

## Memorandum 2001-47

### **Uniform Unincorporated Nonprofit Association Act: Property Issues**

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The Commission has decided to recommend the reorganization and improvement of existing law governing unincorporated associations, rather than adoption of the Uniform Unincorporated Nonprofit Association Act. This project is proceeding incrementally, with the Commission considering different subject areas (e.g., property issues) and tentatively approving proposals before moving on to the next subject area. Once all of the subject areas have been considered, the staff will prepare a draft tentative recommendation for the Commission's consideration.

This memorandum discusses three general issues relating to unincorporated associations and property: (1) the capacity of an unincorporated association to own property and to engage in property transactions, (2) the authority of a person to transfer real property on behalf of an unincorporated association, and (3) disposition of the assets of an unincorporated association on termination of the association's existence.

Draft language implementing staff recommendations is set out in the memorandum for Commission review. Section numbers for the draft language have been assigned arbitrarily for temporary reference. When a draft tentative recommendation is prepared, the proper organization and numbering of the sections will be determined.

All statutory references in this memorandum are to the Corporations Code.

#### CAPACITY TO ACQUIRE, OWN, AND TRANSFER PROPERTY

Existing Section 20001 provides that an unincorporated association has the capacity to own property and engage in property transactions:

Any unincorporated society or association, and every lodge or branch of any such society or association, and any labor organization, may, without incorporation, purchase, receive, own, hold, lease, mortgage, pledge, or encumber, by deed of trust or otherwise, manage, and sell all such real estate and other property as may be necessary for the business purposes and objects of the

society, association, lodge, branch or labor organization, subject to the laws and regulations of the society, association, lodge, or branch and of the grand lodge thereof, or labor organization; and also may take and receive by will or deed all property not so necessary, and hold it until disposed of within a period of 10 years from the acquisition thereof.

Section 20001 could be substantially simplified by replacing the lists of covered entities and authorized actions with more generic language. For example, Section 4 of the Uniform Nonprofit Unincorporated Association Act provides:

- (a) A nonprofit association in its name may acquire, hold, encumber, or transfer an estate or interest in real or personal property.
- (b) A nonprofit association may be a legatee, devisee, or beneficiary of a trust or contract.

The clarity and simplicity of this language is attractive and **the staff recommends** that it be used as a starting point for the draft language. However, it poses three potential problems: (1) it is limited to “nonprofit associations,” (2) the list of authorized actions may be too narrow, and (3) it does not include existing “business purposes and objects” limitations. These issues are discussed below.

### **Nonprofit and For-Profit Associations**

The Uniform Act rule on capacity to own property and engage in property transactions is limited to nonprofit associations. Section 20001 applies to “unincorporated associations,” which may include the various forms of for-profit association (e.g., partnerships, limited liability companies, etc.). Of the for-profit forms of unincorporated association, only one appears to have a statute expressly establishing property powers. See Section 17003(e)-(f) (limited liability company). If the rule in Section 20001 is intended to apply to for-profit associations, then the Uniform Act language could undercut the authority of for-profit unincorporated associations to own property and engage in property transactions. **The staff recommends** that the draft language apply to “unincorporated associations.”

As has been previously discussed, the question of whether “unincorporated association” includes for-profit entities, such as partnerships, is not always clear. This memorandum assumes that a provision using the term “unincorporated association” is intended to apply to for-profit entities unless other law clearly governs such entities in that context. The extent to which the law of

unincorporated associations should govern for-profit unincorporated associations will need to be studied more closely when the Commission considers the proper definitions of “unincorporated association” and “nonprofit association.”

### **Authorized Actions**

The Uniform Act provides that an association may “acquire, hold, encumber, or transfer an estate or interest in real or personal property.” This should cover the transactions authorized in Section 20001. However, Section 20001 also authorizes an unincorporated association to “manage” property. While ownership of property implies a right to manage the property, there is no harm in expressly providing a power of management. **The staff recommends** that “manage” be added to the Uniform Act’s list of property powers, and that the full list of actions authorized by Section 20001 be set out in the Comment to the draft language.

### **Business Purposes and Objects**

Section 20001 requires that the acquisition, ownership, encumbrance, or transfer of property be “necessary for the business purposes and objects” of an association. Property that is not necessary for the business purposes and objects of the association can be held for no longer than 10 years. The staff researched the legislative history of Section 20001 and could find no indication of the purpose of these limitations. Nor is there any case law interpretation.

Section 20001 does not specify the consequences of a property transaction that is unnecessary for the business purposes or objects of the association. It may be that an unnecessary transaction is void or voidable. See, e.g., Restatement (Second) of Contracts § 12 (1981) (“No one can be bound by contract who has not legal capacity to incur at least voidable contractual duties.”). If so, this poses a problem for third parties who transact business with an unincorporated association. The validity of the transaction will depend on the purpose of the association — which the third party may not be in a position to determine. The purpose of an unincorporated association is presumably defined in the association’s governing documents, which are not publicly filed, may be ambiguous, and are subject to change.

In the General Corporation Law, there is an exception to the common law ultra vires doctrine, providing that “no limitation upon the business, purposes,

or powers of the corporation, or upon the powers of the shareholders, officers or directors, or the manner of exercise of such powers ... shall be asserted as between the corporation or any shareholder and any third person....” Section 208(a). This exception does not preclude suits to enjoin ongoing unauthorized business (where the third party has not yet acquired rights), suits to dissolve the corporation, or suits against the officers or directors for violation of their authority.

**The staff recommends** that the business purposes and objects limit on transactions be preserved, as it provides a modest and reasonable limit on the powers of an association, and that a new section protecting third parties, similar to Section 208(a), be added. Such a provision could also protect third parties in cases where a transaction is within the power of an unincorporated association, but is executed incorrectly (e.g., the association fails to follow the execution rules discussed below).

If the business purposes and objects limitation is preserved, an exception should perhaps be added for property acquired by will or other donative transfer. Existing law recognizes that an unincorporated association can acquire property “by will or deed” that is not necessary to its business purposes and objects, but requires that the property be disposed of within 10 years. There are problems with this rule. Apparently, the unincorporated association is allowed to “hold” the property, but is not permitted to “manage” it. This seems unwise and is probably the result of careless drafting. Also, the ten year limit seems arbitrary. The staff sees no reason to impose a 10-year time limit on ownership of unnecessary property. If it is truly unnecessary, why permit ownership for such a lengthy period, and why would an association choose to keep unnecessary property for such a long time? With respect to property acquired by will, no association resources are expended to acquire the property, so there is no concern about misuse of association resources. **The staff recommends** that an unincorporated association have the power to hold, manage, encumber, and transfer property acquired by will or other donative transfer, regardless of whether the property is necessary for its business purposes or objects, and without any time limit.

### **Draft Language**

The staff recommends that existing Section 20001 be replaced with provisions along the following lines:

### **§ 18100. Property powers**

18100. (a) An unincorporated association in its name may acquire, hold, manage, encumber, or transfer an estate or interest in real or personal property as necessary to achieve its business purposes and objects.

(b) An unincorporated association may acquire an estate or interest in real or personal property by will or other donative transfer, and may hold, manage, pledge, encumber, or transfer that property, whether or not the property is necessary for the business purposes or objects of the association.

**Comment.** Section 18100 continues former Section 20001 without substantive change, except that the former provision requiring disposition within 10 years of unnecessary property acquired by will or deed is not continued. Under this section, an unincorporated association has all of the powers granted under former Section 20001, including the power to “purchase, receive, own, hold, lease, mortgage, pledge, or encumber, by deed of trust or otherwise, manage, and sell” property.

### **§ 18105. Limit on assertion of unauthorized action**

18105. No limitation on the power of an unincorporated association to acquire, hold, manage, pledge, encumber, or transfer an estate or interest in real or personal property, or the manner of exercise of those powers, shall be asserted as between the unincorporated association or a member of the unincorporated association and a third person, except in the following proceedings:

(a) A proceeding to enjoin an unauthorized act, or the continuation of an unauthorized act, where a third party has not yet acquired rights that would be adversely affected by the injunction.

[(b) A proceeding to dissolve the unincorporated association.]

(c) A proceeding against an officer of the unincorporated association for violation of the officer’s authority.

**Comment.** Section 18105 is drawn from Section 208(a). It protects third parties from claims that an action of an unincorporated association is unauthorized or improperly executed. See Sections 18100(a) (limiting property powers of unincorporated association to those necessary for business purposes and objects of association), 18110 (requirements for transfer of real property by unincorporated association).

In the tentative recommendation, a note could follow Section 18100 specifically asking for input on whether there is a need to preserve the 10-year disposition rule. Proposed Section 18105(b) is bracketed because it is not clear to what extent formal judicial dissolution is necessary in the context of an unincorporated

association. The manner in which the existence of an unincorporated association is terminated will be considered in a later memorandum discussing governance issues.

#### TRANSFER OF REAL PROPERTY

Section 20002 governs who may transfer real property owned by an unincorporated association. Its first paragraph provides:

All conveyances transferring or in any manner affecting the title to real estate owned or held by an unincorporated benevolent or fraternal society or association, or lodge or branch thereof, or labor organization, shall be executed by its presiding officer and recording secretary under its seal after resolution duly adopted by the society, association, lodge, or branch authorizing the conveyance, and in the case of other unincorporated associations for which no specific provision is made by statute shall be executed by (a) its president or other head and secretary, recording secretary, or other comparable officer, or (b) other officers or persons specifically designated by a resolution duly adopted by the association or by a committee or body duly authorized to act by the articles of association or bylaws.

This provision states one rule for fraternal or benevolent societies and labor organizations, and a different, more flexible rule for any other unincorporated association “for which no specific provision is made by statute.”

It isn't clear why a stricter rule applies to fraternal or benevolent societies, and labor organizations — specifically, why shouldn't these groups be able to designate a person by resolution to transfer property on their behalf? The answer may simply be historical. When the provision was first added, it only applied to fraternal or benevolent societies. In 1970, Section 20001 was amended to empower all unincorporated associations to transfer property and Section 20002 was amended to provide the more flexible execution rule applicable to “other” unincorporated associations. The author of the 1970 amendments may have added the more flexible rule to apply to all types of unincorporated association, without considering whether the new execution rule might also be adequate for fraternal or benevolent societies and labor organizations.

If the Commission decides to preserve both execution rules, then no major changes need to be made to existing law. If, however, the Commission concludes that a single rule should apply, the paragraph could be substantially simplified.

**The staff recommends** the latter approach, which could be implemented by replacing the first paragraph of Section 20002 with a new section along the following lines:

**§ 18110. Transfer of real property**

18110. Except as otherwise provided by statute, a transfer affecting title to real property owned by an unincorporated association shall be executed by one of the following:

(a) The president or other head and the secretary, recording secretary or other comparable officer.

(b) A person specifically designated by a resolution duly adopted by the association or by a committee or other body duly authorized to act by the governing instruments of the association.

**Comment.** Section 18110 continues the first paragraph of former Section 20002 without substantive change, except that the special rule for fraternal or benevolent societies and labor organizations has not been continued. These organizations are now subject to the same rule as any other form of unincorporated association.

In the tentative recommendation, a note could follow the draft language specifically asking for input on whether there is a need to preserve the stricter rule for fraternal or benevolent societies and labor organizations.

**RECORDED STATEMENT OF AUTHORITY**

The second paragraph of Section 20002 provides a procedure for recording a statement of authority to transfer real property on behalf of an unincorporated association (other than a fraternal or benevolent society, or labor organization), and protecting a bona fide purchaser or encumbrancer for value who relies on such a recorded statement:

An unincorporated association not otherwise authorized by statute may record in any county in which it owns or has an interest in real property a verified and acknowledged statement, or a certified copy of such statement recorded in another county, setting forth the name of the association, the names of its officers and the title or capacity of its officers and other persons who are authorized on its behalf to execute conveyances of real property owned or held by the association. It shall be conclusively presumed in favor of any bona fide purchaser or encumbrancer for value of real property of the association located in the county in which such statement or certified copy has been recorded that the officers and persons designated in the statement are duly authorized to execute such conveyances unless there is recorded in such county by

anyone claiming to be a member of the association a statement, verified and acknowledged by the person executing it, which shall set forth the name of the association, particularly identify the recorded statement of the unincorporated association, and state that such previously recorded statement was recorded without authority or that the officers or other persons designated therein are not so authorized. For the purposes of this paragraph, the definitions of “conveyance” and “purchaser” in Section 15010.5 and the definition of “unincorporated association” in Section 24000 shall apply, except that “unincorporated association” shall not include partnerships.

The meaning of “not otherwise authorized by statute” in the first sentence of the section is not entirely clear. The staff recommends that the paragraph be rewritten to make it a separate section, divided into subdivisions, and that the ambiguous phrase be replaced with “Except as otherwise provided by law...”. Thus:

**§ 18115. Recorded statement of authority to transfer**

18115. (a) Except as otherwise provided by law, an unincorporated association may record in any county in which it owns or has an interest in real property a verified and acknowledged statement, or a certified copy of such statement recorded in another county, setting forth the name of the association, the names of its officers and the title or capacity of its officers and other persons who are authorized on its behalf to transfer real property owned or held by the association.

(b) It shall be conclusively presumed in favor of any bona fide purchaser or encumbrancer for value of real property of the association located in the county in which such statement or certified copy has been recorded that the officers and persons designated in the statement are duly authorized to transfer real property unless there is recorded in such county by anyone claiming to be a member of the association a statement, verified and acknowledged by the person executing it, which shall set forth the name of the association, particularly identify the recorded statement of the unincorporated association, and state that such previously recorded statement was recorded without authority or that the officers or other persons designated therein are not so authorized.

(c) As used in this section, “unincorporated association” has the meaning provided in Section 24000, except that “unincorporated association” does not include a partnership.

**Comment.** Section 18115 continues the second paragraph of former Section 20002 without substantive change.

Former Section 20002 incorporated definitions set out in former Section 15010.5, which was repealed. The obsolete definitions have not been continued. The term “conveyance” has been replaced with the term “transfer.” This is a nonsubstantive change.

#### DISPOSITION OF PROPERTY ON TERMINATION

Section 9 of the Uniform Act provides for the disposition of personal property of an inactive unincorporated nonprofit association:

If a nonprofit association has been inactive for [three] years or longer, a person in possession or control of personal property of the nonprofit association may transfer the property:

(1) if a document of a nonprofit association specifies a person to whom transfer is to be made under these circumstances, to that person; or

(2) if no person is so specified, to a nonprofit association or nonprofit corporation pursuing broadly similar purposes, or to a government or governmental subdivision, agency, or instrumentality.

This language raises a number of issues: (1) Should the rule be limited to nonprofit associations? (2) Should the provision allow distribution of assets to members. (3) Should the rule be limited to personal property? (4) Should the rule apply to termination of an unincorporated association as well as “inactivity?” These issues are discussed below:

#### **Exclusion of For-Profit Associations**

The rule should be limited to nonprofit associations. Existing law already addresses the disposition of the property of for-profit unincorporated associations on termination. On winding up a partnership, an accounting is performed to determine each partner’s share of any remaining assets or outstanding liabilities. Section 16807. Specific statutes govern distribution of assets of a dissolved limited partnership (Section 15684) and limited liability company (Section 17353). On termination of a business trust, any remaining assets are distributed to shareholders in proportion to their ownership of shares. See *Goldwater v. Oltman*, 210 Cal. 408 (1930). The same would presumably be true of a defunct joint stock company or real estate investment trust.

## **Distribution to Members**

California has no statute governing disposition of the assets of an unincorporated nonprofit association on termination. However, there is case law discussing distribution of the assets of a dissolved unincorporated nonprofit association. In *Holt v. Santa Clara County Sheriff's Benefit Ass'n*, 250 Cal. App. 2d 925 (1967), the court held that distribution is determined by the association's constitution and bylaws. If the association does not have an applicable provision in its constitution and bylaws, the assets should be distributed to the membership, pro rata. This differs from the Uniform Act in that the statutory default rule is distribution to members rather than distribution to a similar nonprofit association.

In *Holt*, the association at issue was a mutual benefit association, designed to provide retirement and death benefits to its members and their families. Since the property of the association was intended to benefit the members, distribution of assets to members was proper. It is analogous to the rule that allows distribution of the assets to the members of a dissolved mutual benefit nonprofit corporation. See Section 8717.

However, if an association is established to serve a charitable purpose, its assets may be subject to a charitable trust, in which case they should not be distributed to members. In *Los Angeles County Pioneer Society v. Historical Society of Southern California*, 40 Cal. 2d 852 (1953), the court held that the assets of a charitable nonprofit corporation could not be distributed to the association's members on dissolution. The property had been received to further charitable purposes and was held in trust. The attempt to distribute assets to members was a breach of that trust.

In light of the discussion above, the staff sees two problems with the Uniform Act language: (1) it allows for distribution according to the governing instruments, without regard for whether the assets are subject to a charitable trust, and (2) it provides, as a default, for distribution to a similar organization (as if the assets were held in charitable trust), even if the assets are not held in charitable trust.

**The staff recommends:** (1) that language be added providing that the terms of an applicable trust control, and (2) the default rule (applicable in the absence of a controlling trust or governing documents) should be pro rata distribution to members. In other words, if the assets are subject to a charitable trust, the trust

controls. If there is no trust, then the governing documents control. If there are no governing documents, assets are distributed to members.

There is one further issue relating to charitable trusts. Under the law governing corporations, the Attorney General has an active role in supervising the management and disposition of trust assets. See, e.g., Section 6716 (distribution of assets of nonprofit public benefit corporation subject to Attorney General approval or judicial review with Attorney General as party). When the Commission considers governance issues, it should consider whether and to what extent the governance of an unincorporated association organized for charitable purposes is (or should be) subject to Attorney General oversight.

### **Application to Real Property**

The Uniform Act provision is limited to personal property. The staff sees no reason for this limitation and **recommends** that the draft language apply to both real and personal property.

### **Termination of an Unincorporated Association**

The staff sees no reason why the property disposition rule should be limited to disposition in the event of inactivity. **The staff recommends** that the draft language govern distribution of assets on termination of an unincorporated association for any reason. The details of how and when the existence of a nonprofit association is terminated (possibly including termination after some prescribed period of inactivity) should be addressed when the Commission considers governance issues.

### **Draft Language**

Consistent with the discussion above, the staff recommends the following provision:

**§ 18120. Disposition of assets of terminated unincorporated association**

18120. On termination of the existence of a nonprofit association, the assets of the association shall be distributed as follows:

(a) Assets that are held under a trust shall be distributed according to the provisions of the trust.

(b) Asset that are not held under a trust shall be distributed according to the governing documents of the association. If the governing documents do not address distribution of the assets, they shall be distributed pro rata to the members of the association.

**Comment.** Section 18120 is new. It provides rules for distribution of assets of a nonprofit association that has ceased to exist.

Subdivision (a) governs distribution of assets held in charitable trust. See *Lynch v. Spilman*, 67 Cal. 2d 251, 260, 431 P.2d 636, 642, 62 Cal. Rptr. 12, 18 (1967) (“property transferred to a corporation or other institution organized for a charitable purpose without a declaration of the use to which the property is to be put, is received and held by it ‘in trust to carry out the objects for which the organization was created.’”) (citations omitted).

Subdivision (b) governs assets that are not subject to a trust. It is consistent with the holding in *Holt v. Santa Clara County Sheriff’s Benefit Ass’n*, 250 Cal. App. 2d 925, 932, 59 Cal. Rptr. 180, 185 (1967) (“It is the general rule that upon the dissolution of a voluntary association its property should be distributed pro-rata among its members unless otherwise provided by its constitution or by-laws.”) (citations omitted).

Respectfully submitted,

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