

September 6, 1985 0239a

Note. Changes may be made in this Agenda. For meeting information, please call John H. DeMouilly (415) 494-1335.

Time

Sept. 12 (Thursday) - 3:00 p.m. - 10:00 p.m.  
Sept. 13 (Friday) - 9:00 a.m. - 6:00 p.m.

Place

State Capitol  
Room 125  
Sacramento

FINAL AGENDA

for meeting of

CALIFORNIA LAW REVISION COMMISSION

Sacramento

September 12-13, 1985

1. Minutes of August 30-31 Meeting (enclosed)
2. Administrative Matters

Legislative Program

Memorandum 85-77 (to be sent)

Research Contract

Memorandum 85-81 (enclosed)

Future Meeting Schedule

Memorandum 85-82 (enclosed)

3. Study L-601 - Estates and Trusts Code (Multiple-Party Accounts)  
Memorandum 85-80 (enclosed)
4. Study L-640 - Probate Code (Comprehensive Trust Law)  
Memorandum 85-73 (sent 8/29/85)  
Draft of Tentative Recommendation (attached to Memorandum)
5. Study L-1028 - Estates and Trusts Code (Independent Administration)  
Memorandum 85-71 (sent 8/29/85)  
Draft of Tentative Recommendation (attached to Memorandum)  
First Supplement to Memorandum 85-71 (sent 9/4/85)  
Second Supplement to Memorandum 85-71 (enclosed)  
Assembly Bill No. 196 (as amended in Senate August 19, 1985)  
(enclosed)

6. Study L-1032 - Estates and Trusts Code (Small Estate Set-Aside)  
Memorandum 85-74 (sent 8/29/85)  
Draft of Tentative Recommendation (attached to Memorandum)
7. Study L-1031 - Estates and Trusts Code (Passage of Property to  
Surviving Spouse Without Administration)  
Memorandum 85-72 (sent 8/29/85)  
Draft of Tentative Recommendation (attached to Memorandum)  
First Supplement to Memorandum 85-72 (sent 9/5/85)
8. Study L-600 - Estates and Trusts Code (Form of Comments)  
Memorandum 85-79 (sent 9/5/85)

MINUTES OF MEETING  
of  
CALIFORNIA LAW REVISION COMMISSION  
SEPTEMBER 12-13, 1985  
SACRAMENTO

A meeting of the California Law Revision Commission was held in Sacramento on September 12-13, 1985.

Law Revision Commission

Present: Roger Arnebergh  
Bion M. Gregory (Sept. 12)  
Arthur K. Marshall

Edwin K. Marzec  
Ann E. Stodden

Absent: James H. Davis, Chairperson  
Bill Lockyer, Member of Senate  
Alister McAlister, Member of Assembly

John B. Emerson

Staff Members

Present: John H. DeMouilly  
Nathaniel Sterling

Stan G. Ulrich

Absent: Robert J. Murphy III

Consultant Present

Edward C. Halbach, Jr., Property and Probate Law

Other Persons Present

Ted Cranston, State Bar Estate Planning, Trust and Probate Law Section, San Diego (Sept. 12)  
Nancy E. Ferguson, California Probate Referees, Oroville  
Michael Harrington, Los Angeles County Bar Association, Los Angeles  
Sandra Kass, Los Angeles County Bar Association, Los Angeles  
Richard Kinyon, State Bar Association, San Francisco  
Paulette E. Leahy, California Bankers Association, Sacramento  
Albert J. Nicora, California Probate Referees/Attorney, Albany (Sept. 13)  
Bruce Norman, California Bankers Association, Sacramento  
James Quillinan, State Bar Estate Planning, Trust and Probate Law Section, Mountain View (Sept. 13)  
Gerald L. Scott, California Probate Referees, San Jose (Sept. 12)

ADMINISTRATIVE MATTERS

MINUTES OF AUGUST 30-31, 1985, MEETING

The Minutes of the August 30-31, 1985, Meeting were approved as submitted by the staff after the following corrections were made:

- (1) On page 3, lines 18 and 19: "January 16" was substituted for "January 9" and "January 17" was substituted for "January 10"
- (2) On page 8, last line: "harmed" was substituted for "harm"
- (3) On page 12, line 2: "being dependent upon" was substituted for "turning on"

ELECTION OF OFFICERS

The Commission unanimously elected Edwin K. Marzec as Chairperson to succeed James H. Davis and Arthur K. Marshall as Vice Chairperson to fill the vacancy in that position. Their terms end on June 30, 1986.

1985 LEGISLATIVE PROGRAM

The Executive Secretary made the following report concerning the 1985 Legislative Program.

Enacted

1985 Stats. ch. 41 (Assembly Bill 98) - Creditors' Remedies  
1985 Stats. ch. 90 (Assembly Bill 690) - Uniform Transfers to Minors  
1985 Stats. ch. 157 (Assembly Bill 96) - Property Law  
1985 Stats. ch. 359 (Assembly Bill 97) - Urgency Probate Bill  
1985 Stats. ch. 362 (Assembly Bill 150) - Family Law  
1985 Stats. ch. 403 (Senate Bill 1270) - Powers of Attorney  
1985 Stats. Res. ch. 25 (ACR 4 - Continues Authority to Study  
Previously Authorized Topics

Sent to Governor

Assembly Bill 1030 - Mediation Privilege  
Assembly Bill 196 - Probate Law

Placed on Inactive File

Assembly Bill 195 - Revision of Law Revision Commission Statute

SCHEDULE FOR FUTURE MEETINGS

The Commission adopted the following schedule for future meetings.

October 1985

October 10 (Thursday) 3:30 p.m. - 10:00 p.m. Stanford  
October 11 (Friday) 9:00 a.m. - 6:00 p.m.

December 1985

December 5 (Thursday) 3:00 p.m. - 10:00 p.m. State Capitol  
December 6 (Friday) 9:00 a.m. - 6:00 p.m.

January 1986

January 16 (Thursday) 3:00 p.m. - 10:00 p.m. San Diego  
January 17 (Friday) 9:00 a.m. - 6:00 p.m.

March 1986

March 13 (Thursday) 3:00 p.m. - 10:00 p.m. State Capitol  
March 14 (Friday) 9:00 a.m. - 6:00 p.m.

May 1986

May 15 (Thursday) 3:00 p.m. - 10:00 p.m. San Francisco  
May 16 (Friday) 9:00 a.m. - 6:00 p.m.

June 1986

June 26 (Thursday) 3:00 p.m. - 10:00 p.m. State Capitol  
June 27 (Friday) 9:00 a.m. - 6:00 p.m.

July 1986

July 17 (Thursday) 3:00 p.m. - 10:00 p.m. Orange County  
July 18 (Friday) 9:00 a.m. - 6:00 p.m.

September 1986

September 4 (Thursday) 3:00 p.m. - 10:00 p.m. State Capitol  
September 5 (Friday) 9:00 a.m. - 6:00 p.m.

November 1986

November 13 (Thursday) 3:00 p.m. - 10:00 p.m. Los Angeles  
November 14 (Friday) 9:00 a.m. - 6:00 p.m.

December 1986

December 4 (Thursday) 3:00 p.m. - 10:00 p.m. State Capitol  
December 5 (Friday) 9:00 a.m. - 6:00 p.m.

Commissioner Marshall was designated as a subcommittee to make suggestions at the next meeting for any changes in the places of the meetings from March to December 1986.

CONSULTANT CONTRACT

The Commission considered Memorandum 85-81. The Commission approved an addendum to the existing contract with Professor Edward C. Halbach, Jr., to add an additional \$1,000 to the amount available for expenditure under the contract. The contract provides for reimbursement of travel expenses only. The additional \$1,000 will provide sufficient funds to cover the anticipated expenditures under the contract which ends on June 30, 1986. The Executive Secretary was directed to execute the addendum on behalf of the Commission.

STUDY L-600 - ESTATES AND TRUSTS CODE (FORM OF COMMENTS)

The Commission considered Memorandum 85-79. This memorandum was written in response to a suggestion made by Charles A. Collier, Jr., concerning the form of the Comments to sections of the new Estates and Trusts Code. The staff indicated that it is planning to adopt Mr. Collier's suggestion in a somewhat revised form and will use the following categories to explain how a particular new provision compares with prior law:

(a) A section or provision of the new code continues a specified section or sentence (or provision) of prior law without change.

(b) A section or provision of the new code continues a specified section or sentence (or provision) of prior law with changes for clarification only and without substantive change.

(c) A section or provision of the new code restates a specified section or sentence (or provision) of prior law without substantive change.

(d) A section or provision of the new code restates (or continues) a specified section or sentence (or provision) of prior law with the following addition(s):

(e) A section or provision of the new code restates (or continues) a specified section or sentence (or provision) of prior law with the following change(s):

(f) A section or provision of the new code restates (or continues) a specified section or sentence (or provision) of prior law with the following omission(s):

(g) A section or provision of the new code supersedes (or replaces) a specified section or sentence (or provision) of prior law. [This form of Comment is to be used where the new provision covers the same subject matter as prior law but treats it in a different manner.]

(h) A specified section or sentence (or provision) of prior law has been omitted as unnecessary.

#### STUDY L-601 - ESTATES AND TRUSTS CODE (MULTIPLE-PARTY ACCOUNTS)

The Commission considered Memorandum 85-80 and approved the attached letter to be sent to obtain information from credit unions as to their experience under the Multiple-Party Accounts Law. One typographical error in the draft letter attached to the memorandum was noted for correction before the letter is sent.

#### STUDY L-640 - PROBATE CODE (COMPREHENSIVE TRUST LAW)

The Commission began its consideration of Memorandum 85-73, the First Supplement thereto, and the comprehensive trust law attached to the memorandum. The Commission also considered the written comments of the California Bankers Association and Mr. Richard S. Kinyon. (These comments are attached to the Second Supplement to Memorandum 85-73.) The staff will prepare a memorandum for the October meeting that presents the sections in which important changes were made. The Commission reviewed Sections 15000-16421 of the draft statute and approved these sections subject to the following:

Terminology: "Settlor" versus "Trustor"

The Commission approved the use of "settlor" in place of "trustor." It was noted that "settlor" is the more commonly used term and that it is easier to distinguish from "trustee."

§ 15001. General rule concerning application of trust law

This section should provide that the new statute becomes operative on July 1 of the year following enactment. Hence, if the statute is passed in 1986, it would become operative on July 1, 1987.

§ 15004. Application of division to charitable trusts

The general rule should be that the trust law applies to charitable trusts unless a statutory exception is provided. This would replace the provision in Section 15004 that subordinates the trust law to the common law relating to charitable trusts. The staff should consider whether specific exceptions should be included in the provisions relating to modification and termination of trusts and in the provisions relating to the definiteness of beneficiary designations. There may also be other areas where special treatment of charitable trusts is needed.

§ 15006. Judicial Council to prescribe forms

The word "papers" should be changed to "documents" in this section.

§ 15200. Methods of creating trust

This section should be revised as follows:

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 ~~for the benefit of another person.~~

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

(c) A testamentary transfer of property by the owner to another person as trustee ~~for the benefit of the settlor or a third person.~~

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

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

The language is deleted in subdivisions (a)-(d) because it is surplus. Subdivision (e) is revised for clarity and to avoid the implication that the provision determines the time when the trust is created. The comment to this section should contain a cross-reference to Section 15205 which provides that a trust may be created for the benefit of the settlor. The comment should also refer to Section 15208 which makes clear that consideration is not required to create a trust.

§ 15204. Trust for indefinite or general purposes

The comment to this section should state that it is not intended to change the law relating to the purposes of charitable trusts. The phrase "within the stated purposes" should be revised to read "within that purpose."

§ 15205. Designation of beneficiary

This section should not apply to charitable trusts because the rules relating to designation of beneficiaries in private trusts are more restrictive than in charitable trusts. This section should not refer to "private" trusts; rather it should provide that it applies to trusts "other than charitable trusts." This is to avoid confusion over the meaning of "private" trust. The comment to subdivision (b)(1) should make clear that the beneficiary or class of beneficiaries may be presently ascertainable or ascertainable in the future.

§ 15206. Statute of Frauds

The word "subscribed" should be replaced by "signed" and the reference to the trust "estate" should be revised to refer to the trust "property."

§ 15208. Consideration

The comment to this section should contain a cross-reference to Section 15200(e) relating to enforceable promises to create a trust.

§ 15209. Exception to doctrine of merger

Subdivision (b) of this section should be revised as follows:

(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.

§ 15401. Method of revocation by settlor

The question of whether a trust should be revocable by exercise of a power of attorney was discussed. The problem is that many people who give broad durable powers of attorney do not understand that they are giving the power to revoke a trust. This section should provide that a revocable trust may not be revoked by an attorney-in-fact unless the trust instrument expressly permits revocation under a durable power of attorney.

§ 15402. Power to revoke includes power to modify

The sentence in the comment relating to resignation of a trustee who is unwilling to accept enlargement of the trustee's duties should be deleted. This question should be dealt with in the provisions relating to acceptance of the trust. See Section 15600.

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

The Commission reaffirmed the policy of this section that precludes modification or termination of a spendthrift trust by all beneficiaries. The phrase "terminating the trust" in subdivision (b) should be replaced by "doing so." The meaning of "valid restraint on transfer" in subdivision (b) should be clarified by adding a reference in the statute to Sections 15300 et seq. which govern restraints on transfer.

§ 15404. Modification or termination by settlor and all beneficiaries

The comment should make clear that the statutory authority to modify or terminate a trust with the consent of the settlor and all beneficiaries does not affect the settlor's right to revoke or modify a revocable trust.

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

This section should be omitted. The concern is that in some cases involving close relatives the settlor may have intended to benefit such persons, and so they should not be deprived of the right to consent or withhold consent to a modification or termination. It was suggested that the guardian ad litem provisions should provide a sufficient remedy to obtain the consent of unascertained or unborn beneficiaries in the circumstances that Section 15407 was intended to handle.

§ 15408. Termination of trust

Subdivision (a)(1) should be revised as follows: "(1) The term of a trust ~~subject to a fixed term~~ expires."

§ 15409. Trust with uneconomically low principal

This section should be revised to give the trustee the power to terminate a trust when the principal does not exceed \$20,000 in

value. The trust property would then be distributed to ascertainable beneficiaries.

§ 15411. Disposition of property upon termination

The comment to this section should note that in certain circumstances it may be appropriate to distribute money on termination of a trust to a custodial account under the Uniform Transfers to Minors Act.

§ 15600. Acceptance of trust by trustee

This section relating to acceptance of the trust by the trustee should also apply to acceptance of modifications of the trust. Subdivision (b) should make clear that the authority to act in an emergency does not impose a duty to act. The intention of this provision is to avoid the presumption in subdivision (a)(2) that a person who is named as trustee has accepted the trust if such person acts under the trust.

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

This section should also be revised to apply to modifications of a trust so that there is a procedure available for the trustee to reject the duties and liabilities under a trust as modified. A trustee would remain responsible for the trust property and subject to the duties as before, but could reject the new duties without having to resign as trustee.

§ 15602. Trustee's bond

Subdivisions (a)(2) and (a)(3) should be combined to read as follows:

(2) ~~A bond is~~ ~~to be~~ ~~reasonably~~ ~~requested~~ ~~by~~ ~~the~~ ~~beneficiary,~~  
Notwithstanding a waiver of a bond in the trust instrument,

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

The section should make clear that the authority of the court to excuse bond or change the amount of a bond under subdivision (b) overrides a requirement of bond in the trust or a trust provision requiring bond in a particular amount.

§ 15603. Certificate of trustee

The Commission discussed the proposal to enact a statutory form of an affidavit of trusteeship. The state bar representative present at the meeting stated that in his experience such an affidavit was unnecessary and that he had experienced no problems in establishing the existence of a trust and the incumbency of the trustee. The proposal was rejected, although the limitations of the coverage of Section 15603 were recognized.

§ 15621. Vacancy in office of cotrustee

This section should be revised substantially as follows:

15621. ~~Except//as~~ 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.

The comment should state that the effect of this provision is that a majority of the remaining trustees may act even though the majority of the remaining trustees does not meet the quorum requirements under the trust before the vacancies occurred. This rule would be subject to a contrary provision in the trust.

§ 15622. Temporary incapacity of cotrustee

To be consistent with Section 15621, this section should be revised substantially as follows:

15622. ~~Except//as~~ 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.

§ 15640. Resignation of trustee

The staff should prepare a draft of language that would restrict the types of beneficiaries whose consent is needed to accept a trustee's resignation under subdivision (a)(3) of this section. It was suggested that statute should require the consent of only adult beneficiaries who are currently receiving or are entitled to receive income or distributions of principal were the trust terminated.

§ 15641. Liability of resigning trustee

This section should be revised to refer to the liability for acts or omissions of a resigning trustee.

§ 15642. Removal of trustee

In subdivision (a)(3) the reference to "ill feeling" should be deleted. These words are unclear and overlap the concept of hostility.

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

This section should be revised as follows:

15644. ~~All former trustee who holds property of the trust after~~ 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.

The comment should contain a cross-reference to the procedure for appointing a receiver or a temporary trustee. The comment should also note that the trustee remains liable for act or omissions before resignation even after the property is delivered to the successor trustee.

§ 15660. Appointment of trustee to fill vacancy

Subdivision (a) should provide that the court shall, rather than may, fill the vacancy in the manner provided in the trust if it is

practical. The relationship between this section and Section 15621 should be clarified so that it is clear whether there is a duty to fill a vacancy. (See also Section 15643 which delineates when a vacancy occurs.) The period in the second line of subdivision (a) should be a comma. In the comment, the sentence relating to appointment of a greater number of trustees should be deleted. This question should be left to the common law.

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

The Commission reaffirmed the policy of permitting the court to increase or decrease compensation of the trustee depending upon a significant change of circumstances since the trust was created. However, this section should be revised to make clear that the compensation can be changed only prospectively.

§ 15684. Repayment of trustee for expenditures

Under this section, the trustee should not be entitled to fees in the case of a breach of trust unless the court otherwise allows.

§ 15685. Trustee's lien

The comment should note that the statutory reference to holding or ownership of trust property involves things such as liability for taxes, assessments, and tort liability.

§ 15800. Limits on rights of beneficiary of revocable trust

The Commission approved the general policy of this section that the beneficiaries of a revocable trust should not have rights under the trust during the time that the trust is revocable. The Commission reserved judgment on the drafting of this section. The staff should redraft the section to take account of a holder of a general power of appointment or a power to withdraw the property from the trust. The staff should also compare this section, and Sections 15801 and 15802, with Section 1-108 of the Uniform Probate Code. The word "primarily"

should probably be removed from the last sentence relating to the persons to whom the trustee owes fiduciary duties. The phrase "during such time" in the last sentence should spell out the time referred to.

§ 15803. Notice in case involving future interest of beneficiary

In subdivision (a), "beneficiaries" should be changed to "beneficiary" and "persons" should be changed to "person." Subdivision (b) should be revised as follows:

(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).

§ 16000. Duty to administer trust

The words "to the beneficiary" should be deleted from this section. This change avoids the inconsistency with Section 15800 which provides that the duties are owed to the person holding the power to revoke in the case of a revocable trust.

§ 16002. Duty of loyalty

This section should be revised as follows:

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

(b) It is not a violation of the duty provided in subdivision (a) for the trustee to sell, exchange, or participate in the sale or exchange of trust property from one trust to another, if the sale or exchange is fair and reasonable with respect to the beneficiaries of both trusts ~~and the trustee's disclosure to the beneficiaries of both trusts of the material facts relating to the sale or exchange that the trustee should know.~~

The language is omitted from subdivision (b) because the test should be whether the action is fair and reasonable with respect to all the beneficiaries and should not depend upon whether a disclosure was made.

§ 16004. Duty to avoid conflict of interest

The staff should determine which court is referred to in subdivision (b), i.e., whether the court where a lien is sought to be enforced or the probate court (or both) may determine the trustee's right to be reimbursed for the amount that the trustee paid in good faith for a claim against trust property.

§ 16005. Duty not to undertake adverse trust

This section should be revised to avoid automatic liability for having an adverse interest even though the trustee did not know of it. The duty not to undertake an adverse trust could be limited to knowing actions of the trustee, or the duty to eliminate the conflict or resign could arise only when the trustee discovers the conflict. The staff should develop language for consideration by the Commission at the October meeting.

§ 16007. Duty to make trust property productive

The meaning of "under the circumstances" should be fleshed out, perhaps by providing that the trust property is to be made productive if consistent with the purposes of the trust.

§ 16008. Duty to dispose of improper investments

The word "by" should be inserted following "acquired" in subdivision (a).

§ 16009. Duty to keep trust property separate

Subdivision (a), which requires trust property to be kept separate from the trustee's own property, should be deleted because it is redundant with subdivision (b), which requires trust property to be kept separate from other property not subject to the trust.



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

The sentence in the comment relating to the duty to communicate material facts should be revised to make clear that this duty exists also when the trustee has reason to know that the beneficiary does not know the material facts. The comment should also be revised to avoid the implication that the duty to provide information is applicable only in extraordinary circumstances. The citation in the comment of Section 15800 (duties owed to person holding power to revoke) should be expanded into an explanatory sentence so that it will be more informative.

§ 16061. Duty to report information about trust on request

This section should also require reporting of liabilities, receipts, and disbursements. The comment should make clear that the availability of information on request does not limit the general duty of the trustee to report relevant information under Section 16060.

§ 16062. Duty to account to beneficiaries

The Commission discussed the extent to which various classes of beneficiaries should have the right to an automatic accounting. For the time being the section was left as drafted. It was noted that the general duty of Section 16060 provides an affirmative duty to inform beneficiaries of material facts and that trustees will find it in their interest to disclose in order to trigger the statute of limitations in Section 16460. The comment to this section should note that it is not a limitation on the general duty to provide information under Section 16060.

§ 16063. Contents of account

Subdivision (b) should be revised to refer to a statement of assets and liabilities instead of an inventory of property.

§ 16064. Exceptions to duty to report information and account

The comment should contain a cross-reference to the statute of limitations in Section 16460.

§ 16080. Discretionary powers to be exercised reasonably

The comment to this section (and others in the draft) should be revised to employ the new language explaining the disposition of the old law.

§ 16100. Definitions

The comment to this section should refer to Section 7 which has the effect in this section of incorporating later amendments of the Internal Revenue Code.

§ 16103. Exceptions applicable to split-interest trusts

In the references to sections of the Internal Revenue Code in subdivision (b)(1) of this section, the lower case "b" should be upper case. In subdivision (b)(3), the word "irrevocably" should be added after "amounts." The suggestion was made that Sections 16100-16105 relating to private foundations, charitable trusts, and split-interest trusts should be carefully checked by an expert in the area.

§ 16200. General powers of trustee

The staff should check to see whether the reference to subdivision (a) in the last sentence of the first paragraph of the comment is accurate.

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

The comment should be revised to avoid any conflict with the statutory language. To this end, the word "permits" in the last sentence of the comment should be changed to "directs." The first sentence could be revised to read: "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 that conflicts with a general duty . . . ."  
It may also be appropriate to give some examples in the comment.

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

This section should be revised to restore the requirement that the trustee obtain court approval to continue the operation of a business (unless the trust otherwise provides):

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.

§ 16223. Investments

The comment to this section should be expanded to refer to investments in investment company shares, mutual funds, index funds, and other modern vehicles for collective investment, and should note that such investments, while subject to general fiduciary standards, are not forbidden by the fact that discretion over the fund is of necessity delegated to others.

§ 16225. Deposits

Subdivision (a) should be revised to make clear that the accounts are insured or collateralized by a government agency. Subdivision (b) should include a definition of "affiliate" as in Section 16015.

§ 16229. Repairs and alterations of property

This section should contain a reference to improvements.

§ 16244. Loans to beneficiary

This section should be revised as follows:

16244. The trustee has the power to make loans out of trust property to the beneficiary on ~~adequate security and at a rate of interest that is~~ terms and conditions that the trustee determines are fair and appropriate under the circumstances and the power to guarantee loans to the beneficiary by encumbrances on trust property.

The comment to this section should make clear that the interest of a beneficiary that is subject to a spendthrift restraint may not be used for security for such a loan. The comment should also point out that the determination of what is fair and appropriate is subject to fiduciary obligations in light of the purposes of the trust.

§ 16245. Distribution to beneficiaries under legal disability

The comment should contain a cross-reference to the Uniform Transfers to Minors Act if that act provides for distributions from trusts.

§ 16247. Hiring persons

The word "other" should be added preceding "agents" and "or affiliated" should be added after "associated." The comment should refer to Section 17200 relating to the procedure for obtaining instructions. The comment should also explain that an insider may be hired when it is in the best interests of the trust, taking into account the duty of loyalty and the duty to avoid conflicts of interest, particularly involving routine matters, but that in situations involving substantial matters, it would be best not to hire insiders. The provisions on accounting should be revised either in the statute or the comments to provide for disclosure of information concerning who has been hired as an agent of the trust, and a cross-reference to such provision should be included in this comment.

§ 16249. Actions and proceedings

The comment to this section should contain a cross-reference to Section 15684 (reimbursement of trustee for expenditures) which relates to the propriety of obtaining repayment of attorney's fees incurred in an action or proceeding. It may be desirable to provide that a trustee, in the discretion of the court, may not be entitled to payment of attorney's fees from trust property where the trustee is found to have breached the trust. It was suggested that the determination might depend upon whether the trustee acted in good faith.

§ 16301. Definitions

The staff should consider whether the definition of remainder beneficiary in subdivision (c) should be revised to make clear that the term includes persons entitled to principal, presently or in the future.

§ 16302. Duty of trustee as to receipts and expenditures

The reference to Section 15540 in subdivision (a)(3) should be corrected to refer to Section 16040. The comment to this section should explain the revision of subdivision (b) to refer to "no inference that the trustee has improperly exercised such discretion" in place of the existing reference to no inference of imprudence or partiality.

§ 16303. Duty to charge expenses

It would be more appropriate to combine this section with Section 16313 (charges against income and principal), or locate them together.

§ 16304. Income and principal

The Commission discussed the treatment of insurance, annuities, and interest on estate tax liability. The treatment of insurance and annuities does not seem susceptible to a general rule.

§ 16305. When right to income arises; apportionment of income

Subdivisions (a) and (b) of this section should be revised as follows:

16305. (a) An income beneficiary is entitled to income from the date specified in the trust instrument or, if none is specified, from the date an asset becomes subject to the trust. In the case of an asset becoming subject to a trust by reason of a will person's death, it becomes subject to the trust as of the date of the death of the testator person even though there is an intervening period of administration of the testator's person's estate.

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

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

The comment should state that this change deals with the problem of apportionment of income following the death of a settlor of a revocable living trust.

§ 16306. Income earned during administration of decedent's estate

Further work needs to be done on the question of liability for interest on pecuniary legacies. The staff should give further consideration to whether Section 5(a) of the Revised Uniform Principal and Income Act should be included in California law to deal with interest on estate taxes.

§ 16313. Charges against income and principal

Section 16303 should be combined with this section.

§ 16400. Breach of trust

The word "primarily" in the comment should be deleted to conform to the revision of Section 15800.

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

This section should be revised along the following lines:

16401. (a) The trustee is liable to the beneficiary for ~~an agent's~~ 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 ~~directs or permits~~ 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 proper 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.

(b) 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.

The comment to this section should refer to Section 16462 which relates to nonliability of the trustee for following instructions of a person holding the power to revoke. The comment should also note that whether the trustee has acted reasonably is determined pursuant to the standard of care in Section 16040. The staff should consider whether it would be better to revise this section to deal separately with the liability for agents under the trustee's control and for those who are not under the trustee's control, or whether the section should be split into two sections.

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

The approach of this section was approved in general, but it should be made consistent with Section 16013 which states the duty of a trustee with respect to cotrustees.

§ 16403. Liability of dissenting cotrustee to beneficiary

The phrase "does not join in exercising a power" should be changed to "does not consent to exercise of a power" to resolve the apparent conflict between Sections 16402 and 16403. This section should also be checked for conformity with Section 16013. Concern was also expressed that subdivision (b) of this section excuses a trustee for joining in a breach when the trustee should refuse to join. The staff should review the draft to see if the question of liability for expenses of judicial proceedings is adequately covered. A dissenting cotrustee should not be entitled to costs of proceedings and attorney's fees where proceedings are frivolous or are commenced to harass the majority trustees.

§ 16404. Trustee's liability to beneficiary for acts of predecessor

Subdivision (b)(3) of this section should be revised in the same manner as Section 16401(a)(6) to take account of the trustee's knowledge or what the trustee reasonably should have known.

§ 16421. Remedies for breach exclusively equitable

Concern was expressed over the effect this provision might have on the availability of punitive damages particularly in the case of fraud. Consideration of this issue was postponed until the October meeting.

APPROVED AS CORRECTED \_\_\_\_\_ (for  
corrections, see Minutes of next  
meeting)

\_\_\_\_\_  
Date

\_\_\_\_\_  
Chairperson

\_\_\_\_\_  
Executive Secretary