16225. Deposits

16225. (a) The trustee has the power to deposit trust funds at reasonable interest in any of the following accounts to the extent that the account is insured or collateralized by a government agency:

(1) An account in a bank.

(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 or affiliated with the trustee. For the purpose of this subdivision, a financial institution is affiliated with the trustee if it directly or indirectly through one or more intermediaries controls, is controlled by, or is under common control with 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.

(e) Nothing in this section prevents the trustee from holding an amount of trust property reasonably necessary for the orderly administration of the trust in the form of cash or in a checking account without interest.

Comment. Section 16225 continues without substantive change the part of subdivision (c) of former Civil Code Section 2261 relating to deposits in banks. The requirement that the funds be deposited at "reasonable" interest is new to the statute. Section 16225 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), except that the reference to present or future laws of the United States has been omitted as unnecessary. Subdivisions (a)(2) and (a)(3) incorporate limitations applicable under the guardianship-conservatorship statute; the language relating to the extent to which trust funds may be deposited in such accounts is new. See Section 21 ("account" defined). See also Fin. Code §§ 764 (fiduciaries' deposits in banks), 11207 (fiduciaries' deposits in federal savings and loan associations). For other provisions relating to deposits by trustees, see Fin. Code §§ 7000-7002.

Subdivisions (b)-(d) of Section 16225 continue part of subdivision (c) of former Civil Code Section 2261 without substantive change. See also Uniform Trustees' Powers Act § 3(c)(6) (1964). The second sentence of subdivision (b) is new; the definition of "affiliated" is the same as that provided in Corporations Code Section 150. Court authorization under subdivision (d) may be obtained as provided in Section 17200(b)(2), (5), and (6).

Subdivision (e) is a new provision drawn from Probate Code Section 920.3 relating to administration of decedents' estates. This subdivision recognizes that the limitation of the power to make deposits to accounts affording reasonable interest provided in subdivision (a) is not absolute, but is subject to reasonable requirements of trust administration.

See also Section 16202 (exercise of powers is subject to duties).

* * * * *

§ 16229. Repairs and alterations of property

16229. The trustee has the power to do any of the following:

(a) Make ordinary or extraordinary repairs, alterations, improvements in buildings or other trust property.

(b) Demolish any improvements.

(c) Raze existing or erect new party walls or buildings.

Comment. Section 16229 continues subdivision (6) of former Probate Code Section 1120.2 without substantive change and is the same in substance as Section 3(c)(8) of the Uniform Trustees' Powers Act (1964). The reference to improvements is new. See also Section 16202 (exercise of powers is subject to duties).

* * * * *

§ 16244. Loans to beneficiary

16244. The trustee has the power:

(a) To make loans out of trust property to the beneficiary on terms and conditions that the trustee determines are fair and reasonable under the circumstances.

(b) To guarantee loans to the beneficiary by encumbrances on trust property.

Comment. Section 16244 is new. The determination of what is fair and reasonable is subject to the fiduciary duties of the trustee and must be made in light of the purposes of the trust. If the trustee requires security for the loan to the beneficiary, 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). The interest of a beneficiary that is subject to a spendthrift restraint may not be used for security for a loan under this section. See Section 15300 et seq. (restraints on transfer). See also Section 16202 (exercise of powers is subject to duties).

§ 16245. Distribution to beneficiaries under legal disability

16245. The trustee has the power to pay any sum distributable to a beneficiary, without regard to whether the beneficiary is under a legal disability, by paying the sum to the beneficiary or by paying the sum to another person for the use or benefit of the beneficiary.

Comment. Section 16245 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 16202 (exercise of powers is subject to duties). In an appropriate case, a distribution may be

made to a custodian under the Uniform Transfers to Minors Act. See Sections 3905 (transfer authorized by trust), 3906 (other transfer by trustee).

* * * * *

§ 16247. Hiring persons

16247. The trustee has the power to hire persons, including accountants, attorneys, auditors, investment advisors, or other agents, even if they are associated or affiliated with the trustee, to advise or assist the trustee in the performance of administrative duties.

Comment. Section 16247 is new and is the same in substance as part of Section 3(c)(24) of the Uniform Trustees' Powers Act (1964). If the trustee is in doubt concerning the propriety of hiring an agent, the judicial procedure for obtaining instructions is available. See Section 17200(b)(6). An agent with a close relationship with the trustee or an insider may be hired when it is in the best interests of the trust, taking into account the duty of loyalty (see Section 16002) and the duty to avoid conflicts of interest (see Section 16004), and particularly as to routine matters, but in situations involving substantial matters, it is best to hire outside agents. The trustee has a duty to inform certain beneficiaries of agents hired, their relationship to the trustee, if any, and their compensation. See Section 16063(d). See also Sections 16012 (duty not to delegate), 16014 (duty to use special skills), 16202 (exercise of powers is subject to duties), 16401 (trustee's liability to beneficiary for acts of agent).

* * * * *

§ 16249. Actions and proceedings

16249. 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 16249 supersedes the last clause of subdivision (15) of former Probate Code Section 1120.2 and is the same in substance as Section 3(c)(25) of the Uniform Trustees' Powers Act (1964). As to the propriety of reimbursement for attorney's fees and other expenses of an action or proceeding, see Section 15684 and the Comment thereto. See also Sections 62 ("property" defined), 16010 (duty to enforce claims), 16011 (duty to defend actions), 16202 (exercise of powers is subject to duties).

* * * * *

§ 16301. Definitions

16301. 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) "Remainder beneficiary" means the person entitled to principal, presently or in the future, including income which has been accumulated and added to principal.

Comment. Section 16301 continues subdivisions (1)-(3) of former Civil Code Section 730.01. See also Section 84 ("trustee" defined).

§ 16302. Duty of trustee as to receipts and expenditures

16302. (a) A trust shall be administered with due regard to the respective interests of income beneficiaries and remainder beneficiaries. 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 16040 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 16302 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 16040 in place of the former reference to ordinary prudence, discretion, and judgment. 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 (Cum. Supp. 1982). The result of this change is that there is no inference of any sort of impropriety, not just imprudence or partiality, arising from an allocation contrary to this chapter.

Note. Section 16303 from the draft attached to Memorandum 85-73 has been combined with what was Section 16313. Accordingly, all section references between Sections 16303 and 16313 are one number less than the corresponding section in the draft attached to Memorandum 85-73.

§ 16304. When right to income arises; apportionment of income

16304. (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 person's death, it becomes subject to the trust as of the date of the death of the person even though there is an intervening period of administration of the person's estate.

(b) Upon an asset becoming subject to a trust by reason of a person's death:

(1) Receipts due but not paid at the date of death of the person 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 person 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 (b) of Section 16305.

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

* * * * *

§ 16312. Charges against income and principal

16312. (a) 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 this section.

(b) 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, remainder beneficiary, 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.

(c) 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.

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

(1) Trustee's compensation not chargeable to income under paragraphs (4) and (5) of subdivision (b), 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 (b), 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 (b) and by Section 16308.

(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 remainder beneficiary have an interest, any amount apportioned to the trust, including interest and penalties, even though the income beneficiary also has rights in the principal.

(e) Regularly recurring charges payable from income shall be apportioned to the same extent and in the same manner that income is apportioned under Section 16304.

Comment. Subdivision (a) of Section 16312 continues subdivision (c) of former Civil Code Section 730.03 without substantive change. Subdivisions (b)-(e) continue former Civil Code Section 730.13 without substantive change, except that the reference to "absolute discretion" is revised to read "discretion." This revision makes no substantive change. See Sections 16080-16081 (duties with regard to discretionary powers). A reference to "proceeding" has been added to subdivision (d)(2). See Section 17200 et seq. (judicial proceedings concerning trusts). Subdivision (d)(5) has been revised to refer to interest. This revision restores language from Section 13(c)(5) of the Revised Uniform Principal and Income Act and resolves an ambiguity in former law.

* * * * *

CHAPTER 4. LIABILITY OF TRUSTEES TO BENEFICIARIES

Article 1. Liability for Breach of Trust

§ 16400. Breach of trust

16400. A violation by the trustee of any duty that the trustee owes the beneficiary is a breach of trust.

Comment. Section 16400 is new and is drawn from Section 201 of the Restatement (Second) of Trusts (1957). Section 16400 supersedes former Civil Code Section 2234. While a trust is revocable, the trustee owes duties to the person holding the power to revoke and not to the named beneficiaries. See Section 15800; see also Section 15802.5 (holder of general power of appointment or power to withdraw property from trust treated as settlor).

§ 16401. Trustee's liability to beneficiary for acts of agent

16401. (a) Except as provided in subdivision (b), the trustee is not liable to the beneficiary for the acts or omissions of an agent employed by the trustee in the administration of the trust.

(b) The trustee is liable to the beneficiary for the acts or omissions of an agent of the trust that would be a breach of the trust if committed by the trustee under any of the following circumstances:

(1) Where the trustee has the power to direct the act of the agent.

(2) Where the trustee delegates to the agent the authority to perform an act that the trustee is under a duty not to delegate.

(3) Where the trustee does not use reasonable care in the selection of the agent or the retention of the agent selected by the trustee.

(4) Where the trustee does not exercise proper supervision over the agent's conduct in a case where the trustee has the power to supervise the agent.

(5) Where the trustee approves, acquiesces in, or conceals the act of the agent.

(6) Where the trustee neglects to take reasonable steps to compel the agent to redress the wrong in a case where the trustee knows or has information from which the trustee reasonably should have known of the agent's acts or omissions.

(c) The liability of a trustee for acts or omissions of agents that occurred before July 1, 1987, is governed by prior law and not by this section.

Comment. Subdivisions (a) and (b) of Section 16401 are new and are drawn from Section 225 of the Restatement (Second) of Trusts (1957). The former statutes did not provide a rule governing the trustee's liability for the acts or omissions of agents of the trust. Whether a trustee has acted reasonably under this section depends upon application of the standard of care provided in Section 16040. The trustee is not liable in a case where the action is performed or omitted pursuant to the written instructions of the person having the power to revoke a trust. See Section 16462. It should also be noted that the liability to beneficiaries does not include beneficiaries under revocable trusts during the time that the trust can be revoked. See Section 15800; see also Section 15802.5 (holder of general power of appointment or power to withdraw property from trust treated as settlor).

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

§ 16402. Trustee's liability to beneficiary for acts of cotrustee

16402. (a) Except as provided in subdivision (b), the trustee is not liable to the beneficiary for a breach of trust committed by a cotrustee.

(b) The trustee is liable to the beneficiary for a breach committed by a cotrustee under any of the following circumstances:

(1) Where the trustee participates in a breach of trust committed by the cotrustee.

(2) Where the trustee improperly delegates the administration of the trust to the cotrustee.

(3) Where the trustee approves, acquiesces in, or conceals a breach of trust committed by the cotrustee.

(4) Where the trustee negligently enables the cotrustee to commit a breach of trust.

(5) Where the trustee neglects to take reasonable steps to compel the cotrustee to redress a breach of trust in a case where the trustee knows or has information from which the trustee reasonably should have known of the breach.

Comment. Section 16402 is drawn from Section 224 of the Restatement (Second) of Trusts (1957). Section 16402 restates the substance of former Civil Code Section 2239 as follows: the substance of the former liability for consenting to wrongful acts of the cotrustee is restated in subdivision (b)(3), the substance of the former liability for negligently enabling the cotrustee to commit a breach is restated in subdivision (b)(4), and the substance of the former statement that the trustee was liable "for no others" is restated in subdivision (a). Subdivision (b)(5) is consistent with the case law rule under former law. See *Estate of Hensel*, 144 Cal. App.2d 429, 438, 301 P.2d 105 (1956) (citing the rule from the first Restatement). See also *Blackmon v. Hale*, 1 Cal.3d 548, 559, 463 P.2d 418, 83 Cal. Rptr. 194 (1970) (negligent inattention to duties). For the duty of a trustee with respect to cotrustees, see Section 16013. It should also be noted that the liability to beneficiaries does not include beneficiaries under revocable trusts during the time that the trust can be revoked. See Section 15800; see also Section 15802.5 (holder of general power of appointment or power to withdraw property from trust treated as settlor).

Note. Section 16403 is a revised version of Section 16404 in the draft attached to Memorandum 85-73. This reflects the proposed deletion of Section 16403 (liability of dissenting cotrustee to beneficiary) from the draft.

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

16403. (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 or omissions of a predecessor trustee in any of the following circumstances:

(1) Where the successor trustee knows or has information from which the successor trustee reasonably should have known 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.

(3) Where the successor trustee neglects to take proper steps to redress a breach of trust committed by the predecessor trustee in a case where the trustee knows or has information from which the trustee reasonably should have known of the predecessor trustee's breach.

Comment. Section 16403 is new and is the same in substance as Section 223 of the Restatement (Second) of Trusts (1957), except that the language relating to what the trustee should have known in subdivisions (b)(1) and (b)(3) is not in the Restatement. It should also be noted that the liability to beneficiaries does not include beneficiaries under revocable trusts during the time that the trust can be revoked. See Section 15800; see also Section 15802.5 (holder of general power of appointment or power to withdraw property from trust treated as settlor).

* * * * *

Civil Code § 2467 (technical amendment). Authorization of estate transactions

SEC. __. Section 2467 of the Civil Code is amended to read:

2467. (a) In a statutory short form power of attorney, the language conferring general authority with respect to "estate transactions" shall be construed to mean that the principal authorizes the agent to do all of the following:

(1) To the extent that an agent is permitted by law thus to act

for a principal, apply for and procure, in the name of the principal, letters of administration, letters testamentary, letters of trusteeship, or any other type of authority, either judicial or administrative, and act as a fiduciary of any sort.

(2) To the extent that an agent is permitted by law thus to act for a principal, represent and act for the principal in all ways and in all matters affecting any estate of a decedent, absentee, minor, or incompetent, or any trust or other fund, out of which the principal is entitled, or claims to be entitled, to some share or payment or with respect to which the principal is a fiduciary.

(3) Accept, reject, receive, receipt for, sell, assign, release, disclaim, renounce, pledge, exchange, or consent to a reduction in or modification of, any share in or payment from any estate, trust, or other fund, with or without consideration.

(4) Demand and obtain by action, proceeding, or otherwise, any money or other thing of value to which the principal is, may become, or may claim to be entitled by reason of the death testate or intestate of any person or of any testamentary disposition or of any trust or by reason of the administration of the estate of a decedent or absentee or of the guardianship of a minor or the conservatorship of an incompetent or the administration of any trust or other fund; initiate, participate in, or oppose any proceeding, judicial or otherwise, for the ascertainment of the meaning, validity, or effect of any deed, will, declaration of trust, or other transaction affecting in any way the interest of the principal; initiate, participate in, or oppose any proceeding, judicial or otherwise, for the removal, substitution, or surcharge of a fiduciary; and conserve, invest, disburse, or utilize anything so received for purposes enumerated in this section and to reimburse the agent for any expenditures properly made in the execution of the powers conferred on the agent by the statutory short form power of attorney.

(5) Establish any trust with the assets of the principal for the benefit of the principal and the spouse and descendants of the principal, or any one or more of them, upon such terms as the agent determines are necessary or proper; transfer any asset in which the principal has an interest to any such trust or to any trust that the

principal has created; and exercise in whole or in part, release, or let lapse any power the principal may have under any trust whether or not created by the principal, including any power of appointment, revocation, or withdrawal, but a trust created by the principal may only be revoked by the agent as provided in the trust instrument.

(6) Purchase for the principal United States treasury bonds redeemable at par value in payment of federal estate taxes; borrow money from any source for that purpose; make, execute, endorse, and deliver promissory notes, bills of exchange, drafts, agreements, or other obligations for those bonds, and as security for them pledge, mortgage, and assign any stock, bonds, securities, insurance values, or other properties, real or personal, in which the principal may have an interest; and arrange for the safekeeping and custody of any of those treasury bonds.

(7) Prepare, sign, file, and deliver all reports, compilations of information, returns, or papers with respect to any interest had or claimed by or on behalf of the principal in any estate, trust, or other fund; and pay, compromise, or contest, and apply for refunds in connection with any tax or assessment with respect to (A) any interest had or claimed by or on behalf of the principal in any estate, trust, or other fund or by reason of the death of any person or (B) any property in which that interest is had or claimed.

(8) Agree and contract, in any manner, with any person, and on any terms, which the agent may select, for the accomplishment of the purposes enumerated in this section; and perform, rescind, reform, release, or modify any such agreement or contract or any other similar agreement or contract made by or on behalf of the principal.

(9) Execute, acknowledge, verify, seal, file, and deliver any consent, designation, pleading, notice, demand, election, conveyance, release, disclaimer, assignment, check, pledge, waiver, admission of service, notice of appearance, or other instrument the agent believes useful for the accomplishment of any of the purposes enumerated in this section.

(10) Submit to arbitration, settle, and propose or accept a compromise with respect to, any controversy or claim which affects the estate of a decedent, absentee, minor, or incompetent, or the

administration of a trust or other fund, in which the principal has or claims to have an interest; and do any act which the agent believes desirable or necessary in effectuating the compromise.

(11) Hire, discharge, and compensate any attorney, accountant, expert witness, or other assistant, when the agent believes it necessary or desirable for the proper execution of any of the powers described in this section or for the keeping of needed records.

(12) In general, and in addition to all the specific acts enumerated in this section, do any other act which the principal can do through an agent with respect to the estate of a decedent, absentee, minor, or incompetent, or the administration of a trust or other fund, in any one of which the principal has or claims to have an interest or with respect to which the principal is a fiduciary.

(b) All powers described in this section are exercisable equally with respect to any estate of a decedent, absentee, minor, or incompetent, or the administration of any trust or other fund, in which the principal is interested at the time of the giving of the power of attorney or may thereafter become interested, whether located in this state or elsewhere.

Comment. Paragraph (5) of subdivision (a) of Section 2467 is amended to conform to Probate Code Section 15401(b) which precludes revocation of a trust by an attorney in fact unless the trust instrument expressly so permits.

EXHIBIT 2

Restatement (Second) of Trusts §§ 197-199

§ 197. Nature of Remedies of Beneficiary

Except as stated in § 198, the remedies of the beneficiary against the trustee are exclusively equitable.

Comment:

a. Equitable remedy. An equitable remedy is a remedy given by a court of chancery or a court having and exercising the powers of a court of chancery. Compare § 2, Comments *e, f*.

b. Breach of contract. A trustee who fails to perform his duties as trustee is not liable to the beneficiary for breach of contract in the common-law actions of special assumpsit or covenant or in a similar action at law in States in which the common-law forms of action have been abolished. The creation of a trust is conceived of as a conveyance of the beneficial interest in the trust property rather than as a contract. Moreover, questions of the administration of trusts have always been regarded as of a kind which can adequately be dealt with in a suit in equity rather than in an action at law, where questions of fact would be determined by a jury and not by the court. The mere fact that there may happen to be a promise in words by the trustee to perform the trust does not give the common-law courts concurrent jurisdiction over the administration of the trust.

The trustee by accepting the trust and agreeing to perform his duties as trustee does not make a contract to perform the trust enforceable in an action at law. The trustee may by contract undertake other duties than those which he undertakes as trustee, and if he does so he will be liable in an action at law for failure to perform such duties.

c. Where beneficiary entitled to possession. Where the trustee is under a duty to allow the beneficiary to take possession of land held in trust and violates this duty, he is not liable to the beneficiary in an action of ejectment or trespass or in any other action at law.

d. Wrongful dealing with chattels. If a trustee of chattels wrongfully deals with the chattels, he is not liable to the beneficiary in the common-law actions of trespass, trover, detinue, replevin or case or in any other action at law, except as stated in § 198(2).

§ 198. Legal Remedies of Beneficiary

(1) If the trustee is under a duty to pay money immediately and unconditionally to the beneficiary, the beneficiary can maintain an action at law against the trustee to enforce payment.

(2) If the trustee of a chattel is under a duty to transfer it immediately and unconditionally to the beneficiary and in breach of trust fails to transfer it, the beneficiary can maintain an action at law against him.

Comment:

a. Concurrent remedies. Although the beneficiary can maintain an action at law against the trustee as stated in this Section, he has also equitable remedies against the trustee. See § 199.

Comment on Subsection (1):

b. Where money due beneficiary. At common law a person who held the legal title to money to which another person was beneficially entitled was liable to the other person in the common-law action of account. This form of action became generally obsolete and was superseded by a bill in equity and by the actions of debt and general assumpsit, the scope of which actions was extended to cover the situation stated in Subsection (1). Accordingly the actions of debt and general assumpsit, or a similar action at law in States where the common-law forms of action have been abolished, are now available to the beneficiary against a trustee to enforce a duty immediately and unconditionally to pay money to the beneficiary.

Illustrations:

1. A pays \$1000 to B in trust to invest the money and to pay the principal and accrued income to C when C reaches the age of twenty-one. When C reaches the age of twenty-one, B has on hand \$1500 including the principal and accrued income. C can recover against B in an action of debt or general assumpsit or in an action at law in States where the forms of action have been abolished.

2. A transfers shares of stock to B in trust to pay the income to C on the first of January and on the first of July. B receives dividends in March and fails to pay them to C on the first of July. B is liable to C in an action of debt or general assumpsit or in an action at law in States where the forms of action have been abolished.

3. A transfers shares of stock to B in trust to pay the dividends accruing thereon to C. A dividend is received by B and B misappropriates it. B is liable to C in an action of debt or general assumpsit or in an action at law in States where the forms of action have been abolished.

4. A transfers a farm to B in trust to manage the farm and to pay the net income to C. B makes various expenditures and receives various sums of money and states an account showing that there is a net income due to C of \$1000. B is liable to C in an action of debt or general assumpsit or in an action at law in States where the forms of action have been abolished.

This does not mean, however, that a trustee who is under an immediate and unconditional duty to pay to the beneficiary money held in trust has ceased to be a trustee and has become a debtor. Being still a trustee and not a debtor, he is not liable if the money is lost without a breach of trust (see § 204), and although the trustee is insolvent, the beneficiary is entitled in equity to the money, or its proceeds if traceable, in priority to the claims of general creditors of the trustee (see § 202).

By the terms of the trust or by agreement between the parties, however, a novation may be effected whereby the trustee becomes a debtor. See § 12, Comment *o*. In the absence of such terms of the trust or agreement, the trustee cannot by his own act turn his obligation as trustee into that of a debtor.

c. Where money not immediately payable. If the trustee is not under a duty to pay money immediately and unconditionally to the beneficiary, the beneficiary cannot maintain an action at law against him.

Illustration:

5. A bequeaths \$100,000 to B in trust to pay to C or apply for C's benefit so much of the income as is necessary for C's support. C cannot maintain an action at law against B.

d. Active trusts. If the trustee misappropriates money which it is his duty to continue to hold in trust, the beneficiary, not being entitled to immediate payment, cannot maintain an action at law against the trustee. His remedy is a suit in equity to compel the trustee to restore the money misappropriated and to hold it in trust or to pay it to a new trustee. If, however, the trustee is first removed and a new trustee is appointed, the new trustee can maintain an action at law against him to recover the amount misappropriated, since he is under a duty to pay the money immediately and unconditionally to the new trustee.

e. Liability to pay damages for breach of trust. An action at law cannot be maintained against a trustee for damages for a breach of trust as distinguished from an indebtedness arising out of a breach of trust. Thus, if the trustee negligently injures or destroys the subject matter of the trust, other than money, he is not liable in an action at law.

Comment on Subsection (2):

f. Where duty to convey chattel to beneficiary. Although the trustee of a chattel has legal title to the chattel, an action at law can be maintained by the beneficiary against him where the trustee is under a duty to transfer the chattel to the beneficiary at any time the beneficiary may demand it, and violates this duty either by refusing to transfer the chattel on demand or by misappropriating it.

Illustration:

6. A transfers an automobile to B by bill of sale with the understanding that B would resell the automobile at a certain price and if he could not obtain that price that he would reconvey it to A. B having failed to sell the automobile transferred it to a creditor of his in payment of a debt. B is liable to A in an action of trover or in a similar action at law.

§ 199. Equitable Remedies of Beneficiary

The beneficiary of a trust can maintain a suit

- (a) to compel the trustee to perform his duties as trustee;
- (b) to enjoin the trustee from committing a breach of trust;
- (c) to compel the trustee to redress a breach of trust;
- (d) to appoint a receiver to take possession of the trust property and administer the trust;
- (e) to remove the trustee.

Comment:

a. Specific performance. The beneficiary of a trust can maintain a suit to compel the trustee to perform his duties as trustee. It is immaterial that there is an adequate remedy at law. See § 198. The beneficiary can in a proper case bring a bill to have the court declare what the duties of the trustee are and to enforce them.

b. Injunction. The beneficiary can maintain a suit to enjoin a breach of trust, if there is a reasonable likelihood that the trustee will commit such a breach.

c. Redress for breach of trust. If the trustee has committed a breach of trust, the beneficiary can maintain a suit to compel the trustee to redress the breach of trust. See § 205.

d. Appointment of receiver. A receiver will be appointed by the court to take possession of the subject matter of the trust or a part thereof and to administer the trust in respect thereto, if this is necessary for the protection of the interest of the beneficiary.

If proceedings are brought for the removal of the trustee and it appears necessary or proper during the course of the proceedings that the trust should be administered under the supervision of the court, the court may appoint a receiver until it is determined whether the trustee should be removed and a new trustee appointed. The receivership will be terminated by the court when it is determined by the court that the trustee may properly continue as trustee, or when a new trustee is appointed and the title to the trust property is vested in him.

e. Removal of trustee. The court will remove a trustee if he has committed a sufficiently serious breach of trust or if it is probable that he will commit such a breach of trust or where for any other reason his continuance as trustee is likely to be detrimental to the interest of the beneficiary. See § 107.

If the trustee who is removed is a sole trustee, the court will appoint a new trustee; if the trustee who is removed is one of several trustees, the remaining trustees may be permitted to administer the trust or the court may appoint a new trustee, in accordance with the rule stated in § 108.

The new trustee can maintain a suit against the old trustee for the breach of trust, or such suit can be maintained by the beneficiary. See § 200.

f. Judicial jurisdiction of the State. A beneficiary may pursue the remedies enumerated in this Section in the court which has jurisdiction over the administration of the trust. As to the court which has jurisdiction over the administration of a trust of land, see Restatement of Conflict of Laws, § 243; as to the court which has jurisdiction over the administration of a trust of movables, see Restatement of Conflict of Laws, § 299. Such a proceeding may be a proceeding quasi in rem to affect interests in the trust property. It may be a proceeding in personam to subject the trustee to personal liability, or to enjoin him from committing a breach of trust, or to compel him to make specific reparation for a breach of trust, or to remove him.

If the proceeding is a proceeding quasi in rem, the court must have jurisdiction over the trust property to be affected by its judgment, but there need be no jurisdiction over the trustee personally, although he must be given reasonable notice and an opportunity to be heard. See Restatement of Judgments, §§ 3, 32, 75.

If the proceeding is a proceeding in personam, the court must have jurisdiction over the trustee personally. See Restatement of Judgments, §§ 1, 14. If the trustee is a non-resident of the State in which the proceeding is brought, it is often provided

by statute that before being permitted to act as trustee under a will, he must authorize a resident or a public official to receive service of process upon him. In some States it is provided by statute that a trustee under a will, by accepting the appointment as trustee, subjects himself personally to the jurisdiction of the court having supervision of the administration of the trust if service is made upon him in the manner specified in the statute.

In any case reasonable notice of the proceeding and an opportunity to be heard must be given to the trustee. See Restatement of Judgments, § 6.

Under certain circumstances a proceeding may be brought by a beneficiary against the trustee in a State other than that in which a court has jurisdiction over the administration of the trust; as, for example, where the trustee repudiates the trust and removes with the trust property to another State. See Restatement of Conflict of Laws, § 299.

As to the persons who should be made parties to judicial proceedings involving future interests, see Restatement of Property, §§ 180-186.

As to the jurisdiction of the court on an accounting by the trustee, see § 220, Comments *c* and *d*.