

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

STAFF REPORT

California Uniform Prudent Investor Act

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California Law Revision Commission
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NOTE

This is a special edition of the Uniform Prudent Investor Act setting out the original explanatory text from the Commission's recommendation and the final statutory text with official Commission Comments.

UNIFORM PRUDENT INVESTOR ACT *

A new Uniform Prudent Investor Act was approved by the National Conference of Commissioners on Uniform State Laws in the summer of 1994.¹ The new act seeks to modernize investment practices of fiduciaries, focusing on trustees of private trusts.

The primary objectives of the UPIA are stated in its Prefatory Note:

(1) The standard of prudence is applied to any investment as part of the total portfolio, rather than to individual investments. In the trust setting the term “portfolio” embraces all the trust’s assets....

(2) The tradeoff in all investing between risk and return is identified as the fiduciary’s central consideration....

(3) All categoric restrictions on types of investments have been abrogated; the trustee can invest in anything that plays an appropriate role in achieving the risk/return objectives of the trust and that meets the other requirements of prudent investing....

(4) The long familiar requirement that fiduciaries diversify their investments has been integrated into the definition of prudent investing....

(5) The much criticized former rule of trust law forbidding the trustee to delegate investment and management functions has been reversed. Delegation is now permitted, subject to safeguards....

Some of these objectives have already been met in existing California law. California adopted a portfolio approach to investments by trustees in 1984,² and early recognized the trustee’s power to make any type of investment in conformance with applicable duties.³ While preserving the traditional rule against delegating administration of the trust to others, existing law recognizes the ability of trustees to make limited delegations where appropriate and to hire experts to assist in

* This “Staff Report” combines the text of the original Commission recommendation on the *Uniform Prudent Investor Act*, 25 Cal. L. Revision Comm’n Reports 543, 549-552 (1995), with the text of the statute as enacted (1995 Cal. Stat. ch. 63) and revised Comments printed in the *Report of the California Law Revision Commission on Chapter 63 of the Statutes of 1995 (Senate Bill 222)*, in Appendix 4 of the *Annual Report for 1995*, 25 Cal. L. Revision Comm’n Reports 615, 673-705 (1995). No words have been changed, but revised Comments to Probate Code Sections 16200 and 16223, which were included in Appendix 4, have been omitted because they were superseded.

1. The official text of the Uniform Prudent Investor Act [hereinafter “UPIA” or the “uniform act”] is set out as an Appendix, *infra* at pp. 589-613. The uniform act relies heavily on the revised standards for prudent trust investments promulgated in the new Restatement (Third) of Trusts: Prudent Investor Rule (1992).

2. See Prob. Code § 16040(b) & Comment; see also *Selected 1986 Trust and Probate Legislation*, 18 Cal. L. Revision Comm’n Reports 1201, 1240-42 (1986).

3. See Prob. Code § 16223 & Comment. This rule was adopted from the Uniform Trustees’ Powers Act (1964).

administration of the trust.⁴ The duty to diversify has not been codified, but is recognized in case law.⁵

Adoption of the Uniform Prudent Investor Act would add several new features to the Trust Law:

Risk. The law would specifically recognize the importance of analyzing both risk and return, consistent with modern investment theory. Rather than avoiding risk categorically, the uniform act encourages balancing risk and return at levels appropriate to the purposes of the trust.⁶ This rule is not inconsistent with existing law,⁷ but provides greater detail as to the factors to be considered in devising the portfolio investment strategy.

Delegation. A trustee would be able to delegate investment and management decisions where prudent in light of the trustee's skills.⁸ The trustee must exercise care, skill, and caution in selecting the agent and establishing the scope and terms of the delegation consistent with the purposes and terms of the trust, and must monitor the agent's performance.

Trustee's liability for delegation. A trustee who satisfies the delegation standards would not be liable to the beneficiaries for the acts of an agent.⁹ This rule is more protective of trustees who make a proper delegation than the existing standard which, among other things, subjects a trustee for liability if the trustee has the power to direct the act of the agent.¹⁰

Liability of agent. An agent who performs a delegated function owes a duty to the trust and, by accepting the delegation, would be deemed to submit to the jurisdiction of California courts.¹¹

Standard of compliance. "Compliance with the prudent investment rule is determined in light of the facts and circumstances existing at the time of a trustee's decision or action and not by hindsight."¹² This rule emphasizes and protects reliance on the fundamental rule of prudence in adopting an investment strategy and managing the trust. It is consistent with the principle in existing law protecting

4. See Prob. Code §§ 16012 (general duty not to delegate), 16247 (hiring accountants, investment advisors, etc.).

5. See, e.g., *Estate of Collins*, 72 Cal. App. 3d 663, 669-72, 139 Cal. Rptr. 644, 648-49 (1977).

6. See UPIA § 2 & comment.

7. See Prob. Code § 16040(b).

8. See UPIA § 9 & comment.

9. See UPIA § 9(c) & comment.

10. See Prob. Code § 16401(b)(1). This rule should be changed for consistency with UPIA and with the Restatement (Second) of Trusts § 225 (1957). Consequently, the exception where the trustee has the "power to direct" the agent would be revised to refer to cases where the trustee "directs or permits" the acts of the agent.

11. See UPIA § 9(b) & (d).

12. UPIA § 8.

a trustee who has acted “reasonably and in good faith under the circumstances as known to the trustee.”¹³

Application to existing trusts. The prudent investor rule would apply to existing trusts but not to decisions or actions occurring before it became operative.¹⁴ The same general principle was applied when the Trust Law became operative.¹⁵

13. Prob. Code § 16440(b).

14. See UPIA § 16.

15. See Prob. Code § 15001 & Comment; see also Prob. Code § 3.

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Prob. Code §§ 16045-16054 (added). Uniform Prudent Investor Act

SEC. 6. Article 2.5 (commencing with Section 16045) is added to Chapter 1 of Part 4 of Division 9 of the Probate Code, to read:

Article 2.5. Uniform Prudent Investor Act

§ 16045. Short title

16045. This article, together with subdivision (a) of Section 16002 and Section 16003, constitutes the prudent investor rule and may be cited as the Uniform Prudent Investor Act.

Comment. Section 16045 has the same purpose as Section 12 of the Uniform Prudent Investor Act (1994) promulgated by the National Conference of Commissioners on Uniform State Laws. Most of the substance of the uniform act is set forth in this article, but some rules already exist in other parts of the Trust Law and are included within the short title by specific reference. See Sections 16002(a) (duty of loyalty), 16003 (duty to deal impartially with beneficiaries).

See also Section 2 (construction of provisions drawn from uniform acts), which is the same in substance as Section 11 of the Uniform Prudent Investor Act (1994), and Section 13 (severability), which is the same in substance as Section 14 of the Uniform Prudent Investor Act (1994). For a list of uniform acts in the Probate Code, see Section 2 Comment.

§ 16046. Prudent investor rule

16046. (a) Except as provided in subdivision (b), a trustee who invests and manages trust assets owes a duty to the beneficiaries of the trust to comply with the prudent investor rule.

(b) The settlor may expand or restrict the prudent investor rule by express provisions in the trust instrument. A trustee is not liable to a beneficiary for the trustee's good faith reliance on these express provisions.

Comment. Section 16046 is similar to Section 1 of the Uniform Prudent Investor Act (1994). See also Section 16045 (prudent investor rule defined). Subdivision (a) and the first sentence of subdivision (b) are a special application of the general duty provided in Section 16000 (duty to administer trust according to statute, subject to control in trust).

Subdivision (b) continues the rule in former subdivision (c) (now subdivision (b)) of Section 16040, insofar as it applied to matters now governed by this article. The first sentence of subdivision (b) is the same in substance as the first sentence Section 1(b) of the Uniform Prudent Investor Act (1994). The second sentence continues the good-faith standard of Section 16040 in place of the reasonable reliance rule of the Uniform Prudent Investor Act (1994).

§ 16047. Standard of care, portfolio strategy, risk and return objectives

16047. (a) A trustee shall invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.

(b) A trustee's investment and management decisions respecting individual assets and courses of action must be evaluated not in isolation, but in the context of the trust portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the trust.

(c) Among circumstances that are appropriate to consider in investing and managing trust assets are the following, to the extent relevant to the trust or its beneficiaries:

- (1) General economic conditions.
- (2) The possible effect of inflation or deflation.
- (3) The expected tax consequences of investment decisions or strategies.
- (4) The role that each investment or course of action plays within the overall trust portfolio.
- (5) The expected total return from income and the appreciation of capital.
- (6) Other resources of the beneficiaries known to the trustee as determined from information provided by the beneficiaries.
- (7) Needs for liquidity, regularity of income, and preservation or appreciation of capital.
- (8) An asset's special relationship or special value, if any, to the purposes of the trust or to one or more of the beneficiaries.

(d) A trustee shall make a reasonable effort to ascertain facts relevant to the investment and management of trust assets.

(e) A trustee may invest in any kind of property or type of investment or engage in any course of action or investment strategy consistent with the standards of this chapter.

Comment. Section 16047 is generally the same in substance as Section 2(a)-(e) of the Uniform Prudent Investor Act (1994). Subdivisions (a)-(c) of Section 16047 replace the portfolio investment rule of former subdivision (b) of Section 16040. Subdivision (a) is also the same in substance as the first paragraph and subsection (a) of Section 227 of Restatement (Third) of Trusts: Prudent Investor Rule (1992).

The second sentence of subdivision (a) states the basic elements of prudence. Thus, where “prudence” is used in this article, it includes “reasonable care, skill, and caution.” These elements are delineated in the Restatement:

[Care]

The duty of care requires the trustee to exercise reasonable effort and diligence in making and monitoring investments for the trust, with attention to the trust's objectives. The trustee has a related duty of care in keeping informed of rights and opportunities associated with those investments....

[Skill]

The exercise of care alone is not sufficient, however, because a trustee is liable for losses resulting from failure to use the skill of an individual of ordinary intelligence. This is so despite the careful use of all the skill of which the particular trustee is capable.

On the other hand, if follows from the requirement of care as well as from sound policy that, if the trustee possesses a degree of skill greater than that of an individual of ordinary intelligence, the trustee is liable for a loss that results from failure to make reasonably diligent use of that skill....

[Caution]

In addition to the duty to use care and skill, the trustee must exercise the caution of a prudent investor managing similar funds for similar purposes. In the absence of contrary provisions in the terms of the trust, this requirement of caution requires the trustee to invest with a view both to safety of the capital and to securing a reasonable return....

Restatement (Third) of Trusts: Prudent Investor Rule § 227 comments d & e (1992). For a full discussion, see *id.* § 227, comments & Reporter’s Notes (1992).

Subdivision (d) is new to the code. Subdivision (e) replaces former Section 16223 (“The trustee has the power to invest in any kind of property, whether real, personal, or mixed.”). This subdivision, like its predecessor, makes clear that there are no categorical restrictions on proper investments. Any form of investment is permissible in the absence of a prohibition in the trust instrument or an overriding duty. This subdivision 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 fiduciary standards under this chapter in making the investment. See also Sections 62 (“property” defined), 16053 (language invoking standard of Uniform Prudent Investor Act), 16202 (exercise of powers is subject to duties), 16203 (trust instrument that incorporates the powers provided in former Section 1120.2 of the repealed Probate Code).

Statutes pertaining to legal investments appear in other codes. See, e.g., Fin. Code §§ 1561.1 (funds provided services by trust company or affiliate), 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 2(f) of the Uniform Prudent Investor Act (1994) has been omitted from Section 16047 because it is unnecessary. The same general rule is provided by Section 16014 (duty to use special skills). An expert trustee is held to the standard of care of other experts. See the discussions in *Estate of Collins*, 72 Cal. App. 3d 663, 673, 139 Cal. Rptr. 644 (1977); *Coberly v. Superior Court*, 231 Cal. App. 2d 685, 689, 42 Cal. Rptr. 64 (1965); *Estate of Beach*, 15 Cal. 3d 623, 635, 542 P.2d 994, 125 Cal. Rptr. 570 (1975) (bank as executor); see also Section 2401 Comment (standard of care applicable to professional guardian or conservator of estate); Section 3912 Comment (standard of care applicable to professional fiduciary acting as custodian under California Uniform Transfers to Minors Act).

§ 16048. Diversification

16048. In making and implementing investment decisions, the trustee has a duty to diversify the investments of the trust unless, under the circumstances, it is prudent not to do so.

Comment. Section 16048 is drawn from Section 227(b) of the Restatement (Third) of Trusts: Prudent Investor Rule (1992), and is similar to Section 3 of the Uniform Prudent Investor Act (1994). This section is new to the Trust Law, but is consistent with case law. See, e.g., *Estate of Collins*, 72 Cal. App. 3d 663, 669-72, 139 Cal. Rptr. 644, 648-49 (1977). This section, along with Section 16049, supersedes the rule in former Section 16008 (disposition of improper investments and retention of property in furtherance of trust purposes). See the comments to Restatement (Third) of Trusts: Prudent Investor Rule § 227 (1992).

§ 16049. Duties at inception of trusteeship

16049. Within a reasonable time after accepting a trusteeship or receiving trust assets, a trustee shall review the trust assets and make and implement decisions concerning the retention and disposition of assets, in order to bring the trust portfolio into compliance with the purposes, terms, distribution requirements, and other circumstances of the trust, and with the requirements of this chapter.

Comment. Section 16049 is the same as Section 4 of the Uniform Prudent Investor Act (1994). For related duties, see Sections 16000 (duty to administer trust on acceptance), 16006 (duty to take control of and preserve trust property). This section, along with Section 16048, supersedes

the rule in former Section 16008 (disposition of improper investments and retention of property in furtherance of trust purposes).

§ 16050. Investment costs

16050. In investing and managing trust assets, a trustee may only incur costs that are appropriate and reasonable in relation to the assets, overall investment strategy, purposes, and other circumstances of the trust.

Comment. Section 16050 is similar to Section 7 of the Uniform Prudent Investor Act (1994). This section is consistent with the rules concerning costs in Section 227(c)(3) of the Restatement (Third) of Trusts: Prudent Investor Rule (1992). For related rules concerning reimbursement and compensation of trustees, see Sections 15680-15685. The duty to minimize costs applies to delegation to agents and hiring advisers as well as to other aspects of fiduciary investing. In deciding whether to delegate, the trustee must balance the projected benefits against the likely costs. Similarly, in deciding how to delegate, the trustee must take costs into account. The trustee must be alert to protect the beneficiary from “double dipping.” If, for example, the trustee’s regular compensation schedule presupposes that the trustee will conduct the investment management function, it should ordinarily follow that the trustee will lower its fee if delegating the investment function to an outside manager.

§ 16051. Reviewing compliance

16051. Compliance with the prudent investor rule is determined in light of the facts and circumstances existing at the time of a trustee’s decision or action and not by hindsight.

Comment. Section 16051 is the same as Section 8 of the Uniform Prudent Investor Act (1994). See also Section 16045 (prudent investor rule defined). For related rules governing trustee liability, see Sections 16440-16465.

§ 16052. Delegation of investment and management functions

16052. (a) A trustee may delegate investment and management functions as prudent under the circumstances. The trustee shall exercise prudence in the following:

(1) Selecting an agent.

(2) Establishing the scope and terms of the delegation, consistent with the purposes and terms of the trust.

(3) Periodically reviewing the agent’s overall performance and compliance with the terms of the delegation.

(b) In performing a delegated function, an agent has a duty to exercise reasonable care to comply with the terms of the delegation.

(c) Except as otherwise provided in Section 16401, a trustee who complies with the requirements of subdivision (a) is not liable to the beneficiaries or to the trust for the decisions or actions of the agent to whom the function was delegated.

(d) By accepting the delegation of a trust function from the trustee of a trust that is subject to the law of this state, an agent submits to the jurisdiction of the courts of this state.

Comment. Section 16052 is the same in substance as Section 9 of the Uniform Prudent Investor Act (1994), except that subdivision (c) has been revised for coordination with the basic

rule on liability for acts of agents in Section 16401. Unlike the uniform act, the second sentence of subdivision (a) refers to the exercise of “prudence” rather than “reasonable care, skill, and caution.” This is not a substantive change, however, since “prudence” means “reasonable care, skill, and caution” as provided in Section 16047(a). See Section 16047 Comment.

The duty to review the agent’s overall performance under subdivision (a)(3) would include the periodic evaluation of the continued need for and appropriateness of the delegation of authority. In particular circumstances, the trustee may need to terminate the delegation to comply with the duty under Section 16401(b)(3) (duty to use prudence in retaining agent). Section 16052 provides special exceptions to the general rule concerning delegation (Section 16012) and the trustee’s liability for acts of agents (Section 16401). See also Section 16247 (power to hire accountants, auditors, investment advisors, etc.).

§ 16053. Language invoking standard of Uniform Prudent Investor Act

16053. The following terms or comparable language in the provisions of a trust, unless otherwise limited or modified, authorizes any investment or strategy permitted under this chapter: “investments permissible by law for investment of trust funds,” “legal investments,” “authorized investments,” “using the judgment and care under the circumstances then prevailing that persons of prudence, discretion, and intelligence exercise in the management of their own affairs, not in regard to speculation but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of their capital,” “prudent man rule,” “prudent trustee rule,” “prudent person rule,” and “prudent investor rule.”

Comment. Section 16053 is the same as Section 10 of the Uniform Prudent Investor Act (1994) and restates former Section 16042 without substantive change. See also Section 16045 (prudent investor rule defined).

§ 16054. Application to existing relationships

16054. This article applies to trusts existing on and created after its effective date. As applied to trusts existing on its effective date, this article governs only decisions or actions occurring after that date.

Comment. Section 16054 is the same as Section 11 of the Uniform Prudent Investor Act (1994) and is a specific application of the general transitional provisions in Section 3.

CONFORMING REVISIONS

Prob. Code § 16003 (amended). Duty to deal impartially with beneficiaries

SECTION 1. Section 16003 of the Probate Code is amended to read:

16003. If a trust has two or more beneficiaries, the trustee has a duty to deal impartially with them *and shall act impartially in investing and managing the trust property, taking into account any differing interests of the beneficiaries.*

Comment. Section 16003 is amended to provide additional detail drawn from Section 6 of the Uniform Prudent Investor Act (1994).

This section codifies the substance of Section 183 of the Restatement (Second) of Trusts (1957) and is in accord with prior case law. See *Estate of Miller*, 107 Cal. App. 438, 290 P. 528 (1930). For provisions permitting the beneficiaries to relieve the trustee from liability, see Sections 16463 (consent), 16464 (release), 16465 (affirmance). See also Sections 16000 (duties subject to control

by trust instrument), 16040 (trustee's general standard of care in performing duties), 16046 (prudent investor rule), 16047 (standard of care, portfolio strategy, risk and return objectives).

Prob. Code § 16008 (repealed). Duty to dispose of improper investments

SEC. 2. Section 16008 of the Probate Code is repealed.

~~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. Section 16008 is superseded by the rules in Section 16048 (diversification) and 16049 (duties at inception of trusteeship).

Prob. Code § 16012 (amended). Duty not to delegate

SEC. 3. Section 16012 of the Probate Code is amended to read:

16012. (a) 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.

(b) In a case where a trustee has properly delegated a matter to an agent, cotrustee, or other person, the trustee has a duty to exercise general supervision over the person performing the delegated matter.

(c) *This section does not apply to investment and management functions under Section 16052.*

Comment. Section 16012 is amended to recognize the special rule in Section 16052 applicable under the Uniform Prudent Investor Act (1994).

Subdivisions (a) and (b) continue Section 16012 of the repealed Probate Code without change. The first part of subdivision (a) codifies the substance of Section 171 of the Restatement (Second) of Trusts (1957). The second part of subdivision (a) codifies the substance of Section 4 of the Uniform Trustees' Powers Act (1964). As to the construction of provisions drawn from uniform acts, see Section 2. The duty not to delegate administration of the trust does not preclude employment of an agent in a proper case. A trust company may delegate matters involved in trust administration to its affiliates. For provisions permitting the beneficiaries to relieve the trustee from liability, see Sections 16463 (consent), 16464 (release), 16465 (affirmance). 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 general standard of care in performing duties), 16247 (power to hire agents of trust).

Subdivision (b) is drawn from comment k to Section 171 of the Restatement (Second) of Trusts (1957).

Prob. Code § 16040 (amended). Trustee's standard of care in administering trust

SEC. 4. Section 16040 of the Probate Code is amended to read:

16040. (a) The trustee shall administer the trust with the *reasonable* care, skill, prudence, and diligence *and caution* under the circumstances then prevailing that a

prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims to accomplish the purposes of the trust as determined from the trust instrument.

~~(b) When investing, reinvesting, purchasing, acquiring, exchanging, selling, and managing trust property, the trustee shall act with the care, skill, prudence, and diligence under the circumstances then prevailing, including but not limited to the general economic conditions and the anticipated needs of the trust and its beneficiaries, that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims to accomplish the purposes of the trust as determined from the trust instrument. In the course of administering the trust pursuant to this standard, individual investments shall be considered as part of an overall investment strategy.~~

~~(e) The settlor may expand or restrict the standards *standard* provided in subdivisions *subdivision* (a) and (b) by express provisions in the trust instrument. A trustee is not liable to a beneficiary for the trustee's good faith reliance on these express provisions.~~

~~(c) This section does not apply to investment and management functions governed by the Uniform Prudent Investor Act, Article 2.5 (commencing with Section 16045).~~

Comment. Section 16040 is amended for harmony with the new Uniform Prudent Investor Act, Article 2.5 (commencing with Section 16045). This section provides a general standard of care that applies where the special, more detailed rule applicable to investments and management of trust property does not apply, such as determining whether to make discretionary distributions, communicating with beneficiaries, and relations with creditors. See subdivision (c).

The portfolio rule formerly provided by subdivision (b) is restated in Section 16047. Former subdivision (c) has been redesignated as subdivision (b) and revised to delete the reference to former subdivision (b). For a special rule protecting the trustee's good-faith reliance on trust provisions concerning investments, see Section 16046 (prudent investor rule).

Prob. Code § 16042 (repealed). Interpretation of trust terms concerning legal investments

SEC. 5. Section 16042 of the Probate Code is repealed.

~~16042. If a trust created before, on, or after July 1, 1987, refers to "investments permissible by law for investment of trust funds," "authorized by law for investment of trust funds," "legal investments," "authorized investments," or "investments acquired using the judgment and care which men of prudence, discretion, and intelligence exercise in the management of their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income, as well as the probable safety of their capital," or uses other words of similar meaning in defining the powers of the trustee relative to investments, such language, in the absence of other controlling or modifying provisions of the trust instrument, shall be construed as imposing the standard of care provided by Section 16040 and authorizing any investment permitted under Chapter 2 (commencing with Section 16200).~~

Comment. Section 16042 is continued without substantive change in Section 16053.

Prob. Code § 16200 (technical amendment). General powers of trustee

SEC. 7. Section 16200 of the Probate Code is amended to read:

16200. A trustee has the following powers without the need to obtain court authorization:

(a) The powers conferred by the trust instrument.

(b) Except as limited in the trust instrument, the powers conferred by statute.

(c) Except as limited in the trust instrument, the power to perform any act that a trustee would perform for the purposes of the trust under the standard of care provided in Section 16040 *or* 16047.

Comment. Subdivision (c) of Section 16200 is amended to recognize the authority provided in the Uniform Prudent Investor Act. See Sections 16045-16054.

This section is drawn from Sections 2(a) and 3(a) of the Uniform Trustees' Powers Act (1964) and from various California statutes that existed before the enactment of Section 16200 of the repealed Probate Code. As to the construction of provisions drawn from uniform acts, see Section 2.

The introductory clause of Section 16200 makes clear that the trustee has the powers as provided in this section without the need to obtain court authorization. See also Section 16201 (power of court to relieve trustee from restrictions on powers).

Subdivision (b) gives the trustee the statutory powers without the need to incorporate them. The main list of powers is provided in Article 2 (commencing with Section 16220). Additional powers are provided by statutes outside this chapter. See, e.g., Section 16300 *et seq.* (Revised Uniform Principal and Income Act).

Under subdivision (c), the trustee has the powers of a prudent person, without the need to obtain prior court approval. However, if the trustee desires court approval before exercising a power or desires court review after exercise of a power, the procedure provided in Section 17200 *et seq.* is available. This subdivision is drawn from Section 3(a) of the Uniform Trustees' Powers Act (1964). As to the construction of provisions drawn from uniform acts, see Section 2.

The exercise of powers by the trustee is subject to various important limitations as recognized in this section and as provided elsewhere. Subdivisions (b) and (c) make clear that the exercise of statutory or "prudent person" powers is subject to limitations provided in the trust. Section 16202 makes clear that the exercise of powers by the trustee is subject to the fiduciary duties owed to the beneficiaries. See Section 16202 Comment; see also Section 16201 (power of court to relieve trustee from restrictions on powers).

As to the construction of trust language that refers to "investments permissible by law for investment of trust funds," "authorized by law for investment of trust funds," "legal investments," "authorized investments," or "investments acquired using the judgment and care which men of prudence, discretion, and intelligence exercise in the management of their own affairs," or other words of similar meaning in defining the powers of the trustee relative to investments, see Section 16053.

Prob. Code § 16223 (repealed). Investments

SEC. 8. Section 16223 of the Probate Code is repealed.

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

Comment. Section 16223 is replaced by Section 16047(e), which provides the same unrestricted power of investment under the Uniform Prudent Investor Act.

Prob. Code § 16401 (amended). Trustee's liability to beneficiary for acts of agent

SEC. 9. Section 16401 of the Probate Code is amended to read:

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

(b) ~~The~~ *Under any of the circumstances described in this subdivision, the trustee is liable to the beneficiary for an act or omission of an agent employed by the trustee in the administration 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~~ *directs* 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~~ *prudence* 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~~ *periodically review* the agent's conduct in a case where the trustee has the power to supervise ~~the agent overall performance and compliance with the terms of the delegation.~~

(5) Where the trustee 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 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. Subdivision (b) of Section 16401 is amended for consistency with Section 16052 (delegation of investment and management functions), part of the Uniform Prudent Investor Act (1994). See Section 16052 & Comment. Subdivision (b)(1) is also revised in light of language in Section 225(2)(a) of the Restatement (Second) of Trusts (1957). Subdivision (b)(3) is amended to refer to the use of "prudence" which includes the elements of reasonable care, skill, and caution under Section 16040 (standard of care in non-investment functions) or Section 16047(a) (standard of care in investment and management functions under Uniform Prudent Investor Act). This is not intended to be a substantive change. Subdivision (b)(4) is amended to state a more concrete standard and to be consistent with the delegation rules governing investment and management under the Uniform Prudent Investor Act. See Section 16052(a).

Subdivisions (a) and (b) are drawn from Section 225 of the Restatement (Second) of Trusts (1957). Whether a trustee has acted reasonably under this section depends upon application of the standard of care provided in Section 16040. The trustee of a revocable trust is not liable where the agent's act is performed or omitted pursuant to the written instructions of the person having the power to revoke the trust. See Section 16462. Similarly, the trustee of a revocable trust is not liable for hiring an agent where the trustee is directed to do so in writing by the person having the power to revoke. See Section 16462. It should also be noted that the liability to beneficiaries does not include beneficiaries under a revocable trust during the time that the trust can be revoked. See Section 15800; see also Sections 15803 (holder of general power of appointment or power to withdraw property from trust treated as settlor), 16000 (duty to administer trust).

The six paragraphs of subdivision (b) state independent bases for imposition of liability on the trustee. For example, if the trustee has not used reasonable care in selecting or retaining an agent, the trustee may be held liable for the agent's breach under paragraph (3); but even if the trustee has no control over selection or retention of the agent, the trustee may still be held liable for the agent's breach under paragraph (1) if the trustee directed or permitted the agent's actions. It should also be noted that paragraphs (2), (5), and (6) of subdivision (b) apply regardless of whether the trustee has any control over the agent.

REVISED COMMENTS

Prob. Code § 2 (revised comment). Continuation of existing law; construction of provisions drawn from uniform acts

Comment. Section 2 continues Section 2 of the repealed Probate Code without change. See also Gov't Code §§ 9604 (reference made in statute, charter, or ordinance to provisions of one statute carried into another statute under circumstances in which they are required to be construed as restatements and continuations and not as new enactments), 9605 (construction of amended statutory provision).

Some of the provisions of this code are the same as or similar to provisions of uniform acts. Subdivision (b) provides a rule for interpretation of these provisions. Many of the provisions of this code are drawn from the Uniform Probate Code (1987). Some provisions are drawn from other uniform acts:

- Sections 220-224 — Uniform Simultaneous Death Act (1953)
- Sections 260-288 — Uniform Disclaimer of Transfers by Will, Intestacy or Appointment Act (1978)
- Sections 260-288 — Uniform Disclaimer of Transfers Under Nontestamentary Instrument Act (1978)
- Sections 3900-3925 — Uniform Transfers to Minors Act (1983)
- Sections 4001, 4124-4127, 4206, 4304-4305 — Uniform Durable Power of Attorney Act
- Sections 4400-4465 — Uniform Statutory Form Power of Attorney Act
- Sections 6300-6303 — Uniform Testamentary Additions to Trusts Act (1960)
- Sections 6380-6390 — Uniform International Wills Act (1977). See also Section 6387 (need for uniform interpretation of Uniform International Wills Act)
- Sections 16002(a), 16003, 16045-16054 — Uniform Prudent Investor Act (1994)
- Sections 16200-16249 — Uniform Trustees' Powers Act (1964)
- Sections 16300-16313 — Revised Uniform Principal and Income Act (1962)

[remainder of Section 2 Comment unchanged]

Prob. Code § 15001 (revised comment). General rule concerning application of division

Comment. Section 15001 restates Section 15001 of the repealed Probate Code without substantive change. The language used in this section has been revised to reflect the fact that this division of the repealed Probate Code (the Trust Law) became operative on July 1, 1987.

Subdivision (a) provides the general rule that this division applies to all trusts, regardless of when created. Subdivision (a) is comparable to Section 8 of the Uniform Trustees' Powers Act (1964). As to the construction of provisions drawn from uniform acts, see Section 2. Subdivision (b), a specific application of the general rule stated in subdivision (a), makes clear that, except as otherwise provided by statute, this division applies to all proceedings commenced on or after July 1, 1987. Subdivision (c) is a special provision concerning the application of this division to proceedings concerning trusts commenced before July 1, 1987.

For special transitional provisions, see Sections 15401(d) (application of rules governing method of revocation by settlor), 16053 (language invoking standard of Uniform Prudent Investor Act), 16054 (application of Uniform Prudent Investor Act to existing relationships), 16062(b)-(d) (application of duty to account to beneficiaries), 16203 (application of rules governing trustee's powers), 16401(c) (application of rules governing trustee's liability to beneficiary for acts of agent), 16402(c) (application of rules governing trustee's liability to beneficiary for acts of cotrustee), 16403(c) (application of rules governing trustee's liability to beneficiary for acts of predecessor trustee), 18000(b) (application of rule governing personal liability of trustee to third persons on contracts).

Prob. Code § 16000 (revised comment). Duty to administer trust

Comment. Section 16000 continues Section 16000 of the repealed Probate Code without change. This section is drawn in part from Sections 164 and 169 of the Restatement (Second) of Trusts (1957). See also Sections 15600 (acceptance of trust by trustee), 15800 (duties owed to person holding power to revoke), 15803 (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 general standard of care in performing duties), 16046 (prudent investor rule), 16047 (standard of care, portfolio strategy, risk and return objectives), 16049 (duties at inception of trusteeship). For provisions permitting the beneficiaries to relieve the trustee from liability, see Sections 16463 (consent), 16464 (release), 16465 (affirmance).

Prob. Code § 16001 (revised comment). Duties of trustee of revocable trust

Comment. Section 16001 continues Section 16001 of the repealed Probate Code without change. The qualification in subdivision (a) that a direction be acceptable to the trustee does not mean that the trustee is required to determine the propriety of the direction. For the rule protecting the trustee from liability for following directions under this section, see Section 16462. See also Sections 15800 (duties owed to person holding power to revoke), 16000 (duties subject to control in trust instrument), 16040 (trustee's general standard of care in performing duties), 16046 (prudent investor rule), 16047 (standard of care, portfolio strategy, risk and return objectives).

Subdivision (b) clarifies the relationship between the duty to follow directions provided in subdivision (a) and the rules governing modification of trusts. See Sections 15401 (method of revocation by settlor), 15402 (power to revoke includes power to modify).

Prob. Code § 16002 (revised comment). Duty of loyalty

Comment. Section 16002 continues Section 16002 of the repealed Probate Code without change. Subdivision (a) codifies the substance of Section 170(1) of the Restatement (Second) of Trusts (1957). Subdivision (a) is also included within the Uniform Prudent Investor Act (1994). See Section 16045 & Comment. See also Sections 16000 (duties subject to control by trust instrument), 16040 (trustee's general standard of care in performing duties), 16046 (prudent investor rule), 16047 (standard of care, portfolio strategy, risk and return objectives). 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 Section 15002 (common law as law of state). See also Section 16015 (certain actions not violations of duties). For provisions permitting the beneficiaries to relieve the trustee from liability, see Sections 16463 (consent), 16464 (release), 16465 (affirmance).

Subdivision (b) is drawn from Indiana law. See Ind. Code Ann. § 30-4-3-7(d) (West Supp. 1988). This subdivision permits sales or exchanges between two or more trusts that have the same trustee without running afoul of the duty of loyalty. See Restatement (Second) of Trusts § 170 comment r (1957). Subdivision (b) does not require the trustee to give notice to all beneficiaries of both trusts; for limitations on the need to give notice, see Sections 15802 (notice to beneficiary of revocable trust) and 15804 (notice in case involving future interest of beneficiary). See also Sections 15800 (limits on rights of beneficiary of revocable trust), 15801 (consent of beneficiary of revocable trust).

Prob. Code § 16004 (revised comment). Duty to avoid conflict of interest

Comment. Section 16004 continues Section 16004 of the repealed Probate Code without change. For provisions permitting the beneficiaries to relieve the trustee from liability, see Sections 16463 (consent), 16464 (release), 16465 (affirmance). See also Sections 16000 (duties subject to control by trust instrument), 16015 (certain actions not violations of duties), 16040 (trustee's general standard of care in performing duties), 16046 (prudent investor rule), 16047 (standard of care, portfolio strategy, risk and return objectives).

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.

Prob. Code § 16005 (revised comment). Duty not to undertake adverse trust

Comment. Section 16005 continues Section 16005 of the repealed Probate Code without change. For provisions permitting the beneficiaries to relieve the trustee from liability, see Sections 16463 (consent), 16464 (release), 16465 (affirmance). See also Sections 16000 (duties subject to control by trust instrument), 16040 (trustee's general standard of care in performing duties), 16046 (prudent investor rule), 16047 (standard of care, portfolio strategy, risk and return objectives).

Prob. Code § 16006 (revised comment). Duty to take control of and preserve trust property

Comment. Section 16006 continues Section 16006 of the repealed Probate Code without change. This section codifies the substance of Sections 175 and 176 of the Restatement (Second) of Trusts (1957). The section is in accord with prior case law. See, e.g., *Purdy v. Bank of America Nat'l Tr. & Sav. Ass'n*, 2 Cal. 2d 298, 302-04, 40 P.2d 481 (1935); *Estate of Duffill*, 188 Cal. 536, 547, 206 P. 42 (1922); *Martin v. Bank of America Nat'l Tr. & Sav. Ass'n*, 4 Cal. App. 2d 431, 436, 41 P.2d 200 (1935). For provisions permitting the beneficiaries to relieve the trustee from liability, see Sections 16463 (consent), 16464 (release), 16465 (affirmance). See also Sections 16000 (duties subject to control by trust instrument), 16040 (trustee's general standard of care in performing duties), 16046 (prudent investor rule), 16047 (standard of care, portfolio strategy, risk and return objectives).

Prob. Code § 16007 (revised comment). Duty to make trust property productive

Comments. Section 16007 continues Section 16007 of the repealed Probate Code without change. The section 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 16047. 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. For provisions permitting the beneficiaries to relieve the trustee from liability, see Sections 16463 (consent), 16464 (release), 16465 (affirmance). See also Sections 16000 (duties subject to control by trust instrument), 16046(b) (prudent investor rule subject to control by trust instrument).

Prob. Code § 16009 (revised comment). Duty to keep trust property separate and identified

Comment. Section 16009 continues Section 16009 of the repealed Probate Code without change. This section 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). For exceptions to this general duty, see, e.g., Fin. Code §§ 1563 (securities registered in name of nominee), 1564 (Uniform Common Trust Fund Act). For provisions permitting the beneficiaries to relieve the trustee from liability, see Sections 16463 (consent), 16464 (release), 16465 (affirmance). See also Sections 16000 (duties subject to control by trust instrument), 16040 (trustee's general standard of care in performing duties), 16046 (prudent investor rule), 16047 (standard of care, portfolio strategy, risk and return objectives).

Prob. Code § 16010 (revised comment). Duty to enforce claims

Comment. Section 16010 continues Section 16010 of the repealed Probate Code without change. This section codifies the substance of Section 177 of the Restatement (Second) of Trusts (1957) and is in accord with prior case law. See *Ellig v. Naglee*, 9 Cal. 683, 695-96 (1858). Depending upon the circumstances of the case, it might not be reasonable to enforce a claim in view of the likelihood of recovery and the cost of suit and enforcement. For provisions permitting the beneficiaries to relieve the trustee from liability, see Sections 16463 (consent), 16464 (release), 16465 (affirmance). See also Sections 16000 (duties subject to control by trust instrument), 16040 (trustee's general standard of care in performing duties), 16046 (prudent investor rule), 16047 (standard of care, portfolio strategy, risk and return objectives).

Prob. Code § 16011 (revised comment). Duty to defend actions

Comment. Section 16011 continues Section 16011 of the repealed Probate Code without change. This section codifies the substance of the first part of Section 178 of the Restatement (Second) of Trusts (1957) and is in accord with prior case law. See, e.g., *Estate of Duffill*, 188 Cal. 536, 554-55, 206 P. 42 (1922). Depending on the circumstances of the case, it might be reasonable to settle an action or suffer a default rather than to defend an action. For provisions permitting the beneficiaries to relieve the trustee from liability, see Sections 16463 (consent), 16464 (release), 16465 (affirmance). See also Sections 16000 (duties subject to control by trust instrument), 16040 (trustee's general standard of care in performing duties), 16046 (prudent investor rule), 16047 (standard of care, portfolio strategy, risk and return objectives).

Prob. Code § 16013 (revised comment). Duty with respect to cotrustees

Comment. Section 16013 continues Section 16013 of the repealed Probate Code without change. This section codifies the substance of Section 184 of the Restatement (Second) of Trusts (1957) and is in accord with prior case law. See *Birmingham v. Wilcox*, 120 Cal. 467, 471-73, 52 P. 822 (1898). For provisions permitting the beneficiaries to relieve the trustee from liability, see Sections 16463 (consent), 16464 (release), 16465 (affirmance). See also Sections 16000 (duties subject to control by trust instrument), 16040 (trustee's general standard of care in performing duties), 16402 (trustee's liability to beneficiary for acts of cotrustee), 16046 (prudent investor rule), 16047 (standard of care, portfolio strategy, risk and return objectives). If one cotrustee is also a settlor under a revocable trust, another 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.

Prob. Code § 16014 (revised comment). Duty to use special skills

Comment. Section 16014 continues Section 16014 of the repealed Probate Code without change. Subdivision (a) codifies a duty set forth in *Coberly v. Superior Court*, 231 Cal. App. 2d 685, 689, 42 Cal. Rptr. 64 (1965).

Subdivision (b) is similar to the last part of Section 7-302 of the Uniform Probate Code (1987) and the last part of Section 174 of the Restatement (Second) of Trusts (1957). As to the construction of provisions drawn from uniform acts, see Section 2. Subdivision (b) does not limit the duty provided in subdivision (a). Thus, the nature of the trustee's representations to the settlor leading up to the selection of the trustee does not affect the trustee's duty to use the full extent of his or her skills.

For provisions permitting the beneficiaries to relieve the trustee from liability, see Sections 16463 (consent), 16464 (release), 16465 (affirmance). See also Sections 16000 (duties subject to control by trust instrument), 16040 (trustee's general standard of care in performing duties), 16046 (prudent investor rule), 16047 (standard of care, portfolio strategy, risk and return objectives).

Prob. Code § 16201 (revised comment). Power of court to relieve trustee from restrictions on powers

Comments. Section 16201 continues Section 16201 of the repealed Probate Code without change. This section did not change the prior case law rule permitting deviation from trust restrictions as necessary in unforeseen circumstances. See, e.g., *Estate of Loring*, 29 Cal. 2d 423, 436-37, 175 P.2d 524 (1946); *Adams v. Cook*, 15 Cal. 2d 352, 359, 101 P.2d 484 (1940); *Estate of Mabury*, 54 Cal. App. 3d 969, 984-85, 127 Cal. Rptr. 233 (1976); see also Restatement (Second) of Trusts § 167 (1957). For a provision permitting the court to modify a trust where there has been a material change of circumstances, see Section 15409. As to the construction of trust language that refers to “investments permissible by law for investment of trust funds,” “authorized by law for investment of trust funds,” “legal investments,” “authorized investments,” or “investments acquired using the judgment and care which men of prudence, discretion, and intelligence exercise in the management of their own affairs,” or other words of similar meaning in defining the powers of the trustee relative to investments, see Section 16053.

Prob. Code § 16202 (revised comment). Exercise of powers subject to trustee’s duties

Comments. Section 16202 continues Section 16202 of the repealed Probate Code without change. This section recognizes that a power granted to the trustee from any source does not necessarily permit the exercise of the power, nor does it prevent the exercise of a power in a manner that 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). As to the construction of trust language that refers to “investments permissible by law for investment of trust funds,” “authorized by law for investment of trust funds,” “legal investments,” “authorized investments,” or “investments acquired using the judgment and care which men of prudence, discretion, and intelligence exercise in the management of their own affairs,” or other words of similar meaning in defining the powers of the trustee relative to investments, see Section 16053.

Prob. Code § 16203 (revised comment). Application of rules governing trustees’ powers

Comment. Section 16203 continues Section 16203 of the repealed Probate Code with technical changes. This section makes clear the effect of references in instruments to the former provisions listing trustees’ powers. As to the construction of trust language that refers to “investments permissible by law for investment of trust funds,” “authorized by law for investment of trust funds,” “legal investments,” “authorized investments,” or “investments acquired using the judgment and care which men of prudence, discretion, and intelligence exercise in the management of their own affairs,” or other words of similar meaning in defining the powers of the trustee relative to investments, see Section 16053.

Prob. Code § 16220 (revised comment). Collecting and holding property

Comment. Section 16220 continues Section 16220 of the repealed Probate Code without change. This section is the same in substance as Section 3(c)(1) of the Uniform Trustees’ Powers Act (1964). As to the construction of provisions drawn from uniform acts, see Section 2. The exercise of the power to hold property under this section is subject to the limitation provided in Section 21524(c) in the case of a marital deduction trust. See also Sections 62 (“property” defined), 16053 (language invoking standard of Uniform Prudent Investor Act), 16202 (exercise of powers is subject to duties), 16203 (trust instrument that incorporates the powers provided in former Section 1120.2 of the repealed Probate Code).

Prob. Code § 16222 (revised comment). Participation in business; change in form of business

Comment. Section 16222 continues Section 16222 of the repealed Probate Code without change. Subdivision (a) is similar to Section 3(c)(3) of the Uniform Trustees' Powers Act (1964). As to the construction of provisions drawn from uniform acts, see Section 2. 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 16053 (language invoking standard of Uniform Prudent Investor Act), 16202 (exercise of powers is subject to duties), 16203 (trust instrument that incorporates the powers provided in former Section 1120.2 of the repealed Probate Code).

Subdivision (b) excludes the lease of four or fewer residential units from the requirement that the trustee obtain court approval to continue operation of a business or other enterprise that is a part of trust property. It is irrelevant whether the residential units are located in one or more buildings or on one or more lots.

Subdivision (d) limits the rule in subdivision (b) requiring court authorization for the trustee to operate a business or other enterprise that is a part of trust property. This is a special application of the rule stated in Section 16203.

Prob. Code § 16224 (revised comment). Investments in obligations of United States government

Comment. Section 16224 continues Section 16224 of the repealed Probate Code without change. See also Sections 16053 (language invoking standard of Uniform Prudent Investor Act), 16202 (exercise of powers is subject to duties), 16203 (trust instrument that incorporates the powers provided in former Section 1120.2 of the repealed Probate Code).

Prob. Code § 16226 (revised comment). Acquisition and disposition of property

Comment. Section 16226 continues Section 16226 of the repealed Probate Code without change. This section is the same in substance as part of Section 3(c)(7) of the Uniform Trustees' Powers Act (1964). As to the construction of provisions drawn from uniform acts, see Section 2. See also Sections 62 ("property" defined), 16053 (language invoking standard of Uniform Prudent Investor Act), 16202 (exercise of powers is subject to duties), 16203 (trust instrument that incorporates the powers provided in former Section 1120.2 of the repealed Probate Code).

Prob. Code § 16227 (revised comment). Management of property

Comment. Section 16227 continues Section 16227 of the repealed Probate Code without change. This section is the same in substance as part of Section 3(c)(7) of the Uniform Trustees' Powers Act (1964). As to the construction of provisions drawn from uniform acts, see Section 2. See also Sections 62 ("property" defined), 16053 (language invoking standard of Uniform Prudent Investor Act), 16202 (exercise of powers is subject to duties), 16203 (trust instrument that incorporates the powers provided in former Section 1120.2 of the repealed Probate Code).

Prob. Code § 16228 (revised comment). Encumbrances

Comment. Section 16228 continues Section 16228 of the repealed Probate Code without change. This section is the same in substance as part of Section 3(c)(7) of the Uniform Trustees' Powers Act (1964). As to the construction of provisions drawn from uniform acts, see Section 2. See also Sections 62 ("property" defined), 16053 (language invoking standard of Uniform Prudent Investor Act), 16202 (exercise of powers is subject to duties), 16203 (trust instrument that incorporates the powers provided in former Section 1120.2 of the repealed Probate Code).

Prob. Code § 16229 (revised comment). Repairs and alterations of property

Comment. Section 16229 continues Section 16229 of the repealed Probate Code without substantive change. This section is the same in substance as Section 3(c)(8) of the Uniform Trustees' Powers Act (1964). As to the construction of provisions drawn from uniform acts, see Section 2.

See also Sections 16053 (language invoking standard of Uniform Prudent Investor Act), 16202 (exercise of powers is subject to duties), 16203 (trust instrument that incorporates the powers provided in former Section 1120.2 of the repealed Probate Code).

Prob. Code § 16230 (revised comment). Development of land

Comment. Section 16230 continues Section 16230 of the repealed Probate Code without change. This section is the same in substance as Section 3(c)(9) of the Uniform Trustees' Powers Act (1964). As to the construction of provisions drawn from uniform acts, see Section 2. See also Sections 16053 (language invoking standard of Uniform Prudent Investor Act), 16202 (exercise of powers is subject to duties), 16203 (trust instrument that incorporates the powers provided in former Section 1120.2 of the repealed Probate Code).

Prob. Code § 16231 (revised comment). Leases

Comment. Section 16231 continues Section 16231 of the repealed Probate Code without change. This section is the same in substance as Section 3(c)(10) of the Uniform Trustees' Powers Act (1964). As to the construction of provisions drawn from uniform acts, see Section 2. See also Sections 16053 (language invoking standard of Uniform Prudent Investor Act), 16202 (exercise of powers is subject to duties), 16203 (trust instrument that incorporates the powers provided in former Section 1120.2 of the repealed Probate Code).

Prob. Code § 16232 (revised comment). Mineral leases

Comment. Section 16232 continues Section 16232 of the repealed Probate Code with the addition of a reference to geothermal energy. The reference to a pooling or unitization agreement is drawn from Section 3(c)(11) of the Uniform Trustees' Powers Act (1964). As to the construction of provisions drawn from uniform acts, see Section 2. The authority to make leases or agreements extending beyond the term of the trust is consistent with Section 16231 (general power to lease). See also Sections 16053 (language invoking standard of Uniform Prudent Investor Act), 16202 (exercise of powers is subject to duties), 16203 (trust instrument that incorporates the powers provided in former Section 1120.2 of the repealed Probate Code).

Prob. Code § 16233 (revised comment). Options

Comment. Section 16233 continues Section 16233 of the repealed Probate Code without change. This section is the same in substance as Section 3(c)(12) of the Uniform Trustees' Powers Act (1964). As to the construction of provisions drawn from uniform acts, see Section 2. The authority to grant or take options exercisable beyond the term of the trust is consistent with Section 16231 (general power to lease). An option under this section includes a right of first refusal. See also Sections 62 ("property" defined), 16053 (language invoking standard of Uniform Prudent Investor Act), 16202 (exercise of powers is subject to duties), 16203 (trust instrument that incorporates the powers provided in former Section 1120.2 of the repealed Probate Code).

Prob. Code § 16234 (revised comment). Voting rights with respect to corporate shares, memberships, or property

Comment. Section 16234 continues Section 16234 of the repealed Probate Code without change. This section is comparable to Section 2458 (voting rights under guardianship and conservatorship statute). See also Corp. Code §§ 702(a) (voting of shares by trustee), 703(c) (voting of shares in corporate trustee), 705 (proxies); Prob. Code §§ 16053 (language invoking standard of Uniform Prudent Investor Act), 16202 (exercise of powers is subject to duties), 16203 (trust instrument that incorporates the powers provided in former Section 1120.2 of the repealed Probate Code).

Prob. Code § 16235 (revised comment). Payment of calls and assessments

Comment. Section 16235 continues Section 16235 of the repealed Probate Code without change. This section is the same as Section 3(c)(14) of the Uniform Trustees' Powers Act (1964). As to the construction of provisions drawn from uniform acts, see Section 2. See also Sections 16053 (language invoking standard of Uniform Prudent Investor Act), 16202 (exercise of powers is subject to duties), 16203 (trust instrument that incorporates the powers provided in former Section 1120.2 of the repealed Probate Code).

Prob. Code § 16236 (revised comment). Stock subscriptions and conversions

Comment. Section 16236 continues Section 16236 of the repealed Probate Code without change. This section is the same as the first part of Section 3(c)(15) of the Uniform Trustees' Powers Act (1964). As to the construction of provisions drawn from uniform acts, see Section 2. See also Sections 16053 (language invoking standard of Uniform Prudent Investor Act), 16202 (exercise of powers is subject to duties), 16203 (trust instrument that incorporates the powers provided in former Section 1120.2 of the repealed Probate Code).

Prob. Code § 16237 (revised comment). Consent to change in form of business; voting trusts

Comment. Section 16237 continues Section 16237 of the repealed Probate Code without substantive change. This section, in part, is similar to the second part of Section 3(c)(15) of the Uniform Trustees' Powers Act (1964). As to the construction of provisions drawn from uniform acts, see Section 2. See also Sections 16053 (language invoking standard of Uniform Prudent Investor Act), 16202 (exercise of powers is subject to duties), 16203 (trust instrument that incorporates the powers provided in former Section 1120.2 of the repealed Probate Code).

Prob. Code § 16238 (revised comment). Holding securities in name of nominee

Comment. Section 16238 continues Section 16238 of the repealed Probate Code, but deletes the reference to the liability of the trustee for an act of the nominee for consistency with Section 9736 (decedent's estate management). This matter is governed by general provisions on liability of a trustee. See, e.g., Section 16401. This section is comparable to Section 3(c)(16) of the Uniform Trustees' Powers Act (1964). As to the construction of provisions drawn from uniform acts, see Section 2. See also Corp. Code § 702(a) (trustee not entitled to vote shares without transfer into trustee's name); Fin. Code § 1563 (trust company may register securities in name of nominee); Prob. Code §§ 16053 (language invoking standard of Uniform Prudent Investor Act), 16202 (exercise of powers is subject to duties), 16203 (trust instrument that incorporates the powers provided in former Section 1120.2 of the repealed Probate Code).

Prob. Code § 16239 (revised comment). Deposit of securities in securities depository

Comment. Section 16239 continues Section 16239 of the repealed Probate Code without change. See also Sections 16053 (language invoking standard of Uniform Prudent Investor Act), 16200 (powers subject to control by trust instrument), 16202 (exercise of powers is subject to duties), 16203 (trust instrument that incorporates the powers provided in former Section 1120.2 of the repealed Probate Code).

Prob. Code § 16240 (revised comment). Insurance

Comment. Section 16240 continues Section 16240 of the repealed Probate Code without change. This section is the same in substance as Section 3(c)(17) of the Uniform Trustees' Powers Act (1964). As to the construction of provisions drawn from uniform acts, see Section 2. See also Sections 62 ("property" defined), 16053 (language invoking standard of Uniform Prudent Investor Act), 16202 (exercise of powers is subject to duties), 16203 (trust instrument that incorporates the powers provided in former Section 1120.2 of the repealed Probate Code).

Prob. Code § 16241 (revised comment). Borrowing money

Comment. Section 16241 continues Section 16241 of the repealed Probate Code without change. The first sentence of this section is similar to part of Section 3(c)(18) of the Uniform Trustees' Powers Act (1964). As to the construction of provisions drawn from uniform acts, see Section 2. See also Sections 62 ("property" defined), 16053 (language invoking standard of Uniform Prudent Investor Act), 16202 (exercise of powers is subject to duties), 16203 (trust instrument that incorporates the powers provided in former Section 1120.2 of the repealed Probate Code).

Prob. Code § 16242 (revised comment). Payment and settlement of claims

Comment. Section 16242 continues Section 16242 of the repealed Probate Code without change. This section is substantially the same as Section 3(c)(19) of the Uniform Trustees' Powers Act (1964). As to the construction of provisions drawn from uniform acts, see Section 2. The trustee has the power to release a claim; the determination of when to release a claim depends upon the duties imposed on the trustee. As a general matter, the trustee should be able to release a claim not only when it is uncollectible, but also when it is uneconomical to attempt to collect it. See also Sections 16010 (duty to enforce claims), 16011 (duty to defend actions), 16053 (language invoking standard of Uniform Prudent Investor Act), 16202 (exercise of powers is subject to duties), 16203 (trust instrument that incorporates the powers provided in former Section 1120.2 of the repealed Probate Code).

Prob. Code § 16247 (revised comment). Hiring persons

Comment. Section 16247 is the same in substance as part of Section 3(c)(24) of the Uniform Trustees' Powers Act (1964). As to the construction of provisions drawn from uniform acts, see Section 2. 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 (general duty not to delegate), 16014 (duty to use special skills), 16052 (delegation of investment and management functions), 16202 (exercise of powers is subject to duties), 16401 (trustee's liability to beneficiary for acts of agent).

Prob. Code § 16311 (revised comment). Underproductive property

Comment. Subdivision (d) of Section 16311 resolves the conflict between the portfolio approach to investment decisions provided in Section 16047 and the underproductive property provision of Section 16311 as it applies to securities.

Prob. Code § 16440 (revised comment). Measure of liability for breach of trust

Comment. Section 16440 continues Section 16440 of the repealed Probate Code without change. Subdivision (a) is drawn from Section 205 of the Restatement (Second) of Trusts (1957). See also Section 16047 (duty to consider investments as part of an overall investment strategy under Uniform Prudent Investor Act).

Subdivision (b) codifies the good-faith exception to the general liability rules found in the Restatement. See Restatement (Second) of Trusts § 205 comment g (1957). This rule supersedes subdivision (a) of former Civil Code Section 2238 and represents an expansion of the rule in *Estate of Talbot*, 141 Cal. App. 2d 309, 320-27, 296 P.2d 848 (1956). In *Talbot*, liability for appreciation damages was excused on the grounds of good faith, but the trustee was liable for the breach in the amount of the loss to the corpus plus interest.