

No. S251574
(Court of Appeal No. F076395)
(Tuolumne County Super. Ct. No. PR11414)

**IN THE SUPREME COURT OF
THE STATE OF CALIFORNIA**

JOAN MAURI BAREFOOT,
Appellant,

v.

JANA SUSAN JENNINGS AND
SHANA LEE WREN,
Respondents.

SUPREME COURT
FILED

MAR 14 2019

Jorge Navarrete Clerk

Deputy

After a Decision By the Court of Appeal,
Fifth Appellate District

MOTION FOR JUDICIAL NOTICE

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MOTION FOR JUDICIAL NOTICE

Pursuant to Rule 8.252(a), Respondents Jana Susan Jennings and Shana Lee Wren (“Respondents”) respectfully request that the Court take judicial notice of the documents attached hereto as Exhibits A and B.

Exhibit A is a copy of *Selected 1986 Trust and Probate Legislation*, 18 CAL. L. REVISION COMM’N REPORTS 1201 (1986) (hereafter “CLRC Report”). This document was printed from the Law Revision Commission’s web site using the following link: <http://www.clrc.ca.gov/pub/Printed-Reports/Pub155.pdf>. Legislative history is subject to judicial notice under Section 452(c) and (h) of the Evidence Code. See *United Teachers of Los Angeles v. Los Angeles Unified Sch. Dist.*, 54 Cal. 4th 504, 528 (2012); *Elsner v. Uveges*, 34 Cal. 4th 915, 929 n.10 (2004).

Judicial notice may be sought for the first time on appeal concerning pure issues of law—here, statutory interpretation. See, e.g., *Peart v. Ferro*, 119 Cal. App. 4th 60, 81 (2004) (appellate court took judicial notice of legislative history materials even though no request made in trial court); see also *Watkins v. Cty. of Alameda*, 177 Cal. App. 4th 320, 332 n.12 (2009) (judicial notice of legislative materials on Court of Appeal’s own motion to address whether county regulations conflicted with state statute).

Exhibit B: This document was obtained from the Legislature’s web site using the following link: [http://www.calbarjournal.com/Portals/0/documents/legislation/Legislative%20Proposals%202017/TE-2017-04-commencement of discovery.pdf](http://www.calbarjournal.com/Portals/0/documents/legislation/Legislative%20Proposals%202017/TE-2017-04-commencement%20of%20discovery.pdf). In addition, further legislative history regarding the changes recommended in the attached Exhibit B may be found at the Legislature’s web site at: [https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill id=201720180AB308](https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill%20id%3D201720180AB308). As with Exhibit A, these

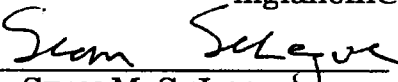
legislative history materials are a proper subject of judicial notice.

DATED: March 13, 2019.

Respectfully,

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EXHIBIT A



**SELECTED 1986
TRUST and PROBATE
LEGISLATION**

with
Official Comments

The Trust Law
Disposition of Estate
Without Administration
Small Estate Set-Aside
Proration of Estate Taxes

September 1986

Published by
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

in cooperation with
California Continuing Education of the Bar

NOT PRINTED AT STATE EXPENSE

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NOTE

The Commission's annual reports and its recommendations and studies are published in separate pamphlets which are later bound in permanent volumes. The page numbers in each pamphlet are the same as in the volume in which the pamphlet is bound. The purpose of this numbering system is to facilitate consecutive pagination of the bound volumes. This pamphlet will appear in Volume 18 of the Commission's *Reports, Recommendations, and Studies* which is scheduled to be published late in 1986.

Cite this pamphlet as *Selected 1986 Trust and Probate Legislation*, 18 Cal L. Revision Comm'n Reports 1201 (1986).

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TRUST and PROBATE
LEGISLATION**

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Official Comments

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PREFACE

On recommendation of the Law Revision Commission, the 1986 session of the California Legislature enacted a new Trust Law and three other statutes dealing with aspects of probate law—disposition of estates without administration, small estate set-aside, and proration of estate taxes. The Trust Law, enacted by Chapter 820 of the Statutes of 1986, becomes operative on July 1, 1987. The statutes relating to disposition of estates without administration and small estate set-aside were enacted by Chapter 783 of the Statutes of 1986 and also become operative on July 1, 1987. The statute relating to proration of estate taxes was enacted by Chapter 783 of the Statutes of 1986 and become operative on January 1, 1987.

This book contains the full text of the newly enacted statutes as well as an official comment to each section. Comments to sections that have been revised to conform with the new statutes are also included. Sections that have been revised for technical reasons are omitted; only the more important substantive revisions in related statutes are set out in this book. The disposition of each repealed section that is replaced by a new statute is noted in a comment at the end of each recommendation.

The four new statutes included in this book are the result of recommendations by the California Law Revision Commission. See *Recommendation Proposing the Trust Law*, 18 Cal. L. Revision Comm'n Reports 501 (1986); *Recommendation Relating to Disposition of Estate Without Administration*, 18 Cal. L. Revision Comm'n Reports 1005 (1986); *Recommendation Relating to Small Estate Set-Aside*, 18 Cal. L. Revision Comm'n Reports 1101 (1986); *Recommendation Relating to Proration of Estate Taxes*, 18 Cal. L. Revision Comm'n Reports 1127 (1986). A discussion of existing law and the reasons for the Commission's recommendations are set out at the beginning of each of the four recommendations. This material has been edited by Stan G. Ulrich, a member of the Commission's legal staff, to reflect changes made in the original recommendations

during the legislative process. The Commission has not reviewed this revised material, and thus it does not necessarily represent the views of the Commission.

The official comments for this legislation are taken from the pertinent Commission recommendation and from special reports on file with the Assembly Committee on Judiciary, the Senate Committee on Judiciary, and the Legislative Counsel. See *Communication From California Law Revision Commission Concerning Assembly Bill 2625* [probate recommendations]; *Communication From California Law Revision Commission Concerning Assembly Bill 2652* [trust recommendation]. These reports will be republished in the 1986 Annual Report of the California Law Revision Commission.

California Continuing Education of the Bar (CEB) paid the cost of printing this book. The Commission is pleased to assist CEB in its effort to inform lawyers, judges, and others concerning the new trust and probate statutes.

Any defect believed to exist in this legislation should be brought to the attention of the Commission so that the Commission can study the matter and present any necessary corrections for legislative consideration.

John H. DeMouly
Executive Secretary

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

proposing the

TRUST LAW

(Revised to Reflect Changes Made in Legislature)

Editorial note. The following text is taken from the Law Revision Commission's *Recommendation Proposing the Trust Law*, 18 Cal. L. Revision Comm'n Reports 501 (1986). This material has been revised to reflect the changes made in the Legislature after the Commission's recommended legislation was introduced. Although these revisions were made by the Commission's legal staff, the revised text does not necessarily represent the views of the Commission.

Material added to the text of the Commission's original printed recommendation is shown in italics. The omission of material appearing in the original recommendation is also indicated. The omitted text related to the legislation as proposed by the Commission that is no longer relevant in light of the changes made in the Legislature.



SUMMARY OF REPORT

The proposed comprehensive trust law reorganizes existing law and consolidates it in the Probate Code. The proposed law governs private express trusts as well as charitable trusts that are subject to the jurisdiction of the Attorney General.

The proposed law retains much of the substance of existing law, while eliminating distinctions between testamentary and living trusts to the extent practicable. Many technical and minor changes are made in the process of reorganizing and combining the several bodies of existing trust law. Assuming enactment during the 1986 legislative session, the operative date of the new Trust Law is deferred until July 1, 1987.

The more important changes that would be made by the proposed law are indicated below:

Creation of Trusts

The essential elements necessary to create a trust under the proposed law are not substantively different, although stated in terms drawn from the Restatement (Second) of Trusts. The proposed law revises the rules governing indefinite beneficiaries and purposes to conform trust law with the law of powers, and to validate trusts which would fail under existing law.

Oral Trusts

The proposed law provides that an oral trust may be made irrevocable, that it may be established only by clear and convincing evidence of the trust elements, and that the oral declaration of the settlor is not, standing alone, sufficient evidence of its creation.

Spendthrift and Other Protective Trusts

The proposed law revises the law relating to spendthrift trusts as follows: (1) The statute makes clear that voluntary and involuntary transfer of the beneficiary's right to principal may be restrained, as well as the right to income. (2) Creditors are precluded from compelling the trustee to exercise discretion to pay income or principal to the

beneficiary; this does not limit any right a beneficiary may have to compel payment. (3) A person claiming delinquent child or spousal support can reach a trust in an amount determined equitable by the court, notwithstanding a restraint on transfer. (4) The right of a public entity to seek reimbursement for support furnished a trust beneficiary or a spouse or minor child of the beneficiary is recognized in the proposed law and treated the same as a claim for child or spousal support; however, this right of reimbursement does not apply where the beneficiary has a disability that substantially impairs his or her ability to provide for care or custody and the disability is a substantial handicap. . . . (5) *The general creditor's right to reach up to 25% of a payment to which the beneficiary is otherwise entitled is retained.*

Enforcement of Charitable Trusts by Attorney General

The proposed law codifies the principle that the Attorney General should get notice of proceedings involving charitable trusts, except where the charitable interest is subject to revocation or where the Attorney General has waived notice. The proposed law also makes the special procedure applicable to internal affairs of trusts available to the Attorney General both during the time that non-charitable beneficiaries have an interest and thereafter.

Trustee's Bond

The proposed law makes clear that . . . *a trust company* qualified to act in California is not required to give a bond, regardless of a requirement in the trust. In other cases the court has discretion to require an individual trustee *or a nonprofit or charitable corporation acting as trustee* to give a bond if reasonably requested by the beneficiary or if needed to protect the interests of beneficiaries, notwithstanding a waiver of bond in the trust.

Acceptance and Rejection of Trusts

The proposed law codifies rules governing the trustee's acceptance of the trust by a written acceptance or by acting under the trust. These rules also permit the person named

as trustee to act in emergency circumstances to protect the trust property without being deemed to have accepted the trust. The proposed law provides for rejection of the trust in writing or by inaction for a reasonable time after learning of the trust.

Trustees' Duties

The proposed law replaces the archaic and incomplete statements of trustees' duties in existing law with a list of duties drawn largely from the Restatement. The proposed law makes clear, however, that fiduciary duties under a revocable trust are owed to the settlor (or other person holding the power of revocation) during the time the trust is revocable.

Standard of Care in Administering the Trust

The proposed law applies the recently revised standard of care governing investment and management of trust property in Civil Code Section 2261 to cover all administrative duties under the trust and eliminates the old statute requiring "at least ordinary care and diligence."

Duty to Inform and Account to Beneficiaries

The proposed law requires trustees to account annually to beneficiaries who are currently receiving or are entitled to receive income or principal, subject to a contrary provision in the trust. Other beneficiaries will be able to request relevant information from the trustee but are not entitled to annual accounts. The proposed law also recognizes that beneficiaries may waive the right to an accounting. The duty to inform and account to beneficiaries does not apply to beneficiaries under revocable trusts during the time when the trust is revocable.

Trustees' Powers

The proposed law adopts the scheme of the Uniform Trustees' Powers Act giving the trustee a set of automatic powers, including all powers that a prudent person would exercise in furtherance of the purposes of the trust, subject to any restrictions or expansions of powers in the trust. The automatic powers in the proposed law are essentially the

same as the optional powers in existing law. The power to continue to operate a business that is in the trust is not automatic, however, but may be exercised only if the trust so provides or the court permits it. The proposed law makes clear that the existence of a power does not excuse its exercise in a manner that would violate a duty.

Allocations Between Income and Principal

The proposed law makes some revisions in the Revised Uniform Principal and Income Act. The standard of care is conformed to the newly revised standard under Civil Code Section 2261. The rule against apportionment of rent, interest, and annuities is reversed in favor of the uniform rule calling for apportionment. Losses to a business or farming operation may be carried forward. The maximum depreciation for natural resources is limited to the amount that is deductible from federal income tax instead of the 27½% standard.

Remedies for Breach of Trust

The proposed law provides a comprehensive list of the traditional remedies available for breach of trust, whereas the existing statute is largely silent on this subject. The proposed law adopts the Restatement formulation of the measure of liability for breach. The proposed law makes the trustee liable for interest at the legal rate on judgments or for any greater amount received as interest. . . .

Limitations

The proposed law provides a three-year limitations period in proceedings by a beneficiary against a trustee that begins to run on the date of receipt of an account or report that discloses the facts of a claim or on the date when the beneficiary reasonably should have discovered the facts. This replaces the existing four-year statute.

Exculpation

The proposed law adopts Restatement rules governing exculpation of trustees by provisions in the trust, a subject

not covered by existing statutes except as to revocable living trusts.

Liability of Trustee to Beneficiaries for Acts of Others

The new law codifies rules governing the trustee's liability for acts of agents, cotrustees, and predecessor trustees, thus filling a gap in existing law. The new law also codifies rules protecting the trustee from liability, i.e., exculpation, consent, release, and subsequent affirmance.

Modification and Termination of Trusts

The proposed law contains comprehensive rules on modification and termination of trusts in place of the scattered and incomplete references in existing statutes. The rule that a trust is revocable unless it is made irrevocable by the trust instrument is retained, but the proposed law makes clear that this rule applies only to trusts created by California domiciliaries, trusts executed in California, and trusts providing that California law governs . . . *the trust*. The proposed law makes clear that a revocable trust may be revoked in the manner provided by statute (delivery of a written instrument to the trustee during the settlor's lifetime), unless a manner specified in the trust is made exclusive. The proposed law gives the court discretion to approve a modification or termination by all beneficiaries without the consent of the settlor, if the reason for modification or termination outweighs the interest in accomplishing a material purpose of the trust. The court has no discretion where the trustor has imposed a valid restraint on the alienation of the beneficiary's interest, as in a spendthrift trust. In the case of a trust with uneconomically low principal, the proposed law establishes a floor of \$20,000 in principal amount below which the trustee may terminate the trust without the need for judicial approval. The proposed law gives the court authority to alter the administrative or distributive provisions of a trust where necessary to accomplish the purpose of the trust. The proposed law liberalizes the statutory rules governing combination of similar trusts. It also permits the division of a trust into two or more separate

trusts upon a showing of good cause and that the trust purposes and the interests of beneficiaries will not be defeated or substantially impaired, whereas existing law requires the consent of all interested parties. The proposed law also provides rules on the disposition of property upon trust termination.

Judicial Proceedings Concerning Trusts

The proposed law makes clear that the superior court, when considering questions regarding the internal affairs of trusts, has full jurisdiction over necessary parties and all the powers of the superior court. The proposed law recognizes that there is no right to a jury trial in proceedings concerning internal affairs of trusts. In the case of testamentary trusts, venue is proper both in the place of administration of the decedent's estate and in the principal place of trust administration. Venue in proceedings involving living trusts is in the county where the principal place of administration of the trust is located. Under the proposed law, the principal place of administration is the usual place where the day-to-day activities of the trust are carried on by the person primarily responsible for administering the trust, rather than the place where the day-to-day records are kept as provided in existing law.

Rights of Beneficiaries of Revocable Trusts

The proposed law limits the rights of beneficiaries of revocable trusts during the time when the trust may be revoked. Hence, beneficiaries of revocable trusts may not petition the court relating to internal trust affairs. Nor are such beneficiaries entitled to receive notice of proceedings commenced by other persons relating to internal trust affairs. The consent of such beneficiaries is not necessary in any case where the consent of "all" beneficiaries is needed to take or approve some action.

Liability of Trustees to Third Persons

Under the proposed law, the trustee is personally liable on a contract where the contract so provides or *where* the trustee fails to reveal its representative capacity or *identify the trust*. The existing rule holds the trustee liable unless the contract excuses liability. The proposed law provides

that the trustee is liable for holding trust property and for torts only if the trustee is personally at fault, i.e., where the trustee, either negligently or intentionally, acts or fails to act. This fills a gap in existing statutory law. The proposed law also makes clear that a third person may sue the trustee in its representative capacity, leaving the issue of ultimate liability between the trustee and the trust estate to a later time.

Rights of Creditors of Settlers

The proposed law provides that a creditor of the settlor may reach property subject to a revocable living trust to the extent of the settlor's power of revocation. After the settlor's death, the creditor may reach trust property to the same extent, if the decedent's estate is otherwise insufficient to satisfy creditors' claims.

Transitional Provisions

As a general rule, the proposed law is made applicable to all trusts, but where significant new rules are provided that a settlor can alter by provisions in the trust, the existing law is generally retained as to living trusts created before the operative date and as to testamentary trusts under wills executed before the operative date



TRUST LAW

OUTLINE OF RECOMMENDATION

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RECOMMENDATION

Background

California is among a small group of states having a relatively significant body of statutory trust law.¹ The foundation of California trust law is a revised version of the Field Code dating from 1872.² Surprisingly large portions of the Field Code remain unamended 113 years later. The Field Code has been the subject of serious criticism over the years; it has even been described as being "about as functional as a vermiform appendix."³

The Probate Code enacted in 1931 included a separate body of trust statutes largely concerned with procedural matters.⁴ Different bodies of procedural law have developed within the Probate Code, due to the separate treatment traditionally afforded testamentary trusts as opposed to living trusts.⁵

Various uniform laws have also been enacted in California, forming yet another body of statutes that must be read with the Field Code and the procedural statutes in the Probate Code.⁶

California trust law is now a patchwork. The various parts are largely uncoordinated. Much of the Field Code is antiquated and at variance with the terminology of 20th Century trust law. The California statutes have not taken advantage of the work of the first or second Restatements

¹ See G. Bogert, *The Law of Trusts and Trustees* § 7, at 31-34 (rev. 2d ed. 1984). This source lists California, Georgia, Indiana, Louisiana, Maryland, New York, Oklahoma, Pennsylvania, and Texas as having detailed trust statutes. Washington should also be added to this list. See Wash. Rev. Code Ann. §§ 11.96.009-11.110.900 (Supp. 1986).

² See Civil Code §§ 859-871, 2215-2269, 2273-2289 *passim*.

³ Evans, *Observations on the State, Etc., of the California Laws of Uses and Trusts*, 28 S. Cal. L. Rev. 111 (1955); see also Hohfeld, *The Need of Remedial Legislation in the California Law of Trusts and Perpetuities*, 1 Calif. L. Rev. 305 (1913); Turrentine, *Suggestions for Revision of Provisions of the California Civil Code Regarding Future Interests*, 21 Calif. L. Rev. 1 (1932).

⁴ See Prob. Code §§ 1120-1133 *passim*.

⁵ See the discussion under "Judicial Proceedings Concerning Trusts" *infra*.

⁶ See the Revised Uniform Principal and Income Act (1962) (Civil Code §§ 730-730.17); the Uniform Management of Institutional Funds Act (1972) (Civil Code §§ 2290.1-2290.12); the Uniform Supervision of Charitable Trusts Act (1954) (Gov't Code §§ 12580-12597); the Uniform Testamentary Additions to Trusts Act (1960) (Prob. Code §§ 6300-6303). Section 3 of the Uniform Trustees' Powers Act (1964) was the source of much of Probate Code Section 1120.2.

of Trusts nor of the provisions in the Uniform Probate Code relating to trust administration.⁷

A major purpose of this recommendation is to reorganize and consolidate the scattered provisions of existing law.⁸ This will make the law more accessible to courts, lawyers, and other interested persons, and should make the law more easily understood. This was, of course, the function of the Field Code when it was enacted—it provided a “hip pocket” statement of basic trust principles that was probably serviceable in the context of 19th Century California.⁹ The Commission has also reviewed existing law with a view toward improving its operation by eliminating inconsistencies, modernizing language, unifying procedures,¹⁰ and filling gaps in the law where additional guidance is considered useful.¹¹ To the extent practicable, the proposed law seeks to apply the same substantive and procedural rules to living and testamentary trusts. The Commission has not set out to completely uproot the existing law. Many provisions in existing law, particularly recent statutory enactments, have been retained in the proposed law without substantive change. The process of revising and reorganizing the Field Code provisions has resulted in more change in the language than in the substance of much of this law.¹²

The Commission has not attempted to codify all relevant rules relating to trusts that may apply under the common law. Rather, the proposed law makes clear that the common law of trusts is the law of California, except to the extent that it is modified by statute.¹³

⁷ See Restatement of Trusts (1935); Restatement (Second) of Trusts (1957); Uniform Probate Code §§ 7-101 to 7-307 (1977).

⁸ Some specialized laws will remain in other codes. See, e.g., Fin. Code §§ 1500-1591 (trust companies); Gov't Code §§ 12580-12597 (Uniform Supervision of Charitable Trusts Act).

⁹ This description appears in a discussion of approaches to trust law reform in 1 Ontario Law Reform Commission, Report on the Law of Trusts (1984).

¹⁰ See, e.g., the discussion under “Judicial Proceedings Concerning Trusts” *infra*.

¹¹ See, e.g., the discussion under “Remedies for Breach of Trust” *infra*.

¹² This is because the substantive rules of the Field Code are largely harmonious with the common law and with the rules of the Restatement, although the wording differs significantly. See American Law Institute, California Annotations to the Restatement of the Law of Trusts *passim* (1940).

¹³ See Civil Code § 22.2 (common law as rule of decision in California courts); see also Tex. Prop. Code Ann. § 111.005 (Vernon 1984) (reestablishment of common law except as modified by Texas Trust Code).

A major source of proposed revisions is the Restatement (Second) of Trusts. To a large extent, the Restatement is harmonious with California case law,¹⁴ in part because the Restatement seeks to state the common law rule, which may also prevail in California. Where there is conflict between the case-law rules, the Restatement seeks to take the rule deemed sounder in principle or more expedient.¹⁵ The Restatement is a widely accepted authority that has influenced the development of California law.¹⁶ The Restatement has also been influential in the recent statutory codifications in Indiana¹⁷ and Texas.¹⁸

A concept that permeates trust law is the settlor's right to determine certain rules of trust administration, trustee liability, the interests of beneficiaries, and other matters. This reduces the impact of many statutory rules, making them in effect rules of construction that apply only where the trust itself does not provide a rule.¹⁹ On the other hand, the Commission has not attempted to draft a statutory trust that could be copied, filled in, and then stored in a safe deposit box to await the appropriate occasion.²⁰ The statutory rules are intended to provide guidance to trust parties and to the court that must determine questions arising in the course of trust administration. While in some instances a settlor may wish to rely on the statutory statement of powers, duties, or some other matter of administration, rather than on language in the trust instrument, the Commission anticipates that most settlors

¹⁴ See American Law Institute, California Annotations to the Restatement of the Law of Trusts *passim* (1940).

¹⁵ G. Bogert, The Law of Trusts and Trustees § 8, at 79-80 (rev. 2d ed. 1984).

¹⁶ See, e.g., *Canfield v. Security-First Nat'l Bank*, 13 Cal. 2d 1, 30-31, 87 P.2d 830 (1939); *Gbur v. Cohen*, 93 Cal. App. 3d 296, 301-02, 155 Cal. Rptr. 507 (1979); *Estate of Hensel*, 144 Cal. App. 2d 429, 438, 301 P.2d 105 (1956); *Estate of Talbot*, 141 Cal. App. 2d 309, 326, 296 P.2d 848 (1956); see also California cases cited in Shepard's Restatement of the Law Citations (1976 & Supps.); 7 B. Witkin, Summary of California Law *Trusts* 5366-498 *passim* (8th ed. 1974).

¹⁷ See Ard, *An Introduction to the Indiana Trust Code Commission Comments*, Ind. Code Ann. Supp. 72, 75 (West 1983).

¹⁸ See State Bar of Texas, Section of Real Estate, Probate and Trust Law, Guide to the Texas Trust Code, Appendix C (1983). The 1943 Texas Trust Act was also drawn in part from the first Restatement. See Moorhead, *The Texas Trust Act*, 22 Tex. L. Rev. 123, 127 (1944). Earlier codifications in Louisiana and Oklahoma were also heavily influenced by the Restatement. See Ard, *A Proposed Trust Code for Indiana—An Effort at Reform*, 45 Notre Dame Law. 427, 428 (1970).

¹⁹ See, e.g., the discussions under "Trustees' Powers" and "Allocation of Receipts and Expenditures Between Principal and Income" *infra*.

²⁰ Compare Prob. Code § 6241 providing a "California statutory will with trust."

will continue to use forms otherwise available and seek the advice of counsel.

The major changes that would be made by the proposed Trust Law are discussed in the following material. Existing law is summarized and compared with the scheme of the proposed law. Minor and technical revisions are not generally noted. For this type of information, reference should be made to the sections and comments of the "Proposed Law," *infra*, and to the "Appendix: Disposition of Existing Trust Provisions," *infra*.

Scope of Proposed Law

The proposed law deals with the law governing private express trusts. Subject to the supervisory authority of the Attorney General,²¹ the proposed law would also provide the framework for charitable trusts, as does existing law.²² The proposed law does not set forth the law concerning constructive and resulting trusts, termed "involuntary trusts" in the Field Code.²³ The statutory treatment of "involuntary trusts" by existing law is not adequate.²⁴ The proposed law leaves the law relating to constructive and resulting trusts largely untouched by preserving the most important statutory provisions²⁵ and making clear that California common law in this area is not changed. The proposed law, like existing trust law, is not intended to govern deeds of trust, Totten trusts, business trusts, employee benefit trusts, or other special arrangements that are not private or charitable express trusts.²⁶ *However, the new law makes clear that the repeal of Civil Code Sections 2215-2244 is not intended to affect the general fiduciary principles applicable to confidential relationships.*

²¹ See Gov't Code §§ 12580-12597 (Uniform Supervision of Charitable Trusts Act).

²² See the discussion under "Charitable Trusts" *infra*.

²³ See Civil Code §§ 2215-2217, 2223-2224, 2275.

²⁴ See 7 B. Witkin, Summary of California Law *Trusts* § 2, at 5367-68 (8th ed. 1974). One commentator has described these provisions in the Field Code as "an unusually successful effort to confuse the theory of 'resulting' trusts." Evans, *Observations on the State, Etc., of the California Laws of Uses and Trusts*, 28 S. Cal. L. Rev. 111, 118 (1955).

²⁵ Civil Code §§ 2223, 2224. The proposed law also preserves without change Civil Code Section 2224.1 relating to an involuntary trust of proceeds from sale of a felon's story.

²⁶ See Prob. Code § 82 (defining "trust").

Formalities for Creating Trusts

Essential Elements

One provision of existing law sets out several elements required for the creation of an express trust: the intention of the settlor to create a trust, trust property (denoted as the "subject" of the trust), a trust purpose, and a trust beneficiary.²⁷ In another section, the Field Code, viewing the process from the point of view of the trustee, declares that a trust is created when the following elements are present: the trustee's acceptance of the trust, the subject of the trust, a trust purpose, and a trust beneficiary.²⁸ A third provision states the principle that the "mutual consent of a trustor and trustee creates a trust of which the beneficiary may take advantage at any time prior to its rescission."²⁹

These provisions do not appear to have created any great problems in California, but they are not consistent with one another and should be reworked. The proposed law sets forth the necessary elements of a trust in the terms of the Restatement (Second) of Trusts.

Intent. In the terms of the Restatement, a trust is created only if the settlor properly manifests an intention to create a trust.³⁰ Special requirements apply to the proper manifestation of the settlor's intent, such as the Statute of Frauds in trusts involving real property.³¹

Property. A trust cannot be created without property.³² Much detail on what constitutes "property" for the purpose of a trust is elaborated in Sections 75-86 of the Restatement. These sections of the Restatement relate to matters such as non-existent interests, indefinite subject matter, limited interests, transferable and non-transferable property, intangible things, equitable interests, interests subject to divestment, contingent interests, and expectancies. The Commission believes that these statements provide useful guidance, but does not recommend legislating this detail.

²⁷ Civil Code § 2221.

²⁸ Civil Code § 2222.

²⁹ Civil Code § 2251. For a criticism of the phrasing and potential operation of these three provisions, see Evans, *Observations on the State, Etc., of the California Laws of Uses and Trusts*, 28 S. Cal. L. Rev. 111, 119-20 (1955).

³⁰ Restatement (Second) of Trusts § 23 (1957).

³¹ See the discussion under "Statute of Frauds" *infra*.

³² Restatement (Second) of Trusts § 74 (1957).

Beneficiary. A *private* trust is not created unless there is a beneficiary.³³ This is consistent with existing law, although under the proposed law the requirement that the beneficiaries must be indicated with reasonable certainty is modified.³⁴

Purpose. Existing law provides that a trust may be created for any purpose for which a contract may be made.³⁵ The proposed law retains the substance of the existing provision by stating that a trust can be created for any purpose that is not illegal or against public policy.³⁶

Methods of Creating Trusts

Existing law is silent as to the mechanics of creating a trust. The proposed law fills the gap by adopting the formulation of the Restatement.³⁷ In addition, the proposed law continues the recently enacted California rule that a valid trust can be created where the settlor is the sole trustee and sole beneficiary, so long as the trust designates one or more successor beneficiaries to take after the death of the settlor.³⁸

Statute of Frauds

Existing law provides that an express trust in relation to real property is not valid unless it is in writing subscribed by the trustee or is declared in the instrument under which the trustee claims the property.³⁹ The proposed law

³³ See Restatement (Second) of Trusts § 112 (1957); Civil Code §§ 2221, 2222.

³⁴ See the discussion under "Indefinite Beneficiaries and Purposes" *infra*.

³⁵ See Civil Code §§ 2220 (trust purpose), 1667-1669 (unlawful contracts).

³⁶ See Restatement (Second) of Trusts §§ 60, 62 (1957). Compare Tex. Prop. Code Ann. § 112.031 (Vernon 1984).

³⁷ See Restatement (Second) of Trusts § 17 (1957). A similar approach has recently been followed in Texas. See Tex. Prop. Code Ann. § 112.001 (Vernon 1984). A person may create a trust under this scheme by any of several methods: . . . *by a property owner's declaration that the owner holds the property as trustee*, by a transfer (made during the property owner's life or by will) to another person . . . *as trustee*, by exercise of a power of appointment to a person as trustee . . . , or by an enforceable promise . . . *to create a trust*.

³⁸ Civil Code § 2225, as added by 1983 Cal. Stat. ch. 138, § 1. This statute makes clear that the doctrine of merger does not act to terminate such a trust. See *In re Estate of Washburn*, 11 Cal. App. 735, 746, 106 P. 415 (1909) (merger of legal and equitable estates).

³⁹ See Civil Code § 852. The language of this special application of the Statute of Frauds varies from that of the general Statute of Frauds provided in Code of Civil Procedure § 1971.

continues the existing special Statute of Frauds as applied to trusts.

Oral Trusts

A settlor in California may create an oral trust in personal property.⁴⁰ A major problem with an oral trust is the difficulty of proving its terms. It is highly unlikely that an oral trust will specify the elements that should be included in the declaration of trust, such as the trust property and purpose, who are the beneficiaries and trustees, and special administrative provisions relating to trustee's powers, duties, liabilities, compensation, and bond. There is also a risk of perjury, particularly by those with something to gain after the death of the purported settlor. In response to these problems, the courts have required that the elements of an oral trust be proven by clear and convincing evidence.⁴¹ The proposed law codifies the requirement that the existence and terms of an oral trust be established by clear and convincing evidence.

The clear and convincing evidence standard may not be sufficient to guard against overreaching in cases where there is no transfer of property. The problem is acute where, after the death of the purported settlor, evidence is offered of the settlor's past statements, but there has been no transfer of the property claimed to be in trust. The proposed law requires some corroboration in the form of a transfer, earmarking, or written evidence in order to uphold a trust supported by an oral rather than written declaration of the settlor. Hence, if the owner of shares of stock makes an oral declaration that he or she holds it in trust for his or her children, the trust would fail unless there was some written evidence of a transfer in trust.⁴²

⁴⁰ See generally 7 B. Witkin, *Summary of California Law Trusts* § 14-16, at 5377-79 (8th ed. 1974).

⁴¹ *E.g.*, *Lefrooth v. Prentice*, 202 Cal. 215, 227, 259 P. 947 (1927) ("clear and unequivocal"); *Kobida v. Hinkelmann*, 53 Cal. App. 2d 186, 188-93, 127 P.2d 657 (1942); *Monell v. College of Physicians & Surgeons*, 198 Cal. App. 2d 38, 48, 17 Cal. Rptr. 744 (1961) ("full, clear and convincing"); *but cf.* *Fahrney v. Wilson*, 180 Cal. App. 2d 694, 697, 4 Cal. Rptr. 670 (1960) (circumstantial evidence and statement of deceased insured coupled with acquiescence of widow supported express oral trust for creditors of decedent).

⁴² The recent revisions of trust statutes in Indiana and Texas have also restricted oral trusts. See Ind. Code Ann. § 30-4-2-1 & comment (West 1979); Tex. Prop. Code Ann. § 112.004 (Vernon 1984).

Consideration

An area of existing law that is unclear is the role of consideration in creating trusts. Civil Code Section 2222 provides that a trust may be created "as to" a trustee by the trustee's "acceptance of the trust, or his acknowledgment, made upon sufficient consideration, of its existence." However, no consideration is needed if the settlor declares himself or herself trustee for another under Civil Code Section 2221. Civil Code Section 2251 further confuses the matter by referring to the creation of a trust by the mutual consent of the settlor and trustee, with no mention of consideration, acceptance, acknowledgment, or declaration. It has been suggested that these provisions lead to an absurdity if strictly applied.⁴³

The proposed law avoids this confusion by providing that consideration is not required for the creation of a trust.⁴⁴ If, however, a person seeks to make a promise to create a trust in the future, the enforceability of the promise is governed by contract law, and consideration is required.⁴⁵

Indefinite Beneficiaries and Purposes

California has followed the common law by requiring a high degree of definiteness in designating beneficiaries of a *private* trust. Hence, if a trust designates a class of persons as beneficiaries, the class must be definite. Under the Restatement this has meant that a class described as "family" will be considered definite enough while one described as "relatives" will not be.⁴⁶ Problems also arise where a settlor attempts to give the trustee the power to determine the beneficiaries. American courts have

⁴³ See Evans, *Observations on the State, Etc., of California Laws of Uses and Trusts*, 28 S. Cal. L. Rev. 111, 119-120 (1955). The problem arises in the process of determining under Civil Code Section 2222 whether consideration is required in the case of an acceptance of a trust as well as an acknowledgment. If consideration is required only as to an acknowledgment, an enforceable trust arises without consideration where the formalities of a writing and delivery of the trust property are satisfied. But if these formalities are not satisfied, the intended trustee to whom the property is conveyed can declare himself trustee without consideration even though he cannot bind himself by an acknowledgment without consideration.

⁴⁴ This provision is drawn from the Texas Trust Code. Tex. Prop. Code Ann. § 112.003 (Vernon 1984). See also Restatement (Second) of Trusts §§ 28-29 (1957).

⁴⁵ See Tex. Prop. Code Ann. § 112.003 (Vernon 1984); Restatement (Second) of Trusts § 20 (1957); Estate of Webb, 49 Cal. 341, 545-46 (1875).

⁴⁶ See Restatement (Second) of Trusts §§ 120, 121 & comment a (1957). Under Probate Code Section 6151, however, devises to "family" or "relatives" are treated the same.

generally applied the rule that a trust is valid only if the entire membership of the class is capable of ascertainment.⁴⁷ The concern has been that if the trustee makes no selection, then there will be no beneficiary to enforce the trust. If the class of beneficiaries is not known in its entirety, the court will not be able to determine what interest any beneficiary has in the trust.⁴⁸ The rules are different for powers of appointment. The same ultimate disposition of property may be valid if a person is given a power of appointment exercisable in favor of the members of a general class or in the discretion of the donee of the power.⁴⁹

An indefinite purpose may also be fatal to an attempt to create a trust.⁵⁰ A private trust that has "benevolent" (i.e., not quite charitable) purposes mixed with charitable purposes will fail.⁵¹ As in the case of indefinite beneficiaries, the defect of indefinite purposes may involve the vagueness of a description.⁵² Similarly, the same disposition that fails as a trust would be valid as a power.⁵³

The proposed law seeks to harmonize the law of trusts and powers in the interest of effectuating settlor intent.⁵⁴ There does not appear to be any compelling interest in invalidating a disposition in the form of a trust when the

⁴⁷ Palmer, *Private Trusts for Indefinite Beneficiaries*, 71 Mich. L. Rev. 359, 360 (1972).

⁴⁸ *Id.* at 361, 366-67.

⁴⁹ See Palmer, *The Effect of Indefiniteness on the Validity of Trusts and Powers of Appointment*, 10 UCLA L. Rev. 241, 280-83 (1963); see generally Civil Code §§ 1380.1-1392.1 (powers of appointment).

⁵⁰ See 7 B. Witkin, *Summary of California Law Trusts* § 25, at 5388 (8th ed. 1974).

⁵¹ See, e.g., *In re Estate of Sutro*, 155 Cal. 727, 734, 102 P. 920 (1909); see also the cases cited in 7 B. Witkin, *Summary of California Law Trusts* § 47, at 5407-09 (8th ed. 1974).

⁵² For example, Adolph Sutro attempted unsuccessfully to give 1200 acres within the city of San Francisco to a trust "for such charities, institutions of learning and science and for premiums to be set apart for distinguished scholarships and scientific discovery and inventions as shall be directed by my executors." *In re Estate of Sutro*, 155 Cal. 727, 730, 102 P. 920 (1909).

⁵³ Compare *In re Estate of Ralston*, 1 Cal. 2d 724, 725-26, 37 P.2d 76 (1934) with *Estate of Kuttler*, 160 Cal. App. 2d 332, 334, 337-39, 325 P.2d 624 (1958); see also *In re Estate of Maloney*, 27 Cal. App. 2d 332, 333, 80 P.2d 998 (1938) (disposition reading "I wish for Mrs. Sarah Collins to doe wat she know I like done if any is left" held invalid for failure to indicate purpose or beneficiaries); *Estate of Feldman*, 78 Cal. App. 2d 778, 780, 787-90, 178 P.2d 498 (1947) (attempted trust of \$12,000 "to distribute according to my personal wishes" held invalid for uncertainty as to purposes and beneficiaries).

⁵⁴ In some cases a disposition in trust has been upheld as a power of appointment. See *In re Estate of Davis*, 13 Cal. App. 2d 64, 69, 56 P.2d 584 (1936) (testamentary disposition in trust for sons and grandchildren as trustee deemed best upheld as power of appointment).

same disposition would be valid as a power. The objection has been made that a court will not be able to enforce a trust where the trustee has discretion to determine members of a described class of beneficiaries or the beneficiaries who would satisfy a benevolent purpose. However, it can be assumed that most trustees will conscientiously attempt to fulfill the trust purpose. Where a trustee refuses to act, the trustee may be compelled to exercise its discretion in a reasonable manner.

Accordingly, *as to private trusts* the proposed law provides that the requirement of having a trust beneficiary is satisfied where (1) the beneficiary or a class is "definitely ascertainable," (2) the beneficiary or class of beneficiaries is "sufficiently described so that it can be reasonably determined that some person meets the description or is within the class," or (3) the trustee or some other person has the power to select the beneficiaries based on a standard or in the discretion of the trustee or some other person. As to purposes, the proposed law permits creation of a *private* trust with an indefinite or general purpose if it can be determined with reasonable certainty that a particular use of the trust property comes within the stated purpose.

Office of Trustee

Acceptance and Rejection of Trust

Existing statutory law refers to acceptance of the trust by the trustee,⁵⁵ but does not provide any detail on how acceptance should be accomplished. The proposed law provides that the person named as trustee may accept the trust by signing the trust instrument or a separate written acceptance or by exercising powers or performing duties under the trust.⁵⁶ Acceptance by action is consistent with California case law.⁵⁷ In the case of an emergency, the person named as trustee is permitted to act to preserve trust property without being considered to have accepted the trust, if the person delivers a written rejection within

⁵⁵ Civil Code §§ 2222, 2254; see also Civil Code § 2251 (mutual consent of trustor and trustee).

⁵⁶ This provision is drawn from Indiana law. See Ind. Code Ann. § 30-4-2-2(a)-(b) (West 1979).

⁵⁷ See, e.g., *Heitman v. Cutting*, 37 Cal. App. 236, 238, 174 P. 675 (1918).

a reasonable time to the settlor or to a beneficiary if the settlor is dead or incompetent.⁵⁸

The rules governing acceptance of the whole trust are also applied to acceptance of modifications of the trust under the proposed law.⁵⁹ Acting under the trust as modified results in acceptance of the modification only if the trustee knows of the modification.

Existing law provides for rejection of certain testamentary trusts by filing a writing with the clerk of the court where the estate proceedings are pending.⁶⁰ The proposed law provides a general rule permitting rejection of a trust (or a modification) by a writing and also provides that the failure to accept for a reasonable time after learning of being named as trustee or of a modification is considered as a rejection.⁶¹

Certificate of Trustee's Incumbency

Under existing law, the trustee of a testamentary trust may apply to the court clerk for a certificate that the trustee is duly appointed and acting under a will.⁶² A trustee may want this certificate to assist in transferring property. Some practitioners are concerned that the certificate is not adequate for this purpose and that a more effective and widely applicable solution needs to be found, particularly with regard to transfers of securities. The Commission is continuing its study of this matter and is interested in receiving the views of interested persons.

The proposed law continues the authority for issuing certificates of trusteeship, even though their utility is limited. The proposed law also permits issuance of such a

⁵⁸ This provision is also drawn from Indiana law. See Ind. Code Ann. § 30-4-2-2(d) (West 1979).

⁵⁹ Civil Code Section 2258(b) provides in connection with a revocable trust that the trustee is to follow all directions "acceptable" to the trustee given by the person having the power to revoke, but provides no procedure for accepting or withholding acceptance. See also the discussion under "Modification and Termination of Trusts" *infra*.

⁶⁰ Prob. Code § 1124. This provision applies only to testamentary trusts that are subject to the continuing jurisdiction of the court. See the discussion under "Judicial Proceedings Concerning Trusts" *infra*.

⁶¹ This provision is drawn in part from Indiana law. See Ind. Code Ann. § 30-4-2-2(c) (West 1979).

⁶² Prob. Code § 1130.1.

certificate to a trustee of a living trust if the court file shows the incumbency of the trustee.⁶³

Trustee's Bond

Under existing law, a trustee named in a will or living trust instrument is not required to give a bond unless the instrument requires it. However, a bond is required of a testamentary trustee appointed by the court, unless the trustee is a nonprofit corporation acting within the scope of its charitable purposes.⁶⁴ Existing law does not require a bond of a trust company appointed as trustee of a testamentary trust.⁶⁵ Existing law is not clear on whether a trust company appointed by the court pursuant to a nomination in the trust must give a bond.⁶⁶ It also appears that a bond may be waived if all creditors and beneficiaries give their consent and there are no minor or unascertained beneficiaries.⁶⁷

Drafting manuals suggest that a bond is ordinarily an unnecessary expense, and that if it is felt that a bond is needed it might be better to select a different trustee.⁶⁸ However, a bond is recommended in the case of a nonresident trustee.⁶⁹

The proposed law provides a comprehensive scheme governing trustees' bonds drawn in part from the Uniform Probate Code.⁷⁰ A bond is not required unless (1) required by the trust, as under existing law, (2) the court finds a bond necessary to protect the interests of beneficiaries, notwithstanding a waiver of bond in the trust, or (3) an

⁶³ For other provisions of the proposed law intended to facilitate efficient property transactions between trustees and third person, see the discussion under "Protection of Third Persons Dealing with Trustees" *infra*.

⁶⁴ Prob. Code §§ 1127, 1127.5.

⁶⁵ See Prob. Code §§ 480-481, 541. The law is not entirely clear since a contrary implication arises from the exception for nonprofit corporations in Probate Code Section 1127.5.

⁶⁶ See California Will Drafting Supplement § 17.21, at 259 (Cal. Cont. Ed. Bar 1981).

⁶⁷ Estate of Shapiro, 79 Cal. App. 2d 731, 181 P.2d 117 (1947).

⁶⁸ See Ellis, *Trustees and Administrative Provisions*, in California Will Drafting Practice § 14.26, at 666 (Cal. Cont. Ed. Bar 1982).

⁶⁹ 3 J. Goddard, Probate Court Practice § 1819 (2d ed. 1977). Where an attorney drafts a will or trust instrument naming himself or herself as trustee, it is also recommended that the trust require bond. Moltzen, *The Lawyer and Will Drafting*, in California Will Drafting § 1.38, at 21-22 (Cal. Cont. Ed. Bar 1965).

⁷⁰ See Section 7-304 of the Uniform Probate Code (1977). At least 10 states have enacted the UPC provision. See G. Bogert, *The Law of Trusts and Trustees* § 151, at 93-105 n.70 (rev. 2d ed. 1978).

individual trustee not named in the trust is appointed by the court as a trustee. This scheme provides flexibility to require a bond where there is a need for protection, without imposing a bond unnecessarily.

The proposed law also makes clear that a bond may not be required of a trust company. Thus even if a trust names a corporate trustee and requires a bond, the corporate trustee will not be required to give a bond. The separate treatment of corporate trustees recognizes that the financial reserve requirements applicable to financial institutions and the required deposit with the State Treasurer provide sufficient safeguards of beneficiaries' interests.⁷¹ *A nonprofit or charitable corporation acting as trustee of a charitable trust is not a "trust company" and thus may be required to give a bond by the trust instrument or by the court.*

Trustee's Compensation

Under existing law, a trustee is entitled to the compensation specified in the trust instrument, but if the instrument does not provide for compensation, the trustee is entitled to reasonable compensation.⁷² Even if the trust provides for the amount of compensation, the court may allow greater compensation in special circumstances spelled out by the statutes, such as where the trustee's duties are substantially greater than anticipated or where the compensation would be inequitable or unreasonably low.⁷³

The proposed law continues the general substance of existing law, but also provides that compensation may be lowered should the duties of the trustee be substantially less than at the time the trust was created.⁷⁴ Similarly, the court

⁷¹ See Fin. Code § 1540 (\$50,000 or \$100,000 minimum deposit, depending on location of trust company, plus \$50,000 for each additional \$500,000 of trust assets up to a maximum security of \$500,000). State statutes generally excuse bond for corporate trustees qualified under the state's laws. See G. Bogert, *The Law of Trusts and Trustees* § 151, at 93-105 n.70 (rev. 2d ed. 1978); see, e.g., Tex. Prop. Code Ann. § 113.058(a) (Vernon 1984).

⁷² Civil Code § 2274; Prob. Code §§ 1122, 1138.1(a)(7); see also Restatement (Second) of Trusts § 242 (1957).

⁷³ Civil Code § 2274; Prob. Code § 1122. The statutory formulation of this power of the court is a legislative response to particular court decisions, and is thus not necessarily a comprehensive treatment. See 7 B. Witkin, *Summary of California Law Trusts* § 80, at 5440-41 (8th ed. 1974); *Review of Selected 1972 California Legislation*, 4 Pac. L.J. 211, 569-70 (1973).

⁷⁴ This rejects the reasoning of *Estate of Bodger*, 130 Cal. App. 2d 416, 421-25, 279 P.2d 61 (1955), which found that the court was without the power to alter the trust

may reduce compensation if compensation in accordance with the terms of the trust would be inequitable or unreasonably high.⁷⁵ The proposed law also makes clear that the court may fix periodic compensation prospectively, for a period of time the court determines is proper.⁷⁶

Existing statutes do not make clear the mechanism by which the appropriate compensation is determined short of going to court. Case law indicates that the trustee may pay itself reasonable fees without the necessity of first obtaining court approval.⁷⁷ The proposed law recognizes the power of the trustee to determine reasonable compensation, subject to the power of the court to review the trustee's determination on petition of a beneficiary or cotrustee.⁷⁸

Resignation of Trustee

Under traditional rules a trustee may resign where the trust instrument provides the manner of resignation⁷⁹ or where the consent of all the beneficiaries is obtained.⁸⁰ However, courts have been reluctant to let trustees escape responsibility for administering the trust simply by resigning. A trustee may in the court's discretion be allowed to resign where the trustee is in ill health, where the trustee is planning to leave the county, where there is serious friction between the trustee and the beneficiaries, or where the burdens of administering the trust have increased since the trust was accepted.⁸¹

provisions on compensation. Civil Code Section 2274 was amended in 1967 to permit increased compensation, thereby overruling *Estate of Whitney*, 78 Cal. App. 638, 649, 248 P. 754 (1926) (court without authority to increase compensation). See 1967 Cal. Stat. ch. 661, § 1; see also 1972 Cal. Stat. ch. 937, § 1. The language of *Estate of Bodger* would also apply to decreasing the trustee's compensation.

⁷⁵ Compensation may also be reduced in the case of a breach of trust. See the discussion under "Remedies for Breach of Trust" *infra*.

⁷⁶ The court's authority to fix prospective compensation under trusts that are not subject to the continuing jurisdiction of the court is apparently in some doubt under existing law. Compare Civil Code § 2274 with Prob. Code § 1122.

⁷⁷ See *Estate of Gilfillan*, 79 Cal. App. 3d 429, 144 Cal. Rptr. 862 (1978) (interpreting Prob. Code § 1122 and upholding Los Angeles Superior Court policy memorandum).

⁷⁸ See the discussion under "Judicial Proceedings Concerning Trusts" *infra*. Under general law the trustee's determination is subject to the fiduciary principle and the court may upset the trustee's determination only if it is not in good faith or within the bounds of reasonable judgment. See Horowitz, *Uniform Trustees' Powers Act*, 41 Wash. L. Rev. 1, 7, 22 (1966); see also Uniform Probate Code § 7-205 (1977).

⁷⁹ Restatement (Second) of Trusts § 106(b) & comment d (1957).

⁸⁰ *Id.* § 106(c) & comment e.

⁸¹ See generally G. Bogert, *The Law of Trusts and Trustees* § 511, at 2-9 (rev. 2d ed. 1978); Restatement (Second) of Trusts § 106(a) & comment c (1957).

California statutory law contains several scattered provisions relating to trustee resignation. One provision applicable to testamentary trusts under continuing jurisdiction provides that the court "shall accept" the trustee's resignation made after distribution of the decedent's estate.⁸² Trustees of other testamentary trusts and of living trusts may resign at any time unless otherwise provided in the trust instrument.⁸³ In this situation the resignation procedure is governed by the trust instrument, but if no procedure is provided, the court "shall accept" the resignation on petition of the trustee.⁸⁴ A trustee may also be "discharged" by the consent of the beneficiary having the capacity to contract.⁸⁵ Existing law exhibits none of the reluctance of the common law to permit the trustee to resign, although the method of resignation may vary. The emphasis of California law is on the disposition of the property and the trustee's continuing liability until the resignation is properly accomplished.

The proposed law permits resignation (1) in accordance with the terms of the trust, (2) with the consent of the person holding the power to revoke a revocable trust, (3) with the consent of all adult beneficiaries of an irrevocable trust who are receiving or are entitled to receive income or who would be entitled to receive a distribution of principal if the trust were terminated,⁸⁶ or (4) pursuant to court order. The proposed law makes specific the authority of the court to make any needed protective orders and to appoint a receiver or temporary trustee. The existing provision that preserves the liability of a resigning trustee notwithstanding a resignation⁸⁷ is also continued.

Removal of Trustee

The court has the inherent power to remove a trustee where necessary to preserve the trust and protect

⁸² Prob. Code § 1125.1; see also Prob. Code § 1124 (named trustee may decline to act before distribution to the trust).

⁸³ Prob. Code § 1138.8; see also Prob. Code § 1138.1(a)(9).

⁸⁴ Prob. Code § 1138.8.

⁸⁵ Civil Code § 2282.

⁸⁶ See also the discussion under "Obtaining Consent of Beneficiaries" *infra*.

⁸⁷ Prob. Code §§ 1125.1, 1138.8.

beneficiaries.⁸⁸ Removal is one of the remedies for breach of trust,⁸⁹ but may also be appropriate where the trustee lacks capacity to administer the trust, has committed a crime involving dishonesty, is unfit due to senility, drunkenness, or lack of ability, is absent, unreasonably fails to cooperate with cotrustees, or shows favoritism toward some beneficiaries.⁹⁰ California law provides for removal of a trustee where the trustee has an interest adverse to that of the beneficiary or where the trustee has violated or is unfit to execute the trust.⁹¹ In the case of testamentary trusts subject to continuing court jurisdiction, a trustee may be removed as well where "hostility, ill feeling, or continued lack of cooperation among and between cotrustees has impaired the proper administration of the trust."⁹²

Existing California law is thus in general harmony with the common law, but contains some arbitrary differences between the treatment of certain testamentary and living trusts. The proposed law eliminates these distinctions, consistent with the general approach of unifying the law applicable to living and testamentary trusts. The proposed law combines the Restatement with some elements of existing law. Under this scheme, a trustee may be removed either on petition or on the court's own motion (1) in accordance with the terms of the trust, (2) where the trustee has committed a breach of trust, (3) where the trustee is insolvent or otherwise unfit to administer the trust, (4) where there is hostility or lack of cooperation between cotrustees that impairs administration of the trust, (5) where the trustee fails or declines to act, or (6) for other good cause. The existing authority of the court to suspend the powers of the trustee to the extent the court deems necessary and to make orders for the surrender of property to a custodian is also continued in the proposed law.⁹³

⁸⁸ See Restatement (Second) of Trusts § 107 (1957); G. Bogert, Handbook of the Law of Trusts § 160, at 573 (5th ed. 1973).

⁸⁹ See the discussion under "Remedies for Breach of Trust" *infra*.

⁹⁰ See Restatement (Second) of Trusts § 107 & comment b (1957); see also *id.* § 387 (removal of charitable trustee).

⁹¹ Civil Code §§ 2233, 2283; Prob. Code § 1123.5.

⁹² Prob. Code § 1123.5.

⁹³ See Prob. Code § 1123.6. This provision applies only to testamentary trust subject to continuing jurisdiction under existing law, but applies to all trusts under the proposed law.

Trustee's Right of Repayment and Trustee's Lien

The proposed law continues the general principle of existing law that a trustee is entitled to reimbursement from the trust of properly incurred expenses and of unauthorized expenditures if they benefited the trust estate.⁹⁴

The proposed law also retains the statutory reference to the trustee's lien for advances made for the protection of the trust,⁹⁵ but the proposed law makes clear that this lien is equitable, meaning that it does not follow trust property into the hands of third persons who give fair consideration without knowledge of the lien.⁹⁶

Administration of Trusts by Foreign Trustees

Existing law provides very restrictive rules governing the administration of trusts in California by foreign corporate trustees.⁹⁷ A foreign corporation may not conduct a trust business except through the mechanism of a domestic subsidiary corporation.⁹⁸ Certain ministerial functions are permitted without running afoul of these prohibitions, such as delivering, registering, paying interest on, certifying, redeeming, and cancelling bonds.⁹⁹

⁹⁴ Civil Code § 2273; see also Prob. Code §§ 1120.2(14), 1122.

⁹⁵ See Prob. Code § 1120.2(14); see also Uniform Trustees' Powers Act § 3(c) (18) (1964).

⁹⁶ See generally 1 J. Pomeroy, *Equity Jurisprudence* §§ 165, 171(4) (5th ed. 1941); *Restatement (Second) of Trusts* § 244 comment c (1957).

⁹⁷ California is among a large group of states that effectively bar foreign corporations from acting as trustees. See G. Bogert, *The Law of Trusts and Trustees* § 132, at 438 n.24 (rev. 2d ed. 1984). This authority lists 15 states with laws of this character. Some of these states allow certain significant actions by foreign corporate trustees, such as receiving, holding, and transferring property. See, e.g., Fla. Stat. Ann. § 660.41(3) (West Supp. 1984). There are no special restrictions on the administration of a trust by a nonresident individual trustee. However, the court may require the trustee to file a bond in an appropriate case. See the discussion under "Trustee's Bond" *supra*.

⁹⁸ See Fin. Code §§ 1503 (foreign corporation may not "have or exercise powers of trust company" or "directly or indirectly transact or conduct . . . a trust business"), 1750(a) (foreign state bank precluded from conducting business in California), 1755(b) (foreign nation bank precluded from transacting business at California branch), 1750(c) (subsidiary corporation). National banks are exempted from the prohibition of Section 1503; national banks that are authorized to conduct business in California are treated as domestic corporations. Foreign corporations may not conduct trust business at a California branch. See Fin. Code §§ 1700-1701 (branch banking), 102, 103, 105, & 106 (commercial banking distinguished from trust business). Nor may a foreign trust company qualify to conduct business pursuant to the provisions governing qualification of foreign corporations generally. See Corp. Code § 191.

⁹⁹ See Fin. Code § 1503. These exceptions apparently relate to 19th Century problems involving railroad trusts; they are obviously of no use in administration of a trust. Section 1503 also excepts actions by a trustee under a mortgage, deed of trust, or other instruments, and railroad obligations.

The Commission has considered several alternatives to the existing scheme. One alternative would be to expand the list of permitted activities so as to permit occasional administration by a foreign corporate trustee, such as receiving distributions, holding, investing in, managing, and acquiring property, or maintaining litigation.¹⁰⁰ Another alternative is to permit foreign trust companies to act in California on the basis of reciprocity.¹⁰¹ The Commission concludes that while some alternatives have appealing features there is no clearly superior scheme to existing California law. A statute that permits administration by foreign corporations might make it more difficult for California courts to obtain needed information in proceedings concerning the administration of the trust and might impose a hardship on beneficiaries' attempts to enforce their rights.

Trustees' Duties

Background

The basic duty of loyalty owed by the trustee to the beneficiaries is set forth in Civil Code Section 2228 in the following terms:

In all matters connected with his trust, a trustee is bound to act in the highest good faith toward his beneficiary, and may not obtain any advantage therein over the latter by the slightest misrepresentation, concealment, threat, or adverse pressure of any kind.

Other sections set forth various aspects of the general duty of loyalty. For example, Civil Code Section 2231 provides: "A trustee may not use the influence which his position gives him to obtain any advantage from his beneficiary." Section 2232 forbids the trustee undertaking another trust

¹⁰⁰ See Uniform Probate Code § 7-105 (1977).

¹⁰¹ Twenty-four states have some sort of reciprocity scheme, which may involve general reciprocity or regional reciprocity. See G. Bogert, *The Law of Trusts and Trustees* § 132, at 429 n.20, 436 n.22 (rev. 2d ed. 1984). A reciprocity scheme might permit general conduct of business or only acting as a trustee in particular cases where the foreign corporation is named in the trust instrument. As Professor Scott has noted, a reciprocity statute does not look to the interests of settlors or beneficiaries, but is enacted on the basis of some public policy, such as protecting local trustees from competition except where a quid pro quo is granted by another state. See 5 A. Scott, *The Law of Trusts* § 558, at 3784-85 (3d ed. 1967).

that is adverse to the beneficiary's interest without the beneficiary's consent. Section 2233 imposes a duty on the trustee to inform the beneficiary of the existence of any duty adverse to the beneficiary's interest.

The basic duty to administer the trust is provided in Civil Code Section 2258(a):

A trustee must fulfill the purpose of the trust, as declared at its creation, and must follow all the directions of the trustor given at that time, except as modified by the consent of all parties interested, in the same manner, and to the same extent, as an employee.

The traditional fiduciary principle is expressed in Civil Code Section 2259: "A trustee, whether he receives any compensation or not, must use at least ordinary care and diligence in the execution of his trust." A specific application of this rule is set forth in Civil Code Section 2260 which requires the trustee to use at least ordinary care and diligence in securing the appointment of a successor trustee before being discharged.

Proposed Law

These expressions of trustees' duties, largely unchanged since the enactment of the Field Code, may have been admirable attempts at codification when they were enacted, but their language is inconsistent with the usual formulations of duties, particularly in light of the influence of the Restatement of Trusts. The statutory rules are also incomplete; very general rules are provided on one hand, and incomplete specific rules on the other. A trustee can not read the various sections pertaining to trustees' duties with the confidence that the governing law has been found.

The proposed law replaces these archaic formulations with a set of trustees' duties drawn largely from the Restatement.¹⁰² The proposed law codifies the duties to administer the trust, of loyalty,¹⁰³ to deal impartially with

¹⁰² See Restatement (Second) of Trusts §§ 169-85, 230 (1957). The new Indiana Trust Code has also taken the Restatement approach. See Ind. Code Ann. §§ 30-4-3-6 to 30-4-3-8 (West 1979 & Supp. 1983-84).

¹⁰³ The proposed law makes clear, however, that it is not a violation of the duty of loyalty for the trustee to engage in transactions between two trusts of which it is the trustee if the transaction is fair and reasonable with respect to the beneficiaries of both trusts and the trustee discloses material facts to the current adult income beneficiaries and presumptive adult remainder beneficiaries. This provision is drawn from Indiana law. See Ind. Code Ann. § 30-4-3-7(c) (West Supp. 1983-84).

beneficiaries, to avoid conflicts of interest,¹⁰⁴ not to undertake an adverse trust, to take control of and preserve trust property, to make the trust property productive, to dispose of improper investments,¹⁰⁵ to keep trust property separate and identified as trust property, to enforce claims, to defend actions, not to delegate administration of the trust, and to use special skills.¹⁰⁶ This more modern and comprehensive list of trustee's duties should provide additional guidance to trustees, particularly to nonprofessional trustees.

In the case of revocable living trusts, the proposed law also makes clear that the trustee owes the duties . . . to the settlor or other person holding the power to revoke the trust, and not to the beneficiary, during the time that a trust is revocable.¹⁰⁷

Trustee's Standard of Care in Administering the Trust

The standard of care governing the trustee's performance of duties under the trust is of great concern to trustees and beneficiaries because its application determines whether or not a breach has occurred. The common law imposes a duty to administer the trust with the care and skill a prudent person would exercise in dealing with the person's own property.¹⁰⁸ California law provides

¹⁰⁴ The proposed law also preserves the rule in Civil Code Section 2263 that prevents the trustee from enforcing a claim against the trust property that the trustee purchased in contemplation of appointment as trustee. The court in this case may allow the trustee to be reimbursed in the amount that the trustee paid in good faith for the claim.

¹⁰⁵ The proposed law continues the existing exception to this general duty to the effect that the trustee may continue to hold property in the trust at its creation or added to it pursuant to proper authority, notwithstanding the general duty to dispose of improper investments, if retention is in the best interests of the trust or in furtherance of the purposes of the trust. See Civil Code § 2261 (b).

¹⁰⁶ The proposed law also makes clear that the provision of services for compensation by a regulated financial institution or its affiliates in the ordinary course of business to the trust or a person dealing with the trust is not violation of the duty of loyalty or the duty to avoid a conflict of interest. This provision is consistent with the case-law rule. See *Estate of Pitzer*, 155 Cal. App. 3d 979, 988, 202 Cal. Rptr. 855 (1984).

¹⁰⁷ See the discussion under "Limitation on Rights of Beneficiaries of Revocable Living Trusts" *infra*.

¹⁰⁸ See Restatement (Second) of Trusts § 174 (1957). The Uniform Probate Code adopts what is called an "external" standard in place of the "personal" standard of the Restatement. Uniform Probate Code Section 7-302 provides: "Except as otherwise provided by the terms of the trust, the trustee shall observe the standards in dealing with the trust assets that would be observed by a prudent man dealing with the property of another"

two standards. Civil Code Section 2259 provides: "A trustee, whether he receives any compensation or not, must use at least ordinary care and diligence in the execution of his trust." A more specific standard is provided for investments and management of trust property by Civil Code Section 2261 (a) (1):

[W]hen investing, reinvesting, purchasing, acquiring, exchanging, selling and managing property for the benefit of another, a trustee shall act with the care, skill, prudence, and diligence under the circumstances then prevailing, specifically including, but not by way of limitation, 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 a like character and with like aims, to attain the goals of the trustor as determined from the trust instrument. Within the limitations of the foregoing and considering individual investments as part of an overall investment strategy, a trustee is authorized to acquire every kind of property, real, personal or mixed, and every kind of investment.

This combined standard of care and powers provision is a recent revision of California law.¹⁰⁹ It adopts a portfolio approach to investment decisions, and thus is intended to modernize the way in which investment decisions of trustees have been judged by the courts.¹¹⁰

The proposed law continues this new standard as applied to investment and management decisions. The proposed law also applies the new standard of care to all other aspects of administration of the trust so that the trustee need comply with only one standard. This does not represent a dramatic change; under existing law, most activities of trustees are covered by the new standard, since it covers investments, acquisitions, dispositions, and management of property. The proposed law thus eliminates the Field Code "ordinary care and diligence" standard in favor of the

¹⁰⁹ See 1984 Cal. Stat. ch. 1372, § 1.

¹¹⁰ See Committee Consultant's Analysis of Assembly Bill 630, Assembly Committee on Judiciary, May 4, 1983.

newly revised standard.¹¹¹ This probably represents no real change in California law, but eliminates any confusion that might arise under the dual standard of existing law. The proposed law also applies the new standard to decisions made under the Revised Uniform Principal and Income Act of 1962¹¹² and the Uniform Management of Institutional Funds Act of 1972.¹¹³ The proposed law also continues the existing rule that the statutory standard of care may be expanded or restricted by express provisions in the trust.

Duty to Report Information and Account to Beneficiaries

With one exception, existing law does not impose on trustees any statutory duty to account to either the court or beneficiaries on a regular basis.¹¹⁴ Existing law does, however, require the trustee to account to the beneficiary periodically upon request. As to testamentary trusts under continuing court jurisdiction, the beneficiary may petition for an order requiring the trustee to render an account; the application may not be denied if an account has not been rendered to the court within the previous six months.¹¹⁵ A similar procedure applies to living trusts and testamentary trusts not subject to continuing court jurisdiction. As to these trusts, if the trustee fails to submit an account or report within 60 days after the beneficiary's written request, and no account or report has been made within six months before the request, the beneficiary is entitled to the requested information on petition.¹¹⁶ The California Supreme Court has also ruled that a "trustee has the duty to the beneficiaries to give them upon their request at

¹¹¹ The proposed law does continue the rule in Civil Code Section 2259 that the standard of care is not affected by whether or not the trustee receives any compensation.

¹¹² See the discussion under "Allocations of Receipts and Expenditures Between Principal and Income" *infra*.

¹¹³ See Civil Code § 2290.6.

¹¹⁴ See 7 B. Witkin, *Summary of California Law Trusts* § 69, at 5429 (8th ed. 1974); *id.*, *Wills and Probate* § 254, at 5757. Apparently, however, it became the tradition for trust companies to file accountings under Probate Code Section 1120, even though the statute does not require it. See Kahn, *Probate Court Jurisdiction over Inter Vivos Trusts*, 5 Beverly Hills B.J. 26, 28 (1971). The only duty to account imposed by statute under existing law concerns testamentary trusts created by will executed before July 1, 1977, and not republished thereafter. See Prob. Code § 1120.1a. In this case, existing law requires trustees to account annually to income beneficiaries. See Prob. Code § 1120.1a(b)-(d).

¹¹⁵ Prob. Code § 1121.

¹¹⁶ Prob. Code § 1138.1(a)(5).

reasonable times complete and accurate information relative to the administration of the trust."¹¹⁷

The proposed law codifies the general duty to keep the beneficiaries informed.¹¹⁸ This provision also makes clear that the beneficiary may have information about the terms of the trust describing or affecting the beneficiary's interest and relevant information about the assets of the trust and the particulars relating to the administration of the trust. If the trustee does not comply with the beneficiary's reasonable request, the beneficiary may petition the court for an order compelling a report of relevant information or an account.¹¹⁹ The proposed law retains the limitations of existing law whereby the court will compel a report or account only if the trustee has failed to submit a requested report or account within 60 days after written request made by the beneficiary and no report or account has been made within six months preceding the request.¹²⁰

The proposed law imposes a general requirement that trustees give an annual account to beneficiaries who are required, or authorized in the trustee's discretion, to receive distributions from the trust.¹²¹ Existing law does not require an annual account, except in the limited case of testamentary trusts that have been removed from continuing jurisdiction of the court; however, as a general rule it is best if trustees take the responsibility to account to beneficiaries at least annually. It is the practice of many trust companies to account quarterly, so the imposition of a duty to account annually will not affect the standard practice of these professional trustees. The annual accounting requirement will encourage a more professional approach on the part of individual trustees. The Commission has heard reports of problems arising where trustees have not adequately maintained trust records over a period of years, a problem that the annual accounting requirement should help rectify.

¹¹⁷ *Strauss v. Superior Court*, 36 Cal. 2d 396, 401, 224 P.2d 726 (1950).

¹¹⁸ This provision is drawn from Section 7-303 of the Uniform Probate Code (1977).

¹¹⁹ See the discussion under "Judicial Proceedings Concerning Trusts" *infra*.

¹²⁰ Prob. Code § 1138.1(a)(5); see also Prob. Code § 1121.

¹²¹ Beneficiaries of revocable living trusts are not entitled to an account, as discussed *infra*.

The duty to account annually, like other duties, is subject to control in the trust instrument. Hence, if a settlor does not wish the beneficiaries to have the right to an annual account, the settlor may simply waive the duty in the trust instrument or qualify it as desired. The proposed law also makes clear that a beneficiary may waive the right to an annual account.¹²²

Broad statements of obligations to give beneficiaries information concerning activities under the trust generally fail to take into account the special nature of beneficiaries' position under revocable living trusts.¹²³ The proposed law provides as a general rule that beneficiaries of revocable living trusts are not entitled to accounts or information while the trust is revocable by the settlor. This rule recognizes that normally the settlor of a revocable trust does not want beneficiaries to be able to delve into the affairs of the trust. The settlor in this situation has the power to alter the relationship to deprive the beneficiaries of the right to an account or report. The proposed law thus recognizes the inherent "at will" nature of the beneficiaries' interest under a revocable trust.

Duties with Regard to Discretionary Powers

A recently enacted statute makes clear that a power given the trustee subject to "absolute, sole, or uncontrolled" discretion must be exercised reasonably.¹²⁴ This provision is generally consistent with the rule under the Restatement that "[w]here discretion is conferred upon the trustee with respect to the exercise of a power, its exercise is not subject to control by the court, except to

¹²² It is assumed that this would be done mainly in a relatively inactive trust so as to save trustee's fees.

¹²³ One provision in the statutes relating to trust companies draws a distinction, however, and forbids the trustee's disclosure of information to beneficiaries except where the trust is irrevocable or where the trust or settlor requires disclosure. See Fin. Code § 1582. This section also permits disclosure where it is determined by an officer of the trust company to be necessary in administration of the trust.

¹²⁴ Civil Code § 2269. This section also applies to situations where the trustee has the power to take or distribute income or principal to or for the benefit of himself or herself pursuant to a standard, in which case the power must be exercised pursuant to the standard. If the standard is not clear, the statute provides that the trustee may exercise it only for his or her health, education, support, or maintenance, and is subject to review by the court. This statute was revised in apparent response to the decision in *Estate of Friedman*, 94 Cal. App. 3d 667, 156 Cal. Rptr. 597 (1979), involving the application of the since-repealed California inheritance tax.

prevent an abuse by the trustee of his discretion."¹²⁵ The proposed law continues the substance of existing law relating to exercise of absolute, sole, or uncontrolled discretion.

Trustees' Powers

Introduction

Under the common law a trustee has only the powers conferred by the trust instrument and other powers necessarily implied to carry out the purposes of the trust.¹²⁶ A provision of the Field Code states that trustee is a "general agent for the trust property" and that the trustee's authority is limited to that conferred by the instrument and by statute, "and none other."¹²⁷

In light of this law, a well-drafted trust will grant the trustee all the powers likely to be needed in the administration of the trust, at least to the extent anticipated by the drafter. Where the trust is less well-drafted, older parts of existing law provide some relief in the form of a limited set of automatic powers, i.e., powers that attach automatically to the office of trustee, unless the trust provides otherwise.¹²⁸ However, these piecemeal powers are not sufficient to save the poorly-drafted trust or even the well-drafted trust that does not fully anticipate the need for certain powers. The trustee will usually find it necessary to petition the court for approval of one of the powers listed in Probate Code Section 1120.2.¹²⁹

¹²⁵ Restatement (Second) of Trusts § 187 (1957); see also Halbach, *Problems of Discretion in Discretionary Trusts*, 61 Colum. L. Rev. 1425, 1431 (1961).

¹²⁶ See, e.g., *Purdy v. Bank of America*, 2 Cal. 2d 296, 302, 40 P.2d 481 (1935); *Kipp v. O'Melveny*, 2 Cal. App. 142, 144, 83 P. 264 (1906); Restatement (Second) of Trusts § 186 (1957). Implied powers may not be exercised if they are forbidden by the terms of the trust. *Id.*

¹²⁷ Civil Code § 2267; but see Prob. Code § 1120.2(18) (court authority to grant trustee necessary or desirable powers on petition therefor). Section 2267 has been characterized as "enigmatic" by one commentator. See Evans, *Observations on the State, Etc., of the California Laws of Uses and Trusts*, 28 S. Cal. L. Rev. 111, 120 (1955).

¹²⁸ See, e.g., Civil Code §§ 730.02 (allocation between principal and income), 2261(b) (power to retain property), 2261(c) (power to make bank deposits), 2269.1 (power to invest in mutual funds), 2270 (power to give proxies), 2271 (powers relating to certain private foundations and charitable trusts), 2272 (power to lease for reasonable term beyond term of trust); Corp. Code § 702 (power to vote shares of stock).

¹²⁹ Section 1120.2 lists a common set of powers drawn from the list in the Uniform Trustees' Powers Act of 1964. This modern list of powers was enacted in 1967, sponsored by the California State Bar. See *Estate of Gilliland*, 44 Cal. App. 3d 32, 39,

The proposed law adopts an expanded automatic powers scheme under which the trustee has the basic statutory powers by virtue of the office of trustee, except to the extent that the trust limits the powers. This scheme is drawn from the Uniform Trustees' Powers Act of 1964, which grants the trustee a commonly accepted and desired set of powers.¹³⁰ In addition to the list of specific powers, this approach also gives the trustee the powers a prudent person would exercise under the circumstances to achieve the purposes of the trust.¹³¹ Existing law automatically provides the powers a prudent person would exercise in the area of investments, including the acquisition of "every kind of property, real, personal or mixed, and every kind of investment."¹³² The success of the prudent person rule in the investment field over the last 40 or 50 years inspired the general rule that is embodied in the Uniform Trustees' Powers Act.¹³³ As explained by the chairman of the committee that drafted the Uniform Act:

The adoption of the prudent man concept in defining trustees' powers necessarily changes and liberalizes the doctrine of implied powers. Under existing law, powers may be implied if deemed by the court to be necessary to accomplish trust purposes; under the prudent man rule, implied powers are those which the trustee in the exercise of prudence believes necessary. The trustee must determine whether he has the necessary power to act; if he makes such a determination in good faith and within the bounds of reasonable judgment, the courts should be precluded from substituting their judgment for that of the trustee.¹³⁴

118 Cal. Rptr. 447 (1974). Originally the statutory list was available on petition only to trustees of living trusts. See Prob. Code § 1138.1(a)(6), as enacted by 1970 Cal. Stat. ch. 849, § 2; *Review of Selected 1970 California Legislation*, 2 Pac. L.J. 289 (1971).

¹³⁰ These powers are essentially the same as those optional powers in Probate Code Section 1120.2.

¹³¹ See Uniform Trustees' Powers Act § 3(a) (1964).

¹³² Civil Code § 2261(a)(1).

¹³³ See Fratcher, *Trustees' Powers Legislation*, 37 N.Y.U. L. Rev. 627, 660 (1962); Horowitz, *Uniform Trustees' Powers Act*, 41 Wash. L. Rev. 1, 7 (1966).

¹³⁴ Horowitz, *Uniform Trustees' Powers Act*, 41 Wash. L. Rev. 1, 7 (1966) (footnotes omitted).

Since the promulgation of the Uniform Trustees' Powers Act, it has found favor in at least 15 states.¹³⁵ The proposed law thus has the benefit of a significant degree of uniformity with almost one-third of the states.

The existence of a power, whether under the trust, by statute, or pursuant to court order, does not justify its exercise; a power should be exercised only when it is consistent with the fiduciary duties of the trustee.¹³⁶ The proposed law makes this principle explicit.

Specific Powers

The automatic powers provided by the proposed law are largely the same as the optional powers under existing law.¹³⁷ The significant changes in trustees' powers that would be made by the proposed law are discussed below.¹³⁸

Participation in business. The proposed law permits the trustee to continue or participate in the operation of a business or other enterprise that is part of the trust property only as authorized by the trust or by court order. This is an exception to the automatic powers generally afforded trustees under the proposed law and is included because of the serious risks involved in operating a business. In order to permit an orderly transition, the proposed law permits the trustee to operate the business for a reasonable time pending a court hearing on the matter or pending the sale of the business.

Deposits in insured or collateralized accounts. The proposed law adopts the approach of the Guardianship and

¹³⁵ Arizona, Florida, Idaho, Kansas, Kentucky, Maine, Mississippi, Montana, Nebraska, New Hampshire, New Mexico, Oregon, Texas, Utah, Washington, and Wyoming. The grant of prudent person powers has received universal approval in adopting states. See 7B Uniform Laws Annotated 741 (master ed. 1985); see generally Minzner, *Article VII of the New Probate Code: In Pursuit of Uniform Trust Administration*, 6 N.M.L. Rev. 213, 231-46 (1976); Volkmer, *Nebraska's Trustees' Powers Act and Principal and Income Act: The New Look in Nebraska Trust Law*, 14 Creighton L. Rev. 121, 123-33 (1980); Comment, *The Utah Trustees' Powers Provisions—New Flexibility for Trustees and New Risks for Beneficiaries*, 1977 Utah L. Rev. 265.

¹³⁶ See Restatement (Second) of Trusts § 186 comment f (1957); see also the discussion under "Trustees' Duties" *supra*.

¹³⁷ See the discussion under "Trustees' Powers: Introduction" *supra*.

¹³⁸ Some minor and technical changes have been made in existing language for purposes of organization and clarity. For example, the minor power to execute and deliver instruments needed in the administration of the trust is included in the proposed law for consistency with the Uniform Act. See Uniform Trustees' Powers Act § 3(c) (26) (1964).

Conservatorship Law to provide useful detail concerning the variety of accounts in which funds can be deposited.¹³⁹

The proposed law thus authorizes deposits in savings and loan associations and credit unions if the accounts satisfy security standards. The proposed law also adds the requirement that the deposit be made at a reasonable rate of interest, but recognizes that a trustee may hold an amount needed for the orderly administration of the trust in the form of cash or in a checking account that does not pay interest.¹⁴⁰

Encumbrances. The proposed law makes clear that the trustee has the power to encumber trust property for a term extending beyond the term of the trust.¹⁴¹ This is consistent with the existing optional power to lease trust property beyond the term of the trust.¹⁴²

Options. The proposed law makes clear that the trustee has the power to grant an option exercisable beyond the term of the trust, consistent with the power to lease and encumber trust property.

Loans to beneficiaries. The proposed law authorizes loans from trust funds to the beneficiary on terms and conditions that are fair and reasonable under the circumstances and permits the trustee to guarantee loans to the beneficiary by encumbrances on trust property. These are new powers and are intended to deal with problems that may arise where the beneficiary has special needs. If the trustee requires security for a loan, the security may consist of a charge on the beneficiary's interest under the trust, although this may not be appropriate in the case of a spendthrift trust.

¹³⁹ See Prob. Code § 2453. The proposed law also continues detail from Civil Code Section 2261 (c) concerning deposits in banks.

¹⁴⁰ The automatic power relating to deposits does not displace other statutory law pertaining to deposits. See Fin. Code §§ 764 (fiduciaries' deposits in banks), 6408.5 (fiduciaries' deposits in insured savings and loan associations); see also Fin. Code §§ 7000-7002 (savings accounts as legal investments).

¹⁴¹ Compare Prob. Code § 1120.2(3).

¹⁴² Prob. Code § 1120.2(1).

Distributions to beneficiaries under legal disability. The proposed law adopts a new power from the Uniform Trustees' Powers Act¹⁴³ permitting the trustee to pay a sum distributable to a beneficiary under a legal disability to someone else for the use or benefit of the beneficiary. This would permit the trustee to pay debts of the beneficiary, such as for housing, without the need to appoint a guardian or conservator.

Nature and value of distributions. The proposed law adopts a new provision from the Uniform Act¹⁴⁴ permitting the trustee to effect distribution of property in divided or undivided interests and to adjust resulting differences in valuation. This power provides needed flexibility and can be useful to the trustee in taking gains and losses into account for tax purposes when determining distributions.

Hiring persons. The proposed law codifies the power to hire accountants, attorneys, auditors, investment advisors, or other agents to assist the trustee in administering the trust.¹⁴⁵ This authority is particularly desirable in the case of a non-expert individual trustee. It should be remembered, however, that the trustee may be liable for the acts of an agent in appropriate circumstances¹⁴⁶ and that the trustee must act prudently in hiring an agent and in relying on advice. The proposed law also incorporates the principle from the Uniform Act that the person hired may be associated with the trustee, but again, the trustee's action must be prudent.

Allocation of Receipts and Expenditures Between Principal and Income

Under existing law, rules for allocating trust receipts and expenditures between income beneficiaries and remainder beneficiaries are provided by the Revised Uniform Principal and Income Act.¹⁴⁷ The allocation rules of the

¹⁴³ Section 3(c) (22).

¹⁴⁴ Section 3(c) (23).

¹⁴⁵ This provision adopts Section 3(c) (24) of the Uniform Act with some modifications.

¹⁴⁶ See the discussion under "Liability of Trustee for Acts of Others: Agents" *infra*.

¹⁴⁷ Civil Code §§ 730-730.17. This is the California version of the Revised Uniform Principal and Income Act of 1962 [hereinafter cited as the RUIA], which became operative in 1968. See 1967 Cal. Stat. ch. 1508. The RUIA replaced the California version of the Uniform Principal and Income Act of 1931, which had been in place

RUPIA are subject to the control of the trust instrument, but where the trust is silent on the matter, the RUIPA governs.¹⁴⁸ It appears that the California version of the RUIPA has functioned in a generally satisfactory manner, but some aspects of the act can be improved. To this end, the Commission has considered variations made in the RUIPA by other states, particularly the more extensive revisions undertaken by Wisconsin, Nebraska, and Texas.¹⁴⁹ Several revisions are also needed to adjust the RUIPA to other aspects of California trust law. The more significant changes that would be made by the proposed law are as follows:

Standard of care. If neither the trust nor the special rules of the RUIPA cover a situation, the RUIPA adopts the general prudent man standard.¹⁵⁰ When this standard was enacted, it was consistent with the standard of care applicable generally to trustees, but the law has since been revised.¹⁵¹ The proposed law incorporates the revised general standard of care in the interest of consistency.¹⁵²

Apportionment of rent, interest, and annuities. Existing law contains a variation from the RUIPA with the effect that payments to a testamentary trust in the form of rent, interest, or annuities that are not due on the date of the testator's death are treated as income even though some amount accrued before death.¹⁵³ This anti-apportionment

since 1941. See 1941 Cal. Stat. ch. 898. As of 1985, 29 states have enacted the RUIPA and 10 states still retain the earlier uniform act. See 7B Uniform L. Ann. 145, 183 (master ed. 1985). California retains the earlier act to the extent that it applies to legal estates. See Civil Code §§ 731-731.15.

¹⁴⁸ See Civil Code § 730.02(a). Where neither the trust nor the special rules of the RUIPA cover a situation, Civil Code Section 730.02(a) (3) provides that the allocation shall be made in accordance with the prudent man standard.

¹⁴⁹ See Neb. Rev. Stat. §§ 30-3101 to 30-3115 (Cum. Supp. 1982); Tex. Prop. Code Ann. §§ 113.101-113.111 (Vernon 1984); Wis. Stat. Ann. § 701.20 (West 1981).

¹⁵⁰ Civil Code § 730.02(a) (3). This provision requires allocation "in accordance with what is reasonable and equitable in view of the manner in which men of ordinary prudence, discretion and judgment would act in the management of their own affairs."

¹⁵¹ See Civil Code § 2261(a), as revised by 1984 Cal. Stat. ch. 1372, § 1.

¹⁵² See the discussion under "Trustee's Standard of Care in Administering the Trust" *supra*.

¹⁵³ Civil Code § 730.04(b) (2), (c). This rule applies only to testamentary trusts, based on the presumption that since the settlor can control the time of commencement of a living trust, the settlor would probably want receipts to go to the income beneficiary if not otherwise provided in the trust instrument. Note, *The Revised Uniform Principal and Income Act—Progress, But Not Perfection*, 1963 U. Ill. L.F. 473, 478.

rule appears to be unique among states that have enacted the RUIA. The proposed law aligns California with the RUIA by providing for apportionment of rent, interest, and annuities between income and principal based on the date of the testator's death. This rule is fairer to principal beneficiaries than the existing anti-apportionment rule.

Losses from business and farming operations. Existing law provides that losses incurred in the operation of a business or farming operation in any fiscal or calendar year fall on principal and are not carried forward for the purpose of calculating net income.¹⁵⁴ This policy results in unfair treatment of remainder beneficiaries in situations where one year's loss is assigned to them while the benefit of the next year's gain goes entirely to the income beneficiaries.¹⁵⁵ This inequity could be particularly drastic in the case of a farming operation where large variations in income and losses are experienced from year to year. The proposed law adopts the approach of the Wisconsin and Nebraska statutes which provide that net losses are carried into subsequent fiscal or calendar years to reduce net profits.¹⁵⁶ *The new law permits use of "recognized methods of accounting" instead of "generally accepted accounting principles" as being more appropriate in certain types of businesses, such as farming operations.*

Allocations to principal for depletion of natural resources. Existing law provides the trustee with discretion to determine whether to allocate up to 27½ percent of gross receipts from natural resources to principal.¹⁵⁷ The percentage amount was derived from the maximum depletion allowance under former federal

¹⁵⁴ Civil Code § 730.08(a).

¹⁵⁵ See Volkmer, *Nebraska's Trustees' Powers Act and Principal and Income Act: The New Look in Nebraska Trust Law*, 14 Creighton L. Rev. 121, 149 n.164 (1980). The comments to the RUIA do not suggest any reason for the rule against carrying losses forward, but one commentator has suggested that it is based on principles applicable to incorporated businesses. See Barclay, *The Principal and Income Act*, 33 Brooklyn L. Rev. 489, 495 (1967).

¹⁵⁶ See Neb. Rev. § 30-3109 (Cum. Supp. 1982); Wis. Stat. Ann. § 701.20(8) (West 1981).

¹⁵⁷ Civil Code § 730.09(a)(3).

income tax statutes. The proposed law, like the statutes of at least five other states, replaces this figure with the appropriate depletion allowance under federal law for the particular type of natural resource involved.¹⁵⁸

Underproductive property. *The new law provides that the rules on underproductive property do not apply to securities listed on a national securities exchange or traded over the counter if the securities are held in a broadly diversified portfolio designed to produce a reasonable return that is appropriate to the purposes of the trust. This provision resolves the conflict between the portfolio approach to investment decisions and the general rules concerning underproductive property in the case of such securities.*

¹⁵⁸ I.R.C. § 613 (1982). The maximum depletion allowance currently is 22 percent.

Remedies for Breach of Trust

Background

If the trustee violates a duty owed to the beneficiary, the trustee has committed a breach of trust and may be subject to any appropriate remedy.¹⁵⁹ In California, as in most jurisdictions, the law relating to remedies for breach has been largely left to the common law. The statutory law in California is sketchy and scattered through the various trust statutes and elsewhere. While the existing law needs reform, it is not advisable to over-legislate on this subject. Remedies should remain sufficiently flexible, as they are under the common law, so that courts can fashion an appropriate response in particular circumstances.¹⁶⁰ The proposed law seeks only to provide a brief description of the basic remedies for breach of trust as a guide to parties, without altering the basic principles of existing law.¹⁶¹

Monetary Liability for Redress of Breach

The trustee is liable for damages arising out of a breach of the trust.¹⁶² Liability for money damages typically arises from actions such as unauthorized payments to beneficiaries, conversion of trust property, retention of property that should be sold or sale of property that should be retained, negligence or misconduct in making or retaining investments, or mishandling duties such as recording instruments affecting trust property, obtaining security, or collecting trust property.¹⁶³

It is elementary that California law recognizes the trustee's liability for damages.¹⁶⁴ The proposed law continues the explicit authority of the court to compel the trustee to redress a breach of trust by payment of money.

¹⁵⁹ See Restatement (Second) of Trusts § 201 (1957); see also the discussion under "Measure of Liability for Breach" *infra*.

¹⁶⁰ See G. Bogert, *The Law of Trusts and Trustees* § 861, at 3 (rev. 2d ed. 1982); see also Ala. Code § 19-3-107 (1976) ("The relief granted in cases of trust, will always be so molded and framed as to render the trust effectual, and secure the best interest of the parties.").

¹⁶¹ A similar approach was taken in the recent revision of trust law in Indiana. See Ind. Code Ann. § 30-4-3-11 (West 1979).

¹⁶² See Restatement (Second) of Trusts §§ 199(c), 205 (1957); G. Bogert, *The Law of Trusts and Trustees* § 862, at 27-28 (rev. 2d ed. 1982).

¹⁶³ *Id.*, at 29-31.

¹⁶⁴ See Civil Code §§ 2236-2238, 2262; 7 B. Witkin, *Summary of California Law Trusts* § 85, at 5445 (8th ed. 1974).

The difficult questions in this area arise in regard to the appropriate procedures and the measure of liability. These questions are discussed elsewhere.¹⁶⁵

Compelling Performance of Duties

At common law, a beneficiary may bring an action to compel the trustee to perform the duties under the trust.¹⁶⁶ The trustee may be compelled to perform a particular act, such as selling trust property, distributing income or other property, making an investment, or conveying property to a successor trustee, and may also be compelled to perform the trust in general.¹⁶⁷

California law is inadequate on this point. Under Civil Code Section 863, a beneficiary of a trust in real property may "enforce the performance of the trust." Civil Code Section 2251 provides that the beneficiary may "take advantage [of the trust] at any time prior to its rescission." No leading cases deal with the specific performance of private trusts,¹⁶⁸ but there are cases recognizing the right of the Attorney General or a cotrustee to sue to enforce a charitable trust.¹⁶⁹ The proposed law codifies the right of the beneficiary to compel the trustee to perform the trustee's duties.

Enjoining Threatened Breach

The beneficiary may bring an action to enjoin the trustee from committing a breach of the trust.¹⁷⁰ This may be an appropriate remedy in situations such as where the trustee intends to make a transfer of property forbidden in the trust instrument or to vote stock in an undesirable manner.¹⁷¹

California law provides that a final injunction may be granted to prevent breach of an obligation arising from a trust.¹⁷² There is also limited case law authority for this

¹⁶⁵ See the discussions under "Measure of Liability for Breach" and "Judicial Proceedings Concerning Trusts" *infra*.

¹⁶⁶ Restatement (Second) of Trusts § 199(a) (1957).

¹⁶⁷ G. Bogert, *The Law of Trusts and Trustees* § 861, at 18-19 (rev. 2d ed. 1982).

¹⁶⁸ See *Tyler v. Houghton*, 25 Cal. 26, 29 (1864) (dictum).

¹⁶⁹ See, e.g., *People ex rel. Ellert v. Cogswell*, 113 Cal. 129, 136, 45 P. 270 (1896) (Attorney General); *Pratt v. Security Trust & Sav. Bank*, 15 Cal. App. 2d 630, 640-41, 59 P.2d 862 (1936); *Holt v. College of Osteopathic Physicians & Surgeons*, 61 Cal. 2d 750, 755-57, 394 P.2d 932, 40 Cal. Rptr. 244 (1964).

¹⁷⁰ Restatement (Second) of Trusts § 199(b) (1957).

¹⁷¹ See G. Bogert, *The Law of Trusts and Trustees* § 861, at 11 (rev. 2d ed. 1982).

¹⁷² Civil Code § 3422; see also Code Civ. Proc. § 526(7).

remedy.¹⁷³ The proposed law continues the general authority of existing law.

Setting Aside Action of Trustee

The authority to set aside acts of the trustee in breach of trust is a corollary of the authority to enjoin threatened breaches.¹⁷⁴ This remedy is mainly useful for avoiding conveyances if it can be done without impairing the rights of third persons.¹⁷⁵

While there is no explicit California law on this subject, it appears to be a useful, if minor, remedy for breach, and is included in the proposed law.

Appointment of Receiver

The beneficiary may seek appointment of a receiver to take possession of trust property and to administer the trust pending final resolution of a problem.¹⁷⁶ This remedy would normally be used in conjunction with some other remedy.¹⁷⁷

General California statutes relating to appointment of receivers provide for appointment of a receiver when there is a dispute between persons jointly interested in any property or when a fund is in danger of being lost, removed, or materially injured.¹⁷⁸ This general language would appear to include disputes between trustees and beneficiaries. The proposed law makes clear that receivers may be appointed in the trust context.

Removal of Trustee

At common law, a trustee may be removed for a sufficiently serious breach or threatened breach of the trust.¹⁷⁹ If the removed trustee was a sole trustee, the court

¹⁷³ See *St. James Church of Christ Holiness v. Superior Court*, 135 Cal. App. 2d 352, 359-62, 287 P.2d 387 (1955).

¹⁷⁴ See G. Bogert, *The Law of Trusts and Trustees* § 861, at 16-17 (rev. 2d ed. 1962).

¹⁷⁵ See the discussion under "Protection of Third Persons Dealing with Trustees" *infra*.

¹⁷⁶ Restatement (Second) of Trusts § 199(d) (1957).

¹⁷⁷ See *id.* comment d; G. Bogert, *The Law of Trusts and Trustees* § 861, at 13 (rev. 2d ed. 1962).

¹⁷⁸ Code Civ. Proc. § 564(1); see also Code Civ. Proc. § 564(7) (receiver available in other cases where receivers have been appointed "by the usages of the courts of equity").

¹⁷⁹ Restatement (Second) of Trusts § 199(e) & comment e (1957).

may also appoint a successor, or in some circumstances, the court may appoint a new cotrustee without removing any other trustee.¹⁸⁰ Breaches that have provided grounds for removal include disobedience to court orders or to the trust instrument, failure or refusal to act, comingling trust property, failure to account, acquisition of an adverse interest, accepting unauthorized compensation, appropriation of trust funds, and breaches resulting in large losses to the trust.¹⁸¹

California statutes also clearly authorize removal of trustees for breach,¹⁸² and the proposed law continues the statutory authority.

Requiring Bond or Increasing Amount of Bond

If the trustee has provided a bond, the bond is a fund for the recovery of damages. Some courts may order that a bond be given to secure faithful performance of the trust in the future if the trustee has breached the trust or threatens to do so.¹⁸³ The court may also order an increase in the amount of an existing bond or require new sureties.¹⁸⁴

California law relating to trustees' bonds is discussed elsewhere.¹⁸⁵ The proposed law does not list bonding as a remedy for breach, because it would be a rare case where it would seem to be appropriate; however, the proposed law allows a court to require a bond if the bond is necessary to protect the interests of beneficiaries.

Reduction or Denial of Compensation

Courts at common law have discretion to deny the trustee all compensation or to reduce compensation for a breach of the trust.¹⁸⁶

California statutory law provides for the determination of compensation and the allowance of greater compensation

¹⁸⁰ See *In re La Rocca's Trust Estate*, 419 Pa. 176, 213 A.2d 666 (1965); see also the discussion under "Office of Trustee" *supra*.

¹⁸¹ See G. Bogert, *Handbook of the Law of Trusts* § 160, at 576 (5th ed. 1973).

¹⁸² See Civil Code § 2283; Prob. Code §§ 1123.5, 1138.1(a) (10).

¹⁸³ G. Bogert, *The Law of Trusts and Trustees* § 861, at 11 (rev. 2d ed. 1982).

¹⁸⁴ *Id.*, at 11-12; see also Tex. Prop. Code Ann. § 113.058(d) (Vernon 1984).

¹⁸⁵ See the discussion under "Trustee's Bond" *supra*.

¹⁸⁶ Restatement (Second) of Trusts § 243 (1957); G. Bogert, *The Law of Trusts and Trustees* § 861, at 23 (rev. 2d ed. 1982); see also Tex. Prop. Code Ann. § 113.062 (Vernon 1984).

under appropriate circumstances, but does not provide for reduction or denial of compensation in the event of a breach.¹⁸⁷ The proposed law lists reduction or denial of compensation as a remedy for breach so that the matter is clear.

Tracing and Recovery of Trust Property or its Proceeds

At common law, the beneficiary may follow the trust property or its proceeds into the hands of persons other than bona fide purchasers and obtain the return to the trust of the property or its proceeds.¹⁸⁸ Many technical rules have been developed over the years to deal with the problems of tracing different forms of property and different mixtures of funds.¹⁸⁹

To the extent it is known, California law seems generally in accord with these principles.¹⁹⁰ The bona fide purchaser rule is codified in an indirect way in Civil Code Section 2243 which declares that "[e]very one to whom property is transferred in violation of a trust, holds the same as an involuntary trustee under such trust, unless he purchased it in good faith, and for a valuable consideration." Where property has undergone a change of form, tracing is still permitted.¹⁹¹ The proposed law makes clear that the

¹⁸⁷ See Civil Code § 2274; Prob. Code §§ 1122, 1138.1(a) (7); see also the discussion under "Trustee's Compensation" *supra*.

¹⁸⁸ See Restatement (Second) of Trusts § 202 (1957); G. Bogert, Handbook of the Law of Trusts §§ 161-65 (5th ed. 1973).

¹⁸⁹ If the trustee has mingled trust funds with personal funds, questions arise over the personal or trust character of funds that are withdrawn and those that remain. The Restatement rule is that the beneficiary is entitled to a proportionate share of the funds remaining on deposit and the funds withdrawn, unless the withdrawn funds are dissipated, in which case the beneficiary is entitled to the funds remaining on deposit. Restatement (Second) of Trusts § 202 comment i (1957). If the trustee later deposits money in the account, the general rule is that the deposit does not restore the dissipated trust funds, and the beneficiary may reach only the lowest intermediate balance. *Id.* comment j. However, if the withdrawn funds were not dissipated after withdrawal, but were redeposited, it is as if the withdrawal had never been made. *Id.* comment l. But funds deposited after withdrawal and dissipation replenish the trust if the trustee manifests an intention to make restitution or if the deposit is made in an account in the name of the trustee as such and not as an individual. *Id.* comment m.

¹⁹⁰ See 7 B. Witkin, Summary of California Law Trusts §§ 86-88, at 5446-49 (8th ed. 1974); *Noble v. Noble*, 198 Cal. 129, 135, 243 P. 439 (1926); *Keeney v. Bank of Italy*, 33 Cal. App. 515, 517, 165 P. 735 (1917); *Carlin v. Masten*, 118 Cal. App. 373, 376-77, 5 P.2d 65 (1931); *People v. California Safe Deposit & Trust Co.*, 175 Cal. 756, 759, 167 P. 388 (1917).

¹⁹¹ See *Byrne v. McGrath*, 130 Cal. 316, 320-21, 62 P. 559 (1900) (trust funds used to buy drugstore and its stock). In one respect, however, California law has rejected the

beneficiary can trace property wrongfully disposed of and recover it or its proceeds, but does not attempt to codify the extensive detail involved in tracing principles.

Reaching Proceeds of Wrongful Disposition

If the trustee acquires property on the trustee's own behalf as the result of a wrongful disposition of trust property, at common law the beneficiary may have an equitable lien on the property in the hands of the trustee or may enforce a constructive trust as a method of securing a claim against the trustee for money.¹⁹² Under this theory the proceeds of the wrongful disposition are treated as the property of the trustee personally whereas under a tracing remedy the proceeds are treated as a substitute for the trust property.¹⁹³ One advantage of the equitable lien is that the claim for damages may be asserted against the proceeds with priority over general creditors of the trustee.¹⁹⁴ Another advantage is that the usual exemptions from creditors' claims do not apply to enforcement of an equitable lien or constructive trust in this situation.¹⁹⁵

Equitable liens and constructive trusts have long been recognized in California.¹⁹⁶ The details of this sort of equitable remedy are best left to case law, but the proposed law makes clear that the equitable lien and the constructive trust are available as remedies for breach of trust.

Miscellaneous Remedies

Several other remedies exist. The beneficiary has the right to obtain information necessary to secure performance of the trust or to obtain a redress of breach.

Restatement rule. Where withdrawn funds have been dissipated and then restored, case law eliminates the requirement that the beneficiary must show that the trustee had an express intent to replace the trust funds. *Church v. Bailey*, 90 Cal. App. 2d 501, 504, 203 P.2d 547 (1949).

¹⁹² Restatement (Second) of Trusts § 202 (1957); G. Bogert, *Handbook of the Law of Trusts* § 158, at 569-70 (5th ed. 1973).

¹⁹³ *Id.*, at 570.

¹⁹⁴ Restatement (Second) of Trusts § 202 comment a (1957).

¹⁹⁵ Restatement (Second) of Trusts § 202 comment d (1957).

¹⁹⁶ See *Citizens' Bank v. Rucker*, 138 Cal. 606, 609-10, 72 P. 46 (1903); 7 B. Witkin, *Summary of California Law Trusts* § 86, at 5446 (8th ed. 1974).

Hence, the beneficiary has a right to an accounting and may be permitted to inspect trust property.¹⁹⁷ The proposed law does not list this as a separate remedy for breach.

A trustee who misappropriates trust property may be criminally liable for embezzlement.¹⁹⁸ The proposed law does not list this criminal remedy since it is of no particular assistance to a beneficiary.

Measure of Liability for Breach of Trust

General Principles

The basic principle of liability for breach is that the injured beneficiary should be made whole, i.e., that the beneficiary should be restored to the same condition as if the wrong had not been committed.¹⁹⁹ The accomplishment of this principle varies depending on the circumstances and the equities of the case. Under the Restatement rule,²⁰⁰ the beneficiary generally has the option of seeking one of the following, whichever is appropriate:

- (a) any loss or depreciation in value of the trust estate resulting from the breach of trust; or
- (b) any profit made by him through the breach of trust; or
- (c) any profit which would have accrued to the trust estate if there had been no breach of trust.

These rules may be relaxed in appropriate cases since the court of equity has the power to excuse the trustee in whole or in part from liability where the trustee has "acted honestly and reasonably and ought fairly to be excused."²⁰¹ There is a general trend away from strict liability in trust law and toward "imposing liability for compensatory damages only when there is proof of fault and of a causal relation between fault and injury."²⁰²

¹⁹⁷ See G. Bogert, *The Law of Trusts and Trustees* § 861, at 7-8 (rev. 2d ed. 1982); see also the discussion under "Duty to Report Information and Account to Beneficiaries" *supra*.

¹⁹⁸ Penal Code § 506; *People v. Stanford*, 16 Cal. 2d 247, 105 P.2d 969 (1940).

¹⁹⁹ See Restatement (Second) of Trusts §§ 199(c), 205 (1957); G. Bogert, *The Law of Trusts and Trustees* § 701, at 198 (rev. 2d ed. 1982).

²⁰⁰ Restatement (Second) of Trusts § 205 (1957).

²⁰¹ *Id.* comment g.

²⁰² Niles, *A Contemporary View of Liability for Breach of Trust*, 29 Rec. A.B. City N.Y. 573 (1974), 114 Tr. & Est. 12, 182 (1975).

The Restatement provides special rules that qualify the general rule, depending upon the nature and seriousness of the breach—whether there was an improper sale or retention of property, an improper investment, or a failure to invest. For example, in the case of an improper sale, four alternative measures may apply under the Restatement, depending on the culpability or good faith of the trustee.²⁰³

California statutory law is in general accord with the Restatement although the Field Code language is archaic and subject to some doubt. Civil Code Section 2237 provides that, if the trustee uses or disposes of trust property contrary to the Field Code's version of the duty of loyalty in Section 2229, the trustee may be required to "account for all profits so made, or to pay the value of its use, and, if he has disposed thereof, to replace it, with its fruits, or to account for its proceeds with interest." Civil Code Section 2238 provides a good faith exception so that a trustee acting with the intent to serve the interests of the beneficiary will be liable "only to make good whatever is lost to the beneficiary by his or her error."

The leading California case law authority in this area is *Estate of Talbot*.²⁰⁴ In *Talbot* the trustee had discretion to sell property but was found to have breached the trust by relying on advice of one of the beneficiaries and failing to exercise an independent judgment. This case is thus distinguished from cases where the trust imposes a duty to retain specific property. The court determined that the trustee was in good faith and so committed only a technical breach of the duty to exercise discretion. Since the beneficiaries could not have compelled retention of the stock in the *Talbot* trust, the proper measure of damages was the loss to the corpus (capital gains taxes and expenses

²⁰³ See Restatement (Second) of Trusts § 208 (1957). The four measures are: (1) value at the time of sale, plus interest; (2) value at the time of the decree plus income that would have accrued if it had not been sold; (3) specific reparation, if reasonable under the circumstances; and (4) accounting for the proceeds of sale. The second of these measures has been troublesome since the liability may be significant in a situation where property (such as shares of stock or artworks) has greatly appreciated between the time of sale and the time of the action against the trustee. The sense that "appreciation damages" may be punitive has led the courts to reserve this measure of liability for particularly culpable trustees and apply a lesser measure where the trustee has been merely negligent or made a good faith mistake. See, e.g., *Estate of Rothko*, 84 Misc. 2d 830, 379 N.Y.S. 2d 923 (1975); *Estate of Talbot*, 141 Cal. App. 2d 309, 296 P.2d 848 (1956).

²⁰⁴ 141 Cal. App. 2d 309, 296 P.2d 848 (1956).

of sale) plus interest. The court relied in part on the Restatement in interpreting the relevant parts of the Field Code.²⁰⁵

The Restatement also provides detailed rules where the trustee has committed a breach by an improper failure to sell trust property.²⁰⁶ If property that is improperly held has greatly depreciated in value, the damages for an "innocent" breach could be as great as in the *Talbot* situation involving "appreciations damages."²⁰⁷

A trustee who purchases property that the trustee has a duty not to purchase may be charged under the Restatement with the amount expended, plus interest, or required to account for the property purchased.²⁰⁸ California law makes the trustee liable "to make good whatever is lost" where an improper investment is made in good faith.²⁰⁹ This standard would seem to afford the court a broad discretion to fix the amount of liability.

If the trustee fails to purchase specific property as required by the trust, under the Restatement the trustee may be (1) charged with its value at the time of the court decree, plus income that would have accrued or (2) required to purchase the property if reasonable to do so and then charged with the difference between the original and current price, plus income that would have accrued.²¹⁰

²⁰⁵ See 141 Cal. App. 2d at 324-26. Among other things, the court cited the language in comment b to Restatement Section 208 to the effect that the section "does not include the situation where the trustee is authorized to sell, but commits a breach of trust by selling at an improper price or otherwise."

²⁰⁶ Under Section 209 of the Restatement, the measure of liability is the amount that would have been received if the property had been sold, with interest thereon. This principle is not limited by a good faith exception, as is the liability for improper sale. Compare Restatement (Second) of Trusts § 208 & comment b (1957) with § 209 & comments. The illustrations in the comments to Section 209, however, involve stock which the trustee is directed to sell within six months.

²⁰⁷ In some situations, however, the trustee may not be held liable for the full amount of a loss under Restatement Section 209, such as where the market has been in a general decline and the breach was not in bad faith. See Restatement (Second) of Trusts § 211 comment d, § 212 comment e (1957); G. Bogert, *The Law of Trusts and Trustees* § 701, at 208 (rev. 2d ed. 1962).

²⁰⁸ Restatement (Second) of Trusts § 210 (1957). The application of this section is limited to situations where the trustee is under a duty not to purchase certain property and does not include situations where the trustee has authority to purchase the property but breaches some duty in doing so. *Id.* comment a.

²⁰⁹ See Civil Code § 2238.

²¹⁰ Restatement (Second) of Trusts § 211 (1957). These rules apply to specific property required to be purchased; if the trustee has a choice among several securities, for example, and does not invest in any of them, the least profitable security is the measure of liability. *Id.* comment e. If the trustee violates the general duty to make

Under Civil Code Section 2262, the trustee is subject to liability for simple or compound interest for failing to invest in violation of the general standard of care.²¹¹

Proposed Law

Measure of liability for breach of trust. The proposed law adopts the basic general rules of the Restatement governing the measure of liability for breach of trust. Thus in appropriate circumstances the trustee may be liable for a loss or depreciation in value arising from the breach, for a profit made through a breach, or for a profit that would have accrued if there had not been a breach. The proposed law does not codify the more detailed Restatement rules for particular types of breach, however, because this would result in too much statutory detail and would create a serious risk of rigidifying the rules of the common law.²¹² The proposed law seeks to bring California statutory provisions into harmony with the general law in this area without inhibiting the process of applying basic principles of liability for breach of trust in new circumstances. The Commission concludes that this function should remain with the courts. It should be recognized that this reformulation of the rules governing the measure of liability for breach of trust does not cause any serious alteration of California law in this area. However, the proposed law does generalize the good faith exception in order to give the court discretion to excuse the trustee in whole or in part from liability if the trustee has acted reasonably and in good faith under the circumstances as known to the trustee *so long as it would be equitable to excuse the trustee from all or part of the liability.*²¹³

trust property productive, the trustee is chargeable with the income that normally would accrue from proper investments, but not with the loss of profit that might have resulted because of a general rise in the values in the securities market. *Id.* comment f.

²¹¹ See, e.g., *Estate of Prior*, 111 Cal. App. 2d 464, 471, 244 P.2d 697 (1952) (executor-trustee liable for 7% interest where money deposited in non-interest commercial bank account); *Lynch v. John M. Redfield Found.*, 9 Cal. App. 3d 293, 302-03, 88 Cal. Rptr. 86 (1970) (trustees of charitable foundation liable for 7% interest on income accumulated in non-interest bearing account for 5 years).

²¹² The new Texas Trust Code takes the same approach of enacting the substance of Restatement Section 205 but omitting the other details. See Tex. Prop. Code Ann. § 114.001(c) (Vernon 1984).

²¹³ This provision represents an expansion of the rule in *Estate of Talbot*, 141 Cal. App. 2d 309, 296 P.2d 848 (1956).

[Material omitted.]

Liability for Interest. Existing law imposes liability for simple interest in the case of negligent failure to invest and compound interest in the case of willful failure to invest.²¹⁶ It is said that the award of compound interest is not made to punish a trustee, but only to prevent the trustee from profiting from wrongdoing.²¹⁷ If the trustee improperly disposes of trust property, the trustee may be liable for the proceeds with interest.²¹⁸

The proposed law replaces these variant provisions with a uniform rule that the trustee is liable for interest in any case where there is a breach resulting in a loss or depreciation of the trust estate or in profit to the trustee. The rate of interest is . . . the same as the rate applicable to money judgments, *currently set at 10%*.²¹⁹ However, if the trustee has actually received a greater amount as interest, the trustee is liable for that amount.²²⁰

Limitations

Under existing law the general four-year statute of limitations applies in proceedings against the trustee for breach of trust.²²¹ If the trustee has submitted an accounting to the court, the normal rules of civil procedure operate to excuse the trustee after the court decree approving the accounting becomes final.²²²

²¹⁴ [Omitted.]

²¹⁵ [Omitted.]

²¹⁶ Civil Code § 2262.

²¹⁷ *Miller v. Lux*, 100 Cal. 609, 616, 35 P. 345 (1893). In *Miller*, interest at the legal rate was compounded to compensate for the fact that the market rate exceeded the legal rate.

²¹⁸ Civil Code § 2237.

²¹⁹ See Code Civ. Proc. § 685.010; see also Cal. Const. art. 15, § 1.

²²⁰ This rule is drawn from Restatement (Second) of Trusts § 207 (1957).

²²¹ See Code Civ. Proc. § 343; *Cortelyou v. Imperial Land Co.*, 166 Cal. 14, 20, 134 P. 981 (1913); *Oeth v. Mason*, 247 Cal. App. 2d 805, 811-12, 56 Cal. Rptr. 69 (1967). This rule is subject to the special three-year statute of limitations in the case of fraud running from the discovery of the facts. Code Civ. Proc. § 338(4).

²²² See Prob. Code §§ 1121 (accounting), 1123 (conclusiveness of decree), 1138.1(a) (2) (accounting).

Under the proposed law, the limitations period is three years and runs from the time the beneficiary receives a written interim or final account or report that adequately discloses the subject of a claim. An account or report is considered to make an adequate disclosure if it provides sufficient information so that the beneficiary knows of the claim or reasonably should have inquired into its existence. If the account or report does not adequately disclose the subject of the claim, the three-year period runs from the date the beneficiary discovered or reasonably should have discovered the subject of the claim.²²³ This scheme encourages frequent and full accountings by the trustee to the beneficiaries and is consistent with modern trust statutes that do not require accountings to the court. By reducing the limitations period from four to three years, the proposed law is a bit more protective of trustees than existing law, but does not unfairly impinge on the rights of beneficiaries since trustees are more likely to account fully under the proposed law.

Exculpation

Existing statutes do not prescribe rules governing exculpation of trustees by provisions in the trust, except where the trust is revocable.²²⁴ The proposed law draws on the Restatement rule permitting the trust to relieve the trustee of liability for breach of trust.²²⁵ The exculpation provision is not effective, however, to relieve the trustee of liability (1) for a breach of trust committed in bad faith, intentionally, or with reckless indifference to the interest of the beneficiary, or (2) for any profit that the trustee derives from the breach of trust. These rules probably do not make any new law for California, but perform the useful function of codifying the principle of exculpation within certain limits.

²²³ This scheme is drawn from Section 7-307 of the Uniform Probate Code (1977), but provides a limitations period of three years instead of six months. At least 14 states have enacted the UPC scheme; Hawaii has increased the six-month limitations period to two years and Missouri has increased it to five years.

²²⁴ See Civil Code § 2258(b) (trustee not liable for following written instructions of person having the power to revoke a revocable trust).

²²⁵ See Restatement (Second) of Trusts § 222 (1957).

Consent

Existing law contains several provisions relating to the consent of beneficiaries to relieve the trustee of liability for some action.²²⁶

The proposed law adopts the Restatement rule in place of the incomplete and varying rules of existing law. Under the Restatement, the beneficiary may be barred from pursuing a trustee for a breach of trust if the beneficiary consented to the breach in advance, requested the breaching act, or joined with the trustee in the breach.²²⁷ The beneficiary's consent is ineffective if the beneficiary is under an incapacity or does not know of his or her rights or of the material facts, or if the consent was improperly induced by the trustee.²²⁸ In cases involving an adverse interest between the trustee and beneficiary, the consent of the beneficiary is not effective in any of the circumstances just noted, and also if the transaction involves a bargain that is not fair and reasonable.²²⁹

Release and Subsequent Affirmance

The new law adopts the Restatement rules concerning discharge of the trustee's liability by the beneficiary's release or contract and by the beneficiary's subsequent affirmance.

Laches

The proposed law does not attempt to codify other doctrines that might protect the trustee from liability to the beneficiary, such as . . . laches; these matters are left to the common law.

²²⁶ See Civil Code §§ 2230 (consent of beneficiary regarding transactions where trustee has adverse interest), 2232 (consent of beneficiary of trust where trustee undertakes another trust adverse to first trust), 2282(d) (discharge from trust by consent of beneficiaries).

²²⁷ See Restatement (Second) of Trusts § 216(1) (1957); G. Bogert, *Handbook of the Law of Trusts* § 168, at 628 (5th ed. 1973); see also Uniform Probate Code § 7-307 (1977).

²²⁸ See Restatement (Second) of Trusts § 216(2) (1957).

²²⁹ See *id.* § 216(3).

Liability of Trustee for Acts of Others

Agents

Existing law does not provide specific rules governing the liability of a trustee for the acts or omissions of an agent of the trust. The general rule at common law is that a trustee is not liable to the beneficiary for acts of agents employed in administration of the trust.²³⁰ The general nonliability rule does not apply in situations where the trustee directs the acts of the agent, improperly delegates authority to the agent, acts negligently in selecting or supervising the agent, approves the agent's acts, or fails to take steps to redress the wrong.²³¹

The proposed law codifies the Restatement rule with some refinements²³² in order to provide guidance in this area.²³³

Cotrustees

Existing law imposes liability on a trustee for the wrongful acts of a cotrustee only if the trustee consented to them or enabled the cotrustee to commit them through negligence.²³⁴ This Field Code doctrine appears to be narrower than the Restatement rule, which also imposes liability for improper delegation, for failure to compel the cotrustee to redress a breach, and for acquiescence in the

²³⁰ Restatement (Second) of Trusts § 225 (1957). This rule does not shield a corporate trustee from liability for breach by its own officers and employees within the course of administration. *Id.* § 225 comment b.

²³¹ *Id.*

²³² For example, the liability for not exercising proper supervision (*id.* § 225(2)(d)) is limited to situations where the trustee has the power to supervise the agent; the liability for acquiescing in or *concealing* the act of an agent (*id.* § 225(2)(e)) is . . . *not included*; the liability for neglecting to take property steps to compel the agent to redress the wrong (*id.* § 225(2)(f)) is restricted to cases where the trustee knows . . . of the agent's acts or omissions.

²³³ Indiana has also recently taken this approach. See Ind. Code Ann. § 30-4-3-11 (West 1979).

²³⁴ Civil Code § 2239.

cotrustee's acts.²³⁵ There is some doubt, however, that California courts will strictly construe the existing statutory rule.²³⁶

... [T]he proposed law adopts the Restatement approach to a trustee's liability for a breach of trust committed by a cotrustee, subject to certain refinements.²³⁷

Predecessor Trustee

There does not appear to be any California law on the subject of the liability of a successor trustee for acts or omissions of the trustee's predecessor. Under the Restatement, a successor is not liable for a predecessor's breach, but may be liable if the situation is allowed to continue, if steps are not taken to compel the predecessor trustee to deliver property to the successor, or if steps are not taken to redress the breach of the predecessor.²³⁸

The proposed law codifies the Restatement rules subject to some refinements²³⁹ as in the case of liability for acts of agents and cotrustees.²⁴⁰

²³⁵ See Restatement (Second) of Trusts § 224 (1957). The rules governing liability of agents and cotrustees under the Restatement are similar.

²³⁶ See *Gbur v. Cohen*, 93 Cal. App. 3d 296, 302, 155 Cal. Rptr. 507 (1979) (question raised as to whether Civil Code Section 2239 should be read literally); *Blackmon v. Hale*, 1 Cal. 3d 548, 559, 463 P.2d 418, 83 Cal. Rptr. 194 (1970) (quoting *In re Estate of Whitney*, 124 Cal. App. 109, 118, 11 P.2d 1107 (1932), to the effect that a trustee may be liable by negligent inattention to his duties, by delinquency therein far short of active participation in the conversion of trust funds by a co-guardian).

²³⁷ For example, the trustee's liability for acquiescing in the act of a cotrustee (Restatement (Second) of Trusts § 224(2)(c)) is limited to situations where the trustee knowingly acquiesces; the liability for failing to exercise reasonable care which enables the cotrustee to breach the trust (*id.* § 224(2)(d)) is revised to provide for liability for negligently enabling the cotrustee to commit the breach; the liability for neglecting to take proper steps to compel the cotrustee to redress the wrong (*id.* § 224(2)(e)) is restricted to cases where the trustee knows or has information from which the trustee reasonably should have known of the breach.

²³⁸ See Restatement (Second) of Trusts § 223 (1957).

²³⁹ For example, the successor trustee's liability for improperly permitting a breach committed by the predecessor trustee to continue (Restatement (Second) of Trusts § 223(2)(a)) is limited to situations where the trustee knows or has information from which the trustee reasonably should have known of the breach; the liability for neglecting to take proper steps to redress the breach (*id.* § 223(2)(c)) is restricted to cases where the trustee knows or has information from which the trustee reasonably should have known of the predecessor's breach.

²⁴⁰ Texas codified these rules in its new Trust Code. See Tex. Prop. Code Ann. § 114.002 (Vernon 1984); see also La. Rev. Stat. Ann. § 9:2204 (West 1965).

Modification and Termination of Trusts

Introduction

The trust is a flexible mechanism which can be adapted to a variety of situations, but the person who drafts the trust may not adequately anticipate the needs of beneficiaries in changed circumstances.²⁴¹ Even the drafter's best efforts may not provide the appropriate degree of flexibility, and some persons who draft trust instruments do not have the expertise needed to fashion an instrument that responds to the changing needs, values, and circumstances of the settlor and the beneficiaries. Obviously, during the lifetime of the settlor, a revocable trust does not suffer from these drawbacks, but after the settlor's death, the now irrevocable trust may encounter situations where modification or termination is needed. Changes in tax laws may make modification highly beneficial.²⁴² Restrictive features of a trust may come to be viewed as too restraining in the face of the interest in free alienability of property. A rigid trust may also become uneconomical to administer over time.

Revocability of Trusts

Whether the settlor may terminate a trust and thereby take away the rights of the beneficiaries generally depends upon whether the trust is revocable. In most jurisdictions a trust is irrevocable unless the settlor reserves the right to revoke,²⁴³ but California law since 1931 has provided a contrary rule that presumes transfers in trust to be revocable unless the trust instrument provides otherwise.²⁴⁴ The California rule has been defended because "many trustors were not aware that they were creating inter vivos trusts" and because "in many cases the income from the

²⁴¹ This discussion draws heavily on a background study prepared for the Commission by Professor Gail Boreman Bird. See Bird, *Trust Termination: Unborn, Living and Dead Hands—Too Many Fingers in the Trust Pie*, 36 *Hastings L.J.* 563 (1985).

²⁴² See Collier, *Unscrambling Pre-ERTA Estate Plans*, in *Estate Planning 1982* § 7.1, at 186 (Cal. Cont. Ed. Bar 1983).

²⁴³ See Restatement (Second) of Trusts § 330(1) (1957); G. Bogert, *Handbook of the Law of Trusts* § 148, at 534 (5th ed. 1973).

²⁴⁴ See Civil Code § 2280, as amended by 1931 Cal. Stat. ch. 950, § 1. Only California, Oklahoma, and Texas have accepted this rule. See G. Bogert, *Handbook of the Law of Trusts* § 148, at 534 (5th ed. 1973).

trusts became inadequate to support the trustors, who found themselves precluded from reaching the trust corpus," an acute problem in 1929 and 1930.²⁴⁵ The revocable trust is currently a popular form of probate avoidance, so the rule presuming revocability of living trusts may be consistent with the normal expectations of persons drafting trusts, particularly those who are less sophisticated in the law. Ultimately the nature of the statutory rule is probably not too important since well-advised drafters will make clear in the trust instrument whether the trust is revocable or not, and will not rely on a statutory presumption for or against revocability.²⁴⁶

The proposed law retains the California rule presuming revocability of living trusts. This rule seems to be functioning in a satisfactory manner and is favored by California practitioners. However, some technical problems need attention. Existing law implies that oral trusts of personal property may not be made irrevocable.²⁴⁷ The proposed law permits a settlor to create an irrevocable oral trust in personal property if the terms of the oral trust can be shown by clear and convincing evidence.²⁴⁸

The California presumption of revocability may create problems when applied to a trust that has been drafted under the law of one of the 47 states that presume a trust to be irrevocable. Unless the trust instrument makes clear whether the trust is revocable or irrevocable, the intention of the settlor may be in doubt if the foreign trust is moved to California. The general rules governing conflict of laws provide some guidance,²⁴⁹ but problems may still arise

²⁴⁵ Comment, 28 Calif. L. Rev. 202, 208 (1940).

²⁴⁶ See, e.g., Larson, *Drafting the Trust: Distributive Provisions*, in J. Cohan, *Drafting California Revocable Living Trusts* §§ 4.2-4.13, at 112-20 (2d ed. Cal. Cont. Ed. Bar 1984).

²⁴⁷ The problem arises because Civil Code Section 2280 presumes a trust to be revocable unless it is "expressly made irrevocable by the instrument creating the trust." The reference to an instrument implicitly excludes the possibility of an oral trust satisfying this section.

²⁴⁸ See also the discussion under "Formalities for Creating Trusts: Oral Trusts" *supra*.

²⁴⁹ As summarized by Professor Scott, the relevant conflict of laws rules are as follows:

[1] If the settlor designated the law of a particular state to govern the validity and effect of the trust, the law of that state is applicable to determine whether the trust is revocable. . . .

[2] Where the settlor has not designated the applicable law and the trust is to be administered in the state in which the settlor resides, the law of that state is applicable as to the revocation or amendment of the trust. . . .

where conflict of laws rules would apply the law of the situs of land or the law of the state having significant contacts. If the settlor moves the trust to California without knowing of the presumption of revocability, adverse tax consequences may result in a case where the settlor intended to establish an irrevocable trust.²⁵⁰ The proposed law makes clear that the California rule on revocability of a trust applies only where the settlor was domiciled here when the trust was created, where the trust instrument was executed here, or where the trust instrument provides that the law of California governs . . . the trust. This rule is based on the assumption that most nondomiciliaries who create trusts in another jurisdiction and who do not indicate an intention to adopt California law or to make the trust revocable would not want it to be revocable.

Manner of Termination of Revocable Trusts

A revocable trust is terminated when it is wholly revoked by the settlor. Civil Code Section 2280 provides that this may be accomplished "by writing filed with the trustee." This manner of revocation applies where a revocable trust is silent on the manner of revocation, but California courts generally have held that where the trust instrument prescribes a method of revocation, the prescribed procedure must be followed rather than the statutory method.²⁵¹ This rule has been defended on the grounds

[3] Where a settlor domiciled in one state creates a trust of movables and fixes the administration of the trust in another state, it has been held that the law of the latter state is applicable on the question of the settlor's power to revoke the trust. . . .

[4] On the other hand, if no place of administration is fixed by the settlor, the revocability of the trust will be determined by those contacts which for this purpose are most significant. . . .

5 A. Scott, *The Law of Trusts* § 581, at 3857-59 (3d ed. 1967) (footnotes omitted); see also *Restatement (Second) of Conflict of Laws* § 268 & comment g (1969) (as to movables, in absence of indication of settlor's intent, instrument construed under law of state settlor "would probably have desired to be applicable"); *id.* § 277 & comment c (as to land, in absence of indication of settlor's intent, instrument usually construed under rules applied by courts of situs).

²⁵⁰ See, e.g., *Hughes v. Commissioner*, 104 F.2d 144 (9th Cir. 1939) (involving a trust established in California with a Massachusetts trustee, found to be irrevocable under the Massachusetts rule as to securities transferred to the Massachusetts trust company).

²⁵¹ See, e.g., *Rosenauer v. Title Ins. & Trust Co.*, 30 Cal. App. 3d 300, 304, 106 Cal. Rptr. 321 (1973); *Hibernia Bank v. Wells Fargo Bank*, 66 Cal. App. 3d 399, 404, 136 Cal. Rptr. 60 (1977), overruling *Fernald v. Lawsten*, 26 Cal. App. 2d 552, 560-61, 79 P.2d 742 (1938).

that the settlor may wish to establish a more complicated manner of revocation than that provided by statute where there is a concern about "future senility or future undue influence while in a weakened condition."²⁵² On the other hand, the case-law rule may be criticized as defeating the clear intention of the settlor who attempts to revoke a revocable trust by the statutory method, in circumstances that do not involve undue influence or a lack of capacity. In fact, the settlor may have forgotten about the method provided in the trust, or may not be aware of the case-law rule.

The proposed law adopts a compromise position that makes available the statutory method of revoking by delivery of a written instrument to the trustee during the settlor's lifetime except where the trust instrument explicitly makes exclusive the method of revocation specified in the trust. This allows a settlor to establish a more protective revocation scheme, but also honors the settlor's intention where the intent to make the scheme exclusive is not expressed in the trust instrument.

Modification of Revocable Trusts

Under general principles the settlor, or other person holding the power to revoke, may modify as well as terminate a revocable trust.²⁵³ The proposed law codifies this rule and also makes clear that the method of modification is the same as the method of termination, barring a contrary provision in the trust.

Modification or Termination by Settlor and All Beneficiaries

Under existing law, if the settlor and all beneficiaries are legally competent and seek the termination or modification of an otherwise irrevocable trust, it can be terminated or modified even though the purposes of the trust have not been accomplished and notwithstanding a spendthrift provision in the trust.²⁵⁴ This rule stands on the firm footing

²⁵² J. Cohan & J. Kasner, Supplement to Drafting California Revocable Inter Vivos Trusts § 5.2, at 73 (Cal. Cont. Ed. Bar 1982).

²⁵³ See Restatement (Second) of Trusts § 331 (1957); *Heifetz v. Bank of America*, 147 Cal. App. 2d 776, 781-82, 306 P.2d 979 (1957) (citing the first Restatement of Trusts).

²⁵⁴ See Civil Code § 771; Restatement (Second) of Trusts § 338 & comment d (1957); see also Civil Code § 2258(a) (modification by consent of "all parties interested").

that if everyone with an interest agrees to a modification or termination, there is no reason not to allow it. Of course, special questions may arise where a beneficiary is incapacitated, unknown, or unborn.²⁵⁵ But if consent can be obtained through appropriate means, there is no public policy that requires continuation of the trust. The proposed law codifies this rule.

Where fewer than all beneficiaries consent, the proposed law allows the consenting beneficiaries, with the consent of the settlor, to modify or terminate their part of the trust, if court approval is obtained. Court approval is required in this case to ensure the protection of the interests of the nonconsenting beneficiaries.

Modification or Termination by All Beneficiaries

There are situations where the beneficiaries may wish to modify or terminate an irrevocable trust but the consent of the settlor is not forthcoming, either because the settlor is unwilling to give consent or because the settlor is dead, incapacitated, or otherwise unavailable. Under existing case law the beneficiaries may modify or terminate if they all consent and a material purpose of the trust would not be defeated thereby.²⁵⁶ The most typical applications of the material purposes doctrine involve trusts providing spendthrift restraints, successive beneficiaries, or postponement of enjoyment of income or principal to a certain age.²⁵⁷

²⁵⁵ See the discussion under "Obtaining Consent of Beneficiaries" *infra*.

²⁵⁶ See, e.g., *Moxley v. Title Ins. & Trust Co.*, 27 Cal. 2d 457, 165 P.2d 15 (1946); Restatement (Second) of Trusts § 337 (1957).

²⁵⁷ To permit the beneficiaries of a spendthrift trust to terminate it would make the spendthrift feature an illusion. See *Leonardini v. Wells Fargo Bank & Union Trust Co.*, 131 Cal. App. 2d 9, 14, 280 P.2d 81 (1955). It appears that the mere provision for successive beneficiaries, such as in a trust providing for payment of income to one beneficiary for life, with principal to a remainderman on the income beneficiary's death, does not necessarily invoke the material purposes doctrine. 4 A. Scott, *The Law of Trusts* § 337.1, at 2658 (3d ed. 1967); Restatement (Second) of Trusts § 337 comment f (1957). However, a material purpose may be shown by extrinsic evidence in this type of case. See *Estate of Easterday*, 45 Cal. App. 2d 598, 605-608, 114 P.2d 669 (1941). Trusts that postpone enjoyment to a certain age may usually not be terminated before that age, the courts taking the view that the age restriction is material. This is the so-called *Claffin* doctrine, from the leading case of *Claffin v. Claffin*, 149 Mass. 19, 20 N.E. 454 (1889). Accord *Moxley v. Title Ins. & Trust Co.*, 27 Cal. 2d 457, 165 P.2d 15 (1946). The court in *Moxley* conceded that in some situations changed circumstances might warrant modification of a trust in order to accomplish the "real intent" of the settlor. *Id.* at 466-67.

The proposed law accepts the main elements of the decisional rules and codifies the material purposes doctrine with an important exception. The proposed law gives the court some degree of discretion to permit modification or termination where the reason for terminating or modifying the trust under the circumstances outweighs the interest in accomplishing a material purpose of the trust. This court discretion to relax the material purposes doctrine under the proposed law does not apply in the case of a spendthrift or similar protective provision.²⁵⁸

Obtaining Consent of Beneficiaries

Obtaining the consent of all beneficiaries for a modification or termination of a trust is a problem where a beneficiary is unborn or unascertained, or where a beneficiary is legally incompetent (such as in the case of a beneficiary who is a minor or is declared incompetent). Various methods have been developed to deal with the problem.

Guardian ad litem. Existing law authorizes the court to appoint a guardian ad litem to represent the interests of a person who is unknown, unborn, unascertained, missing, or under a legal disability.²⁵⁹ The guardian ad litem must act in a fiduciary capacity and may not forfeit the beneficiary's interests in the process of giving consent to a proposed modification or termination; the representation must be real and not merely formal.²⁶⁰ The consent of the guardian ad litem should be based on a quid pro quo offered the incapacitated beneficiary.²⁶¹ The proposed law introduces a limited refinement in existing law by permitting the guardian ad litem to rely on general family benefit accruing to living members of the beneficiary's family as a basis for approving a modification or termination.²⁶² This will enable a guardian ad litem to consent on behalf of unborn beneficiaries where the family is the beneficiary of the

²⁵⁸ See the discussion under "Spendthrift and Other Protective Trusts" *infra*.

²⁵⁹ See Code Civ. Proc. § 373.5; Prob. Code §§ 1120(b), 1138.7, 1215.3.

²⁶⁰ *Leonardini v. Wells Fargo Bank & Union Trust Co.*, 131 Cal. App. 2d 9, 17, 280 P.2d 81 (1955); *Wogman v. Wells Fargo Bank & Union Trust Co.*, 123 Cal. App. 2d 657, 666, 267 P.2d 423 (1954).

²⁶¹ See *Hatch v. Riggs Nat'l Bank*, 361 F.2d 539, 566 (D.C. Cir. 1966).

²⁶² This is drawn from Wisconsin law. See Wis. Stat. Ann. § 701.12(2) (West 1981).

modification or termination, on the assumption that a benefit conferred on the potential parents and other family members will most likely benefit a child born into the family.

Other representatives. The other methods for obtaining consent of a legally incapacitated person are unchanged by the proposed law. Hence, consent may be given in appropriate cases by an attorney in fact under a durable power of attorney²⁶³ or by a conservator.²⁶⁴

Virtual representation. The doctrine of virtual representation permits living members of a class to represent unborn members if there is no adverse interest between the living and the unborn.²⁶⁵ This doctrine is based on the assumption that in pursuing his or her own self-interest the living member of the class will safeguard the interests of other members of the class where their interests are substantially similar. In many cases, of course, the interests of the living members of a class are diametrically opposed to those of unborn members, and the doctrine can not be applied. The proposed law does not disturb existing law in this area.

Presumption of fertility. Termination has been precluded in California by application of the conclusive presumption of fertility, otherwise known as the "fertile octogenarian rule."²⁶⁶ This problem arises where there are unborn beneficiaries who may be members of a class described as "issue," "descendants," or "children."²⁶⁷ The

²⁶³ See, e.g., Civil Code §§ 2450, 2467 (statutory form of durable power of attorney). Under the proposed law, an attorney in fact under a durable power of attorney may not exercise a power to modify or revoke a trust unless the trust expressly permits such action.

²⁶⁴ See Prob. Code § 2580.

²⁶⁵ See *Mabry v. Scott*, 51 Cal. App. 2d 245, 124 P.2d 659 (1942) (modification resulting in partial termination).

²⁶⁶ See *Fletcher v. Los Angeles Trust & Sav. Bank*, 182 Cal. 177, 184, 187 P. 425 (1920); *Wogman v. Wells Fargo Bank & Union Trust Co.*, 123 Cal. App. 2d 657, 665, 267 P.2d 423 (1954).

²⁶⁷ The question of the appropriate treatment of adopted children has been postponed for study in connection with class gifts generally.

rationale supporting this rule has been that evidence on fertility is too uncertain.²⁶⁸ The proposed law adopts the more modern view and makes clear that the presumption is rebuttable.

Dispositions in favor of "heirs" or "next of kin" of settlor. Doubt may arise as to the persons who may have to consent to a modification or termination where the settlor reserves the right to income during his or her life and provides that the remainder goes to remaindermen described as "heirs" or "next of kin" of the settlor. Before the doctrine of worthier title was abolished in California,²⁶⁹ the settlor would be able to terminate the trust as the sole beneficiary.²⁷⁰ The rationale of the old rule is that a limitation in favor of heirs or next of kin should not preclude the settlor from changing his or her mind since there was probably no intention that the determination of the ultimate beneficiaries be final.²⁷¹ The proposed law revives a limited form of the doctrine of worthier title so that the consent of a member of a class described as "heirs" or "next of kin" of the settlor is not required to modify or terminate a trust unless the court finds that the person is reasonably likely to take.²⁷² Thus, the consent of beneficiaries described as "heirs" or "next of kin" who are not likely to take is not necessary to modify or terminate the trust.

Modification and Termination by Court

The court has the inherent equitable power to authorize deviation from the express terms of a trust in order to accomplish the purposes of the settlor.²⁷³ Courts have

²⁶⁸ See Leach, *Perpetuities in a Nutshell*, 51 Harv. L. Rev. 638, 643 (1938). With advances in medical science a number of jurisdictions have abandoned the conclusive presumption and allow expert medical testimony. See, e.g., *In re Bassett's Estate*, 104 N.H. 504, 190 A.2d 415 (1963); *P. v. Wilmington Trust Co.*, 188 A.2d 361 (Del. Ch. 1962); see generally 4 A. Scott, *The Law of Trusts* § 340.1, at 2713 (3d ed. 1967); *Restatement (Second) of Trusts* § 340 comment e (1987).

²⁶⁹ See 1959 Cal. Stat. ch. 122, § 1, enacting Civil Code § 1073.

²⁷⁰ See *Bixby v. California Trust Co.*, 33 Cal. 2d 495, 202 P.2d 1018 (1949).

²⁷¹ See Scott, *Revoking a Trust: Recent Legislative Simplification*, 65 Harv. L. Rev. 617, 623 (1952).

²⁷² This rule is drawn from New York law, but the preservation of the rights of heirs or next of kin who are likely to take is not found in New York law. See N.Y. Est. Powers & Trusts Law § 7-1.9(b) (McKinney Supp. 1985).

²⁷³ G. Bogert, *The Law of Trusts and Trustees* § 994, at 242 (rev. 2d ed. 1983); *Restatement (Second) of Trusts* §§ 167, 336 (1957).

traditionally been more reluctant to alter the dispositive provisions of a trust than the administrative provisions.²⁷⁴ Thus a court may authorize a trustee to sell property that would otherwise have to be retained²⁷⁵ or to make investments that would otherwise be improper under the express terms of the trust.²⁷⁶ The court will alter a dispositive provision if it is necessary to accomplish the primary purpose of a trust.²⁷⁷

The proposed law gives the court specific authority to direct or permit modification of both administrative and distributive provisions of a trust on petition of a trustee or beneficiary if, owing to circumstances not known to or anticipated by the settlor, the continuation of the trust under its terms would defeat or substantially impair the accomplishment of the purposes of the trust.²⁷⁸ The proposed law mandates that the court consider a spendthrift or similar protective provision in the trust as a factor in making its decision, but makes clear that the court is not precluded from exercising its discretion to modify or terminate the trust solely because of such a provision.

Existing law provides a special procedure for modifying or terminating a trust with uneconomically low principal.²⁷⁹ This procedure is also based on the court's authority to modify a trust to achieve its purpose, but recognizes that if the trust is not economically viable, it cannot achieve its purpose and is better terminated. The proposed law continues this special procedure.

²⁷⁴ Haskell, *Justifying the Principle of Distributive Deviation in Trust Law*, 18 *Hastings L.J.* 267, 270-71 (1967).

²⁷⁵ See, e.g., *Adams v. Cook*, 15 Cal. 2d 352, 101 P.2d 484 (1940).

²⁷⁶ See *Stanton v. Wells Fargo Bank & Union Trust Co.*, 150 Cal. App. 2d 763, 310 P.2d 1010 (1957).

²⁷⁷ For example, if an income beneficiary was in good health at the creation of the trust but later becomes a chronic invalid who is unable to earn a living, the court has permitted an invasion of the corpus in a case where no one else had an interest in it. See *Whittingham v. California Trust Co.*, 214 Cal. 128, 4 P.2d 142 (1931). If the financial situation of the income beneficiary is not so precarious, however, deviation has been denied even though the interests of other beneficiaries would be protected. See *Moxley v. Title Ins. & Trust Co.*, 27 Cal. 2d 457, 462, 165 P.2d 15 (1946) (beneficiary with inadequate funds who desired to purchase a home). Where the interests of the remaindermen would be impaired by the deviation, the petition of the income beneficiaries for an increased payment has been denied even where the primary purpose of the trust was the support of the income beneficiaries. See *Estate of Van Deusen*, 30 Cal. 2d 285, 182 P.2d 565 (1947).

²⁷⁸ This authority is drawn from Sections 167 and 336 of the Restatement (Second) of Trusts (1957).

²⁷⁹ Civil Code § 2279.1; Prob. Code § 1120.6.

The proposed law also provides a new rule permitting termination of extremely small trusts without the need for obtaining a court order. If the trust principal does not exceed \$20,000 in value, the trustee is given the power to terminate the trust. The statute thus presumes such trusts to be uneconomical. The problem with requiring trustees of such trusts to apply to the court is that such applications involve additional expense and there is a risk that the court may not grant approval of the termination.

Disposition of Trust Property upon Termination

Except in the case where a trust with uneconomically low principal is terminated,²⁸⁰ existing law does not provide the manner of disposition of property upon termination of a trust. The proposed law sets out general rules depending upon the nature of the termination. Where a trust is revoked, the trust property is distributed as directed by the settlor.²⁸¹ If the trust is terminated by the consent of the settlor and all beneficiaries, the trust property should be distributed as agreed by the parties to the trust. In any situation where the termination is accomplished pursuant to a court order in the absence of the consent of all parties, the trust property should be disposed of as provided in the trust or as ordered by the court, but the court is to order distribution in a manner that conforms as nearly as possible to the intention of the settlor.²⁸²

Combination of Similar Trusts

Under existing law, two or more testamentary trusts that are "substantially identical" and have the same trustee may be combined and administered as one trust if it would be consistent with the intent of the settlor and would facilitate administration of the trust without defeating or impairing the interests of the beneficiaries.²⁸³ The proposed law

²⁸⁰ See Civil Code § 2279.1(b); Prob. Code § 1120.6(b).

²⁸¹ See G. Bogert, *The Law of Trusts and Trustees* § 1010, at 457 (rev. 2d ed. 1983); see also the discussion under "Manner of Termination of Revocable Trusts" *supra*.

²⁸² The requirement that the intention of the settlor be followed is drawn from Civil Code Section 2279.1(b) and Probate Code Section 1120.6(b). See also G. Bogert, *The Law of Trusts and Trustees* § 1010, at 456, 459-61 (rev. 2d ed. 1983). Where the trustee has terminated a trust with a principal value of less than \$20,000, the trustee distributes the property as provided in the trust or as the trustee determines is consistent with the intention of the settlor.

²⁸³ Prob. Code § 1133.

provides greater flexibility than existing law. The proposed law permits combination of both testamentary and living trusts, or of a testamentary with a living trust, and does not require that the trusts initially have the same trustee. The proposed law also allows combination of trusts that are "substantially similar," rather than "substantially identical," and permits combination if it can be done without "substantially impairing" beneficiaries' interests, rather than where there is "no impairment." The proposed law permits a beneficiary to petition for a combination of trusts, whereas existing law provides for a petition by the trustee without notice.

Division of Trusts

A recently enacted statute provides for the division of a trust into two or more separate trusts upon a showing of good cause and with the consent of all parties in interest.²⁸⁴ The proposed law eliminates the requirement of obtaining the consent of all parties in interest. Under the proposed law, the trust may be divided on petition of a trustee or beneficiary where good cause is shown and the court finds that dividing the trust will not defeat or substantially impair the accomplishment of the trust purpose or the interests of the beneficiaries. Division of a trust may be desirable where different members of a family want their own trusts because of a disagreement about how the trust should be administered or because a beneficiary moves to another part of the country and prefers to take his or her part of the trust along.

Judicial Proceedings Concerning Trusts

Introduction

During the past 20 years, California law concerning judicial proceedings relating to trust administration has undergone significant change. For many years the statutes have provided a summary procedure for judicial supervision of testamentary trusts.²⁸⁵ Until relatively

²⁸⁴ Prob. Code § 1138.1(a)(14), as amended by 1985 Cal. Stat. ch. 32, § 1 (operative May 7, 1985). This statute is apparently drawn from Pennsylvania law. See Pa. Cons. Stat. Ann. tit. 20, § 7181 (Purdon 1975).

²⁸⁵ "Supervision," when used in this discussion, refers to the continuing jurisdiction of the probate court over testamentary trusts under Probate Code Sections 1120-1133.

recently, parties to living trusts were relegated to formal actions in equity for redress of breach or for instructions and approval of accountings.²⁸⁶

In 1967, the court was given specific statutory authority to grant powers to trustees of testamentary trusts upon petition.²⁸⁷ The area of judicial administration of living trusts remained uncertain until 1971 when a new procedure applicable to written living trusts became operative.²⁸⁸ Testamentary trusts and living trusts were put on the same footing when the law was revised to make the new living trust procedure applicable to trusts created by a will executed or republished after July 1, 1977.²⁸⁹

However, California has not had a full-fledged supervisory scheme requiring automatic periodic accountings to the court or prior court approval of actions by trustees. Judicial supervision in California under Probate Code Section 1120 has meant supervision or assistance sought by a trustee or beneficiary and is thus a system that is intended to avoid unnecessary judicial intervention or involvement. See Wile, *Judicial Assistance in the Administration of California Trusts*, 14 Stan. L. Rev. 231, 238-39 (1962).

²⁸⁶ See *id.* at 239-43.

²⁸⁷ See Prob. Code § 1120.2. The statutory list of powers from which the court could choose is substantially similar to the powers granted automatically in Section 3 of the Uniform Trustees' Powers Act (1964). See also the discussion under "Trustees' Powers" *supra*.

²⁸⁸ See Prob. Code §§ 1138-1138.13. Section 1138 applies to "written voluntary express trusts" other than testamentary trusts governed by the older procedure, and certain other types of trusts such as supervised charitable trusts, Totten trusts, etc. See 1970 Cal. Stat. ch. 849, § 2.5; see also the discussion under "Scope of Proposed Law" *supra*.

²⁸⁹ See Prob. Code §§ 1120(c), added by 1976 Cal. Stat. ch. 860, § 3. This provision also permits the settlor to provide in the will that the new procedure does not apply, in which case the trust will remain subject to the older procedure of Probate Code Section 1120 *et seq.* Another provision in the new statutory procedure introduces a complication in the law relating to judicial proceedings concerning trust administration. A settlor may provide in the trust that the summary procedure of Probate Code Sections 1138-1138.13 is not available for any or all of the purposes specified in the statute. Prob. Code § 1138.1(b). Thus it appears that the administration of a trust may be reviewed by a court on petition of a trustee or beneficiary for a number of purposes as limited in the trust and that an independent action in equity would then be required to consider issues arising in an excluded category. The effect is that a settlor may seek to impose the sort of procedural burdens on trustees and beneficiaries and, incidentally, on the court system, that existed for living trusts before 1970. Since the new summary procedure applies to both testamentary and living trusts as of mid-1977, the old summary procedure apparently may be made unavailable by a provision in a testamentary trust. It is thus possible for a settlor to provide in a testamentary trust that some matters will be subject to the old procedure of Probate Code Sections 1120-1133, that some will be subject to the new procedure of Probate Code Sections 1138-1138.13, and that the remaining matters can be determined only in an equitable action. This situation may be made even more complicated if the trust is not clear, since Section 1138.1(b) provides that the procedure does not apply where the trust excludes it "by necessary implication."

The old procedure for continuing court jurisdiction over testamentary trusts remains in place for trusts created by wills executed before July 1, 1977, and not republished thereafter. However, a procedure for removing such trusts from the continuing jurisdiction of the court has also been provided.²⁹⁰ The removal procedure is mandatory for testamentary trusts that have at least one trustee which is a trust company,²⁹¹ but is optional for trusts that do not have a trust company as a trustee.²⁹² No provision is made for removal of a post-1977 testamentary trust that provides for continuing jurisdiction.

The notion is inherent in existing law that beneficiaries of pre-1977 testamentary trusts are entitled to whatever additional protections may be available through local practice under the continuing jurisdiction scheme. Beneficiaries and trustees of such trusts are saved filing fees for petitioning to determine questions arising in the administration of the trust.²⁹³ In addition, venue is restricted to the court where the estate was administered, unless jurisdiction is transferred to another county.²⁹⁴ Retention of the continuing jurisdiction scheme also honors the reliance interest of settlors who may have counted on the assumed protections of the scheme. The proposed law continues the basic substance of this aspect of existing law by preserving the scheme of Probate Code Section 1120 and the removal procedures of Probate Code Section 1120.1a. However, the procedural detail applicable to notice and the conduct of proceedings is unified in the proposed law. It is anticipated that eventually all trusts will be administered subject to the intermittent intervention scheme generally applicable and

²⁹⁰ See Prob. Code § 1120.1a.

²⁹¹ Prob. Code § 1120.1a(a)-(c). The removal takes place by operation of law if certain formalities of notice and filings with the court are satisfied.

²⁹² Prob. Code § 1120.1a(d). Removal in this situation requires approval of the court at a noticed hearing. If a trust company is appointed as a successor trustee of a trust that is subject to the continuing jurisdiction of the court, the mandatory removal procedure applies. See Prob. Code § 1120.1a(f).

²⁹³ See Gov't Code §§ 26827 (first paper fee in probate proceedings of up to \$86), 26827.4 (\$14 subsequent paper fee, no fee for accountings under Prob. Code § 1120). The proposed law preserves the rule that petitioners under trusts subject to continuing jurisdiction are excused the filing fee. Existing law also waives the filing fee in proceedings under Probate Code Section 1138 *et seq.* for a petitioner under a trust that has been removed from continuing jurisdiction. Prob. Code § 1138.4.

²⁹⁴ See Prob. Code §§ 1120(b) (continuing jurisdiction), 1128-1130 (transfer of proceedings).

then the special continuing jurisdiction procedures will become unnecessary.

Subject Matter Jurisdiction

California has not had a separate probate court since 1879, when the Constitution was revised to replace the system of county courts and district courts with a statewide court of general jurisdiction known as the superior court.²⁹⁵ The attempt to unify the court system was not entirely successful, however, because the courts invented the concept of the superior court sitting in probate with a "limited and special" jurisdiction and without the general equity jurisdiction and powers of the superior court not sitting in probate.²⁹⁶ Courts have agonized over this state of affairs and drawn distinctions between different forms of jurisdiction and between the proper and improper exercise of equitable powers in the probate court.²⁹⁷ The problems arising from this doctrine have spurred the Legislature and the courts to expand the subject-matter jurisdiction and power of the probate courts to deal efficiently with questions that arise. Hence, the probate court is not an inferior court as it once was, nor are decrees of the probate court accorded less finality. The court in *Estate of Baglione*²⁹⁸ extended the jurisdiction of the probate court to allow a determination of the whole matter before it. Jurisdiction was expanded legislatively to permit the probate court to determine disputes over property in the estate claimed by a third person.²⁹⁹

Until late 1970, questions arising in the administration of living trusts were determined as an exercise of the general

²⁹⁵ See generally Turrentine, *Introduction to the California Probate Code*, in 52 West's Annotated California Codes: Probate Code 23-27 (1956); 2 B. Witkin, *California Procedure Courts* §§ 160, 172, 184, 186 (3d ed. 1985).

²⁹⁶ See *Guardianship of Kemp*, 43 Cal. App. 3d 758, 118 Cal. Rptr. 64 (1974); *Schlyen v. Schlyen*, 43 Cal. 2d 361, 375, 273 P.2d 897 (1954); cases cited in 7 B. Witkin, *Summary of California Law Wills and Probate* §§ 232-36, at 5741-45 (8th ed. 1974); Doherty & Stephenson, *Jurisdiction and Venue*, in 1 California Decedent Estate Administration § 5.1, at 186-87, §§ 5.15-5.17, at 192-93 (Cal. Cont. Ed. Bar 1971); Comment, *Probate Court Jurisdiction: The Demise of the Privity Rule in Title Disputes*, 5 Pac. L.J. 165 (1974). The term "probate court" refers to the superior court sitting in probate and exercising that limited and special jurisdiction.

²⁹⁷ See 7 B. Witkin, *Summary of California Wills and Probate* §§ 233-36, at 5741-45 (8th ed. 1974); Doherty & Stephenson, *Jurisdiction and Venue*, in 1 California Decedent Estate Administration § 5.21, at 197-98 (Cal. Cont. Ed. Bar 1971).

²⁹⁸ 65 Cal. 2d 192, 196-97, 417 P.2d 683, 53 Cal. Rptr. 139 (1966).

²⁹⁹ See Prob. Code §§ 851.5, 852, 853.

equitable powers of the superior court, not the limited and special jurisdiction of the probate court.³⁰⁰ The more cumbersome procedure of bringing a formal action in equity has been replaced by a special procedure under Probate Code Sections 1138-1138.13. The once neat division of jurisdictional concepts between living and testamentary trusts was disrupted when the special procedure applicable to living trusts under Probate Code Sections 1138-1138.13 was applied to testamentary trusts created after mid-1977 or removed from continuing jurisdiction.³⁰¹

This situation of having separate and limited probate courts has long been criticized by commentators.³⁰² The proposed law seeks to eliminate the confusion and unnecessary limitations involved in the question of jurisdiction over trusts by providing for exclusive jurisdiction over internal trust affairs in the superior court. The proposed law also makes clear that when considering internal trust affairs the superior court has all the powers the superior court would have when exercising its general jurisdiction. The proposed law does not affect the inherent power of the superior courts to organize in different departments to handle various types of judicial business. Thus there will still be a "probate court" that handles trusts, administration of decedents' estates, guardianships, and conservatorships, but it will not be limited by the existing concept of the superior court "sitting in probate." The proposed law retains the limitation on exclusive subject

³⁰⁰ See generally Wile, *Judicial Assistance in the Administration of California Trusts*, 14 *Stan. L. Rev.* 231 (1962).

³⁰¹ Some doubt existed as to the meaning of "superior court" in Probate Code Section 1138.1, with some commentators arguing that it meant the superior court of general jurisdiction (see, e.g., 7 B. Witkin, *Summary of California Law Trusts* § 10, at 5373 (8th ed. 1974)) and others arguing that it meant the probate court (see, e.g., A. Marshall, *California Probate Procedure* § 2318, at 503 (3d ed. 1973)). The issue was resolved in favor of the probate court in *Copley v. Copley*, 80 Cal. App. 3d 97, 106, 145 Cal. Rptr. 437 (1978), where the court found that the language used is "the language used by the Legislature when treating with matters within the jurisdiction of the superior court sitting in probate and not in an exercise of its general jurisdiction."

³⁰² See, e.g., Simes & Basye, *The Organization of the Probate Court in America*, reprinted in *Problems in Probate Law—Including a Model Probate Code* 385, 426-27, 484-85 (1946); Turrentine, *Introduction to the California Probate Code*, in 52 *West's Annotated California Codes: Probate Code* 23-27 (1956); Wile, *Judicial Assistance in the Administration of California Trusts*, 14 *Stan. L. Rev.* 231, 249 n.73 (1962); Note, *Equitable Jurisdiction of Probate Courts and Finality of Probate Decrees*, 48 *Yale L.J.* 1273, 1276-77 (1939); see also *Estate of Baglione*, 65 Cal. 2d 192, 196-97, 417 P.2d 683, 53 Cal. Rptr. 139 (1966).

matter jurisdiction of the superior court but eliminates any question as to the equitable powers of the court when it considers questions relating to the internal affairs of a trust.³⁰³ This leaves in place the existing division of labor in the superior court system.

Jurisdiction over Trust, Trust Property, and Parties

The proposed law makes clear that the superior court sitting in probate may exercise jurisdiction in proceedings involving the administration of trusts on any basis permitted by the state and federal constitutions.³⁰⁴ Personal jurisdiction may thus be exercised over a trustee where the trustee is found, regardless of the location of trust property.³⁰⁵ Jurisdiction may be exercised to determine questions involving trust property, particularly land, located in California even if the principal place of administration of the trust is not in California.³⁰⁶ The exercise of jurisdiction is also subject to the basic constitutional requirements of fairness and substantial justice.³⁰⁷

The proposed law recognizes that a determination that a California court may exercise jurisdiction is not necessarily decisive if the exercise would be an undue interference with the jurisdiction of a court of another state which has primary supervision over the administration of the trust.³⁰⁸ The concept of primary supervision in the context of trust administration is a special application of the doctrine of *forum non conveniens*.³⁰⁹ If the court has acquired

³⁰³ This would also overrule cases such as *Copley v. Copley*, 80 Cal. App. 3d 97, 106-07, 145 Cal. Rptr. 437 (1978), which find a limitation on the powers of the probate court. The goal of fully empowering probate courts has been reached in a number of states, particularly those that have enacted the Uniform Probate Code. See Uniform Probate Code §§ 1-302, 7-201, 7-206; see also Simes & Basye, *The Organization of the Probate Court in America*, reprinted in *Problems in Probate Law—Including a Model Probate Code* 385, 427-28 (1946).

³⁰⁴ The proposed law incorporates by reference the general jurisdictional provision of Code of Civil Procedure Section 410.10. See generally the Judicial Council Comment to Code Civ. Proc. § 410.10.

³⁰⁵ See *Estate of Knox*, 52 Cal. App. 2d 338, 348, 126 P.2d 108 (1942).

³⁰⁶ See Restatement (Second) of Conflict of Laws § 276 & comments (1969); 5 A. Scott, *The Law of Trusts* §§ 644-47, at 4074-83 (3d ed. 1967).

³⁰⁷ See *International Shoe Co. v. Washington*, 326 U.S. 310 (1945); *Shaffer v. Heitner*, 433 U.S. 186 (1977).

³⁰⁸ See *Estate of Knox*, 52 Cal. App. 2d 338, 344-48, 126 P.2d 108 (1942); *Schuster v. Superior Court*, 98 Cal. App. 619, 623-28, 277 P. 509 (1929); Restatement (Second) of Conflict of Laws § 267 & comments (1969).

³⁰⁹ See Code Civ. Proc. § 410.30.

jurisdiction over parties to a trust, jurisdiction continues over the parties and the subject of the proceeding, notwithstanding the removal of trust property or a person to another jurisdiction, until the conclusion of the action or proceeding concerning the trust.³¹⁰

The proposed law adopts a principle drawn from the Uniform Probate Code that asserts jurisdiction over trustees based on the trustee's acceptance of administration of a trust having its principal place of administration in California.³¹¹ Similarly, jurisdiction is asserted over beneficiaries of a trust with its principal place of administration in California to the extent of their interests. These assertions of jurisdiction are, of course, subject to the overriding constitutional requirements. Consequently, appropriate notice must be given to a trustee or beneficiary as a condition of asserting jurisdiction.³¹²

Concurrent Jurisdiction

A corollary of the principle that the superior court considering internal trust affairs should have full powers is the rule that this court has concurrent jurisdiction with other courts over questions involving the existence of trusts, disputes with creditors or debtors of trusts, and other matters involving disputes between trustees and third persons.³¹³ Thus as a matter of judicial economy, the superior court, in proceedings brought before it concerning internal trust affairs, has the power to determine issues other than those strictly relating to the internal affairs of the trust. If a question as to the rights of a third person arises in such proceedings, the court will have the opportunity to decide the issue and need not refer it to another department of the superior court. On the other hand, the fact that a party involved in litigation is a trust will not deprive a court of jurisdiction to decide a case, except that proceedings by a beneficiary against a trustee are within

³¹⁰ See Code Civ. Proc. § 410.50(b); *cf.* *Maloney v. Maloney*, 67 Cal. App. 2d 278, 280, 154 P.2d 426 (1944) (jurisdiction over child custody issue).

³¹¹ See Uniform Probate Code § 7-103(b) (1977).

³¹² See, e.g., *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

³¹³ This provision in the proposed law is drawn from Section 7-204 of the Uniform Probate Code (1977).

the exclusive jurisdiction of the superior court in proceedings under the special procedure provided by statute.

Venue

The venue of proceedings under the proposed law is the county of the principal place of administration of the trust. This continues an aspect of existing law³¹⁴ but the proposed law redefines "principal place of administration of the trust." Under existing law, the principal place is the usual place of business where the day-to-day records pertaining to the trust are kept,³¹⁵ whereas under the proposed law it is the usual place where the day-to-day activity of the trust is carried on by the trustee or its representative who is primarily responsible for the administration of the trust. This change is made to take account of the centralization of records common in large institutional trustees. There may be some doubt as to the location of the day-to-day records in the event of computer data bases, and the place where the records are located may not be where the trustee has contact with the beneficiaries of the trust. The proposed law redefines the principal place of administration so as to describe the place where the actual administration of the trust occurs.³¹⁶

Existing law provides an optional venue in the case of a testamentary trust that is not subject to continuing court jurisdiction. A proceeding involving the internal affairs of a testamentary trust may be commenced in either the county where the estate was administered or in the county where venue is otherwise proper.³¹⁷ The proposed law continues this dual venue rule for testamentary trusts.

³¹⁴ See Prob. Code § 1138.3.

³¹⁵ Prob. Code § 1138.3(a).

³¹⁶ In the case of cotrustees, venue is in the county of the usual place where the day-to-day activity of the trust is carried on by the trustee or its representative who is primarily responsible for the administration of the trust. However, if this place cannot be determined, venue is the usual place of business or residence of any cotrustee as agreed by them or, if none, the residence or place of business of any of them, as under existing law. The proposed law continues the provision of Civil Code Section 2289 that venue for a proceeding to appoint a trustee in the case where the trust has no trustee is in the county where any trust property is located.

³¹⁷ See Prob. Code § 1138.3(b). Where the trust is subject to continuing court jurisdiction under Probate Code Section 1120, that court has jurisdiction, and venue in the county of principal place of administration, if different, would not be appropriate. Jurisdiction may be transferred to another county, however, by a special procedure. See Prob. Code §§ 1128-1129. These rules are continued in the proposed law.

No Right to Jury Trial

There is no right to a jury trial in proceedings involving the internal affairs of a trust.³¹⁸ The proposed law makes this explicit and also states that the remedies of beneficiaries against trustees are exclusively *in equity*.³¹⁹

Grounds for Petition

Existing law provides a list of grounds for a petition to the superior court concerning the internal affairs of a trust.³²⁰ The grounds for petition include determining the distribution of property, compelling and settling accounts of the trustee, instructing the trustee, granting additional powers to the trustee, fixing payment of compensation, appointing and removing trustees, and approving a transfer of a trust to another jurisdiction. The proposed law continues existing law in this area, but adds additional grounds for petition. These include determining questions of construction of trust instruments, determining the existence or nonexistence of any immunity, power, privilege, duty, or right, determining the validity of a trust provision, compelling redress of breach, modifying or terminating a trust, authorizing the combination or division of trusts, and approving a transfer of a trust or trust property to this state.³²¹ In addition, the proposed law recognizes that the special proceedings are not limited to

³¹⁸ The right to a jury trial in California is the right as it existed at common law in 1850 or as granted by statute. See *People v. One 1941 Chevrolet Coupe*, 37 Cal. 2d 283, 286-87, 231 P.2d 832 (1951); *C & K Engineering Contractors v. Amber Steel Co.*, 23 Cal. 3d 1, 8, 587 P.2d 1136, 151 Cal. Rptr. 323 (1978); see generally Bloom, *The Right to a Non-Jury Trial for Trust and Probate Issues*, L.A. Law., June 1984, at 34-38. There is no right to a jury in a "probate proceeding" unless the right is conferred by statute. *Estate of Beach*, 15 Cal. 3d 623, 642, 542 P.2d 994, 125 Cal. Rptr. 570 (1975); see also 7 B. Witkin, *California Procedure Trial* § 96, at 94-95 (3d ed. 1985). Nor is there a right to a jury in equitable actions, as distinct from legal actions. See *id.* §§ 92-93, at 91-93. It is the gist of the action, and not its technical form, however, that determines the right to a jury. See *C & K Engineering Contractors v. Amber Steel Co.*, 23 Cal. 3d 1, 8-9, 587 P.2d 1136, 151 Cal. Rptr. 323 (1978).

³¹⁹ See Restatement (Second) of Trusts § 197 (1957). The proposed law does not adopt the rule of Restatement Section 198 that the beneficiary can maintain an action at law against the trustee to enforce payment of money or transfer of property that the trustee is under a duty to pay or transfer immediately because duplicative legal remedies are unnecessary and can lead to confusion.

³²⁰ See Prob. Code § 1138.1.

³²¹ Some of these grounds are drawn from Section 7-201 (a) of the Uniform Probate Code (1977); others merely recognize authority provided in other parts of the trust statutes, such as that involving combining trusts.

the listed grounds but are appropriate for determining questions relating to any internal affairs of the trust, as well as for determining the existence of a trust.

Existing law provides 30 days' notice to persons named in a petition and 20 days' notice to the Attorney General in a case involving a transfer of a trust with a charitable disposition.³²² The proposed law standardizes the required period of notice at 30 days. The proposed law makes clear that included within the court's authority to make necessary orders³²³ is the power to appoint a temporary trustee to administer the trust in whole or in part. In other respects, the proposed law continues the substance of the existing procedural law.

Limitation on Rights of Beneficiaries of Revocable Living Trusts

Trust law generally gives the same rights to beneficiaries of revocable living trusts as it does to beneficiaries of irrevocable living trusts and testamentary trusts.³²⁴ The general opinion expressed to the Commission by practitioners is that beneficiaries of revocable trusts should not have the rights normally given beneficiaries of irrevocable trusts since the settlor generally holds the ultimate power to direct administration of the trust so long as the settlor has the power of revocation. Accordingly, the proposed law makes clear that the beneficiaries of a revocable living trust do not have the right to petition the court concerning the internal affairs of the trust until such

³²² See Prob. Code §§ 1138.6(a), (d), 1139.3.

³²³ See Prob. Code §§ 1121, 1138.2.

³²⁴ This conclusion is drawn from the tendency of statutes, court decisions, and other sources to refer to the beneficiary without making any distinctions between those claiming rights under revocable as opposed to irrevocable trusts. See, e.g., Civil Code §§ 2215-2238 *passim*; Prob. Code §§ 24 ("beneficiary" defined), 1138.1 (grounds for petition); Restatement (Second) of Trusts §§ 112 *et seq.* (beneficiary), 169 *et seq.* (duties of trustee) (1957); 3 A. Scott, *The Law of Trusts* § 200, at 1641 n.1 (3d ed. 1967); Uniform Probate Code § 1-201(2) (1977) (defining "beneficiary" to include present or future interests and vested or contingent interests); see also Fink, *Drafting the Trust: Administrative Provisions*, in J. Cohan, *Drafting California Revocable Living Trusts* § 5.68, at 248 (Cal. Cont. Ed. Bar 2d ed. 1984) (recommending specifically limiting in the trust instrument the right of beneficiaries to bring petitions); but see Uniform Probate Code § 1-108 (1977) (holder of general power of appointment or power of amendment or revocation acts for beneficiaries). Financial Code Section 1582 distinguishes between beneficiaries of irrevocable trusts and other beneficiaries for the purpose of limiting disclosure of information concerning the existence, condition, management, and administration of a private trust.

time as the settlor, or other person holding the power to revoke, is unable to exercise a power of revocation, whether due to incompetence or death.³²⁵ Similarly, beneficiaries of revocable trusts are not required to be given notice of proceedings involving the trust.

Transfer of Trusts to or from California

California provides relatively detailed statutory procedures for transferring trusts to this state from another jurisdiction or to another jurisdiction from this state.³²⁶ A transfer may involve moving the place of administration of the trust or moving trust property. The statutory procedure is not mandatory,³²⁷ but a trustee may desire to use the transfer procedure to be discharged from liability in the jurisdiction of departure. The procedure is also useful for ensuring compliance with the law of a state that requires certain standards to be satisfied before transfer of trusts or trust property is permitted.³²⁸

While it might be argued that statutory transfer procedures should be exclusive, the proposed law continues the principle that other methods remain available. It would probably be futile to attempt to control the change of situs of a trust since in many situations it is not clear where a trust is located. In addition, expensive court proceedings would have to take place to determine the location of the trust, which is unnecessary in the absence of a controversy.

Various practical methods for moving a trust exist:

- (1) Obtaining a court order in the old jurisdiction authorizing a change of situs to the new jurisdiction.
- (2) Appointment of a new trustee in the new jurisdiction and transferring the situs of the trust from the old jurisdiction to him.
- (3) Changing situs without court proceedings pursuant to mechanics for making the change set forth in the trust instrument.

³²⁵ See Civil Code § 2258(b).

³²⁶ Prob. Code §§ 1139-1139.7 (transfers out of California), 1139.10-1139.19 (transfers to California). The procedure for transferring trusts to California was enacted in 1976 on the recommendation of the Commission. See *Recommendation Relating to Transfer of Out-of-State Trusts to California*, 13 Cal. L. Revision Comm'n Reports 2101 (1976).

³²⁷ Prob. Code §§ 1139(b), 1139.10(b).

³²⁸ See Prob. Code §§ 1139.16(d) (court approval in other jurisdiction), 1139.17 (conditional order approving transfer).

(4) Changing situs without court order by express consent of trustee and all beneficiaries.

(5) Changing situs by "decanting" the trust by having the old trustee convey substantially all the old trust's assets to a new trustee at the new situs; the old trust may continue as a "shell" at the old situs.

(6) Changing situs de facto and removing the trust assets from the old jurisdiction by placing them in a different form while they are still held by the trust: e.g., placing title to real estate in a corporation whose stock is held by the trust, or in a general or limited partnership with the trust as a general or limited partner, or mortgaging or pledging the property, with the trust as mortgagee or pledgee.

(7) Change of situs by terminating the old trust in the old jurisdiction and creating a new trust with the same terms in a new jurisdiction.³²⁹

It would be impractical to attempt to control all these more or less informal methods of moving trusts and trust property. In addition, there may be good reasons for not resorting to a statutory procedure, such as where the trust principal is not very valuable and the costs of formal proceedings would be burdensome.

The California transfer statutes appear to have operated without significant problems. The proposed law makes only minor and technical changes in the existing provisions.³³⁰

³²⁹ Hendrickson, *Change of Situs of a Trust, Part II*, Tr. & Est., Feb. 1979, at 109.

³³⁰ These changes include the following: (1) The petition for transfer of a trust or trust property to another jurisdiction requires that the petitioner state whether any civil action is pending against the trustee in California. Prob. Code § 1139.2(5). The proposed law limits this overly broad requirement so that the petitioner need state only whether a civil action is pending in this state arising out of the administration of the trust sought to be transferred. (2) The proposed law requires 30 days' notice to the Attorney General in a situation where a charitable trust is sought to be transferred out of California, whereas existing law provides 20 days' notice. Prob. Code § 1139.3. This change is made to standardize notice periods. (3) The proposed law does not continue the requirement of existing law that, as a prerequisite to exercising discretion to approve a transfer out of California, the court must find that the "substantial rights of residents of this state will not be materially affected" by the transfer. Prob. Code § 1139.4(3). This change is not intended to affect the court's authority to approve or disapprove a transfer, but the Commission considers it to be an unclear standard, particularly as a prerequisite to exercising discretion. (4) The proposed law makes clear that a bond is required of a trustee in this state when a trust is transferred from another jurisdiction only if required as a condition of transfer by the law of the other jurisdiction. Prob. Code § 1139.16 (bond required "if necessary"). (5) The proposed law also makes clear that general provisions governing notice and judicial proceedings apply as well to transfer proceedings. See the discussion under "Judicial Proceedings Concerning Trusts" *supra*.

Liability of Trustee to Third Persons

Introduction

The basic rule of the common law is that the trustee is personally liable for obligations incurred in administration of the trust to the same extent as if the trustee held the property free of the trust.³³¹ Where the trustee is liable, the common law generally permits the trustee to be indemnified out of the trust estate for obligations properly incurred in administration of the trust.³³² The modern trend of trust law is to provide more protection to trustees by treating them in a representative capacity, not unlike corporate officers.

Trustee's Contract Liability

As a general rule, at common law the trustee is personally liable on contracts made in the administration of the trust unless the contract provides that the trustee is not personally liable.³³³

California law is not clear in this area. Civil Code Section 2267 provides in relevant part: "A trustee is a general agent for the trust property. . . . His acts, within the scope of his authority, bind the trust property to the same extent as the acts of an agent bind his principal." It has been suggested that while this language is "not apt or clear, it would seem to have been intended to establish representative liability."³³⁴ Some California cases have applied this statute to hold that the trustee acting within the scope of its authority binds the trust estate, contrary to the common law.³³⁵ Other cases have cited the common law with

³³¹ See Restatement (Second) of Trusts § 261 (1957); 7 B. Witkin, Summary of California Law Trusts § 100, at 5460 (8th ed. 1974).

³³² Restatement (Second) of Trusts § 261 comment b (1957); see also the discussion under "Indemnification of Trustees" *infra*.

³³³ Restatement (Second) of Trusts §§ 262, 263(1), (3). The trustee is not relieved of liability to the third person if the contract liability results from the trustee's breach of trust and the trust property is insufficient to pay the amount of the contract liability. If the trustee has made a contract that is not within the trustee's powers, the trustee is personally liable for breach of warranty. *Id.* § 262(2).

³³⁴ G. Bogert, The Law of Trusts and Trustees § 712, at 268 (rev. 2d ed. 1982).

³³⁵ See, e.g., Purdy v. Bank of America, 2 Cal. 2d 298, 40 P.2d 481 (1935).

approval.³³⁶ However, even if the trust is liable, it does not appear that the trustee's personal liability is supplanted.³³⁷

The proposed law adopts the modern rule which makes the trustee personally liable on contracts properly entered into only where the contract provides for personal liability or where the trustee fails to reveal its representative capacity . . . or identify the trust estate in the contract.³³⁸ This would reverse the prevailing case law rule in California and would conform more closely to the expectations of the parties in a commercial context.

Trustee's Liability for Holding Property

The common law viewed the trustee as the owner of the property and as a consequence liabilities arising out of ownership became the personal responsibility of the trustee.³³⁹ Under this rule, the trustee may be liable for taxes and other expenditures required to maintain the property in a condition that satisfies safety and nuisance regulations or covenants.³⁴⁰ The common law liability for calls and assessments on stock in the trust estate has been largely relieved by statute.³⁴¹

The proposed law adopts the concept of personal fault drawn from the Uniform Probate Code.³⁴² A trustee may be liable for obligations arising out of ownership of property only if the trustee personally was either intentional or

³³⁶ See, e.g., *Hall v. Jameson*, 151 Cal. 606, 611, 91 P. 518 (1907); *Duncan v. Dormer*, 94 Cal. App. 218, 221, 270 P. 1003 (1928).

³³⁷ See Evans, *Observations on the State, Etc. of the California Laws of Uses and Trusts*, 28 S. Cal. L. Rev. 111, 120-21 (1955). The Restatement cites the California Field Code provision embodied in Civil Code Section 2267 as authority for the proposition that a person to whom the trustee has incurred a liability should be able to resort to the trust estate if it is equitable to do so. Restatement (Second) of Trusts § 271A & comment a (1957). There is some question whether the Field Code was actually intended to make such a change. See Tepper, *Liability of the Trust Estate Arising out of Trustee's Contracts with Third Persons*, 2 Hastings L.J. 53, 56 (1950).

³³⁸ This rule is drawn from Section 7-306(a) of the Uniform Probate Code (1977). A large group of states has adopted this rule. See G. Bogert, *The Law of Trusts and Trustees* § 712, at 269 n.35 (rev. 2d ed. 1982). *The new law excuses liability where the trustee either indicates its representative capacity or identifies the trust; the Uniform Probate Code requires both factors.* Of course, the excuse of personal liability for breach of contract does not excuse the trustee from liability to the beneficiary for breach of trust.

³³⁹ See Restatement (Second) of Trusts § 265 comment a (1957). General law, as reflected in the Restatement, now limits this liability to the extent to which the trust estate is sufficient to indemnify the trustee. *Id.* § 265.

³⁴⁰ See G. Bogert, *The Law of Trusts and Trustees* § 720, at 327 (rev. 2d ed. 1982).

³⁴¹ See Corp. Code § 413.

³⁴² Uniform Probate Code § 7-306(b) (1977).

negligent in acting or failing to act. This rule is preferable to the common law since it makes the trustee liable only in circumstances where the trustee was in a position to control its liability. The concept of liability based on personal fault is consistent with California law in a closely related area—the right of reimbursement of a trustee or executor for a tort committed by an agent.³⁴³

Trustee's Liability for Torts

Like the liability for ownership of property, the trustee's liability under the common law for torts committed in the course of administration of the trust is determined just as if the trustee held the property free of the trust.³⁴⁴ The common law rule applies regardless of whether the trustee committed the tort intentionally, negligently, or without fault, regardless of whether the trustee's conduct consisted of action or failure to act, and regardless of whether the trustee violated the duties under the trust.³⁴⁵

Nearly half of the states have adopted statutes modifying the common law rules to permit an action against the trust, in the form of a suit against the trustee in a representative capacity.³⁴⁶ The proposed law adopts this scheme. As in the case of liability for ownership of property, this scheme is supported by the principle that the trustee should be personally liable only for actions or inaction in situations where the trustee has control.

Indemnification of Trustees

Even though the common law makes the trustee personally liable in a variety of circumstances, the right of the trustee to indemnification from the trust is also recognized. Hence, if the trustee properly incurred liability in the administration of the trust, the trustee is entitled to

³⁴³ See *Johnston v. Long*, 30 Cal. 2d 54, 62-63, 181 P.2d 645 (1947).

³⁴⁴ Restatement (Second) of Trusts § 264 (1957).

³⁴⁵ *Id.* comment a. The trust cannot shield the trustee from liability for torts under the common law. *Id.* comment d. It is interesting to note that the older cases restrict the liability of charitable trustees to situations where they were personally at fault. *Id.* § 402. The doctrine of charitable immunity has been abolished in a majority of the states. See G. Bogert, *The Law of Trusts and Trustees* § 401, at 372-406 (rev. 2d ed. 1977 & Supp. 1985).

³⁴⁶ See G. Bogert, *The Law of Trusts and Trustees* § 732, at 376-79, § 735, at 389 (rev. 2d ed. 1982). This change has been influenced in large part by the Uniform Trusts Act (1937) and the Uniform Probate Code (1977).

exoneration or reimbursement.³⁴⁷ In the case of exoneration, the trustee is entitled to have the liability satisfied out of trust property rather than out of the trustee's own funds. In the case of reimbursement, the trustee is entitled to repayment out of trust property. The trustee also may have a lien on trust property in the amount of the indemnification due.³⁴⁸ The right to indemnification may be limited by the trust to a particular part of trust property, such as in the case of a business where the risks of the business are expected to be borne by the business property and not other assets of the trust.³⁴⁹ However, the trustee is not entitled to indemnification for expenses that are improperly incurred, except in the case where a benefit is conferred on the trust (unless indemnification would be inequitable) or where the beneficiaries accept the action of the trustee.³⁵⁰

Existing California law provides for indemnification in the following terms: "A trustee is entitled to the repayment, out of the trust property, of all expenses actually and properly incurred by him in the performance of his trust. He is entitled to the repayment of even unlawful expenditures, if they were productive of actual benefit to the estate."³⁵¹ This statute has been applied to permit reimbursement for contract liabilities, such as for brokerage fees,³⁵² insurance premiums,³⁵³ interest on loans,³⁵⁴ litigation expenses,³⁵⁵ and expenses for obtaining a patent.³⁵⁶ The trustee will be denied reimbursement if the expenditure

³⁴⁷ See Restatement (Second) of Trusts § 244 & comment b (1957).

³⁴⁸ See *id.* comment c.

³⁴⁹ *Id.* comment i.

³⁵⁰ Restatement (Second) of Trusts § 245 (1957). The Restatement applies these general rules to liabilities arising from contract, property ownership, and tort, although the application of the rules takes on a different flavor in the area of torts as distinct from contracts. See *id.* §§ 246-248 & comments. For example, a trustee who is liable for a tort of a properly employed agent on the basis of that agent's negligence, is entitled to indemnity, whereas a trustee who is personally at fault is not. See *id.* § 247 comments b-d.

³⁵¹ Civil Code § 2273.

³⁵² *Rutherford v. Ott*, 37 Cal. App. 47, 173 P. 490 (1918).

³⁵³ *Bixby v. Hotchkis*, 58 Cal. App. 2d 445, 136 P.2d 597 (1943).

³⁵⁴ *Purdy v. Johnson*, 174 Cal. 521, 163 P. 893 (1917).

³⁵⁵ *Van Orden v. Anderson*, 122 Cal. App. 132, 9 P.2d 572 (1932).

³⁵⁶ *Jackson v. Hyde*, 91 Cal. 463, 27 P. 759 (1891).

was improper, as where litigation expenses were a result of the trustee's "greed and indifference."³⁵⁷ The question of reimbursement for tort liability arises much less often, but it appears that a trustee may be allowed reimbursement for an agent's tort committed in the course of administration of the trust unless the trustee is personally at fault.³⁵⁸ This brief summary identifies a problem in this area of the law—the right of reimbursement or indemnification becomes an impediment to a third person who is attempting to enforce a claim against the trustee. The solution under the proposed law is to permit the third person to sue the trustee in a representative capacity, as discussed below. The proposed law also codifies the common law rules on the trustee's right of indemnification. Hence, the trustee is entitled to repayment of properly incurred expenses and also to repayment of unauthorized expenditures if they benefited the trust estate.

Procedural Problems

If a contract or tort creditor is not paid, the creditor has historically been faced with the problem of determining whom to pursue and on what theory. Under traditional rules, a contract creditor could sue the trustee as an individual in an action at law, but the creditor could not resort to trust property for the satisfaction of the claim unless the contract so provided.³⁵⁹ Equity came to the rescue of creditors in situations where it was impossible or extremely difficult to collect against the trustee by permitting recovery by way of a creditor's suit out of trust assets in the amount of the trustee's right of indemnity.³⁶⁰ In many jurisdictions, the necessity of relying on an equitable action was eliminated by statutes permitting suit against the trustee in a representative capacity, or directly against the trust, resulting in collection against trust assets.³⁶¹

³⁵⁷ Estate of Vokal, 121 Cal. App. 2d 252, 259-60, 263 P.2d 64 (1953).

³⁵⁸ Cf. *Johnston v. Long*, 30 Cal. 2d 54, 181 P.2d 645 (1947) (executor operating business personally liable for negligence of agents and entitled to reimbursement, citing Restatement of Trusts §§ 247, 268). A dissent in *Johnston* urged the view that the executor should be held liable only in a representative capacity. 30 Cal. 2d at 81 (Schauer, J. dissenting).

³⁵⁹ See G. Bogert, *The Law of Trusts and Trustees* § 712, at 258-66 (rev. 2d ed. 1982).

³⁶⁰ See *id.* § 716, at 297-304.

³⁶¹ See *id.* § 712, at 269-76 nn.35-38.

The third person should not have to be concerned with the source of the fund that will be used to pay the claim.³⁶² The proposed law adopts this position. Hence, a third person with a claim against the trust or trustee may assert the claim against the trust by bringing an action against the trustee in the trustee's representative capacity.³⁶³ The question of ultimate liability as between the trust estate and the trustee may then be determined in proceedings concerning the internal affairs of the trust or may be settled informally among the parties to the trust.³⁶⁴ The proposed law thus continues the substance of existing law on reimbursement,³⁶⁵ but not the procedural rules of the common law that limited the right of creditors to pursue the trustee in a representative capacity.

Trustee's Lien

Where the trustee has a right to indemnity, the common law gives the trustee a lien on trust property to secure reimbursement for personal funds spent for the benefit of the trust.³⁶⁶ Existing law recognizes the existence of such a lien.³⁶⁷ The trustee's lien for reimbursement is good only as against beneficiaries of the trust and not against third persons.³⁶⁸

The proposed law continues the trustee's lien, but makes clear that it is an equitable lien. This does not represent a substantive change in the law. The reference to the equitable nature of the trustee's lien is included in the statute to give notice that this lien does not follow trust property into the hands of transferees of trust property who give fair value without knowledge of the lien.³⁶⁹

³⁶² See the comment to Uniform Probate Code § 7-306 (1977).

³⁶³ This provision is drawn from Uniform Probate Code § 7-306(c) (1977).

³⁶⁴ This provision is drawn from Uniform Probate Code § 7-306(d) (1977).

³⁶⁵ See the discussion under "Indemnification of Trustees" *supra*.

³⁶⁶ Restatement (Second) of Trusts § 244 comment c (1957).

³⁶⁷ See Prob. Code § 1120.2(14). This provision is drawn from Section 3(c)(18) of the Uniform Trustees' Powers Act (1964).

³⁶⁸ See Horowitz, *Uniform Trustees' Powers Act*, 41 Wash. L. Rev. 1, 22 (1966).

³⁶⁹ See generally 1 J. Pomeroy, *Equity Jurisprudence* §§ 165, 171(4) (5th ed. 1941); see also Restatement (Second) of Trusts § 244 comment c (1957).

Protection of Third Persons Dealing with Trustees

Existing law codifies the rule that a bona fide purchaser of trust property takes the property free of the trust, even though the property was transferred in breach of the trust.³⁷⁰ Rules protecting bona fide purchasers are favored by courts and legislatures because of their commercial expediency. However, the rules may vary depending upon the type of property involved. One commentator has described the general state of the law as follows:

One who purchases half a million dollars worth of corporate bonds from a trustee need not inquire into his powers to sell and to give a receipt for the price, but one who buys a pig or a rocking chair at a trustee's auction is bound to study the terms of the trust and determine at his peril their correct legal meaning.³⁷¹

If the common law rule, as applied to particular types of transactions, has not been changed by statute, the transferee will not be protected where he or she knew or should have known of the breach.³⁷²

The proposed law protects a third person who acts in good faith and for a valuable consideration unless the third person has actual knowledge that the trustee is improperly exercising powers under the trust. Constructive knowledge or inquiry notice of the trustee's powers is not sufficient to deprive a good faith transferee of protection.³⁷³ This rule is generally consistent with changes that have been made in the law concerning negotiable instruments, securities, and bank accounts.³⁷⁴

The proposed law also continues the existing provisions that protect third persons who rely on documents relating to real property recorded with the county recorder.³⁷⁵

³⁷⁰ See Civil Code § 2243; Restatement (Second) of Trusts §§ 283-84 (1957). The rules governing what is notice and what is value can be complicated, depending upon the circumstances of the case. See *id.* §§ 296-97 (notice), 298-309 (value); 7 B. Witkin, Summary of California Law *Trusts* §§ 90-92, at 5449-52 (8th ed. 1974).

³⁷¹ Fratcher, *Trustees' Powers Legislation*, 37 N.Y.U. L. Rev. 627, 662 (1962).

³⁷² See Restatement (Second) of Trusts § 297 (a) & comments (1957); Fratcher, *Trustees' Powers Legislation*, 37 N.Y.U. L. Rev. 627, 662 (1962).

³⁷³ This provision is drawn from Section 7 of the Uniform Trustees' Powers Act (1964).

³⁷⁴ See, e.g., Com. Code §§ 3117 (b), 3304 (2), (4) (e), 8304, 8308 (11), 8403; Fin. Code § 952.

³⁷⁵ See Civil Code §§ 869, 869a.

Rights of Creditors of Settlers

With the increasing use of revocable living trusts as probate-avoidance devices, concern has developed over the problems faced by creditors of settlers.³⁷⁶ Trusts of this sort can usually be amended or revoked by the settlor at any time. The settlor may be the trustee until incompetence or death and may be the only beneficiary having any present enjoyment.

In the past, trusts of this sort were subject to attack as invalid attempts to avoid the Statute of Wills. The doctrine of merger was used to destroy the trust by finding a merger of beneficial interests in the settlor.³⁷⁷ Civil Code Section 2225 was added to the California trust statutes in 1983 to make clear that self-settled trusts are not invalid in certain circumstances:

A voluntary trust shall not be deemed invalid, merged, or terminated if the trustor is also the sole trustee and sole beneficiary during the trustor's lifetime, or if there are two or more trustors, one or more of whom is a trustee, and the beneficial interest in the trust is in the trustors during the lifetime of the trustors, so long as the trust provides for one or more successor beneficiaries or remaindermen following the death of the trustor. . . .

The proposed law would continue this anti-merger provision.

The question of validity having been answered by statute, a creditor of a person who has created a revocable living trust may attack the trust as a fraudulent conveyance.³⁷⁸ In the situation where a creditor is attempting to collect after the death of the settlor, the creditor may make the argument that the creation of the revocable living trust is

³⁷⁶ See generally Chillag, *Creditors' Rights to Reach Nonprobate Assets*, 5 Est. Plan & Cal. Prob. Rep. 1 (1983); Dennis-Strathmeyer, *Simple Probate-Avoidance Trusts: Higher Stakes and Old Problems*, 4 Est. Plan. & Cal. Prob. Rep. 69 (1983); Effland, *Rights of Creditors in Nonprobate Assets*, 48 Mo. L. Rev. 431 (1983).

³⁷⁷ Section 57 of the Restatement of Trusts (1935) provided that a revocable trust in which the settlor had a life estate was testamentary and invalid under the Statute of Wills if the settlor retained power to control the trustee in the administration of the trust. The Restatement (Second) of Trusts (1957) reversed this position and provided that such trusts were not invalid.

³⁷⁸ See Civil Code §§ 3439-3439.12 (Uniform Fraudulent Conveyance Act); cf. *Headen v. Miller*, 141 Cal. App. 3d 169, 190 Cal. Rptr. 198 (1983) (creditors could reach proceeds of life insurance policy fraudulently transferred by changing beneficiary designation from business partner to wife).

not a completed transfer and that the transfer only takes place at death when it makes the estate insolvent in fraud of creditors.³⁷⁹ To avoid this problem, drafters of revocable living trusts commonly insert a provision in the trust authorizing but not directing the payment of debts.³⁸⁰ Existing law authorizes the personal representative, on application of a creditor, to sue for recovery of property fraudulently conveyed during the decedent's lifetime if the estate assets are insufficient to satisfy creditors' claims.³⁸¹

California law in this area is uncertain and should be clarified. A model approach is suggested by the statutes governing creditors' claims under the power of appointment statute.³⁸² A general power of appointment and a revocable living trust are analogous in that the donor-donee of a general power and the settlor having the power to revoke and direct the trustee³⁸³ have the same effective control over the property.³⁸⁴ The proposed law makes clear that the creation of a revocable living trust does not affect the rights of creditors of the settlor during the settlor's lifetime. Hence, creditors are permitted to reach property subject to a revocable living trust to the extent that the settlor has the power of revocation.³⁸⁵ Upon the death of a settlor who had the power of revocation, property subject to the power of revocation at the settlor's

³⁷⁹ See Effland, *Rights of Creditors in Nonprobate Assets*, 48 Mo. L. Rev. 431, 441 (1983).

³⁸⁰ It is suggested that the drafter avoid directing the payment of debts, however, since such a direction might have the effect of waiving the argument that the trust is not liable. See Dennis-Strathmeyer, *Simple Probate-Avoidance Trusts: Higher Stakes and Old Problems*, 4 Est. Plan. & Cal. Prob. Rep. 69, 73 (1983).

³⁸¹ Prob. Code § 579.

³⁸² See Civil Code §§ 1390.3, 1390.4. This approach has been adopted by the courts in Massachusetts and Oregon. See Effland, *Rights of Creditors in Nonprobate Assets*, 48 Mo. L. Rev. 431, 440-43 (1983).

³⁸³ See Civil Code § 2258(b).

³⁸⁴ Professor Effland describes the treatment of this question in the Restatement of Trusts and the Restatement of Property as showing a "glaring inconsistency:" "If the same settlor had no power to revoke but gave the trustee a discretionary power to pay the principal to the settlor, the settlor's creditors could reach the principal. [Citing Restatement (Second) of Trusts § 156(2).] If the same settlor reserved not a power to revoke but a general power of appointment, again the creditors could reach the principal. [Citing Restatement of Property § 328 (1940).] Why should a power to revoke, which is a greater power, mean that the creditors are left with no rights?" Effland, *Rights of Creditors in Nonprobate Assets*, 48 Mo. L. Rev. 431, 440 (1983).

³⁸⁵ This rule is analogous to the rule applicable to unexercised powers of appointment created by a donor in favor of himself or herself under Civil Code Section 1390.4.

death would be subject to creditors' claims and to expenses of administration of the estate if the decedent's estate is otherwise insufficient to satisfy them.³⁶⁶

Procedure for Closing off Creditors' Claims

The Commission has received suggestions that the trust statute include an optional procedure for giving notice to creditors of the trust estate and providing a limited period for presenting claims. This procedure is envisioned as analogous to the procedure for determining creditors' claims in probate.³⁶⁷ The Commission is interested in receiving comments on this suggestion. In the future, the Commission will be considering what, if any, claims procedure it will recommend to the Legislature.

Spendthrift and Other Protective Trusts

Background

Existing California statutory law contains an incomplete and confusing statement of the California law relating to spendthrift and other protective trusts.

Civil Code Section 867. Civil Code Section 867 permits a settlor to impose a disabling restraint on the voluntary transfer of the beneficiary's interest in a trust for the receipt of the rents and profits of real property or for the payment of an annuity out of such rents and profits.³⁶⁸ However, the section is an incomplete statement of California law. Both before and after the enactment of Section 867, the California courts have upheld the validity of a disabling restraint on voluntary and involuntary transfer of income from any trust, not just one to receive rents and profits of real property.³⁶⁹

³⁶⁶ This rule is analogous to the rule applicable upon the death of a donee of a general testamentary power of appointment under Civil Code Section 1390.3(b).

³⁶⁷ See Prob. Code § 333.

³⁶⁸ Civil Code Section 867 provides:

867. The beneficiary of a trust for the receipt of the rents and profits of real property, or for the payment of an annuity out of such rents and profits, may be restrained from disposing of his interest in such trust, during his life or for a term of years, by the instrument creating the trust.

³⁶⁹ See *Seymour v. McAvoy*, 121 Cal. 438, 442, 53 P. 946 (1898) (concerning validity of spendthrift trust created in 1869 and thus not subject to the Civil Code provisions enacted in 1872); *Canfield v. Security First Nat'l Bank*, 8 Cal. App. 2d 277, 283-88, 48 P.2d 133 (1935) (Civil Code § 859 interpreted to apply to both real and personal

Civil Code Section 859. Civil Code Section 859 permits a creditor to reach the "surplus" of the rents and profits of trust property beyond the amount that may be necessary for the education and support of the beneficiary where the trust has no valid direction for accumulation.³⁰⁰ Section 859 also is an incomplete statement of the California law.³⁰¹

Code of Civil Procedure Section 709.010. Code of Civil Procedure Section 709.010³⁰² permits a judgment creditor to

property); *Canfield v. Security-First Nat'l Bank*, 13 Cal. 2d 1, 13-17, 87 P.2d 830 (1939) (Civil Code §§ 859 and 867 read together to apply to trusts of personal property). Section 859 was amended in 1935 to refer also to personal property trusts. See 1935 Cal. Stat. ch. 406, § 1. See also Note, 40 Calif. L. Rev. 441, 444 n.18 (1952) (noting that trusts of personal property have been successfully restrained and recommending amendment of Civil Code § 867 to conform to § 859).

³⁰⁰ Civil Code Section 859 provides:

859. Where a trust is created to receive the rents and profits of real or personal property, and no valid direction for accumulation is given, the surplus of such rents and profits, beyond the sum that may be necessary for the education and support of the person for whose benefit the trust is created, may be applied to the satisfaction of a money judgment against the person as provided in Section 709.010 of the Code of Civil Procedure.

³⁰¹ See the discussion of Civil Code Section 867 *supra*. See also Evans, *Observations on the State, Etc., of the California Laws of Uses and Trusts*, 28 S. Cal. L. Rev. 111, 112-14 (1955).

³⁰² Code of Civil Procedure Section 709.010 provides:

709.010. (a) As used in this section, "trust" has the meaning provided in Section 1138 of the Probate Code but includes a trust subject to court supervision under Article 1 (commencing with Section 1120) of Chapter 19 of Division 3 of the Probate Code.

(b) The judgment debtor's interest as a beneficiary of a trust is subject to enforcement of a money judgment only upon petition under this section by a judgment creditor to a court prescribed in Chapter 19 (commencing with Section 1120) of Division 3 of the Probate Code (administration of trusts). The judgment debtor's interest in the trust may be applied to the satisfaction of the money judgment by such means as the court, in its discretion, determines are proper, including but not limited to imposition of a lien on or sale of the judgment debtor's interest, collection of trust income, and liquidation and transfer of trust assets by the trustee.

(c) Upon petition of the judgment creditor under this section, the court may make an order that the trustee withhold and pay to the judgment creditor all or a portion of the amount that otherwise would be paid periodically to the judgment debtor from the trust. Unless the order otherwise provides, the order shall continue in effect until the judgment of the judgment creditor is satisfied or the order is modified or terminated. In the case of periodic payments from a spendthrift or support trust, the order may not require that the trustee pay to the judgment creditor any exempt portion of the amount that otherwise would be paid periodically to the judgment debtor from the trust; and, for this purpose, the exempt portion is the amount that the court determines is substantially equivalent to the amount that would be exempt on a like amount of earnings under Chapter 5 (commencing with Section 706.010) (Wage Garnishment Law), including, but not limited to, amounts determined under Sections 706.050, 706.051, and 706.052. Nothing in this subdivision limits the right of the state or other public entity to recover for support provided to a trust beneficiary or to recover for payments made for the support of a trust beneficiary.

reach a portion of the periodic payments to a trust beneficiary, whether or not the trust is a spendthrift trust. After a court hearing, the court is authorized to order the trustee to withhold an amount from each periodic payment and to pay that amount to the judgment creditor to be applied to the satisfaction of the judgment. The court's authority is limited; the court may not order that more be withheld by the trustee than could be withheld on a like amount of earnings pursuant to a wage garnishment.

In the case of the ordinary creditor, Section 709.010 permits the creditor to reach the portion of the payment that is in excess of the amount that the beneficiary proves is necessary for support of the beneficiary and the beneficiary's family supported in whole or in part by the beneficiary, but in no event may more than 25 percent of the payment be withheld and paid to the creditor.

If the judgment is for delinquent child or spousal support, Section 709.010 permits the creditor to reach the portion of the payment which the court determines is equitable, taking into account the needs of all persons the beneficiary is required to support, but in making the division between

(d) Except to the extent that the court order otherwise specifically provides, the provisions of any order entered under subdivision (c) shall not become effective until 30 days after the order has been served upon the trustee, except that the trustee may waive all or any portion of the 30-day period. The trustee may file with the court that made the order a petition requesting modification or clarification of any of the provisions of the order. Notwithstanding any contrary provision of law, the trustee is not required to pay any fee to the clerk of the court as a condition to filing a petition under this subdivision or any subsequent document in connection with a petition. If any provision of the order is modified or set aside, the court, on motion of the judgment creditor or judgment debtor, may set aside or modify other provisions of the order. The trustee, the judgment creditor, and the judgment debtor may present evidence or further evidence that is relevant to the issues to be decided by the court at any hearing on the trustee's petition. The court shall take this evidence into account in determining those issues. Nothing in this subdivision limits any right of a trustee to petition a court under Chapter 19 (commencing with Section 1120) of Division 3 of the Probate Code.

(e) Where the trust gives the trustee discretion over the payment of either principal or income of a trust, or both, nothing in this section affects or limits that discretion or requires the exercise of that discretion in any particular manner. The trustee has no duty to oppose a petition under this section or to make any claim for exemption on behalf of the trust beneficiary. The trustee is not liable for any action taken, or omitted to be taken, in compliance with any court order made under this section.

(f) Except as provided in subdivisions (c), (d), and (e), nothing in this section affects the law relating to enforcement of a money judgment against the judgment debtor's interest in a spendthrift trust, but surplus amounts from a spendthrift trust liable pursuant to Section 859 of the Civil Code are subject to enforcement of a money judgment under this section.

the support creditor and the beneficiary the court is subject to the restriction that not more than one-half of the payment can be withheld for the support creditor.³⁹³

Recommendations

The Commission recommends enactment of a new statute governing the validity of restrictions on voluntary and involuntary transfers of the beneficiary's interest in a trust. The proposed law is drawn from the Restatement (Second) of Trusts³⁹⁴ and from a 1969 Wisconsin statute.³⁹⁵

... The proposed law contains the following provisions:

(1) *Restraints on voluntary and involuntary transfer.* Subject to several exceptions discussed *infra*, if the trust instrument provides that the beneficiary's right to income or principal is not subject to voluntary or involuntary transfer, the interest may not be transferred by the beneficiary or subjected to the claims of creditors. The provision protecting principal from voluntary or involuntary transfer clarifies a doubtful aspect of California law.³⁹⁶ The proposed law makes clear, however, that principal amounts that have become due and payable to a beneficiary under the terms of the trust or pursuant to

³⁹³ Under special circumstances set out in a federal statute, the court can award up to 65 percent of the payment to the support creditor. Section 709.010 provides that the amount to be paid to the beneficiary is not less than the amount the court determines to be substantially equivalent to the amount that would be exempt on a like amount of earnings under the wage garnishment law. This amount is not less than the amount that is protected under federal law. Federal law permits garnishment of 50 percent of the employee's earnings if the employee is supporting a spouse or dependent other than the person who caused the garnishment and 60 percent if the employee is not supporting such additional persons; these percentages are increased to 55 percent and 65 percent, respectively, if the support payments are more than 12 weeks delinquent. See 15 U.S.C.A. § 1673(b) (2) (West 1982).

³⁹⁴ See Restatement (Second) of Trusts §§ 152-157 (1957).

³⁹⁵ See Wis. Stat. Ann. § 701.06 (West 1981).

³⁹⁶ This rule is consistent with the result in several California cases. See *Seymour v. McAvoy*, 121 Cal. 438, 444, 53 P. 946 (1898) (creditor could not reach contingent remainder); *San Diego Trust & Sav. Bank v. Heustis*, 121 Cal. App. 675, 683-84, 694-97, 10 P.2d 158 (1932) (where husband was income and remainder beneficiary, estranged wife could not reach trust funds for support); *Coughran v. First Nat'l Bank*, 19 Cal. App. 2d 152, 64 P.2d 1013 (1937) (in an action to quiet title, attachment levied against beneficiary's contingent fractional interest in trust property was held invalid). However, there is no clear holding in the California cases as to the validity of disabling restraints on the transfer of trust principal by a vested remainder beneficiary.

exercise of the trustee's discretion may be reached by creditors in the hands of the trustee and after payment to the beneficiary.

(2) *Trusts for support.* The proposed law makes clear that a trust providing for the payment of income or principal for the education or support of the beneficiary is also entitled to protection to the extent that the income or principal is necessary for the designated purpose. *This rule is subject to several important exceptions.*

(3) *Trust subject to discretion of trustee.* The proposed law protects the exercise of the trustee's discretion from control by creditors. Thus, a creditor is precluded from seeking a court order requiring the trustee to exercise discretion to pay income or principal to or for the benefit of the beneficiary. However, once the trustee has notice of a proceeding by a creditor under Code of Civil Procedure Section 709.010, the trustee is liable for not paying to the creditor any amount that the trustee has determined to pay that is also not protected by a valid restraint on transfer.³⁹⁷ This limitation on the ability of creditors to compel the exercise of a trustee's discretion does not limit the right of a beneficiary to compel exercise of discretion.³⁹⁸

(4) *Invalidity of restraint where settlor is beneficiary.* The proposed law codifies the rule that a restraint on transfer of the settlor's interest as beneficiary is not valid.³⁹⁹ The invalidity of the restraint in this case does not affect the validity of the trust. If the settlor creates a trust for the payment of education or support, the proposed law makes clear that a transferee or creditor can reach the maximum amount that the trustee can pay to the settlor under the terms of the trust.⁴⁰⁰

³⁹⁷ This provision of the proposed law is drawn from Section 155 of the Restatement (Second) of Trusts (1957), but under the proposed law, the rule applies whether or not the trustee's discretion is subject to a standard, whereas the discretion must be uncontrolled under the Restatement rule.

³⁹⁸ See *Estate of Ferrall*, 41 Cal. 2d 166, 258 P.2d 1009 (1953) (whether fraud, bad faith, or an abuse of discretion has been committed by trustees in refusing to make payments for the support of the beneficiary of a discretionary trust is subject to review by the court); *Estate of Miller*, 230 Cal. App. 2d 888, 41 Cal. Rptr. 410 (1964) (court required trustee to make payments to beneficiary).

³⁹⁹ See, e.g., *Nelson v. California Trust Co.*, 33 Cal. 2d 501, 202 P.2d 1021 (1949).

⁴⁰⁰ This amount may not exceed the amount of the settlor's proportionate contribution to the trust. In a case involving community property, this rule protects the interest of the spouse.

(5) *Claims for child or spousal support.* The proposed law continues the favored status of support creditors with certain important modifications. A claimant for delinquent child or spousal support can reach the beneficiary's interest in the trust to the extent that the court determines is equitable and reasonable under the circumstances out of income or principal that the beneficiary can compel the trustee to pay or that the trustee determines to pay in the exercise of discretion. The court may also make an order for the payment of amounts as they become due in the future. This rule favoring support creditors applies notwithstanding any restraint on transfer in the trust instrument.

(6) *Liability of trust for public support.* The proposed law codifies the principle that the beneficiary's interest in a trust is liable for reimbursement for support provided by the public to the beneficiary or to the spouse or minor child of the beneficiary.⁴⁰¹ This rule is limited to situations where the settlor is obligated by statute to pay for public support of the beneficiary or where the beneficiary is obligated by statute to pay for his or her own public support or that of the beneficiary's spouse or minor child.⁴⁰² Claims for reimbursement may arise when a person is supported in a public institution⁴⁰³ or is the recipient of welfare outside an institution.⁴⁰⁴ With one important exception, as a matter of public policy, claims for reimbursement by the public are given the same status as claims for child support and can be enforced notwithstanding a restraint on transfer or other provision in the trust instrument. Similarly, where the beneficiary is the settlor or the spouse or minor child of the settlor, the right of reimbursement extends to discretionary payments even if the beneficiary can not compel payment. However, in any of these situations the court has discretion

⁴⁰¹ See *Estate of Lackmann*, 156 Cal. App. 2d 674, 678-83, 320 P.2d 186 (1958); see also Restatement (Second) of Trusts § 157 (1957).

⁴⁰² This limitation is consistent with case law. See *Estate of Hinckley*, 195 Cal. App. 2d 164, 15 Cal. Rptr. 570 (1961) (discretionary trust created by sister of beneficiary to pay for emergencies not required to pay full amount of cost of state care); *Estate of Johnson*, 198 Cal. App. 2d 503, 17 Cal. Rptr. 909 (1961) (discretionary trust created by sister of beneficiary not required to pay amount over basic standard set in trust).

⁴⁰³ See, e.g., Welf. & Inst. Code § 903 (liability of parents for support of minor under order of juvenile court).

⁴⁰⁴ See, e.g., Welf. & Inst. Code § 17403 (liability for support of indigent from public funds).

to determine the amount that is equitable and reasonable under the circumstances; the proposed law does not automatically make the entire interest liable to claims of reimbursement. In order to encourage settlors to provide for the care of disabled persons, the proposed law does not permit reimbursement of a public agency from the interest of a beneficiary who has a disability that substantially impairs the person's ability to provide for his or her own care or custody where the disability is a substantial handicap.⁴⁰⁵ Without some statutory authority, the status of such trusts is not clear and parents of a disabled child are faced with the wrenching problem of trying to make sure that their child is provided for after they die.⁴⁰⁶ Without this protection, there is a danger that the entire trust will be consumed by a public entity seeking reimbursement with no improvement in the condition of the beneficiary. In this atmosphere, fewer and fewer parents will establish such trusts for their disabled children.⁴⁰⁷

(7) *Liability of income in excess of amount for education and support.* The proposed law continues in more modern language the principle of Civil Code Section 859, thus permitting creditors to reach the beneficiary's interest to the extent that it exceeds the amount necessary for the beneficiary's education and support, notwithstanding a restraint on transfer of income or principal in the trust instrument.

(8) *Rights of general creditors.* The new law continues the main elements of the existing law relating to the rights of general creditors. Thus, general creditors may reach 25% of the amount that otherwise would be paid to the beneficiary under the terms of the trust or pursuant to the exercise of the trustee's discretion. This right does not affect any discretion the trustee may have to alter or eliminate payments. The amount available to general creditors may be reduced to the extent necessary to support the beneficiary and persons the beneficiary is required to

⁴⁰⁵ This provision is drawn from Wisconsin law. See Wis. Stat. Ann. § 701.06(5)-(5m) (West 1981).

⁴⁰⁶ See Wall St. J., Aug. 16, 1985, at 19, col. 3.

⁴⁰⁷ See Frolik, *Discretionary Trusts for a Disabled Beneficiary: A Solution or a Trap for the Unwary?*, 46 U. Pitt. L. Rev. 335, 342-44, 366-70 (1985).

support. The rights of general creditors are subordinate to the rights of support creditors. The new law also makes clear that all of the beneficiary's general creditors may reach, in the aggregate, no more than 25% of the payment otherwise due the beneficiary (or any lesser amount determined by the court). Thus if one creditor is receiving 25% of the amount that otherwise would be paid to the beneficiary, other general creditors may not reach any further portion of payments to the beneficiary.

Charitable Trusts

The law governing charitable trusts is largely the same as that governing private trusts.⁴¹¹ Existing statutory law does not, for the most part, make any special provision for charitable trusts. The Field Code does not distinguish between private and charitable trusts; it thus appears that the Field Code applies to both types of trusts.⁴¹² The provisions concerning testamentary trusts subject to continuing court jurisdiction in the Probate Code likewise make no distinction between charitable and private trusts, but special provisions apply to charitable dispositions.⁴¹³ Probate Code Sections 1138-1138.14 governing judicial proceedings concerning internal affairs of trusts exclude

⁴⁰⁸ [Omitted.]

⁴⁰⁹ [Omitted.]

⁴¹⁰ [Omitted.]

⁴¹¹ See Restatement (Second) of Trusts §§ 348-403 (1957); 7 B. Witkin, Summary of California Law Trusts § 38, at 5399 (8th ed. 1974).

⁴¹² See, e.g., Civil Code §§ 2215-2216, 2221-2222. It should be noted, however, that courts may find a statute inapplicable to a charitable trust in appropriate circumstances. See, e.g., *In re Estate of Sutro*, 155 Cal. 727, 733, 102 P. 920 (1909) (limitation on purpose for which trust may be created under former statute not applicable to charitable trust).

⁴¹³ See Prob. Code §§ 1120(c) (amendment of trust to qualify for charitable deduction), 1120.1a para. 1 & (f) (notice to Attorney General).

charitable trusts subject to supervision by the Attorney General.⁴¹⁴ Probate Code Section 1138.1(a)(13) provides, however, for modification of a trust to qualify for the charitable deduction. Existing law also requires notice to be given to the Attorney General whenever a trust or trust property is to be transferred from California to another jurisdiction.⁴¹⁵ A reading of the provisions relating to trusts in the Civil and Probate Codes thus does not suggest that charitable trusts are to be treated differently from private trusts.

The most important body of statutory law relating to charitable trusts is the Uniform Supervision of Trustees for Charitable Purposes Act⁴¹⁶ which requires registration of charitable trusts with the Attorney General and codifies the traditional authority of the Attorney General to investigate and bring proceedings to enforce charitable trusts.⁴¹⁷

The proposed law recognizes the special treatment given charitable trusts under the common law by subordinating the general statutory rules to the supervisory authority of the Attorney General. In addition, some special rules are applied to charitable trusts.⁴¹⁸ For example, the beneficiaries of a charitable trust may be designated with much less certainty than those of a private trust—in fact, a charitable trust may fail if its beneficiaries are overly specific, such as where individual persons are named.⁴¹⁹ The doctrine of *cy pres* may save a charitable trust in situations where a private trust would fail, such as where the beneficiary designation is defective or where the trust purpose has become illegal.⁴²⁰ The proposed law also

⁴¹⁴ See Gov't Code §§ 12580-12597; Prob. Code § 1138(b).

⁴¹⁵ Prob. Code § 1139.3.

⁴¹⁶ Gov't Code §§ 12580-12597.

⁴¹⁷ The authority of the Attorney General to require trustee registration and reporting does not apply to certain trustees listed in Government Code Section 12583, such as public entities, religious organizations, cemetery corporations, hospitals, and health care plans.

⁴¹⁸ Traditional doctrines of the common law that apply to charitable trusts and that are not displaced by a specific statutory provision are not disturbed by the proposed law. See the discussion relating to the common law under "TRUST LAW: Background" *supra*.

⁴¹⁹ See *People v. Cogswell*, 113 Cal. 129, 136, 45 P. 270 (1896); 7 B. Witkin, Summary of California Law Trusts §§ 38-39, at 5399-5401 (8th ed. 1974); Restatement (Second) of Trusts § 375 (1957).

⁴²⁰ See Restatement (Second) of Trusts § 399 (1957); 7 B. Witkin, Summary of California Law Trusts §§ 49-50, at 5411-14 (8th ed. 1974).

recognizes the role of the Attorney General by making clear that the Attorney General may petition to enforce the trust under the statutory special procedure. This codifies the general case-law rule.⁴²¹ The proposed law also codifies the case-law rule that a trustee of a charitable trust may petition to enforce the trust.⁴²²

Transitional Provisions

General Rule

The proposed law adopts the general rule that the new Trust Law applies to all trusts regardless of when they were created. The proposed law would also apply to all proceedings concerning trusts commenced before the operative date of the new law unless a court determines that the application of a particular provision would substantially interfere with the effective conduct of the proceedings or the rights of the parties or other interested persons. In that event, the particular provision of the new law would not apply, and the prior rule would govern the case.⁴²³ In many cases the proposed law continues the substance of existing law, so there is no reason to postpone application of the new statutory formulation. Furthermore, some changes are made for reasons of public policy and so are applied to existing trusts to the extent possible.

⁴²¹ See, e.g., *People v. Cogswell*, 113 Cal. 129, 136, 45 P. 270 (1896); *Brown v. Memorial Nat'l Home Found.*, 162 Cal. App. 2d 513, 534, 329 P.2d 118 (1958); *Pratt v. Security Trust & Sav. Bank*, 15 Cal. App. 2d 630, 59 P.2d 862 (1936). The special proceedings provided by Probate Code Section 1138.1 are not available to the Attorney General during the time that any private beneficiary has or may claim an interest in the trust. See Prob. Code § 1138(b). A person with a special interest, such as a charitable corporation which is entitled to benefits under the trust, may also enforce the trust. See *San Diego County Council, Boy Scouts of Am. v. City of Escondido*, 14 Cal. App. 3d 189, 92 Cal. Rptr. 186 (1971); *Restatement (Second) of Trusts* § 391 comment c (1957). The proposed law does not codify this principle, but it is preserved under the provision discussed *supra* which continues the common law rules to the extent they are not displaced. A general beneficiary may also be permitted to sue for enforcement as a relator when such status is granted by the Attorney General. See *Bell & Bell, Supervision of Charitable Trusts in California*, 32 *Hastings L.J.* 433, 447 (1980).

⁴²² See *Holt v. College of Osteopathic Physicians & Surgeons*, 61 Cal. 2d 750, 755-57, 394 P.2d 932, 40 Cal. Rptr. 244 (1964) (suit by minority cotrustees).

⁴²³ This general approach is consistent with transitional provisions in other bodies of law. See, e.g., Code Civ. Proc. § 694.020 (application of Enforcement of Judgments Law). It is also consistent with Section 8 of the Uniform Trustees' Powers Act (1964).

Policies Applied Only Prospectively

In order to avoid disruption and to protect legitimate reliance on existing law, the proposed law provides the following exceptions to the general rule and thus preserves existing law as to existing trusts in certain circumstances after the operative date of the proposed law:

—The manner of revocation of a trust revocable by the settlor created by an instrument executed before the new law would be governed by the old law since the proposed law requires a specific provision in the trust to eliminate the possibility of revocation by the statutory method.⁴²⁴ Some settlors may wish the method specified in the trust to be exclusive, which it is under existing case law.

—The duty to account at least annually to beneficiaries is limited to trusts created after the operative date or by wills . . . *executed after the operative date*.⁴²⁵ Since the annual accounting may be waived in the trust instrument, it would not be fair to require trustees to account as to pre-operative date trusts where the settlor can be presumed not to have desired an annual accounting.

—The rules relating to the liability of trustees for the acts of agents, . . . cotrustees, and *predecessor trustees* are altered by the proposed law.⁴²⁶ A trustee who has relied on the old rules in fashioning its conduct would be unfairly treated if the new rules could be applied to impose a retroactive liability for actions or inactions occurring before the operative date of the proposed law. Accordingly, the new rules apply only to acts or omissions occurring after the operative date.

—The proposed law shortens the limitations period on proceedings by beneficiaries against trustees from four years to three years.⁴²⁷ . . . *The new law applies the three-year limitations period to all claims. However, claims arising before July 1, 1987, are afforded a one-year grace period, and so are not barred by the new rule until July 1, 1988.*

⁴²⁴ See the discussion under "Manner of Termination of Revocable Trusts" *supra*.

⁴²⁵ See the discussion under "Duty to Report Information and Account to Beneficiaries" *supra*.

⁴²⁶ See the discussion under "Liability of Trustee for Acts of Others" *supra*.

⁴²⁷ See the discussion under "Limitations" *supra*.

—The proposed law alters the rule governing liability of trustees on contracts.⁴²⁸ Clearly trustees and third persons who have entered into contracts under the existing rule should not have their rights determined by the new rule.

Policies Applied to All Trusts

Several important rules in the proposed law would be applied to all trusts regardless of the time of creation or any other factor. Most important are the following:

—By its revision of the rules concerning indefinite beneficiaries and indefinite purposes, the proposed law would have the effect of making valid some trusts that are probably not valid under existing law.⁴²⁹ These changes are included in the proposed law as a matter of public policy and there is no detectable reliance interest that would raise any constitutional issue. Accordingly, these substantive rules would apply in any dispute arising under a trust regardless of time of creation.

—The proposed law requires corroborative evidence of creation of certain oral trusts.⁴³⁰ A person who creates an oral trust that does not meet the new standards has no reliance interest worthy of protection, so the proposed law applies the new rules to all situations.

—The proposed law gives the court a greater degree of discretion in approving termination of a trust on petition of all beneficiaries.⁴³¹ This provision in the proposed law forwards a public policy and is made applicable to all trusts.

—The rules governing consent to a modification or termination by a guardian ad litem are expanded slightly by the proposed law.⁴³² This is a matter of public policy and should apply to all trusts. It is unknown whether California courts might or might not create such rules in appropriate circumstances if the

⁴²⁸ See the discussion under "Trustee's Contract Liability" *supra*.

⁴²⁹ See the discussion under "Indefinite Beneficiaries and Purposes" *supra*.

⁴³⁰ See the discussion under "Oral Trusts" *supra*.

⁴³¹ See the discussion under "Modification or Termination by All Beneficiaries" *supra*.

⁴³² See the discussion under "Obtaining Consent of Beneficiaries: Guardian ad litem" *supra*.

proper case were presented, so this rule may anticipate change, rather than make it.

—The provision of the proposed law making the presumption of fertility rebuttable is based on public policy considerations and should apply to all trusts.⁴³³

—The proposed law provides a special rule in the modification and termination context where a settlor has made a disposition in favor of “heirs” or “next of kin” of the settlor.⁴³⁴ It is best to make this rule apply to all trusts so as to avoid the complications that would arise from having two rules in this rather esoteric area. It may also be presumed that most settlors who use the words “heirs” or “next of kin” in a trust are not likely to have known of the existing rule.

—As a matter of public policy, the court is given broader discretion to approve a modification of administrative or dispositive provisions or the termination of a trust owing to a change of circumstances.⁴³⁵ The new provision is drafted in recognition of the fact that modification or termination is on its face contrary to the settlor’s intent. However, the provision looks to the settlor’s underlying purposes in determining whether to modify or terminate, and in this light, does not defeat any reliance interest of parties to the trust.

—The remedies for breach of trust in the proposed law probably break no new ground,⁴³⁶ but even if they did, there would not be any vested right of a breaching trustee in a particular remedy. Accordingly, the remedies for breach apply to any situation. It should be remembered that the proposed law gives the court authority to decline to apply the new law if its application would substantially interfere with the rights of a trust party.

—The automatic powers scheme contains the set of powers that are traditionally desired by trust drafters.

⁴³³ See the discussion under “Obtaining Consent of Beneficiaries: Presumption of fertility” *supra*.

⁴³⁴ See the discussion under “Obtaining Consent of Beneficiaries: Disposition in favor of ‘heirs’ or ‘next of kin’ of settlor” *supra*.

⁴³⁵ See the discussion under “Modification and Termination by Court” *supra*.

⁴³⁶ See the discussion under “Remedies for Breach of Trust” *supra*.

Since these powers are largely the same as the powers listed in existing law,⁴³⁷ there is no serious risk of interfering with administration of existing trusts. The provision of powers does not require the exercise of any powers by a trustee. Well-drafted trusts may not need any of the statutory powers, but poorly-drafted trusts should have the benefit of the automatic powers and thus avoid the need to petition the court for a grant of additional powers.

—The various revisions in the Revised Uniform Principal and Income Act are applied to all trusts even though they result in some substantive differences.⁴³⁸ Since the RUIA rules are default rules that apply where the trust does not provide another rule, it is best to apply the improved statutory rules to all trusts as a matter of public policy. It also makes administration of trusts simpler for professional trustees since they will not have to operate under two different schemes.

—The rules governing accountability and the measure of liability of trustees represent a different formulation of the same general rules, although there may be some question about the details of the application of either existing law or the proposed law.⁴³⁹ On balance, however, the proposed law results in distinct limitations on the liability of trustees, so there should not be any serious objection to application of the entire package to all trusts from a policy standpoint.

—The rules concerning jurisdiction, jury trials, and proceedings are either reformulations of existing law or matters of public policy which should be applied to proceedings involving all trusts.⁴⁴⁰

—The proposed law provides new rules governing the enforceability of claims of the settlor's creditors.⁴⁴¹ The new rules represent clarification of an area of the law that is currently unsettled, so there is no identifiable reliance interest on the part of settlors or their beneficiaries who might desire to defeat the

⁴³⁷ See the discussion under "Trustees' Powers" *supra*.

⁴³⁸ See the discussion under "Allocation of Receipts and Expenditures Between Principal and Income" *supra*.

⁴³⁹ See the discussions under "Measure of Liability for Breach of Trust" *supra*.

⁴⁴⁰ See the discussion under "Judicial Proceedings Concerning Trusts" *supra*.

⁴⁴¹ See the discussion under "Rights of Creditors of Settlers" *supra*.

claims of creditors. It is also conceivable that the California courts, if called upon to do so, would follow the lead of the Massachusetts and Oregon courts in declaring similar rules.

Conforming Changes

Some statutes in other codes will need adjustment in light of the proposed law. For the most part these changes are technical and minor. The comments to the revisions set out *infra* explain these changes.

Editorial note. The new Trust Law was added to the Probate Code by Chapter 820 of the Statutes of 1986 and becomes operative on July 1, 1987. Each section of the new law is followed by its official comment. The comments are taken from the Law Revision Commission's *Recommendation Proposing the Trust Law*, 18 Cal. L. Revision Comm'n Reports 501 (1986), and from the *Communication From California Law Revision Commission Concerning Assembly Bill 2652*, on file with the Assembly Committee on Judiciary, the Senate Committee on Judiciary, and the Legislative Counsel. Comments to conforming revisions and repealed sections are taken from the same sources.

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TRUST LAW

Probate Code §§ 15000-18201

DIVISION 9. TRUST LAW

PART 1. GENERAL PROVISIONS

§ 15000. Short title

15000. This division shall be known and may be cited as the Trust Law.

Comment. Section 15000 is new and provides a convenient means of referring to this division. While most important statutory provisions concerning trusts are included in this division, it should be noted that definitions and other general provisions applicable to this division are located elsewhere. See, e.g., Sections 24 ("beneficiary" defined), 56 ("person" defined), 62 ("property" defined), 82 ("trust" defined), 83 ("trust company" defined), 84 ("trustee" defined), 88 ("will" defined); see also Fin. Code §§ 1500-1591 (trust companies), 6515 (savings and loan associations as trustees); Gov't Code §§ 12580-12597 (Uniform Supervision of Trustees for Charitable Purposes Act).

§ 15001. General rule concerning application of division

15001. Except as otherwise provided by statute:

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

(b) On and after July 1, 1987, this division applies to all proceedings concerning trusts commenced before July 1, 1987, unless in the opinion of the court application of a particular provision of this division would substantially interfere with the effective conduct of the proceedings or the rights of the parties and other interested persons, in which case the particular provision of this division does not apply and prior law applies.

Comment. Section 15001 provides the general rule governing the application of this division to administration of existing trusts and pending proceedings involving trusts. Subdivision (a) continues without substantive change the second sentence of former Civil Code Section 2225 (application of doctrine of

merger), the first sentence of subdivision (e) of former Civil Code Section 2261 (application of rules governing investments), and the first sentence of former Probate Code Section 1138.13 (application of provisions governing court proceedings involving trusts), and supersedes the second paragraph of former Probate Code Section 1120.2. Subdivision (a) is also comparable to Section 8 of the Uniform Trustees' Powers Act (1964).

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

For special transitional provisions, see Sections 15401(d) (application of rules governing method of revocation by settlor), 16042 (interpretation of trust terms concerning legal investments), 16062(b) (application of duty to account annually to beneficiaries), 16203 (application of rules governing trustee's powers), 16401(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), 16460(c) (application of limitations period in proceedings by beneficiaries against trustees), 18000(b) (application of rule governing personal liability of trustee to third persons on contracts).

§ 15002. Common law as law of state

15002. Except to the extent that the common law rules governing trusts are modified by statute, the common law as to trusts is the law of this state.

Comment. Section 15002 is a special application of the rule stated in Civil Code Section 22.2 (common law as rule of decision in California courts) and is drawn from Civil Code Section 1380.1 (common law in powers of appointment). Section 15002 supersedes former Probate Code Section 1120.6(c) (preservation of power of court to permit modification or termination prior to enactment of statute).

As used in this section, the "common law" does not refer to the common law as it existed in 1850 when the predecessor of Civil Code Section 22.2 was enacted; rather, the reference is to the contemporary and evolving rules of decision developed by the courts in exercise of their power to adapt the law to new situations and to changing conditions. See, e.g., *Fletcher v. Los Angeles Trust & Sav. Bank*, 182 Cal. 177, 187 P. 425 (1920). See also Section 15004 (application of division to charitable trusts).

§ 15003. Constructive and resulting trusts and fiduciary relationships not affected

15003. (a) Nothing in this division affects the law relating to constructive or resulting trusts.

(b) The repeal of Title 8 (commencing with Section 2215) of Part 4 of Division 3 of the Civil Code as provided in the act that added this division to the Probate Code is not intended to alter the rules applied by the courts to fiduciary and confidential relationships, except as to express trusts governed by this division.

Comment. Subdivision (a) of Section 15003 makes clear that the provisions in this division, relating as they do to express trusts, have no effect on the law relating to constructive and resulting trusts. See Section 82 ("trust" defined). Thus Section 15003 supersedes various provisions of former law relating to "involuntary" trusts. See former Civil Code §§ 856, 2215, 2217, 2275. For provisions relating to "involuntary trusts," see Civil Code Sections 2223-2225.

Subdivision (b) makes clear that the repeal of the Civil Code provisions relating to trusts, particularly former Civil Code Sections 2215-2244, is not intended to affect the general fiduciary principles applicable to confidential relationships. Over the years, courts have cited these provisions in cases involving different types of confidential and fiduciary relationships. See, e.g., *Baker v. Baker*, 260 Cal. App. 2d 583, 586, 67 Cal. Rptr. 523 (1968) (husband and wife); *Bone v. Hayes*, 154 Cal. 759, 763, 99 P. 172 (1908) (agent and principal); *Wickersham v. Crittenden*, 93 Cal. 17, 29-30, 28 P. 788 (1892) (corporate officers); *City of Fort Bragg v. Brandon*, 41 Cal. App. 227, 229, 82 P. 454 (1919) (municipalities); *Cooley v. Miller & Luz*, 168 Cal. 120, 131, 142 P. 83 (1914) (attorney and client). On the other hand, courts have also decided cases in this area on the basis of general equitable principles without citing the former Civil Code provisions. See, e.g., *Estate of Kromrey*, 98 Cal. App. 2d 639, 645-46, 220 P.2d 805 (1950) (attorney and client); *Committee of Missions v. Pacific Synod*, 157 Cal. 105, 127, 106 P. 395 (1909) (church); *Schwab v. Schwab-Wilson Machine Corp.*, 13 Cal. App. 2d 1, 3, 55 P.2d 1268 (1936) (corporate directors). See also Civil Code §§ 2322 (authority of agent), 5103 (spouses' duty in transactions with each other); Corp. Code § 309 (performance of duties by corporate director).

Subdivision (b) is also intended to recognize that the courts have the inherent power to fashion appropriate remedies under the circumstances and that this power in the area of confidential relationships does not depend upon the particular language of

former Civil Code Sections 2215-2244. See Civil Code § 22.2 (common law as law of state); see also Prob. Code § 15002 (common law as law of state). Of course, trusts now governed by the new Trust Law are no longer subject to the repealed statutes. See Sections 82 ("trust" defined), 15001 (application of Trust Law).

§ 15004. Application of division to charitable trusts

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

Comment. Section 15004 is a new provision that recognizes that special rules may apply to charitable trusts. See generally 7 B. Witkin, *Summary of California Law Trusts* §§ 37-55, at 5398-418 (8th ed. 1974); Restatement (Second) of Trusts §§ 348-403 (1957). Thus the rules of this division are subordinate to contrary provisions provided in this division and in the Uniform Supervision of Trustees for Charitable Purposes Act, Government Code Sections 12580-12597, as to trusts that are subject to the jurisdiction of the Attorney General. See Gov't Code §§ 12582 ("trustee" defined for purposes of uniform act), 12583 (charitable trustees excluded from coverage of uniform act); see also Sections 15205 (designation of beneficiary rule not applicable to charitable trusts), 16105 (Attorney General as party in proceedings involving certain private foundations), 17203(c) (notice to Attorney General of proceedings involving charitable trust), 17210 (enforcement of beneficiary's rights under charitable trust by Attorney General).

§ 15005. Law applicable to marital deduction gifts in trust

15005. (a) Except as provided in subdivision (b), Article 3 (commencing with Section 1030) of Chapter 16 of Division 3 applies to gifts, whether outright or in trust, made in a trust.

(b) This section does not apply to any trust if its terms expressly or by necessary implication make this section inapplicable to it.

(c) For purposes of this section, references in Article 3 (commencing with Section 1030) of Chapter 16 of

Division 3 to a "testator" refer to the settlor and references to a "will" refer to a trust.

Comment. Section 15005 continues former Probate Code Section 1138.14 without substantive change and supersedes former Civil Code Section 2264.

§ 15006. Judicial Council to prescribe forms

15006. The Judicial Council may prescribe the form of the petitions, notices, orders, and other documents required by this division. The form prescribed by the Judicial Council is deemed to comply with this division.

Comment. Section 15006 is new and is drawn from Section 1456 (forms under guardianship-conservatorship statute).

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

**CHAPTER 1. CREATION AND VALIDITY OF
TRUSTS**

§ 15200. Methods of creating trust

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

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

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

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

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

(e) An enforceable promise to create a trust.

Comment. Section 15200 is drawn from Section 17 of the Restatement (Second) of Trusts (1957). Section 15200 supersedes parts of former Civil Code Sections 2221 and 2222. A declaration under subdivision (a) must satisfy the requirements of Section 15206 (Statute of Frauds as applied to trust of real property) or 15207 (oral trust of personal property), if applicable. A trust may be created for the benefit of the settlor or of a third person (including the trustee). See Sections 15205 (designation of beneficiary), 15209 (exception to doctrine of merger).

Consideration is not required to create a trust. See Section 15208. Subdivision (e) is worded differently from the corresponding provision in the Restatement to avoid the implication that it deals with the question of the time of creation of such a trust.

§ 15201. Intention to create trust

15201. A trust is created only if the settlor properly manifests an intention to create a trust.

Comment. Section 15201 codifies Section 23 of the Restatement (Second) of Trusts (1957). This section restates a requirement of former Civil Code Section 2221(1) without substantive change. Special requirements may apply to the manifestation of the settlor's intent. See Sections 15206 (Statute of Frauds as applied to trust of real property), 15207 (oral trust of personal property).

§ 15202. Trust property

15202. A trust is created only if there is trust property.

Comment. Section 15202 is the same as Section 74 of the Restatement (Second) of Trusts (1957). Section 15202 restates a requirement of former Civil Code Sections 2221 and 2222 without substantive change. See also Section 62 ("property" defined). For additional comments concerning the nature of property required to form a trust, see Restatement (Second) of Trusts §§ 75-86 (1957).

§ 15203. Trust purpose

15203. A trust may be created for any purpose that is not illegal or against public policy.

Comment. Section 15203 restates former Civil Code Section 2220 without substantive change. See also Civil Code §§ 1667-1669 (unlawful contracts).

§ 15204. Trust for indefinite or general purposes

15204. A trust created for an indefinite or general purpose is not invalid for that reason if it can be determined with reasonable certainty that a particular use of the trust property comes within that purpose.

Comment. Section 15204 is new. Under this section, a trust for indefinite or general purposes may be created and enforced, even though it is not limited to charitable purposes. This changes the rule applicable under cases such as *In re Estate of Sutro*, 155 Cal. 727, 730, 102 P. 920 (1907). This section is not intended to

affect the law relating to the purposes for which a charitable trust may be created.

§ 15205. **Designation of beneficiary**

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

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

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

(2) A grant of a power to the trustee or some other person to select the beneficiaries based on a standard or in the discretion of the trustee or other person.

Comment. Subdivision (a) of Section 15205 restates a requirement in former Civil Code Sections 2221 and 2222 as it applied to private (i.e., noncharitable) trusts. As provided in subdivision (a), this section does not govern the beneficiary designations in charitable trusts. This subject is left to case law. See Section 15002 (common law as law of state).

Subdivision (b) continues the requirement of former Civil Code Sections 2221 and 2222 that the beneficiary be indicated with "reasonable certainty," but also permits trusts to describe a beneficiary or class of beneficiaries in a less strict fashion so long as it can be determined that someone satisfies the criteria in the trust instrument. Under subdivision (b) (1), the determination of the class of beneficiaries can satisfy the requirements of this section if the class is ascertainable presently or in the future. Subdivision (b) (2) affords the settlor a greater degree of flexibility in creating a trust. Under subdivision (b) (2), a disposition that would be valid as a power of appointment will not fail just because it is made in trust. *Cf. In re Estate of Davis*, 13 Cal. App. 2d 64, 69, 56 P.2d 584 (1936) (testamentary disposition in trust to distribute to sons and grandchildren as trustee upheld as power of appointment).

§ 15206. **Statute of Frauds**

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

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

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

(c) By operation of law.

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

§ 15207. Oral trust of personal property

15207. (a) The existence and terms of an oral trust of personal property may be established only by clear and convincing evidence.

(b) The oral declaration of the settlor, standing alone, is not sufficient evidence of the creation of a trust of personal property.

(c) In the case of an oral trust, a reference in this division or elsewhere to a trust instrument or declaration means the terms of the trust as established pursuant to subdivision (a).

Comment. Subdivision (a) of Section 15207 codifies the rule requiring clear and convincing evidence of the creation of an oral trust in personal property. See, e.g., *Lefrooth v. Prentice*, 202 Cal. 215, 227, 259 P. 947 (1927); *Monell v. College of Physicians & Surgeons*, 198 Cal. App. 2d 38, 48, 17 Cal. Rptr. 744 (1961); *Kobida v. Hinkelman*, 53 Cal. App. 2d 186, 188-93, 127 P.2d 657 (1942). Under this rule, circumstantial evidence is not sufficient. See *Fahrney v. Wilson*, 180 Cal. App. 2d 694, 697, 4 Cal. Rptr. 670 (1960).

Subdivision (b) provides a new requirement for the validity of oral trusts. Under subdivision (b), a delivery of personal property to another person accompanied by an oral declaration by the transferor that the transferee holds it in trust for a beneficiary creates a valid oral trust. Constructive delivery, such as by earmarking property or recording it in the name of the transferee, is also sufficient to comply with subdivision (b).

Subdivision (c) is intended to facilitate application of trust statutes to properly established oral trusts. Although Section 15400 provides that a trust is revocable unless the trust instrument expressly makes it irrevocable, an oral trust may be shown to be irrevocable pursuant to this section.

Nothing in this section affects the law concerning constructive trusts. See Section 15003 and the Comment thereto. Hence, in appropriate circumstances, an attempted disposition of property that fails to satisfy the requirements for an oral trust under Section 15207 may be remedied through the mechanism of a constructive trust.

§ 15208. Consideration

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

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

§ 15209. Exception to doctrine of merger

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

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

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

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

**CHAPTER 2. RESTRICTIONS ON VOLUNTARY
AND INVOLUNTARY TRANSFERS**

§ 15300. Restraint on transfer of income

15300. Except as provided in Sections 15304 to 15307, inclusive, if the trust instrument provides that a beneficiary's interest in income is not subject to voluntary or involuntary transfer, the beneficiary's

interest in income under the trust may not be transferred and is not subject to enforcement of a money judgment until paid to the beneficiary.

Comment. Section 15300 continues the power of a settlor to restrain transfer of the beneficiary's interest in income that was provided in former Civil Code Section 867. The reference in former Civil Code Section 867 to restraints during the life of the beneficiary or for a term of years is not continued because it is unnecessary. The settlor is free to impose a restraint for a term of years under Section 15300.

For qualifications of the protection provided by Section 15300, see Sections 15304 (settlor as beneficiary), 15305 (claim for child or spousal support), 15306 (claim for reimbursement of public support), 15306.5 (right of general creditors to reach maximum of one-fourth of payments due beneficiary), 15307 (amount of income in excess of amount needed for education and support subject to creditors' claims). Once the income is paid to the beneficiary, it is subject to claims of creditors. *Kelly v. Kelly*, 11 Cal. 2d 356, 362-65, 79 P.2d 1059 (1938).

§ 15301. Restraint on transfer of principal

15301. (a) Except as provided in subdivision (b) and in Sections 15304 to 15307, inclusive, if the trust instrument provides that a beneficiary's interest in principal is not subject to voluntary or involuntary transfer, the beneficiary's interest in principal may not be transferred and is not subject to enforcement of a money judgment until paid to the beneficiary.

(b) After an amount of principal has become due and payable to the beneficiary under the trust instrument, upon petition to the court under Section 709.010 of the Code of Civil Procedure by a judgment creditor, the court may make an order directing the trustee to satisfy the money judgment out of that principal amount. The court in its discretion may issue an order directing the trustee to satisfy all or part of the judgment out of that principal amount.

Comment. Subdivision (a) of Section 15301 makes clear that a restraint on voluntary or involuntary transfer of principal is valid. This rule is consistent with the result in several California cases. See *Seymour v. McAvoy*, 121 Cal. 438, 444, 53 P. 946 (1898) (creditor could not reach contingent remainder); *San Diego Trust & Sav. Bank v. Heustis*, 121 Cal. App. 675, 683-84, 694-97, 10 P.2d 158 (1932) (where husband was income and remainder

beneficiary, estranged wife could not reach trust funds for support); *Coughran v. First Nat'l Bank*, 19 Cal. App. 2d 152, 64 P.2d 1013 (1937) (in an action to quiet title, attachment levied against beneficiary's contingent fractional interest in trust property was held invalid). There was no clear holding under former California law as to the validity of disabling restraints on transfer of trust principal by a vested remainder beneficiary.

Subdivision (b) permits a creditor to reach principal that is due or payable to the beneficiary, notwithstanding a spendthrift provision in the trust. Under former California law, there was no decision determining whether a judgment creditor could reach principal held by the trustee that was due or payable where the beneficiary's interest was subject to a restraint on transfer.

For qualifications of the protection provided by Section 15301, see Sections 15304 (settlor as beneficiary), 15305 (claim for child or spousal support), 15306 (claim for reimbursement of public support), 15306.5 (right of general creditors to reach maximum of one-fourth of payments due beneficiary), 15307 (amount of income in excess of amount needed for education and support subject to creditors' claims). Where trust principal that was subject to a restraint on transfer has been paid to the beneficiary, it is subject to the claims against the beneficiary. See *Kelly v. Kelly*, 11 Cal. 2d 356, 362-65, 79 P.2d 1059 (1938).

§ 15302. Trust for support

15302. Except as provided in Sections 15304 to 15307, inclusive, if the trust instrument provides that the trustee shall pay income or principal or both for the education or support of a beneficiary, the beneficiary's interest in income or principal or both under the trust, to the extent the income or principal or both is necessary for the education or support of the beneficiary, may not be transferred and is not subject to the enforcement of a money judgment until paid to the beneficiary.

Comment. Section 15302 is the same in substance as Section 154 of the Restatement (Second) of Trusts (1957), but is drafted to make clear that the protection applies to the extent that a trust provides for the education or support of the beneficiary and not only where the trust provides solely for the payment of an amount for education or support. Section 15302 is consistent with prior California law. See former Civil Code § 859; *Seymour v. McAvoy*, 121 Cal. 438, 442-44, 53 P. 946 (1898).

For qualifications of the protection provided by Section 15302, see Sections 15304 (settlor as beneficiary), 15305 (claim for child

or spousal support), 15306 (claim for reimbursement of public support), 15306.5 (right of general creditors to reach maximum of one-fourth of payments due beneficiary), 15307 (amount of income in excess of amount needed for education and support subject to creditors' claims).

§ 15303. Transferee or creditor cannot compel trustee to exercise discretion; liability of trustee for payment to or for beneficiary

15303. (a) If the trust instrument provides that the trustee shall pay to or for the benefit of a beneficiary so much of the income or principal or both as the trustee in the trustee's discretion sees fit to pay, a transferee or creditor of the beneficiary may not compel the trustee to pay any amount that may be paid only in the exercise of the trustee's discretion.

(b) If the trustee has knowledge of the transfer of the beneficiary's interest or has been served with process in a proceeding under Section 709.010 of the Code of Civil Procedure by a judgment creditor seeking to reach the beneficiary's interest, and the trustee pays to or for the benefit of the beneficiary any part of the income or principal that may be paid only in the exercise of the trustee's discretion, the trustee is liable to the transferee or creditor to the extent that the payment to or for the benefit of the beneficiary impairs the right of the transferee or creditor. This subdivision does not apply if the beneficiary's interest in the trust is subject to a restraint on transfer that is valid under Section 15300 or 15301.

(c) This section applies regardless of whether the trust instrument provides a standard for the exercise of the trustee's discretion.

(d) Nothing in this section limits any right the beneficiary may have to compel the trustee to pay to or for the benefit of the beneficiary all or part of the income or principal.

Comment. Subdivisions (a) and (b) of Section 15303 are drawn from Section 155 of the Restatement (Second) of Trusts (1957), and provide that a judgment creditor cannot compel the trustee of a discretionary trust to pay any part of the discretionary trust income or principal, although a judgment creditor may be able to reach any payment the trustee does

decide to make. Subdivisions (a) and (b) are consistent with prior California law. See *Canfield v. Security-First Nat'l Bank*, 13 Cal. 2d 1, 30-31, 87 P.2d 830 (1939) (citing Restatement of Trusts § 155); *Alvis v. Bank of America*, 95 Cal. App. 2d 118, 124, 212 P.2d 608 (1949).

Unlike Section 155 of the Restatement, Section 15303 applies whether or not the trustee's discretion is subject to a standard. See Section 15303(c). The Restatement provision applies only where the trustee has "uncontrolled discretion." Accordingly, under Section 15303, even though the beneficiary of the trust could compel the trustee to make payment pursuant to the standard set out in the trust instrument, the transferee or creditor has no similar right to compel the payment.

Subdivision (d) of Section 15303 makes clear that the section does not affect or limit any right the beneficiary (as distinguished from a transferee or creditor of the beneficiary) may have to compel payment. See *Estate of Ferrall*, 41 Cal. 2d 166, 258 P.2d 1009 (1953) (whether fraud, bad faith, or an abuse of discretion has been committed by trustees in refusing to make payments for the support of the beneficiary of a discretionary trust is subject to review by the court). See also *Estate of Miller*, 230 Cal. App. 2d 888, 41 Cal. Rptr. 410 (1964) (court required trustee to make payments to beneficiary).

§ 15304. Where settlor is a beneficiary

15304. (a) If the settlor is a beneficiary of a trust created by the settlor and the settlor's interest is subject to a provision restraining the voluntary or involuntary transfer of the settlor's interest, the restraint is invalid against transferees or creditors of the settlor. The invalidity of the restraint on transfer does not affect the validity of the trust.

(b) If the settlor is the beneficiary of a trust created by the settlor and the trust instrument provides that the trustee shall pay income or principal or both for the education or support of the beneficiary or gives the trustee discretion to determine the amount of income or principal or both to be paid to or for the benefit of the settlor, a transferee or creditor of the settlor may reach the maximum amount that the trustee could pay to or for the benefit of the settlor under the trust instrument, not exceeding the amount of the settlor's proportionate contribution to the trust.

Comment. The first sentence of subdivision (a) of Section 15304 is the same in substance as Section 156(1) of the Restatement (Second) of Trusts (1957). See the comments to Restatement § 156. Subdivision (a) codifies the case-law rule applicable under former law. See, e.g., *Nelson v. California Trust Co.*, 33 Cal. 2d 501, 202 P.2d 1021 (1949). This section does not affect the protection of certain pension trusts by Code of Civil Procedure Section 704.115. See Section 82 ("trusts" defined to exclude trusts for the primary purpose of paying pensions).

Subdivision (b) is drawn from Section 156(2) of the Restatement (Second) of Trusts (1957). The limitation on the amount that may be reached by transferees and creditors to the proportionate amount of the settlor's contribution is drawn from Wisconsin law. See Wis. Stat. Ann. § 701.06(6) (West 1981); see also the comments to Restatement § 156.

A person who furnishes the consideration for the creation of a trust is the settlor. *McColgan v. Walter Magee, Inc.*, 172 Cal. 182, 155 P. 995 (1916) (beneficiary transferred assets into trust although certain other persons could have prevented transfer by refusal to consent); *Parscal v. Parscal*, 148 Cal. App. 3d 1098, 1104, 196 Cal. Rptr. 462 (1983) (child support enforceable against beneficiary's interest in trust created by beneficiary's employers under a collective bargaining agreement with benefit credits according to the amount contributed by employers to employee's account).

§ 15305. Claims for child or spousal support

15305. (a) As used in this section, "support judgment" means a money judgment for support of the trust beneficiary's spouse or former spouse or minor child.

(b) If the beneficiary has the right under the trust to compel the trustee to pay income or principal or both to or for the benefit of the beneficiary, the court may, to the extent that the court determines it is equitable and reasonable under the circumstances of the particular case, order the trustee to satisfy all or part of the support judgment out of all or part of those payments as they become due and payable, presently or in the future.

(c) Whether or not the beneficiary has the right under the trust to compel the trustee to pay income or principal or both to or for the benefit of the beneficiary, the court may, to the extent that the court determines it is equitable and reasonable under the circumstances of the

particular case, order the trustee to satisfy all or part of the support judgment out of all or part of future payments that the trustee, pursuant to the exercise of the trustee's discretion, determines to make to or for the benefit of the beneficiary.

(d) This section applies to a support judgment notwithstanding any provision in the trust instrument.

Comment. Section 15305 is drawn in part from a provision of Wisconsin law relating to enforcement of child support. See Wis. Stat. Ann. § 701.06(4) (West 1981). Section 15305 reflects the same public policy as Section 157(a) of the Restatement (Second) of Trusts (1957). To obtain relief under Section 15305, the judgment creditor under the support judgment must file a petition with the court under Section 709.010 of the Code of Civil Procedure.

Although a trust is a spendthrift trust or a trust for support, the interest of the beneficiary can be reached in satisfaction of a money judgment against the beneficiary for child or spousal support. In some cases a spendthrift clause may be construed as not intended to exclude the beneficiary's dependents. Even if the clause is construed as applicable to claims of the dependents for support, it is against public policy to give full effect to the provision. A provision in the trust is not effective to exempt the trust from enforcement of a judgment for support of a minor child or support of a spouse or former spouse. See subdivision (b). As a general rule, the beneficiary should not be permitted to have the enjoyment of the interest under the trust while neglecting to support his or her dependents. It is a matter for the exercise of discretion by the court as to how much of the amount payable to the beneficiary under the trust should be applied for such support and how much the beneficiary should receive. Even though the beneficiary's spouse has obtained an order directing the beneficiary to pay a specified amount for support, the spouse cannot compel the trustee to pay the full amount ordered unless the court determines that it is equitable and reasonable under the circumstances of the particular case to compel the trustee to make the payment. The result is much the same as though the trust were created not solely for the benefit of the beneficiary, but also for the benefit of the beneficiary's dependents. *Cf.* Estate of Johnston, 252 Cal. App. 2d 923, 927-30, 60 Cal. Rptr. 852 (1967) (discussion of public policy in light of former Civil Code § 859).

Section 15305 changes California law. Code of Civil Procedure Section 709.010 formerly included a provision giving the court discretion to divide periodic payments to a beneficiary from a trust (including a spendthrift trust) between the beneficiary and

the person or persons entitled to child or spousal support from the beneficiary. The amount that could be applied to child or spousal support was limited to the amount that could have been applied to child or spousal support on a like amount of earnings. This provision has been removed from Section 709.010, leaving Section 15305 to govern this situation. Apart from the provision in Code of Civil Procedure Section 709.010, under former law child or spousal support was not a preferred claim against the interest of a trust beneficiary, and the support claimant was treated the same as any other creditor. See, e.g., *Estate of Lawrence*, 267 Cal. App. 2d 77, 82-83, 72 Cal. Rptr. 851 (1968) (former wife); *Canfield v. Security-First Nat'l Bank*, 8 Cal. App. 2d 277, 288-89, 48 P.2d 133 (1935) (former wife); *San Diego Trust & Sav. Bank v. Heustis*, 121 Cal. App. 2d 675, 683-94, 10 P.2d 158 (1932) (estranged wife); *Estate of Johnston*, 252 Cal. App. 2d 923, 928-29, 60 Cal. Rptr. 852 (1967) (minor child); but see *Parscal v. Parscal*, 148 Cal. App. 3d 1098, 1104-05, 196 Cal. Rptr. 462 (1983) (child support enforceable against beneficiary's interest in trust created by beneficiary's employers under a collective bargaining agreement where employer's contributions based on employee's hours of work); cf. *Estate of Lackmann*, 156 Cal. App. 2d 674, 678-83, 320 P.2d 186 (1958) (state institution in which beneficiary of a spendthrift trust was an inmate permitted to reach the beneficiary's interest).

§ 15306. Liability for public support

15306. (a) Notwithstanding any provision in the trust instrument, if a statute of this state makes the beneficiary liable for reimbursement of this state or a local public entity in this state for public support furnished to the beneficiary or to the beneficiary's spouse or minor child, upon petition to the court under Section 709.010 of the Code of Civil Procedure by the appropriate state or local public entity or public official, to the extent the court determines it is equitable and reasonable under the circumstances of the particular case, the court may do the following:

(1) If the beneficiary has the right under the trust to compel the trustee to pay income or principal or both to or for the benefit of the beneficiary, order the trustee to satisfy all or part of the liability out of all or part of the payments as they become due, presently or in the future.

(2) Whether or not the beneficiary has the right under the trust to compel the trustee to pay income or principal

or both to or for the benefit of the beneficiary, order the trustee to satisfy all or part of the liability out of all or part of the future payments that the trustee, pursuant to the exercise of the trustee's discretion, determines to make to or for the benefit of the beneficiary.

(3) If the beneficiary is a settlor or the spouse or minor child of the settlor and the beneficiary does not have the right under the trust to compel the trustee to pay income or principal or both to or for the benefit of the beneficiary, to the extent that the trustee has the right to make payments of income or principal or both to or for the beneficiary pursuant to the exercise of the trustee's discretion, order the trustee to satisfy all or part of the liability without regard to whether the trustee has then exercised or may thereafter exercise the discretion in favor of the beneficiary.

(b) Subdivision (a) does not apply to any trust that is established for the benefit of an individual who has a disability that substantially impairs the individual's ability to provide for his or her own care or custody and constitutes a substantial handicap.

Comment. Section 15306 is drawn from Wisconsin law. See Wis. Stat. Ann. § 701.06(5)-(5m) (West 1981). Subdivision (a) of Section 15306 is generally consistent with prior California law which permitted a state institution in which the beneficiary of a spendthrift trust was an inmate to reach the beneficiary's interest. See *Estate of Lackmann*, 156 Cal. App. 2d 674, 678-83, 320 P.2d 186 (1958) (citing Restatement of Trusts § 157). This section applies to reimbursement for public support provided in the form of welfare furnished to an individual who is not in an institution as well as aid furnished while the individual is a resident of a state institution. See, e.g., Welf. & Inst. Code §§ 903 (liability for support of minor under order of juvenile court), 17403 (liability for support of indigent from public funds). However, subdivision (a) of Section 15306 makes clear that the state or local agency has the right to reach the beneficiary's interest for reimbursement of support provided to the spouse or minor child of the beneficiary. Subdivision (b) limits the right of the state or a local agency to reach the beneficiary's interest in welfare cases where the trust was established to provide for the care of a disabled beneficiary who is unable to provide for his or her own care or custody. This limitation is intended to encourage potential settlors to provide in a trust for the care or support of a disabled person without the risk that the benefits of the trust

will be taken to reimburse a public agency for a minimal level of support provided by the public agency.

§ 15306.5 Rights of general creditors

15306.5. (a) Notwithstanding a restraint on transfer of the beneficiary's interest in the trust under Section 15300 or 15301, and subject to the limitations of this section, upon a judgment creditor's petition under Section 709.010 of the Code of Civil Procedure, the court may make an order directing the trustee to satisfy all or part of the judgment out of the payments to which the beneficiary is entitled under the trust instrument or that the trustee, in the exercise of the trustee's discretion, has determined or determines in the future to pay to the beneficiary.

(b) An order under this section may not require that the trustee pay in satisfaction of the judgment an amount exceeding 25 percent of the payment that otherwise would be made to, or for the benefit of, the beneficiary.

(c) An order under this section may not require that the trustee pay in satisfaction of the judgment any amount that the court determines is necessary for the support of the beneficiary and all the persons the beneficiary is required to support.

(d) An order for satisfaction of a support judgment, as defined in Section 15305, has priority over an order to satisfy a judgment under this section. Any amount ordered to be applied to the satisfaction of a judgment under this section shall be reduced by the amount of an order for satisfaction of a support judgment under Section 15305, regardless of whether the order for satisfaction of the support judgment was made before or after the order under this section.

(e) If the trust gives the trustee discretion over the payment of either principal or income of a trust, or both, nothing in this section affects or limits that discretion in any manner. The trustee has no duty to oppose a petition to satisfy a judgment under this section or to make any claim for exemption on behalf of the beneficiary. The trustee is not liable for any action taken, or omitted to be taken, in compliance with any court order made under this section.

(f) Subject to subdivision (d), the aggregate of all orders for satisfaction of money judgments against the beneficiary's interest in the trust may not exceed 25 percent of the payment that otherwise would be made to, or for the benefit of, the beneficiary.

Comment. Section 15306.5 restates the substance of former provisions of Code of Civil Procedure Section 709.010. Subdivision (a) permits general creditors to seek to satisfy a money judgment from payments that are to be made to a trust beneficiary. This right applies to payments that are required by the terms of the trust, or that are determined by the trustee in the exercise of the trustee's discretion under the trust. Subdivision (e), however, makes clear that the right of the creditor does not affect any discretion the trustee may have under the trust instrument to change the amount of the payment, or even to cease payment altogether. See also Section 15307 (creditor's right to reach income in excess of amount for education and support). As provided in the introductory clause, this creditor's right applies regardless of a restraint on transfer provided in the trust instrument.

The creditor's right under subdivision (a) is subject to important limitations provided in subdivisions (b) and (c). Subdivision (b) provides a maximum amount that the creditor can reach, equal to 25% of each payment. This provision is comparable to the rule that applied under former subdivision (c) of Code of Civil Procedure Section 709.010 (incorporating the wage garnishment withholding standard of Code of Civil Procedure Section 706.050). See Code Civ. Proc. § 706.050 and the Comment thereto.

Subdivision (c) protects part or all of the payment that otherwise would be applied to the judgment where the amount is necessary for the support of the beneficiary and persons the beneficiary is required to support. This provision is comparable to Code of Civil Procedure Section 706.051 (wage garnishment exemption) which was incorporated by former subdivision (c) of Code of Civil Procedure Section 709.010 for purposes of enforcement of money judgments against trust payments.

Subdivision (d) makes clear that an order in favor of a creditor under this section is subject to the claim of a creditor who has obtained an order for enforcement of a support judgment, i.e., a minor child, spouse, or former spouse. The second sentence of subdivision (d) makes clear that the priority of support judgments does not depend on the time of issuance of the order for enforcement. This scheme is comparable to the priority that

applies to earnings withholding orders under the Wage Garnishment Law. See Code Civ. Proc. § 706.030(b)(2). It should also be noted that while a spouse, former spouse, or minor child enforcing a support judgment may use this section, in the normal case, support creditors will apply under Section 15305. The limitations provided in this section do not apply to enforcement of a support judgment under Section 15305.

Subdivision (e) continues former subdivision (e) of Code of Civil Procedure Section 709.010 without substantive change.

Subdivision (f) limits the aggregate amount of the beneficiary's interest in one trust that is subject to enforcement where several creditors have obtained orders. Thus, if one creditor is receiving 25% of the payment that otherwise would have been made to the beneficiary, a second general creditor will not be able to reach any of the payment in the hands of the trustee. If one creditor is receiving 15%, a second general creditor can reach only 10% of the original amount of the payment. Of course, the aggregate amount of all orders may be less than 25% if the court has determined under subdivision (c) that more than 75% of the original payment is necessary for the beneficiary's support. The introductory clause of subdivision (f) recognizes that the 25% limitation does not affect the amount that may be reached in satisfaction of a support judgment.

§ 15307. Income in excess of amount for education and support subject to creditors' claims

15307. Notwithstanding a restraint on transfer of a beneficiary's interest in the trust under Section 15300 or 15301, any amount to which the beneficiary is entitled under the trust instrument or that the trustee, in the exercise of the trustee's discretion, has determined to pay to the beneficiary in excess of the amount that is or will be necessary for the education and support of the beneficiary may be applied to the satisfaction of a money judgment against the beneficiary. Upon the judgment creditor's petition under Section 709.010 of the Code of Civil Procedure, the court may make an order directing the trustee to satisfy all or part of the judgment out of the beneficiary's interest in the trust.

Comment. Section 15307 replaces former Civil Code Section 859. While Sections 15305 and 15306 permit only certain preferred creditors to reach the beneficiary's interest in the trust, Section 15307 permits an ordinary creditor to reach income under limited circumstances. To obtain relief under Section 15307, the judgment creditor must file a petition under Section 709.010 of the Code of Civil Procedure. See Code Civ. Proc.

§ 709.010(b). Under Code of Civil Procedure Section 709.010, the court may make a continuing order for application of future payments to the satisfaction of the judgment. It should also be noted, however, that a creditor does not have the power to compel the trustee to exercise discretion. See Section 15303.

The introductory clause of Section 15307 makes clear that this section applies only to a trust in which transfer of the beneficiary's interest is restrained. Section 15307 does not apply to enforcement against a trust that does not restrain transfer of the beneficiary's interest; the entire interest of a beneficiary under such a trust may be applied to the satisfaction of a money judgment under Code of Civil Procedure Section 709.010.

A station-in-life test is used to determine the amount necessary for education and support under this section. See *Canfield v. Security-First Nat'l Bank*, 13 Cal. 2d 1, 21-24, 87 P.2d 830 (1939); *Magner v. Crooks*, 139 Cal. 640, 642, 73 P. 585 (1903); *Smith v. Smith*, 51 Cal. App. 2d 29, 35-38, 124 P.2d 117 (1942); *cf. Alvis v. Bank of America*, 95 Cal. App. 2d 118, 122-24, 212 P.2d 608 (1949) (beneficiary who had disappeared). The California Supreme Court has rejected the more extreme New York cases, but has continued to embrace the station-in-life test which considers factors such as the social background of the beneficiary. See, e.g., *Canfield v. Security-First Nat'l Bank*, 13 Cal. 2d 1, 24-28, 87 P.2d 830 (1939). If the trustee has discretion to determine the disposition of the trust income, the trustee may be able to defeat the creditor's attempt to reach the excess income under this section by reducing the amount to be paid to the beneficiary to the amount determined by the court to be necessary for the support and education of the beneficiary. See *Estate of Canfield*, 80 Cal. App. 2d 443, 450-52, 181 P.2d 732 (1947); *E. Griswold, Spendthrift Trusts* § 428 (2d ed. 1947).

Other provisions may permit a creditor of the beneficiary to satisfy all or part of the creditor's claim out of all or part of the payments of the income or principal as they fall due, presently or in the future. See Sections 15305 (child or spousal support), 15306 (public support); see also Section 15304 (settlor as beneficiary).

§ 15308. Subsequent modification of court's order

15308. Any order entered by a court under Section 15305, 15306, 15306.5, or 15307 is subject to modification upon petition of an interested person filed in the court where the order was made.

Comment. Section 15308 is drawn from Wisconsin law. See Wis. Stat. Ann. § 701.06(7) (West 1981). See also Section 48 ("interested person" defined).

§ 15309. Disclaimer not a transfer

15309. A disclaimer or renunciation by a beneficiary of all or part of his or her interest under a trust shall not be considered a transfer under Section 15300 or 15301.

Comment. Section 15309 is drawn from Wisconsin law. See Wis. Stat. Ann. § 701.06(3) (West 1981).

**CHAPTER 3. MODIFICATION AND
TERMINATION OF TRUSTS**

§ 15400. Presumption of revocability

15400. Unless a trust is expressly made irrevocable by the trust instrument, the trust is revocable by the settlor. This section applies only where the settlor is domiciled in this state when the trust is created, where the trust instrument is executed in this state, or where the trust instrument provides that the law of this state governs the trust.

Comment. The first sentence of Section 15400 restates part of the first sentence of former Civil Code Section 2280 without substantive change. For the procedure for revoking a trust, see Section 15401. See also Section 15402 (power to revoke includes power to modify). The second sentence of Section 15400 is a new provision that limits the application of the California rule presuming revocability.

§ 15401. Method of revocation by settlor

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

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

(2) By a writing (other than a will) signed by the settlor and delivered to the trustee during the lifetime of the settlor. If the trust instrument explicitly makes the method of revocation provided in the trust instrument the exclusive method of revocation, the trust may not be revoked pursuant to this paragraph.

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

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

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

Comment. Subdivision (a) of Section 15401 supersedes part of the first sentence of former Civil Code Section 2280. The settlor may revoke a revocable trust in the manner provided in subdivision (a) (2), unless there is a contrary provision in the trust. This rule differs from the case law rule under the former statute. See *Rosenauer v. Title Ins. & Trust Co.*, 30 Cal. App. 3d 300, 304, 106 Cal. Rptr. 321 (1973). The settlor may not revoke a trust by a will under subdivision (a) (2), even if the will purporting to revoke is delivered to the trustee during the lifetime of the settlor. However the settlor may revoke by will if the trust so provides, pursuant to subdivision (a) (1). See Restatement (Second) of Trusts § 330 comment j (1957).

Subdivision (b) is new. See also Civil Code §§ 2400-2407 (Uniform Durable Power of Attorney Act), 2450-2473 (statutory short form power of attorney). Under subdivision (b), a provision in the power of attorney permitting the attorney in fact to revoke the trust is ineffective unless the trust instrument expressly authorizes revocation by the attorney in fact. See, e.g., Civil Code § 2467(a) (5) (provision in statutory power of attorney form permitting exercise of principal's power to revoke).

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

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

§ 15402. Power to revoke includes power to modify

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

Comment. Section 15402 is new and codifies the general rule that a power of revocation implies the power of modification. See *Heifetz v. Bank of America Nat'l Trust & Sav. Ass'n*, 147 Cal. App. 2d 776, 781-82, 305 P.2d 979 (1957); Restatement (Second) of Trusts § 331 comment g (1957). An unrestricted power to modify may also include the power to revoke a trust. See *Heifetz v. Bank of America Nat'l Trust & Sav. Ass'n*, *supra*; Restatement (Second) of Trusts § 331 comment h. See also Sections 15600 (trustee's acceptance of modification of trust), 15601 (trustee's rejection of modification of trust).

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

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

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

Comment. Section 15403 is drawn from Section 337 of the Restatement (Second) of Trusts (1957). Unlike the Restatement, however, subdivision (b) gives the court some discretion in applying the material purposes doctrine except in situations where transfer of the beneficiary's interest is restrained, such as by a spendthrift provision. See Section 15300 (restraint on transfer of beneficiary's interest). Section 15403 permits termination of an irrevocable trust with the consent of all beneficiaries where the trust provides for successive beneficiaries or postpones enjoyment of a beneficiary's interest. The discretionary power provided in subdivision (b) also represents a change in the California case-law rule. See, e.g., *Moxley v. Title Ins. & Trust Co.*, 27 Cal. 2d 457, 462, 165 P.2d 15 (1946). Section 15403 is intended to provide some degree of flexibility in applying the material purposes doctrine in situations where transfer of the beneficiary's interest is not restrained. For provisions governing judicial proceedings, see Section 17200 *et*

seq. For provisions relating to obtaining consent of persons under an incapacity, see e.g., Civil Code §§ 2450, 2467 (statutory form of durable power of attorney); Prob. Code §§ 2580 (conservator), 15405 & 17208 (appointment of guardian ad litem). See also Section 15406 (no conclusive presumption of fertility). For provisions governing modification and termination of trusts where the consent of all beneficiaries cannot be obtained, see Sections 15408 (trust with uneconomically low principal) and 15409 (modification or termination by court order in changed circumstances). Subdivision (a) limits the application of this section to irrevocable trusts since if the trust is revocable by the settlor, the method of revocation is governed by Section 15401. Compare Section 15404 (modification or termination by settlor and all beneficiaries).

§ 15404. Modification or termination by settlor and all beneficiaries

15404. (a) If the settlor and all beneficiaries of a trust consent, they may compel the modification or termination of the trust.

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

(c) If the trust provides for the disposition of principal to a class of persons described only as "heirs" or "next of kin" of the settlor, or using other words that describe the class of all persons who would take under the rules of intestacy, the court may limit the class of beneficiaries whose consent is needed to compel the modification or termination of the trust to the beneficiaries who are reasonably likely to take under the circumstances.

Comment. Subdivisions (a) and (b) of Section 15404 are drawn from Section 338 of the Restatement (Second) of Trusts (1957). Subdivision (a) restates the substance of the rule formerly provided by the second sentence of the second paragraph of Civil Code Section 771 and supersedes part of former Civil Code Section 2258(a). A trust may be modified or terminated pursuant to this section without court approval, but a court order may be sought by petition under Section 17200. A revocable trust may be modified or terminated pursuant to this

section, as in a case where the method of modification or revocation specified in the trust is found to be overly restrictive. See Section 15401; compare Section 15801 (consent by beneficiary of revocable trust). However, nothing in this section affects the right of a settlor to revoke or modify a revocable trust under Section 15401. For provisions relating to obtaining consent of persons under an incapacity, see, e.g., Civil Code §§ 2450, 2467 (statutory form of durable power of attorney); Prob. Code §§ 2580 (conservator), 15405 & 17208 (appointment of guardian ad litem). See also Section 15406 (no conclusive presumption of fertility). A trust may be modified or terminated under this section regardless of any provision in the trust restraining transfer of the beneficiary's interest and regardless of whether its purposes have been achieved. See Restatement (Second) of Trusts § 338 comments b-d.

Subdivision (c) reinstates a limited form of the doctrine of worthier title. Under this subdivision, the need to obtain the consent of persons constituting the class of heirs or next of kin of the settlor may be excused by the court as to beneficiaries (typically unborn or remote beneficiaries) who are not reasonably likely to take principal under the trust. This limitation protects the interests of beneficiaries who are likely to take while permitting the settlor to modify or terminate an otherwise irrevocable trust in line with the probable intent of the settlor.

§ 15405. Guardian ad litem

15405. For the purposes of Section 15403 and 15404, the consent of a beneficiary who is legally incapacitated, unascertained, or unborn may be given in proceedings before the court by a guardian ad litem, if it would be appropriate to do so. In this case the guardian ad litem may rely on general family benefit accruing to living members of the beneficiary's family as a basis for approving a modification or termination of the trust.

Comment. Section 15405 recognizes that, where appropriate, a guardian ad litem may give consent to modification or termination on behalf of certain incapacitated beneficiaries. The second sentence of this section permits a non-pecuniary quid pro quo as a basis for protecting the interests of the beneficiaries represented by the guardian ad litem. This provision is drawn from Wisconsin law. Wis. Stat. Ann. § 701.12(2) (West 1981). Under this rule, the guardian ad litem may rely on the assumption that a benefit conferred on potential parents will ultimately benefit a child who might be born into the family. On the quid pro quo doctrine generally, see *Hatch v. Riggs Nat'l Bank*, 361 F.2d 559 (D.C. Cir. 1966).

§ 15406. No conclusive presumption of fertility

15406. In determining the class of beneficiaries whose consent is necessary to modify or terminate a trust pursuant to Section 15403 or 15404, the presumption of fertility is rebuttable.

Comment. Section 15406 abandons the "fertile octogenarian" doctrine as applied in the context of trust termination. Under this section, the way is open for the court to approve a termination where the possibility of the birth of additional beneficiaries is negligible. See Restatement (Second) of Trusts § 340 comment e (1957). Section 15406 thus adopts the modern view that fertility may not be a realistic issue or is subject to proof. See 4 A. Scott, *The Law of Trusts* § 340.1, at 2713 (3d ed. 1967). This section rejects the California case-law rule. See *Fletcher v. Los Angeles Trust & Sav. Bank*, 182 Cal. 177, 184, 187 P. 425 (1920); *Wogman v. Wells Fargo Bank & Union Trust Co.*, 123 Cal. App. 2d 657, 665, 267 P.2d 423 (1954).

§ 15407. Termination of trust; trustee's powers on termination

15407. (a) A trust terminates when any of the following occurs:

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

(b) On termination of the trust, the trustee continues to have the powers reasonably necessary under the circumstances to wind up the affairs of the trust.

Comment. Subdivision (a) of Section 15407 lists the ways in which trusts typically may terminate. Paragraph (1) is a new statutory provision that codifies a case-law rule. See *In re Estate of Hanson*, 159 Cal. 401, 405, 114 P. 810 (1911); Restatement (Second) of Trusts § 334 (1957). Paragraphs (2), (3), and (4) restate former Civil Code Section 2279 without substantive change. Paragraph (5) is a new statutory provision.

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

§ 15408. Trust with uneconomically low principal

15408. (a) On petition by a trustee or beneficiary, if the court determines that the fair market value of the principal of a trust has become so low in relation to the cost of administration that continuation of the trust under its existing terms will defeat or substantially impair the accomplishment of its purposes, the court may, in its discretion and in a manner that conforms as nearly as possible to the intention of the settlor, order any of the following:

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

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

(c) The existence of a trust provision restraining transfer of the beneficiary's interest does not prevent application of this section.

Comment. Subdivisions (a) and (c) of Section 15408 restate without substantive change subdivisions (a) and (d) of former Civil Code Section 2279.1 and subdivisions (a) and (d) of former Probate Code Section 1120.6. For provisions governing judicial proceedings, see Section 17200 *et seq.* See also Section 15800 (limits on rights of beneficiary of revocable trust).

Subdivision (b) is a new provision that gives the trustee the power to terminate a trust with a principal value of \$20,000 or less. In such case, the trustee need not seek court approval for termination of the trust; the presumption is established that a \$20,000 trust is inherently uneconomical. A trustee has discretion, however, to seek court approval under Section 17200(b)(5) (approval of trustee's accounts), and even in a case where the trustee has determined to terminate the trust under subdivision (b), the trustee may seek instructions on the correct manner of distributing the trust property. See Sections 15410 (disposition of property upon termination), 17200(b)(4) (determining to whom property passes on termination).

§ 15409. Modification or termination in changed circumstances

15409. (a) On petition by a trustee or beneficiary, the court may modify the administrative or dispositive provisions of the trust or terminate the trust if, owing to circumstances not known to the settlor and not anticipated by the settlor, the continuation of the trust under its terms would defeat or substantially impair the accomplishment of the purposes of the trust. In this case, if necessary to carry out the purposes of the trust, the court may order the trustee to do acts that are not authorized or are forbidden by the trust instrument.

(b) The court shall consider a trust provision restraining transfer of the beneficiary's interest as a factor in making its decision whether to modify or terminate the trust, but the court is not precluded from exercising its discretion to modify or terminate the trust solely because of a restraint on transfer.

Comment. Subdivision (a) of Section 15409 is drawn from Sections 167 and 336 of the Restatement (Second) of Trusts (1957). Subdivision (b) is drawn from a provision of the Texas Trust Code. See Tex. Prop. Code Ann. § 112.054 (Vernon 1984). See also Sections 15800 (limits on rights of beneficiary of revocable trust), 16201 (power of court to relieve trustee from restrictions on powers). Modification of the dispositive provisions of a trust for the support of a beneficiary may be appropriate, for example, in a case where the beneficiary has become unable to support himself or herself due to poor health or serious injury. See, e.g., *Whittingham v. California Trust Co.*, 214 Cal. 128, 4 P.2d 142 (1931). See also Civil Code § 726 (accelerated distribution of accumulations to destitute beneficiaries).

§ 15410. Disposition of property upon termination

15410. At the termination of a trust, the trust property shall be disposed of as follows:

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

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

(c) In any other case, as provided in the trust instrument or in a manner directed by the court that conforms as nearly as possible to the intention of the

settlor as expressed in the trust instrument. If a trust is terminated by the trustee pursuant to subdivision (b) of Section 15408, the trust property shall be distributed as determined by the trustee pursuant to this subdivision.

Comment. Section 15410 is new. Subdivisions (a) and (b) recognize that the persons holding the power to modify a trust have the power to direct the manner of distribution of property upon termination. See Section 15402 (power to revoke includes power to modify), 15403 (termination by all beneficiaries), 15404 (termination by settlor and all beneficiaries). Subdivision (a) supersedes the part of former Civil Code Section 2280 relating to disposition of property upon revocation.

Subdivision (c) applies to the cases not described in subdivisions (a) and (b). Subdivision (c) is drawn in part from former Civil Code Section 2279.1(b) and former Probate Code Section 1120.6(b), which applied to termination of trusts with uneconomically low principal. Subdivision (c) also supersedes former Civil Code Section 864 (disposition of real property upon failure or termination of trust). Subdivision (c) applies to cases where the trust terminates under its own terms, such as the expiration of a term of years or the occurrence of an event. See Section 15407(a)(1)-(2). Subdivision (c) also applies to cases where the trust is terminated pursuant to a court order without the consent of the settlor and beneficiaries. See, e.g., Sections 15407(a)(3) (termination where trust purpose becomes unlawful), 15407(a)(4) (termination where trust purpose becomes impossible to fulfill), 15408 (termination of trust with uneconomically low principal), 15409 (termination in changed circumstances). The last sentence of subdivision (c) provides for its application in a case where a trustee has terminated a trust having a principal value of \$20,000 or less pursuant to Section 15408(b).

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

§ 15411. Combination of similar trusts

15411. If the terms of two or more trusts are substantially similar, on petition by a trustee or beneficiary, the court, for good cause shown, may combine the trusts if the court determines that administration as a single trust will not defeat or substantially impair the accomplishment of the trust purposes or the interests of the beneficiaries.

Comment. Section 15411 supersedes former Probate Code Section 1133. Unlike former law, Section 15411 applies to living trusts as well as testamentary trusts. In addition, a living trust and a testamentary trust may be combined under Section 15411. Trusts may be combined pursuant to Section 15411 only upon a petition pursuant to Section 17200(a) and (b)(14). See also Section 15800 (limits on rights of beneficiary of revocable trust). The requirement in former Probate Code Section 1133 that the trusts be "substantially identical" has been changed to "substantially similar." The reference to substantially impairing is also new; former Probate Code Section 1133 referred only to "impairing" the interests of beneficiaries. The former requirement that the combination be consistent with the intent of the settlor and facilitate administration of the trust is superseded by the requirement that the combination may not defeat or substantially impair accomplishment of trust purposes.

§ 15412. Division of trusts

15412. On petition by a trustee or beneficiary, the court, for good cause shown, may divide a trust into two or more separate trusts, if the court determines that dividing the trust will not defeat or substantially impair the accomplishment of the trust purposes or the interests of the beneficiaries.

Comment. Section 15412 supersedes the authority to divide trusts in subdivision (a)(14) of former Probate Code Section 1138.1. The former rule required the consent of all parties in interest, whereas Section 15412 provides a standard intended to protect the interests of beneficiaries without necessarily requiring their consent. Division of a trust may be appropriate, for example, in a situation where different members of a family desire their own separate trusts because of a disagreement or where a beneficiary has moved to a different part of the country. For provisions governing judicial proceedings, see Section 17200 *et seq.* See also Section 15800 (limits on rights of beneficiary of revocable trust).

PART 3. TRUSTEES AND BENEFICIARIES

CHAPTER 1. TRUSTEES

Article 1. General Provisions

§ 15600. Acceptance of trust by trustee

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

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

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

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

Comment. Subdivision (a) of Section 15600 is a new provision drawn from the Indiana Trust Code. See Ind. Code Ann. § 30-4-2-2(a)-(b) (West 1979). Subdivision (a) supersedes part of the introductory clause and subdivision (1) of former Civil Code Section 2222 and part of former Civil Code Section 2251. The provision in subdivision (a) (2) for acceptance of the trust by acts of the person named as trustee is consistent with case law. See, e.g., *Heitman v. Cutting*, 37 Cal. App. 236, 238, 174 P. 675 (1918). See also former Civil Code § 2258 (trustee of revocable trust to follow directions of settlor acceptable to trustee).

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

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

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

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

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

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

Comment. Section 15601 is a new provision drawn from the Indiana Trust Code. See Ind. Code Ann. § 30-4-2-2(c) (West 1979). Section 15601 supersedes former Probate Code Section 1124 which provided for rejection of certain testamentary trusts by filing a writing with the court clerk. Under this section, a trustee may reject new duties without having to resign as trustee. However, if a modification is rejected, the trustee remains subject to the duties and liabilities under the trust as it existed before the modification. The provision in subdivision (c) that a trustee who rejects the trust is not liable is consistent with Sections 16000 (duty to administer trust upon acceptance) and 16400 (violation of duty is breach of trust). See also Sections 15660 (appointment of trustee to fill vacancy), 17200(b) (10) (petition to appoint trustee). The appropriate recipient of the written rejection depends upon the circumstances of the case. Ordinarily, it would be appropriate to give the rejection to the person who informs the person of the proposed trusteeship. If proceedings involving the trust are pending, the rejection could be filed with the court clerk. In the case of a person named as trustee of a revocable living trust, it would be appropriate to give the rejection to the settlor. In any case it would be best to give notice of rejection to a beneficiary with a present interest in the trust since the beneficiary would be motivated to seek appointment of a new trustee.

§ 15602. Trustee's bond

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

(1) A bond is required by the trust instrument.

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

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

(b) Notwithstanding paragraph (1) of subdivision (a), the court may excuse a requirement of a bond, reduce or increase the amount of a bond, release a surety, or permit the substitution of another bond with the same or different sureties.

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

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

(e) A trust company may not be required to give a bond, notwithstanding a contrary provision in the trust instrument.

Comment. Subdivisions (a)-(c) of Section 15602 are drawn from Section 7-304 of the Uniform Probate Code (1977). Subdivision (a) (3) restates part of former Probate Code Section 1127 without substantive change, except that subdivision (a) (3) applies only to an individual trustee who is not named or nominated as an original or successor trustee in the trust instrument. See also Sections 15643 (vacancy in office of trustee), 15660 (appointment of trustee to fill vacancy). In other respects this section supersedes former Probate Code Sections 1127 (bond of trustee named by court) and 1127.5 (exception for substitute or successor trustee that is charitable corporation). Subdivision (d) supersedes the second sentence of former Probate Code Section 1127.

Subdivision (e) makes clear that a trust company is not required to give a bond. See Section 83 ("trust company" defined). This restates part of former Probate Code Sections 480 and 481 without substantive change. A nonprofit or charitable corporation that acts as trustee under a charitable trust is not a trust company, as defined in Section 83, and thus is subject to the

provisions of paragraphs (1) and (2) of subdivision (a) of this section relating to when a bond is required. A bond is required if the trust instrument requires it (subject to the court's power to excuse the bond) or if the bond is found by the court to be necessary to protect the interests of beneficiaries. But a bond is not required of a nonprofit or charitable corporation that is appointed as trustee under a charitable trust merely because the corporation is not named as a trustee in the trust instrument. For provisions relating to nonprofit or charitable corporations acting as trustees, see, e.g., Corp. Code §§ 5140(k) (power of nonprofit public benefit corporation to act as trustee), 7140(k) (power of nonprofit mutual benefit corporation to act as trustee), 9140(k) (power of nonprofit religious corporation to act as trustee); Gov't Code § 12582.1 ("charitable corporation" defined for purposes of Uniform Supervision of Trustees for Charitable Purposes Act).

§ 15603. Certificate of trustee

15603. On application by the trustee, the court clerk shall issue a certificate that the trustee is a duly appointed and acting trustee under the trust if the court file shows the incumbency of the trustee.

Comment. Section 15603 restates former Probate Code Section 1130.1 without substantive change and expands the former provision to cover living trusts.

Article 2. Cotrustees

§ 15620. Actions by cotrustees

15620. Unless otherwise provided in the trust instrument, a power vested in two or more trustees may only be exercised by their unanimous action.

Comment. Section 15620 restates former Civil Code Section 2268 without substantive change and supersedes the first part of former Civil Code Section 860. See also Section 16402 (trustee's liability to beneficiary for acts of cotrustee). Section 15620 also supersedes the part of former Civil Code Section 2240 relating to consent by cotrustees as to deposit of securities in a securities depository.

§ 15621. Vacancy in office of cotrustee

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

Comment. Section 15621 supersedes the second part of former Civil Code Section 860 and former Civil Code Section 2288. Under this section, a vacancy in the office of a cotrustee is disregarded in the operation of the trust so long as there is at least one trustee remaining. If the trust provides for majority rule, the remaining trustees act by majority vote of their number, even though the number of trustees constituting a majority is now less than before the vacancy occurred. In effect, the vacant positions are not counted in determining a quorum or in determining the number constituting a majority. This rule is subject to contrary provision in the trust instrument, as noted in the introductory clause. See also Sections 15643 (vacancy in office of trustee), 15660 (appointment of trustee to fill vacancy).

§ 15622. Temporary incapacity of cotrustee

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

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

Article 3. Resignation and Removal of Trustees

§ 15640. Resignation of trustee

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

- (1) As provided in the trust instrument.
- (2) In the case of a revocable trust, with the consent of the person holding the power to revoke the trust.
- (3) In the case of a trust that is not revocable, with the consent of all adult beneficiaries who are receiving or are entitled to receive income under the trust or to receive a distribution of principal if the trust were terminated at the time consent is sought.

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

(b) On petition by the trustee, the court shall accept the trustee's resignation. The court may also make any orders necessary for the preservation of the trust property, including the appointment of a receiver or a temporary trustee.

Comment. Subdivisions (a) (1), (a) (3), and (a) (4) of Section 15640 are similar to Section 106 of the Restatement (Second) of Trusts (1957), except that the class of persons whose consent is needed under subdivision (a) (3) is more restricted. For a provision governing acceptance of the trust, see Section 15600. Subdivision (a) (1) continues part of the second sentence of former Probate Code Section 1138.8 without substantive change. Subdivision (a) (2) is a new provision that recognizes that the person holding the power to revoke a revocable trust has control over the trust rather than the beneficiaries. See Section 15800. Subdivision (a) (3) supersedes former Civil Code Section 2282(d) which permitted discharge from the trust with the consent of "the beneficiary, if the beneficiary has capacity to contract." For provisions relating to consent by beneficiaries under an incapacity, see, e.g., Civil Code §§ 2450, 2467 (statutory form of durable power of attorney); Prob. Code §§ 2580 (conservator), 17208 (guardian ad litem). Subdivision (a) (4) restates the authority of the court under former law. See former Civil Code §§ 2282(e), 2283; former Prob. Code §§ 1125.1, 1138.1(a) (9), 1138.8. Under subdivision (a) (4) the court has authority to accept a resignation regardless of whether the trust provides a manner of resignation. Former Probate Code Section 1138.8 permitted the court to act where the trust was silent.

The provision that the trustee's resignation shall be accepted by the court in subdivision (b) restates part of the last sentence of the first paragraph of former Probate Code Section 1125.1 and part of the third sentence of former Probate Code Section 1138.8. The authority for protective orders in subdivision (b) restates part of the last sentence of the first paragraph of former Probate Code Section 1125.1 and part of the third sentence of former Probate Code Section 1138.8. See also Section 17206 (general authority to make necessary orders). For the procedure applicable to proceedings under subdivision (b), see Section 17200 *et seq.* See also Section 17200(b) (11) (petition to accept resignation of trustee).

§ 15641. Liability of resigning trustee

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

Comment. Section 15641 restates the first part of the second paragraph of former Probate Code Section 1125.1 and the first part of the last sentence of former Probate Code Section 1138.8 without substantive change. Section 15641 also supersedes the provisions of former Civil Code Section 2282 relating to discharge of trustees from liability. See also Sections 16460 (limitations on proceedings against trustee), 16461 (exculpation of trustee).

§ 15642. Removal of trustee

15642. (a) A trustee may be removed in accordance with the trust instrument or by the court on its own motion or on petition of a cotrustee or beneficiary.

(b) The grounds for removal of a trustee by the court include the following:

(1) Where the trustee has committed a breach of the trust.

(2) Where the trustee is insolvent or otherwise unfit to administer the trust.

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

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

(5) For other good cause.

(c) If it appears to the court that trust property or the interests of a beneficiary may suffer loss or injury pending a decision on a petition for removal of a trustee and any appellate review, the court may, on its own motion or on petition of a cotrustee or beneficiary, compel the trustee whose removal is sought to surrender trust property to a cotrustee or to a receiver or temporary trustee. The court may also suspend the powers of the trustee to the extent the court deems necessary.

Comment. Subdivision (a) of Section 15642 is the same in substance as Section 107 of the Restatement (Second) of Trusts (1957). The authority of the court to remove trustees continues authority found in former law. See former Civil Code §§ 2233, 2283; former Prob. Code §§ 1123.5, 1138.1(a)(10). The recognition that the trustee may be removed as provided in the trust instrument is new. See Restatement (Second) of Trusts

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

The statement of grounds for removal of the trustee by the court is drawn from the Texas Trust Code and the Restatement. See Tex. Prop. Code Ann. § 113.082(a) (Vernon 1984); Restatement (Second) of Trusts § 107 comments b-d (1957). Paragraphs (1) and (2) of subdivision (b) supersede parts of former Civil Code Sections 2233 and 2283 and part of the first sentence of former Probate Code Section 1123.5. The general language relating to a trustee being otherwise unfit to administer the trust subsumes the reference in former Section 1126 to a trustee who is incapable of acting. Paragraph (3) of subdivision (b) continues part of the second sentence of former Probate Code Section 1123.5 without substantive change, except that the reference to "ill feeling" is omitted as redundant with "hostility," and the word "continued" has been omitted since the test is whether the administration of the trust is impaired. Paragraph (4) of subdivision (b) continues part of the first sentence of former Probate Code Section 1126 and part of the first sentence of former Probate Code Section 1138.9 without substantive change. Paragraph (5) of subdivision (b) continues authority found in former Probate Code Sections 1126 and 1138.9.

Subdivision (c) continues former Probate Code Section 1138.2 without substantive change and restates former Probate Code Section 1123.6 without substantive change. See also Section 17206 (general authority to make necessary orders).

§ 15643. Vacancy in office of trustee

15643. There is a vacancy in the office of trustee in any of the following circumstances:

- (a) The person named as trustee rejects the trust.
- (b) The person named as trustee cannot be identified or does not exist.
- (c) The trustee resigns or is removed.
- (d) The trustee dies.
- (e) A conservator or guardian of the person or estate of an individual trustee is appointed.
- (f) The trustee files a petition for adjudication of bankruptcy or for approval of an arrangement, composition, or other extension under the federal Bankruptcy Code, or a petition filed against the trustee for any of these purposes is approved.

(g) A trust company's charter is revoked or powers are suspended, if the revocation or suspension is to be in effect for a period of 30 days or more.

(h) A receiver is appointed for a trust company if the appointment is not vacated within a period of 30 days.

Comment. Section 15643 restates the first paragraph (including subdivisions (1) and (2)) of former Civil Code Section 2281 without substantive change, except that the reference in former law to discharge of the trustee is omitted as unnecessary. Section 15643 also restates part of the first sentence of former Probate Code Section 1126 and part of the first sentence of former Probate Code Section 1138.9 without substantive change. Section 15643 supersedes part of former Civil Code Section 860 to the extent it related to the occurrence of a vacancy in the office of a trustee. For rules concerning filling a vacancy, see Section 15660. See also Sections 83 ("trust company" defined), 15601 (rejection of trust), 15640 (resignation of trustee), 15641 (liability of resigning trustee), 15642 (removal of trustee), 16460 (limitations on proceedings against trustee), 17200(b)(5) (petition to settle trustee's account), 18102 (protection of third person dealing with former trustee).

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

15644. When a vacancy has occurred in the office of trustee, the former trustee who holds property of the trust shall deliver the trust property to the successor trustee or a person appointed by the court to receive the property and remains responsible for the trust property until it is delivered. A trustee who has resigned or is removed has the powers reasonably necessary under the circumstances to preserve the trust property until it is delivered to the successor trustee and to perform actions necessary to complete the resigning or removed trustee's administration of the trust.

Comment. The first sentence of Section 15644 restates part of the second paragraph of former Probate Code Section 1125.1 and part of the last sentence of former Probate Code Section 1138.8 without substantive change. See Section 15643 (vacancy in office of trustee); see also Sections 16420(a)(4) (appointment of receiver or temporary trustee upon breach of trust), 17206 (authority to make necessary orders and appoint temporary trustee). The second sentence makes clear that a trustee who has resigned or is removed has the powers needed to complete the

trustee's remaining duties. The trustee who has resigned remains liable for actions or omissions during his or her term as trustee even after the property is delivered to the successor until liability is barred. See Section 16460 (limitations on proceedings against trustee).

Article 4. Appointment of Trustees

§ 15660. Appointment of trustee to fill vacancy

15660. (a) If the trust has no trustee or if the trust instrument requires a vacancy in the office of a cotrustee to be filled, the vacancy shall be filled as provided in this section.

(b) If the trust instrument provides a practical method of appointing a trustee or names the person to fill the vacancy, the vacancy shall be filled as provided in the trust instrument.

(c) If the vacancy in the office of trustee is not filled as provided in subdivision (b), on petition of a cotrustee or beneficiary, the court may, in its discretion, appoint a trustee to fill the vacancy. If the trust provides for more than one trustee, the court may, in its discretion, appoint the original number or any lesser number of trustees. In selecting a trustee, the court shall give consideration to the wishes of the beneficiaries who are 14 years of age or older.

Comment. Section 15660 supersedes former Civil Code Sections 2287 and 2289 and former Probate Code Sections 1125, 1126, and 1138.9. For a provision governing the occurrence of vacancies in the office of trustee, see Section 15643. Subdivision (a) makes clear that the vacancy in the office of a cotrustee must be filled only if the trust so requires. If the vacancy in the office of cotrustee is not filled, the remaining cotrustees may continue to administer the trust under Section 15621, unless the trust instrument provides otherwise. The provision in subdivision (b) relating to a "practical" method of appointing a trustee continues language found in former Civil Code Section 2287 and supersedes part of former Probate Code Section 1138.9.

The authority of the court to appoint the same or a lesser number of trustees in subdivision (c) continues the second sentence of former Civil Code Section 2289 without substantive change. The provision requiring the court to give consideration to the wishes of the beneficiaries in subdivision (c) supersedes

the second sentence of former Civil Code Section 2287. See Restatement (Second) of Trusts § 108 comment i (1957). Subdivision (c) gives the court discretion to fill a vacancy in a case where the trust does not name a successor who is willing to accept the trust, where the trust does not provide a practical method of appointment, or where the trust does not require the vacancy to be filled. For a limitation on the rights of certain beneficiaries of revocable trusts, see Section 15800. For the procedure applicable to judicial proceedings, see Section 17200 *et seq.* See also Section 17200(b)(10) (petition to appoint trustee).

Article 5. Compensation and Indemnification of Trustees

§ 15680. Trustee's compensation as provided in trust instrument; different compensation

15680. (a) Subject to subdivision (b), if the trust instrument provides for the trustee's compensation, the trustee is entitled to be compensated in accordance with the trust instrument.

(b) Upon proper showing, the court may fix or allow greater or lesser compensation than could be allowed under the terms of the trust in any of the following circumstances:

(1) Where the duties of the trustee are substantially different from those contemplated when the trust was created.

(2) Where the compensation in accordance with the terms of the trust would be inequitable or unreasonably low or high.

(3) In extraordinary circumstances calling for equitable relief.

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

Comment. Subdivision (a) of Section 15680 continues the first sentence of former Civil Code Section 2274 without substantive change and restates the first sentence of former Probate Code Section 1122 without substantive change. Subdivision (b) restates the second sentence of former Civil Code Section 2274 and the second sentence of former Probate

Code Section 1122 without substantive change, except that subdivision (b) makes clear that the court can reduce the trustee's compensation when appropriate. Subdivision (c) makes clear that an order changing the amount of compensation cannot be applied retroactively to actions already taken. See also Sections 15682 (court determination of prospective compensation), 17200(b) (9) (petition to fix compensation).

§ 15681. Trustee's compensation where trust silent

15681. If the trust instrument does not specify the trustee's compensation, the trustee is entitled to reasonable compensation under the circumstances.

Comment. Section 15681 continues the third sentence of former Civil Code Section 2274 without substantive change and restates part of the third sentence of former Probate Code Section 1122 without substantive change. The trustee has authority to fix and pay its compensation without the necessity of prior court review. See Section 16243 (power to pay compensation and other expenses). See also Sections 15682 (court determination of prospective compensation), 17200(b) (9) (petition to fix compensation).

§ 15682. Court determination of prospective compensation

15682. The court may fix an amount of periodic compensation under Sections 15680 and 15681 to continue for as long as the court determines is proper.

Comment. Section 15682 is a new provision that makes clear that the court may fix compensation prospectively. This section supersedes the last part of the third sentence of former Probate Code Section 1122. See also Section 17200(b) (9) (petition to fix compensation).

§ 15683. Compensation of cotrustees

15683. Unless the trust instrument otherwise provides or the trustees otherwise agree, if the trust has two or more trustees, the compensation shall be apportioned among the cotrustees according to the services rendered by them.

Comment. Section 15683 restates the fourth sentence of former Civil Code Section 2274 and the fourth sentence of former Probate Code Section 1122 without substantive change. See also Section 17200(b) (9) (petition to fix compensation).

§ 15684. Repayment of trustee for expenditures

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

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

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

Comment. Section 15684 restates former Civil Code Section 2273 without substantive change and supersedes part of the last sentence of Probate Code Section 1122 relating to proper expenses. Section 15684 also supersedes provisions relating to advancing the trustee's personal funds in former Probate Code Section 1120.2(14). Under this section, a trustee is not entitled to attorney's fees and expenses of a proceeding where it is determined that the trustee breached the trust, unless the court otherwise orders as provided in subdivision (b). *See, e.g., Estate of Gilmaker*, 226 Cal. App. 2d 658, 663-65, 38 Cal. Rptr. 270 (1964); *Estate of Vokal*, 121 Cal. App. 2d 252, 258-61, 263 P.2d 64 (1953).

§ 15685. Trustee's lien

15685. The trustee has an equitable lien on the trust property as against the beneficiary in the amount of advances, with any interest, made for the protection of the trust, and for expenses, losses, and liabilities sustained in the administration of the trust or because of ownership or control of any trust property.

Comment. Section 15685 restates part of subdivision (14) of former Probate Code Section 1120.2 without substantive change and is the same in substance as part of Section 3(c) (18) of the Uniform Trustees' Powers Act (1964); however, the reference to the equitable nature of the lien is new. An equitable lien is not good against a transferee of trust property who gives fair consideration for the property without knowledge of the lien. *See generally* 1 J. Pomeroy, *Equity Jurisprudence* §§ 165, 171(4) (5th ed. 1941); *see also* Restatement (Second) of Trusts § 244 comment c (1957). The reference in Section 15685 to liabilities because of ownership or control of trust property involves liability for taxes and assessments on trust property and tort liability arising out of trust property. *See also* Section 18001 (personal liability of trustee arising out of ownership or control of trust property).

CHAPTER 2. BENEFICIARIES

§ 15800. Limits on rights of beneficiary of revocable trust

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

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

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

Comment. Section 15800 is new. This section has the effect of postponing the enjoyment of rights of beneficiaries of revocable trusts until the death or incompetence of the settlor or other person holding the power to revoke the trust. See also Section 15803 (holder of general power of appointment or power to withdraw property from trust treated as settlor). Section 15800 thus recognizes that the holder of a power of revocation is in control of the trust and should have the rights to enforce the trust. See Section 17200 *et seq.* (judicial proceedings concerning trusts). A corollary principle is that the holder of the power of revocation may direct the actions of the trustee. See Section 16001 (duties of trustee of revocable trust); see also Sections 15401 (method of revocation by settlor), 15402 (power to revoke includes power to modify). Under this section, the duty to inform and account to beneficiaries is owed to the person holding the power to revoke during the time that the trust is presently revocable. See Section 16060 *et seq.* (trustee's duty to inform and account to beneficiaries). The introductory clause recognizes that the trust instrument may provide rights to beneficiaries of revocable trusts which must be honored until such time as the trust is modified to alter those rights. See Sections 16001 (duties of trustee of revocable trust), 16080-16081 (duties with regard to discretionary trusts). The introductory clause also makes clear that this section does not eliminate the rights of beneficiaries of revocable trusts in situations where the joint action of the settlor and all beneficiaries is required. See Sections 15404 (modification or termination by settlor and all beneficiaries), 15410(b) (disposition of property on termination of trust with consent of settlor and all beneficiaries).

§ 15801. Consent by beneficiary of revocable trust

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

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

Comment. Section 15801 is new. Subdivision (a) recognizes the principle that the consent of a beneficiary of a revocable trust should not have any effect during the time that the trust is presently revocable, since the power over the trust is held by the settlor or other person holding the power to revoke. See the Comment to Section 15800. See also Section 15803 (holder of general power of appointment or power to withdraw property from trust treated as settlor). Under the rule provided in Section 15801, the consent of the person holding the power to revoke, rather than the beneficiaries, excuses the trustee from liability as provided in Section 16460(a) (limitations on proceedings against trustee). For provisions permitting a trustee to be relieved of liability by the beneficiaries, see Sections 16463 (consent), 16464 (release), 16465 (affirmance). Subdivision (b) makes clear that this section does not eliminate the requirement of obtaining the consent of beneficiaries in cases where the consent of the settlor and all beneficiaries is required. See Section 15404 (modification or termination by settlor and all beneficiaries).

§ 15802. Notice to beneficiary of revocable trust

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

Comment. Section 15802 is new. This section recognizes that notice to the beneficiary of a revocable trust would be an idle act in the case of a revocable trust since the beneficiary is powerless to act. See Section 15800 (limits on rights of beneficiary of revocable trust). See also Section 15803 (holder of general power of appointment or power to withdraw property from trust treated as settlor). For notice provisions, see Sections 17100-17107, 17203, 17403, 17454.

§ 15803. Rights of holder of power of appointment or withdrawal

15803. The holder of a presently exercisable general power of appointment or power to withdraw property from the trust has the rights of a settlor provided by Sections 15800 to 15802, inclusive, to the extent of the holder's power over the trust property.

Comment. Section 15803 makes clear that a holder of a power of appointment or a power of withdrawal is treated as a settlor for purposes of Sections 15800-15802 in recognition of the fact that the holder of such power is in an equivalent position to control the trust as it relates to the property covered by the power.

§ 15804. Notice in case involving future interest of beneficiary

15804. (a) Subject to subdivisions (b) and (c), it is sufficient compliance with a requirement in this division that notice be given to a beneficiary, or to a person interested in the trust, if notice is given as follows:

(1) Where an interest has been limited on any future contingency to persons who will compose a certain class upon the happening of a certain event without further limitation, notice shall be given to the persons in being who would constitute the class if the event had happened immediately before the commencement of the proceedings.

(2) Where an interest has been limited to a living person and the same interest, or a share therein, has been further limited upon the happening of a future event to the surviving spouse or to persons who are or may be the distributees, heirs, issue, or other kindred of the living person, notice shall be given to the living person.

(3) Where an interest has been limited upon the happening of any future event to a person, or a class of persons, or both, and the interest, or a share of the interest, has been further limited upon the happening of an additional future event to another person, or a class of persons, or both, notice shall be given to the person or persons in being who would take the interest upon the happening of the first of these events.

(b) If a conflict of interest involving the subject matter of the trust proceeding exists between a person to whom notice is required to be given and a person to whom notice is not otherwise required to be given under subdivision (a), notice shall also be given to persons not otherwise entitled to notice under subdivision (a) with respect to whom the conflict of interest exists.

(c) Nothing in this section affects any of the following:

(1) Requirements for notice to a person who has requested special notice, a person who has filed notice of appearance, or a particular person or entity required by statute to be given notice.

(2) Availability of a guardian ad litem pursuant to Section 17208.

Comment. Subdivision (a) of Section 15804 restates former Probate Code Section 1215.1 without substantive change. See also Section 24 ("beneficiary" defined). For provisions where this section applies, see Sections 17203 (notice of hearing on petitions generally), 17351 (provisions for removal of certain testamentary trusts from continuing jurisdiction), 17403 (notice of petition for transfer to another jurisdiction), 17454 (notice of petition for transfer to California).

Subdivision (b) restates former Probate Code Section 1215.2 without substantive change. Subdivision (c) restates the first sentence of former Probate Code Section 1215.4 without substantive change. See Section 17204 (request for special notice).

PART 4. TRUST ADMINISTRATION

CHAPTER 1. DUTIES OF TRUSTEES

Article 1. Trustee's Duties in General

§ 16000. Duty to administer trust

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

Comment. Section 16000 is drawn in part from Sections 164 and 169 of the Restatement (Second) of Trusts (1957). Section 16000 restates the part of former Civil Code Section 2258 requiring the trustee to "fulfill the purpose of the trust" and also

supersedes former Civil Code Section 2253 insofar as it related to control of the trustee's duties by the trust instrument. See also Sections 15600 (acceptance of trust by trustee), 15800 (duties owed to person holding power to revoke), 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 standard of care in performing duties). For provisions permitting the beneficiaries to relieve the trustee from liability, see Sections 16463 (consent), 16464 (release), 16465 (affirmance).

§ 16001. Duties of trustee of revocable trust

16001. (a) Except as provided in subdivision (b), the trustee of a revocable trust shall follow any written direction acceptable to the trustee given from time to time (1) by the person then having the power to revoke the trust or the part thereof with respect to which the direction is given or (2) by the person to whom the settlor delegates the right to direct the trustee.

(b) If a written direction given under subdivision (a) would have the effect of modifying the trust, the trustee has no duty to follow the direction unless it complies with the requirements for modifying the trust.

Comment. Subdivision (a) of Section 16001 continues the first sentence of former Civil Code Section 2258(b) without substantive change. The qualification 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 (standard of care in performing duties).

Subdivision (b) is a new provision that 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).

§ 16002. Duty of loyalty

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

(b) It is not a violation of the duty provided in subdivision (a) for a trustee who administers two trusts

to sell, exchange, or participate in the sale or exchange of trust property between the trusts, if both of the following requirements are met:

(1) The sale or exchange is fair and reasonable with respect to the beneficiaries of both trusts.

(2) The trustee gives to the beneficiaries of both trusts notice of all material facts related to the sale or exchange that the trustee knows or should know.

Comment. Subdivision (a) of Section 16002 codifies the substance of Section 170(1) of the Restatement (Second) of Trusts (1957). Section 16002 restates the general duty of loyalty expressed in former Civil Code Sections 2228 (trustee to act in "highest good faith"), 2229 (not to use property for trustee's profit), 2231 (influence not to be used for trustee's advantage), 2232 (trustee not to undertake adverse trust), 2233 (trustee to disclose adverse interest), 2235 (transactions between trustee and beneficiary presumed under undue influence), and 2263 (trustee cannot enforce claim against trust purchased after becoming trustee). See also Sections 16000 (duties subject to control by trust instrument), 16040 (trustee's standard of care in performing duties). This article does not attempt to state all aspects of the trustee's duty of loyalty, nor does this article seek to cover all duties that may exist. See 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 a new provision drawn from Indiana law. See Ind. Code Ann. § 30-4-3-7(c) (West Supp. 1983-84). This subdivision permits sales or exchanges between two or more trusts that have the same trustee without running afoul of the duty of loyalty. 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).

§ 16003. Duty to deal impartially with beneficiaries

16003. If a trust has two or more beneficiaries, the trustee has a duty to deal impartially with them.

Comment. Section 16003 codifies the substance of Section 183 of the Restatement (Second) of Trusts (1957). This section is in accord with 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 standard of care in performing duties).

§ 16004. Duty to avoid conflict of interest

16004. (a) The trustee has a duty not to use or deal with trust property for the trustee's own profit or for any other purpose unconnected with the trust, nor to take part in any transaction in which the trustee has an interest adverse to the beneficiary.

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

(c) A transaction between the trustee and a beneficiary which occurs during the existence of the trust or while the trustee's influence with the beneficiary remains and by which the trustee obtains an advantage from the beneficiary is presumed to be a violation of the trustee's fiduciary duties. This presumption is a presumption affecting the burden of proof. This subdivision does not apply to the provisions of an agreement between a trustee and a beneficiary relating to the hiring or compensation of the trustee.

Comment. Subdivision (a) of Section 16004 restates former Civil Code Section 2229 and part of the introductory provision of former Civil Code Section 2230 without substantive change. 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 standard of care in performing duties), 16015 (certain actions not violations of duties).

Subdivision (b) restates former Civil Code Section 2263 without substantive change. The court referred to in subdivision (b) may be the court where the trust is administered, such as

where the trustee seeks reimbursement for the claim under Section 17200(b), or the court where enforcement of the claim is sought, such as where the trustee seeks to foreclose a lien or seeks recognition of the claim in proceedings commenced by some other creditor.

The first sentence of subdivision (c) restates the presumption of former Civil Code Section 2235, but the presumption is phrased in terms of a violation of the trustee's fiduciary duties, rather than a presumption of insufficient consideration and undue influence. The second sentence relating to the nature of the presumption is consistent with case law. See, e.g., *McDonald v. Hewlett*, 102 Cal. App. 2d 680, 687-88, 228 P.2d 83 (1951); see also Evid. Code §§ 605 (presumption affecting burden of proof defined), 606 (effect of presumption affecting burden of proof). The exception to the burden of proof provided in the last sentence of subdivision (c) restates the second sentence of former Civil Code Section 2235 without substantive change.

§ 16005. Duty not to undertake adverse trust

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

Comment. Section 16005 supersedes former Civil Code Section 2232. 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 standard of care in performing duties).

§ 16006. Duty to take control of and preserve trust property

16006. The trustee has a duty to take reasonable steps under the circumstances to take and keep control of and to preserve the trust property.

Comment. Section 16006 codifies the substance of Sections 175 and 176 of the Restatement (Second) of Trusts (1957). This section is in accord with case law. See, e.g., *Purdy v. Bank of America Nat'l Tr. & Sav. Ass'n*, 2 Cal. 2d 298, 303, 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, 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 standard of care in performing duties).

§ 16007. Duty to make trust property productive

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

Comment. Section 16007 codifies the substance of Section 181 of the Restatement (Second) of Trusts (1957). For the trustee's standard of care governing investments and management of trust property, see Section 16040(b). In appropriate circumstances under Section 16007, property may be made productive by appreciation in value rather than by production of income. If the trust instrument imposes a duty on the trustee to hold property and give possession of it to a beneficiary at a later date, this duty would override the general duty to make the property productive. See Restatement (Second) of Trusts § 181 comment a (1957). Similarly, if a beneficiary has the right under the trust instrument to occupy a home, the trustee would have no duty to make the property productive of income. For provisions permitting the beneficiaries to relieve the trustee from liability, see Sections 16463 (consent), 16464 (release), 16465 (affirmance). See also Section 16000 (duties subject to control by trust instrument).

§ 16008. Duty to dispose of improper investments

16008. (a) Except as provided in subdivision (b), the trustee has a duty within a reasonable time to dispose of any part of the trust property included in the trust at the time of its creation, or later acquired by or added to the trust, that would not be a proper investment for the trustee to make.

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

Comment. Subdivision (a) of Section 16008 codifies the substance of Section 230 of the Restatement (Second) of Trusts (1957), subject to the exception provided in subdivision (b). In contrast with the Restatement rule, subdivision (a) is not limited to property received in the trust at the time of its creation, but

applies as well to property added or acquired later. 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 standard of care in performing duties).

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

§ 16009. Duty to keep trust property separate and identified

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

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

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

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

§ 16010. Duty to enforce claims

16010. The trustee has a duty to take reasonable steps to enforce claims that are part of the trust property.

Comment. Section 16010 codifies the substance of Section 177 of the Restatement (Second) of Trusts (1957). This section is in accord with case law. See *Ellig v. Naglee*, 9 Cal. 683, 695-96 (1858). Under this section, it may not be reasonable to enforce

a claim depending upon 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 standard of care in performing duties).

§ 16011. Duty to defend actions

16011. The trustee has a duty to take reasonable steps to defend actions that may result in a loss to the trust.

Comment. Section 16011 codifies the substance of the first part of Section 178 of the Restatement (Second) of Trusts (1957). This section is in accord with 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 standard of care in performing duties).

§ 16012. Duty not to delegate

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.

Comment. The first part of subdivision (a) of Section 16012 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). 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 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).

§ 16013. Duty with respect to cotrustees

16013. If a trust has more than one trustee, each trustee has a duty to do the following:

- (a) To participate in the administration of the trust.
- (b) To take reasonable steps to prevent a cotrustee from committing a breach of trust or to compel a cotrustee to redress a breach of trust.

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

§ 16014. Duty to use special skills

16014. (a) The trustee has a duty to apply the full extent of the trustee's skills.

(b) If the settlor, in selecting the trustee, has relied on the trustee's representation of having special skills, the trustee is held to the standard of the skills represented.

Comment. Subdivision (a) of Section 16014 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 (1977) and the last part of Section 174 of the Restatement (Second) of Trusts (1957). 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 standard of care in performing duties).

§ 16015. Certain actions not violations of duties

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

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

Article 2. Trustee's Standard of Care

§ 16040. Trustee's standard of care in administering trust

16040. (a) The trustee shall administer the trust with the care, skill, prudence, and diligence 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.

(c) The settlor may expand or restrict the standards provided in subdivisions (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.

Comment. Subdivision (a) of Section 16040 provides a general standard of care drawn from subdivision (a)(1) of former Civil Code Section 2261 which applied to investment and management decisions. Subdivision (a) supersedes the "ordinary care and diligence" standard that was provided in former Civil Code Section 2259.

Subdivision (b) of Section 16040 provides the standard of care applicable to investment and management of trust property. Subdivision (b) restates subdivision (a)(1) of former Civil Code Section 2261 without substantive change. The former reference to attaining the goals of the settlor has been changed to refer to accomplishing the purposes of the trust. 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 the Comment to Section 2401 (standard of care applicable to professional guardian or conservator of estate) and the Comment to Section 3912 (standard of care applicable to professional fiduciary acting as custodian under Uniform Transfers to Minors Act). The last sentence of subdivision (b) reflects the portfolio approach for judging investment decisions.

Subdivision (c) restates subdivision (a)(2) of former Civil Code Section 2261 without substantive change.

§ 16041. Standard of care not affected by compensation

16041. A trustee's standard of care and performance in administering the trust is not affected by whether or not the trustee receives any compensation.

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

§ 16042. Interpretation of trust terms concerning legal investments

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 continues the second sentence of subdivision (e) of former Civil Code Section 2261 without substantive change.

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

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

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

Comment. Section 16060 is drawn from the first sentence of Section 7-303 of the Uniform Probate Code (1977) and is consistent with the duty stated in California case law to give beneficiaries complete and accurate information relative to the administration of a trust when requested at reasonable times. See *Strauss v. Superior Court*, 36 Cal. 2d 396, 401, 224 P.2d 726 (1950). The trustee is under a duty to communicate to the beneficiary information that is reasonably necessary to enable the beneficiary to enforce the beneficiary's rights under the trust or to prevent or redress a breach of trust. See *Restatement (Second) of Trusts* § 173 comment c (1957). Ordinarily, the

trustee is not under a duty to furnish information to the beneficiary in the absence of a request for the information. See *id.* comment d. Thus, the general duty provided in this section is ordinarily satisfied by compliance with Sections 16061 and 16062 unless there are special circumstances requiring particular information to be reported to beneficiaries. However, if the trustee is dealing with the beneficiary on the trustee's own account, the trustee has a duty to communicate material facts in connection with the transaction that the trustee knows or should know. The trustee also has a duty to communicate material facts affecting the beneficiary's interest that the trustee knows the beneficiary does not know and that the beneficiary needs to know for protection in dealing with a third person. See *id.* During the time that a revocable trust can be revoked, the duty provided by this section is not owed to the beneficiaries but only to the settlor or other person having the power to revoke. See Section 15800. See also Sections 24 ("beneficiary" defined), 16000 (duties subject to control in trust instrument), 16001 (duties of trustee of revocable trust), 16460 (limitations on proceedings against trustee).

§ 16061. Duty to report information about trust on request

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

Comment. Section 16061 is drawn from Section 7-303(b) of the Uniform Probate Code (1977). The reference to the acts of the trustee is drawn from former Probate Code Section 1138.1(a)(5). If the trustee does not comply with the reasonable request of the beneficiary, information may be sought on petition pursuant to Section 17200(b)(7). Note that the right to petition for a report or account under Section 17200(b)(7) is limited to one report or account every six months and after a trustee has failed to furnish the report or account within 60 days after a written request. A beneficiary who is not entitled to an annual account under Section 16062 may be entitled to information or a particular account under this section. The availability of information on request under this section does not negate the

affirmative duty of the trustee to provide information under Section 16060. During the time that a revocable trust can be revoked, the right to request information pursuant to this section does not belong to the beneficiaries but only to the settlor or other person having the power to revoke. See Section 15800. See also Sections 24 ("beneficiary" defined), 16064 (exceptions to duty to report and account). In an appropriate case, more information may be required under this section than through the duty to account annually. See Section 16063 (contents of annual account).

§ 16062. Duty to account to beneficiaries

16062. (a) Except as provided in Section 16064, the trustee shall account at least annually, at the termination of the trust, and upon a change of trustees, to each beneficiary to whom income or principal is required or authorized in the trustee's discretion to be currently distributed.

(b) A trustee of a living trust created by an instrument executed before July 1, 1987, or of a trust created by a will executed before July 1, 1987, is not subject to the duty to account provided in this section, but the requirement of an account pursuant to former Section 1120.1a of the Probate Code may be satisfied by furnishing an account that satisfies the requirements of Section 16063.

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

Subdivision (b) makes clear that the requirement of furnishing an annual account under subdivision (a) does not apply to pre-operative date trusts. This section does not affect any requirement for an account that may exist under prior law, whether pursuant to a statute, trust instrument, or court order. See, e.g., former Prob. Code § 1120.1a(b). However, under subdivision (b), the accounting requirement may be satisfied by furnishing an account in the form provided by Section 16063. A trust created by a will executed before July 1, 1987, is governed by prior law regardless of whether any codicils are executed after the operative date.

§ 16063. Contents of account

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

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

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

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

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

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

(f) A statement that claims against the trustee for breach of trust may not be made after the expiration of three years from the date the beneficiary receives an account disclosing facts giving rise to the claim.

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

§ 16064. Exceptions to duty to report information and account

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

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

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

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

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

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

Article 4. Duties With Regard to Discretionary Powers

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

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

§ 16081. **Standard for exercise of "absolute," "sole," or "uncontrolled" powers**

16081. (a) Subject to the additional requirements of subdivision (b), if a trust instrument confers "absolute," "sole," or "uncontrolled" discretion on a trustee, the trustee shall act in accordance with fiduciary principles and shall not act in bad faith or in disregard of the purposes of the trust.

(b) Notwithstanding the settlor's use of terms like "absolute," "sole," or "uncontrolled," a person who is a beneficiary of a trust and who, either individually or as trustee or cotrustee, holds a power to take or distribute income or principal to or for the benefit of himself or herself pursuant to a standard, shall exercise that power

reasonably and in accordance with the standard. In any case in which the standard governing the exercise of the power does not clearly indicate that a broader power is intended, the holder of the power may exercise it in his or her favor only for his or her health, education, support, or maintenance.

Comment. Section 16081 continues subdivision (c) and most of subdivision (d) of former Civil Code Section 2269 without change. See also Section 17200(b) (5) (court review of exercise of discretionary powers).

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

§ 16100. Definitions

16100. As used in this article, the following definitions shall control:

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

(b) "Private foundation" means a private foundation as defined in Section 509 of the Internal Revenue Code.

(c) "Split-interest trust" means a split-interest trust as described in Section 4947(a) (2) of the Internal Revenue Code.

Comment. Section 16100 defines terms for purposes of this article. Subdivisions (a) and (b) restate parts of former Civil Code Section 2271 without substantive change. Subdivision (c) restates part of subdivision (a) of former Civil Code Section 2271.1 without substantive change. The references in these former sections to the Tax Reform Act of 1969 have been omitted because they are superfluous. See also Section 7 (reference to law includes later amendments or additions).

§ 16101. Distribution under charitable trust or private foundation

16101. During any period when a trust is deemed to be a charitable trust or a private foundation, the trustee shall distribute its income for each taxable year (and principal if necessary) at a time and in a manner that will not subject the property of the trust to tax under Section 4942 of the Internal Revenue Code.

Comment. Section 16101 restates part of the first paragraph of former Civil Code Section 2271 without substantive change. See Section 16100 ("charitable trust" and "private foundation" defined). See also Section 10 (singular includes plural).

§ 16102. Restrictions on trustees under charitable trust, private foundation, or split-interest trust

16102. During any period when a trust is deemed to be a charitable trust, a private foundation, or a split-interest trust, the trustee shall not do any of the following:

(a) Engage in any act of self-dealing as defined in Section 4941 (d) of the Internal Revenue Code.

(b) Retain any excess business holdings as defined in Section 4943 (c) of the Internal Revenue Code.

(c) Make any investments in such manner as to subject the property of the trust to tax under Section 4944 of the Internal Revenue Code.

(d) Make any taxable expenditure as defined in Section 4945 (d) of the Internal Revenue Code.

Comment. Section 16102 restates part of the first paragraph of former Civil Code Section 2271 (applicable to charitable trusts and private foundations) and part of subdivision (a) of former Civil Code Section 2271.1 (applicable to split-interest trusts) without substantive change. The references in former law to specific amendatory sections of the Tax Reform Act of 1969 are omitted because they are unnecessary in view of Section 16100 (b). See also Section 10 (singular includes plural).

§ 16103. Exceptions applicable to split-interest trusts

16103. With respect to split-interest trusts:

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

(b) Section 16102 does not apply with respect to any of the following:

(1) Any amounts payable under the terms of such trust to income beneficiaries, unless a deduction was allowed under Section 170 (f) (2) (B), 2055 (e) (2) (B), or 2522 (c) (2) (B) of the Internal Revenue Code.

(2) Any amounts in trust other than amounts for which a deduction was allowed under Section 170, 545 (b) (2), 556 (b) (2), 642 (c), 2055, 2106 (a) (2), or 2522 of

the Internal Revenue Code, if the amounts are segregated, as that term is defined in Section 4947(a)(3) of the Internal Revenue Code, from amounts for which no deduction was allowable.

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

Comment. Section 16103 restates subdivisions (b) and (c) of former Civil Code Section 2271.1 without substantive change, but the word "irrevocably" in subdivision (b)(3) is added for conformity with federal law. See also Section 16100 ("split-interest trust" defined).

§ 16104. Incorporation in trust instruments

16104. The provisions of Sections 16101, 16102, and 16103 shall be deemed to be contained in the instrument creating every trust to which this article applies. Any provision of the instrument inconsistent with or contrary to this article is without effect.

Comment. Section 16104 restates the second paragraph of former Civil Code Section 2271 and subdivision (d) of former Civil Code Section 2271.1 without substantive change.

§ 16105. Proceedings

16105. (a) A proceeding contemplated by Section 101(1)(3) of the federal Tax Reform Act of 1969 (Public Law 91-172) may be commenced pursuant to Section 17200 by the organization involved. All specifically named beneficiaries of the organization and the Attorney General shall be parties to the proceedings. Notwithstanding Section 17000, this provision is not exclusive and does not limit any jurisdiction that otherwise exists.

(b) If an instrument creating a trust affected by this section has been recorded, a notice of pendency of judicial proceedings under this section shall be recorded in a similar manner within 10 days from the commencement of the proceedings. A duly certified copy of any final judgment or decree in the proceedings shall be similarly recorded.

Comment. Section 16105 restates former Civil Code Section 2271.2 without substantive change. The reference to the procedure applicable to the internal affairs of trusts in Section 17200 is new. See also Sections 17200(b)(19) (petition for

purpose of Section 16105), 17203(c) (notice to Attorney General). For the text of Section 101 (l) (3) of the Tax Reform Act of 1969, relating to judicial proceedings by a private foundation that is necessary to reform or excuse compliance with its governing instrument to comply with 26 U.S.C. § 4942, see the note following 26 U.S.C.A. § 4940.

CHAPTER 2. POWERS OF TRUSTEES

Article 1. General Provisions

§ 16200. General powers of trustee

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.

Comment. Section 16200 is drawn from Sections 2(a) and 3(a) of the Uniform Trustees' Powers Act (1964) and from various California statutes. Subdivisions (a) and (b) of Section 16200 supersede part of former Civil Code Section 2240 (power to deposit securities subject to contrary provision in trust instrument) and restate the second sentence of former Civil Code Section 2267 (trustee has authority conferred by trust instrument and statute) without substantive change. Subdivision (b) also supersedes the authority to make deposits provided in subdivision (c) of former Civil Code Section 2261. Subdivision (a) is consistent with the part of subdivision (a) of former Civil Code Section 2258 that required the trustee to fulfill the purposes of the trust.

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. This provision supersedes the first paragraph of former Probate Code Section 1120.2 which required court approval to exercise powers not expressed in the trust and subdivision (18) of former Probate Code Section 1120.2 which gave the court authority to grant necessary or desirable powers. 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, as was required under former Probate Code Section 1120.2. 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) of this section, 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).

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 the Comment to Section 16202; see also Section 16201 (power of court to relieve trustee from restrictions on powers).

§ 16201. Power of court to relieve trustee from restrictions on powers

16201. This chapter does not affect the power of a court to relieve a trustee from restrictions on the exercise of powers under the trust instrument.

Comment. Section 16201 restates subdivision (d) of former Civil Code Section 2261 without substantive change, except that the rule is made general and is not restricted to the making or retention of investments as under former Civil Code Section 2261(d). Section 16201 also supersedes former Probate Code Section 1120.2(18). Under Section 16201, the case law rule permitting deviation from trust restrictions as necessary in unforeseen circumstances is not changed. 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.

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

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

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

§ 16203. **Application of rules governing trustees' powers**

16203. An instrument that incorporates the powers provided in former Section 1120.2 of the Probate Code shall be deemed to refer to the powers provided in Article 2 (commencing with Section 16220). For this purpose, the trustee's powers under former Section 1120.2 of the Probate Code are not diminished and the trustee is not required to obtain court approval for exercise of a power for which court approval was not required by former law.

Comment. Section 16203 is new and clarifies the effect of references in instruments to the former provisions listing trustees' powers.

Article 2. Specific Powers of Trustees

§ 16220. **Collecting and holding property**

16220. The trustee has the power to collect, hold, and retain trust property received from a settlor or any other person until, in the judgment of the trustee, disposition of the property should be made. The property may be retained even though it includes property in which the trustee is personally interested.

Comment. Section 16220 supersedes part of subdivision (b) of former Civil Code Section 2261 and part of subdivision (2) of former Probate Code Section 1120.2. Section 16220 is the same in substance as Section 3(c)(1) of the Uniform Trustees' Powers Act (1964). The specific references to stock in the trustee or in a corporation controlling or controlled by the trustee in former Civil Code Section 2261(b) and in former Probate Code Section 1120.2(2) are omitted from Section 16220 because they are unnecessary; however, the substance of the law is not changed by Section 16220 since stock of the type described by the former provisions is within the general language of the new law. See Section 62 ("property" defined). The exercise of the power to hold property under this section is subject to the limitation provided in Section 1035(d) in the case of a marital deduction trust. See also Section 16202 (exercise of powers is subject to duties).

§ 16221. Receiving additions to trust

16221. The trustee has the power to accept additions to the property of the trust from a settlor or any other person.

Comment. Section 16221 supersedes part of the first sentence of subdivision (b) of former Probate Code Section 1120 and paragraph (3) of subdivision (a) of former Probate Code Section 1138.1. Section 16221 is the same in substance as Section 3(c)(2) of the Uniform Trustees' Powers Act (1964). See also Sections 62 ("property" defined), 16202 (exercise of powers is subject to duties).

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

16222. (a) Subject to subdivision (b), 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) Except as provided in subdivision (c), the trustee may continue the operation of a business or other enterprise only as authorized by the trust instrument or by the court.

(c) The trustee may continue the operation of a business or other enterprise for a reasonable time

pending a court hearing on the matter or pending a sale of the business or other enterprise.

Comment. Subdivision (a) of Section 16222 continues subdivision (17) of former Probate Code Section 1120.2 without substantive change. Subdivision (a) is similar to Section 3(c) (3) of the Uniform Trustees' Powers Act (1964). Subdivisions (b) and (c) are new. Under Section 16222 the trustee may have the power to continue a business that is made part of the trust, but may not enter into a new business. See also Section 16202 (exercise of powers is subject to duties).

§ 16223. Investments

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

Comment. Section 16223 restates without substantive change part of subdivision (2) of former Probate Code Section 1120.2 and part of paragraph (1) of subdivision (a) of former Civil Code Section 2261. Statutes pertaining to legal investments appear in other codes. See, e.g., Fin. Code § 1564 (common trust funds); Gov't Code §§ 971.2, 17202, 61673; Harb. & Nav. Code §§ 6331, 6931; Health & Safety Code §§ 33663, 34369, 37649, 52040, 52053.5; Pub. Res. Code § 26026; Sts. & Hy. Code §§ 8210, 25371, 30241, 30242, 31173; Water Code §§ 9526, 20064. Section 16223 is the same in substance as Section 3(c) (5) of the Uniform Trustees' Powers Act (1964), except that surplus language has been omitted. Under this section any form of investment is permissible in the absence of a prohibition in the trust instrument or an overriding duty. This section is intended to permit investment in investment company shares, mutual funds, index funds, and other modern vehicles for collective investments. While investment in these funds is not forbidden merely because discretion over the fund is delegated to others, the trustee is ultimately subject to general fiduciary standards of care in making the investment. See Section 16040 (standard of care). See also Sections 62 ("property" defined), 16202 (exercise of powers is subject to duties).

§ 16224. Investments in obligations of United States government

16224. (a) In the absence of an express provision to the contrary in a trust instrument, where the instrument directs or permits investment in obligations of the United States government, the trustee has the power to invest in those obligations directly or in the form of an interest in

a money market mutual fund registered under the Investment Company Act of 1940 (15 U.S.C. Sec. 80a-1 et seq.) or an investment vehicle authorized for the collective investment of trust funds pursuant to Section 9.18 of Part 9 of Title 12 of the Code of Federal Regulations, the portfolios of which are limited to United States government obligations maturing not later than five years from the date of investment or reinvestment and to repurchase agreements fully collateralized by United States government obligations.

(b) This section applies only to trusts created on or after January 1, 1985.

Comment. Section 16224 continues the first sentence of subdivision (a) and subdivision (b) of former Civil Code Section 2269.1 with some technical changes to eliminate surplus language. See also Section 16202 (exercise of powers is subject to duties).

§ 16225. Deposits

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

(1) An account in a bank.

(2) An account in an insured savings and loan association, as defined in Section 1406.

(3) An account consisting of shares of an insured credit union, as defined in Section 1443.

(b) A trustee may deposit trust funds pursuant to subdivision (a) in a financial institution operated by, or that is an affiliate of, the trustee. For the purpose of this subdivision, "affiliate" means a corporation that directly or indirectly through one or more intermediaries controls, is controlled by, or is under common control with another domestic or foreign corporation.

(c) This section does not limit the power of a trustee in a proper case to deposit trust funds in an account described in subdivision (a) that is subject to notice or other conditions respecting withdrawal prescribed by law or governmental regulation.

(d) The court may authorize the deposit of trust funds in an account described in subdivision (a) in an amount greater than the maximum insured or collateralized amount.

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

Comment. Section 16225 restates the part of subdivision (c) of former Civil Code Section 2261 relating to deposits in banks. The requirement that the funds be deposited at "reasonable" interest is new to the statute. Section 16225 is comparable to Section 2453 governing deposits by guardians and conservators with respect to deposits in savings and loan associations and credit unions. The limitation on bank deposits in subdivision (a) (1) is the same as that provided in former Civil Code Section 2261 (c), except that the reference to present or future laws of the United States has been omitted as unnecessary. Subdivisions (a) (2) and (a) (3) incorporate limitations applicable under the guardianship-conservatorship statute; the language relating to the extent to which trust funds may be deposited in such accounts is new. See Section 21 ("account" defined). See also Fin. Code §§ 764 (fiduciaries' deposits in banks), 11207 (fiduciaries' deposits in federal savings and loan associations). For other provisions relating to deposits by trustees, see Fin. Code §§ 7000-7002.

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

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

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

§ 16226. Acquisition and disposition of property

16226. The trustee has the power to acquire or dispose of property, for cash or on credit, at public or private sale, or by exchange.

Comment. Section 16226 restates part of the second sentence of paragraph (1) of subdivision (a) of former Civil Code Section 2261 and part of subdivision (5) of former Probate Code Section 1120.2 without substantive change. Section 16226 is the same in substance as part of Section 3(c) (7) of the Uniform Trustees' Powers Act (1964). Section 16226 also supersedes the part of subdivision (1) of former Probate Code Section 1120.2 pertaining to sale of trust assets on deferred payments. See also Sections 62 ("property" defined), 16202 (exercise of powers is subject to duties).

§ 16227. Management of property

16227. The trustee has the power to manage, control, divide, develop, improve, exchange, partition, change the character of, or abandon trust property or any interest therein.

Comment. Section 16227 is the same in substance as part of Section 3(c) (7) of the Uniform Trustees' Powers Act (1964). Section 16227 continues the authority to manage, control, or divide property provided in subdivision (1) of former Probate Code Section 1120.2 and part of subdivision (5) of former Probate Code Section 1120.2 without change, except that "property" is used in place of "asset." See also Sections 62 ("property" defined), 16202 (exercise of powers is subject to duties).

§ 16228. Encumbrances

16228. The trustee has the power to encumber, mortgage, or pledge trust property for a term within or extending beyond the term of the trust in connection with the exercise of any power vested in the trustee.

Comment. Section 16228 supersedes part of subdivision (3) of former Probate Code Section 1120.2 and is the same in substance as part of Section 3(c) (7) of the Uniform Trustees' Powers Act (1964). See also Sections 62 ("property" defined), 16202 (exercise of powers is subject to duties).

§ 16229. Repairs and alterations of property

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

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

(b) Demolish any improvements.

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

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

§ 16230. Development of land

16230. The trustee has the power to do any of the following:

(a) Subdivide or develop land.

(b) Dedicate land to public use.

(c) Make or obtain the vacation of plats and adjust boundaries.

(d) Adjust differences in valuation on exchange or partition by giving or receiving consideration.

(e) Dedicate easements to public use without consideration.

Comment. Section 16230 continues subdivision (7) of former Probate Code Section 1120.2 without substantive change and is the same in substance as Section 3(c) (9) of the Uniform Trustees' Powers Act (1964). See also Section 16202 (exercise of powers is subject to duties).

§ 16231. Leases

16231. The trustee has the power to enter into a lease for any purpose as lessor or lessee with or without the option to purchase or renew and for a term within or extending beyond the term of the trust.

Comment. Section 16231 restates part of subdivision (1) of former Probate Code Section 1120.2 without substantive change and is the same in substance as Section 3(c) (10) of the Uniform Trustees' Powers Act (1964). Section 16231 supersedes former Civil Code Section 2272. See also Section 16202 (exercise of powers is subject to duties).

§ 16232. Mineral leases

16232. The trustee has the power to enter into a lease or arrangement for exploration and removal of gas, oil, or other minerals, and to enter into a community oil lease or a pooling or unitization agreement, and for a term within or extending beyond the term of the trust.

Comment. Section 16232 restates part of subdivision (1) of former Probate Code Section 1120.2 without substantive change and adds the reference to a pooling or unitization agreement drawn from Section 3(c) (11) of the Uniform Trustees' Powers Act (1964). 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 Section 16202 (exercise of powers is subject to duties).

§ 16233. Options

16233. The trustee has the power to grant an option involving disposition of trust property or to take an option for the acquisition of any property, and an option may be granted or taken that is exercisable beyond the term of the trust.

Comment. Section 16233 is the same in substance as Section 3(c) (12) of the Uniform Trustees' Powers Act (1964). The first half of Section 16233 continues subdivision (8) of former Probate Code Section 1120.2 without substantive change, but the word "property" is used in place of "asset." The authority to grant or take options exercisable beyond the term of the trust is new and 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), 16202 (exercise of powers is subject to duties).

§ 16234. Voting rights with respect to corporate shares, memberships, or property

16234. With respect to any shares of stock of a domestic or foreign corporation, any membership in a nonprofit corporation, or any other property, a trustee has the power to do any of the following:

(a) Vote in person, and give proxies to exercise, any voting rights with respect to the shares, memberships, or property.

(b) Waive notice of a meeting or give consent to the holding of a meeting.

(c) Authorize, ratify, approve, or confirm any action that could be taken by shareholders, members, or property owners.

Comment. Section 16234 is drawn from Section 2458 (voting rights under guardianship-conservatorship statute). Section 16234 restates without substantive change subdivision (9) of former Probate Code Section 1120.2 and former Civil Code Section 2270, except that the requirement in former Civil Code Section 2270 that authorizations be in writing is omitted. See also Corp. Code §§ 702(a) (voting of shares by trustee), 703(c) (voting of shares in corporate trustee), 705 (proxies); Prob. Code § 16202 (exercise of powers is subject to duties).

§ 16235. Payment of calls and assessments

16235. The trustee has the power to pay calls, assessments, and any other sums chargeable or accruing against or on account of securities.

Comment. Section 16235 continues subdivision (10) of former Probate Code Section 1120.2 without substantive change and is the same as Section 3(c)(14) of the Uniform Trustees' Powers Act (1964). See also Section 16202 (exercise of powers is subject to duties).

§ 16236. Stock subscriptions and conversions

16236. The trustee has the power to sell or exercise stock subscription or conversion rights.

Comment. Section 16236 continues subdivision (11) of former Probate Code Section 1120.2 without substantive change and is the same as the first part of Section 3(c)(15) of the Uniform Trustees' Powers Act (1964). See also Section 16202 (exercise of powers is subject to duties).

§ 16237. Consent to change in form of business; voting trusts

16237. The trustee has the power to consent, directly or through a committee or other agent, to the reorganization, consolidation, merger, dissolution, or liquidation of a corporation or other business enterprise, and to participate in voting trusts, pooling arrangements, and foreclosures, and in connection therewith, to deposit securities with and transfer title and delegate discretions to any protective or other committee as the trustee may deem advisable.

Comment. Section 16237 continues subdivision (4) of former Probate Code Section 1120.2 without substantive change and, in part, is similar to the second part of Section 3(c)(15) of the Uniform Trustees' Powers Act (1964). See also Section 16202 (exercise of powers is subject to duties).

§ 16238. Holding securities in name of nominee

16238. The trustee has the power to hold a security in the name of a nominee or in other form without disclosure of the trust so that title to the security may pass by delivery, but the trustee is liable for any act of the nominee in connection with the security so held.

Comment. Section 16238 continues subdivision (12) of former Probate Code Section 1120.2 without substantive change and is the same in substance as Section 3(c)(16) of the Uniform Trustees' Powers Act (1964). 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 § 16202 (exercise of powers is subject to duties).

§ 16239. Deposit of securities in securities depository

16239. The trustee has the power to deposit securities in a securities depository, as defined in Section 30004 of the Financial Code, which is licensed under Section 30200 of the Financial Code or is exempt from licensing by Section 30005 or 30006 of the Financial Code. The securities may be held by the securities depository in the manner authorized by Section 775 of the Financial Code.

Comment. Section 16239 continues part of former Civil Code Section 2240 without substantive change. See also Sections 16200 (powers subject to control by trust instrument), 16202 (exercise of powers is subject to duties). Section 16239 does not continue the provision in former Civil Code Section 2240 relating to consent by cofiduciaries. See Section 15620 (actions by cotrustees).

§ 16240. Insurance

16240. The trustee has the power to insure the property of the trust against damage or loss and to insure the trustee against liability with respect to third persons.

Comment. Section 16240 restates subdivision (13) of former Probate Code Section 1120.2 without substantive change and is

the same in substance as Section 3(c)(17) of the Uniform Trustees' Powers Act (1964). See also Sections 62 ("property" defined), 16202 (exercise of powers is subject to duties).

§ 16241. Borrowing money

16241. The trustee has the power to borrow money for any trust purpose to be repaid from trust property.

Comment. Section 16241 supersedes the authority to borrow provided in subdivision (3) of former Probate Code Section 1120.2 and is similar to part of Section 3(c)(18) of the Uniform Trustees' Powers Act (1964). See also Sections 62 ("property" defined), 16202 (exercise of powers is subject to duties).

§ 16242. Payment and settlement of claims

16242. The trustee has the power to do any of the following:

- (a) Pay or contest any claim.
- (b) Settle a claim by or against the trust by compromise, arbitration, or otherwise.
- (c) Release, in whole or in part, any claim belonging to the trust.

Comment. Section 16242 is substantially the same as Section 3(c)(19) of the Uniform Trustees' Powers Act (1964). Subdivisions (a) and (b) continue the first and second clauses of subdivision (15) of former Probate Code Section 1120.2 without substantive change. Subdivision (c) continues the third clause of subdivision (15) of former Probate Code Section 1120.2 without substantive change, except that the limitation on releasing claims only to the extent that they are uncollectible is not continued. The trustee has the power to release claims; 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), 16202 (exercise of powers is subject to duties).

§ 16243. Payment of taxes, trustee's compensation, and other expenses

16243. The trustee has the power to pay taxes, assessments, reasonable compensation of the trustee and of employees and agents of the trust, and other expenses

incurred in the collection, care, administration, and protection of the trust.

Comment. Section 16243 continues subdivision (16) of former Probate Code Section 1120.2 without substantive change, except that the references to reasonable compensation and compensation of employees and agents are new. Section 16243 is the same in substance as Section 3(c)(20) of the Uniform Trustees' Powers Act (1964). For other provisions relating to trustees' compensation, see Sections 15680-15683. See also Section 16202 (exercise of powers is subject to duties).

§ 16244. Loans to beneficiary

16244. The trustee has the following powers:

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

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

Comment. Section 16244 is new. The determination of what is fair and reasonable is subject to the fiduciary duties of the trustee and must be made in light of the purposes of the trust. If the trustee requires security for the loan to the beneficiary, adequate security under this section may consist of a charge on the beneficiary's interest in the trust. See Restatement (Second) of Trusts § 255 (1957). The interest of a beneficiary that is subject to a spendthrift restraint may not be used for security for a loan under this section. See Section 15300 *et seq.* (restraints on transfer). See also Section 16202 (exercise of powers is subject to duties).

§ 16245. Distribution to beneficiaries under legal disability

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

Comment. Section 16245 is a new provision and is drawn from Section 3(c)(22) of the Uniform Trustees' Powers Act (1964). The exercise of the power to distribute property under this section is subject to the limitation provided in Section 1035(d) in the case of a marital deduction trust. See also Section

16202 (exercise of powers is subject to duties). In an appropriate case, a distribution may be made to a custodian under the Uniform Transfers to Minors Act. See Sections 3905 (transfer authorized by trust), 3906 (other transfer by trustee).

§ 16246. Nature and value of distributions

16246. The trustee has the power to effect distribution of property and money in divided or undivided interests and to adjust resulting differences in valuation. A distribution in kind may be made pro rata or non-pro rata.

Comment. Section 16246 is a new provision. The first sentence is the same as Section 3(c) (23) of the Uniform Trustees' Powers Act (1964). The trustee also has the power to sell property in order to make the distribution. The second sentence recognizes the authority to take gains and losses into account for tax purposes when making distributions. This power provides needed flexibility and avoids the possibility of a taxable event arising from a non-pro rata distribution. See also Section 16202 (exercise of powers is subject to duties).

§ 16247. Hiring persons

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

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

§ 16248. Execution and delivery of instruments

16248. The trustee has the power to execute and deliver all instruments which are needed to accomplish or facilitate the exercise of the powers vested in the trustee.

Comment. Section 16248 is new and is the same in substance as Section 3(c) (26) of the Uniform Trustees' Powers Act (1964). See also Section 16202 (exercise of powers is subject to duties).

§ 16249. Actions and proceedings

16249. The trustee has the power to prosecute or defend actions, claims, or proceedings for the protection of trust property and of the trustee in the performance of the trustee's duties.

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

CHAPTER 3. REVISED UNIFORM PRINCIPAL AND INCOME ACT**§ 16300. Short title**

16300. This chapter may be cited as the Revised Uniform Principal and Income Act.

Comment. Section 16300 continues former Civil Code Section 730 without change.

§ 16301. Definitions

16301. As used in this chapter:

(a) "Income beneficiary" means the person to whom income is presently payable or for whom it is accumulated for distribution as income.

(b) "Inventory value" means the cost of property purchased by the trustee and the market value of other property at the time it became subject to the trust, but

in the case of a testamentary trust the trustee may use any value finally determined for the purposes of an estate or inheritance tax.

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

Comment. Subdivisions (a) and (b) of Section 16301 continue subdivisions (1) and (2) of former Civil Code Section 730.01 without change. Subdivision (c) restates subdivision (3) of former Civil Code Section 730.01 (which defined "remainderman") without substantive change and with the addition of the language "presently or in the future." See also Section 84 ("trustee" defined).

§ 16302. Duty of trustee as to receipts and expenditures

16302. (a) A trust shall be administered with due regard to the respective interests of income beneficiaries and remainder beneficiaries. A trust is so administered with respect to the allocation of receipts and expenditures if a receipt is credited or an expenditure is charged to income or principal or partly to each in any of the following ways:

(1) In accordance with the terms of the trust instrument, notwithstanding contrary provisions of this chapter.

(2) In the absence of any contrary terms of the trust instrument, in accordance with the provisions of this chapter.

(3) If neither paragraph (1) nor (2) is applicable, in accordance with the standard of care provided in Section 16040 and with what is reasonable and equitable in view of the interests of those entitled to income as well as of those entitled to principal.

(b) If the trust instrument gives the trustee discretion in crediting a receipt or charging an expenditure to income or principal or partly to each, no inference that the trustee has improperly exercised such discretion arises from the fact that the trustee has made an allocation contrary to a provision of this chapter.

Comment. Section 16302 continues former Civil Code Section 730.02 with two changes: Subdivision (a) (3) adopts the revised general standard of care provided in Section 16040 in place of the former reference to ordinary prudence, discretion, and judgment. Subdivision (b) replaces the former reference to "imprudence or partiality" with a reference to improper exercise of discretion. This variation of language in Section 2 of the Revised Uniform Principal and Income Act (1962) is drawn from Nebraska Law. Neb. Rev. Stat. § 30-3102 (Cum. Supp. 1982). The result of this change is that there is no inference of any sort of impropriety, not just imprudence or partiality, arising from an allocation contrary to this chapter.

§ 16303. Income and principal

16303. (a) Income is the return in money or property derived from the use of principal, including return received as any of the following:

(1) Rent of real or personal property, including sums received for cancellation or renewal of a lease.

(2) Interest on money lent, including sums received as consideration for the prepayment of principal except as provided in Section 16307 on bond premium and bond discount.

(3) Receipts allocated to income as provided in Section 16304.

(4) Income earned during administration of a decedent's estate as provided in Section 16305.

(5) Corporate distributions as provided in Section 16306.

(6) Accrued increment on bonds or other obligations issued at discount as provided in Section 16307.

(7) Receipts from business and farming operations as provided in Section 16308.

(8) Receipts from disposition of natural resources as provided in Section 16309.

(9) Receipts from other principal subject to depletion as provided in Section 16310.

(10) Receipts from disposition of underproductive property as provided in Section 16311.

(b) Principal is the property which has been set aside by the owner or the person legally empowered so that it

is held in trust eventually to be delivered to a remainder beneficiary while the return or use of the principal is in the meantime taken or received by or held for accumulation for an income beneficiary. Principal includes the following:

(1) Consideration received by the trustee on the sale or other transfer of principal or on repayment of a loan or as a refund or replacement or change in the form of principal.

(2) Proceeds of property taken on eminent domain proceedings.

(3) Proceeds of insurance upon property forming part of the principal except proceeds of insurance upon a separate interest of an income beneficiary.

(4) Receipts allocated to principal as provided in Section 16304.

(5) Stock dividends, receipts on liquidation of a corporation, and other corporate distributions as provided in Section 16306.

(6) Receipts from the disposition of corporate securities as provided in Section 16307.

(7) Royalties and other receipts from disposition of natural resources as provided in Section 16309.

(8) Receipts from other principal subject to depletion as provided in Section 16310.

(9) Any profit resulting from any change in the form of principal except as provided in Section 16311 on underproductive property.

(10) Receipts from disposition of underproductive property as provided in Section 16311.

(11) Any allowances for depreciation established under Section 16308 and paragraph (2) of subdivision (b) of Section 16312.

Comment. Section 16303 continues subdivisions (a) and (b) of former Civil Code Section 730.03 without change. Subdivisions (a) (3) and (b) (4) are new cross-references, but represent no substantive change.

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

16304. (a) An income beneficiary is entitled to income from the date specified in the trust instrument or,

if none is specified, from the date an item of property becomes subject to the trust. In the case of an item of property becoming subject to a trust by reason of a person's death, it becomes subject to the trust as of the date of the death of the person even though there is an intervening period of administration of the person's estate.

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

(1) Receipts due but not paid at the date of death of the person are principal.

(2) Receipts in the form of periodic payments (other than corporate distributions to stockholders), including rent, interest, or annuities, not due at the date of the death of the person shall be treated as accruing from day to day. That portion of the receipt accruing before the date of death is principal and the balance is income.

(c) In all other cases, any receipt from income-producing property is income even though the receipt was earned or accrued in whole or in part before the date when the property became subject to the trust.

(d) If an income beneficiary's right to income ceases by death or in any other manner, all payments actually paid to the income beneficiary or in the hands of the trustee for payment to the income beneficiary before such termination belong to the income beneficiary or to his or her personal representative. All income actually received by the trustee after such termination shall be paid to the person next entitled to income by the terms of the trust. This subdivision does not apply to income received by a trustee under subdivision (b) of Section 16305.

(e) Corporate distributions to stockholders shall be treated as due on the day fixed by the corporation for determination of stockholders of record entitled to distribution or, if no date is fixed, on the date of declaration of the distribution by the corporation.

Comment. Section 16304 continues former Civil Code Section 730.04 without substantive change, except that subdivision (b) (2) has been conformed to Section 4(b) (2) of the Revised Uniform Principal and Income Act (1962) and references to the testator and the will have been replaced. The

first change requires apportionment of rent, interest, and annuities, contrary to the former rule. The effect of the last change is to make the principles of this section applicable to the problem of apportionment of income following the death of a settlor of a revocable living trust. The references to "assets" in former Civil Code Section 730.04 have been replaced with references to "property"; these are non-substantive changes. See Section 62 ("property" defined).

§ 16305. Income earned during administration of decedent's estate

16305. (a) Unless the will otherwise provides, income from the property of a decedent's estate after the death of the testator and before distribution, including income from property used to discharge liabilities, shall be distributed in the manner set forth in Chapter 11 (commencing with Section 660) of Division 3. Income received by a trustee under this subdivision shall be treated as income of the trust.

(b) When an income beneficiary's right to income, including interest payable under Section 663, ceases by death or in any other manner during the period of probate administration, income attributable to the period prior to the termination of such right, when subsequently received by the trustee, shall be equitably prorated between the beneficiary or his or her personal representative and the person next entitled to income by the terms of the trust instrument.

Comment. Subdivision (a) of Section 16305 continues former Civil Code Section 730.05(a) and (b) without change. The reference to "assets" in former Civil Code Section 730.05 has been replaced with a reference to "property"; this is a non-substantive change. See Section 62 ("property" defined). Subdivision (b) continues former Civil Code Section 730.05(c) without change.

§ 16306. Corporate distributions

16306. (a) Corporate distributions of shares of the distributing corporation, including distributions in the form of a stock split or stock dividend, are principal. A right to subscribe to shares or other securities issued by the distributing corporation accruing to stockholders on

account of their stock ownership and the proceeds of any sale of the right are principal.

(b) Except to the extent that the corporation indicates that some part of a corporate distribution is a settlement of preferred or guaranteed dividends accrued since the trustee became a stockholder or is in lieu of an ordinary cash dividend, a corporate distribution is principal if the distribution is pursuant to any of the following:

(1) A call of shares.

(2) A merger, consolidation, reorganization, or other plan by which assets of the corporation are acquired by another corporation.

(3) A total or partial liquidation of the corporation, including any distribution which the corporation indicates is a distribution in total or partial liquidation or any distribution of assets, other than cash, pursuant to a court decree or final administrative order by a government agency ordering distribution of the particular assets.

(c) In the case of a regulated investment company or a trust qualifying and electing to be taxed under federal law as a real estate investment trust:

(1) Distributions made from ordinary income are income.

(2) All other distributions, including distributions from capital gains, depreciation, or depletion, whether made in the form of cash, an option to take new stock or cash, or an option to purchase additional shares, are principal.

(d) Except as provided in subdivisions (a), (b), and (c), all corporate distributions are income, including cash dividends, distributions of or rights to subscribe to shares or securities or obligations of corporations other than the distributing corporation, and the proceeds of the rights or property distributions. Except as provided in subdivisions (b) and (c), if the distributing corporation gives a stockholder an option to receive a distribution either in cash or in its own shares, the distribution chosen is income.

(e) The trustee may rely upon any statement of the distributing corporation as to any fact relevant under any provision of this chapter concerning the source or character of dividends or distributions of corporate assets.

Comment. Subdivisions (a), (b), (d), and (e) of Section 16306 continue former Civil Code Section 730.06 (a), (b), (d), and (e), respectively, without change. Subdivision (c) restates former Civil Code Section 730.06(c) without substantive change.

§ 16307. Bonds and other obligations for payment of money

16307. (a) Bonds or other obligations for the payment of money are principal at their inventory value, except as provided in subdivision (b) for discount bonds. No provision shall be made for amortization of bond premiums or for accumulation for discount. The proceeds of sale, redemption, or other disposition of the bonds or obligations are principal.

(b) The increment in value of a bond or other obligation for the payment of money payable at a future time in accordance with a fixed schedule of appreciation in excess of the price at which it was issued is distributable as income. The increment in value is distributable to the beneficiary who was the income beneficiary at the time of increment from the first principal cash available or, if none is available, when realized by sale, redemption, or other disposition. Whenever unrealized increment is distributed as income but out of principal, the principal shall be reimbursed for the increment when realized.

Comment. Section 16307 continues former Civil Code Section 730.07 without change.

§ 16308. Business and farming operations

16308. (a) If a trustee uses any part of the principal in the operation of a business, including an agricultural or farming operation, of which the settlor was a sole proprietor or a partner, the net profits and losses of the business shall be computed in accordance with recognized methods of accounting for a comparable business. Net profits from a business are income. Net losses from a business do not reduce other trust income for the fiscal or calendar year during which they occur but shall be carried into subsequent fiscal or calendar years and reduce the net profits of the business for those years.

(b) Subdivision (a) is subject to the provisions of Section 16313 and for this purpose any property of the business or agricultural or farming operation shall be deemed to be "trust property" within the meaning of Section 16313.

Comment. Section 16308 continues former Civil Code Section 730.08(a) and (c) without substantive change, except for two important changes: (1) The last sentence of subdivision (a) reverses the former rule against carrying losses forward. This revision is drawn from statutes in Nebraska and Wisconsin. Neb. Rev. Stat. § 30-3109 (Cum. Supp. 1982); Wis. Stat. Ann. 701.20(8) (West 1981). (2) The reference in former law to "generally accepted accounting principles" is replaced with a reference to "recognized methods of accounting." This change avoids use of the term of art "generally accepted accounting principles" which may be inappropriate as applied to certain types of businesses, such as agricultural and farming operations. This revision is drawn from the Nebraska statute. Neb. Rev. Stat. § 30-3109 (Cum. Supp. 1982).

§ 16309. Natural resources

16309. (a) If any part of the principal consists of a right to receive royalties, overriding or limited royalties, working interests, production payments, net profit interests, or other interests in minerals or other natural resources in, on, or under land, the receipts from taking the natural resources from the land shall be allocated as follows:

(1) If received as rent on a lease or extension payments on a lease, the receipts are income.

(2) If received from a production payment, the receipts are income to the extent of any factor for interest or its equivalent provided in the governing instrument. There shall be allocated to principal the fraction of the balance of the receipts which the unrecovered cost of the production payment bears to the balance owed on the production payment, exclusive of any factor for interest or its equivalent. The receipts not allocated to principal are income.

(3) If received as a royalty, overriding or limited royalty, or bonus, or from a working, net profit, or any other interest in minerals or other natural resources, receipts not provided for in paragraphs (1) and (2) shall

be apportioned on a yearly basis in accordance with this paragraph whether or not any natural resource was being taken from the land at the time the trust was established. The receipts shall be allocated entirely to income or apportioned between income and principal as the trustee in its discretion may determine, but the amount added to principal as an allowance for depletion may not exceed the lesser of (A) the percentage of gross receipts allowed as a deduction for depletion in computing taxable income for federal income tax purposes or (B) 50 percent of the net receipts remaining after payment of expenses, direct and indirect, computed without allowance for depletion.

(b) This section does not apply to timber, water, soil, sod, dirt, turf, or mosses.

Comment. Section 16309 continues former Civil Code Section 730.09 with two changes. In subdivision (a) (3) the reference to "absolute discretion" is revised to read "discretion"; this revision makes no substantive change. See Sections 16080-16081 (duties with regard to discretionary powers). The former reference to 27½% of gross receipts in subdivision (a) (3) is replaced with a standard tied to federal tax law. For the rule governing property subject to depletion that is not covered by Section 16309, see Section 16310.

§ 16310. Other property subject to depletion

16310. If the principal consists of property subject to depletion, other than property subject to Section 16309, including land from which merchantable timber may be removed and, when subject to depletion or amortization, leaseholds, patents, copyrights, royalty rights, and rights to receive payments on a contract for deferred compensation, receipts from the property shall be allocated entirely to income or apportioned between income and principal as the trustee in its discretion may determine, but in no event shall the amount allocated to principal exceed a reasonable allowance for depletion or amortization.

Comment. Section 16310 continues former Civil Code Sections 730.10 (timber) and 730.11 (other property subject to depletion), except that the reference to "absolute discretion" is revised to read "discretion." This revision makes no substantive change. See Sections 16080-16081 (duties with regard to discretionary powers).

§ 16311. Underproductive property

16311. (a) Except as otherwise provided in this section, a portion of the net proceeds of sale of any part of principal which has not produced an average net income of at least 1 percent per year of its inventory value for more than a year, including as income the value of any beneficial use of the property by the income beneficiary, shall be treated as delayed income to which the income beneficiary is entitled as provided in this section. The net proceeds of sale are the gross proceeds received, including the value of any property received in substitution for the property disposed of, less the expenses, including capital gains tax, if any, incurred in disposition and less any carrying charges paid while the property was underproductive.

(b) The sum allocated as delayed income is the difference between the net proceeds and the amount which, had it been invested at simple interest at 5 percent per year while the property was underproductive, would have produced the net proceeds. This sum, plus any carrying charges and expenses previously charged against income while the property was underproductive, less any income received by the income beneficiary from the property and less the value of any beneficial use of the property by the income beneficiary, is income, and the balance is principal.

(c) If principal subject to this section is disposed of by conversion into property which cannot be apportioned easily, including land or mortgages, (for example, real property acquired by or in lieu of a foreclosure), the income beneficiary is entitled to the net income from any property or obligation into which the original principal is converted while the substituted property or obligation is held. If within five years after the conversion the substituted property has not been further converted into easily apportionable property, no allocation as provided in this section shall be made.

(d) This section does not apply to securities listed on a national securities exchange or traded over the counter if the securities are held in a broadly diversified portfolio designed to produce a reasonable return appropriate to the purposes of the trust.

Comment. Subdivisions (a), (b), and (c) of Section 16311 continue former Civil Code Section 730.12 without change. Subdivision (d) is a new provision that resolves a conflict between the portfolio approach to investment decisions provided in Section 16040(b) and the underproductive property provisions of this section as it applies to securities.

§ 16312. Charges against income and principal

16312. (a) After determining income and principal in accordance with the terms of the trust instrument or with this chapter, the trustee shall charge to income or principal expenses and other charges as provided in this section.

(b) The following charges shall be made against income:

(1) Ordinary expenses incurred in connection with the administration, management, or preservation of the trust property, including regularly recurring taxes assessed against any portion of the principal, water rates, premiums on insurance taken upon the interests of the income beneficiary, remainder beneficiary, or trustee, interest paid by the trustee, and ordinary repairs.

(2) The trustee in its discretion may make a reasonable allowance for depreciation on property subject to depreciation under generally accepted accounting principles, but no allowance shall be made for depreciation of that portion of any real property used by a beneficiary as a residence.

(3) One-half of court costs, attorney's fees, and other fees on periodic judicial accounting, unless the court directs otherwise.

(4) Court costs, attorney's fees, and other fees on other accountings or judicial proceedings if the matter primarily concerns the income interest, unless the court directs otherwise.

(5) One-half of the trustee's regular compensation, whether based on a percentage of principal or income, unless the court directs otherwise.

(6) All expenses reasonably incurred for current management of principal and application of income.

(7) Any tax levied upon receipts defined as income under this part or the trust instrument and payable by the trustee.

(c) If charges against income are of unusual amount, the trustee may by means of reserves or other reasonable means charge them over a reasonable period of time and withhold from distribution sufficient sums to regularize distributions.

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

(1) Trustee's compensation not chargeable to income under paragraphs (4) and (5) of subdivision (b), special compensation of trustees, expenses reasonably incurred in connection with principal, court costs and attorney's fees primarily concerning matters of principal, and trustee's compensation computed on principal as an acceptance, distribution, or termination fee.

(2) Charges not provided for in subdivision (b), including the cost of investing and reinvesting principal, the payments on principal of an indebtedness (including a mortgage amortized by periodic payments of principal), expenses for preparation of property for rental or sale, and, unless the court directs otherwise, expenses incurred in maintaining or defending any action or proceeding to construe the trust or protect it or the property or assure the title of any trust property.

(3) Extraordinary repairs or expenses incurred in making a capital improvement to principal, including special assessments, but a trustee may establish an allowance for depreciation out of income to the extent permitted by paragraph (2) of subdivision (b) and by Section 16308.

(4) Any tax levied upon profit, gain, or other receipts allocated to principal notwithstanding denomination of the tax as an income tax by the taxing authority.

(5) If an estate or inheritance tax is levied in respect of a trust in which both an income beneficiary and a remainder beneficiary have an interest, any amount apportioned to the trust, including penalties, even though the income beneficiary also has rights in the principal.

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

Comment. Subdivision (a) of Section 16312 continues subdivision (c) of former Civil Code Section 730.03 without substantive change. Subdivisions (b)-(e) continue former Civil Code Section 730.13 with the following changes: The reference to "absolute discretion" is revised to read "discretion"; this revision makes no substantive change. See Sections 16080-16081 (duties with regard to discretionary powers). A reference to "proceeding" has been added to subdivision (d) (2). See Section 17200 *et seq.* (judicial proceedings concerning trusts).

§ 16313. Reserve or allowance for depreciation or depletion

16313. The trustee is not required to set aside a reserve or allowance from trust income for depreciation or depletion of, or to amortize, any trust property unless the trust instrument expressly requires a reserve or allowance. Nothing in this chapter prevents a trustee in its discretion from establishing a reserve or allowance, or from continuing any previous practice of maintaining a reserve or allowance.

Comment. Section 16313 continues the first sentence and the first part of the second sentence of former Civil Code Section 730.14 without substantive change.

**CHAPTER 4. LIABILITY OF TRUSTEES
TO BENEFICIARIES**

Article 1. Liability for Breach of Trust

§ 16400. Breach of trust

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

Comment. Section 16400 is new and is drawn from Section 201 of the Restatement (Second) of Trusts (1957). Section 16400 supersedes former Civil Code Section 2234. While a trust is revocable, the trustee owes duties to the person holding the power to revoke and not to the named beneficiaries. See Section 15800; see also Section 15803 (holder of general power of appointment or power to withdraw property from trust treated as settlor).

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

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

(b) 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 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 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. Subdivisions (a) and (b) of Section 16401 are new and are drawn from Section 225 of the Restatement (Second) of Trusts (1957). The former statutes did not provide a rule governing the trustee's liability for the acts or omissions of agents of the trust. Whether a trustee has acted reasonably under this section depends upon application of the standard of care provided in Section 16040. The trustee 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 has the power to direct 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.

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

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

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

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

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

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

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

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

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

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

Comment. Section 16402 is drawn from Section 224 of the Restatement (Second) of Trusts (1957). Section 16402 restates the substance of former Civil Code Section 2239 as follows: the substance of the former liability for consenting to wrongful acts of the cotrustee is restated in subdivision (b) (3), the substance of the former liability for negligently enabling the cotrustee to commit a breach is restated in subdivision (b) (4), and the substance of the former statement that the trustee was liable "for no others" is restated in subdivision (a). Subdivision (b) (5) is consistent with the case-law rule under former law. See *Estate of Hensel*, 144 Cal. App. 2d 429, 438, 301 P.2d 105 (1956) (citing the rule from the first Restatement). See also *Blackmon v. Hale*, 1 Cal. 3d 548, 559, 463 P.2d 418, 83 Cal. Rptr. 194 (1970) (negligent inattention to duties). For the duty of a trustee with respect to cotrustees, see Section 16013. It should also be noted that the liability to beneficiaries does not include beneficiaries under revocable trusts during the time that the trust can be revoked. See Section 15800; see also Sections 15803 (holder of general power of appointment or power to withdraw property from trust treated as settlor), 16000 (duty to administer trust).

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

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

16403. (a) Except as provided in subdivision (b), a successor trustee is not liable to the beneficiary for a breach of trust committed by a predecessor trustee.

(b) A successor trustee is liable to the beneficiary for breach of trust involving acts or omissions of a predecessor trustee in any of the following circumstances:

(1) Where the successor trustee knows or has information from which the successor trustee reasonably should have known of a situation constituting a breach of trust committed by the predecessor trustee and the successor trustee improperly permits it to continue.

(2) Where the successor trustee neglects to take reasonable steps to compel the predecessor trustee to deliver the trust property to the successor trustee.

(3) Where the successor trustee neglects to take reasonable steps to redress a breach of trust committed by the predecessor trustee in a case where the successor

trustee knows or has information from which the successor trustee reasonably should have known of the predecessor trustee's breach.

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

Comment. Section 16403 is new and is the same in substance as Section 223 of the Restatement (Second) of Trusts (1957), except that the language in subdivision (b) (3) relating to what the trustee should have known in subdivisions (b) (1) and (b) (3) differs from the Restatement. In certain circumstances it may not be reasonable to enforce a claim against a former trustee, depending upon the likelihood of recovery and the cost of suit and enforcement. It should also be noted that the liability to beneficiaries does not include beneficiaries under revocable trusts during the time that the trust can be revoked. See Section 15800; see also Section 15803 (holder of general power of appointment or power to withdraw property from trust treated as settlor). For provisions permitting a trustee to be relieved of liability for acts of a predecessor trustee, see Sections 16463 (consent), 16464 (release), 16465 (affirmance).

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

Article 2. Remedies for Breach of Trust

§ 16420. Remedies for breach of trust

16420. (a) If a trustee commits a breach of trust, or threatens to commit a breach of trust, a beneficiary or cotrustee of the trust may commence a proceeding for any of the following purposes that is appropriate:

- (1) To compel the trustee to perform the trustee's duties.
- (2) To enjoin the trustee from committing a breach of trust.
- (3) To compel the trustee to redress a breach of trust by payment of money or otherwise.
- (4) To appoint a receiver or temporary trustee to take possession of the trust property and administer the trust.
- (5) To remove the trustee.
- (6) Subject to Section 18100, to set aside acts of the trustee.

- (7) To reduce or deny compensation of the trustee.
- (8) Subject to Section 18100, to impose an equitable lien or a constructive trust on trust property.
- (9) Subject to Section 18100, to trace trust property that has been wrongfully disposed of and recover the property or its proceeds.

(b) The provision of remedies for breach of trust in subdivision (a) does not prevent resort to any other appropriate remedy provided by statute or the common law.

Comment. Subdivision (a) of Section 16420 codifies in general terms the remedies available to a beneficiary or cotrustee where a trustee has committed a breach of trust or threatens to do so. For the applicable procedure, see Section 17200 *et seq.* (judicial proceedings concerning trusts). As provided in subdivision (b), the list of remedies in subdivision (a) is not necessarily exclusive and is not intended to prevent resort to any other appropriate remedy. See Section 15002 (common law as law of state); Penal Code § 506 (embezzlement by trustee); *People v. Stanford*, 16 Cal. 2d 247, 105 P.2d 969 (1940) (embezzlement); see also Section 16421 (remedies are exclusively equitable). The petitioner may seek any one or more of the remedies as is appropriate in the circumstances of the case. Section 16420 provides a general list of remedies and does not attempt to set out the refinements and exceptions developed over many years by the common law. The availability of a particular remedy listed in Section 16420, and its application under the circumstances, are governed by the common law. See Section 15002 (common law as law of state).

Paragraph (1) of subdivision (a) of Section 16420 supersedes a part of former Civil Code Sections 863 (beneficiary may "enforce the performance of the trust") and 2251 (beneficiary may "take advantage" of trust). See also *Bacon v. Grosse*, 165 Cal. 481, 132 P. 1027 (1913); Restatement (Second) of Trusts § 199(a) (1957).

Paragraph (2) is consistent with other statutes. See Civil Code § 3422; Code Civ. Proc. § 526(7); see also *Quist v. Empire Water Co.*, 204 Cal. 646, 269 P. 533 (1928); *St. James Church of Christ Holiness v. Superior Court*, 135 Cal. App. 2d 352, 359-62, 287 P.2d 387 (1955); Restatement (Second) of Trusts § 199(b) (1957).

Paragraph (3) restates the general liability provided in former Civil Code Sections 2236-2238 and 2262. See also Restatement (Second) of Trusts § 199(c) (1957). The reference to payment of money in paragraph (3) is comprehensive and includes liability that might be characterized as damages, restitution, or

surcharge. For the measure of liability, see Article 3 (commencing with Section 16440). The characterization of monetary liability does not affect the fact that the remedies for breach of trust are exclusively equitable, as provided in Section 16421. In certain circumstances, rather than ordering the payment of money, it may be appropriate for the court to order the trustee to transfer tangible property as a remedy for breach of trust.

Paragraph (4) makes explicit the authority to appoint a receiver. See Code Civ. Proc. § 564(1), (8); *Bowles v. Superior Court*, 44 Cal. 2d 574, 583-84, 283 P.2d 704 (1955) (appointment of receiver pending removal of trustees and as temporary trustee); see also Restatement (Second) of Trusts § 199(d) (1957). Paragraph (4) also permits appointment of a temporary trustee where appointment of a receiver would be appropriate. See Sections 15660 (appointment of trustee to fill vacancy), 17206 (authority to make necessary orders and appoint temporary trustee).

Paragraph (5) restates in general terms the authority to remove a trustee for breach of trust provided by former Civil Code Section 2283 and former Probate Code Section 1123.5. See also Restatement (Second) of Trusts § 199(e) (1957). For provisions governing removal of trustees, see Sections 15642 (grounds for removal), 15644 (delivery of property by removed trustee), 17200(b) (10) (petition for removal).

Paragraph (6) is new. The authority to set aside wrongful acts of the trustee is a corollary of the power to enjoin a threatened breach as provided in paragraph (2). As recognized in the introductory clause of paragraph (6), the wrongful acts of the trustee may not be set aside if to do so would impair the rights of bona fide purchasers. See also G. Bogert, *The Law of Trusts and Trustees* § 861, at 16-17 (rev. 2d ed. 1982).

Paragraph (7) is new and is drawn from Section 243 of the Restatement (Second) of Trusts (1957). Prior California statutes provided only for the determination of reasonable compensation and for the allowance of greater compensation under appropriate circumstances. See former Civil Code § 2274; former Prob. Code §§ 1122, 1138.1(a) (7).

Paragraph (8) states a general rule recognized in California cases. See, e.g., *Citizens' Bank v. Rucker*, 138 Cal. 606, 609-10, 72 P. 46 (1903); see also Restatement (Second) of Trusts § 202 (1957). The introductory clause recognizes that this remedy is limited by the rights of a bona fide purchaser as provided in Section 18100.

Paragraph (9) is consistent with California case law. See *Noble v. Noble*, 198 Cal. 129, 135, 243 P. 439 (1926); *Keeney v. Bank of*

Italy, 33 Cal. App. 515, 517, 165 P. 735 (1917); *People v. California Safe Deposit & Trust Co.*, 175 Cal. 756, 759-60, 167 P. 388 (1917); *Church v. Bailey*, 90 Cal. App. 2d 501, 504, 203 P.2d 547 (1949); *Carlin v. Masten*, 118 Cal. App. 373, 376-77, 5 P.2d 65 (1931). The introductory clause recognizes that this remedy is limited by the rights of bona fide purchasers as provided in Section 18100.

§ 16421. Remedies for breach exclusively in equity

16421. The remedies of a beneficiary against the trustee are exclusively in equity.

Comment. Section 16421 is a new provision that is drawn from Section 197 of the Restatement (Second) of Trusts (1957). For a list of remedies, see Section 16420. Under this section, for example, the beneficiary may not commence an action against the trustee for breach of contract. See Restatement (Second) of Trusts § 197 comment b (1957). However, the trustee may be found liable for the payment of money on account of the breach. See Sections 16420(a)(3) (compelling payment of money for breach of trust), 16440-16441 (measure of liability for breach of trust).

**Article 3. Measure of Liability
for Breach of Trust**

§ 16440. Measure of liability for breach of trust

16440. (a) If the trustee commits a breach of trust, the trustee is chargeable with any of the following that is appropriate under the circumstances:

(1) Any loss or depreciation in value of the trust estate resulting from the breach of trust, with interest.

(2) Any profit made by the trustee through the breach of trust, with interest.

(3) Any profit that would have accrued to the trust estate if the loss of profit is the result of the breach of trust.

(b) If the trustee has acted reasonably and in good faith under the circumstances as known to the trustee, the court, in its discretion, may excuse the trustee in whole or in part from liability under subdivision (a) if it would be equitable to do so.

Comment. Subdivision (a) of Section 16440 is drawn from Section 205 of the Restatement (Second) of Trusts (1957). Subdivision (a) supersedes former Civil Code Sections 2237 and

2238. See also Section 16040(b) (propriety of considering investments as part of an overall investment strategy).

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 appreciations 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.

§ 16441. Measure of liability for interest

16441. If the trustee is liable for interest pursuant to Section 16440, the trustee is liable for the greater of the following amounts:

- (a) The amount of interest that accrues at the legal rate on judgments.
- (b) The amount of interest actually received.

Comment. Section 16441 supersedes former Civil Code Section 2262 (liability for interest upon failure to properly invest trust funds) and part of former Civil Code Section 2237 (liability for interest on proceeds). See also Code Civ. Proc. § 685.010 (rate of interest on judgments).

§ 16442. Other remedies not affected

16442. The provisions in this article for liability of a trustee for breach of trust do not prevent resort to any other remedy available under the statutory or common law.

Comment. Section 16442 makes clear that Sections 16440 and 16441 do not prevent resort to any other remedy available against the trustee under the statutory or common law. See Section 15002 (common law as law of state); see also 16420 (remedies for breach of trust).

Article 4. Limitations and Exculpation

§ 16460. Limitations on proceedings against trustee

16460. (a) Unless a claim is previously barred by adjudication, consent, limitation, or otherwise:

- (1) If a beneficiary has received an interim or final

account in writing, or other written report, that adequately discloses the existence of a claim against the trustee for breach of trust, the claim is barred as to that beneficiary unless a proceeding to assert the claim is commenced within three years after receipt of the account or report. An account or report adequately discloses existence of a claim if it provides sufficient information so that the beneficiary knows of the claim or reasonably should have inquired into the existence of the claim.

(2) If an interim or final account or other report does not adequately disclose the existence of a claim against the trustee for breach of trust, the claim is barred as to that beneficiary unless a proceeding to assert the claim is commenced within three years after the beneficiary discovered, or reasonably should have discovered, the subject of the claim.

(b) For the purpose of subdivision (a), a beneficiary is deemed to have received an account or report, as follows:

(1) In the case of an adult who is reasonably capable of understanding the account or report, if it is received by the adult personally.

(2) In the case of an adult who is not reasonably capable of understanding the account or report, if it is received by the person's legal representative, including a guardian ad litem or other person appointed for this purpose.

(3) In the case of a minor, if it is received by the minor's guardian or, if the minor does not have a guardian, if it is received by the minor's parent so long as the parent does not have a conflict of interest.

(c) The limitations period applicable to actions by a beneficiary against a trustee on a claim that arose before July 1, 1987, is governed by this section, except that a claim arising before July 1, 1987, is not barred by this section until July 1, 1988.

Comment. Section 16460 is a new provision drawn in part from Section 7-307 of the Uniform Probate Code (1977). Section 16460 supersedes the provisions of former Civil Code Section 2282 relating to discharge of trustees. For a provision governing consent, release, and affirmance by beneficiaries to relieve the trustee of liability, see Sections 16463-16465. The reference in the introductory clause to claims "otherwise" barred also includes

principles such as estoppel and laches that apply under the common law. See Section 15002 (common law as law of state). See also Sections 16461 (exculpation of trustee by provision in trust instrument), 16462 (nonliability for following instructions under revocable trust). During the time that a trust is revocable, the person holding the power to revoke is the one who must receive the account or report in order to commence the running of the limitations period provided in this section. See Sections 15800 (limits on rights of beneficiary of revocable trust), 16064(b) (exception to duty to account). Under prior law, the four-year limitations period provided in Code of Civil Procedure Section 343 was applied to actions for breach of express trusts. See *Cortelyou v. Imperial Land Co.*, 166 Cal. 14, 20, 134 P. 981 (1913); *Oeth v. Mason*, 247 Cal. App. 2d 805, 811-12, 56 Cal. Rptr. 69 (1967). Section 16460 is an exception to the four-year rule provided in Code of Civil Procedure Section 343.

Subdivision (b) provides special rules concerning who must receive the account or report for it to have the effect of barring claims based on the information disclosed. Under subdivision (b)(2) it may be appropriate to seek the appointment of a guardian ad litem or some other person to receive accounts and reports where no conservator has been appointed for the person and there is serious doubt that the beneficiary can understand the account or report.

Subdivision (c) applies the three-year statute of limitations provided by subdivision (a) to claims arising prior to the operative date, but also provides a one-year grace period before such claims are barred by application of this section.

For provisions relating to the duty to report information and account to beneficiaries, see Sections 16060-16064.

§ 16461. Exculpation of trustee

16461. (a) Except as provided in subdivision (b), the trustee can be relieved of liability for breach of trust by provisions in the trust instrument.

(b) A provision in the trust instrument is not effective to relieve the trustee of liability (1) for breach of trust committed intentionally, with gross negligence, in bad faith, or with reckless indifference to the interest of the beneficiary, or (2) for any profit that the trustee derives from a breach of trust.

Comment. Section 16461 is the same in substance as part of Section 222 of the Restatement (Second) of Trusts (1957), except that the reference to gross negligence does not appear in the Restatement. For special provisions applicable to revocable

trusts, see Section 16462. Although a trust may not exculpate a trustee from liability for a profit from a breach, as provided in clause (2) of subdivision (b), the trust may limit the trustee's duties with the effect that the trustee does not commit a breach in that area. However, it is against public policy to attempt to eliminate liability for profits derived from a breach of a duty that the trustee does have. See Restatement (Second) of Trusts § 222 comments b & c (1957).

§ 16462. Nonliability for following instructions under revocable trust

16462. (a) Notwithstanding Section 16461, a trustee of a revocable trust is not liable to a beneficiary for any act performed or omitted pursuant to written directions from the person holding the power to revoke, including a person to whom the power to direct the trustee is delegated.

(b) Subdivision (a) applies to a trust that is revocable in part with respect to the interest of the beneficiary in that part of the trust property.

Comment. Section 16462 restates subdivision (b) of former Civil Code Section 2258, insofar as it concerned the trustee's liability under a revocable trust, without substantive change. See also Section 16001 (trustee's duty to follow written directions under revocable trust). Section 16462 also restates subdivision (b) of former Civil Code Section 2238 without substantive change.

§ 16463. Consent of beneficiary to relieve trustee of liability for breach of trust

16463. (a) Except as provided in subdivisions (b) and (c), a beneficiary may not hold the trustee liable for an act or omission of the trustee as a breach of trust if the beneficiary consented to the act or omission before or at the time of the act or omission.

(b) The consent of the beneficiary does not preclude the beneficiary from holding the trustee liable for a breach of trust in any of the following circumstances:

(1) Where the beneficiary was under an incapacity at the time of the consent or of the act or omission.

(2) Where the beneficiary at the time consent was given did not know of his or her rights and of the material facts that the trustee knew or should have known and

that the trustee did not reasonably believe that the beneficiary knew.

(3) Where the consent of the beneficiary was induced by improper conduct of the trustee.

(c) Where the trustee has an interest in the transaction adverse to the interest of the beneficiary, the consent of the beneficiary does not preclude the beneficiary from holding the trustee liable for a breach of trust under any of the circumstances described in subdivision (b) or where the transaction to which the beneficiary consented was not fair and reasonable to the beneficiary.

Comment. Section 16463 is a new provision that is the same in substance as Section 216 of the Restatement (Second) of Trusts (1957). Section 16463 supersedes provisions relating to beneficiaries' consent to relieve a trustee of liability that appeared in former Civil Code Sections 2230, 2232, and 2282(d). See also Sections 16460 (limitations on proceedings against trustee), 16464 (release), 16465 (affirmance). As to other rules that may limit the trustee's liability, see the Comment to Section 16460.

§ 16464. Discharge of trustee's liability by release or contract

16464. (a) Except as provided in subdivision (b), a beneficiary may be precluded from holding the trustee liable for a breach of trust by the beneficiary's release or contract effective to discharge the trustee's liability to the beneficiary for that breach.

(b) A release or contract is not effective to discharge the trustee's liability for a breach of trust in any of the following circumstances:

(1) Where the beneficiary was under an incapacity at the time of making the release or contract.

(2) Where the beneficiary did not know of his or her rights and of the material facts (A) that the trustee knew or reasonably should have known and (B) that the trustee did not reasonably believe that the beneficiary knew.

(3) Where the release or contract of the beneficiary was induced by improper conduct of the trustee.

(4) Where the transaction involved a bargain with the trustee that was not fair and reasonable.

Comment. Section 16464 is a new provision that is the same in substance as Section 217 of the Restatement (Second) of Trusts (1957). Section 16464 supersedes former Civil Code Section 2230 to the extent that section governed release. See also Sections 16460 (limitations on proceedings against trustee), 16463 (consent), 16465 (affirmance). As to other rules that may limit the trustee's liability, see the Comment to Section 16460.

§ 16465. Discharge of trustee's liability by subsequent affirmance

16465. (a) Except as provided in subdivision (b), if the trustee, in breach of trust, enters into a transaction that the beneficiary may at his or her option reject or affirm, and the beneficiary affirms the transaction, the beneficiary shall not thereafter reject it and hold the trustee liable for any loss occurring after the trustee entered into the transaction.

(b) The affirmance of a transaction by the beneficiary does not preclude the beneficiary from holding a trustee liable for a breach of trust if, at the time of the affirmance, any of the following circumstances existed:

(1) The beneficiary was under an incapacity.

(2) The beneficiary did not know of his or her rights and of the material facts (A) that the trustee knew or reasonably should have known and (B) that the trustee did not reasonably believe that the beneficiary knew.

(3) The affirmance was induced by improper conduct of the trustee.

(4) The transaction involved a bargain with the trustee that was not fair and reasonable.

Comment. Section 16465 is a new provision that is the same in substance as Section 218 of the Restatement (Second) of Trusts (1957). See also Sections 16460 (limitations on proceedings against trustee), 16463 (consent), 16464 (release). As to other rules that may limit the trustee's liability, see the Comment to Section 16460.

PART 5. JUDICIAL PROCEEDINGS CONCERNING TRUSTS

CHAPTER 1. JURISDICTION AND VENUE

§ 17000. Subject matter jurisdiction

17000. (a) The superior court having jurisdiction over the trust pursuant to this part has exclusive jurisdiction of proceedings concerning the internal affairs of trusts.

(b) The superior court having jurisdiction over the trust pursuant to this part has concurrent jurisdiction of the following:

(1) Actions and proceedings to determine the existence of trusts.

(2) Actions and proceedings by or against creditors or debtors of trusts.

(3) Other actions and proceedings involving trustees and third persons.

Comment. Section 17000 is new and is drawn from the first sentence of Section 7-201(a) of the Uniform Probate Code (1977). Subdivision (a) provides for exclusive jurisdiction in the superior court in matters involving the internal affairs of trusts. See Chapter 3 (commencing with Section 17200). Jurisdiction was in the superior court under former Probate Code Section 1138.3. Subdivision (a) also supersedes former Probate Code Section 1123.7.

It is intended that the department of the superior court that customarily deals with probate matters will exercise the exclusive jurisdiction relating to internal trust affairs provided by subdivision (a). This department of the superior court is not a court of limited power. See Section 17001 (superior court sitting in probate is full-power court).

Subdivision (b) is new and is drawn from Section 7-204 of the Uniform Probate Code.

§ 17001. Full-power court

17001. In proceedings concerning the internal affairs of trusts commenced pursuant to this division, the court has all the powers of the superior court.

Comment. Section 17001 is a new provision that makes clear that the department of the superior court exercising the exclusive jurisdiction to determine internal trust affairs provided

by Section 17000(a) has all the powers of the superior court when exercising its general jurisdiction. Hence, while not intending to disrupt the traditional division of business among different departments of the superior court, this section rejects the limitation on the powers of the probate court that has been cited in appellate decisions. See, e.g., *Copley v. Copley*, 80 Cal. App. 3d 97, 106-07, 145 Cal. Rptr. 437 (1978).

§ 17002. Principal place of administration of trust

17002. (a) The principal place of administration of the trust is the usual place where the day-to-day activity of the trust is carried on by the trustee or its representative who is primarily responsible for the administration of the trust.

(b) If the principal place of administration of the trust cannot be determined under subdivision (a), it shall be determined as follows:

(1) If the trust has a single trustee, the principal place of administration of the trust is the trustee's residence or usual place of business.

(2) If the trust has more than one trustee, the principal place of administration of the trust is the residence or usual place of business of any of the cotrustees as agreed upon by them or, if not, the residence or usual place of business of any of the cotrustees.

Comment. Section 17002 supersedes the second and third sentences of former Probate Code Section 1138.3(a). Subdivision (a) of Section 17002 substitutes a criterion of day-to-day activity for the former reference to the location of the day-to-day records of the trust.

§ 17003. Jurisdiction over trustees and beneficiaries

17003. Subject to Section 17004:

(a) By accepting the trusteeship of a trust having its principal place of administration in this state the trustee submits personally to the jurisdiction of the court under this division.

(b) To the extent of their interests in the trust, all beneficiaries of a trust having its principal place of administration in this state are subject to the jurisdiction of the court under this division.

Comment. Section 17003 is a new provision that is intended to facilitate the exercise of the court's power under this chapter. This section is drawn from Section 7-103 of the Uniform Probate Code (1977). As recognized by the introductory clause, constitutional limitations on assertion of jurisdiction apply to the exercise of jurisdiction under Section 17003. Consequently, appropriate notice must be given to a trustee or beneficiary as a condition of jurisdiction under this section. See, e.g., *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). Section 17003 is not a limitation on the jurisdiction of the court over the trust, trust property, or parties to the trust. See Section 17004 (general basis of jurisdiction). See also Section 15800 (limits on rights of beneficiary of revocable trust).

§ 17004. Basis of jurisdiction over trust, trust property, and trust parties

17004. The court may exercise jurisdiction in proceedings under this division on any basis permitted by Section 410.10 of the Code of Civil Procedure.

Comment. Section 17004 is a new provision that recognizes that the court, in proceedings relating to internal trust affairs or other purposes described in Section 17000, may exercise jurisdiction on any basis that is not inconsistent with the California or United States Constitutions, as provided in Code of Civil Procedure Section 410.10. See generally Judicial Council Comment to Code Civ. Proc. § 410.10. In addition, Section 17003 codifies a basis of personal jurisdiction derived from concepts of presence in the state and consent to jurisdiction. However, personal jurisdiction over a trustee may be exercised where the trustee is found, regardless of the location of the trust property. See *Estate of Knox*, 52 Cal. App. 2d 338, 348, 126 P.2d 108 (1942). Similarly, jurisdiction may be exercised to determine matters concerning trust property, particularly land, located in California even if the principal place of administration of the trust is not in California. See Restatement (Second) of Conflict of Laws § 276 & comments (1969); 5 A. Scott, *The Law of Trusts* §§ 644-47, at 4074-83 (3d ed. 1967).

A determination that a California court may exercise jurisdiction is not decisive if the exercise would be an undue interference with the jurisdiction of a court of another state which has primary supervision over the administration of the trust. See *Estate of Knox*, 52 Cal. App. 2d 338, 344-48, 126 P.2d 108 (1942); *Schuster v. Superior Court*, 98 Cal. App. 619, 623-28, 277 P. 509 (1929); Restatement (Second) of Conflict of Laws § 267 &

comments (1969). This concept of primary supervision in the context of trust administration is a special application of the doctrine of *forum non conveniens*, which is recognized generally in Code of Civil Procedure Section 410.30.

Where the court has acquired jurisdiction over parties to a trust, jurisdiction continues over the parties and the subject of the proceeding, notwithstanding the removal from the state of a person or trust property, until the conclusion of the action or proceeding concerning the trust. See Code Civ. Proc. § 410.50(b); *cf. Maloney v. Maloney*, 67 Cal. App. 2d 278, 280, 154 P.2d 426 (1944) (jurisdiction over child custody issue).

§ 17005. Venue

17005. (a) The proper county for commencement of a proceeding pursuant to this division is either of the following:

(1) In the case of a living trust, the county where the principal place of administration of the trust is located.

(2) In the case of a testamentary trust, either the county where the decedent's estate is administered or where the principal place of administration of the trust is located.

(b) If a living trust has no trustee, the proper county for commencement of a proceeding for appointing a trustee is the county where the trust property, or some portion of the trust property, is located.

(c) Except as otherwise provided in subdivisions (a) and (b), the proper county for commencement of a proceeding pursuant to this division is determined by the rules applicable to civil actions generally.

Comment. Subdivision (a) (1) of Section 17005 restates part of the first sentence of former Probate Code Section 1138.3(a) without substantive change. See Section 17002 (principal place of administration of trust).

Subdivision (a) (2) restates former Probate Code Section 1138.3(b) without substantive change and extends the former provision to all testamentary trusts.

Subdivision (b) restates part of the first sentence of former Civil Code Section 2289 without substantive change, except that it makes clear that it applies only to appointment of a trustee for a living trust that has no trustee. Proceedings to appoint a trustee for a testamentary trust that has no trustee are commenced in the county where the decedent's estate is administered. See subdivision (a) (2).

Subdivision (c) provides venue rules applicable in cases not covered by subdivisions (a) and (b), such as where jurisdiction over a trust, trust property, or parties to a trust is based on a factor other than the presence of the principal place of administration in this state. See Section 17004 (general basis of jurisdiction). Thus, for example, when the principal place of administration of a trust is in another state, but jurisdiction is proper in California, the general rules governing venue apply. See, e.g., Code Civ. Proc. §§ 392 (real property), 395 (county of defendant's residence). This subdivision is drawn from Section 7-204 of the Uniform Probate Code (1977).

§ 17006. Jury trial

17006. There is no right to a jury trial in proceedings under this division concerning the internal affairs of trusts.

Comment. Section 17006 is a new statutory provision which codifies the case law rule. See *People v. One 1941 Chevrolet Coupe*, 37 Cal. 2d 283, 286-87, 231 P.2d 832 (1951); *C & K Engineering Contractors v. Amber Steel Co.*, 23 Cal. 3d 1, 8, 587 P.2d 1136, 151 Cal. Rptr. 323 (1978); *Estate of Beach*, 15 Cal. 3d 623, 642, 542 P.2d 994, 125 Cal. Rptr. 570 (1975).

CHAPTER 2. NOTICE

§ 17100. Application of chapter

17100. This chapter applies to notice in proceedings commenced pursuant to this division or notice otherwise required by this division.

Comment. Section 17100 supersedes former Probate Code Section 1215. See also Section 82 ("trust" defined). This article governs notice in proceedings under Chapter 3 (commencing with Section 17200), Chapter 4 (commencing with Section 17300) (trusts subject to continuing jurisdiction), Chapter 5 (commencing with Section 17400) (transfer of trust to another jurisdiction), and Chapter 6 (commencing with Section 17450) (transfer of trust to California).

§ 17101. Form of notice

17101. If notice of the time and place of a hearing is required to be given, the notice shall be in the form prescribed by the Judicial Council or, if the Judicial Council has not prescribed an applicable form, in compliance with Section 1200.1.

Comment. Section 17101 is drawn from Section 1464 (form of notice under guardianship-conservatorship statute). See also Section 15006 (Judicial Council may prescribe forms required by division).

§ 17102. Manner of mailing; when mailing complete

17102. (a) If a notice or other paper is required or permitted to be mailed, it shall be sent as follows:

(1) By first-class mail if the person's address is within the United States.

(2) By airmail if the person's address is not within the United States.

(b) Mailing is complete when the notice or other paper is deposited in the mail, postage prepaid, addressed to the person to whom it is mailed.

(c) If the address is not known, notice shall be given as the court may require in the manner provided in Section 413.30 of the Code of Civil Procedure.

Comment. Subdivisions (a) and (b) of Section 17102 are new and are the same as Section 1465. Subdivision (c) continues the substance of part of the second paragraph of subdivision (a) of former Probate Code Section 1138.6. This section supersedes former Probate Code Section 1125.1 and part of the second paragraph of subdivision (a) of former Probate Code Section 1138.6.

§ 17103. Personal delivery instead of mailing

17103. If a notice or other paper is required or permitted to be mailed, it may be delivered personally to the person to whom it is required or permitted to be mailed.

Comment. Section 17103 is the same as the first sentence of Section 1466 and restates the fourth paragraph of subdivision (a) of former Probate Code Section 1138.6 without substantive change.

§ 17104. Proof of giving notice; conclusiveness of order

17104. (a) Proof of the giving of notice shall be made at or before the hearing to the satisfaction of the court. Proof may be made by, but is not limited to, the means provided in Section 1468.

(b) If it appears to the satisfaction of the court that notice has been regularly given or that the party entitled

to notice has waived it, the court shall so find in its order. When the order becomes final, it is conclusive on all persons, whether or not in being.

Comment. Section 17104 is the same as parts of Section 1468 (proof of notice under guardianship-conservatorship statute) and incorporates the various means for making proof of service provided in Section 1468. Subdivision (b) supersedes part of former Probate Code Section 1123. Section 17104 restates without substantive change the fifth paragraph of subdivision (a) of former Probate Code Section 1138.6, and also subdivision (c) of former Probate Code Section 1200.5 to the extent it applied to proceedings involving trusts.

§ 17105. Additional notice

17105. (a) The court may, on its own motion or on motion of a trustee or other person interested in the trust, require that further or additional notice be given at any stage of the proceeding. The court may prescribe the form and method of the notice to be given.

(b) A petitioner or other person required to give notice may cause notice to be given to any person interested in the trust without the need for a court order.

Comment. Subdivision (a) of Section 17105 restates subdivision (a) (1) and subdivision (b) of former Probate Code Section 1215.3 without substantive change. Section 17105 is comparable to Sections 1204 and 1462.

Subdivision (b) restates the second sentence of former Probate Code Section 1215.4 without substantive change.

§ 17106. Shortening time

17106. The court may for good cause shorten the time for giving a notice.

Comment. Section 17106 restates former Probate Code Section 1138.6(c) without substantive change.

§ 17107. Notice of postponed hearings

17107. The court may continue or postpone any hearing, from time to time, in the interest of justice, and no further notice of the continued or postponed hearing is required unless otherwise ordered by the court.

Comment. Section 17107 is the same as Sections 1205 and 1463.

CHAPTER 3. PROCEEDINGS CONCERNING TRUSTS

§ 17200. Petitioners; grounds for petition

17200. (a) Except as provided in Section 15800, a trustee or beneficiary of a trust may petition the court under this chapter concerning the internal affairs of the trust or to determine the existence of the trust.

(b) Proceedings concerning the internal affairs of a trust include, but are not limited to, proceedings for any of the following purposes:

(1) Determining questions of construction of a trust instrument.

(2) Determining the existence or nonexistence of any immunity, power, privilege, duty, or right.

(3) Determining the validity of a trust provision.

(4) Ascertaining beneficiaries and determining to whom property shall pass or be delivered upon final or partial termination of the trust, to the extent the determination is not made by the trust instrument.

(5) Settling the accounts and passing upon the acts of the trustee, including the exercise of discretionary powers.

(6) Instructing the trustee.

(7) Compelling the trustee to report information about the trust or account to the beneficiary, if (A) the trustee has failed to submit a requested report or account within 60 days after written request of the beneficiary and (B) no report or account has been made within six months preceding the request.

(8) Granting powers to the trustee.

(9) Fixing or allowing payment of the trustee's compensation.

(10) Appointing or removing a trustee.

(11) Accepting the resignation of a trustee.

(12) Compelling redress of a breach of the trust by any available remedy.

(13) Approving or directing the modification or termination of the trust.

(14) Approving or directing the combination or division of trusts.

(15) Amending or conforming the trust instrument in the manner required to qualify a decedent's estate for the charitable estate tax deduction under federal law, including the addition of mandatory governing instrument requirements for a charitable remainder trust as required by final regulations and rulings of the United States Internal Revenue Service, in any case in which all parties interested in the trust have submitted written agreement to the proposed changes or written disclaimer of interest.

(16) Authorizing or directing transfer of a trust or trust property to or from another jurisdiction.

(17) Directing transfer of a testamentary trust subject to continuing court jurisdiction from one county to another.

(18) Approving removal of a testamentary trust from continuing court jurisdiction.

(19) Reforming or excusing compliance with the governing instrument of an organization pursuant to Section 16105.

Comment. Section 17200 restates the substance of subdivision (a) of former Probate Code Section 1138.1 and supersedes parts of former Probate Code Section 1120. The reference to determining the existence of a trust in subdivision (a) is new. Subdivision (a) also restates without substantive change part of former Probate Code Section 1139.1 and the first sentence of former Probate Code Section 1139.2 (petition for transfer of trust to another jurisdiction) and part of former Probate Code Section 1139.12 (petition for transfer to California). The introductory clause of subdivision (a) is a new provision that has the effect of giving the right to petition concerning the internal affairs of a revocable living trust to the settlor (or other person holding the power to revoke) instead of the beneficiaries during the time that the settlor (or other person holding the power to revoke) is competent. See Section 15800 and the Comment thereto.

The list of grounds for a petition concerning the internal affairs of a trust under subdivision (b) is not exclusive and is not intended to preclude a petition for any other purpose that can be characterized as an internal affair of the trust. Paragraphs (1) and (2) of subdivision (b) are new and are drawn from Section 7-201(a) of the Uniform Probate Code (1977). Paragraph (3) is new. Paragraph (5) restates parts of subdivisions (b) and (d) of former Civil Code Section 2269 (review of exercise of discretionary powers) without substantive change. See Sections

16080-16081 (duties with regard to discretionary powers). Paragraph (9) supersedes the last sentence of former Civil Code Section 2274.

Various provisions elsewhere in this division relate to proceedings under this article. For limitations on the right of a beneficiary to compel the trustee to account or report under paragraph (7), see Sections 15800 and 16060-16064. As to granting powers to the trustee under paragraph (8), see Section 16201. As to the trustee's compensation under paragraph (9), see Sections 15680-15683. As to breaches of trust involved in paragraph (12), see Sections 16400-16462. As to modification and termination of trusts under paragraph (13), see Sections 15400-15410. As to combining or dividing trusts under paragraph (14), see Sections 15411 and 15412. As to transfers of trusts under paragraph (16), see Sections 17400-17405 and 17450-17457. As to transfers of certain testamentary trusts within California under paragraph (17), see Section 17304. As to removal of certain testamentary trusts from continuing court jurisdiction under paragraph (18), see Section 17352.

The procedure provided in this chapter is available to determine matters concerning the administration of trusts notwithstanding a purported limitation or exclusion in the trust instrument. The provision of former Probate Code Section 1138.1(b) to the effect that the trust could restrict the availability of remedies is not continued.

See also Sections 24 ("beneficiary" defined), 82 ("trust" defined), 17005 (venue).

§ 17201. Commencement of proceeding

17201. (a) A proceeding under this chapter is commenced by filing a verified petition stating facts showing that the petition is authorized under this chapter and the grounds of the petition.

(b) When a petition that requires a hearing is filed with the court clerk, the clerk shall set the matter for hearing.

Comment. Subdivision (a) of Section 17201 restates the first sentence of former Probate Code Section 1138.4, except for the former provision relating to authorization by the terms of the trust. The provision relating to the grounds of the petition supersedes part of former Probate Code Section 1138.7. Subdivision (a) also supersedes parts of former Probate Code Sections 1123.5, 1123.6, 1128, 1139.2, and 1139.14.

Subdivision (b) restates parts of former Probate Code Sections 1120(a), 1120.1a(d), 1123.5, 1125.1, 1129, 1138.6(a), 1139.3, and

1139.15 without substantive change. Subdivision (b) is comparable to Section 1451 (guardianship-conservatorship statute).

§ 17202. Dismissal of petition

17202. The court may dismiss a petition if it appears that the proceeding is not reasonably necessary for the protection of the interests of the trustee or beneficiary.

Comment. Section 17202 restates former Probate Code Section 1138.5(a) without substantive change. See also Section 17200(a) (who may petition).

§ 17203. Notice

17203. At least 30 days before the time set for the hearing on the petition, the petitioner shall cause notice of the time and place of hearing to be mailed to any of the following persons who are not petitioners:

(a) All trustees.

(b) All beneficiaries who are entitled to notice.

(c) The Attorney General, if the petition relates to a charitable trust subject to the jurisdiction of the Attorney General, unless the Attorney General waives notice.

Comment. The introductory paragraph and subdivisions (a) and (b) of Section 17203 restate the first part of the second paragraph of subdivision (a) of former Probate Code Section 1138.6 without substantive change. See also Sections 17100-17107 (manner of notice). Subdivision (b) recognizes that there are other rules governing which beneficiaries are entitled to notice. Under Section 15802, beneficiaries of revocable trusts are not entitled to notice during the time that the trust may be revoked, nor are such beneficiaries entitled to get notice even if they have requested special notice pursuant to Section 17204. Under Section 15804, the need to give notice is limited in the case of certain beneficiaries having future interests, but this limitation does not apply to beneficiaries who have requested special notice. See Section 15804(c)(1). These rules limit the requirement of notice whether the interest involved is that of a beneficiary of a private trust or that of a beneficiary of a charitable trust subject to jurisdiction of the Attorney General. Section 17203 also supersedes parts of former Probate Code Section 1125.1 and 1126.

Subdivision (c) supersedes part of subdivision (f) of former Probate Code Section 1120.1a, subdivision (d) of former Probate Code Section 1138.6, and the third sentence of former Probate

Code Section 1139.3. Subdivision (c) also reflects the notice requirements of Government Code Section 12591. See also Section 24 ("beneficiary" defined).

§ 17204. Request for special notice

17204. (a) If proceedings involving a trust are pending, a beneficiary of the trust may, in person or by attorney, serve on the trustee or the trustee's attorney and file with the court clerk where the proceedings are pending a written request stating that the beneficiary desires special notice of the filing of petitions in the proceeding relating to any or all of the purposes described in Section 17200 and giving an address for receiving notice by mail. Proof of service of the request on the trustee shall be filed with the court clerk when the request is filed.

(b) Except as provided in subdivision (c), after serving and filing a request and proof of service pursuant to subdivision (a), the beneficiary is entitled to notice pursuant to Section 17203.

(c) A request for special notice made by a beneficiary whose right to notice is restricted by Section 15802 is not effective.

Comment. Section 17204 supersedes the former provisions relating to requests for special notice with regard to testamentary trusts in former Probate Code Section 1120.5 and in Probate Code Sections 1202 and 1202.5. See also provisions relating to trusts formerly appearing in Probate Code Sections 1200 and 1200.5. Subdivision (c) makes clear that the restrictions on rights of beneficiaries of revocable trusts apply to the right to request special notice. Section 15804 which limits the need to give notice to certain beneficiaries with future interests does not restrict the right of such beneficiaries to request special notice. See Section 15804(c) (1). See also Section 17104 (proof of notice).

§ 17205. Request for copy of petition

17205. If a trustee or beneficiary has served and filed either a notice of appearance, in person or by counsel, directed to the petitioner or the petitioner's counsel in connection with a particular petition and proceeding or a written request for a copy of the petition, and has given an address to which notice or a copy of the petition may be mailed or delivered, the petitioner shall cause a copy

of the petition to be mailed to that person within five days after service of the notice of appearance or receipt of the request.

Comment. Section 17205 restates the third paragraph of subdivision (a) of former Probate Code Section 1138.6 without substantive change. This section provides the manner of determining to whom a copy of a petition in a particular proceeding should be sent.

§ 17206. Authority to make necessary orders; temporary trustee

17206. The court in its discretion may make any orders and take any other action necessary or proper to dispose of the matters presented by the petition, including appointment of a temporary trustee to administer the trust in whole or in part.

Comment. The first part of Section 17206 continues former Probate Code Section 1138.2 and part of former Probate Code Section 1121 without substantive change. This section also supersedes the last clause of subdivision (b) of former Probate Code Section 1120.6. The authority to appoint a temporary trustee is new.

§ 17207. Appeal

17207. An appeal may be taken from the grant or denial of any final order made under this chapter, except the following:

(a) Compelling the trustee to submit an account or report acts as trustee to a beneficiary pursuant to paragraph (7) of subdivision (b) of Section 17200.

(b) Accepting the resignation of a trustee pursuant to paragraph (11) of subdivision (b) of Section 17200.

(c) Approving removal of a testamentary trust from continuing court jurisdiction pursuant to paragraph (18) of subdivision (b) of Section 17200.

Comment. Section 17207 supersedes part of former Probate Code Section 1138.10 and the part of Probate Code Section 1240 that formerly related to trusts. Unlike former law, Section 17207 lists the orders that are not appealable, rather than the orders that are appealable. Under this section, orders described in Section 17200 that are new to the law are appealable. See, e.g., Section 17200(a) (determining existence of trust), (b)(1) (construction of trust instrument), (b)(2) (determining

existence of any immunity, power, privilege, duty, or right). Unlike the former statute, Section 17207 permits an appeal from the grant or denial of the following orders: (1) For the modification or termination of a trust with uneconomically low principal (see former Civil Code § 2279.1; former Prob. Code §§ 1138.1(b)(12), 1138.10), (2) for the amendment or conformance of a trust instrument to qualify for charitable estate tax deduction (see Section 17200(b)(15)), (3) directing transfer of a testamentary trust subject to continuing court jurisdiction (see Section 17200(b)(17)), and (4) reforming or excusing compliance with the governing instrument of an organization under Section 16105 (see Section 17200(b)(19)). See also Section 17202 (dismissal of petition).

§ 17208. Appointment of guardian ad litem

17208. (a) The court may, on its own motion or on request of a trustee or other person interested in the trust, appoint a guardian ad litem at any stage of a proceeding concerning the trust to represent the interest of any of the following persons, if the court determines that representation of the interest otherwise would be inadequate:

- (1) A minor.
- (2) An incapacitated person.
- (3) An unborn person.
- (4) An unascertained person.
- (5) A person whose identity or address is unknown.
- (6) A designated class of persons who are not ascertained or are not in being.

(b) If not precluded by a conflict of interest, a guardian ad litem may be appointed to represent several persons or interests.

(c) The reasonable expenses of the guardian ad litem, including compensation and attorney's fees, shall be determined by the court and paid as the court orders, either out of trust property or by the petitioner.

(d) Sections 372 to 373.5, inclusive, of the Code of Civil Procedure do not apply to the appointment of a guardian ad litem under this section.

Comment. Section 17208 continues without substantive change paragraph (2) of subdivision (a) and subdivision (b) of former Probate Code Section 1215.3 and subdivision (a) of former Probate Code Section 1138.7, and supersedes part of the

last paragraph of subdivision (b) of former Probate Code Section 1120. Subdivision (c) is drawn from the third paragraph of Code of Civil Procedure Section 373.5. Subdivision (d) supersedes subdivision (c) of former Probate Code Section 1138.7 and the last sentence of subdivision (b) of former Probate Code Section 1120. A guardian ad litem may be appointed in situations where a guardian or conservator has already been appointed, if the need for a guardian ad litem exists. This section is not intended to limit any power the court may have to appoint an attorney to represent the interests of an incapacitated person.

§ 17209. Intermittent judicial intervention in trust administration

17209. The administration of trusts is intended to proceed expeditiously and free of judicial intervention, subject to the jurisdiction of the court.

Comment. Section 17209 restates former Probate Code Section 1138.12 without substantive change.

§ 17210. Enforcement of beneficiary's rights under charitable trust by Attorney General

17210. In a case involving a charitable trust subject to the jurisdiction of the Attorney General, the Attorney General may petition under this chapter.

Comment. Section 17210 codifies the general rule that the Attorney General stands in the place of the beneficiaries of a charitable trust for purposes of enforcement of the trust. See Section 24 ("beneficiary" defined to include any person entitled to enforce the trust in the case of a charitable trust); see, e.g., *People v. Cogswell*, 113 Cal. 129, 136, 45 P. 270 (1896); *Estate of Schloss*, 56 Cal. 2d 248, 257, 363 P.2d 875, 14 Cal. Rptr. 643 (1961); see also Restatement (Second) of Trusts § 391 (1957).

CHAPTER 4. TESTAMENTARY TRUSTS SUBJECT TO CONTINUING COURT JURISDICTION

Article 1. Administration of Testamentary Trusts Subject to Continuing Court Jurisdiction

§ 17300. Application of article

17300. This article applies only to the following:

(a) A trust created by a will executed before July 1, 1977, and not incorporated by reference in a will on or after July 1, 1977.

(b) A trust created by a will which provides that the trust is subject to the continuing jurisdiction of the superior court.

Comment. Section 17300 restates without substantive change a part of subdivision (a) of former Probate Code Section 1120, and the exception to former Section 1120 provided in the first sentence of subdivision (d) of former Probate Code Section 1120.1a. The effect of this section is to limit the application of provisions for continuing jurisdiction of the court to two classes of trusts: (1) trusts created by a will executed before July 1, 1977, when trusts were no longer required to be subject to continuing jurisdiction (see 1976 Cal. Stat. ch. 860, § 3), and not incorporated by reference thereafter, and (2) trusts that are specifically made subject to the continuing jurisdiction of the court by a provision in the trust instrument. A trust created by a will executed before July 1, 1977, which is incorporated by reference in a will thereafter, but that contains a provision making it subject to the continuing jurisdiction of the court, falls into the second class. See also Section 6130 (incorporation by reference in a will).

§ 17301. Continuing court jurisdiction

17301. If a trust described in Section 17300 continues after distribution of the decedent's estate, the court in which the decedent's estate was administered retains jurisdiction over the trust for any of the purposes specified in Section 17200.

Comment. Section 17301 preserves the continuing jurisdiction over testamentary trusts of the superior court where the decedent's estate is administered which was provided in

subdivision (b) of former Probate Code Section 1120. The incorporation of the grounds for a petition under Section 17200 continues the various grounds for invoking the court's continuing jurisdiction provided in subdivision (b) of former Probate Code Section 1120.

§ 17302. Applicable procedures

17302. Except as otherwise provided in this article, proceedings relating to trusts under continuing court jurisdiction are governed by this part.

Comment. Section 17302 makes clear that the general procedures governing judicial proceedings relating to trusts apply to proceedings involving trusts that remain subject to continuing court jurisdiction. See Sections 17000-17210. This incorporation of the general provisions continues the substance of much of the law relating to trusts subject to continuing court jurisdiction because the general procedures are drawn in part from former Probate Code Section 1120 *et seq.* See the Comments to Sections 17000-17210. This article has the effect of making inapplicable the alternative venue over testamentary trusts provided in Section 17005. The other distinction between proceedings under this article and those under Section 17200 *et seq.* is that no filing fee is required when a petition relating to an account is filed under the continuing jurisdiction provided in this article. See Gov't Code § 26827.4(b). In other respects, the procedures are the same.

§ 17303. Effect of removal from continuing jurisdiction

17303. This article does not apply to a trust described in Section 17300 that has been removed from continuing court jurisdiction.

Comment. Section 17303 makes clear the relation between this article and Article 2 (commencing with Section 17350). After a trust is removed from continuing court jurisdiction, the general provisions of this part apply to the trust.

§ 17304. Transfer of jurisdiction over trust to different county

17304. (a) At any time after final distribution of the decedent's estate, a trust described in Section 17300 may be transferred to a different county in this state as provided in this section.

(b) The petition for transfer shall set forth all of the following:

(1) The name of the county to which jurisdiction over the trust is sought to be transferred.

(2) The names, ages, and places of residence of the trustees and all beneficiaries of the trust, so far as known to the petitioner.

(3) A brief description of the character, condition, value, and location of property of the trust.

(4) A brief statement of the reasons for transfer.

(c) If, after hearing, it appears to the court that the transfer of jurisdiction to the county designated in the petition or to any other county in this state will be in the best interests of the estate, or that economical and convenient administration of the trust will be facilitated by the transfer, the court shall make an order transferring jurisdiction over the trust. Upon such order, the court clerk shall certify a copy of the order of transfer to the clerk of the court to which jurisdiction is transferred, together with copies of the instrument creating the trust, the decree of distribution, and any other documents or matters of record the court determines by order to be necessary to define the powers and duties of the trustee, or otherwise to be necessary in connection with further administration of the trust.

(d) The court to which jurisdiction is transferred may from time to time require by order the filing of certified copies of additional papers or matters of record from the court in which the decedent's estate was administered as are required.

(e) Upon the filing of a certified copy of the order of transfer, together with supporting documents, the court to which jurisdiction is transferred has the same jurisdiction over the trust as the court in which the decedent's estate was administered but for the transfer.

Comment. Section 17304 restates the transfer provisions of former Probate Code Sections 1128 and 1129. Subdivision (a) continues the authority provided by the first sentence of former Probate Code Section 1128.

Subdivision (b) restates the contents of the petition set forth in former Probate Code Section 1128 without substantive change. See also Section 17201(a) (verified petition).

Subdivision (c) restates the fourth and fifth sentences of the first paragraph of former Probate Code Section 1129 without substantive change. See also Sections 17100-17107 (notice),

17201(b) (clerk to set matters for hearing), 17203 (30 days' notice).

Subdivision (d) continues the last sentence of the first paragraph of former Probate Code Section 1129 without substantive change.

Subdivision (e) continues the second paragraph of former Probate Code Section 1129 without substantive change.

Article 2. Removal of Trusts From Continuing Court Jurisdiction

§ 17350. Application of article

17350. This article applies only to trusts created by will executed before July 1, 1977, and not incorporated by reference in a will on or after July 1, 1977.

Comment. Section 17350 restates the first sentence of former Probate Code Section 1120.1a without substantive change insofar as it provided an operative date for provisions relating to removal of trusts from continuing court jurisdiction. See also Section 6130 (incorporation by reference in will).

§ 17351. Removal of trust from continuing jurisdiction where trustee is trust company

17351. (a) If any of the trustees of a trust described in Section 17350 is a trust company, the trust shall be removed from continuing court jurisdiction as provided in this section. Within six months after the initial funding of the trust, the trustee shall give a notice of removal of the trust from continuing court jurisdiction to each beneficiary. Notice of removal shall be sent by registered or certified mail or by first-class mail, but notice sent by first-class mail is effective only if an acknowledgment of receipt of notice is signed by the beneficiary and returned to the trustee.

(b) The notice of removal of the trust from continuing court jurisdiction shall contain the following:

(1) A statement that as of January 1, 1983, the law was changed to remove the necessity for continuing court jurisdiction over the trust.

(2) A statement that Section 17200 of the Probate Code gives any beneficiary the right to petition a court to determine important matters relating to the administration of the trust.

(3) A copy of the text of Sections 17200 and 17201.

(4) A statement that each income beneficiary, as defined in subdivision (a) of Section 16301, is entitled to an annual statement of the principal and income receipts and disbursements of the trust and that any other beneficiary is entitled to such information upon written request to the trustee.

(5) The name and location of the court in the county in which it is appropriate to file a petition pursuant to Section 17200, the name and location of the court that had jurisdiction over the administration of the decedent's estate, and a statement that it is appropriate to file a petition pursuant to Section 17200 with either court.

(c) The trustee shall file with the court that had jurisdiction over the administration of the decedent's estate proof of giving notice under this section within seven months after the initial funding of the trust.

Comment. Section 17351 restates subdivision (a) of former Probate Code Section 1120.1a with some technical changes. See Sections 17102 (notice sent to person's address), 17103 (personal delivery instead of mailing), 17104 (proof of giving notice); see also Sections 24 ("beneficiary" defined), 83 ("trust company" defined).

§ 17352. Removal of trust from continuing jurisdiction where no trustee is trust company

17352. (a) If none of the trustees of a trust described in Section 17350 is a trust company, the trust may be removed from continuing court jurisdiction only with approval of the court. The trustee may petition for court approval at any time, and from time to time, in the trustee's discretion.

(b) The petition for removal shall set forth the trust accounts in detail, report the trustee's acts, and show the condition of the trust estate. A copy of the trust instrument shall be attached to the petition.

(c) At the hearing the court may receive testimony from any interested person and may grant or deny the petition, or may grant the petition on such conditions as the court in its discretion deems proper.

(d) If the petition is granted, the trustee shall send the notice of removal of the trust provided in subdivision (b) of Section 17351 and file proof of service as required by

subdivision (c) of Section 17351 within six months and seven months, respectively, from the date the petition is granted. A copy of the court order granting the petition shall be attached to the notice.

(e) If the petition is not granted, the trust shall continue to be administered under Article 1 (commencing with Section 17300) as if the settlor had provided in the will that the court does not lose jurisdiction of the estate by final distribution.

Comment. Section 17352 restates part of subdivision (d) of former Probate Code Section 1120.1a, subject to some technical changes. See Sections 17000 (subject-matter jurisdiction of court), 17201(a) (petitions to be verified), 17201(b) (clerk to set matters for hearing), 17203 (30 days' notice); see also 83 ("trust company" defined).

§ 17353. Removal by trust company as successor trustee

17353. If a trust company is appointed as a successor trustee of a trust which, at the time of the appointment, is subject to continuing court jurisdiction because it was not removed pursuant to Section 17352, the successor trustee shall comply with Section 17351. For the purpose of complying with Section 17351, the date of appointment of the successor trustee shall be treated as the date of initial funding of the trust.

Comment. Section 17353 restates the first sentence of subdivision (g) of former Probate Code Section 1120.1a without substantive change. See also Section 83 ("trust company" defined).

§ 17354. Effect of change in trustees or other event on removal

17354. After a trust is removed from continuing court jurisdiction pursuant to this article, neither a change in trustees nor any other event causes the trust to be subject to continuing court jurisdiction under Article 1 (commencing with Section 17300).

Comment. Section 17354 restates the second sentence of subdivision (g) of former Probate Code Section 1120.1a without substantive change.

CHAPTER 5. TRANSFER OF TRUST TO ANOTHER JURISDICTION

§ 17400. Application of chapter

17400. (a) This chapter applies to all of the following:

(1) A trust that is subject to this division.

(2) A trust subject to Chapter 8 (commencing with Section 6320) of Part 1 of Division 6.

(3) Any other trust to which the provisions of this chapter are made applicable by statute or trust instrument.

(b) This chapter does not prevent the transfer of the place of administration of a trust or of trust property to another jurisdiction by any other available means.

Comment. Subdivision (a) of Section 17400 restates former Probate Code Section 1139(a) without substantive change, but subdivision (a)(1) also permits the transfer of oral trusts. See 15207 (oral trusts of personal property). Subdivision (b) supersedes former Probate Code Section 1139(b). Under the definition of "trust" in Section 82, this chapter also applies to charitable trusts. See 15004 (application of division to charitable trusts). See also Sections 17005 (venue), 17200(b)(16) (proceedings for transfer of trust).

§ 17401. Transfer of place of administration or property from California

17401. (a) The court may make an order for the transfer of the place of administration of a trust or the transfer of some or all of the trust property to a jurisdiction outside this state as provided in this chapter.

(b) Except as otherwise provided in this chapter, proceedings under this chapter are governed by this part.

Comment. Subdivision (a) of Section 17401 restates the first part of former Probate Code Section 1139.1 without substantive change and supersedes former Probate Code Section 1132. See also Sections 62 ("property" defined), 17000 (subject-matter jurisdiction of superior court).

Subdivision (b) makes clear that the general rules applicable under this part apply unless this chapter provides a different rule. See, e.g., Sections 17006 (jury trial), 17100-17107 (notice), 17200-17210 (proceedings).

§ 17402. Contents of petition

17402. The petition for transfer shall set forth all of the following:

(a) The names and places of residence of the following:

(1) The trustee administering the trust in this state.

(2) The trustee, including any domiciliary trustee, who will administer the trust or trust property in the other jurisdiction.

(b) The names, ages, and places of residence of the living beneficiaries, as far as known to the petitioner.

(c) Whether the trustee who will administer the trust in the other jurisdiction has agreed to accept the trust. If so, the acceptance or a copy shall be attached as an exhibit to the petition or otherwise filed with the court.

(d) A general statement of the qualifications of the trustee who will administer the trust in the other jurisdiction and the amount of fiduciary bond, if any. If the trustee is an individual, the statement shall include the trustee's age.

(e) A general statement of the nature and value of the property of any trust of the same settlor being administered in the other jurisdiction by the trustee who will administer the trust in the other jurisdiction.

(f) The name of the court, if any, having jurisdiction of the trustee in the other jurisdiction or of its accounts or in which a proceeding may be had with respect to administration of the trust or the trustee's accounts.

(g) A statement of the character, condition, location, and value of the trust property sought to be transferred.

(h) Whether there is any pending civil action in this state against the trustee arising out of the administration of the trust sought to be transferred.

(i) A statement of the reasons for the transfer.

Comment. Section 17402 restates the part of former Probate Code Section 1139.2 providing for the contents of the petition for transfer without substantive change. The reference in subdivision (b) to living beneficiaries restates part of former Probate Code Section 1139.7 without substantive change. See also Sections 24 ("beneficiary" defined), 15802 (notice to beneficiary of revocable trust), 17200(a) (petition by trustee or beneficiary), 17201(a) (petition to be verified).

§ 17403. Notice and hearing

17403. (a) At least 30 days before the time set for the hearing on the petition, the petitioner shall cause notice of the time and place of the hearing to be mailed to each of the persons named in the petition at their respective addresses as stated in the petition.

(b) Any person interested in the trust, as trustee, beneficiary, or otherwise, may appear and file written grounds in opposition to the petition.

Comment. Subdivision (a) of Section 17403 restates the second sentence of former Probate Code Section 1139.3 without substantive change. See Section 17402 (places of residence listed in petition). Subdivision (b) continues the fourth sentence of former Probate Code Section 1139.3 without substantive change. For a provision governing notice to the Attorney General in a case involving a charitable trust, see Section 17203(c). See also Sections 15802 (notice to beneficiary of revocable trust), 17102 (manner of mailing notice), 17103 (personal delivery instead of mailing), 17201(b) (clerk to set petition for hearing).

§ 17404. Order granting transfer

17404. The court may, in its discretion, grant the petition and order the trustee to transfer the trust property or to transfer the place of administration of the trust to the other jurisdiction if, after hearing, all of the following appear to the court:

(a) The transfer of the trust property to a trustee in another jurisdiction, or the transfer of the place of administration of the trust to another jurisdiction, will promote the best interests of the trust and those interested in it, taking into account the interest in the economical and convenient administration of the trust.

(b) The transfer will not violate the trust instrument.

(c) Any new trustee to whom the trust property is to be transferred is qualified, willing, and able to administer the trust or trust property under the trust instrument.

Comment. Section 17404 restates without substantive change the introductory clause and subdivisions (1), (3), and (4) of former Probate Code Section 1139.4 (prerequisites for transfer) and part of former Probate Code Section 1139.1 (subject to limitation in trust), except that the court is required to take into account the interest in economical and convenient

administration rather than to find that it would necessarily result from the transfer. The requirement in subdivision (c) that the trustee be willing is included for consistency with Section 17455(a)(3).

The discontinuation of subdivision (2) of former Probate Code Section 1139.4 relating to "substantial rights of residents" is not intended to have any effect on the court's discretion to approve or disapprove a transfer.

§ 17405. Manner of transfer; discharge of trustee

17405. If a transfer is ordered under this chapter, the court may direct the manner of transfer and impose terms and conditions as may be just, including, but not limited to, a requirement for the substitution of a successor trustee in any pending litigation in this state. The delivery of property in accordance with the order of the court is a full discharge of the trustee in relation to all property embraced in the order.

Comment. Section 17405 continues former Probate Code Section 1139.5 without substantive change.

**CHAPTER 6. TRANSFER OF TRUST
FROM ANOTHER JURISDICTION**

§ 17450. Application of chapter

17450. (a) This chapter applies to a trust, or portion thereof, administered in a jurisdiction outside this state.

(b) This chapter does not prevent the transfer of the place of administration of a trust or of trust property to this state by any other available means.

Comment. Subdivision (a) of Section 17450 restates former Probate Code Section 1139.10(a) without substantive change, except that subdivision (a) also permits the transfer of oral trusts to California. See Section 15207 (oral trusts of personal property). See Section 82 ("trust" defined). Section 17450 makes this chapter applicable to the transfer to California of the place of administration of trusts or trust property administered in a jurisdiction outside California. Hence, this chapter applies to trusts administered in foreign countries as well as those administered in other states. Subdivision (b) supersedes former Probate Code Section 1139.10(b). See also Section 17200(b)(16) (proceedings for transfer of trust).

§ 17451. Transfer of place of administration or property to California

17451. (a) The court may make an order accepting the transfer of the place of administration of a trust from another jurisdiction to this state or the transfer of some or all of the trust property in another jurisdiction to a trustee in this state as provided in this chapter.

(b) Except as otherwise provided in this chapter, proceedings under this chapter are governed by this part.

Comment. Subdivision (a) of Section 17451 restates former Probate Code Section 1139.11 without substantive change and is comparable to Section 17401 (a). See also Sections 62 ("property" defined), 17000 (subject matter jurisdiction in superior court).

Subdivision (b) makes clear that the general rules applicable under this part apply unless this chapter provides a different rule. See, e.g., Sections 17006 (jury trial), 17100-17107 (notice), 17200-17210 (proceedings).

§ 17452. Venue

17452. (a) If the petition requests that a resident of this state be appointed trustee, the petition shall be filed in the court of the county where the proposed principal place of administration of the trust pursuant to Section 17002 is located.

(b) If the petition requests that only a nonresident of this state be appointed trustee, the petition shall be filed in the court of the county where either (1) any beneficiary resides or (2) a substantial portion of the trust property to be transferred is located or will be located.

Comment. Section 17452 restates former Probate Code Section 1139.13 without substantive change. See also Section 17000 (subject matter jurisdiction of superior court).

§ 17453. Contents of petition

17453. The petition for transfer shall set forth all of the following:

(a) The names and places of residence of the following:

(1) The trustee administering the trust in the other jurisdiction.

(2) The proposed trustee to whom administration of the trust or trust property will be transferred.

(b) The names, ages, and places of residence of all living beneficiaries, as far as known to the petitioner.

(c) Whether administration of the trust has been subject to supervision in a jurisdiction outside this state. If so, the petition shall state whether a petition or appropriate request for transfer of place of administration of the trust or trust property to this state has been filed, if necessary, with the court in the other jurisdiction, and the status of the petition or request.

(d) Whether the trustee proposed to administer the trust in this state has agreed to accept the trust in this state. If the trustee has agreed, the acceptance shall be attached as an exhibit to the petition or otherwise filed with the court.

(e) A general statement of the qualifications of the trustee proposed to administer the trust in this state and the amount of any bond to be requested. If the trustee is an individual, the statement shall include the trustee's age.

(f) A copy of the trust instrument or a statement of the terms of the trust instrument in effect at the time the petition is filed, including all amendments thereto.

(g) A statement of the character, condition, location, and value of the trust property sought to be transferred.

(h) A statement of the reasons for the transfer.

Comment. Section 17453 continues former Probate Code Section 1139.14 without substantive change, except that the statement of the age of the trustee is required only of individual trustees. This section is also comparable to Section 17403. The reference in subdivision (b) to living beneficiaries restates part of former Probate Code Section 1139.19 without substantive change. See also Sections 24 ("beneficiary" defined), 15802 (notice to beneficiary of revocable trust), 17200(a) (petition by trustee or beneficiary), 17201(a) (petition to be verified).

§ 17454. Notice and hearing

17454. (a) At least 30 days before the time set for the hearing on the petition, the petitioner shall cause notice of the time and place of the hearing to be mailed to each of the persons named in the petition at their respective addresses as stated in the petition.

(b) Any person interested in the trust, as trustee, beneficiary, or otherwise, may appear and file written grounds in opposition to the petition.

Comment. Subdivision (a) of Section 17454 restates the second sentence of subdivision (a) of former Probate Code Section 1139.15 without substantive change. See Section 17453 (places of residence listed in petition). Subdivision (b) continues subdivision (b) of former Probate Code Section 1139.15 without change. Section 17454 is comparable to Section 17403. For a provision governing notice to the Attorney General in a case involving a charitable trust, see Section 17203(c). See also Sections 15802 (notice to beneficiary of revocable trust), 17102 (manner of mailing notice), 17201(b) (clerk to set petition for hearing).

§ 17455. Order accepting transfer and appointing trustee

17455. (a) The court may, in its discretion, grant the petition and issue an order accepting transfer of trust property or the place of administration of the trust to this state and appoint a trustee to administer the trust in this state, if, after hearing, all of the following appear to the court:

(1) The transfer of the trust property to a trustee in this state, or the transfer of the place of administration of the trust to this state, will promote the best interests of the trust and those interested in it, taking into account the interest in the economical and convenient administration of the trust.

(2) The transfer will not violate the trust instrument.

(3) The trustee appointed by the court to administer the trust in this state, and to whom the trust property is to be transferred, is qualified, willing, and able to administer the trust or trust property under the trust instrument.

(4) The proper court in the other jurisdiction has approved the transfer if approval is necessary under the law of the other jurisdiction.

(b) If the court grants the petition under subdivision (a), the court shall require the trustee to give a bond, if necessary under the law of the other jurisdiction or of this state, and may require bond as provided in Section 15602.

Comment. Section 17455 restates former Probate Code Section 1139.16 without substantive change, except that (1) the court is required to take into account the interest in economical and convenient administration rather than to find that it would necessarily result from the transfer, (2) a bond is required only if the law of the other jurisdiction or California so provides, and (3) the court's authority to require bond under general provisions is recognized. See, e.g., Section 15602(a)(3) (bond required of trustee appointed by court). The reference to "assets" in former Probate Code Section 1139.16 has been replaced with a reference to "property"; this is a non-substantive change. See Section 62 ("property" defined).

§ 17456. Conditional order accepting transfer

17456. If appropriate to facilitate transfer of the trust property or the place of administration of a trust to this state, the court may issue a conditional order appointing a trustee to administer the trust in this state and indicating that transfer to this state will be accepted if transfer is approved by the proper court of the other jurisdiction.

Comment. Section 17456 continues former Probate Code Section 1139.17 without substantive change. This section provides a method whereby the California court can indicate its willingness to accept jurisdiction over a trust administered in another jurisdiction where the law of the other jurisdiction requires appointment of a trustee in the proposed new place of administration before approving transfer. See, e.g., Mass. Gen. Laws Ann. ch. 206, § 29 (West 1969).

§ 17457. Administration of transferred trust

17457. A trust transferred to this state pursuant to this chapter shall be administered in the same manner as a trust of that type created in this state.

Comment. Section 17457 supersedes former Probate Code Section 1139.18. Under Section 17457 a transferred trust is treated the same as a trust that was created in California, and so is governed by this division. See also Section 15004 (application of division to charitable trusts); Gov't Code §§ 12580-12597 (supervision of certain charitable trusts). This section is not intended to provide choice of law rules. A trust that was subject to judicial supervision in another state will not be subject to continuing court jurisdiction under Sections 17300-17304 unless the trust instrument so provides and the court so determines in the order accepting transfer to California.

PART 6. RIGHTS OF THIRD PERSONS

CHAPTER 1. LIABILITY OF TRUSTEE TO THIRD PERSONS

§ 18000. Personal liability of trustee to third persons on contracts

18000. (a) Unless otherwise provided in the contract or in this chapter, a trustee is not personally liable on a contract properly entered into in the trustee's fiduciary capacity in the course of administration of the trust unless the trustee fails to reveal the trustee's representative capacity or identify the trust in the contract.

(b) The personal liability of a trustee on a contract entered into before July 1, 1987, is governed by prior law and not by this section.

Comment. Subdivision (a) of Section 18000 is new and is drawn from Section 7-306(a) of the Uniform Probate Code (1977). However, unlike the Uniform Probate Code, this section excuses the trustee from personal liability on a contract where *either* the trustee's representative capacity *or* the identity of the trust is revealed in the contract. Under Section 18000, it is assumed that either one of these statements in a contract puts the person contracted with on notice of the fact that the other person is a trustee. The protection afforded the trustee by this section applies only to contracts that are properly entered into in the trustee's fiduciary capacity, meaning that the trustee is exercising an available power and is not violating a duty. This section does not excuse any liability the trustee may have for breach of trust. See Section 18005 (liability as between trustee and trust estate).

The rule provided in subdivision (a) is the reverse of the case-law rule in California that a trustee was personally liable on a contract unless the contract stipulated that the trustee was not liable. See *Hall v. Jameson*, 151 Cal. 606, 611, 91 P. 518 (1907); *Duncan v. Dormer*, 94 Cal. App. 218, 221, 270 P. 1003 (1928); but *cf.* *Purdy v. Bank of America*, 2 Cal. 2d 298, 301-02, 40 P.2d, 481 (1935) (trust estate also liable when properly bound by acts of trustee). However, to fall within the rule of subdivision (a) of Section 18000, either the trustee's status or the identity of the trust must be revealed. This was not sufficient under prior case law. See *Hall v. Jameson*, *supra*. Subdivision (a) also supersedes former Civil Code Section 2267 to the extent it affected liability.

Subdivision (b) preserves the case-law rule governing a trustee's personal liability for pre-operative date contracts.

§ 18001. Personal liability of trustee arising from ownership or control of trust estate

18001. A trustee is personally liable for obligations arising from ownership or control of trust property only if the trustee is personally at fault.

Comment. Section 18001 is a new provision and is the same in substance as part of Section 7-306(b) of the Uniform Probate Code (1977). A trustee is "personally at fault" when the trustee, either intentionally or negligently, acts, or fails to act. For rules governing the assertion of claims, see Section 18004. The question of ultimate liability as between the trust and the trustee is governed by Section 18005.

§ 18002. Personal liability of trustee for torts

18002. A trustee is personally liable for torts committed in the course of administration of the trust only if the trustee is personally at fault.

Comment. Section 18002 is a new provision and is the same in substance as part of Section 7-306(b) of the Uniform Probate Code (1977). A trustee is "personally at fault" when the trustee commits a tort either intentionally or negligently. *Cf. Johnston v. Long*, 30 Cal. 2d 54, 62-63, 181 P.2d 645 (1947) (liability of fiduciaries for torts committed by agents depends on personal fault). For rules governing the assertion of claims, see Section 18004. The question of ultimate liability as between the trust and the trustee is governed by Section 18005.

§ 18003. Liability of dissenting cotrustee to third persons

18003. (a) A cotrustee who does not join in exercising a power held by three or more cotrustees is not liable to third persons for the consequences of the exercise of the power.

(b) A dissenting cotrustee who joins in an action at the direction of the majority cotrustees is not liable to third persons for the action if the dissenting cotrustee expresses the dissent in writing to any other cotrustee at or before the time the action is taken.

(c) This section does not excuse a cotrustee from liability for failure to discharge the cotrustee's duties as a trustee.

Comment. Section 18003 is a new provision. It is drawn from Section 114.006(a) of the Texas Trust Code. See *Tex. Prop. Code Ann. § 114.006* (Vernon 1984).

§ 18004. Assertion of claims against trust

18004. A claim based on a contract entered into by a trustee in the trustee's representative capacity, on an obligation arising from ownership or control of trust property, or on a tort committed in the course of administration of the trust may be asserted against the trust by proceeding against the trustee in the trustee's representative capacity, whether or not the trustee is personally liable on the claim.

Comment. Section 18004 is a new provision and is the same in substance as Section 7-306(c) of the Uniform Probate Code (1977). This section supersedes the first and last sentences of former Civil Code Section 2267 (acts of trustee within scope of authority bind trust property). Section 18004 alters the case law rule that the trustee could not be sued in a representative capacity where the trust estate was not liable. See *Purdy v. Bank of America*, 2 Cal. 2d 298, 301, 40 P.2d 481 (1935); *Rapaport v. Forer*, 20 Cal. App. 2d 271, 278, 66 P.2d 1242 (1937). See also Section 18005 (liability as between trustee and trust estate).

§ 18005. Liability as between trustee and trust estate

18005. The question of liability as between the trust estate and the trustee personally may be determined in a proceeding under Section 17200.

Comment. Section 18005 is new. It is drawn from Section 7-306(d) of the Uniform Probate Code (1977). Under this section, ultimate liability as between the estate and the trustee need not be determined before the third person's claim can be satisfied. It is permissible, and may be preferable, for judgment to be entered against the trust without determining the trustee's ultimate liability until later. Where judgment is entered against the trustee individually, the question of the trustee's right to reimbursement may be settled informally with the beneficiaries or in a separate proceeding in the probate court. For rules governing indemnification of trustees, see Section 15684. See also Section 17200 *et seq.* (proceedings against trustee by beneficiary).

CHAPTER 2. PROTECTION OF THIRD PERSONS**§ 18100. Protection of third person dealing with trustee**

18100. With respect to a third person dealing with a trustee or assisting a trustee in the conduct of a

transaction, if the third person acts in good faith and for a valuable consideration and without actual knowledge that the trustee is exceeding the trustee's powers or improperly exercising them:

(a) The third person is not bound to inquire whether the trustee has power to act or is properly exercising a power and may assume without inquiry the existence of a trust power and its proper exercise.

(b) The third person is fully protected in dealing with or assisting the trustee just as if the trustee has and is properly exercising the power the trustee purports to exercise.

Comment. Section 18100 is drawn from Section 7 of the Uniform Trustees' Powers Act (1964). Section 18100 supersedes former Civil Code Section 2243.

§ 18101. Application of property delivered to trustee by third person

18101. A third person who acts in good faith is not bound to ensure the proper application of trust property paid or delivered to the trustee.

Comment. Section 18101 supersedes former Civil Code Section 2244 and is essentially the same as the last sentence of Section 7 of the Uniform Trustees' Powers Act (1964).

§ 18102. Protection of third person dealing with former trustee

18102. If a third person acting in good faith and for a valuable consideration enters into a transaction with a former trustee without knowledge that the person is no longer a trustee, the third person is fully protected just as if the former trustee were still a trustee.

Comment. Section 18102 restates the second paragraph of former Civil Code Section 2281 without substantive change, but is drafted for consistency with Section 18100. See also Section 15643 (vacancy in office of trustee).

§ 18103. Effect on purchaser of omission of trust from grant of real property

18103. If an express trust relating to real property is not contained or declared in the grant to the trustee, or in an instrument signed by the trustee and recorded in

the same office with the grant to the trustee, the grant shall be deemed absolute in favor of purchasers from the trustee without notice and for a valuable consideration.

Comment. Section 18103 continues former Civil Code Section 869 without substantive change. See also Civil Code § 1214 (prior recording of subsequent conveyances).

§ 18104. Effect on real property transactions where beneficiary undisclosed

18104. (a) If an interest in or lien or encumbrance on real property is conveyed, created, or affected by an instrument in favor of a person in trust but no beneficiary is indicated in the instrument, it is presumed that the person holds the interest, lien, or encumbrance absolutely and free of the trust. This is a presumption affecting the burden of proof. In an action or proceeding involving the interest, lien, or encumbrance instituted against the person, the person shall be deemed the only necessary representative of the undisclosed beneficiary and of the original grantor or settlor and anyone claiming under them. A judgment is binding upon and conclusive against these persons as to all matters finally adjudicated in the judgment.

(b) An instrument executed by the person holding an interest, lien, or encumbrance described in subdivision (a), whether purporting to be the act of that person in his or her own right or in the capacity of a trustee, is presumed to affect the interest, lien, or encumbrance according to the tenor of the instrument. This is a presumption affecting the burden of proof. Upon the recording of the instrument in the county where the land affected by the instrument is situated, the presumption is conclusive in favor of a purchaser or encumbrancer in good faith and for valuable consideration.

Comment. Section 18104 restates the first two paragraphs of former Civil Code Section 869a without substantive change. See *Hansen v. G & G Trucking Co.*, 236 Cal. App. 2d 481, 491-94, 46 Cal. Rptr. 186 (1965) (presumption rebuttable, not conclusive). The language relating to the presumptions affecting the burden of proof in both subdivisions (a) and (b) is consistent with Evidence Code Section 605.

CHAPTER 3. RIGHTS OF CREDITORS OF SETTLOR

§ 18200. Creditor's rights against revocable trust during settlor's lifetime

18200. If the settlor retains the power to revoke the trust in whole or in part, the trust property is subject to the claims of creditors of the settlor to the extent of the power of revocation during the lifetime of the settlor.

Comment. Section 18200 is new. This section is analogous to the rule applicable to property subject to an unexercised power of appointment created by a donor in favor of himself or herself. See Civil Code § 1390.4. Section 18200 permits the creditor to ignore the trust to the extent that it is revocable.

§ 18201. Creditor's rights against revocable trust after settlor's death

18201. Upon the death of a settlor who had retained the power to revoke the trust in whole or in part, the property that was subject to the power of revocation at the time of the settlor's death is subject to the claims of creditors of the decedent settlor's estate and to the expenses of administration of the estate to the extent that the decedent settlor's estate is inadequate to satisfy those claims and expenses.

Comment. Section 18201 is new. This section is analogous to the rule applicable upon the death of a donee of a general testamentary power of appointment under Civil Code Section 1390.3(b).



CONFORMING REVISIONS RELATING TO TRUST LAW

Civil Code § 716.5 (added). Duration of trust exceeding time for vesting of future interests

716.5. (a) A trust is not invalid, either in whole or in part, merely because the duration of the trust may exceed the time within which future interests in property must vest under this title, if the interest of all the beneficiaries must vest, if at all, within that time.

(b) If a trust is not limited in duration to the time within which future interests in property must vest under this title, a provision, express or implied, in the instrument creating the trust that the trust may not be terminated is ineffective insofar as it purports to be applicable beyond that time.

(c) Whenever a trust has existed longer than the time within which future interests in property must vest under this title, the following shall apply:

(1) It shall be terminated upon the request of a majority of the beneficiaries.

(2) It may be terminated by a court of competent jurisdiction upon the petition of the Attorney General or of any person who would be affected thereby if the court finds that the termination would be in the public interest or in the best interest of a majority of the persons who would be affected thereby.

Comment. Section 716.5 continues former Section 771 without substantive change, except for the deletion of unnecessary language relating to termination of living trusts by action of all settlors and beneficiaries. Termination in this situation is governed by Probate Code Section 15404. This section has been relocated with the other provisions relating to perpetuities.

Civil Code §§ 730-730.17 (repealed). Revised Uniform Principal and Income Act

Comment. Former Chapter 2.5 is superseded by the new Trust Law. See Prob. Code §§ 16300-16313. The disposition of each repealed section of the former law is indicated in the comment to the repealed section. See the Appendix to

Recommendation Proposing the Trust Law, 18 Cal. L. Revision Comm'n Reports 501 (1986).

**Civil Code § 731.02 (technical amendment). Application of
Legal Estates Principal and Income Law**

Comment. Section 731.02 is amended to correct a cross-reference to the Revised Uniform Principal and Income Act.

**Civil Code § 771 (repealed). Duration of trust exceeding
time for vesting of future interests; termination**

Comment. Former Section 771 is continued without substantive change in Section 716.5, except for the deletion of the second sentence of the second paragraph relating to termination of inter vivos trusts by action of all settlors and beneficiaries. Termination in this situation is governed by Probate Code Section 15404. As to consent by persons under an incapacity, see the Comment to Probate Code Section 15404.

Civil Code §§ 852-871 (repealed). Uses and trusts

Comment. Former Title 4 is superseded by the new Trust Law. See Prob. Code § 15000 *et seq.* The disposition of each repealed section of the former law is indicated in the comment to the repealed section. See the Appendix to *Recommendation Proposing the Trust Law*, 18 Cal. L. Revision Comm'n Reports 501 (1986).

**Civil Code § 1392.1 (technical amendment). Revocability
of power of appointment**

Comment. Section 1392.1 is amended to correct cross-references.

Civil Code §§ 2215-2290.12 (repealed). Trusts

Comment. Former Title 8 is superseded by the new Trust Law. See Prob. Code § 15000 *et seq.* The disposition of each repealed section of the former law is indicated in the comment to the repealed section. See the Appendix to *Recommendation Proposing the Trust Law*, 18 Cal. L. Revision Comm'n Reports 501 (1986).

Civil Code §§ 2223-2225 (added). Involuntary trusts

TITLE 8. INVOLUNTARY TRUSTS

§ 2223. Involuntary trust for wrongful detainer

2223. One who wrongfully detains a thing is an involuntary trustee thereof, for the benefit of the owner.

Comment. Section 2223 continues former Section 2223 without change. See also Prob. Code § 15003 (constructive and resulting trusts unaffected by new Trust Law).

§ 2224. Involuntary trust for fraud etc.

2224. One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he or she has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it.

Comment. Section 2224 continues former Section 2224 without change. See also Prob. Code § 15003 (constructive and resulting trusts unaffected by new Trust Law).

§ 2225. Involuntary trust of proceeds of felon's story

Comment. Section 2225 continues former Section 2224.1 without change.

Civil Code § 2322 (technical amendment). Authority of agent

Comment. Section 2322 is amended to correct a cross-reference. Although the statutory statement of trustees' duties varies considerably from that in former Civil Code Sections 2228-2240, the amendment of this section is not intended to alter the general rule that agents are subject to the same general standards as trustees. See, e.g., *Helbing v. Helbing*, 89 Cal. App. 2d 224, 227, 200 P.2d 560 (1949); *Kinert v. Wright*, 81 Cal. App. 2d 919, 925, 185 P.2d 364 (1947).

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

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

Civil Code § 2932.5 (added). Power of sale under assigned mortgage

Comment. Section 2932.5 continues former Section 858 without substantive change.

Civil Code § 2934b (added). Vacation of office of trustee under deed of trust

2934b. Sections 15643 and 18102 of the Probate Code apply to trustees under deeds of trust given to secure obligations.

Comment. Section 2934b restates the last paragraph of former Civil Code Section 2281 without substantive change. See Prob. Code §§ 15643 (vacancy in office of trustee), 18102 (protection of third person dealing with former trustee).

Civil Code § 5103 (technical amendment). Spouses' duty in transactions with each other

5103. (a) Subject to subdivision (b), either husband or wife may enter into any transaction with the other, or with any other person, respecting property, which either might if unmarried.

(b) Except as provided in Sections 143, 144, and 146 of the Probate Code, in transactions between themselves, a husband and wife are subject to the general rules which control the actions of persons occupying confidential relations with each other.

Comment. Section 5103 is amended to delete a cross-reference to a repealed title in the Civil Code. This amendment is nonsubstantive and is not intended to alter the law governing the duty of spouses toward one another.

Civil Code § 5110.150 (added). Revocable living trust of community property

5110.150. (a) Unless the trust instrument or the instrument of transfer expressly provides otherwise, community property that is transferred in trust remains community property during the marriage, regardless of the identity of the trustee, if the trust, originally or as amended before or after the transfer, provides that the trust is revocable as to that property during the marriage and the power, if any, to modify the trust as to the rights

and interests in that property during the marriage may be exercised only with the joinder or consent of both spouses.

(b) Unless the trust instrument expressly provides otherwise, a power to revoke as to community property may be exercised by either spouse acting alone. Community property, including any income or appreciation, that is distributed or withdrawn from a trust by revocation, power of withdrawal, or otherwise, remains community property unless there is a valid transmutation of the property at the time of distribution or withdrawal.

(c) The trustee may convey and otherwise manage and control the trust property in accordance with the provisions of the trust without the joinder or consent of the husband or wife unless the trust expressly requires the joinder or consent of one or both spouses.

(d) This section applies to a transfer made before, on, or after July 1, 1987. Nothing in this section affects the community character of property that is transferred before, on, or after July 1, 1987, in any manner or to a trust other than described in this section.

Comment. Section 5110.150 replaces former Section 5113.5. It should be noted that a transfer in trust by a married person is not exempt from the general limitations on transfers and transmutations by married persons acting alone. See Sections 5125 and 5127 (joinder or consent) and Sections 5110.710-5110.740 (transmutation).

Subdivision (a) states the rule that a revocable living trust of community property retains its community character regardless of the lack of other trust provisions referred to in former Section 5113.5. Although subdivision (a) is intended to be consistent with Revenue Ruling 66-283 in order to obtain community property income tax treatment for the trust property under Internal Revenue Code Section 1014(b)(6), whether the terms of a particular trust are sufficient to obtain such treatment is ultimately a matter of federal law.

One consequence of retention of its community character is that the trust property is subject to claims of creditors and to division at dissolution to the same extent as any other community property. See Civil Code § 5120.010 *et seq.*; Prob. Code § 18200 (creditors' rights against revocable trust during settlor's lifetime). Likewise, the interest of the decedent in the

community property is subject to testamentary disposition at death unless a contrary method of disposition is provided in the trust instrument, as is typically the case. Prob. Code § 104. In this situation, the spouses' traditional community property right of testamentary disposition is substantially preserved by the unilateral power of revocation. See subdivision (b). Where the trust requires joint action for revocation, the trust could preserve the power of testamentary disposition by granting the first spouse to die a testamentary power of modification, appointment, or disposition as to the spouse's share of the community property.

Subdivision (b) establishes the presumption that either spouse acting alone may revoke the trust as to the community property. Prior law was not clear. The statute makes clear, however, that a unilateral revocation does not change the community property character of property received by the revoking spouse.

Subdivision (c) makes clear that the trustee may manage the trust community property in the same manner as other trust assets, free from the general limitations on disposition of community property imposed on spouses, unless the trust expressly provides such limitations.

Section 5110.150 is not restrictive and does not provide the exclusive means by which community property may be held in trust without loss of its community character. See subdivision (d).

Code of Civil Procedure § 395.1 (technical amendment).

Venue in action against fiduciary for money or property

Comment. Section 395.1 is amended to recognize the special venue provisions relating to internal affairs of trusts. See also Prob. Code §§ 17000(a) (exclusive jurisdiction over internal affairs of trusts), 17300-17304 (proceedings involving trust subject to continuing court jurisdiction).

Code of Civil Procedure § 695.030 (technical amendment).

Property subject to enforcement of money judgment

Comment. Section 695.030 is amended to delete "spendthrift" from subdivision (b) (1) in recognition that trusts other than "spendthrift" trusts may be not assignable or transferable. See e.g., Prob. Code § 15302 (trust for support).

**Code of Civil Procedure § 709.010 (technical amendment).
Enforcement of money judgment against beneficiary's
interest in trust**

709.010. (a) As used in this section, "trust" has the meaning provided in Section 82 of the Probate Code.

(b) The judgment debtor's interest as a beneficiary of a trust is subject to enforcement of a money judgment only upon petition under this section by a judgment creditor to a court having jurisdiction over administration of the trust as prescribed in Part 5 (commencing with Section 17000) of Division 9 of the Probate Code. The judgment debtor's interest in the trust may be applied to the satisfaction of the money judgment by such means as the court, in its discretion, determines are proper, including but not limited to imposition of a lien on or sale of the judgment debtor's interest, collection of trust income, and liquidation and transfer of trust property by the trustee.

(c) Nothing in this section affects the limitations on the enforcement of a money judgment against the judgment debtor's interest in a trust under Chapter 2 (commencing with Section 15300) of Part 2 of Division 9 of the Probate Code, and the provisions of this section are subject to the limitations of that chapter.

Comment. Subdivision (a) of Section 709.010 is amended to replace the reference to Section 1138 of the Probate Code with a reference to Section 82 of the Probate Code (defining "trust" for the purposes of the Probate Code).

Subdivision (b) of Section 709.010 is amended to replace the reference to Chapter 19 of Division 3 of the Probate Code with a reference to Part 5 of Division 9 of the Probate Code. The change is nonsubstantive.

Former subdivisions (c), (d), (e), and (f) are deleted. The deleted subdivisions permitted the court to order that amounts be withheld by the trustee from periodic payments from a trust, whether or not a spendthrift or support trust, using the same standard that applies when earnings of a judgment debtor are subject to an earnings withholding order (wage garnishment). The deleted subdivisions are superseded by the new provisions of the Probate Code governing the rights of transferees and creditors of the beneficiary of a trust to reach the beneficiary's interest in the trust. See Prob. Code §§ 15300-15309 and the Comments thereto.

New subdivision (c) is phrased to make it consistent with the new provisions added to the Probate Code. See Prob. Code §§ 15300-15309.

**Code of Civil Procedure § 1971 (technical amendment).
Statute of Frauds**

Comment. Section 1971 is amended to reflect the enactment of Probate Code Section 15206 which retains the Statute of Frauds as applied to trusts. This amendment of Section 1971 is not substantive.

**Code of Civil Procedure § 1972 (technical amendment).
Exception to Statute of Frauds**

Comment. Section 1972 is amended to reflect the enactment of Probate Code Section 15206 which provides the Statute of Frauds as applied to trusts. This amendment of Section 1972 is not substantive. Section 1972 is also amended to delete the reference to the impact of the Statute of Frauds on a testamentary disposition of real property. Oral wills are no longer permitted; all wills, whether disposing of real or personal property, must be in writing. Prob. Code §§ 6110-6111.

Corporations Code § 703 (amended). Shares in fiduciary

703. (a) Shares standing in the name of another corporation, domestic or foreign, may be voted by an officer, agent, or proxyholder as the bylaws of the other corporation may prescribe or, in the absence of such provision, as the board of the other corporation may determine or, in the absence of that determination, by the chairman of the board, president or any vice president of the other corporation, or by any other person authorized to do so by the chairman of the board, president, or any vice president of the other corporation. Shares which are purported to be voted or any proxy purported to be executed in the name of a corporation (whether or not any title of the person signing is indicated) shall be presumed to be voted or the proxy executed in accordance with the provisions of this subdivision, unless the contrary is shown.

(b) Shares of a corporation owned by its subsidiary shall not be entitled to vote on any matter.

(c) Shares held by the issuing corporation in a fiduciary capacity, and shares of an issuing corporation held in a fiduciary capacity by its subsidiary, shall not be entitled to vote on any matter, except as follows:

(1) To the extent that the settlor or beneficial owner possesses and exercises a right to vote or to give the corporation binding instructions as to how to vote such shares.

(2) Where there are one or more cotrustees who are not affected by the prohibition of this subdivision, in which case the shares may be voted by the cotrustees as if it or they are the sole trustee.

Comment. Subdivision (c) of Section 703 is amended to restore an exception that appeared in Financial Code Section 1561 before its amendment in 1978. See 1967 Cal. Stat. ch. 1706, § 2; 1978 Cal. Stat. ch. 965, § 110. Terminology in subdivision (c) (1) is revised to conform to the Trust Law. See Prob. Code § 15000 *et seq.*

**Corporations Code § 10251 (technical amendment).
Common trust funds**

Comment. Subdivision (c) of Section 10251 is amended to correct a cross-reference.

**Corporations Code § 29002 (technical amendment).
Definitions in Bucket Shop Law**

Comment. Section 29002 is amended to delete the reference to a repealed provision in the Civil Code. See Prob. Code § 82 ("trust" defined). This amendment makes no substantive change.

**Education Code §§ 94600-94610 (added). Uniform
Management of Institutional Funds Act**

**CHAPTER 6. UNIFORM MANAGEMENT
OF INSTITUTIONAL FUNDS ACT**

§ 94600. Short title

Comment. Section 94600 continues former Civil Code Section 2290.12 without change.

§ 94601. Definitions

Comment. Section 94601 continues former Civil Code Section 2290.1 without change.

§ 94602. Expenditure of asset net appreciation for current use

Comment. Section 94602 continues former Civil Code Section 2290.2 without change.

§ 94603. Construction of gift instruments

Comment. Section 94603 continues former Civil Code Section 2290.3 without change.

§ 94604. Authority of board to invest and reinvest

Comment. Section 94604 continues former Civil Code Section 2290.4 without change.

§ 94605. Delegation of authority

Comment. Section 94605 continues former Civil Code Section 2290.5 without change.

§ 94606. Standard of care

94606. (a) When investing, reinvesting, purchasing, acquiring, exchanging, selling, and managing property, appropriating appreciation, and delegating investment management for the benefit of an institution, the members of the governing board shall act with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with these matters would use in the conduct of an enterprise of like character and with like aims to accomplish the purposes of the institution. In the course of administering the fund pursuant to this standard, individual investments shall be considered as part of an overall investment strategy.

(b) In exercising judgment under this section, the members of the governing board shall consider the long and short term needs of the institution in carrying out its purposes, its present and anticipated financial requirements, expected total return on its investments, general economic conditions, the appropriateness of a reasonable proportion of higher risk investment with

respect to institutional funds as a whole, income, growth, and long term net appreciation, as well as the probable safety of funds.

Comment. Subdivision (a) of Section 94606 supersedes the first sentence of former Civil Code Section 2290.6. The standard of care in subdivision (a) has been revised to conform to the standard of care governing investment by trustees. See Prob. Code § 16040. The reference in former law to the judgment, care, and prudence which persons of discretion and intelligence would exercise in the management of their affairs is replaced by a standard based on what a prudent person similarly situated would do to accomplish like purposes.

Subdivision (b) continues the second sentence of former Civil Code Section 2290.6 without change.

§ 94607. Release of restriction in gift instruments

Comment. Section 94607 continues former Civil Code Section 2290.7 without change.

§ 94608. Severability

Comment. Section 94608 continues former Civil Code Section 2290.8 without change.

§ 94609. Application and construction

Comment. Section 94609 continues former Civil Code Section 2290.9 without change.

§ 94610. Status of governing boards

Comment. Section 94610 continues former Civil Code Section 2290.11 without substantive change.

Financial Code § 1561 (technical amendment). Investment of trust funds

Comment. Section 1561 is amended to reflect the consolidation of trust law in the Probate Code and to eliminate unnecessary language. See Prob. Code §§ 16000 (duty to administer trust according to trust instrument), 16040(c) (standard of care subject to trust instrument), 16200 (powers subject to control by trust).

Government Code § 26827.4 (technical amendment).**Filing fee for subsequent papers in probate**

26827.4. (a) The fee for filing of a subsequent paper in a proceeding under the Probate Code which requires a court hearing shall be fourteen dollars (\$14), except for papers for proceedings required by any of the following:

(1) Section 591.2 of the Probate Code.

(2) Accountings of trustees of testamentary trusts that are subject to the continuing jurisdiction of the court pursuant to Chapter 4 (commencing with Section 17300) of Part 5 of Division 9 of the Probate Code.

(3) Division 4 (commencing with Section 1400) of the Probate Code.

(b) Objections to any papers exempt from the fee imposed by this section shall be subject to the filing fee of fourteen dollars (\$14). This section does not apply to petitions filed pursuant to subdivision (b) of Section 26827.

Comment. Section 26827.4 is revised to correct the reference to accountings under testamentary trusts subject to continuing jurisdiction in light of the new Trust Law. See Prob. Code § 15000 *et seq.* This revision makes no substantive change.

Probate Code § 20 (amended). Application of definitions

Comment. Section 20 is amended to make the definitions in this part applicable to the Trust Law.

Probate Code § 82 (amended). "Trust" defined

82. (a) "Trust" includes any express trust, private or charitable, with additions thereto, wherever and however created, but does not include a charitable trust that is not subject to the jurisdiction of the Attorney General.

(b) "Trust" includes a trust created or determined by judgment or decree under which the trust is to be administered in the manner of an express trust.

(c) "Trust" excludes other constructive trusts, and it excludes resulting trusts, guardianships, conservatorships, personal representatives, Totten trust accounts, custodial arrangements pursuant to the Uniform Gifts to Minors Act or the Uniform Transfers to Minors Act of any state, business trusts that are taxed as

partnerships or corporations, investment trusts subject to regulation under the laws of this state or any other jurisdiction, common trust funds, voting trusts, security arrangements, transfers in trust for purpose of suit or enforcement of a claim or right, liquidation trusts, and trusts for the primary purpose of paying debts, dividends, interest, salaries, wages, profits, pensions, or employee benefits of any kind, and any arrangement under which a person is nominee or escrowee for another.

Comment. Section 82 is amended to eliminate from the general definition of trusts those charitable trusts that are not subject to the jurisdiction of the Attorney General. See Section 15004 (application of Trust Law to charitable trusts). Section 82 is also amended to include descriptions of various arrangements that appeared in former Section 1138. Section 82 has also been divided into subdivisions.

Probate Code § 83 (added). "Trust company" defined

83. "Trust company" means an entity that has qualified to engage in and conduct a trust business in this state.

Comment. Section 83 is drawn from parts of Probate Code Sections 480 and 1120.1a. See also Section 15643 (vacancy in office of trustee), 17351-17353 (removal of trust from continuing court jurisdiction). Entities that may qualify to conduct a trust business in this state include state chartered commercial banks (see Fin. Code §§ 107, 1500.1) and national banking associations (see Fin. Code §§ 1502, 1503), corporations authorized to conduct a trust business (see Fin. Code § 107), trust departments of title insurance companies (see Fin. Code §§ 107, 1501; Ins. Code §§ 12392, 12395), and state and federal savings and loan associations (see Fin. Code §§ 5102, 6515). See also Fin. Code § 106 ("trust business" defined). Whether an entity has qualified to engage in and conduct a trust business in this state depends on other law. In order to fall within the definition of "trust company" in Section 83, a corporation, association, or other entity must satisfy the requirements of state or federal law that apply to the particular type of entity.

Probate Code § 1032 (technical amendment). Marital deduction gift

Comment. Section 1032 is amended to correct a cross-reference. This amendment makes no substantive change.

Probate Code §§ 1120-1139.19 (repealed). Administration of trusts

Comment. Former Chapter 19 is superseded by the new Trust Law. See Prob. Code § 15000 *et seq.* The disposition of each repealed section of the former law is indicated in the comment to the repealed section. See the Appendix to *Recommendation Proposing the Trust Law*, 18 Cal. L. Revision Comm'n Reports 501 (1986).

Probate Code § 1200 (amended). Manner of notice under Probate Code

Comment. Subdivision (d) is added to Section 1200 to make clear that the general notice provisions do not apply to the Trust Law. See Section 17100 *et seq.* (notice in trust proceedings).

Probate Code § 1200.5 (amended). Manner of notice in certain cases

Comment. Subdivision (a) is amended and a new subdivision (e) is added to Section 1200.5 to make clear that the general notice provisions of this section do not apply to the Trust Law. See Section 17100 *et seq.* (notice in trust proceedings).

Probate Code § 1202 (amended). Request for special notice

Comment. Section 1202 is amended to delete the provision for serving a request for notice on a trustee. Requests for notice under the Trust Law are governed by Section 17204.

Probate Code §§ 1215-1215.4 (repealed). Notice in trust proceedings

Comment. Former Article 1.5 is superseded by the new Trust Law. See Prob. Code § 15000 *et seq.* The disposition of each section of the former law is indicated in the comment to the repealed section. See the Appendix to *Recommendation Proposing the Trust Law*, 18 Cal. L. Revision Comm'n Reports 501 (1986).

Probate Code § 1240 (amended). Appeals

Comment. Section 1240 is amended to delete references to orders involving trusts. The substance of the deleted language is continued in Section 17207.

Probate Code § 2574 (technical amendment). Investment in securities and governmental obligations

Comment. Section 2574 is amended to correct a cross-reference.

Probate Code § 6325 (technical amendment). Jurisdiction over trusts for insurance or other employee benefits

Comment. Section 6325 is amended to correct cross-references. For changes in the law applicable to trust administration, see the Comments to the new sections referred to in Section 6325. Subdivision (a) (11) is amended to replace the reference to "assets" with "property"; this is a non-substantive change. See Section 62 ("property" defined).

Probate Code § 6326 (technical amendment). Applicability of trust administration provisions

Comment. Section 6326 is amended to refer to the statute governing trust administration.

Probate Code § 6327 (technical amendment). Appealable orders

Comment. Section 6327 is amended to conform to the revisions of Section 1240. See the Comment to Section 1240.

APPENDIX

DISPOSITION OF EXISTING TRUST PROVISIONS

Note. The following bodies of law relating to trusts would be repealed and superseded by the new Trust Law, Division 9 (commencing with Section 15000) of the Probate Code:

Civil Code §§ 730-730.17
Civil Code §§ 852-871
Civil Code §§ 2215-2290.12
Probate Code §§ 1120-1139.19
Probate Code §§ 1215-1215.4

Set out below is a comment to each of these sections which indicates the disposition of existing law in the new Trust Law and various conforming revisions.

Civil Code §§ 730-730.17 (repealed). Revised Uniform Principal and Income Act

CHAPTER 2.5. PRINCIPAL AND INCOME LAW

§ 730 (repealed). Short title

Comment. Former Section 730 is continued in Probate Code Section 16300 without change.

§ 730a (repealed). Effect on personal income tax and bank and corporation tax

Comment. Former Section 730a is omitted because it is unnecessary. The California Revised Uniform Principal and Income Act relates to the administration of trusts and the problem of allocating trust receipts and expenditures between income beneficiaries and remaindermen; it does not deal with the characterization of receipts for other purposes.

§ 730.01 (repealed). Definitions

Comment. Subdivisions (1) and (2) of former Section 730.01 are continued in Probate Code Section 16301(a) and (b) without change. Subdivision (3) is restated in Probate Code Section 16301(c) (defining "remainder beneficiary") without substantive change. Subdivision (4) is omitted as unnecessary; its substance is restated in Probate Code Section 84 ("trustee" defined).

§ 730.02 (repealed). Duty of trustee as to receipts and expenditures

Comment. Former Section 730.02 is continued in Probate Code Section 16302 without substantive change, except that the standard of care in former Section 730.02(a) (3) is superseded by the general standard of care provided in Section 16040, and the language describing the excluded inference under former Section 730.02(b) has been broadened so that there is no inference of any impropriety, not just no inference of imprudence or partiality. See Prob. Code § 16302(b) and the Comment thereto.

§ 730.03 (repealed). Income and principal; charging of expenses

Comment. Subdivision (a) of former Section 730.03 is continued in Probate Code Section 16303(a) (1), (2), and (4)-(10) without change. Subdivision (b) is continued in Probate Code Section 16303(b) (1)-(3) and (5)-(11) without change. Subdivision (c) is continued in Probate Code Section 16312(a) without substantive change.

§ 730.04 (repealed). When right to income arises; apportionment of income

Comment. Former Section 730.04 is continued in Probate Code Section 16304 without substantive change, except that the parenthetical rule in subdivision (b) (2) of former Section 730.04 has been revised to require apportionment of rent, interest, and annuities in conformity with Section 4(b) (2) of the Revised Uniform Principal and Income Act (1962), and references to the testator and the will have been revised so that the rules apply to apportionment of income following the death of a settlor of a revocable living trust.

§ 730.05 (repealed). Income earned during administration of decedent's estate

Comment. Subdivisions (a) and (b) of former Section 730.05 are continued in Probate Code Section 16305(a) without change. Subdivision (c) of former Section 730.05 is continued in Probate Code Section 16305(b) without change.

§ 730.06 (repealed). Corporate distributions

Comment. Subdivisions (a), (b), (d), and (e) of former Section 730.06 are continued in Probate Code Section 16306(a), (b), (d), and (e), respectively, without change. Subdivision (c) of former Section 730.06 is restated in Probate Code Section 16306(c) without substantive change.

§ 730.07 (repealed). Bonds and other obligations for payment of money

Comment. Former Section 730.07 is continued in Probate Code Section 16307 without change.

§ 730.08 (repealed). Business and farming operations

Comment. Former Section 730.08 is continued in Probate Code Section 16308 without substantive change, except that the rule in the last sentence of subdivision (a) forbidding carrying losses forward is replaced by a rule requiring losses to be carried forward.

§ 730.09 (repealed). Natural resources

Comment. Former Section 730.09 is continued in Probate Code Section 16309 without substantive change, except that the 27½ percent maximum depletion allowance is superseded by a limit based on federal income tax law. The reference to "absolute" discretion is not continued; the elimination of this language is not a substantive change. See Prob. Code § 16081 (standard for exercise of "absolute" powers).

§ 730.10 (repealed). Timber

Comment. Section 730.10 is restated in Probate Code Section 16310 without substantive change. The reference to "absolute" discretion is not continued; the elimination of this language is not a substantive change. See Prob. Code § 16081 (standard for exercise of "absolute" powers).

§ 730.11 (repealed). Other property subject to depletion

Comment. Former Section 730.11 is continued in Probate Code Section 16310 without substantive change. The reference to "absolute" discretion is not continued; the elimination of this language is not a substantive change. See Prob. Code § 16081 (standard for exercise of "absolute" powers).

§ 730.12 (repealed). Underproductive property

Comment. Former Section 730.12 is continued in Probate Code Section 16311 without change.

§ 730.13 (repealed). Charges against income and principal

Comment. Former Section 730.13 is continued in Probate Code Section 16312(b)-(e), except that the reference to "absolute" discretion is not continued; the elimination of this language is not a substantive change. See Prob. Code § 16081 (standard for exercise of "absolute" powers). Some language has been added as explained in the Comment to Probate Code Section 16312.

§ 730.14 (repealed). Reserve or allowance for depreciation or depletion

Comment. The first sentence and the first part of the second sentence of former Section 730.14 are restated in Probate Code Section 16313 without substantive change. The transitional provisions in the last part of the second sentence and in the last sentence are superseded by Probate Code Section 15001 (application of Trust Law to existing trusts).

§ 730.15 (repealed). Application of chapter

Comment. Former Section 730.15 is superseded by Probate Code Section 15001 (operative date).

§ 730.16 (repealed). Operative date

Comment. Former Section 730.16 is omitted because it is no longer necessary.

§ 730.17 (repealed). Severability

Comment. Former Section 730.17 is omitted because it is unnecessary. See Prob. Code § 11 (severability).

Civil Code §§ 852-871 (repealed). Uses and trusts**TITLE 4. USES AND TRUSTS****§ 852 (repealed). Requirements of trusts relating to real estate**

Comment. Former Section 852 is restated in Probate Code Section 15206 (Statute of Frauds) without substantive change.

§ 853 (repealed). Resulting trusts

Comment. Former Section 853 is omitted because it is an incomplete and inadequate statement of the common law purchase money resulting trust. Repeal of Section 853 is not intended to disturb California case law concerning resulting trusts. See Prob. Code § 15003 (constructive and resulting trusts unaffected); see also Prob. Code § 15002 (common law as law of state).

§ 856 (repealed). Bona fide purchaser or encumbrancer as to implied or resulting trust

Comment. Former Section 856 is omitted because it is unnecessary in light of Civil Code Section 1214. See also Prob. Code § 15003 (constructive and resulting trusts unaffected).

§ 858 (repealed). Power of sale under assigned instrument

Comment. Former Section 858 is continued in Section 2932.5 without substantive change.

§ 859 (repealed). Trust to receive rents and profits

Comment. Former Section 859 is replaced by Probate Code Section 15307.

§ 860 (repealed). Execution of joint powers

Comment. The first part of former Section 860 is superseded by Probate Code Section 15620 (actions by cotrustees). The second part is superseded by Probate Code Sections 15621 (vacancy in office of cotrustee), 15622 (temporary incapacity of cotrustee), and 15643 (vacancy in office of trustee). See also Civil Code § 1385.4 (joint exercise of powers of appointment).

§ 863 (repealed). Title vested in trustee; enforcement rights of beneficiaries

Comment. The first sentence of former Section 863 pertaining to the title vested in the trustee is omitted. See Prob. Code §§ 15200 (methods of creating trust), 16000-16081 (trustees' duties). The part of the first sentence relating to the execution of the trust is superseded by Probate Code Section 16420(a) (1) (beneficiary may compel performance of trustee's duties). The second sentence of former Section 863 is also omitted. See Prob. Code § 17200 (petition by beneficiary to enforce trust).

§ 864 (repealed). Transfer or devise of property subject to trust

Comment. Former Section 864 is superseded by Probate Code Section 15410(c) (disposition of property upon termination of trust). See also Prob. Code § 16000 (duty to administer trust according to its terms).

§ 865 (repealed). Title of grantee or devisee of property subject to trust

Comment. Former Section 865 is omitted because it is obsolete. See generally Prob. Code § 15000 *et seq.* (Trust Law).

§ 866 (repealed). Estates remaining in trustor

Comment. Former Section 866 is omitted because it is unnecessary. See Prob. Code §§ 15200 (methods of creating trust), 15206 (Statute of Frauds).

§ 867 (repealed). Restraint of disposal of beneficial interest

Comment. Former Section 867 is restated in Probate Code Section 15300 without substantive change. See Prob. Code § 15300 and the Comment thereto.

§ 869 (repealed). Effect on bona fide purchaser of omission of trust from grant

Comment. Former Section 869 is continued in Probate Code Section 18103 (effect on purchaser of omission of trust from grant of real property) without substantive change. See also Civil Code § 1214 (unrecorded conveyance void as to subsequent purchaser).

§ 869a (repealed). Effect of transactions where beneficiary undisclosed

Comment. The first and second paragraphs of former Section 869a are restated in Probate Code Section 18104 without substantive change. See the Comment to Prob. Code § 18104. See also Prob. Code § 10 (singular includes plural). The last paragraph of former Section 869a is omitted because it is no longer needed.

§ 870 (repealed). Acts in contravention of trust

Comment. Former Section 870 is omitted. For provisions relating to the general subject of former Section 870, see Prob. Code §§ 16200-16313 (powers of trustees), 16420 (remedies for breach of trust), 18100 (protection of third person dealing with trustee).

§ 871 (repealed). Termination of trust estate

Comment. Former Section 871 is superseded by Probate Code Sections 15407 (termination of trust) and 15409 (termination in changed circumstances).

Civil Code §§ 2215-2290.12 (repealed). Trusts

TITLE 8. TRUST

CHAPTER 1. TRUSTS IN GENERAL

Article 1. Nature and Creation of a Trust

§ 2215 (repealed). Classification of trusts

Comment. Former Section 2215 is omitted because it served no useful purpose and was inconsistent with the classifications usually used by the courts. See 7 B. Witkin, *Summary of California Law Trusts* § 2, at 5367-68 (8th ed. 1974). See also Prob. Code §§ 82 ("trust" defined), 15002 (common law as law of state), 15003 (constructive and resulting trusts unaffected).

§ 2216 (repealed). Voluntary trust defined

Comment. Former Section 2216 is omitted. See the Comment to former Section 2215. See also Prob. Code § 82 ("trust" defined), 16000 (duty to administer trust upon acceptance).

§ 2217 (repealed). Involuntary trust defined

Comment. Former Section 2217 is omitted. See the Comment to former Section 2215. Repeal of Section 2217 has no effect on the law relating to resulting or constructive trusts. See Prob. Code § 15003 (constructive and resulting trusts unaffected); see also Prob. Code § 15002 (common law as law of state).

§ 2218 (repealed). Trustor, trustee, beneficiary

Comment. The definition of "trustor" in former Section 2218 is not continued. The new Trust Law uses the term "settlor" in place of "trustor." The definition of "beneficiary" is superseded by Probate Code Section 24 ("beneficiary" defined). The definition of "trustee" is superseded by Probate Code Section 84 ("trustee" defined).

§ 2219 (repealed). Trustee defined

Comment. Former Section 2219 is omitted. See Prob. Code § 84 ("trustee" defined); see also Prob. Code § 15200 (methods of creating trust).

§ 2220 (repealed). Trust purposes

Comment. Former Section 2220 is restated in Probate Code Section 15203 (trust purpose) without substantive change. See also Prob. Code §§ 62 ("property" defined), 15202 (trust property).

§ 2221 (repealed). Creation of voluntary trust as to trustor and beneficiary

Comment. Former Section 2221 is superseded by Probate Code Sections 15200-15207 (creation of trusts).

§ 2222 (repealed). Creation of voluntary trust as to trustee

Comment. Former Section 2222 is superseded by Probate Code Sections 15200-15207 (creation of trusts), 15600 (acceptance of trust by trustee), and 16000 (duty to administer trust upon acceptance).

§ 2223 (repealed). Involuntary trustee and wrongful detainer

Comment. Former Section 2223 is continued in new Section 2223 without change.

§ 2224 (repealed). Involuntary trustee and fraud

Comment. Former Section 2224 is continued in new Section 2224 without change.

§ 2224.1 (repealed). Trust of proceeds from sale of story of convicted felon

Comment. Former Section 2224.1 is continued in Section 2225 without change.

§ 2225 (repealed). Exception to doctrine of merger

Comment. The first sentence of former Section 2225 is restated in Probate Code Section 15209 (exception to doctrine of merger) without substantive change. The second sentence is restated in Probate Code Sections 15001 (application of law) and 15206 (Statute of Frauds) without substantive change.

Article 2. Obligations of Trustees

§ 2228 (repealed). Good faith

Comment. Former Section 2228 is superseded by Probate Code Section 16002 (duty of loyalty). See also Prob. Code § 16004 (duty to avoid conflict of interest).

§ 2229 (repealed). Use of property

Comment. Former Section 2229 is restated in Probate Code Section 16004(a) (duty to avoid conflict of interest) without substantive change, subject to the exceptions provided in Probate Code Section 16015 (certain actions not violations of duties). See also Prob. Code § 16002 (duty of loyalty).

§ 2230 (repealed). Prohibited transactions

Comment. The introductory provision of former Section 2230 is restated in Probate Code Section 16004(a) without substantive change, subject to the exceptions provided in Probate Code Section 16015 (certain actions not violations of duties). The remainder of former Section 2230 relating to consent by beneficiaries is replaced by Probate Code Section 16463 (consent of beneficiary to relieve trustee of liability for breach of trust). See also Prob. Code §§ 16464 (release by beneficiary), 16465 (affirmance by beneficiary).

§ 2231 (repealed). Influence to obtain advantage from beneficiary

Comment. Former Section 2231 is superseded by Probate Code Section 16002 (duty of loyalty).

§ 2232 (repealed). Undertaking trust adverse to interest of beneficiary

Comment. Former Section 2232 is superseded by Probate Code Section 16005 (duty not to knowingly undertake adverse trust). See also Prob. Code § 16002 (duty of loyalty). The last part of former Section 2232 relating to consent by beneficiaries is replaced by Probate Code Section 16463 (consent of beneficiary to relieve trustee of liability for breach of trust). See also Prob. Code §§ 16464 (release by beneficiary), 16465 (affirmance by beneficiary).

§ 2233 (repealed). Trustee's adverse interest

Comment. Former Section 2233 is superseded by Probate Code Sections 15642(b) (grounds for removal of trustee), 16002 (duty of loyalty), and 16004 (duty to avoid conflict of interest).

§ 2234 (repealed). Violations as fraud against beneficiary

Comment. Former Section 2234 is superseded by Probate Code Section 16400 (violation of duty is breach of trust). The liability for breach is governed by statute. See Prob. Code §§ 16440 (measure of liability for breach of trust), 16441 (measure of liability for interest).

§ 2235 (repealed). Transactions between trustee and beneficiary

Comment. Former Section 2235 is superseded by Probate Code Section 16002 (duty of loyalty) and 16004 (duty to avoid conflict of interest).

§ 2236 (repealed). Mingling trust property

Comment. Former Section 2236 is superseded by Probate Code Sections 16009 (duty to keep trust property separate) and 16440 (measure of liability for breach of trust). See also Prob. Code § 16420(a)(3) (redress of breach by payment of money).

§ 2237 (repealed). Measure of liability for breach of trust

Comment. Former Section 2237 is superseded by Probate Code Sections 16440(a) (measure of liability for breach of trust) and 16441 (measure of liability for interest). See also Prob. Code § 16420(a)(3) (redress of breach by payment of money).

§ 2238 (repealed). Measure of liability for good faith breach

Comment. Subdivision (a) of former Section 2238 is superseded by Probate Code Section 16440 (measure of liability for breach of trust). Subdivision (b) is restated in Probate Code Section 16462(a) (nonliability for following instructions under revocable trust) without substantive change. See also Prob. Code § 16420(a)(3) (redress of breach by payment of money).

§ 2239 (repealed). Liability of cotrustees

Comment. Former Section 2239 is restated in Probate Code Section 16402 (trustee's liability to beneficiary for acts of cotrustee) with several changes. See the Comment to Prob. Code § 16402.

§ 2240 (repealed). Deposit of securities in securities depository

Comment. Parts of former Section 2240 are superseded by Probate Code Sections 15620 (actions by cotrustees) and 16200 (powers subject to limitations in trust). The

authority to make deposits is continued in Probate Code Section 16239 (power to deposit securities in depository) without substantive change.

Article 3. Obligations of Third Persons

§ 2243 (repealed). Third persons as involuntary trustees

Comment. Former Section 2243 is superseded by Probate Code Section 18100 (protection of third person dealing with trustee). See also Prob. Code § 15003 (constructive and resulting trusts unaffected).

§ 2244 (repealed). Obligations of third persons

Comment. Former Section 2244 is superseded by Probate Code Section 18101 (application of property delivered to trustee by third person).

CHAPTER 2. TRUSTS FOR THE BENEFIT OF THIRD PERSONS

Article 1. Nature and Creation of the Trust

§ 2250 (repealed). Application of chapter

Comment. Former Section 2250 is superseded by Probate Code Section 82 ("trust" defined). The provision relating to the vesting of title in the trustee is not continued. See the Comment to former Section 863.

§ 2251 (repealed). Creation of trust by mutual consent

Comment. Former Section 2251 is superseded by Probate Code Sections 15200-15207 (creation of trust), 15600 (acceptance of trust by trustee), and 16420(a)(1) (beneficiary may compel trustee to perform duties).

§ 2252 (repealed). Who is trustor when trustee appointed by court or officer

Comment. Former Section 2252 is omitted as unnecessary.

§ 2253 (repealed). Declaration of trust

Comment. Former Section 2253 is superseded generally by Probate Code Sections 15200 (methods of creating trust), 15201 (intention to create trust), and 16000 (duty to administer trust).

§ 2254 (repealed). Matters included in declaration of trust

Comment. Former Section 2254, which stated a special application of the parol evidence rule, is omitted because this question is governed by the general parol evidence rule. See Code Civ. Proc. § 1856; see also Prob. Code § 15207 (proof of terms of oral trust of personal property).

Article 2. Obligations of Trustees

§ 2258 (repealed). Obedience to declaration of trust

Comment. The part of subdivision (a) of former Section 2258 relating to control of the trustee's duties by the trust instrument is restated in Probate Code Section 16000 (duty to administer trust according to trust instrument) without substantive change, but the characterization of the duty of the trustee as that of an employee is omitted. The part of subdivision (a) relating to modification is superseded by Probate Code Section 15404 (modification by settlor and all beneficiaries).

The first sentence of subdivision (b) is continued in Probate Code Section 16001 (duty of trustee of revocable trust) without substantive change. The second sentence is restated in Probate Code Section 16462 (nonliability for following instructions under revocable trust) without substantive change. The reference to a person having a vested or contingent interest in the trust is replaced by the reference in Probate Code Section 16462 to the beneficiary. See Prob. Code § 24 ("beneficiary" defined). The last part of the second sentence relating to fiduciary obligations of the directing party is omitted as unnecessary. See also Prob. Code § 10 (singular includes plural).

§ 2259 (repealed). Trustee's degree of care and diligence

Comment. The part of former Section 2259 relating to the effect of compensation on the standard of care is restated in Probate Code Section 16041 without substantive change. The "ordinary care and diligence" standard of former Section 2259 is superseded by Probate Code Section 16040 (trustee's standard of care in administering trust).

§ 2260 (repealed). Trustee's care and diligence as to appointment of successor

Comment. Former Section 2260 is superseded by Probate Code Sections 15641 (liability of resigning trustee), 15660 (appointment of trustee to fill vacancy), 16000 (duty to administer trust), and 17200(b) (10) (petition for appointment of trustee).

§ 2261 (repealed). Investments

Comment. The standard of care governing investments and management of trust property provided by subdivision (a) (1) of former Section 2261 is restated in Probate Code Section 16040(b) without substantive change. The authority to acquire "every kind of property" is restated in Probate Code Sections 16223 (power to invest) and 16226 (power to acquire property). See also Prob. Code §§ 62 ("property" defined), 16200 (general powers of trustee include powers of prudent person). Subdivision (a) (2) of former Section 2261 is restated in Probate Code Section 16040(c) without substantive change. See also Prob. Code § 16000 (general duties of trustee subject to control by trust instrument).

The standard of care provided in the last half of the first sentence of subdivision (b) is superseded by Probate Code Sections 16040 (trustee's standard of care in administering trust) and 16200 (exercise of powers subject to limitations in trust). See also Prob. Code § 16220 (power to collect and hold property). The authority to retain property in trust at its inception or later acquired pursuant to proper authority is restated in Section 16008(b) as an exception to the general duty to dispose of improper investments. The second sentence of subdivision (b) is superseded by Probate Code Section 16220 (power to hold property in which trustee is interested). See also Prob. Code § 62 ("property" defined).

Subdivision (c) is superseded by Probate Code Sections 16200 (exercise of powers subject to limitations in trust) and 16225 (power to make deposits). See also Prob. Code § 16201 (power of court to relieve trustee from restrictions).

Subdivision (d) is restated in Probate Code Section 16201 (power of court to relieve trustee from restrictions on powers) without substantive change.

The first sentence of subdivision (e) is restated in the general rule provided in Probate Code Section 15001 (application of Trust Law) without substantive change. The second sentence of subdivision (e) is continued in Section 16042 (interpretation of trust provisions concerning legal investments) without substantive change.

Subdivision (f) is superseded by Probate Code Section 62 which defines "property" to include real and personal property or any interest therein and to mean anything that may be the subject of ownership.

§ 2262 (repealed). Trustee's liability for interest for failure to invest

Comment. Former Section 2262 is superseded by Probate Code Sections 16440 (measure of liability for breach of trust) and 16441 (measure of liability for interest). See also Prob. Code § 16420(a) (3) (redress of breach by payment of money).

§ 2263 (repealed). Trustee's claims against trust fund

Comment. Former Section 2263 is restated in Probate Code Section 16004(b) without substantive change.

§ 2264 (repealed). Transfer in trust of pecuniary amount by transfer of property other than money

Comment. Former Section 2264 is omitted. The subject matter of former Section 2264 was superseded by former Probate Code Section 1138.14 which is continued in Probate Code Section 15005 (law applicable to marital deduction gifts in trust).

Article 3. Powers of Trustees**§ 2267 (repealed). Trustee as general agent**

Comment. The first and last sentences of former Section 2267 are superseded by Probate Code Sections 18000 (personal liability of trustee to third persons on contracts) and 18004 (assertion of claims against trusts). See also 7 B. Witkin, *Summary of California Law Trusts* § 100, at 5460 (8th ed. 1974). The second sentence of former Section 2267 is restated in Probate Code Section 16200 (powers of trustee derived from trust instrument and statute) without substantive change. See also Prob. Code §§ 16200-16249 (trustees' powers).

§ 2268 (repealed). Actions by cotrustees

Comment. Former Section 2268 is restated in Probate Code Section 15620 (cotrustees act unanimously unless trust instrument provides otherwise).

§ 2269 (repealed). Discretionary powers

Comment. Subdivision (a) of former Section 2269 is continued in Probate Code Section 16080 (discretionary powers to be exercised reasonably) without substantive change. The word "presumed" is omitted as unnecessary. Subdivision (b) and part of subdivision (d) are restated in Probate Code Sections 17200(b)(5) (review of exercise of discretionary powers) without substantive change. Subdivision (c) and most of subdivision (d) are continued in Probate Code Section 16081 without change. Subdivision (e) is omitted because it is unnecessary in light of Civil Code Sections 1381.2, 1385.1, and 1387.2.

§ 2269.1 (repealed). Permissible investments

Comment. The first sentence of subdivision (a) and subdivision (b) of former Section 2269.1 are continued in Probate Code Section 16223 without substantive change. The second sentence of subdivision (a) is superseded by Probate Code Section 16202 (exercise of trustee's powers subject to duties). See also Prob. Code § 16040 (trustee's standard of care in administering trust).

§ 2270 (repealed). Proxies to vote shares in trust; shareholder's meetings and acts

Comment. Former Section 2270 is restated in Probate Code Section 16234 without substantive change, except that the provision for authorizing actions *in writing* is not continued.

§ 2271 (repealed). Distribution of income of private foundation or charitable trust

Comment. Former Section 2271 is restated in Probate Code Sections 16100-16102 and 16104 without substantive change. The substance of the "whenever created" language in the first paragraph is continued in Probate Code Section 15001 (application of Trust Law).

§ 2271.1 (repealed). Split-interest trust

Comment. Former Section 2271.1 is restated in Probate Code Sections 16100 and 16102-16104 without substantive change. The substance of the "whenever created" language in subdivision (a) is continued in Probate Code Section 15001 (application of Trust Law).

§ 2271.2 (repealed). Jurisdiction under Section 101(1)(3) of Tax Reform Act of 1969

Comment. Former Section 2271.2 is restated in Probate Code Sections 16105 (proceedings), 17200(b)(19) (grounds for petition), and 17203(b) (notice).

§ 2272 (repealed). Leases of trust property

Comment. Former Section 2272 is superseded by Probate Code Sections 16231 (trustee's power to lease) and 18100 (protection of third person dealing with trustee). See also Prob. Code §§ 15001 (application of Trust Law), 16200(b) (powers available without necessity of court approval).

Article 4. Rights of Trustees**§ 2273 (repealed). Repayment of expenses paid by trustee**

Comment. Former Section 2273 is restated in Probate Code Section 15684 (repayment of trustee for expenditures) without substantive change.

§ 2274 (repealed). Trustee's compensation

Comment. The first sentence of former Section 2274 is continued in Probate Code Section 15680(a) without substantive change. The second sentence of former Section 2274 is restated in Probate Code Section 15680 (trustee's compensation under trust terms) without substantive change. The third sentence is continued in Probate Code Section 15681 (compensation where trust silent) without substantive change. The fourth sentence is restated in Probate Code Section 15683 (compensation of cotrustees) without substantive change. The last sentence is superseded by Probate Code Sections 17000 (jurisdiction in superior court) and 17200 (proceedings concerning trusts).

§ 2275 (repealed). Rights of involuntary trustee

Comment. Former Section 2275 is omitted because it is unnecessary. The rights to compensation and repayment of expenses provided in former Sections 2273 and 2274, as restated in Probate Code Sections 15680-15681 and 15683-15684 apply only to trustees of express trusts. See Prob. Code § 82 ("trust" defined). See also Prob. Code § 15003 (constructive and resulting trusts unaffected).

Article 5. Termination of the Trust**§ 2279 (repealed). Extinguishment of trust**

Comment. Former Section 2279 is restated in Probate Code Section 15407(a) (2)-(4) (termination of trust) without substantive change.

§ 2279.1 (repealed). Uneconomically low principal

Comment. Subdivisions (a) and (d) of former Section 2279.1 are restated in Probate Code Section 15408 (modification or termination of trust with uneconomically low principal) without substantive change. The first part of subdivision (b) is superseded by Probate Code Section 15410(c) (disposition of property upon termination). The remainder of subdivision (b) is superseded by Probate Code Section 17206 (authority to make necessary orders). Subdivision (c) is superseded by Probate Code Section 15002 (common law as law of state).

§ 2280 (repealed). Revocable trusts

Comment. The part of the first sentence of former Section 2280 relating to the presumption of revocability of trusts is restated in the first sentence of Probate Code Section 15400 (presumption of revocability) without substantive change. The rule in the first sentence relating to the method of revocation is superseded by Probate Code Section 15401(a) (method of revocation by settlor). The second sentence is superseded by Probate Code Section 15410(a) (disposition of property as directed by settlor). The last sentence is omitted because it is no longer necessary; there is no intent to make trusts created before 1931 retroactively revocable.

§ 2281 (repealed). Vacation of office of trustee

Comment. The first paragraph (including subdivisions (1) and (2)) of former Section 2281 relating to occurrence of vacancies is restated in Probate Code Section 15643 without substantive change, but the reference to the trustee's discharge is omitted as unnecessary. The second paragraph is restated in Probate Code Section 18102 (protection of third person dealing with former trustee) without substantive change. The last paragraph is restated in Civil Code Section 2934b (application to deeds of trust) without substantive change.

§ 2282 (repealed). Discharge of trustee

Comment. The parts of former Section 2282 relating to discharge from liability are superseded by Probate Code Sections 15641 (liability of resigning trustee) and 16460

(limitations on proceedings against trustees). Subdivision (d) is superseded by Probate Code Sections 15640(a)(3) (resignation with consent of beneficiaries), 16463 (consent of beneficiary), 16464 (release by beneficiary), 16465 (affirmance by beneficiary). Subdivision (e) is restated in Probate Code Section 15640(a)(4) (resignation with approval of court) without substantive change. See also Prob. Code §§ 15407(b) (trustee's powers on termination), 15641 (liability of resigning trustee), 16460(a) (limitations based on consent), 16461 (exculpation of trustee).

§ 2283 (repealed). Removal of trustee by superior court

Comment. The first part of the first sentence of former Section 2283 is restated in Probate Code Section 15642(a) and (b)(1)-(2) (removal of trustee by court). See also Prob. Code §§ 16420(a)(3) (removal of trustee for breach of trust), 17000 (jurisdiction in superior court). The remainder of the first sentence is superseded by Probate Code Section 15640(a)(4) and (b) (court acceptance of resignation). The second sentence is omitted because it is obsolete.

Article 6. Succession or Appointment of New Trustees

§ 2287 (repealed). Appointment of trustees by superior court

Comment. The first sentence of former Section 2287 is superseded by Probate Code Section 15660 (appointment of trustee to fill vacancy). The second sentence is superseded by the more general language in the last sentence of Probate Code Section 15660(c) (consideration of wishes of beneficiaries).

§ 2288 (repealed). Survivorship among cotrustees

Comment. Former Section 2288 is superseded by Probate Code Section 15621 (vacancy in office of cotrustee).

§ 2289 (repealed). Appointment of trustees by superior court

Comment. Most of the first sentence of former Section 2289 is superseded by Probate Code Section 15660 (appointment of trustee to fill vacancy). The venue rule is restated in Probate Code Section 17005(b) without substantive change. The second sentence is continued in Probate Code Section 15660(c) (appointment of different number of trustees) without substantive change. See also Prob. Code §§ 17000 (jurisdiction in superior court), 17002 (principal place of administration of trust), 17005(b) (venue).

§§ 2290.1-2290.12 (repealed). Uniform Management of Institutional Funds Act

CHAPTER 3. UNIFORM MANAGEMENT OF INSTITUTIONAL FUNDS ACT

Comment. The Uniform Management of Institutional Funds Act, former Civil Code Sections 2290.1-2290.12, is continued without change in Education Code Sections 94600-94610, except as noted in the Comments to those sections.

Probate Code §§ 1120-1139.19 (repealed). Administration of trusts

CHAPTER 19. ADMINISTRATION OF TRUSTS

Article 1. Testamentary Trusts

§ 1120 (repealed). Continuing court jurisdiction of trusts

Comment. Former Section 1120 is restated in Article 1 (commencing with Section 17300) of Chapter 4 of Part 5 of Division 9 with minor changes. See Sections 17300-17302. Trusts not subject to continuing court jurisdiction under Sections 17300-17302 are subject to the intermittent jurisdiction of the courts when invoked pursuant to Section 17200. The new law contains provisions comparable to parts of former Section 1120 and other sections in former Article 1. See Sections 17000 (jurisdiction in superior court), 17200(b)(3)

(petition to settle accounts), 17200(b)(6) (petition for instructions), 17200(b)(15) (amending trust for charitable estate tax deduction), 17203 (notice of hearing on petition), 16200-16249 (trustees' powers); see also 17100-17107 (notice), 17201(b) (clerk to set petition for hearing), 17208 (appointment of guardian ad litem). The provision for accepting additions to trusts is superseded by Section 16221 (power to accept additions to trust).

§ 1120.1 (repealed). Additions to trust subject to jurisdiction of court

Comment. Former Section 1120.1 is superseded by Section 82 which defines "trust" to include additions to a trust.

§ 1120.1a (repealed). Removal of trusts from continuing court supervision

Comment. Former Section 1120.1a is restated in Sections 17350-17354 (removal of trusts from continuing court supervision) with some technical changes. See the Comments to Sections 17350-17354. See also Sections 16060-16062 & 16064 (trustee's duty to report information and account to beneficiaries), 16063 (contents of annual account), 17201(b) (clerk to set petition for hearing). References to "remaindermen" are omitted since they are unnecessary in light of the definition of "beneficiary" in Section 24.

§ 1120.2 (repealed). Powers of trustee

Comment. Former Section 1120.2 is superseded by Sections 16200-16249 (trustees' powers). The provision in the first paragraph of former Section 1120.2 requiring a petition in order to exercise powers not expressed in the trust instrument or otherwise conferred is superseded by Section 16200 which grants extensive powers notwithstanding the silence of the trust instrument. See also Section 16201 (power of court to relieve trustee from restrictions on powers).

The first clause of subdivision (1) of former Section 1120.2 is restated in Sections 16226 (acquisition and disposition of property) and 16227 (management of property) without substantive change. The second and third clauses of subdivision (1) are restated in Sections 16231 (leases) and 16232 (mineral leases) without substantive change.

Parts of subdivision (2) are restated in Sections 16220 (retaining trust property) and 16223 (investments) without substantive change. The reference to reinvesting, stock of the trustee, and common trust funds are omitted as unnecessary. The power to invest under Section 16223 applies to any type of property. See also Section 62 ("property" defined); Fin. Code § 1564 (common trust funds).

The first clause of subdivision (3) is superseded by Section 16241 (borrowing money). The remainder of subdivision (3) is superseded by Section 16228 (encumbrances).

Subdivision (4) is continued in Section 16237 (consent to change in form of business, voting trusts) without substantive change.

The first clause of subdivision (5) is restated in Section 16226 (acquisition and disposition of property) without substantive change. The second clause is continued in Section 16227 (management of property) without change, except that "property" is used in place of "asset."

Subdivision (6) is continued in Section 16229 (repairs and alterations) without substantive change.

Subdivision (7) is continued in Section 16230 (development of land) without substantive change.

Subdivision (8) is restated in Section 16233 (options) without substantive change, except that Section 16233 makes clear that an option may be exercisable beyond the term of the trust.

Subdivision (9) is restated in Section 16234 (voting rights with respect to corporate shares, memberships, or property) without substantive change.

Subdivision (10) is continued in Section 16235 (payment of calls and assessments) without substantive change.

Subdivision (11) is continued in Section 16236 (stock subscriptions and conversions) without substantive change.

Subdivision (12) is continued in Section 16238 (holding securities in name of nominee) without substantive change.

Subdivision (13) is restated in Section 16240 (insurance) without substantive change.

The first part of subdivision (14) is superseded by Section 16243 (payment of expenses in administration of the trust). No power is needed for the trustee to advance its own funds since in doing so it is not acting as trustee. However, if a trustee does advance its own funds in protection of the trust, the trustee's right of reimbursement may arise under Section 15684 or the trustee may have a lien on trust property. The part of subdivision (14) relating to the trustee's lien for advances of the trustee's funds is restated in Section 15685 without substantive change, but Section 15685 makes clear that the lien is an equitable lien.

The first two clauses of subdivision (15) are continued in Section 16242(a) and (b) (payment and settlement of claims) without substantive change. The third clause is continued in Section 16242(c) except that the reference to releasing claims to the "extent that the claim is uncollectible" is not continued. The last clause is superseded by Section 16249 (actions and proceedings).

Subdivision (16) is continued in Section 16243 (payment of taxes, trustee's compensation, and other expenses) without substantive change, except that the power to pay compensation is limited to "reasonable" compensation.

Subdivision (17) is continued in Section 16222(a) (participation in business; change in form of business) without substantive change, but Section 16222(a) makes clear that the trustee has power to participate only in a business that is part of trust property. See also Section 16222(b) (limitation on power to continue operation of business).

Subdivision (18) is superseded by Sections 16200 (general powers without court authorization) and 16201 (power of court to relieve trustee from restrictions on powers). See the Comment to Section 16200.

The second paragraph is superseded by Section 15001 (application of Trust Law).

The last paragraph is omitted as unnecessary in light of Section 11 (severability).

§ 1120.5 (repealed). Request for special notice by beneficiary

Comment. Former Section 1120.5 is superseded by Section 17204 (request for notice). See also Section 17105(a) (additional notice).

§ 1120.6 (repealed). Uneconomically low principal

Comment. Subdivisions (a) and (d) of former Section 1120.6 are restated in Section 15408(a) and (c) (modification or termination of trust with uneconomically low principal) without substantive change. The first clause of subdivision (b) is restated in Section 15410(c) (disposition of property upon termination of trust) without substantive change. The last clause of subdivision (b) is superseded by Section 17206 (authority to make necessary orders). Subdivision (c) is superseded by Probate Code Section 15002 (common law as law of state).

§ 1121 (repealed). Accounting

Comment. Former Section 1121 is superseded by Sections 17200(b) (7) (petition to compel account) and Sections 16060-16062 and 16064 (trustee's duty to report information and account to beneficiary). See also Section 15800 (limitation on rights of beneficiary of revocable trust).

§ 1122 (repealed). Compensation of trustee

Comment. The first and second sentences of former Section 1122 are restated in Section 15680(a) and (b) (trustee's compensation as provided under trust instrument) without substantive change, but Section 15680 permits the court to decrease the trustee's compensation as well as increase it. The reference to the decree of distribution is not continued since the new law applies to both living and testamentary trusts. The first part of the third sentence is restated in Section 15681 (trustee's compensation where trust silent) without substantive change. The remainder of the third sentence is superseded by Sections 15682 (court determination of prospective compensation) and 17200(b) (9) (petition to fix or allow compensation). The fourth sentence is restated in Section 15683 (compensation of cotrustees) without substantive change. The last sentence is superseded by Sections 15684 (repayment of trustee for expenditures) and 17200(b) (5) (petition to settle accounts). See also Section 16243 (trustee's power to pay compensation and expenses).

§ 1123 (repealed). Conclusiveness of decree

Comment. Former Section 1123 is superseded by Section 17104(b).

§ 1123.5 (repealed). Removal of trustee

Comment. Former Section 1123.5 is superseded by Section 15642 (removal of trustee). See also Sections 16420(a)(5) (removal of trustee for breach of trust), 17000 *et seq.* (judicial proceedings concerning trusts), 17201(b) (clerk to set petition for hearing).

§ 1123.6 (repealed). Custody of assets pending hearing

Comment. Former Section 1123.6 is restated in Section 15642(c) without substantive change. See also Section 17206 (general authority to appoint temporary trustee).

§ 1123.7 (repealed). Exclusive jurisdiction and procedure

Comment. Former Section 1123.7 is superseded by Section 17000 (subject-matter jurisdiction).

§ 1124 (repealed). Declination of designated trustee to act

Comment. Former Section 1124 is superseded by Section 15601 (rejection of trust). See also Sections 15600 (acceptance of trust by trustee), 15640 (resignation of trustee), 16000 (duty to administer trust upon acceptance).

§ 1125 (repealed). Filling vacancies before distribution

Comment. Former Section 1125 is superseded by Sections 15660 (appointment of trustee to fill vacancy) and 17200(a), (b)(10) (petition to appoint trustee).

§ 1125.1 (repealed). Petition of resignation of trustee

Comment. The first paragraph of former Section 1125.1 is superseded by Sections 15640 (resignation of trustee), 17101 (form of notice), 17102 (manner of mailing notice), 17200(a), (b)(11) (petition to accept resignation), 17201(b) (clerk to set matter for hearing), 17203 (notice).

The first part of the second paragraph is restated in Section 15641 (liability of resigning trustee) without substantive change. The remainder of the second paragraph is restated in Section 15644 (delivery of property by former trustee upon occurrence of vacancy) without substantive change.

§ 1126 (repealed). Filling vacancies after distribution

Comment. Former Section 1126 is superseded by Sections 15660 (appointment of trustee to fill vacancy), 17101 (form of notice), 17102 (manner of mailing notice), 17203 (notice), and 17200(a), (b)(10) (petition to appoint trustee). See also Sections 15601 (rejection of trust by writing or inaction), 15642 (removal of trustee), 15643 (vacancy in office of trustee), 17204 (request for special notice).

§ 1127 (repealed). Trustee's bond

Comment. Former Section 1127 is superseded by Section 15602 (trustee's bond). The requirement that an individual successor trustee who is not named in the trust must give bond is restated in Section 15602(a)(3) without substantive change.

§ 1127.5 (repealed). Bond not required of certain charitable corporation trustees

Comment. Former Section 1127.5 is superseded by Section 15602(e) (bond not required of trustees who are not individuals).

§ 1128 (repealed). Transfer of trust proceedings to another county

Comment. Former Section 1128 is restated in Sections 17304(a)-(b) (transfer of jurisdiction of trust to different county) and 17201(a) (petition to be verified).

§ 1129 (repealed). Hearing on transfer of trust proceedings to another county

Comment. The first three sentences of the first paragraph of former Section 1129 are superseded by Sections 17102 (manner of mailing), 17201(b) (clerk to set matter for hearing), and 17203 (notice). The fourth and fifth sentences are continued in Sections

17304(c) (transfer of jurisdiction over trust to different county) without substantive change. The sixth sentence is continued in Section 17304(d) without substantive change.

The second paragraph is continued in Section 17304(e) without substantive change.

The third paragraph is superseded by Section 17302 (applicable procedures).

§ 1130 (repealed). Vouchers; withdrawal; production; destruction or delivery to trustee or attorney

Comment. Former Section 1130 is omitted. Vouchers in support of an account are not required under the Trust Law.

§ 1130.1 (repealed). Certificate of appointment as trustee

Comment. Former Section 1130.1 is restated in Section 15603 (certificate of trustee) without substantive change, but Section 15603 also applies to living trusts. See also Section 10 (singular includes plural).

§ 1132 (repealed). Transfer of testamentary trust to another jurisdiction

Comment. Former Section 1132 is superseded by Section 17401 (transfer of trust from California). See also Sections 82 ("trust" defined), 17400 (application of transfer provisions).

§ 1133 (repealed). Combination of assets and administration of trusts as one trust

Comment. Former Section 1133 is superseded by Section 15411 (combination of similar trusts).

Article 2.5. Inter Vivos and Other Trusts

§ 1138 (repealed). "Trust" defined

Comment. Subdivision (a) of former Section 1138 is restated in Section 82(a) ("trust" defined) without substantive change, except that the procedure relating to internal trust affairs under the new law is not limited to written trusts and the reference to "voluntary" trusts is omitted because it is unnecessary. See the Comment to former Civil Code § 2215. See also Section 17200 (proceedings concerning trusts). The language in subdivision (a) concerning trusts "entirely administered or to be entirely administered in this state" is superseded by Section 17002 which delineates the principal place of administration of the trust.

Subdivision (b) of former Section 1138 is continued in Section 82(c) without substantive change except as noted. The former exclusion of trusts subject to court supervision is superseded by Section 17302 (general procedures applicable). See also the Comment to former Section 1120. The former exclusion of deeds of trust is continued in Section 82 by the reference to security arrangements. The former exclusion of charitable trusts subject to supervision of the Attorney General is omitted. See Section 82(a) ("trust" defined); see also Section 15004 (application of Trust Law to certain charitable trusts).

§ 1138.1 (repealed). Grounds for petition by trustee

Comment. Subdivision (a) of former Section 1138.1 is restated in Section 17200 (petitioners; grounds for petition) with the following changes: Paragraph (3) is omitted since Section 16221 permits additions to trusts without the need for court approval. Paragraph (6) is superseded by Section 17200(b) (8) which is drafted in recognition of the automatic powers available under Sections 16200-16249. See Section 16201 (power of court to relieve trustee from restrictions on powers); see also Sections 16060-16062 & 16064 (duty to report information and account to beneficiaries). Paragraph (14) is superseded by Section 15412 (division of trusts). See also Section 15640(b) (acceptance of trustee's resignation by court).

Subdivision (b) is omitted; the trust instrument may not limit the availability of proceedings under Section 17200 *et seq.*

§ 1138.2 (repealed). Orders and decrees of court

Comment. Former Section 1138.2 is continued in Section 17206 without change.

§ 1138.3 (repealed). Venue

Comment. The first sentence of subdivision (a) of former Section 1138.3 is restated in Section 17005(a) (venue) without substantive change. See also Section 17000(a) (subject-matter jurisdiction of superior court). The second and third sentences of subdivision (a) are superseded by Section 17002 (principal place of administration of trust).

Subdivision (b) is restated in Section 17005(a) (2) (alternative venue for testamentary trusts) without substantive change.

§ 1138.4 (repealed). Petition

Comment. The first sentence of former Section 1138.4 is restated in Section 17201(a) (commencement of proceeding) without substantive change, except that the provision relating to authorization by the terms of the trust is omitted since the trust can not prevent resort to the statutory procedure. The second sentence is omitted.

§ 1138.5 (repealed). Dismissal of petition

Comment. Subdivision (a) of former Section 1138.5 is restated in Section 17202 (dismissal of petition) without substantive change. See also Section 24 ("beneficiary" defined to include remaindermen). Subdivision (b) is omitted.

§ 1138.6 (repealed). Notice and hearing

Comment. The first paragraph of subdivision (a) of former Section 1138.6 is restated in Section 17201(b) (clerk to set petition for hearing) without substantive change. The second paragraph is restated in Sections 17203 (notice of hearing on petition) and 17102 (manner of notice; notice in manner directed by court) without substantive change. The third paragraph is restated in Section 17205 (request for and service of copy of petition) without substantive change. The fourth paragraph is restated in Section 17103 (personal delivery) without substantive change. The fifth paragraph is restated in Section 17104 (proof of notice) without substantive change. See also Section 24 ("beneficiary" defined to include remaindermen).

Subdivision (b) is omitted. Trust proceedings are governed by the new Trust Law, Division 9 (commencing with Section 15000), not by the provisions on administration of decedents' estates.

Subdivision (c) is restated in Section 17106 (shortening time for notice) without substantive change.

Subdivision (d) is superseded by Section 17203(c) (notice to Attorney General).

§ 1138.7 (repealed). Appointment of guardian ad litem; threatened exercise of power not conferred upon trustee

Comment. Subdivision (a) of former Section 1138.7 is restated in Section 17208(a)-(b) (appointment of guardian ad litem) without substantive change.

Subdivision (b) is superseded by Sections 17200 (petition), 17201(a) (grounds for petition), and 17203 (notice). See also Section 17100 *et seq.* (general notice provisions), 17208 (appointment of guardian ad litem).

Subdivision (c) is continued in Section 17208(c) without substantive change.

§ 1138.8 (repealed). Resignation of trustee or cotrustee; appointment of successor trustee

Comment. The first three sentences of former Section 1138.8 are superseded by Section 15640 (resignation of trustee). The first part of the last sentence is restated in Section 15641 (liability of resigning trustee) without substantive change. The remainder of the last sentence is superseded by Section 15644 (delivery of property by resigning trustee).

§ 1138.9 (repealed). Appointment of successor trustee

Comment. Former Section 1138.9 is superseded by Sections 15642(b) (5) (removal of trustee for other cause), 15643 (vacancy in office of trustee), 15660 (appointment of trustee to fill vacancy), and 17200(a), (b) (10) (petition for appointment of trustee to fill vacancy).

§ 1138.10 (repealed). Appeal

Comment. Former Section 1138.10 is superseded by Section 17207 (appeal). See the Comment to Section 17207.

§ 1138.11 (repealed). Cumulative and nonexclusive remedies

Comment. The provision of former Section 1138.11 relating to the cumulative nature of remedies is restated in Section 16420(b) without substantive change. The provision relating to nonexclusive remedies, to the extent it related to jurisdiction, is superseded by Section 17000(a) (exclusive jurisdiction over internal affairs of trusts). See also Sections 16420-16421 (remedies for breach of trust), 17001 (court as full-power court), 17206 (authority to make necessary orders).

§ 1138.12 (repealed). Legislative intent

Comment. Former Section 1138.12 is restated in Section 17209 (intermittent judicial intervention in trust administration) without substantive change.

§ 1138.13 (repealed). Applicability of article

Comment. The first sentence of former Section 1138.13 is restated in Section 15001(a) (application of Trust Law) without substantive change. The second sentence is omitted; the right to petition under Section 17200 cannot be restricted by the trust instrument under the Trust Law. See also Section 82 ("trust" defined).

§ 1138.14 (repealed). Transfer in trust of pecuniary amount

Comment. Former Section 1138.14 is continued in Section 15005 (law applicable to marital deduction gifts in trust) without substantive change.

Article 3. Transfer to Another Jurisdiction

§ 1139 (repealed). Application of article

Comment. Subdivision (a) of former Section 1139 is restated in Section 17400(a) (application of chapter) without substantive change, except that the limitation to written trusts is omitted. Subdivision (b) is superseded by Section 17400(b) (availability of other means of transfer). Subdivision (c) is omitted because it is no longer needed.

§ 1139.1 (repealed). Transfer of place of administration or assets

Comment. The introductory clause of Section 1139.1 is restated in Section 17401(a) (authority of court) without substantive change. See also Sections 17000 (subject-matter jurisdiction of superior court), 17200(a), (b)(16) (petition for transfer). Clause (a) pertaining to trusts under continuing jurisdiction of the court is superseded by the more general language of Section 17401(a). Clause (b) is superseded by Sections 17200(a) (who may petition) and 17404(b) (order granting transfer if not violative of terms of trust).

§ 1139.2 (repealed). Petition for transfer

Comment. The first sentence of former Section 1139.2 is restated in Section 17200(a) (who may petition) without substantive change. The remainder of former Section 1139.2 is restated in Sections 17402 (contents of petition) and 17201(a) (petition to be verified) without substantive change, except that a statement of the age of a trustee is required only for an individual and the statement relating to civil actions is limited to actions arising out of administration of the trust.

§ 1139.3 (repealed). Notice and hearing

Comment. The provision of former Section 1139.3 requiring the clerk to set the petition for hearing is continued in Section 17201(b) without substantive change. The remainder of the first sentence is omitted; notice is given by the petitioner. See Section 17403(a). The last three sentences are restated in Sections 17203(c) (notice to Attorney General regarding charitable trust) and 17403 (notice and hearing) without substantive change, except that 30 rather than 20 days' notice must be given the Attorney General. See also Sections 17102 (manner of mailing notice).

§ 1139.4 (repealed). Court order

Comment. The introductory clause and subdivisions (1), (3), and (4) of former Section 1139.4 are restated in Section 17404 (order granting transfer) without substantive change, except that the court is required to take into account the interest in economical and convenient administration rather than to find that it would necessarily result from the transfer. Subdivision (2) is omitted.

§ 1139.5 (repealed). Manner of transfer; discharge of trustee

Comment. Former Section 1139.5 is continued in Section 17405 (manner and effect of transfer) without substantive change.

§ 1139.6 (repealed). Other trusts

Comment. Former Section 1139.6 is omitted. See Sections 17000 (subject-matter jurisdiction in superior court), 17002 (principal place of administration), 17005 (venue), 17400 (application of transfer procedure).

§ 1139.7 (repealed). "Beneficiary" defined

Comment. Former Section 1139.7 is restated in Sections 24 ("beneficiary" defined) and 17402(b) (notice of petition to living beneficiaries) without substantive change.

Article 4. Transfer From Another Jurisdiction

§ 1139.10 (repealed). Application of article

Comment. Subdivision (a) of former Section 1139.10 is restated in Section 17450(a) (application of chapter) without substantive change, except that the limitation to written trusts is omitted. Subdivision (b) is superseded by Section 17450(b) (nonexclusive procedure).

§ 1139.11 (repealed). Transfer of place of administration or assets to California

Comment. Former Section 1139.11 is restated in Section 17451(a) (authority of court) without substantive change. See also Section 17200(a), (b)(16) (petition for transfer).

§ 1139.12 (repealed). Petition for transfer

Comment. Former Section 1139.12 is restated in Section 17200(a) (petition) without substantive change.

§ 1139.13 (repealed). Venue

Comment. Former Section 1139.13 is continued in Sections 17452 (venue) and 17000(a) (subject-matter jurisdiction in superior court) without substantive change.

§ 1139.14 (repealed). Contents of petition

Comment. Former Section 1139.14 is continued in Sections 17453 (contents of petition) and 17201(a) (petition to be verified) without substantive change, except that a statement of the age of a trustee is required only for an individual.

§ 1139.15 (repealed). Notice and hearing

Comment. The part of subdivision (a) of former Section 1139.15 requiring the clerk to set the petition for hearing is continued in Section 17201(b). The remainder of the first sentence of subdivision (a) is omitted. The second sentence of subdivision (a) is continued in Section 17454 (notice) without substantive change. Subdivision (b) is continued in Section 17454 (notice and hearing) without change. See also Section 17102 (manner of mailing notice).

§ 1139.16 (repealed). Order accepting transfer and appointing trustee

Comment. Former Section 1139.16 is restated in Section 17455 (order accepting transfer and appointing trustee) without substantive change, except as follows: (1) the court is required to take into account the interest in economical and convenient administration rather than to find that it would necessarily result from the transfer, (2)

the discretion of the court to require bond is governed by the general provisions in Section 15602, and (3) a bond is required only if the law of the other jurisdiction or California so provides.

§ 1139.17 (repealed). Conditional order accepting transfer

Comment. Former Section 1139.17 is continued in Section 17456 (conditional order accepting transfer) without change.

§ 1139.18 (repealed). Administration of transferred trust

Comment. Former Section 1139.18 is superseded by Section 17457 (administration of transferred trust). See the Comment to Section 17457.

§ 1139.19 (repealed). "Beneficiary" defined

Comment. Section 1139.19 is restated in Sections 24 ("beneficiary" defined) and 17453(b) (notice of petition to living beneficiaries) without substantive change.

Probate Code §§ 1215-1215.4 (repealed). Notice in trust proceedings

Article 1.5. Notice in Trust Proceedings

§ 1215 (repealed). Definitions

Comment. Former Section 1215 is superseded by Section 17100 (application of chapter).

§ 1215.1 (repealed). Notice in cases involving future interests

Comment. Former Section 1215.1 is restated in Section 15804(a) (notice in cases involving future interests) without substantive change.

§ 1215.2 (repealed). Conflicts of interest in subject matter

Comment. Former Section 1215.2 is restated in Section 15804(b) (notice where conflict of interest) without substantive change.

§ 1215.3 (repealed). Additional notices; appointment of guardian ad litem

Comment. Former Section 1215.3 is restated in Sections 17208 (appointment of guardian ad litem) and 17105(a) (court-ordered additional notice) without substantive change.

§ 1215.4 (repealed). Effect of article on other notice requirements

Comment. The first sentence of former Section 1215.4 is restated in Section 15804(c) (effect on other notice requirements) without substantive change. The second sentence is restated in Section 17105(b) (additional notice by party) without substantive change.



CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

relating to

**DISPOSITION OF ESTATE
WITHOUT ADMINISTRATION**

(Revised to Reflect Changes Made in Legislature)

Editorial note. The following text is taken from the Law Revision Commission's *Recommendation Relating to Disposition of Estate Without Administration*, 18 Cal. L. Revision Comm'n Reports 1005 (1986). This material has been revised to reflect the changes made in the Legislature after the Commission's recommended legislation was introduced. Although these revisions were made by the Commission's legal staff, the revised text does not necessarily represent the views of the Commission.

Material added to the text of the Commission's original printed recommendation is shown in italics. The omission of material appearing in the original recommendation is also indicated. The omitted text related to the legislation as proposed by the Commission that is no longer relevant in light of the changes made in the Legislature.

DISPOSITION OF ESTATE WITHOUT ADMINISTRATION

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RECOMMENDATION

relating to

DISPOSITION OF ESTATE WITHOUT ADMINISTRATION

INTRODUCTION

The Commission recommends that a new Division 8 be added to the Probate Code. This new division, relating to disposition of estates without administration, would replace Probate Code Sections 630-632 (collection or transfer of personal property of small estate without administration) and Probate Code Sections 649.1-658 (passage of property to a surviving spouse without administration).

COLLECTION OR TRANSFER OF SMALL ESTATE WITHOUT ADMINISTRATION

EXISTING LAW

Section 630 of the Probate Code provides a summary means for the collection of a decedent's personal property where the gross value of the decedent's real and personal property in this state does not exceed \$60,000 and the gross value of the decedent's real property in this state does not exceed \$10,000.

In determining the value of the decedent's estate for the purposes of Section 630, all of the following property is excluded:

- Property held by the decedent as a joint tenant.¹
- Property in which the decedent had a life or other estate terminable upon the decedent's death.²

¹ Prob. Code § 632. See also Prob. Code §§ 210-212 (recording affidavit or court order where title to real property affected by death of a person).

² Prob. Code § 632. The exclusion for life estates and estates terminable upon the decedent's death embraces life interests in trusts and contractual rights (such as life insurance or employee retirement) that terminate at death, as well as life interests in other property. See O. McCarroll, 1 California Decedent Estate Administration Supplement § 3.6, at 76 (Cal. Cont. Ed. Bar 1985). See also Prob. Code §§ 210-212 (recording affidavit or court order where title to real property affected by death of a person).

—Property which passed to the decedent's surviving spouse under the decedent's will or by intestate succession.³

—State registered property (vehicles, vessels, mobilehomes, manufactured homes, commercial coaches, and truck campers).⁴

—Amounts due the decedent for services in the armed forces of the United States.⁵

—Compensation, not exceeding \$5,000, owing to the decedent for services from any employment.⁶

In most cases in which successors seek to settle the affairs of a decedent's estate without probate or administration, much of the decedent's personal property will be in their possession. The procedures of Section 630 do not deal directly with such property. Section 630 merely facilitates the transfer of property from third persons by enabling successors "without procuring letters of administration, or awaiting the probate of the will" to:

—"collect any money due the decedent."

—"receive the tangible personal property of the decedent."

—"have any evidences of a debt, obligation, interest, right, stock, or chose in action transferred" to them.

The claimant to the decedent's property makes an affidavit or declaration under penalty of perjury showing the claimant's right to the property and gives the affidavit or declaration to the debtor, custodian, registrar, or transfer agent.⁷ The claimant is then entitled to collect the money or property and to have any evidences of interest, indebtedness, or right transferred.⁸ The person making the payment or transfer need not inquire into the truth of the affidavit or declaration; the claimant's receipt for the

³ Prob. Code § 632. See Prob. Code § 649.1 (property passing to surviving spouse). See also Prob. Code §§ 650-658 (determination or confirmation of property passing to surviving spouse).

⁴ Prob. Code § 630. Special provisions permit transfer of registration of state registered property without probate if the decedent does not own other property that would require probate of the decedent's estate. See Health & Safety Code § 18102 (manufactured home, mobilehome, commercial coach, truck camper, or floating home); Vehicle Code §§ 5910 (vehicle), 9916 (vessel).

⁵ Prob. Code § 630.

⁶ Prob. Code § 630.

⁷ Prob. Code § 630.

⁸ Prob. Code § 630.

property paid, delivered, or transferred is a sufficient discharge of liability.⁹

The summary procedure can be used only if the person who succeeds to the decedent's property is the sole beneficiary or all the beneficiaries under the decedent's will (whether or not related to the decedent) or is the decedent's surviving spouse, child, issue of a deceased child, parent, brother, sister, issue of a deceased brother or sister, or grandparent.¹⁰

The summary procedure is merely a collection mechanism and does not give title to the person collecting the property as against other claimants to the property.¹¹ Moreover, the collected property may be subjected to the possession and control of an executor or administrator¹² who may use the property to satisfy claims against the decedent's estate¹³ or distribute it to those persons entitled to succeed to the decedent's estate.¹⁴

RECOMMENDATIONS

The Commission recommends the addition of a new division to the Probate Code that will include provisions that will fill in the gaps in the existing summary affidavit procedure for the collection or transfer of personal property and that will provide two new summary procedures to obtain a marketable title to real property.

⁹ Prob. Code § 631. See also Prob. Code § 630(d) (transfer agent of security).

¹⁰ Prob. Code § 630. The summary procedure also may be used by any of the following: The guardian or conservator of the estate of any person bearing the required relationship to the decedent, a trustee named in a trust agreement executed by the decedent during his or her lifetime, the primary beneficiaries of which bear the required relationship to the decedent, and the custodian where the decedent's will nominates a custodian to receive a gift to a beneficiary under the Uniform Gifts to Minors Act or the Uniform Transfers to Minors Act of any state. *Id.*

¹¹ See *Brezzo v. Brangero*, 51 Cal. App. 79, 81, 196 P. 87 (1921). See also *Estate of Kevil*, 98 Cal. App. 2d 388, 220 P.2d 555 (1950).

¹² An unpaid creditor or a person who takes a portion of the decedent's property by testate or intestate succession can institute a probate proceeding. See Prob. Code §§ 323 (persons entitled to have will probated), 422 (persons entitled to obtain letters of administration of the estate of person dying intestate). See also *In re Estate of Edwards*, 154 Cal. 91, 97 P. 23 (1908) (right of creditor to petition for probate of will).

¹³ See Prob. Code § 300. See also Prob. Code § 631 (payment or transfer to the successor "shall not preclude administration when necessary to enforce payment of the decedent's debts").

¹⁴ See *Brezzo v. Brangero*, 51 Cal. App. 79, 196 P. 87 (1921).

Affidavit Procedure for Collection or Transfer of Personal Property

Size and type of estate. During recent years, the Commission has reviewed the provisions relating to the size and type of estate that qualifies to use the affidavit procedure for collection or transfer of personal property. Two recommendations were submitted to the Legislature as a result of this review.¹⁵ The enactment of the legislation proposed in these recommendations increased the maximum estate value, permitted collection or transfer of personal property even where the estate includes real property of small value, and excluded certain state registered property in determining the value of the decedent's estate.¹⁶

Only two technical revisions in this area of the law are recommended:¹⁷

(1) Existing law contains two limitations on the use of the affidavit procedure to collect or transfer personal property. The gross value of the decedent's real and personal property in this state may not exceed \$60,000, and the gross value of the decedent's real property in this state may not exceed \$10,000. The second limitation—that the gross value of the real property not exceed \$10,000—is not continued in the new division. Retaining this second

¹⁵ *Recommendation Relating to Distribution of Estates Without Administration*, 17 Cal. L. Revision Comm'n Reports 421 (1984); *Recommendation Relating to Transfer Without Probate of Certain Property Registered by the State*, 18 Cal. L. Revision Comm'n Reports 129 (1986).

¹⁶ 1984 Cal. Stat. ch. 451 (increase in maximum estate value; permits affidavit procedure to be used even if estate includes real property interest of small value); 1985 Cal. Stat. ch. 982 (adds to the types of property excluded in determining gross value of decedent's property the following: all vehicles registered or titled under the Vehicle Code (instead of "motor vehicles"), vessels numbered under the Vehicle Code, and manufactured homes and truck campers registered under the Health and Safety Code).

¹⁷ California is one of the most liberal states in permitting use of the affidavit procedure, but it is difficult to compare California to other states because many of them do not use the gross value of the decedent's property but use the net value (gross value less liens and encumbrances). See, e.g., Ariz. Rev. Stat. Ann. § 14-3971 (value of all of the personal property in decedent's estate, less liens and encumbrances, does not exceed \$30,000; value of real property in decedent's estate (less liens and encumbrances against the real property as of the date of decedent's death) does not exceed \$15,000, the value of the decedent's interest in the real property being determined from the full cash value of the property as shown on the tax assessment rolls for the year in which the decedent died). See also Texas Prob. Code Ann. § 137 (Vernon Supp. 1984) (value of the entire assets of the estate, not including homestead and exempt property, does not exceed \$50,000).

limitation would in some cases require that the estate be probated merely in order to collect or transfer the personal property, even though there would be no need to probate the estate in order to obtain a marketable title to the real property in the estate.¹⁸

(2) In determining the value of the decedent's estate for the purposes of the affidavit procedure for collection or transfer of personal property, certain state registered property (manufactured homes, mobilehomes, commercial coaches, and truck campers) is excluded.¹⁹ Section 18102 of the Health and Safety Code provides a special affidavit procedure for the transfer of registration of the title or interest of the decedent in this state registered property. Section 18102 was amended in 1985²⁰ to add "floating homes" to the types of property to which Section 18102 applies.²¹ To conform to this addition, the new division excludes floating homes in determining the value of the decedent's estate for purposes of the general affidavit procedure for collection or transfer of personal property.

Persons authorized to use affidavit procedure. Probate Code Section 630 permits use of the affidavit procedure by the person or persons who have the right to succeed to the property of the decedent if the person or persons are:

¹⁸ The new division contains a new procedure that permits the successor to the decedent's interest in real property to obtain a court order determining that the property has passed to the successor if the real and personal property of the decedent in this state does not exceed \$60,000. There is no limit on the value of the real property, so long as the gross value of the real and personal property together do not exceed the \$60,000 limit. Use of this new procedure permits the successor to obtain a marketable title to the real property without the need for probate of the estate. However, even though the successor is able to obtain a marketable title to the real property in a case where the real property has a gross value in excess of \$10,000, it would still be necessary to probate the decedent's estate in order to collect or transfer the personal property if the affidavit procedure for collection or transfer of personal property were to remain subject to the limitation that the procedure cannot be used where the property of the decedent in this state includes real property having a gross value in excess of \$10,000. To avoid this result, the \$10,000 limit for real property should be eliminated, leaving only the limitation that the affidavit procedure for collection or transfer of personal property can be used only where the real and personal property of the decedent in this state does not have a gross value in excess of \$60,000.

¹⁹ Prob. Code § 630.

²⁰ 1985 Cal. Stat. ch. 1467, § 27.

²¹ For a definition of "floating home," see Health and Safety Code § 18075.55.

—The sole beneficiary or all of the beneficiaries under the will of the decedent, regardless of whether or not any beneficiary is related to the decedent.

—The decedent's surviving spouse, children, issue of deceased children, parents, brothers, sisters, issue of a deceased brother or sister, or grandparents.

—The guardian or conservator of the estate of any person bearing the required relationship to the decedent.

—The trustee named under a trust agreement executed by the decedent during his or her lifetime, the primary beneficiaries of which bear the required relationship to the decedent, if such person or persons has or have the right to succeed to the property of the decedent.

The relatives who are authorized to use the affidavit procedure have been broadened by a series of amendments since Section 630 was originally enacted.²² Section 630 now permits use of the affidavit procedure by almost any relative likely to inherit the decedent's property. Yet there will be occasional cases where the decedent dies without a will and the relative who takes by intestate succession is not one described in Section 630. In such a case, no matter how small the decedent's estate, it will be necessary to probate the estate in order to collect or transfer the estate of the decedent.

The great majority of the states do not restrict use of their summary procedure for collection or transfer of estate property to a limited class of relatives; any successor in interest, whether by will or intestate succession, may use the procedure.²³

²² As originally enacted in 1931, Section 630 permitted use of the affidavit procedure by the decedent's surviving spouse, child, parent, brother, or sister. 1931 Cal. Stat. ch. 281, amended by 1931 Cal. Stat. ch. 1089, § 1. In 1937, "lawful issue of deceased children" was added. 1937 Cal. Stat. ch. 181, § 1. In 1959, "the lawful issue of a deceased brother or sister" was added. 1959 Cal. Stat. ch. 195. In 1976, "the trustee named under a trust agreement executed by the decedent during his lifetime, the primary beneficiaries of which bear such relationship to the decedent" was added. 1976 Cal. Stat. ch. 1028, § 1. In 1982, Section 630 was amended to make clear that beneficiaries under the decedent's will could use the summary procedure, "regardless of whether or not any beneficiary is related to the decedent." 1982 Cal. Stat. ch. 520, § 5. In 1984, "grandparent" was added. 1984 Cal. Stat. ch. 451, § 9.

²³ Alabama Code §§ 43-2-691, 43-2-692 (1975); Alaska Stat. §§ 13.16.680, 13.16.685 (Supp. 1985); Arizona Rev. Stat. Ann. §§ 14-3971, 14-3972 (Supp. 1985-86); Arkansas Stat. Ann. §§ 62-2127 (Supp. 1985), 62-2128 (1971); Connecticut Gen. Stat. Ann. § 45-266

By way of contrast, under Section 630, an intestate successor who does not bear the requisite relationship to the decedent can receive property to which the successor is entitled only after administration of the small estate. The new division follows the approach taken in the great majority of other states and permits any successor in interest to use the summary procedure, thereby fully implementing the policy of avoiding costs and delays of administration when a small estate is involved by permitting all entitled successors to collect personal property by affidavit or declaration. This approach is consistent with the existing California rule that a successor who takes under the decedent's will may use the summary procedure, whether or not the successor is related to the decedent.

Forty-day delay before summary procedure can be used. The new division includes a procedural requirement not found in existing law. The successors must wait 40 days before presenting the affidavit or declaration to the holder of the property. This new restriction insures a reasonable period during which persons who may be

(West Supp. 1985); Florida Stat. Ann. § 735.301 (West Supp. 1984); Hawaii Rev. Stat. §§ 560-3-1201, 560-3-1202 (Supp. 1984); Idaho Code §§ 15-3-1201, 15-3-1202 (1979); Illinois Ann. Stat. ch. 110½ § 25-1 (Smith-Hurd Supp. 1985); Indiana Code Ann. §§ 29-1-8-1, 29-1-8-2 (Supp. 1985); Louisiana Code Civ. Proc. Ann. Arts. 3431, 3432, 3434 (West Supp. 1985); Maine Rev. Stat. Ann. tit. 18-A, §§ 3-1201, 3-1202 (1981); Missouri Ann. Stat. § 473.097 (Vernon Supp. 1985-86); Montana Code Ann. §§ 72-3-1101, 72-3-1102 (1985); Nebraska Rev. Stat. §§ 30-24, 125, 30-24, 126 (1979); New Jersey Rev. Stat. §§ 3B:10-3, 3B:10-4 (Supp. 1985); New Mexico Stat. Ann. § 45-3-1201 (Supp. 1985), 45-3-1202 (1978); North Carolina Gen. Stat. § 28A-25-1 (Supp. 1985); North Dakota Cent. Code § 30.1-23-01, 30.1-23-02 (Supp. 1985); Oregon Rev. Stat. §§ 114.515, 114.525, 114.535 (1984); South Dakota Codified Laws Ann. § 30-11A-1 (1984); Tennessee Code Ann. §§ 30-4-103, 30-4-104 (1984); Texas Prob. Code Ann. §§ 137 (Vernon Supp. 1986), 139, 140 (Vernon 1980); Utah Code Ann. §§ 75-3-1201, 75-3-1202 (Supp. 1985); Virginia Code §§ 64.1-132.2, 64.1-132.3 (Supp. 1985); Wisconsin Stat. Ann. § 867.03 (West Supp. 1985); Wyoming Stat. § 2-1-210 (1981). See Uniform Probate Code § 3-1201 (1980) (no close relative requirement). See also Delaware Code Ann. tit. 12, §§ 2306 (Supp. 1984), 2307 (1979) (limited to spouse of the decedent or any person who is a grandparent of the decedent, a lineal descendant of a grandparent of the decedent, the personal representative of any of the foregoing who may be deceased, or the guardian or trustee of any of the foregoing who may be incapacitated, or the trustee of a trust created by the decedent); Massachusetts Gen. Laws Ann. ch. 195, § 16 (Supp. 1985) (limited to decedent's surviving spouse, child, grandchild, parent, brother, sister, niece, nephew, aunt, or uncle and includes state department of mental health and state department of public welfare where decedent was receiving public assistance); Nevada Rev. Stat. § 146.080 (1979) (provision drawn from existing California law and limited to the surviving spouse, the children, issue of deceased children, parents, brothers and sisters of the decedent).

entitled to a decedent's property can learn of the decedent's death and determine whether administration of the estate is desirable.²⁴ In addition, a forced waiting period increases the likelihood that the decedent's debts—particularly those that are billed regularly—will come to the attention of the decedent's successors.

Presenting decedent's evidence of ownership. The decedent may have had an evidence of ownership (such as a stock certificate) and would have been required to present the evidence of ownership before the duty of the holder or registrar to pay, deliver, or transfer the property would arise. If the holder or registrar were to pay, deliver, or transfer the property to the successor of the decedent without obtaining the evidence of ownership, the holder or registrar might be liable to another person who later presents the outstanding evidence of ownership and requests payment, delivery, or transfer of the property. The existing statute does not deal with this problem.²⁵

The new division requires that the affidavit or declaration be accompanied by the decedent's evidence of ownership, if available.²⁶ If the evidence of ownership is not presented, the new division permits the holder of the property to require the person seeking the payment, delivery, or transfer of the property to provide a satisfactory indemnification agreement or a bond to hold the holder harmless.²⁷

Inventory and appraisal. Under existing law, there is no requirement that there be an inventory and

²⁴ The new 40-day delay requirement is consistent with existing Probate Code Section 649.2 (surviving spouse has power to deal with and dispose of real property after 40 days from the death of other spouse). For a similar requirement, see Veh. Code § 9916 (requirement that 40 days have elapsed from death of owner to permit transfer of ownership of vessel using affidavit procedure). The new division contains a separate provision that permits a surviving spouse to collect salary owing to the deceased spouse without waiting for a 40-day period to elapse.

²⁵ Other statutes do deal with the problem. See the statutes cited in note 26 *infra*.

²⁶ This requirement is consistent with Health & Safety Code § 18102 and Vehicle Code §§ 5910 and 9916 (transfer upon affidavit of manufactured home, mobilehome, commercial coach, truck camper, vehicle, or vessel upon furnishing affidavit and appropriate certificate of ownership or title and registration card, if available).

²⁷ This provision is drawn in part from Financial Code Section 6652 (issuance of new evidence of account by savings and loan association).

appraisal in order to collect or transfer property of a small estate.²⁸ The new division permits use of the summary procedure only if the affidavit or declaration is accompanied by an inventory and appraisal by a probate referee of any real property (but not personal property) in the decedent's estate. This new requirement recognizes that the value of real property may be difficult to determine. If the decedent's estate does not include any real property, no inventory and appraisal is required.

Proof of identity of claimants to estate. The existing statute does not deal with the problem of the proof of identity of the persons executing the affidavit or declaration. The new division includes a provision that is designed to provide clear rules as to the type of identification that reasonably may be relied upon to establish the identity of a person executing an affidavit or declaration.²⁹

Enforcement of duty to transfer property to successor. The existing statute does not expressly provide a remedy if the holder of the decedent's property refuses to surrender the property or to transfer the record title to the decedent's successor. The new division expressly provides a remedy against the holder who refuses to pay, deliver, or transfer any personal property or evidence thereof when presented with the affidavit or declaration showing the right of the successor (together with any required evidence of ownership, inventory and appraisal, and proof of identity of the persons executing the affidavit or declaration). The person entitled to the property may recover the property or compel its payment, delivery, or transfer in an action brought for that purpose against the holder of the property. And, if the court finds that the holder acted unreasonably in refusing to pay, deliver, or transfer the property, the person entitled to the property is also entitled to attorney's fees.

²⁸ An appraisal by a probate referee is not required for estates subject to summary probate proceedings pursuant to Section 630. Prob. Code § 605(a)(2)(B).

²⁹ The new provision is drawn from Civil Code Section 1185 (acknowledgment of instrument by notary public) but does not permit a driver's license issued by a Canadian or Mexican public agency to be used as reasonable proof of identity.

Liability of person to whom payment, delivery, or transfer is made. Probate Code Section 631 provides that "payment or transfer shall not preclude administration when necessary to enforce payment of the decedent's debts." The existing statute contains no other provisions concerning the liability of the person who obtains possession of or title to property using the summary procedure. The new division includes comprehensive provisions governing this liability.

Under the new division, a person to whom payment, delivery, or transfer is made personally liable for the unsecured debts of the decedent. Any such debt may be enforced against the person in the same manner it could have been enforced against the decedent if the decedent had not died. The personal liability is limited: It can not exceed the fair market value of the property paid, delivered, or transferred to the person, less the amount of any liens and encumbrances on the property.

The new division also makes a person to whom payment, delivery, or transfer is made personally liable to any person having a superior right to the property by testate or intestate succession from the decedent. If the person used the affidavit procedure fraudulently, the person is liable to the person having the superior right for three times the value of the property. An action to enforce this liability must be commenced within... *three* years after the affidavit or declaration was presented to the holder of the property.³⁰ ...

If proceedings for administration of the decedent's estate are commenced, the new division makes each person to whom payment, delivery, or transfer of the decedent's property is made and who still has the property liable for restitution of the property to the estate together with the net income from the property. If the person no longer has the property, the person is liable for restitution to the estate of the fair market value of the property as of the date of disposition of the property, together with the net income

³⁰ *The three-year period is not tolled for any reason. . . .*

the person received from the property and interest from the date of disposition at the rate of 10 percent on the fair market value of the property. If the person used the affidavit procedure fraudulently, the person is liable to the estate for three times the value of the property. A three-year statute of limitations is provided for enforcement of this liability.³¹

The remedies described above are in addition to any remedies available by reason of any fraud or intentional wrongdoing.

Obtaining a Marketable Title to Real Property of Small Value Without Probate

Unless the successor is the surviving spouse,³² there is no summary procedure under existing California law to obtain a marketable title to a real property interest of small value. Therefore, in order to obtain marketable title to real property, whether the estate be large or small, there must be proceedings for the probate of the decedent's will or for administration of the decedent's estate.

If a decedent dies owning real property of minimal value (such as a desert lot or speculative undeveloped mineral rights) the property is sometimes abandoned by the decedent's heirs or devisees because the cost of administration may exceed the value of the property.

The new division provides two new procedures to deal with this problem. One procedure permits the successor of the decedent to obtain a court order determining that the real property passed to the successor where the estate is a small estate. The other procedure is an affidavit procedure available where the gross value of the real property does not exceed \$10,000. The two new procedures are outlined below.

Court Order Determining Succession to Real Property of Small Estate. The new division contains a new procedure for obtaining, without the need for a probate proceeding,

³¹ The three-year period is not tolled for any reason.

³² In the case of a surviving spouse, a summary procedure is provided under Probate Code Sections 650-658 whereby the surviving spouse can obtain a marketable title to real property. See also Probate Code § 649.2 (right of surviving spouse to dispose of community and quasi-community real property after 40 days from the death of the other spouse).

a court order determining that real property of the decedent passed to one or more persons by intestate succession or under the decedent's will. The procedure can be used only to determine succession to real property, whether or not the decedent's estate includes personal property, and only where the gross value of the real and personal property in the decedent's estate does not exceed \$60,000.³³

The new procedure is drawn from existing Probate Code Sections 650-655, which provide for an order determining that property passed to a surviving spouse. An inventory and appraisal by a probate referee of the real property is required. The person who receives the property pursuant to the court order is personally liable for the unsecured debts of the decedent. This liability is limited to the fair market value (at the date of the decedent's death) of the real property received by the person on whom liability is imposed, less the amount of any liens and encumbrances on the property.

Affidavit Procedure for Transfer of Real Property Not Exceeding \$10,000 in Value. The new division includes a new procedure, drawn from a recently enacted Arizona statute,³⁴ that permits use of an affidavit to transfer title to real property as of record where the gross value of all real property in the decedent's estate located in California, as shown by an inventory and appraisal by a probate referee, does not exceed \$10,000.³⁵ The procedure can be used only after six months from the death of the decedent. The affidavit is filed in the superior court and must have attached an inventory and appraisal of the real property and must contain a notary public's certificate of acknowledgment identifying each person executing the affidavit.

Upon receipt of the affidavit and the required fee, the court clerk, after determining that the affidavit is complete

³³ The property described *supra* in the text accompanying notes 1-6 is excluded in determining the value of the decedent's estate.

³⁴ The Arizona statute was enacted in 1983. See Ariz. Rev. Stat. Ann. §§ 14-3971, 14-3972 (Supp. 1984-85). For a discussion of the Arizona statute, see Effland, *Handling Real and Personal Property At Death Without Administration Under the 1983 Amendments to the Arizona Probate Code*, Ariz. B.J., Dec.-Jan. 1984, at 34, 36.

³⁵ The value of the real property described *supra* in the text accompanying notes 1-6 is excluded in determining the value of the real property in the decedent's estate.

and has the required attachments, files the affidavit and attachments and issues a certified copy of the affidavit without the attachments. The certified copy of the affidavit is recorded in the office of the county recorder of the county where the real property is located.

A good faith purchaser, lessee, or lender has the same rights and protections as a purchaser, lessee, or lender would have if the person designated as a successor in the recorded certified copy of the affidavit had been named as a distributee of the real property in a decree of distribution that had become final.

The person designated as the successor to property in the certified copy of the affidavit is personally liable for the unsecured debts of the decedent. The person also is personally liable to any person having a superior right to the property by testate or intestate succession. If proceedings for administration of the decedent's estate are commenced, the person is liable for restoration of the property or its value. These liability provisions are comparable to the liability provisions that apply under the new division when the affidavit procedure is used to collect or transfer personal property.³⁶

PASSAGE OF PROPERTY TO SURVIVING SPOUSE WITHOUT ADMINISTRATION

EXISTING LAW

When a married person dies, the property which passes to the surviving spouse is not subject to probate administration unless the surviving spouse elects to have it administered.³⁷ The surviving spouse³⁸ may obtain a court order determining that all or part of the decedent's estate is property passing to the surviving spouse.³⁹ The court order may also confirm the surviving spouse's ownership of

³⁶ See the discussion in the text, *supra*, under heading "Liability of person to whom payment, delivery, or transfer is made."

³⁷ Prob. Code § 649.1.

³⁸ In addition to the surviving spouse, the personal representative, guardian, or conservator of the surviving spouse's estate may obtain an order. Prob. Code § 650.

³⁹ The procedure for obtaining an order determining that separate, community, and quasi-community property passed to a surviving spouse is found in Probate Code Sections 650-658. An order determining that separate property passed to the surviving spouse may only be obtained under those sections where the decedent died

the surviving spouse's one-half share of the community and quasi-community property.⁴⁰ The order may be obtained without the need for probate administration.⁴¹ Although the surviving spouse is not required to petition for the order, such an order is sometimes required by a title insurance company or a stock transfer agent.⁴²

Unless the interests of both spouses are probated, the surviving spouse is personally liable for the deceased spouse's debts that are chargeable against the community or quasi-community property.⁴³ The surviving spouse also is personally liable for the debts of the deceased spouse that are chargeable against the separate property passing to the surviving spouse without administration.⁴⁴ This personal liability is limited. The liability does not exceed the value at the date of death (less the amount of any liens and encumbrances) of the total of the following:

(1) The surviving spouse's one-half share of the community and quasi-community property that is not exempt from the enforcement of a money judgment.

(2) The deceased spouse's one-half share in the community and quasi-community property that passes to the surviving spouse without administration.

(3) The separate property of the deceased spouse that passes to the surviving spouse without administration.⁴⁵

After 40 days from the death of a spouse, the surviving spouse has full power to sell, lease, mortgage, or otherwise deal with and dispose of the community and quasi-community real property, unless a notice is recorded in the county in which the property is situated to the effect

after 1984. The same procedure can be used to obtain an order confirming the surviving spouse's ownership of the surviving spouse's one-half share of the community and quasi-community property.

⁴⁰ Prob. Code §§ 650, 655.

⁴¹ Prob. Code §§ 650, 655.

⁴² See 17 Cal. L. Revision Comm'n Reports 426 (1984).

⁴³ Prob. Code § 649.4. Funeral expenses and expenses of last illness are not charged to the community share of the surviving spouse. Prob. Code § 951.1. For rules governing liability of community and quasi-community property for the debts of a spouse, see Civil Code Sections 5120.010-5122.

⁴⁴ Prob. Code § 649.4.

⁴⁵ Prob. Code § 649.4(b).

that an interest in the property is claimed by another under the will of the deceased spouse.⁴⁶

RECOMMENDATIONS

The new division restates and reorganizes the existing law summarized above with a few substantive changes and additions. The significant changes and additions are described below.⁴⁷

Collection of deceased spouse's earnings. The new division includes provisions that give the surviving spouse the right immediately to collect not more than \$5,000 of the earnings owed by an employer to the deceased spouse. Payment is made upon receipt of an affidavit (or declaration under penalty of perjury) executed by or on behalf of the surviving spouse. This new procedure is drawn from the existing affidavit procedure for collection of a small estate.⁴⁸ However, the surviving spouse may use the new procedure without regard to the value of the estate. Use of this new procedure will provide the surviving spouse with funds until a probate proceeding can be commenced and a family allowance obtained.

[Material Omitted.]

⁴⁶ Prob. Code § 649.2. The personal representative, guardian, or conservator of the estate of the surviving spouse has the same power. *Id.*

⁴⁷ Minor changes are indicated in the Comments to the sections of the new division.

⁴⁸ Prob. Code §§ 630-632.

⁴⁹ [Omitted.]

⁵⁰ [Omitted.]

Right to probate only portion of property. The new division makes clear that the surviving spouse may elect to probate only a portion of the surviving spouse's one-half of the community or quasi-community property. This will permit, for example, probate of all of a block of stock that is community property without the need to probate the surviving spouse's one-half share of the other community and quasi-community property.⁵¹ The new division also recognizes the existing practice in some cases of probating only a portion of the deceased spouse's estate.

Procedural changes. The new division makes several changes in the procedure for obtaining an order determining that all or part of the decedent's estate is property passing to or belonging to the surviving spouse:

(1) The existing requirement⁵² that a copy of the petition be served with the notice of hearing on the petition for the order is not continued. This change is consistent with the general practice in probate proceedings not to serve a copy of the petition with the notice of hearing on the petition.⁵³

(2) The general requirement⁵⁴ applicable to notices of hearings—that the notice of hearing be served not less than 10 days before the hearing—is adopted in place of the existing requirement⁵⁵ that notice of hearing be given not less than 20 days before the hearing.

⁵¹ The rights of creditors will not be adversely affected. The existing personal liability of the surviving spouse for the debts of the deceased spouse chargeable against the community or quasi-community property will continue, reduced by the fair market value of the property administered in the estate of the deceased spouse.

⁵² Prob. Code § 653. A copy of the petition is not required to be served under existing law if all of the deceased spouse's property passes to the surviving spouse under the deceased spouse's will and no contingencies in the will remain to be satisfied at the time of the filing of the petition. Prob. Code § 653(b).

⁵³ See Prob. Code § 1200.5.

⁵⁴ Prob. Code § 1200.5(b).

⁵⁵ Prob. Code § 653.

(3) An inventory and appraisal is not required in order to obtain the order, but the petitioner has the option to file an inventory and appraisal in the proceeding if the petitioner so desires. The existing authority of the court to require an inventory and appraisal where the interests of justice require⁵⁶ is limited to cases where the filing of an inventory and appraisal is necessary to protect the interests of creditors of an unincorporated business which the deceased spouse was operating or managing at the time of death.⁵⁷

(4) The provision of existing law⁵⁸ for court approval of the attorney's fee for services performed in connection with the obtaining of a court order determining that property is property passing to or belonging to the surviving spouse is not continued. Under the new division, the attorney's fee for services performed in connection with obtaining the court order is to be determined by private agreement between the attorney and the client and is not subject to approval by the court.⁵⁹ This replaces the existing law which provides for court approval of a portion only of the legal fees that are likely to be involved in the disposition without administration of the estate of a deceased spouse.⁶⁰

⁵⁶ Prob. Code § 657.

⁵⁷ See Prob. Code § 656. A provision expressly giving the court authority to require the filing of an inventory and appraisal is added to the provision of the new division that continues the substance of existing Probate Code Section 656.

⁵⁸ See Prob. Code § 910(b).

⁵⁹ Although the attorney's fee is not approved by the court, the new division gives the probate court jurisdiction to determine disputes concerning the fee. If there is no agreement between the lawyer and the client concerning the attorney's fee and there is a dispute concerning the reasonableness of the fee, a petition may be filed requesting the court to determine the reasonableness of the fee. If there is an agreement concerning the attorney's fee and there is a dispute concerning the meaning of the agreement, the probate court is authorized to determine the dispute.

⁶⁰ Existing law provides only for court approval of the fee for filing a petition and obtaining a court order determining that all or part of the decedent's estate is property passing to or belonging to the surviving spouse. See Prob. Code § 910(b). No provision is made in existing law for court approval of the attorney's fee for other legal work in connection with the estate (such as, for example, tax work, joint tenancy termination, transfer of registered ownership of corporate shares or other registered personal property, or collection of insurance proceeds); those matters are left to private agreement between the attorney and client. The new division leaves the entire matter of legal fees to private agreement between the attorney and client where there is no election by the surviving spouse to probate the estate of the deceased spouse.

Editorial note. The new statute relating to disposition of small estates without administration was added to the Probate Code by Chapter 783 of the Statutes of 1986 and becomes operative on July 1, 1987. Each section of the new statute is followed by its official comment. The comments are taken from the Law Revision Commission's *Recommendation Relating to Disposition of Estate Without Administration*, 18 Cal. L. Revision Comm'n Reports 1005 (1986), and from the *Communication From California Law Revision Commission Concerning Assembly Bill 2625*, on file with the Assembly Committee on Judiciary, the Senate Committee on Judiciary, and the Legislative Counsel. Comments to conforming revisions and repealed sections are taken from the same sources.

OUTLINE OF NEW DIVISION 8 OF PROBATE CODE

DIVISION 8. DISPOSITION OF ESTATE WITHOUT ADMINISTRATION

PART 1. COLLECTION OR TRANSFER OF SMALL ESTATE WITHOUT ADMINISTRATION

CHAPTER 1. DEFINITIONS

- § 13000. Construction of words and phrases
- § 13002. Holder of the decedent's property
- § 13004. Particular item of property
- § 13006. Successor of the decedent

CHAPTER 2. GENERAL PROVISIONS

- § 13050. Exclusions in determining property or estate of decedent or its value
- § 13051. Authority of guardian, conservator, trustee, or custodian
- § 13052. Date of valuation of property
- § 13053. Application of this part
- § 13054. Reference to provision of former law deemed reference to new provision

CHAPTER 3. AFFIDAVIT PROCEDURE FOR COLLECTION OR TRANSFER OF PERSONAL PROPERTY

- § 13100. Collection or transfer of personal property without probate
- § 13101. Furnishing of affidavit
- § 13102. Presenting decedent's evidence of ownership
- § 13103. Inventory and appraisal of real property required
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**DIVISION 8. DISPOSITION OF ESTATE
WITHOUT ADMINISTRATION**

**PART 1. COLLECTION OR TRANSFER
OF SMALL ESTATE WITHOUT ADMINISTRATION**

CHAPTER 1. DEFINITIONS

§ 13000. Construction of words and phrases

13000. Unless the provision or context otherwise requires, the words and phrases defined in this chapter govern the construction of this part.

Comment. Sections 13002-13006 provide definitions of terms used in this part.

§ 13002. Holder of the decedent's property

13002. "Holder of the decedent's property" or "holder" means, with respect to any particular item of property of the decedent, the person owing money to the decedent, having custody of tangible personal property of the decedent, or acting as registrar or transfer agent of the evidences of a debt, obligation, interest, right, security, or chose in action belonging to the decedent.

Comment. Section 13002 is drawn from language of a portion of subdivision (b) of former Probate Code Section 630. A person owing money to the decedent includes a financial institution. See Section 56 (defining "person").

§ 13004. Particular item of property

13004. "Particular item of property" means, respectively, particular personal property of the decedent which is sought to be collected, received, or transferred by the successor of the decedent under Chapter 3 (commencing with Section 13100), or particular real property of the decedent for which the successor of the decedent seeks a court order determining succession under Chapter 4 (commencing with Section 13150) or with respect to which the successor of the decedent files an affidavit of succession under Chapter 5 (commencing with Section 13200). Subject to this section, "particular item of property" includes all interests specified in Section 62.

Comment. Section 13004 is new. This definition, together with the definition of "successor of the decedent" in Section 13006, requires that an affidavit or declaration be executed by all of the persons who succeed to the particular property sought to be collected, received, or transferred (see Sections 13100 and 13101 and Section 13200) and that a petition be verified by all of the persons who succeed to the particular real property that is the subject of the petition (see Sections 13151-13152).

§ 13006. Successor of the decedent

13006. "Successor of the decedent" means:

(a) If the decedent died leaving a will, the sole beneficiary or all of the beneficiaries who succeeded to a particular item of property of the decedent under the decedent's will. For the purposes of this part, the trustee of a trust created during the decedent's lifetime is a beneficiary under the decedent's will if the trust succeeds to the particular item of property under the decedent's will.

(b) If the decedent died without a will, the sole person or all of the persons who succeeded to the particular item of property of the decedent under Sections 6401 and 6402.

Comment. Subdivision (a) of Section 13006 is drawn from portions of subdivision (b) of former Probate Code Section 630. A guardian, conservator, or custodian may act on behalf of the person entitled to the property. See Section 13051. A trustee of a trust created by the will of the decedent is not a beneficiary under the decedent's will for the purposes of this part. See the Comment to Section 13051.

Subdivision (b) expands the provision of subdivision (b) of former Probate Code Section 630 to include all persons who succeeded to a particular item of property of the decedent under Sections 6401 and 6402 (intestate succession). The former provision limited the heirs who could use the former summary affidavit procedure to the following relatives of the decedent: surviving spouse, children, issue of deceased children, parents, brothers or sisters, issue of deceased brothers or sisters, and grandparents. Under subdivision (b), the persons who can use the summary provisions of this part are not so limited.

See also the Comment to Section 13004.

CHAPTER 2. GENERAL PROVISIONS**§ 13050. Exclusions in determining property or estate of decedent or its value**

13050. (a) For the purposes of this part:

(1) Any property or interest or lien thereon which, at the time of the decedent's death, was held by the decedent as a joint tenant, or in which the decedent had a life or other interest terminable upon the decedent's death, or which was held by the decedent and passed to the decedent's surviving spouse pursuant to Section 13500, shall be excluded in determining the property or estate of the decedent or its value.

(2) A multiple-party account to which the decedent was a party at the time of the decedent's death shall be excluded in determining the property or estate of the decedent or its value, whether or not all or a portion of the sums on deposit are community property, to the extent that the sums on deposit belong after the death of the decedent to a surviving party, P.O.D. payee, or beneficiary. As used in this paragraph, the terms "multiple-party account," "party," "P.O.D. payee," and "beneficiary" have the same meaning as given those terms by Section 5101.

(b) For the purposes of this part, all of the following property shall be excluded in determining the property or estate of the decedent or its value:

(1) Any vehicle registered under Division 3 (commencing with Section 4000) of the Vehicle Code or titled under Division 16.5 (commencing with Section 38000) of the Vehicle Code.

(2) Any vessel numbered under Division 3.5 (commencing with Section 9840) of the Vehicle Code.

(3) Any manufactured home, mobilehome, commercial coach, truck camper, or floating home registered under Part 2 (commencing with Section 18000) of Division 13 of the Health and Safety Code.

(c) For the purposes of this part, the value of the following property shall be excluded in determining the value of the decedent's property in this state:

(1) Any amounts due to the decedent for services in the armed forces of the United States.

(2) The amount, not exceeding five thousand dollars (\$5,000), of salary or other compensation, including compensation for unused vacation, owing to the decedent for personal services from any employment.

Comment. Paragraph (1) of subdivision (a) of Section 13050 continues former Probate Code Section 632 without substantive change. The exclusion for an interest that terminates at death embraces life interests in trusts and contractual rights (such as insurance and employee retirement or death benefits) that terminate at death, as well as life interests in other property. O. McCarroll, 1 California Decedent Estate Administration Supplement § 3.6, at 76 (Cal. Cont. Ed. Bar 1985).

Paragraph (2) of subdivision (a) is new and is the same in substance as subdivision (b) of former Probate Code Section 647. Paragraph (2) is a special application of paragraph (1) of subdivision (a) of Section 13050 and continues prior law by making clear that funds in a multiple-party account as defined in Section 5101 are excluded in determining the property or estate of the decedent or its value to the extent that the funds belong after the death of the decedent to a surviving party, P.O.D. payee, or beneficiary. Under former Probate Code Section 632 (now paragraph (1) of subdivision (a) of Section 13050), joint tenancy accounts were expressly excluded from the decedent's estate, and Totten trust accounts and P.O.D. accounts were presumably also excluded as an estate terminable upon the decedent's death. Paragraph (2) excludes multiple-party account funds, whether or not they are community property under Section 5305, to the extent that the funds pass to a surviving party, P.O.D. payee, or beneficiary. To the extent that the funds do not belong after the death of the decedent to a surviving party, P.O.D. payee, or beneficiary, the funds are includable in the decedent's estate for the purpose of this part. *Cf.* Estate of Pezzola, 112 Cal. App. 3d 752, 169 Cal. Rptr. 464 (1980).

Subdivision (b) continues the portion of subdivision (a) of former Probate Code Section 630 that excluded certain state registered property in determining the estate or its value with the addition of "floating home" in paragraph (3). This addition reflects the 1985 amendment to Section 18102 of the Health and Safety Code which added "floating homes" to the kinds of property which can be transferred without administration under that section. See 1985 Cal. Stat. ch. 1467, § 27. The state registered property excluded under subdivision (b) can be

transferred without probate under special statutory provisions. See Health & Safety Code § 18102 (manufactured homes, mobilehomes, commercial coaches, truck campers, and floating homes); Veh. Code §§ 5910 (vehicles), 9916 (vessels).

Subdivision (c) continues without substantive change the portion of subdivision (a) of former Probate Code Section 630 that provided a salary exclusion in determining the value of the decedent's property. Although this exclusion does not prevent the use of the affidavit procedure under Sections 13100-13115 to collect salary owed to the decedent, other procedures for collection of the salary owed to the decedent may be available. See, e.g., Gov't Code §§ 12479 (designation by state employee of person to receive warrants upon employee's death), 53245 (designation by public employee of person to receive warrants upon employee's death). See also Probate Code Sections 160 (payment of money due to decedent to person designated by decedent), 13600 (collection by surviving spouse of compensation, not exceeding \$5,000, owed by employer to decedent).

§ 13051. Authority of guardian, conservator, trustee, or custodian

13051. For the purposes of this part:

(a) A guardian or conservator of the estate of a person entitled to any of the decedent's property may act on behalf of the person without authorization or approval of the court in which the guardianship or conservatorship proceeding is pending.

(b) A trustee of a trust created during the decedent's lifetime may act on behalf of the trust.

(c) If the decedent's will nominates a custodian to receive a devise to a beneficiary under the Uniform Gifts to Minors Act or the Uniform Transfer to Minors Act of any state and the nomination has not been revoked, the custodian may act on behalf of the beneficiary until such time as the custodianship terminates.

Comment. Subdivision (a) of Section 13051 is drawn from subdivision (d) of former Probate Code Section 650 and is consistent with the portion of subdivision (b) of former Probate Code Section 630 which referred to the guardian or conservator of the estate. Subdivision (b) is new and supersedes the portion of subdivision (b) of former Probate Code Section 630 which referred to a trustee. The trustee must be the trustee of a living trust created by the decedent or by another during the

decedent's lifetime or the trustee of a testamentary trust created by another who died during the decedent's lifetime; the trustee of a trust created by the decedent's will is not included under subdivision (b). Subdivision (c) is drawn from subdivision (c) of former Probate Code Section 630.

§ 13052. Date of valuation of property

13052. In making an inventory and appraisal for the purposes of this part, the probate referee shall use the date of the decedent's death as the date of valuation of the property.

Comment. Section 13052 makes clear that the probate referee is to use the date of the decedent's death as the date of valuation in making an inventory and appraisal for the purposes of this part. For provisions concerning inventory and appraisal, see Sections 13103 (affidavit procedure for collection or transfer of personal property), 13152(b) (petition for court order determining succession to real property), 13200(c) (affidavit procedure for real property of small value).

Under this part, valuation is as of the date of death. Date of death values are used for all other probate inventory purposes, are used for tax purposes for the federal estate tax, the California estate tax, and in connection with adjustment of basis of property for income tax purposes. Because of these tax considerations in particular, the appraisal used for the purposes of this part is the date of death value, not some more current value. Thus, for example, record title to real property may be transferred by affidavit under Chapter 5 (commencing with Section 13200) even if the real property since the date of death has appreciated to a value in excess of \$10,000.

§ 13053. Application of this part

13053. (a) Except as provided in subdivision (b), this part applies whether the decedent died before, on, or after July 1, 1987.

(b) This part does not apply and the law in effect at the time of payment, delivery, or transfer shall apply if the payment, delivery, or transfer is made pursuant to former Probate Code Sections 630 to 632, inclusive, prior to July 1, 1987.

Comment. Section 13053 is a new provision that preserves prior law where a payment, delivery, or transfer was made under prior law before the operative date of this part. The section also makes clear that this part applies if the payment, delivery, or

transfer is made on or after the operative date, without regard to whether the decedent died before or after that date. Thus, where the decedent died before the operative date, the provisions of this part may be used to require the payment, delivery, or transfer if the property was not paid, delivered, or transferred prior to the operative date pursuant to the provisions of former Probate Code Sections 630-632.

§ 13054. Reference to provision of former law deemed reference to new provision

13054. On and after July 1, 1987, a reference in any statute of this state or in a written instrument, including a will or trust, to a provision of former Sections 630 to 632, inclusive, shall be deemed to be a reference to the comparable provisions of Chapter 3 (commencing with Section 13100).

Comment. Section 13054 is new and is drawn from Section 1490 and former Section 649.6. Section 13054 makes clear that, after the operative date of Sections 13100-13115, a reference in a statute or written instrument to a provision of former law will be deemed to be a reference to the comparable provision of Chapter 3 (commencing with Section 13100).

**CHAPTER 3. AFFIDAVIT PROCEDURE FOR
COLLECTION OR TRANSFER OF PERSONAL
PROPERTY**

**§ 13100. Collection or transfer of personal property
without probate**

13100. Excluding the property described in Section 13050, if the gross value of the decedent's real and personal property in this state does not exceed sixty thousand dollars (\$60,000) and if 40 days have elapsed since the death of the decedent, the successor of the decedent may, without procuring letters of administration or awaiting probate of the will, do any of the following with respect to one or more particular items of property:

(a) Collect any particular item of property that is money due the decedent.

(b) Receive any particular item of property that is tangible personal property of the decedent.

(c) Have any particular item of property that is evidence of a debt, obligation, interest, right, security, or chose in action belonging to the decedent transferred, whether or not secured by a lien on real property.

Comment. Section 13100 continues without substantive change a portion of former Probate Code Section 630 with the addition of the requirement that 40 days have elapsed since the death of the decedent. The new 40-day requirement is consistent with Section 13540 (surviving spouse has power to deal with and dispose of real property after 40 days from the death of other spouse). For similar requirements, see Health & Safety Code § 18102 (requirement that 40 days have elapsed from death of owner to permit transfer of registration of manufactured home, mobilehome, commercial coach, truck camper, or floating home using affidavit procedure); Veh. Code § 9916 (requirement that 40 days have elapsed from death of owner to permit transfer of ownership of vessel using affidavit procedure). For a provision permitting a surviving spouse to collect salary owing to the deceased spouse without waiting for a 40-day period to elapse, see Sections 13600-13605.

The procedure provided by this chapter can be used only if all of the following conditions are satisfied:

(1) The gross value of the decedent's real and personal property in this state (excluding certain property) does not exceed \$60,000. See Section 13100. See also Section 13050 (exclusions). (The provision of former Section 630 that precluded use of the affidavit procedure where the gross value of the decedent's real property in this state exceeded \$10,000 is not continued.)

(2) No proceeding for the administration of the decedent's estate is pending or has been conducted in California. See Section 13108.

(3) Not less than 40 days have elapsed since the death of the decedent. See Section 13100.

(4) The person who seeks to collect the money, receive the property, or have the evidences transferred is the successor of the decedent. See Section 13101. The affidavit or declaration required by Section 13101 must be executed by all the successors who have an interest in the property sought to be collected, received, or transferred. See Sections 13004 (defining "particular item of property") and 13006 (defining "successor of the decedent").

The procedure under this chapter cannot be used for real property. See Section 13115. However, the phrase "whether or not secured by a lien on real property" has been added to subdivision (c) of Section 13100 to make clear that evidence of a debt or obligation may be transferred under this chapter even though the debt or obligation is secured by a lien on real property. For a procedure for obtaining without probate a court order determining the persons who succeed to real property of a decedent (limited to a case where the gross value of decedent's real and personal property in this state does not exceed \$60,000), see Sections 13150-13157. For an affidavit procedure for obtaining marketable title to real property of a decedent without probate (limited to a case where the gross value of decedent's real property in this state does not exceed \$10,000), see Sections 13200-13208. For a procedure permitting a surviving spouse to obtain a court order that real property passed to the surviving spouse (without limit as to the value of the real property), see Sections 13650-13660. See also Sections 13540-13542 (right of surviving spouse to dispose of real property).

§ 13101. Furnishing of affidavit

13101. (a) To collect money, receive tangible personal property, or have evidences transferred under this chapter, an affidavit or a declaration under penalty of perjury under the laws of this state shall be furnished to the holder of the decedent's property stating all of the following:

- (1) The decedent's name.
- (2) The date and place of the decedent's death.
- (3) "At least 40 days have elapsed since the death of the decedent, as shown in a certified copy of the decedent's death certificate attached to this affidavit or declaration."
- (4) "No proceeding is now being or has been conducted in California for administration of the decedent's estate."
- (5) "The gross value of the decedent's real and personal property in California, excluding the property described in Section 13050 of the California Probate Code, does not exceed sixty thousand dollars (\$60,000)."
- (6) A description of the property of the decedent that is to be paid, transferred, or delivered to the affiant or declarant.

(7) The name of the successor of the decedent (as defined in Section 13006 of the California Probate Code) to the described property.

(8) Either of the following, as appropriate:

(A) "The affiant or declarant is the successor of the decedent (as defined in Section 13006 of the California Probate Code) to the decedent's interest in the described property."

(B) "The affiant or declarant is authorized under Section 13051 of the California Probate Code to act on behalf of the successor of the decedent (as defined in Section 13006 of the California Probate Code) with respect to the decedent's interest in the described property."

(9) "No other person has a right to the interest of the decedent in the described property."

(10) "The affiant or declarant requests that the described property be paid, delivered, or transferred to the affiant or declarant."

(11) "The affiant or declarant affirms or declares under penalty of perjury under the laws of the State of California that the foregoing is true and correct."

(b) Where more than one person executes the affidavit or declaration under this section, the statements required by subdivision (a) shall be modified as appropriate to reflect that fact.

(c) A certified copy of the decedent's death certificate shall be attached to the affidavit or declaration.

Comment. Section 13101 supersedes portions of subdivision (b) of former Probate Code Section 630. The portions of Section 13101 prescribing the contents of the affidavit or declaration are new and replace the provision of former Probate Code Section 630 that required that the person or persons furnish an affidavit or declaration "showing the right of the person or persons to receive such money or property, or to have such evidences transferred." The affidavit or declaration must be executed by all successors of the decedent who have an interest in the property sought to be collected, received, or transferred. See Sections 13004 (defining "particular item of property") and 13006 (defining "successor of the decedent").

§ 13102. Presenting decedent's evidence of ownership

13102. (a) If the decedent had evidence of ownership of the property described in the affidavit or declaration and the holder of the property would have had the right to require presentation of the evidence of ownership before the duty of the holder to pay, deliver, or transfer the property to the decedent would have arisen, the evidence of ownership, if available, shall be presented with the affidavit or declaration to the holder of the decedent's property.

(b) If the evidence of ownership is not presented to the holder pursuant to subdivision (a), the holder may require, as a condition for the payment, delivery, or transfer of the property, that the person presenting the affidavit or declaration provide the holder with a bond or undertaking in a reasonable amount determined by the holder to be sufficient to indemnify the holder against all liability, claims, demands, loss, damages, costs, and expenses that the holder may incur or suffer by reason of the payment, delivery, or transfer of the property. Nothing in this subdivision precludes the holder and the person presenting the affidavit or declaration from dispensing with the requirement that a bond or undertaking be provided and instead entering into an agreement satisfactory to the holder concerning the duty of the person presenting the affidavit or declaration to indemnify the holder.

Comment. Section 13102 is new. Subdivision (a) is comparable to Health & Safety Code § 18102 and Vehicle Code §§ 5910 and 9916 (transfer upon affidavit of manufactured home, mobilehome, commercial coach, truck camper, floating home, vehicle, or vessel upon furnishing affidavit and appropriate certificate of ownership or title and registration card, if available). See also Financial Code Section 6950 (payment of deposit account of nonresident decedent upon presentation of evidence of ownership of account, if any). Subdivision (b) is included to protect the holder against the possible claim of another where there is outstanding evidence of ownership. The provision is drawn in part from Financial Code Section 6652 (issuance of new evidence of account by savings and loan association).

§ 13103. Inventory and appraisal of real property required

13103. If the estate of the decedent includes any real property, the affidavit or declaration shall be accompanied by an inventory and appraisal of the real property. The form, content, and manner of making the inventory and appraisal of the real property shall be as set forth in Chapter 9 (commencing with Section 600) of Division 3. The inventory and appraisal shall be made by a probate referee selected by the affiant or declarant from those probate referees appointed by the Controller under Section 1305 to appraise property in the county where the real property is located.

Comment. Section 13103 is new. Under former law, the affidavit or declaration alone was sufficient. Even though the procedure provided in this chapter may be used to collect or transfer personal property only, if the estate includes any real property (excluding real property held in joint tenancy or other real property described in paragraph (1) of subdivision (a) of Section 13050), an appraisal of the real property by a probate referee is required. Even though an appraisal of the real property is required, the inventory and appraisal need not include an inventory and appraisal of the personal property in the decedent's estate. If the decedent's estate does not include any real property, no inventory and appraisal is required. For provisions relating to real property, see Chapter 4 (commencing with Section 13150) (court order determining succession to real property) and Chapter 5 (commencing with Section 13200) (affidavit procedure for transfer of real property of small value).

§ 13104. Proof of identity of persons executing the affidavit

13104. (a) Reasonable proof of the identity of each person executing the affidavit or declaration shall be provided to the holder of the decedent's property.

(b) Reasonable proof of identity is provided for the purposes of this section if both of the following requirements are satisfied:

(1) The person executing the affidavit or declaration is personally known to the holder.

(2) The person executes the affidavit or declaration in the presence of the holder.

(c) If the affidavit or declaration is executed in the presence of the holder, a written statement under penalty or perjury by a person personally known to the holder affirming the identity of the person executing the affidavit or declaration is reasonable proof of identity for the purposes of this section.

(d) If the affidavit or declaration is executed in the presence of the holder, the holder may reasonably rely on any of the following as reasonable proof of identity for the purposes of this section:

(1) An identification card or driver's license issued by the Department of Motor Vehicles of this state that is current or was issued during the preceding five years.

(2) A passport issued by the Department of State of the United States that is current or was issued during the preceding five years.

(3) Any of the following documents if the document is current or was issued during the preceding five years and contains a photograph and description of the person named on it, is signed by the person, and bears a serial or other identifying number:

(A) A passport issued by a foreign government that has been stamped by the United States Immigration and Naturalization Service.

(B) A driver's license issued by a state other than California.

(C) An identification card issued by a state other than California.

(D) An identification card issued by any branch of the armed forces of the United States.

(e) For the purposes of this section, a notary public's certificate of acknowledgment identifying the person executing the affidavit or declaration is reasonable proof of identity of the person executing the affidavit or declaration.

(f) Unless the affidavit or declaration contains a notary public's certificate of acknowledgment of the identity of the person, the holder shall note on the affidavit or declaration either that the person executing the affidavit or declaration is personally known or a description of the identification provided by the person executing the affidavit or declaration.

Comment. Section 13104 is a new provision that is designed to provide clear rules as to the type of identification that reasonably may be relied upon to establish the identity of a person executing an affidavit or declaration. The section is drawn from Civil Code Section 1185 (acknowledgment of instrument by notary public) but does not permit a driver's license issued by a Canadian or Mexican public agency to be used as reasonable proof of identity.

Under subdivision (f), the holder must make a notation as required by subdivision (f) for each person executing the affidavit or declaration, but such a notation is not required for the person or persons for whom the affidavit or declaration contains a notary public's certificate of acknowledgment of identity.

§ 13105. Transfer of property to successor

13105. (a) If the requirements of Sections 13100 to 13104, inclusive, are satisfied:

(1) The person or persons executing the affidavit or declaration as successor of the decedent are entitled to have the property described in the affidavit or declaration paid, delivered, or transferred to them.

(2) A transfer agent of a security described in the affidavit or declaration shall change the registered ownership on the books of the corporation from the decedent to the person or persons executing the affidavit or declaration as successor of the decedent.

(b) If the holder of the decedent's property refuses to pay, deliver, or transfer any personal property or evidence thereof to the successor of the decedent within a reasonable time, the successor may recover the property or compel its payment, delivery, or transfer in an action brought for that purpose against the holder of the property. If an action is brought against the holder under this section, the court shall award attorney's fees to the person or persons bringing the action if the court finds that the holder of the decedent's property acted unreasonably in refusing to pay, deliver, or transfer the property to them as required by subdivision (a).

Comment. Subdivision (a) of Section 13105 is drawn from portions of former Probate Code Section 630. The person paying, delivering, or transferring the property is protected from liability. See Section 13106. See also Section 13102(b) (providing bond to protect person paying, delivering, or transferring

property). Payment or transfer pursuant to Section 13105 does not preclude later administration of the decedent's estate. See Section 13108. As to the liabilities of the person receiving the property, see Sections 13109-13113.

Subdivision (b) is new and makes clear that the duty imposed by subdivision (a) can be enforced by an action against the holder. This remedy is in addition to the remedies against the holder if the decedent's estate is probated. The holder does not act unreasonably in refusing to pay, deliver, or transfer the property if the refusal is based on the holder's good faith belief that there may be estate taxes payable.

§ 13106. Protection of transferor from liability

13106. (a) If the requirements of Sections 13100 to 13104, inclusive, are satisfied, receipt by the holder of the decedent's property of the affidavit or declaration constitutes sufficient acquittance for the payment of money, delivery of property, or changing registered ownership of property pursuant to this chapter and discharges the holder from any further liability with respect to the money or property. The holder may rely in good faith on the statements in the affidavit or declaration and has no duty to inquire into the truth of any statement in the affidavit or declaration.

(b) If the requirements of Sections 13100 to 13104, inclusive, are satisfied, the holder of the decedent's property is not liable for any taxes due to this state by reason of paying money, delivering property, or changing registered ownership of property pursuant to this chapter.

Comment. Subdivision (a) of Section 13106 continues the first sentence of former Probate Code Section 631 without substantive change but with the addition of clarifying language. Subdivision (b) is new and is drawn from Section 6855 of the Financial Code. See also Section 13102(b) (bond to protect person paying, delivering, or transferring property).

§ 13107. Claim against estate in probate

13107. When the money or property claimed in an affidavit or declaration presented under this chapter is that of a deceased heir or devisee of a deceased person whose estate is being administered in this state, the personal representative of the person whose estate is being administered shall present the affidavit or

declaration to the court in which the estate is being administered. The court shall direct the personal representative to pay the money or deliver the property to the person or persons identified by the affidavit or declaration as the successor of the decedent to the extent that the decree of distribution determines that the deceased heir or devisee was entitled to the money or property under the will or the laws of succession.

Comment. Section 13107 continues former Probate Code Section 631.1 without substantive change.

§ 13108. No pending probate proceeding; later probate proceeding not precluded

13108. (a) The procedure provided by this chapter may be used only if no proceeding for the administration of the decedent's estate is pending or has been conducted in this state.

(b) Payment, delivery, or transfer of a decedent's property pursuant to this chapter does not preclude later proceedings for administration of the decedent's estate.

Comment. Subdivision (a) of Section 13108 is a new provision that is consistent with the last sentence of former Probate Code Section 631. Subdivision (b) is drawn from the last sentence of former Probate Code Section 631. See generally *Brezzo v. Brangero*, 51 Cal. App. 79, 81, 196 P. 87 (1921); *Evans, Comments on the Probate Code of California*, 19 Calif. L. Rev. 602, 607 (1931); *Broll, Summary Administration*, in 1 California Decedent Estate Administration § 3.14, at 124 (Cal. Cont. Ed. Bar 1971).

§ 13109. Liability for decedent's unsecured debts

13109. A person to whom payment, delivery, or transfer of the decedent's property is made under this chapter is personally liable, to the extent provided in Section 13112, for the unsecured debts of the decedent. Any such debt may be enforced against the person in the same manner as it could have been enforced against the decedent if the decedent had not died. In any action based upon the debt, the person may assert any defenses, cross-complaints, or setoffs that would have been available to the decedent if the decedent had not died.

Comment. Section 13109 is a new provision drawn from former Section 645.3, continued as Section 6611 (small estate set-aside), but Section 13109 does not include the one-year

limitation on the duration of personal liability provided by Section 6611. Instead, Section 13109 follows Section 13554 (enforcement of liability of deceased spouse against surviving spouse) and Section 13156 (enforcement of debt against petitioners who receive low value real property under court order made in summary proceeding). Section 13109 (by providing that any action based on the debt is subject to the same defenses that would have been available to the decedent if the decedent had not died) adopts the same statute of limitations that would have applied in an action against the decedent on the debt had the decedent not died. The liability under Section 13109 is limited. See Section 13112.

§ 13110. Liability to person having superior right

13110. (a) Except as provided in subdivision (b), each person to whom payment, delivery, or transfer of the decedent's property is made under this chapter is personally liable to the extent provided in Section 13112 to any person having a superior right by testate or intestate succession from the decedent.

(b) In addition to any other liability the person has under this section and Sections 13109, 13111, and 13112, any person who fraudulently secures the payment, delivery, or transfer of the decedent's property under this chapter is liable to the person having such a superior right for three times the fair market value of the property. For the purposes of this subdivision, the "fair market value of the property" is the fair market value of the property paid, delivered, or transferred to the person liable under this subdivision, valued as of the time the person liable under this subdivision presents the affidavit or declaration under this chapter to the holder of the decedent's property, excluding any liens and encumbrances on that property at that time.

(c) An action to impose liability under this section is forever barred three years after the affidavit or declaration is presented under this chapter to the holder of the decedent's property, or three years after the discovery of the fraud, whichever is later. The three-year period specified in this subdivision is not tolled for any reason.

Comment. Section 13110 is new. The section makes clear that a person having a superior right to the property by testate or intestate succession can bring an action against the person who received the property. This remedy is an alternative to petitioning for the probate of the decedent's estate. See Section 13111. The liability under Section 13110 is limited. See Section 13112.

§ 13111. Restitution if estate proceeding commenced

13111. (a) Subject to subdivisions (b), (c), (d), and (e), if proceedings for the administration of the decedent's estate are commenced, each person to whom payment, delivery, or transfer of the decedent's property is made under this chapter is liable for:

(1) The restitution of the property to the estate if the person still has the property, together with the net income the person received from the property.

(2) The restitution to the estate of the fair market value of the property if the person no longer has the property, together with (A) the net income the person received from that property and (B) interest on the fair market value of the property from the date of disposition at the rate payable on a money judgment. For the purposes of this subdivision, the "fair market value of the property" is the fair market value, valued as of the time of the disposition of the property, of the property paid, delivered, or transferred to the person under this chapter, excluding any liens and encumbrances on the property at that time.

(b) Subject to subdivision (c) and subject to any additional liability the person has under Sections 13109 to 13112, inclusive, if the person fraudulently secured the payment, delivery, or transfer of the decedent's property under this chapter, the person is liable under this section for restitution to the decedent's estate of three times the fair market value of the property. For the purposes of this subdivision, the "fair market value of the property" is the fair market value, valued as of the time the person liable under this subdivision presents the affidavit or declaration under this chapter, of the property paid, delivered, or transferred to the person under this chapter, excluding the amount of any liens and encumbrances on the property at that time.

(c) The property and amount required to be restored to the estate under this section shall be reduced by any property or amount paid by the person to satisfy a liability under Section 13109 or 13110.

(d) An action to enforce the liability under this section may be brought only by the personal representative of the estate of the decedent. In an action to enforce the liability under this section, the court's judgment may enforce the liability only to the extent necessary to protect the interests of the heirs, devisees, and creditors of the decedent.

(e) An action to enforce the liability under this section is forever barred three years after presentation of the affidavit or declaration under this chapter to the holder of the decedent's property, or three years after the discovery of the fraud, whichever is later. The three-year period specified in this subdivision is not tolled for any reason.

Comment. Section 13111 is a new provision that requires restitution to the decedent's estate if probate proceedings are commenced.

§ 13112. Limitation on liability under Sections 13109 and 13110

13112. (a) A person to whom payment, delivery, or transfer of the decedent's property has been made under this chapter is not liable under Section 13109 or 13110 if proceedings for the administration of the decedent's estate are commenced and the person satisfies the requirements of Section 13111.

(b) Except as provided in subdivision (b) of Section 13110, the aggregate of the personal liability of a person under Sections 13109 and 13110 shall not exceed the fair market value, valued as of the time the affidavit or declaration is presented under this chapter, of the property paid, delivered, or transferred to the person under this chapter, less the amount of any liens and encumbrances on that property at that time, together with the net income the person received from the property and, if the property has been disposed of, interest on the fair market value of the property accruing from the date of disposition at the rate payable on a money judgment.

For the purpose of this subdivision, "fair market value of the property" has the same meaning as defined in paragraph (2) of subdivision (a) of Section 13111.

Comment. Section 13112 is new and limits the liability of a person to whom payment, delivery, or transfer of the decedent's property is made under this chapter.

§ 13113. Other remedies not affected

13113. The remedies available under Sections 13109 to 13112, inclusive, are in addition to any remedies available by reason of any fraud or intentional wrongdoing.

Comment. Section 13113 is a new provision that makes clear that the remedies provided in this chapter for decedent's estate, creditors, and persons having a superior right to the property do not limit any other remedies that are available by reason of fraud or intentional wrongdoing.

§ 13114. Payment of costs and fees of public administrator

13114. A public administrator who has taken charge of the estate of a decedent as provided in Section 1140 may refuse to pay money or deliver property pursuant to this chapter if payment of the costs and fees described in Section 1144.5, subject to the dollar limitations specified in that section, has not first been made or adequately assured to the satisfaction of the public administrator.

Comment. Section 13114 continues subdivision (e) of former Probate Code Section 630 without substantive change.

§ 13115. Chapter does not apply to real property

13115. The procedure provided in this chapter may not be used to obtain possession or the transfer of real property.

Comment. Section 13115 continues the last sentence of subdivision (b) of former Probate Code Section 630 with language changes for clarification only and without substantive change. For provisions relating to real property, see Chapter 4 (commencing with Section 13150) (court order determining succession to real property) and Chapter 5 (commencing with Section 13200) (affidavit procedure for real property of small value).

CHAPTER 4. COURT ORDER DETERMINING SUCCESSION TO REAL PROPERTY

§ 13150. No pending probate proceeding

13150. The procedure provided by this chapter may be used only if no proceeding is being or has been conducted in this state for administration of the decedent's estate.

Comment. Section 13150 makes the procedure provided by this chapter an alternative to the probate of a small estate.

§ 13151. Petition for court order determining succession to real property

13151. Exclusive of the property described in Section 13050, if a decedent dies leaving real property in this state and the gross value of the decedent's real and personal property in this state does not exceed sixty thousand dollars (\$60,000) and 40 days have elapsed since the death of the decedent, the successor of the decedent to an interest in a particular item of property that is real property, without procuring letters of administration or awaiting the probate of the will, may file a petition in the superior court of the county in which the estate of the decedent may be administered requesting a court order determining that the petitioner has succeeded to that real property and that administration of the decedent's estate is unnecessary.

Comment. Sections 13150-13157 are new and provide a procedure for obtaining, without the need for a probate proceeding, a court order determining that real property of the decedent passed to one or more persons by intestate succession or under the decedent's will. The new procedure is drawn from Sections 13650-13660 (order determining that property passed to surviving spouse).

The procedure provided by this chapter can be used only if all of the following conditions are satisfied:

(1) The gross value of the decedent's real and personal property in this state (excluding certain property) does not exceed \$60,000. See Sections 13151 and 13152. See also Section 13050 (excluded property).

(2) No proceeding is pending or has been conducted in this state for administration of the decedent's estate. See Section 13150.

(3) The decedent died leaving real property in this state and 40 days have elapsed since the death of the decedent. See Section 13151.

(4) The petition is joined in by all those who have succeeded to the real property by intestate succession or under the decedent's will. See Section 13151. See also Sections 13004 (defining "particular item of property") and 13006 (defining "successor of the decedent").

(5) The petition is accompanied by an inventory and appraisal by a probate referee. See Section 13152(b).

(6) Notice is given to all heirs and devisees of the decedent, to the executor named in the decedent's will, and to all other persons named in the decedent's will, so far as known to the petitioner. See Section 13153.

§ 13152. Contents of petition; inventory and appraisal

13152. (a) The petition shall be verified by each petitioner, shall contain a request that the court make an order under this chapter determining that the particular item of property described in the petition is property passing to the petitioner and that no administration of the decedent's estate is necessary, and shall state all of the following:

(1) The facts necessary to determine that the petition is filed in the proper county.

(2) The gross value of the decedent's real and personal property in California, excluding the property described in Section 13050, as shown by the inventory and appraisal attached to the petition, does not exceed sixty thousand dollars (\$60,000).

(3) A description of the particular item of property in this state which the petitioner alleges is property of the decedent passing to the petitioner.

(4) The facts upon which the petitioner bases the allegation that the described real property is property passing to the petitioner.

(5) A statement that no proceeding is being or has been conducted in this state for administration of the decedent's estate.

(6) Whether estate proceedings for the decedent have been commenced in any other jurisdiction and, if so, where those proceedings are pending or were conducted.

(7) The names, addresses, relationships, and ages of the heirs and devisees of the decedent, the names and addresses of all persons named as executors of the will of the decedent, and, if the personal representative is the trustee of a trust that is a devisee under the will of the decedent, the names and addresses of all persons interested in the trust, as determined in cases of future interests pursuant to paragraph (1), (2), or (3) of subdivision (a) of Section 15804, so far as known to any petitioner.

(b) There shall be attached to the petition an inventory and appraisal in the form set forth in Section 600 of the decedent's real and personal property in this state, excluding the property described in Section 13050. The appraisal shall be made as set forth in Chapter 9 (commencing with Section 600) of Division 3. The petitioner may appraise the assets which a personal representative could appraise under paragraph (1) of subdivision (a) of Section 605.

(c) If the petitioner bases his or her claim to the described particular item of property upon the will of the decedent, a copy of the will shall be attached to the petition.

This section shall only become operative if Assembly Bill No. 2652 of the 1985-86 Regular Session is enacted and adds a Section 15804 to this code, in which case this section shall become operative on July 1, 1987.

Comment. Section 13152 is drawn in part from Section 13651 (petition for order determining property is property passing to surviving spouse). A guardian, conservator, trustee, or custodian is authorized to act as petitioner on behalf of the person to whom the real property passes. See Section 13051.

§ 13153. Notice of hearing

13153. The clerk shall set the petition for hearing. Not less than 10 days before the hearing on the petition notice of the hearing shall be personally served upon or mailed, postage prepaid, to each of the persons named in the petition pursuant to Section 13152, addressed to each person at the person's residence or mailing address as set forth in the petition, or if neither of these addresses are known to any petitioner, the county seat of the county where the proceedings are pending.

Comment. Section 13153 is drawn from subdivision (b) of Section 13655 (petition for order determining property is property passing to surviving spouse). See also the Comment to Section 13655.

§ 13154. Court order

13154. (a) If the court makes the determinations required under subdivision (b), the court shall issue an order determining (1) that real property, to be described in the order, of the decedent is property passing to the petitioners and the specific property interest of each petitioner in the described property and (2) that no administration of the decedent's estate is necessary.

(b) The court may make an order under this section only if the court makes all of the following determinations:

(1) The gross value of the decedent's real and personal property in this state, excluding the property described in Section 13050, does not exceed sixty thousand dollars (\$60,000).

(2) Not less than 40 days have elapsed since the death of the decedent.

(3) No proceeding is being or has been conducted in this state for administration of the decedent's estate.

(4) The real property described in the order is property of the decedent passing to the petitioner.

(c) If the petition has attached an inventory and appraisal that satisfies the requirements of subdivision (b) of Section 13152, the determination required by paragraph (1) of subdivision (b) of this section shall be made on the basis of the verified petition and the attached inventory and appraisal, unless evidence is offered by a person opposing the petition that the gross value of the decedent's real and personal property in this state, excluding the property described in Section 13050, exceeds sixty thousand dollars (\$60,000).

Comment. Section 13154 states the determinations required for a court order determining that real property described in the order is property of the decedent passing to the petitioners.

The court does not make a determination under Section 13154 as to the value of specific items or parcels of property; the court makes a determination only that "the gross value of the decedent's real and personal property in California, excluding

the property described in Section 13050 of the Probate Code, does not exceed \$60,000.”

§ 13155. Finality of order

13155. Upon becoming final, an order under this chapter determining that real property is property passing to the petitioner is conclusive on all persons, whether or not they are in being.

Comment. Section 13155 is drawn from Section 13657 (property passing to surviving spouse).

§ 13156. Personal liability of petitioners

13156. (a) Subject to subdivisions (b) and (c), the petitioner who receives the decedent's property pursuant to an order under this chapter is personally liable for the unsecured debts of the decedent.

(b) The personal liability of any petitioner shall not exceed the fair market value at the date of the decedent's death of the property received by that petitioner pursuant to an order under this chapter, less the amount of any liens and encumbrances on the property.

(c) In any action or proceeding based upon an unsecured debt of the decedent, the petitioner may assert any defense, cross-complaint, or setoff which would have been available to the decedent if the decedent had not died.

Comment. Section 13156 is drawn from Section 6611 (small estate set-aside), but Section 13156 does not include the one-year limitation on the duration of personal liability provided by Section 6611. See the discussion in the Comment to Section 13109.

§ 13157. Attorney's fee

13157. The attorney's fee for services performed in connection with the filing of a petition and obtaining a court order under this chapter shall be determined by private agreement between the attorney and the client and is not subject to approval by the court. If there is no agreement between the attorney and the client concerning the attorney's fee for services performed in connection with the filing of a petition and obtaining of a court order under this chapter and there is a dispute concerning the reasonableness of the attorney's fee for those services, a petition may be filed with the court in

the same proceeding requesting that the court determine the reasonableness of the attorney's fee for those services. If there is an agreement between the attorney and the client concerning the attorney's fee for services performed in connection with the filing of a petition and obtaining a court order under this chapter and there is a dispute concerning the meaning of the agreement, a petition may be filed with the court in the same proceeding requesting that the court determine the dispute.

Comment. Section 13157 is comparable to Section 13660 (determination or confirmation of property passing or belonging to surviving spouse). See the Comment to Section 13660.

CHAPTER 5. AFFIDAVIT PROCEDURE FOR REAL PROPERTY OF SMALL VALUE

§ 13200. Filing affidavit in superior court; inventory and appraisal

13200. (a) No sooner than six months from the death of a decedent, a person or persons claiming as successor of the decedent to a particular item of property that is real property may file in the superior court in the county in which the decedent was domiciled at the time of death, or if the decedent was not domiciled in this state at the time of death, then in any county in which real property of the decedent is located, an affidavit in the form prescribed by the Judicial Council pursuant to Section 13209 stating all of the following:

- (1) The name of the decedent.
- (2) The date and place of the decedent's death.
- (3) A legal description of the real property and the interest of the decedent therein.
- (4) "The gross value of all real property in the decedent's estate located in California, as shown by the inventory and appraisal attached to this affidavit, excluding the real property described in Section 13050 of the California Probate Code, does not exceed ten thousand dollars (\$10,000)."

(5) "At least six months have elapsed since the death of the decedent as shown in a certified copy of decedent's death certificate attached to this affidavit."

(6) "No proceeding is now being or has been conducted in California for administration of the decedent's estate."

(7) "Funeral expenses, expenses of last illness, and all unsecured debts of the decedent have been paid."

(8) "The affiant is the successor of the decedent (as defined in Section 13006 of the Probate Code) and to the decedent's interest in the described property, and no other person has a superior right to the interest of the decedent in the described property."

(9) "The affiant declares under penalty of perjury under the law of the State of California that the foregoing is true and correct."

(b) For each person executing the affidavit, the affidavit shall contain a notary public's certificate of acknowledgment identifying the person.

(c) There shall be attached to the affidavit an inventory and appraisal of the decedent's real property in this state, excluding the real property described in Section 13050. The form, content, and manner of making the inventory and appraisal of the real property shall be as set forth in Chapter 9 (commencing with Section 600) of Division 3. The inventory and appraisal shall be made by a probate referee selected by the affiant from those probate referees appointed by the Controller under Section 1305 to appraise property in the county where the real property is located.

(d) If the person or persons executing the affidavit claim under the decedent's will, a copy of the will shall be attached to the affidavit.

(e) A certified copy of the decedent's death certificate shall be attached to the affidavit.

Comment. Sections 13200-13208 provide a new procedure for obtaining a marketable title to real property in which the decedent's interest is shown by a probate referee's appraisal not to exceed \$10,000 gross value. The new procedure is drawn in part from a statute enacted in Arizona in 1983. See *Ariz. Rev. Stat. Ann.* §§ 14-3971, 14-3972 (Supp. 1984-85). For a discussion of the Arizona statute, see Effland, *Handling Real and Personal Property At Death Without Administration Under the 1983 Amendments to the Arizona Probate Code*, *Ariz. B.J.*, Dec.-Jan. 1984, at 34, 36.

The procedure provided by this chapter can be used only if all of the following conditions are satisfied:

(1) The gross value of the decedent's real property in this state (excluding certain property) does not exceed \$10,000. See Section 13200(a)(4). See also Section 13050 (exclusions).

(2) No proceeding for the administration of the decedent's estate is pending or has been conducted in California. See Section 13200(a)(6).

(3) Not less than six months have elapsed since the death of the decedent. See Section 13200(a) (introductory clause).

(4) The funeral expenses, expenses of last illness, and all unsecured debts of the decedent have been paid. See Section 13200(a)(7).

(5) The person executing the affidavit is the successor of the decedent. See Section 13200(a)(8).

(6) The affidavit contains a notary public's certificate of acknowledgment identifying each person executing the affidavit. See Section 13200(b).

(7) An inventory and appraisal of the real property, made by a probate referee, is attached to the affidavit. See Section 13200(c).

(8) A copy of the decedent's will is attached to the affidavit if the successor of the decedent claims the property under the will of the decedent. See Section 13200(d).

Where the real property has a gross value in excess of \$10,000 or less than six months have elapsed since the death of the decedent, there is another procedure available for obtaining a marketable title to the real property without the need for probate. See Sections 13150-13157 (where gross value of decedent's real and personal property in this state does not exceed \$60,000, successor of decedent may obtain court order determining succession to the real property).

§ 13201. Filing fee

13201. Notwithstanding any other provision of law, the total fee for the filing of an affidavit under Section 13200 and the issuance of one certified copy of the affidavit under Section 13202 is thirty-five dollars (\$35).

Comment. The fee provided by Section 13201 is the total fee. No additions to the \$35 fee are to be made for such fees as a law library fee, judges' retirement fee, reporter's fee, or the like.

§ 13202. **Issuance and recording of certified copy of affidavit**

13202. Upon receipt of the affidavit and the required fee, the court clerk, upon determining that the affidavit is complete and has the required attachments, shall file the affidavit and attachments and shall issue a certified copy of the affidavit without the attachments. The certified copy shall be recorded in the office of the county recorder of the county where the real property is located. The county recorder shall index the certified copy in the index of grantors and grantees. The decedent shall be indexed as the grantor and each person designated as a successor to the property in the certified copy shall be indexed as a grantee.

Comment. See the Comment to Section 13200.

§ 13203. **Effect of recorded affidavit**

13203. (a) A good faith purchaser or lessee of real property for value from, or a good faith lender to, a person designated as a successor of the decedent to a particular item of property in a certified copy of an affidavit issued under Section 13202 and recorded in the county in which the real property is located has the same rights and protections as the purchaser, lessee, or lender would have if each person designated as a successor in the recorded certified copy of the affidavit had been named as a distributee of the real property in a decree of distribution that had become final.

(b) The issuance and recording of a certified copy of an affidavit under this chapter does not preclude later proceedings for administration of the decedent's estate.

Comment. Subdivision (a) of Section 13203 is designed to give the successors designated in the certified copy of the affidavit a marketable title to the real property. Good faith purchasers, lessees, and lenders are protected to the same extent as they are protected when they deal with the distributee under a final decree of distribution. See Section 1021 (effect of final decree of distribution). Although Section 13203 protects good faith purchasers, lessees, and lenders, it does not preclude later probate proceedings. See subdivision (b). The successor designated in the recorded affidavit has a duty to restore the property and its net income, or its value and interest on its proceeds if the property has been disposed of, to the estate if

proceedings are later commenced for administration of the decedent's estate. See Section 13206. The successor also is liable to an unsecured creditor (Section 13204) or to a person having a superior right to the property (Section 13205). Liability under Sections 13204 and 13205 is limited. See Section 13207. If the person fraudulently executed or filed the affidavit, the person is liable to the decedent's estate or to a person having a superior right to the property for three times the fair market value of the property. See Sections 13205(b), 13206(b).

§ 13204. Liability for decedent's unsecured debts

13204. Each person who is designated as a successor of the decedent in a certified copy of an affidavit issued under Section 13202 is personally liable to the extent provided in Section 13207 for the unsecured debts of the decedent. Any such debt may be enforced against the person in the same manner as it could have been enforced against the decedent if the decedent had not died. In any action based upon the debt, the person may assert any defense, cross-complaint, or setoff that would have been available to the decedent if the decedent had not died.

Comment. Section 13204 is the same in substance as Section 13109. See the Comment to that section. The liability under Section 13204 is limited. See Section 13207.

§ 13205. Liability to person having superior right

13205. (a) Except as provided in subdivision (b), each person who is designated as a successor of the decedent in a certified copy of any affidavit issued under Section 13202 is personally liable to the extent provided in Section 13207 to any person having a superior right by testate or intestate succession from the decedent.

(b) In addition to any other liability the person has under this section and Sections 13204, 13206, and 13207, if the person fraudulently executed or filed the affidavit under this chapter, the person is liable to the person having a superior right for three times the fair market value of the property. For the purposes of this subdivision, the "fair market value of the property" is the fair market value, valued as of the time the certified copy of the affidavit was issued under Section 13202, of the property the person liable took under the certified copy

of the affidavit to which the other person has a superior right, excluding any liens and encumbrances on the property at that time.

(c) An action to impose liability under this section is forever barred five years after the certified copy of the affidavit is issued under Section 13202. This five-year period allowed for commencing the action is tolled during the minority of the person having the superior right, but is not tolled for any other reason.

Comment. Section 13205 is comparable to Section 13110. The liability under Section 13205 is limited. See Section 13207.

§ 13206. Restitution if estate proceeding commenced

13206. (a) Subject to subdivisions (b), (c), (d), and (e), if proceedings for the administration of the decedent's estate are commenced, each person who is designated as a successor of the decedent in a certified copy of an affidavit issued under Section 13202 is liable for:

(1) The restitution to the decedent's estate of the property the person took under the certified copy of the affidavit if the person still has the property, together with the net income the person received from the property.

(2) The restitution to the decedent's estate of the fair market value of the property if the person no longer has the property, together with (A) the net income the person received from the property prior to disposing of it and (B) interest from the date of disposition at the rate payable on a money judgment on the fair market value of the property. For purposes of this paragraph, the "fair market value of the property" is the fair market value, valued as of the time of the disposition of the property, of the property the person took under the certified copy of the affidavit, excluding the amount of any liens and encumbrances on the property at the time the certified copy of the affidavit was issued.

(b) Subject to subdivision (d), if the person fraudulently executed or filed the affidavit under this chapter, the person is liable under this section for restitution to the decedent's estate of three times the fair market value of the property. For the purposes of this subdivision, the "fair market value of the property" is the

fair market value, valued as of the time the certified copy of the affidavit was issued, of the property the person took under the certified copy of the affidavit, excluding the amount of any liens and encumbrances on the property at that time.

(c) Subject to subdivision (d), if proceedings for the administration of the decedent's estate are commenced and a person designated as a successor of the decedent in a certified copy of an affidavit issued under Section 13202 made a significant improvement to the property taken by the person under the certified copy of the affidavit in the good faith belief that the person was the successor of the decedent to that property, the person is liable for whichever of the following the decedent's estate elects:

(1) The restitution of the property, as improved, to the estate of the decedent upon the condition that the estate reimburse the person making restitution for (A) the amount by which the improvement increases the fair market value of the property restored, valued as of the time of restitution, and (B) the amount paid by the person for principal and interest on any liens or encumbrances that were on the property at the time the certified copy of the affidavit was issued.

(2) The restoration to the decedent's estate of the fair market value of the property, valued as of the time of the issuance of the certified copy of the affidavit under Section 13202, excluding the amount of any liens and encumbrances on the property at that time, together with interest on the net amount at the rate payable on a money judgment running from the date of the issuance of the certified copy of the affidavit.

(d) The property and amount required to be restored to the estate under this section shall be reduced by any property or amount paid by the person to satisfy a liability under Section 13204 or 13205.

(e) An action to enforce the liability under this section may be brought only by the personal representative of the estate of the decedent. In an action to enforce the liability under this section, the court's judgment may enforce the liability only to the extent necessary to protect the interests of the heirs, devisees, and creditors of the decedent.

(f) An action to enforce the liability under this section is forever barred three years after the certified copy of the affidavit is issued under Section 13202, or three years after the discovery of the fraud, whichever is later. The three-year period specified in this subdivision is not tolled for any reason.

Comment. Section 13206 is comparable to Section 13111. See the Comment to that section.

§ 13207. Limitation on liability under Sections 13204 and 13205

13207. (a) A person designated as a successor of the decedent in a certified copy of an affidavit issued under Section 13202 is not liable under Section 13204 or 13205 if proceedings for the administration of the decedent's estate are commenced and the person satisfies the requirements of Section 13206.

(b) Except as provided in subdivision (b) of Section 13205, the aggregate of the personal liability of a person under Sections 13204 and 13205 shall not exceed the fair market value at the time of the issuance of the certified copy of the affidavit under Section 13202 of the decedent's property received by that person under this chapter, less the amount of any liens and encumbrances on the property at that time, together with the net income the person received from the property and, if the property has been disposed of, interest on the fair market value of the property from the date of disposition at the rate payable on a money judgment. For the purpose of this subdivision, "fair market value of the property" has the same meaning as defined in paragraph (2) of subdivision (a) of Section 13206.

Comment. Section 13207 is comparable to Section 13112.

§ 13208. Other remedies not affected

13208. The remedies available under Sections 13204 to 13207, inclusive, are in addition to any remedies available by reason of any fraud or intentional wrongdoing.

Comment. Section 13208 makes clear that the remedies provided in this chapter for the decedent's estate, creditors, and persons having a superior right to the property by testate or

intestate succession do not limit any other remedies that are available by reason of fraud or intentional wrongdoing.

§ 13209. **Judicial Council to prescribe form of affidavit**
13209. The Judicial Council shall prescribe the form of affidavit to be used under this chapter. Any form so prescribed by the Judicial Council is deemed to comply with this chapter.

Comment. Section 13209 is new and is comparable to Section 1456.

PART 2. PASSAGE OF PROPERTY TO SURVIVING SPOUSE WITHOUT ADMINISTRATION

CHAPTER 1. GENERAL PROVISIONS

§ 13500. **Necessity of administration**

13500. Except as provided in this chapter, when a husband or wife dies intestate leaving property that passes to the surviving spouse under Section 6401, or dies testate and by his or her will devises all or a part of his or her property to the surviving spouse, the property passes to the survivor subject to the provisions of Chapter 2 (commencing with Section 13540) and Chapter 3 (commencing with Section 13550), and no administration is necessary.

Comment. Section 13500 restates subdivision (a) of former Section 649.1 without substantive change.

§ 13501. **Property subject to administration**

13501. Except as provided in Chapter 6 (commencing with Section 6600) of Division 3 and in Part 1 (commencing with Section 13000) of this division, the following property of the decedent is subject to administration under Division 3 (commencing with Section 300):

(a) Property passing to someone other than the surviving spouse under the decedent's will or by intestate succession.

(b) Property disposed of in trust under the decedent's will.

(c) Property in which the decedent's will limits the surviving spouse to a qualified ownership. For the purpose of this subdivision, a devise to the surviving spouse that is conditioned on the spouse surviving the decedent by a specified period of time is not a "qualified ownership" interest if the specified period of time has expired.

Comment. Section 13501 restates former Section 649.3 without substantive change. Administration of property described in Section 13501 may be avoided under Part 1 (commencing with Section 13000) (collection or transfer of small estate without administration) if the requirements of that part are satisfied. See also Chapter 6 (commencing with Section 6600) of Part 3 of Division 6 (small estate set-aside).

§ 13502. Election of administration

13502. (a) Upon the election of the surviving spouse or the personal representative, guardian of the estate, or conservator of the estate of the surviving spouse, all or a portion of the following property may be administered under Division 3 (commencing with Section 300):

(1) The one-half of the community property that belongs to the decedent under Section 100, the one-half of the quasi-community property that belongs to the decedent under Section 101, and the separate property of the decedent.

(2) The one-half of the community property that belongs to the surviving spouse under Section 100 and the one-half of the quasi-community property that belongs to the surviving spouse under Section 101.

(b) The election shall be made by a writing specifically evidencing the election filed in the proceedings for the administration of the estate of the deceased spouse within four months after the issuance of letters testamentary or of administration, or within such further time as the court may allow upon a showing of good cause, and before entry of an order under Section 13656.

Comment. Section 13502 continues subdivisions (b) and (c) of former Section 649.1 with the addition of language in the introductory portion of subdivision (a) that makes clear that "all or a portion" of the described property of the deceased spouse or the surviving spouse may be probated. This language makes

clear that the surviving spouse may elect to probate only a portion of the surviving spouse's one-half of the community or quasi-community property. This is consistent with the practice under prior law and permits, for example, probate of all of a block of stock that is community property without the need to probate the surviving spouse's one-half share of the other community property. The language also recognizes the practice in some cases under former law of probating less than all of the property of the deceased spouse in the estate of the deceased spouse.

§ 13503. Election to transfer property to trustee

13503. (a) The surviving spouse or the personal representative, guardian of the estate, or conservator of the estate of the surviving spouse may file an election and agreement to have all or part of the one-half of the community property that belongs to the surviving spouse under Section 100 and the one-half of the quasi-community property that belongs to the surviving spouse under Section 101 transferred by the surviving spouse or the surviving spouse's personal representative, guardian, or conservator to the trustee under the will of the deceased spouse or the trustee of an existing trust identified by the will of the deceased spouse, to be administered and distributed by the trustee.

(b) The election and agreement shall be filed in the proceedings for the administration of the estate of the deceased spouse and before the entry of the decree of final distribution in the proceedings.

Comment. Section 13503 continues subdivision (d) of former Section 649.1 without substantive change.

§ 13504. Property held in a revocable trust

13504. Notwithstanding the provisions of this part, community property held in a revocable trust described in Section 5113.5 of the Civil Code is governed by the provisions, if any, in the trust for disposition in the event of death.

Comment. Section 13504 continues former Section 649.5 without substantive change.

§ 13505. Application of this part

13505. This part applies whether the deceased spouse died before, on, or after July 1, 1987.

Comment. Section 13505 makes this part applicable whether the deceased spouse died before, on, or after the operative date of this part. The section eliminates the restrictive effect of former Section 658 which preserved the law in effect prior to January 1, 1985, for cases where the deceased spouse died before that date.

§ 13506. Reference in statute or written instrument to repealed statutory provision

13506. On and after July 1, 1987, a reference in any statute of this state or in a written instrument, including a will or trust, to a provision of former Sections 202 to 206, inclusive, of the Probate Code (as repealed by Chapter 527 of the Statutes of 1984) or former Sections 649.1 to 649.5, inclusive, or Sections 650 to 658, inclusive, of the Probate Code (as repealed by the act enacting this section) shall be deemed to be a reference to the comparable provision of this part.

Comment. Section 13506 is new and is drawn from Sections 649.6 and 1490 of the Probate Code. Section 13506 supersedes former Section 649.6. Section 13506 makes clear that, after the operative date of Sections 13500-13660, a reference in a statute or written instrument to a provision of former law will be deemed to be a reference to the comparable provision of this part.

**CHAPTER 2. RIGHT OF SURVIVING SPOUSE
TO DISPOSE OF REAL PROPERTY**

§ 13540. Right of surviving spouse to dispose of real property

13540. (a) Except as provided in Section 13541, after 40 days from the death of a spouse, the surviving spouse or the personal representative, guardian of the estate, or conservator of the estate of the surviving spouse has full power to sell, lease, mortgage, or otherwise deal with and dispose of the community or quasi-community real property, and the right, title, and interest of any grantee, purchaser, encumbrancer, or lessee shall be free of rights of devisees or creditors of the deceased spouse to the same extent as if the property had been owned as the separate property of the surviving spouse.

(b) Nothing in this section affects or limits the liability of the surviving spouse under Sections 13550 to 13553, inclusive.

Comment. Section 13540 continues the first portion of the first sentence and all of the last sentence of former Section 649.2.

Subdivision (b) of Section 13540 is a new provision that makes clear that Section 13540 does not affect or limit the liability of a surviving spouse under Sections 13550-13554. Although Section 13540 may preclude a devisee or creditor from enforcing his or her rights against a grantee, purchaser, encumbrancer, or lessee or against the property interest transferred to the grantee, purchaser, encumbrancer, or lessee, the section does not relieve the surviving spouse of any liability under Sections 13550-13554. If the surviving spouse is liable under those sections and the devisee or creditor obtains a judgment against the surviving spouse, the judgment may be enforced against any property of the surviving spouse (including the proceeds of the disposition described in Section 13540) that is subject to the enforcement of a judgment.

§ 13541. Recording notice of interest in property

13541. (a) Section 13540 does not apply if, within 40 days from the death of the spouse, a notice that satisfies the requirements of this section is recorded in the office of the county recorder of the county in which the property is situated.

(b) The notice shall contain all of the following:

(1) A description of the property in which an interest is claimed.

(2) A statement that an interest in the property is claimed by a named person under the will of the deceased spouse.

(3) The name or names of the owner or owners of the record title to the property.

(c) There shall be endorsed on the notice instructions that it shall be indexed by the recorder in the name or names of the owner or owners of record title to the property, as grantor or grantors, and in the name of the person claiming an interest in the property, as grantee.

Comment. Section 13541 restates a portion of former Section 649.2 without substantive change except that Section 13541 contains additional language to make clear that the notice must be recorded within 40 days from the death of the spouse. This clarification is consistent with language in *Wilson v. Superior Court*, 101 Cal. App. 2d 592, 595, 225 P.2d 1002 (1951).

§ 13542. Dispositions under former law not affected

13542. The repeal of former Section 649.2 by the act enacting this section does not affect any sale, lease, mortgage, or other transaction or disposition of real property made prior to July 1, 1987, to which that section applied, and such a sale, lease, mortgage, or other transaction or disposition shall continue to be governed by the provisions of former Section 649.2 notwithstanding the repeal of that section.

Comment. Section 13542 is a new provision that makes clear that dispositions made under prior law are not affected.

**CHAPTER 3. LIABILITY FOR DEBTS
OF DECEASED SPOUSE****§ 13550. Personal liability of surviving spouse**

13550. Except as provided in Sections 951.1, 13552, 13553, and 13554, upon the death of a married person, the surviving spouse is personally liable for the debts of the deceased spouse chargeable against the property described in Section 13551 to the extent provided in Section 13551.

Comment. Section 13550 continues subdivision (a) of former Section 649.4 without substantive change.

§ 13551. Limitation on liability

13551. The liability imposed by Section 13550 shall not exceed the fair market value at the date of the decedent's death, less the amount of any liens and encumbrances, of the total of the following:

(a) The portion of the one-half of the community and quasi-community property belonging to the surviving spouse under Sections 100 and 101 that is not exempt from enforcement of a money judgment and is not administered in the estate of the deceased spouse.

(b) The portion of the one-half of the community and quasi-community property belonging to the decedent under Sections 100 and 101 that passes to the surviving spouse without administration.

(c) The separate property of the decedent that passes to the surviving spouse without administration.

Comment. Section 13551 continues the substance of subdivision (b) of former Section 649.4 without substantive change but with the addition of language to make clear that (1) "value" means fair market value and (2) the value of property belonging to the surviving spouse that is administered in the estate of the deceased spouse under Division 3 is excluded in determining the extent of the liability of the surviving spouse. See Section 13502(a) (election to administer only a portion of the community and quasi-community property that belongs to the surviving spouse).

§ 13552. Effect of commencement of proceedings for administration of estate of deceased spouse

13552. If proceedings are commenced in this state for the administration of the estate of the deceased spouse and the time for filing or presenting claims has commenced, any action upon the liability of the surviving spouse pursuant to Section 13550 is barred to the same extent as provided for claims under Article 1 (commencing with Section 700) of Chapter 12 of Division 3, except as to the following:

(a) Creditors who commence judicial proceedings for the enforcement of the debt and serve the surviving spouse with the complaint therein prior to the expiration of the time for filing or presenting claims.

(b) Creditors who have or who secure the surviving spouse's acknowledgment in writing of the liability of the surviving spouse for the debts.

(c) Creditors who file a timely claim in the proceedings for the administration of the estate of the deceased spouse.

Comment. Section 13552 continues subdivision (d) of former Section 649.4 without substantive change but with the addition of the clarifying phrase "who have or who secure" in subdivision (b).

§ 13553. No liability if all property administered

13553. The surviving spouse is not liable under this chapter if all the property described in paragraphs (1) and (2) of subdivision (a) of Section 13502 is administered under Division 3 (commencing with Section 300).

Comment. Section 13553 continues subdivision (c) of former Section 649.4 without substantive change.

§ 13554. Enforcement of liability

13554. (a) Except as otherwise provided in this chapter, any debt described in Section 13550 may be enforced against the surviving spouse in the same manner as it could have been enforced against the deceased spouse if the deceased spouse had not died.

(b) In any action based upon the debt, the surviving spouse may assert any defense, cross-complaint, or setoff which would have been available to the deceased spouse if the deceased spouse had not died.

Comment. Section 13554 continues subdivision (e) of former Section 649.4 without substantive change.

**CHAPTER 4. COLLECTION BY AFFIDAVIT
OF COMPENSATION OWED TO DECEASED
SPOUSE**

§ 13600. Collection of salary or other compensation, not exceeding \$5,000, by affidavit

13600. (a) At any time after a husband or wife dies, the surviving spouse or the guardian or conservator of the estate of the surviving spouse may, without procuring letters of administration or awaiting probate of the will, collect salary or other compensation owed by an employer for personal services of the deceased spouse, including compensation for unused vacation, not in excess of five thousand dollars (\$5,000) net.

(b) Not more than five thousand dollars (\$5,000) net in the aggregate may be collected by or for the surviving spouse under this chapter from all of the employers of the decedent.

(c) For the purposes of this chapter, a guardian or conservator of the estate of the surviving spouse may act on behalf of the surviving spouse without authorization or approval of the court in which the guardianship or conservatorship proceeding is pending.

Comment. Sections 13600-13606 provide a simple procedure that permits a surviving spouse immediately to collect not more than \$5,000 of the earnings owed by an employer to the deceased

spouse. Use of this new procedure will provide funds for the surviving spouse until the probate proceeding is commenced and a family allowance may be obtained.

If the employer does not personally know the surviving spouse, reasonable proof of identity must be provided to the employer. The kinds of proof of identity that may be relied on are specified in Section 13104. See Section 13601(c).

Section 13600 permits the guardian or conservator of the estate of the surviving spouse to use the new procedure under this chapter to collect compensation owing to the deceased spouse. See also Section 13601(d) (proof of appointment of person as guardian or conservator). Letters of the conservator of the estate of the surviving spouse would be reasonable proof of authority to act for the surviving spouse.

This chapter is drawn from Sections 13100-13115 (affidavit procedure for collection or transfer of property of small estate where death occurred not less than 40 days before affidavit presented to holder of property). However, use of the procedure under this chapter applies without regard to the amount of the decedent's estate; use of the procedure is not limited to cases where the estate is a small estate. And use of the procedure under this chapter is permitted without any delay after the death of the decedent; use of the procedure is not limited to cases where the decedent died not less than 40 days before the affidavit or declaration is presented to the employer.

§ 13601. Contents of affidavit

13601. (a) To collect salary or other compensation under this chapter, an affidavit or a declaration under penalty of perjury under the laws of this state shall be furnished to the employer of the deceased spouse stating all of the following:

- (1) The name of the decedent.**
- (2) The date and place of the decedent's death.**
- (3) Either of the following, as appropriate:**
 - (A) "The affiant or declarant is the surviving spouse of the decedent."**

(B) "The affiant or declarant is the guardian or conservator of the estate of the surviving spouse of the decedent."

- (4) "The surviving spouse of the decedent is entitled to the earnings of the decedent under the decedent's will or by intestate succession and no one else has a superior right to the earnings."**

(5) "No proceeding is now being or has been conducted in California for administration of the decedent's estate."

(6) "Sections 13600 to 13605, inclusive, of the California Probate Code require that the earnings of the decedent, including compensation for unused vacation, not in excess of five thousand dollars (\$5,000) net, be paid promptly to the affiant or declarant."

(7) "Neither the surviving spouse, nor anyone acting on behalf of the surviving spouse, has a pending request to collect compensation owed by another employer for personal services of the decedent under Sections 13600 to 13605, inclusive, of the California Probate Code."

(8) "Neither the surviving spouse, nor anyone acting on behalf of the surviving spouse, has collected any compensation owed by an employer for personal services of the decedent under Sections 13600 to 13605, inclusive, of the California Probate Code except the sum of _____ dollars (\$_____) which was collected from _____."

(9) "The affiant or declarant requests that he or she be paid the salary or other compensation owed by you for personal services of the decedent, including compensation for unused vacation, not to exceed five thousand dollars (\$5,000) net, less the amount of _____ dollars (\$_____) which was previously collected."

(10) "The affiant or declarant affirms or declares under penalty of perjury under the laws of the State of California that the foregoing is true and correct."

(c) Reasonable proof of the identity of the surviving spouse shall be provided to the employer. If a guardian or conservator is acting for the surviving spouse, reasonable proof of the identity of the guardian or conservator shall also be provided to the employer. Proof of identity that is sufficient under Section 13104 is sufficient proof of identity for the purposes of this subdivision.

(d) If a person presenting the affidavit or declaration is a person claiming to be the guardian or conservator of the estate of the surviving spouse, the employer shall be provided with reasonable proof, satisfactory to the employer, of the appointment of the person to act as

guardian or conservator of the estate of the surviving spouse.

Comment. See the Comment to Section 13600.

§ 13602. Payment of earnings by employer

13602. If the requirements of Section 13600 are satisfied, the employer to whom the affidavit or declaration is presented shall promptly pay the earnings of the decedent, including compensation for unused vacation, not in excess of five thousand dollars (\$5,000) net, to the person presenting the affidavit or declaration.

Comment. Section 13602 imposes a duty on the employer to pay promptly the decedent's earnings to the person presenting the affidavit or declaration. The employer who pays the decedent's earnings to the person presenting the affidavit or declaration is protected from liability. See Section 13603. Payment pursuant to Section 13602 does not preclude later administration of the decedent's estate. See Section 13605. As to the liability of the person receiving the payment, see Section 13605.

§ 13603. Protection of employer from liability

13603. If the requirements of Section 13601 are satisfied, receipt by the employer of the affidavit or declaration constitutes sufficient acquittance for the compensation paid pursuant to this chapter and discharges the employer from any further liability with respect to the compensation paid. The employer may rely in good faith on the statements in the affidavit or declaration and has no duty to inquire into the truth of any statement in the affidavit or declaration.

Comment. Section 13603 is a new provision that protects the employer who pays to the affiant or declarant compensation owing to the deceased spouse. To obtain this protection, the affidavit or declaration must satisfy the requirements of Section 13601 and must be accompanied by reasonable proof of the identity of the person presenting the affidavit as the surviving spouse or person acting for the surviving spouse and, if someone claims to be acting for the surviving spouse, must be accompanied by reasonable proof of the authority of the person to act for the surviving spouse. See Sections 13600 and 13601 and the Comment to Section 13600. Section 13603 is comparable to Section 13106 and is drawn from the first sentence of former Section 631.

§ 13604. Enforcement of payment

13604. (a) If the employer refuses to pay as required by this chapter, the surviving spouse may recover the amount the surviving spouse is entitled to receive under this chapter in an action brought for that purpose against the employer.

(b) If an action is brought against the employer under this section, the court shall award attorney's fees to the surviving spouse if the court finds that the employer acted unreasonably in refusing to pay as required by this chapter.

Comment. Section 13604 is a new provision comparable to subdivision (b) of Section 13105. Section 13604 makes clear that the duty imposed by Section 13602 may be enforced by an action against the employer. This remedy is in addition to the remedies against the employer if the estate of the deceased spouse is probated. See also Section 13656 (court order determining that property passed to surviving spouse made in proceeding to determine or confirm property passing or belonging to surviving spouse).

§ 13605. Rights of heirs or devisees of deceased spouse not affected

13605. Nothing in this chapter limits the rights of the heirs or devisees of the deceased spouse. Payment of a decedent's compensation pursuant to this chapter does not preclude later proceedings for administration of the decedent's estate.

Any person to whom payment is made under this chapter is answerable and accountable therefor to the personal representative of the decedent's estate and is liable for the amount of the payment to any other person having a superior right to the payment received. In addition to any other liability the person has under this section, a person who fraudulently secures a payment under this chapter is liable to a person having a superior right to the payment for three times the amount of the payment.

Comment. Section 13605 is a new provision that makes clear that the surviving spouse takes under this chapter subject to the rights of any person having a superior right and has the duty to restore the payment received to the decedent's estate if the estate is probated.

§ 13606. Other methods of collecting compensation not affected

13606. The procedure provided in this chapter is in addition to, and not in lieu of, any other method of collecting compensation owed to a decedent.

Comment. Section 13606 makes clear that the procedure provided by this chapter is in addition to and not in lieu of any other method of collecting unpaid compensation owed to a decedent. See, e.g., Sections 160 (payment of money due to decedent to person designated by decedent), 6600-6615 (small estate set-aside), 13100-13115 (affidavit procedure for collection or transfer of personal property of a small estate), 13650-13660 (court order determining that property passed to surviving spouse). See also Gov't Code §§ 12479 (designation by state employee of person to receive warrants upon employee's death), 53245 (designation by public employee of person to receive warrants upon employee's death).

**CHAPTER 5. DETERMINATION OR
CONFIRMATION OF PROPERTY PASSING OR
BELONGING TO SURVIVING SPOUSE**

§ 13650. Filing of petition

13650. (a) A surviving spouse or the personal representative, guardian of the estate, or conservator of the estate of the surviving spouse may file a petition in the superior court of the county in which the estate of the deceased spouse may be administered requesting an order that administration of all or part of the estate is not necessary for the reason that all or part of the estate is property passing to the surviving spouse. The petition may also request an order confirming the ownership of the surviving spouse of property belonging to the surviving spouse under Section 100 or 101.

(b) To the extent of the election, this section does not apply to property that the petitioner has elected, as provided in Section 13502, to have administered under Division 3 (commencing with Section 300).

(c) A guardian or conservator may file a petition under this section without authorization or approval of the court in which the guardianship or conservatorship proceeding is pending.

Comment. Subdivision (a) of Section 13650 continues the first sentence of subdivision (a) of former Section 650 without substantive change but subdivision (a) of Section 13650 uses language drawn from subdivision (c) of former Section 655 in place of the language of the first sentence of subdivision (a) of former Section 650 which referred to the allegation in the petition. Subdivision (b) of Section 13650 continues subdivision (c) of former Section 650 without substantive change. Subdivision (c) of Section 13650 continues subdivision (d) of former Section 650 without substantive change.

§ 13651. Contents of petition

13651. (a) A petition filed pursuant to Section 13650 shall be verified, shall allege that administration of all or a part of the estate of the deceased spouse is not necessary for the reason that all or a part of the estate is property passing to the surviving spouse, and shall set forth all of the following information:

(1) If proceedings for the administration of the estate are not pending, the facts necessary to determine the county in which the estate of the deceased spouse may be administered.

(2) A description of the property of the deceased spouse which the petitioner alleges is property passing to the surviving spouse, including the trade or business name of any property passing to the surviving spouse that consists of an unincorporated business or an interest in an unincorporated business which the deceased spouse was operating or managing at the time of death.

(3) The facts upon which the petitioner bases the allegation that all or a part of the estate of the deceased spouse is property passing to the surviving spouse.

(4) A description of any interest in the community property or quasi-community property, or both, which the petitioner requests the court to confirm to the surviving spouse as belonging to the surviving spouse pursuant to Section 100 or 101.

(5) The names, ages, and addresses of the heirs and devisees of the deceased spouse, the names and addresses of all persons named as executors of the will of the deceased spouse, and the names and addresses of all persons appointed as personal representatives of the deceased spouse, which are known to the petitioner.

(b) If the petitioner bases the allegation that all or part of the estate of the deceased spouse is property passing to the surviving spouse upon the will of the deceased spouse, a copy of the will shall be attached to the petition.

Comment. Section 13651 continues a portion of subdivision (a) and all of subdivision (b) of former Section 650 without substantive change except that paragraph (2) of subdivision (a) of Section 13651 has been revised to make clear that it is limited to an unincorporated business.

§ 13652. Filing petition in pending proceeding

13652. If proceedings for the administration of the estate of the deceased spouse are pending, a petition under this chapter shall be filed in those proceedings without the payment of an additional fee.

Comment. Section 13652 continues the first sentence of former Section 651 without substantive change.

§ 13653. Filing petition with petition for probate proceeding

13653. If proceedings for the administration of the estate of the deceased spouse are not pending, a petition under this chapter may, but need not, be filed with a verified petition for probate of the will of the deceased spouse or for administration of the estate of the deceased spouse.

Comment. Section 13653 restates the second sentence of former Section 651 without substantive change. If proceedings for the administration of the estate of the deceased spouse are not pending, the petition may be filed with a petition for the probate of the will of the deceased spouse or for administration of the estate of the deceased spouse or the petition may be filed (without filing a petition for probate or administration) in the superior court of the county in which the estate of the deceased spouse may be administered. See Section 13650.

§ 13654. Probate of will or administration not precluded by petition

13654. The filing of a petition under this chapter does not preclude the court from admitting the will of the deceased spouse to probate or appointing a personal representative of the estate of the deceased spouse upon the petition of any person legally entitled, including any

petition for probate of the will or for administration of the estate which is filed with a petition filed under this chapter.

Comment. Section 13654 restates former Section 652 without substantive change.

§ 13655. Notice of hearing

13655. (a) If a petition filed under this chapter is filed with a petition for probate of the deceased spouse's will, notice of the hearing on the petition shall be given in the manner prescribed by Sections 327 and 328 and shall be included in the notice required by those sections. If the petition filed under this chapter is filed with a petition for administration of the estate of the deceased spouse, notice of the hearing on the petition shall be given in the manner prescribed by Section 441 and shall be included in the notice required by that section.

(b) If proceedings for the administration of the estate of the deceased spouse are pending at the time a petition is filed under this chapter or, if the proceedings are not pending and if the petition filed under this chapter is not filed with a petition for probate of the deceased spouse's will or for administration of the estate of the deceased spouse, the clerk shall set the petition for hearing. At least 10 days before the hearing, notice of the hearing on the petition filed under this chapter shall be personally served upon the following persons by the petitioner or mailed, postage prepaid, by the petitioner to the following persons, addressed to the addresses given in their request for special notice or notice of appearance, the addresses of their offices or places of residence, or, if neither of these addresses is known to the petitioner, the county seat of the county in which the proceedings are pending:

(1) Any personal representative who is not the petitioner.

(2) All devisees and known heirs of the deceased spouse and, if the personal representative is the trustee of a trust that is a devisee under the will of the decedent, all persons interested in the trust, as determined in cases of future interests pursuant to paragraph (1), (2), or (3) of subdivision (a) of Section 15804.

(3) All persons or their attorneys who have requested special notice pursuant to Section 1202.

(4) All persons or their attorneys who have given notice of appearance.

(c) The notice specified in subdivision (b) shall also be mailed as provided in subdivision (b) to the Attorney General, addressed to the office of the Attorney General at Sacramento, California, if the petitioner bases the allegation that all or part of the estate of the deceased spouse is property passing to the surviving spouse upon the will of the deceased spouse and the will involves or may involve either of the following:

(1) A testamentary trust of property for charitable purposes other than a charitable trust with a designated trustee, resident in this state.

(2) A devise for a charitable purpose without an identified devisee or beneficiary.

This section shall only become operative if Assembly Bill No. 2652 of the 1985-86 Regular Session is enacted and adds a Section 15804 to this code, in which case this section shall become operative on July 1, 1987.

Comment. Subdivision (a) of Section 13655 restates the substance of former Section 654 with two omissions:

(1) The last sentence of former Section 654, which required that a copy of the petition also be served, is not continued.

(2) The requirement of former Section 654 that notice of the hearing be given at least 20 days prior to the date of the hearing is not continued. By adopting the provisions of Sections 328 and 441, subdivision (a) of Section 13655 incorporates the requirement of those sections that notice of hearing be given at least 10 days before the hearing on the petition.

Subdivision (b) of Section 13655 restates the substance of former Section 653 with the following changes:

(1) The requirement of former Section 653 that a copy of the petition be served is not continued.

(2) The requirement of former Section 653 that notice of hearing be given at least 20 days prior to the hearing is replaced by a requirement that notice of hearing be given at least 10 days before the hearing.

(3) The requirement of former Section 653 that notice of hearing be given to "[a]ll other persons who are named in the will of the deceased spouse, if the petitioner bases the allegation that all or part of the estate of the deceased spouse is property passing to the surviving spouse upon the will" is not continued.

This requirement is replaced by the addition of new language in paragraph (2) of subdivision (b) that requires notice, if the personal representative is the trustee of a trust that is a devisee under the decedent's will, to all persons interested in the trust as determined in the case of future interests pursuant to the general statutory provision governing notice in future interests cases. Subdivision (b) requires notice to all persons who might be adversely affected by the order. The former requirement that required notice to all persons named in the will, however, apparently required notice to persons named in the will who were neither devisees nor named as executors of the will. Elimination of the requirement that notice be given to all persons named in the will avoids the need to give notice of hearing to persons who have no interest in the proceeding. For example, notice no longer needs to be given to a mortuary designated in the will to handle funeral arrangements, or to a former spouse where the will recites dissolution of a prior marriage.

§ 13656. Court order

13656. (a) If the court finds that all of the estate of the deceased spouse is property passing to the surviving spouse, the court shall issue an order describing the property, determining that the property is property passing to the surviving spouse, and determining that no administration is necessary. The court may issue any further orders which may be necessary to cause delivery of the property or its proceeds to the surviving spouse.

(b) If the court finds that all or part of the estate of the deceased spouse is not property passing to the surviving spouse, the court shall issue an order (1) describing any property which is not property passing to the surviving spouse, determining that that property does not pass to the surviving spouse and determining that that property is subject to administration under Division 3 (commencing with Section 300) and (2) describing the property, if any, which is property passing to the surviving spouse, determining that that property passes to the surviving spouse, and determining that no administration of that property is necessary. If the court determines that property passes to the surviving spouse, the court may issue any further orders which may be necessary to cause delivery of that property or its proceeds to the surviving spouse.

(c) If the petition filed under this chapter includes a description of the interest of the surviving spouse in the community or quasi-community property, or both, which belongs to the surviving spouse pursuant to Section 100 or 101 and the court finds that the interest belongs to the surviving spouse, the court shall issue an order describing the property and confirming the ownership of the surviving spouse and may issue any further orders which may be necessary to cause ownership of the property to be confirmed in the surviving spouse.

Comment. Section 13656 continues subdivisions (a) and (b) of former Section 655 without substantive change.

The order under subdivision (b) of Section 13656 determines that property which is not property passing to the surviving spouse is subject to administration under Division 3. But administration of this property may be avoided under Part 1 (commencing with Section 13000) (collection or transfer of small estate without administration) if the requirements of that part are satisfied. See also Sections 6600-6614 (small estate set-aside).

§ 13657. Effect of court order

13657. Upon becoming final, an order under Section 13656 (1) determining that property is property passing to the surviving spouse or (2) confirming the ownership of the surviving spouse of property belonging to the surviving spouse under Section 100 or 101 shall be conclusive on all persons, whether or not they are in being.

Comment. Section 13657 continues subdivision (c) of former Section 655 without substantive change.

§ 13658. Protection of interests of creditors of business of deceased spouse

13658. If the court determines that all or a part of the property passing to the surviving spouse consists of an unincorporated business or an interest in an unincorporated business which the deceased spouse was operating or managing at the time of death, the court shall require the surviving spouse to file a list of all of the known creditors of the business and the amounts owing to each of them. The court may issue any order necessary to protect the interests of the creditors of the business, including, but not limited to, the filing of (1) an

undertaking and (2) an inventory and appraisalment in the form set forth in Section 600 and made as set forth in Chapter 9 (commencing with Section 600) of Division 3.

Comment. Section 13658 continues former Section 656 without substantive change except that the provision is limited to creditors of an "unincorporated" business and language (drawn from former Section 657) is added to give the court specific authority to require the filing of an inventory and appraisalment where necessary to protect the creditors of the business.

§ 13659. Inventory and appraisalment

13659. Except as provided in Section 13658, no inventory and appraisalment of the estate of the deceased spouse shall be required in a proceeding under this chapter. However, within three months after the filing of a petition under this chapter, or within such further time as the court or judge for reasonable cause may allow, the petitioner may file with the clerk of the court an inventory and appraisalment in the form set forth in Section 600. The appraisalment shall be made as set forth in Chapter 9 (commencing with Section 600) of Division 3. The petitioner may appraise the assets which a personal representative could appraise under Section 605.

Comment. The first sentence of Section 13659 is drawn from former subdivision (a) (2) (A) of Section 605 and supersedes the last sentence of former Section 657. The remainder of Section 13659 is drawn from the first three sentences of former Section 657.

An inventory and appraisalment is not required to obtain an order under this chapter. However, Section 13659 gives the petitioner the option to file an inventory and appraisalment in a proceeding under this chapter if the petitioner so desires. This option permits the petitioner to obtain an independent appraisal made by a probate referee if such an appraisal is desired by the petitioner. The petitioner may consider the independent appraisal useful for the purposes of capital gains taxes or other taxes. See also Section 13658 (authority of court to require the filing of an inventory and appraisalment to protect creditors of unincorporated business of deceased spouse).

§ 13660. Attorney's fee

13660. The attorney's fee for services performed in connection with the filing of a petition and obtaining of a court order under this chapter shall be determined by private agreement between the attorney and the client and is not subject to approval by the court. If there is no agreement between the attorney and the client concerning the attorney's fee for services performed in connection with the filing of a petition and obtaining of a court order under this chapter and there is a dispute concerning the reasonableness of the attorney's fee for those services, a petition may be filed with the court in the same proceeding requesting that the court determine the reasonableness of the attorney's fee for those services. If there is an agreement between the attorney and the client concerning the attorney's fee for services performed in connection with the filing of a petition and obtaining a court order under this chapter and there is a dispute concerning the meaning of the agreement, a petition may be filed with the court in the same proceeding requesting that the court determine the dispute.

Comment. Section 13660 replaces the provision of prior law that provided for court approval of the attorney's fee for services performed in connection with the filing of a petition and obtaining a court order under former Sections 650-658. See former subdivision (b) of Section 910. No provision was made under former law for court approval of the attorney's fee for other legal work in connection with the estate of the deceased spouse (such as, for example, tax work, joint tenancy termination, or collection of insurance proceeds), and those matters were left to private agreement between the attorney and the client. Section 13660 leaves the entire matter of the legal fees to private agreement between the attorney and the client in the case of a petition and order under this chapter, thereby avoiding the provision for court approval of a portion only of the legal fees that are likely to be involved in the disposition of the estate of a deceased spouse. The last two sentences of Section 13660 make clear that the probate court has jurisdiction (1) to determine the reasonableness of the attorney's fee if there is a dispute and no agreement or (2) to determine the meaning of the agreement if there is a dispute concerning the meaning of an agreement concerning the attorney's fees for filing the petition and

obtaining the order. The probate court has no jurisdiction with respect to the attorney's fee for other legal work in connection with the decedent's property.

CONFORMING AMENDMENTS

**Code of Civil Procedure § 353.5 (technical amendment).
Action against decedent's surviving spouse**

Comment. Section 353.5 is amended to replace the reference to former Section 649.4 of the Probate Code with a reference to the new provisions that have replaced it.

**Code of Civil Procedure § 385 (technical amendment).
Nonabatement of action by death or disability of a party**

Comment. Section 385 is amended to replace the reference to former Section 630 of the Probate Code to the new provisions which have replaced that section.

**Health & Safety Code § 18102 (amended). Transfer of
manufactured home, mobilehome, commercial coach,
truck camper, or floating home without probate**

18102. (a) If 40 days have elapsed since the death of a registered or legal owner of a manufactured home, mobilehome, commercial coach, truck camper, or floating home registered under this part, without the decedent leaving other property necessitating probate, and irrespective of the value of the manufactured home, mobilehome, commercial coach, truck camper, or floating home, the following person or persons may secure a transfer of registration of the title or interest of the decedent:

(1) The sole person or all of the persons who succeeded to the property of the decedent under Sections 6401 and 6402 of the Probate Code, unless the manufactured home, mobilehome, commercial coach, truck camper, or floating home is, by will, otherwise bequeathed.

(2) The sole beneficiary or all of the beneficiaries who succeeded to the manufactured home, mobilehome, commercial coach, truck camper, or floating home under the will of the decedent, where the manufactured home,

mobilehome, commercial coach, truck camper, or floating home is, by will, so bequeathed.

(b) The person authorized by subdivision (a) may secure a transfer of registration of the title or interest of the decedent upon presenting to the department all of the following:

(1) The appropriate certificate of title and registration card, if available.

(2) A certificate of the heir or beneficiary under penalty of perjury containing the following statements:

(A) The date and place of the decedent's death.

(B) The decedent left no other property necessitating probate and no probate proceeding is now being or has been conducted in this state for the decedent's estate.

(C) The declarant is entitled to the manufactured home, mobilehome, commercial coach, truck camper, or floating home either (i) as the sole person or all of the persons who succeeded to the property of the decedent under Sections 6401 and 6402 of the Probate Code if the decedent left no will or (ii) as the beneficiary or beneficiaries under the decedent's last will if the decedent left a will, and no one has a right to the decedent's manufactured home, mobilehome, commercial coach, truck camper, or floating home that is superior to that of the declarant.

(D) There are no unsecured creditors of the decedent or, if there are, the unsecured creditors of the decedent have been paid in full or their claims have been otherwise discharged.

(3) If required by the department, a certificate of the death of the decedent.

(4) If required by the department, the names and addresses of any other heirs or beneficiaries.

(c) If the department is presented with the documents specified in paragraphs (1) and (2) of subdivision (b), no liability shall be incurred by the department or any officer or employee of the department by reason of the transfer of registration of the manufactured home, mobilehome, commercial coach, truck camper, or floating home pursuant to this section. The department or officer or employee of the department may rely in good faith on the statements in

the certificate specified in paragraph (2) of subdivision (b) and has no duty to inquire into the truth of any statement in the certificate. The person who secures the transfer of the manufactured home, mobilehome, commercial coach, truck camper, or floating home pursuant to this section is subject to the provisions of Sections 13109 to 13113, inclusive, of the Probate Code to the same extent as a person to whom transfer of property is made under Chapter 3 (commencing with Section 13100) of Part 1 of Division 8 of the Probate Code.

Comment. Section 18102 is amended to do the following:

(1) To add the provision for a 40-day delay after the decedent's death. This makes the section consistent with Probate Code §§ 13100 (affidavit procedure for collection or transfer of personal property), 13151 (court order determining succession to real property), 13540 (right of surviving spouse to dispose of real property); Veh. Code § 9916 (affidavit procedure for transfer of ownership of title or interest of decedent in vessel).

(2) To substitute references to the general provisions of the Probate Code governing intestate succession in place of the references to former Probate Code Section 630. Probate Code Section 630 has been repealed.

(3) To make clear that a beneficiary who takes a manufactured home, mobilehome, commercial coach, truck camper, or floating home under the decedent's will (whether or not the beneficiary is related to the decedent) may secure a transfer of registration of the title or interest of the decedent without the need to probate the decedent's estate. This is consistent with the practice of the department and with other comparable provisions. See Veh. Code §§ 5910 (vehicle), 9916 (vessel).

(4) To specify in somewhat more detail the contents of the certificate to be presented to the department and to limit to unsecured creditors the requirement that creditors have been paid. The section as amended is consistent with other comparable provisions. See Veh. Code §§ 5910 (vehicle), 9916 (vessel).

(5) To add subdivision (c). The first two sentences of subdivision (c) are drawn from the first sentence of former Section 631 of the Probate Code. The third sentence of subdivision (c) makes clear the extent of the liability of the person who secures the transfer under Section 18102. For provisions comparable to subdivision (c), see Veh. Code §§ 5910(c), 9916(c). See also Prob. Code § 13106.

Probate Code § 20 (amended). Application of definitions

Comment. Section 20 is amended to apply the definitions in Sections 21 through 88 to Divisions 8 (disposition of estate without administration), 9 (trust law), and 10 (proration of taxes), as well as to Divisions 1, 2, and 6. The introductory clause of Section 20 recognizes that, in a particular context, special definitions may be used that differ from those provided in Sections 21-88. See, e.g., Sections 20100 ("person interested in the estate," "property"), 20200 ("property," "trustee").

Probate Code § 584.2 (technical amendment). Exercise of restricted stock options

Comment. Section 584.2 is amended to substitute a reference to Section 1200.5 (giving notice of hearing by mail) in place of the reference to Section 1200 (posting notice of hearing). This is a technical, nonsubstantive revision.

Prior to 1980, Probate Code Section 1200 required notice both by posting and by mail. In 1980, the provisions for notice by mail were split out of Section 1200 and relocated in a new Section 1200.5 (see 1980 Cal. Stat. ch. 955, §§ 29, 31), but conforming revisions were not made to all the sections of the Probate Code that made reference to Section 1200. The substitution in Section 584.2 of a reference to Section 1200.5 (giving notice by mail) in place of the former reference to Section 1200 (posting notice of hearing) will effectuate legislative intent. Subdivision (d) of Section 1200 provides that notice by posting under that section is not required, notwithstanding any other provision of the Probate Code, except for a few matters specifically enumerated in that section, and subdivision (e) of Section 1200.5 provides that the notice by mail under that section is in addition to the notice, if any, required to be given in the manner specified in Section 1200.

Probate Code § 584.3 (technical amendment). Granting option to purchase real property

Comment. Section 584.3 is amended to delete the obsolete cross-reference to Section 1213.5 of the Civil Code which has been repealed, and to substitute a reference to the new Civil Code provisions which replaced the repealed section.

Probate Code § 584.5 (technical amendment). Investment of surplus moneys as provided in will

Comment. Section 584.5 is amended to substitute references to Section 1200.5 in place of the former references to Section

1200. This is a technical, nonsubstantive revision. See the Comment to Section 584.2.

Probate Code § 584.6 (technical amendment). Order authorizing investment of surplus moneys as provided in will

Comment. Section 584.6 is amended to substitute a reference to Section 1200.5 in place of the former reference to Section 1200. This is a technical, nonsubstantive revision. See the Comment to Section 584.2.

Probate Code § 605 (amended). Inventory and appraisement

Comment. Section 605 is amended to delete from paragraph (2) of subdivision (a) the provisions containing the references to former Sections 630 and 650, to make a technical revision in paragraph (3) of subdivision (a), and to add subdivisions (d) and (e) which contain references to special inventory and assessment provisions in the small estate set-aside statute and the disposition without administration provisions.

Probate Code § 704.2 (technical amendment). Claim for payment of debts of deceased spouse

Comment. Section 704.2 is amended to replace the references to former Section 649.4 with references to the new provisions which have replaced the former section.

Probate Code § 707 (technical amendment). Time to file certain claims

Comment. Section 707 is amended to replace the reference to former Section 630 with a reference to the new provisions that have replaced it.

Probate Code § 718.6 (technical amendment). Acceptance of deed in lieu of foreclosure or trustee's sale

Comment. Section 718.6 is amended to substitute a reference to Section 1200.5 in place of the former reference to Section 1200. This is a technical, nonsubstantive revision. See the Comment to Section 584.2.

Probate Code § 771.3 (technical amendment). Purchase of securities or commodities sold short

Comment. Section 771.3 is amended to substitute a reference to Section 1200.5 in place of the former reference to Section 1200.

This is a technical, nonsubstantive revision. See the Comment to Section 584.2.

Probate Code § 851.5 (technical amendment). Conveyance or transfer of property claimed to belong to decedent or another

Comment. Section 851.5 is amended to delete the language that requires the clerk to give notice as provided in Section 1200 (notice by posting). The posting requirement was eliminated by the addition of subdivision (d) to Section 1200. Subdivision (d) of Section 1200 provides that notice by posting under Section 1200 is not required unless the hearing is on a petition listed in subdivision (a) of Section 1200.

Section 851.5 also is amended to substitute a reference to Section 1200.5 in place of the former reference to Section 1200. This is a technical, nonsubstantive revision. See the Comment to Section 584.2.

Probate Code § 854 (amended). Option to purchase given in will

854. (a) When an option to purchase real or personal property is given in a will, the optionee has the right to exercise the option at any time within the time limits provided by the will. For the purposes of this section, if a time limitation in the will is measured from the death of the testator, that time shall be extended by the period between the testator's death and the issuance of letters testamentary or letters of administration with the will annexed or by six months, whichever is the shorter period.

(b) When an option to purchase real or personal property is given in a will admitted to probate, the optionee or the personal representative may petition the court, within any time limits provided in the will, for an order requiring that the property be transferred or conveyed to the optionee upon compliance with the terms and conditions stated in the will. The clerk shall set the petition for hearing by the court. Notice of the hearing on the petition shall be given for the period and in the manner required by Section 1200.5. The order shall not be made unless the court finds that the rights of creditors will not be impaired or requires a bond in an amount and with a surety as the court shall direct or approve.

(c) Subject to subdivision (d), if the option given in the will is exercisable under the terms of the will after the time that the estate would otherwise be closed, the property subject to the option shall be distributed subject to the option.

(d) If the will does not provide a time limit for exercise of the option, the time limit is one year from the death of the decedent.

Comment. Section 854 is amended to make the following changes:

(1) To add subdivisions (a) and (c) to make clear that the optionee may exercise the option given by will within any time limits provided by the will, and if the option remains exercisable when the estate is to be closed, the property is distributed subject to the option. This is consistent with *Estate of Secreto*, 134 Cal. App. 3d 938, 184 Cal. Rptr. 873 (1982), which held that the former six-month period for filing a petition did not limit the time the optionee had under the will to exercise the option.

(2) To add subdivision (d) to provide a one-year time limit from the decedent's death for exercise of the option when the will provides no time limit. This changes the former rule that when the will provided no time limit, the time limit was six months from issuance of letters. *Estate of Clark*, 152 Cal. App. 3d 894, 199 Cal. Rptr. 753 (1984).

(3) To permit the personal representative (whether or not the optionee) to file a petition under this section.

(4) To delete the language that required the clerk to give notice as provided in Section 1200 (notice by posting). The posting requirement was eliminated by the addition of subdivision (d) to Section 1200. Subdivision (d) of Section 1200 provides that notice by posting under Section 1200 is not required unless the hearing is on a petition listed in subdivision (a) of Section 1200.

(5) To substitute a reference to Section 1200.5 in place of the former reference to Section 1200. This is a technical, nonsubstantive revision. See the Comment to Section 584.2.

(6) To delete the fourth sentence which required either a court finding that all inheritance taxes had been paid or consent by the State Controller. Inheritance taxes have been eliminated in California. See Rev. & Tax. Code § 13301.

Probate Code § 910 (amended). Attorney's fees

910. Attorneys for executors and administrators shall be allowed out of the estate, as fees for conducting the ordinary probate proceedings, the same amounts as are

allowed by the previous article as commissions to executors and administrators; and such further amount as the court may deem just and reasonable for extraordinary services.

Comment. Section 910 is amended to delete the second paragraph. This paragraph is replaced by Section 13660.

**Probate Code § 1080 (technical amendment).
Determination of heirship**

Comment. Section 1080 is amended to substitute a reference to Section 1200.5 (notice by mail) in place of the reference to Section 1200 (posting notice of hearing). This is a technical, nonsubstantive revision.

Prior to 1980, Probate Code Section 1200 required notice both by posting and by mail. In 1980, the provisions for notice by mail were split out of Section 1200 and relocated in a new Section 1200.5 (see 1980 Cal. Stat. ch. 955, §§ 29, 31), but conforming revisions were not made to all the sections of the Probate Code that made reference to Section 1200. The substitution in Section 1080 of a reference to Section 1200.5 (giving notice by mail) in place of the former reference to Section 1200 (posting notice of hearing) will effectuate legislative intent. Subdivision (d) of Section 1200 provides that notice by posting under that section is not required, notwithstanding any other provision of the Probate Code, except for a few matters specifically enumerated in that section, and subdivision (e) of Section 1200.5 provides that the notice by mail under that section is in addition to the notice, if any, required to be given in the manner specified in Section 1200.

Probate Code § 1191 (technical amendment). Petition to determine heirship

Comment. Section 1191 is amended to delete the language that requires the clerk to give notice as provided in Section 1200 (notice by posting). The posting requirement was eliminated by the addition of subdivision (d) to Section 1200. Subdivision (d) of Section 1200 provides that notice by posting under Section 1200 is not required unless the hearing is on a petition listed in subdivision (a) of Section 1200.

Section 1191 also is amended to substitute a reference to Section 1200.5 in place of the former reference to Section 1200. This is a technical, nonsubstantive revision. See the Comment to Section 584.2.

Probate Code § 1200.5 (amended). Notice by mail or personal service

Comment. Subdivision (a) of Section 1200.5 is amended to make the following changes:

(1) To add a reference in paragraph (6) to a petition to authorize a transfer or conveyance to one given an option to purchase the decedent's property given in a will admitted to probate. See Section 854.

(2) To amend paragraph (22) to recognize that various sections in the Probate Code may require that notice of hearing be given for the period and in the manner required by Section 1200.5 although the subject of the hearing is not listed in paragraphs (1) to (21).

Probate Code § 1406 (repealed & added). Account in an insured savings and loan association

1406. (a) "Account in an insured savings and loan association" means a savings account or mutual capital certificate of either of the following:

(1) A federal association.

(2) A savings association doing business in this state which is an "insured institution," as defined in Title IV of the National Housing Act (12 U.S.C. Sec. 1724 et seq.).

(b) As used in this section:

(1) "Federal association" has the same meaning as defined in subdivision (b) of Section 5102 of the Financial Code.

(2) "Mutual capital certificate" has the same meaning as defined in Section 5111 of the Financial Code.

(3) "Savings account" has the same meaning as defined in Section 5116 of the Financial Code.

(4) "Savings association" has the same meaning as defined in subdivision (a) of Section 5102 of the Financial Code.

Comment. Section 1406 is repealed and reenacted to conform to the Financial Code provisions as revised by Chapter 1091 of the Statutes of 1983.

Probate Code § 1469 (technical amendment). Notice under guardianship-conservatorship law

Comment. Section 1469 is amended to add a reference to Section 1200.5. The effect of this addition is to require that notice be given under the provisions of the

guardianship-conservatorship law where this division applies provisions of the Probate Code that contain a reference to Section 1200.5.

Vehicle Code § 5910 (amended). Transfer of vehicle without probate

5910. (a) Upon the death of an owner or legal owner of a vehicle registered under this code, without the decedent leaving other property necessitating probate, and irrespective of the value of the vehicle, the following person or persons may secure transfer of registration of the title or interest of the decedent:

(1) The sole person or all of the persons who succeeded to the property of the decedent under Sections 6401 and 6402 of the Probate Code unless the vehicle is, by will, otherwise bequeathed.

(2) The sole beneficiary or all of the beneficiaries who succeeded to the vehicle under the will of the decedent where the vehicle is, by will, so bequeathed.

(b) The person authorized by subdivision (a) may secure a transfer of registration of the title or interest of the decedent upon presenting to the department all of the following:

(1) The appropriate certificate of ownership and registration card, if available.

(2) A certificate of the heir or beneficiary under penalty of perjury containing the following statements:

(A) The date and place of the decedent's death.

(B) The decedent left no other property necessitating probate and no probate proceeding is now being or has been conducted in this state for the decedent's estate.

(C) The declarant is entitled to the vehicle either (i) as the sole person or all of the persons who succeeded to the property of the decedent under Sections 6401 and 6402 of the Probate Code if the decedent left no will or (ii) as the beneficiary or beneficiaries under the decedent's last will if the decedent left a will, and no one has a right to the decedent's vehicle that is superior to that of the declarant.

(D) There are no unsecured creditors of the decedent or, if there are, the unsecured creditors of the decedent have been paid in full or their claims have been otherwise discharged.

(3) If required by the department, a certificate of the death of the decedent.

(4) If required by the department, the names and addresses of any other heirs or beneficiaries.

(c) If the department is presented with the documents specified in paragraphs (1) and (2) of subdivision (b), no liability shall be incurred by the department or any officer or employee of the department by reason of the transfer of registration of the vehicle pursuant to this section. The department or officer or employee of the department may rely in good faith on the statements in the certificate specified in paragraph (2) of subdivision (b) and has no duty to inquire into the truth of any statement in the certificate. The person who secures the transfer of the vehicle pursuant to this section is subject to the provisions of Sections 13109 to 13113, inclusive, of the Probate Code to the same extent as a person to whom transfer of property is made under Chapter 3 (commencing with Section 13100) of Part 1 of Division 8 of the Probate Code.

(d) The department may prescribe a combined form for use under this section and Section 9916.

Comment. Section 5910 is amended to do the following:

(1) To substitute references to the general provisions of the Probate Code governing intestate succession in place of the references to former Probate Code Section 630. Probate Code Section 630 has been repealed.

(2) To add a new subdivision (c), and to redesignate former subdivision (c) as subdivision (d). The first two sentences of subdivision (c) are drawn from the first sentence of former Section 631 of the Probate Code. The third sentence of subdivision (c) makes clear the extent of the liability of the person who secures the transfer under Section 5910. For provisions comparable to subdivision (c), see Health & Safety Code § 18102(c); Veh. Code § 9916(c). See also Prob. Code § 13106.

Vehicle Code § 9916 (amended). Transfer of vessel without probate

9916. (a) If 40 days have elapsed since the death of an owner or legal owner of any vessel numbered under this division without the decedent leaving other property necessitating probate, and irrespective of the value of the

vessel, the following person may secure a transfer of ownership of the title or interest of the decedent:

(1) The sole person or all of the persons who succeeded to the property of the decedent under Sections 6401 and 6402 of the Probate Code unless the vessel is, by will, otherwise bequeathed.

(2) The sole beneficiary or all of the beneficiaries who succeeded to the vessel under the will of the decedent where the vessel is, by will, so bequeathed.

(b) The person authorized by subdivision (a) may secure a transfer of ownership of the title or interest of the decedent upon presenting to the department all of the following:

(1) The appropriate certificate of ownership and certificate of number, if available.

(2) A certificate of the heir or beneficiary under penalty of perjury containing the following statements:

(A) The date and place of the decedent's death.

(B) The decedent left no other property necessitating probate and no probate proceeding is now being or has been conducted in this state for the decedent's estate.

(C) The declarant is entitled to the vessel either (i) as the sole person or all of the persons who succeeded to the property of the decedent under Sections 6401 and 6402 of the Probate Code if the decedent left no will or (ii) as the beneficiary or beneficiaries under the decedent's last will if the decedent left a will, and no one has a right to the decedent's vessel that is superior to that of the declarant.

(D) There are no unsecured creditors of the decedent or, if there are, the unsecured creditors of the decedent have been paid in full or their claims have been otherwise discharged.

(3) If required by the department, a certificate of the death of the decedent.

(4) If required by the department, the names and addresses of any other heirs or beneficiaries.

(c) If the department is presented with the documents specified in paragraphs (1) and (2) of subdivision (b), no liability shall be incurred by the department or any officer or employee of the department by reason of the transfer of registration of the vessel pursuant to this section. The department or officer

or employee of the department may rely in good faith on the statements in the certificate specified in paragraph (2) of subdivision (b) and has no duty to inquire into the truth of any statement in the certificate. The person who secures the transfer of the vessel pursuant to this section is subject to the provisions of Section 13109 to 13113, inclusive, of the Probate Code to the same extent as a person to whom transfer of property is made under Chapter 3 (commencing with Section 13100) of Part 1 of Division 8 of the Probate Code.

Comment. Section 9916 is amended to do the following:

(1) To substitute references to the general provisions of the Probate Code governing intestate succession in place of the references to former Probate Code Section 630. Probate Code Section 630 has been repealed.

(2) To add a new subdivision (c). The first two sentences of subdivision (c) are drawn from the first sentence of former Section 631 of the Probate Code. The third sentence of subdivision (c) makes clear the extent of the liability of the person who secures the transfer under Section 9916. For provisions comparable to subdivision (c), see Health & Safety Code § 18102(c); Veh. Code § 5910(c). See also Prob. Code § 13106.

COMMENTS TO REPEALED SECTIONS

Probate Code § 630 (repealed). Affidavit procedure for estates not exceeding \$60,000 (as amended by 1985 Cal. Stat. ch. 982)

Comment. The portion of subdivision (a) of Section 630 which restricted use of the affidavit procedure to cases where the gross value of the decedent's real and personal property in this state does not exceed \$60,000 is continued in Section 13100 without substantive change. The portion of subdivision (a) which precluded use of the affidavit procedure if the gross value of the decedent's real property in this state exceeded \$10,000 is not continued. The portion of subdivision (a) which excluded certain state registered property is continued in Section 13050(b) with the addition of "floating home." The portions of subdivision (a) which excluded amounts due for services in the armed forces of the United States and not exceeding \$5,000 in compensation owing to the decedent for services from any employment is continued in Section 13050(c) without substantive change.

The portion of subdivision (b) of Section 630 that limited use of the affidavit procedure in intestate succession cases to the relatives of the decedent listed in the subdivision is not continued. See Sections 13006 (defining "successor of the decedent"), 13100 (persons authorized to use affidavit procedure).

The portion of subdivision (b) relating to the guardian or conservator of the estate is superseded by Section 13051(a). The portion of subdivision (b) relating to a trustee is superseded by the last sentence of subdivision (a) of Section 13006 and by Section 13051(b). The reference in subdivision (b) to the beneficiaries under the decedent's will is continued in Section 13006(a) and by the use of the defined term "successor of the decedent" in Sections 13100-13115 which supersede former Probate Code §§ 630-632. The portion of subdivision (b) that required that the person or persons listed has or have a right to succeed to the property of the decedent is continued in effect under Section 13006 (defining "successor of the decedent").

The portion of subdivision (b) of Section 630 granting authority to collect money, receive tangible personal property, or have evidences transferred without probate is continued in Section 13100, but is made subject to a 40-day delay and to other requirements. See the Comment to Section 13100.

The reference in subdivision (b) of Section 630 to a "financial institution" has been omitted as unnecessary because a financial institution is included within the definition of "holder of the decedent's property" in Section 13002 as a person "owing money to the decedent." See also Section 56 (defining "person"). The phrase "person, representative, corporation, officer or body" in subdivision (b) has been omitted as unnecessary in view of the broad definition of "person" in Section 56.

The reference in subdivision (b) of Section 630 to the "person . . . owing the money, having custody of such property or acting as registrar or transfer agent of such evidences of debt, obligation, interest, right, stock, or chose in action" is continued in the definition of "holder of the decedent's property" in Section 13002 and by use of the defined term in Sections 13100-13115 which supersede former Probate Code §§ 630-632.

The portion of subdivision (b) of Section 630 referring to furnishing an affidavit or declaration under penalty of perjury showing the right of the person or persons to receive the money or property or to have the evidences transferred is superseded by Section 13101 which specifies the contents of the affidavit or declaration. See also Sections 13102 (presenting decedent's evidence of ownership), 13103 (inventory and appraisalment of real property), 13104 (proof of identity).

The last sentence of subdivision (b) of Section 630 is restated in Section 13115 without substantive change.

Subdivision (c) of Section 630 is restated in subdivision (c) of Section 13051 without substantive change.

Subdivision (d) of Section 630 is continued in Section 13105(a) (2) and Section 13106 without substantive change.

Subdivision (e) of Section 630 is continued in Section 13114 without substantive change.

Probate Code § 631 (repealed). Effect of receipt of affidavit

Comment. The first sentence of former Section 631 is continued without substantive change in Section 13106(a) with the addition of clarifying language. The last sentence is continued without substantive change in Section 13108(b). See the Comment to that section. See also Section 13111 (restitution if estate proceeding commenced).

Probate Code § 631.1 (repealed). Claim against estate in probate

Comment. Section 631.1 is continued without substantive change in Section 13107.

Probate Code § 632 (repealed). Exclusion of estate terminable upon death and of property passing to surviving spouse

Comment. Section 632 is continued without substantive change in Section 13050(a) (1).

Probate Code § 649.1 (repealed). Necessity of administration; election of administration; transfer of property to trustee

Comment. Former Section 649.1 is continued in substance by the following provisions of the Probate Code: Subdivision (a) is continued in Section 13500; subdivisions (b) and (c) are continued in Section 13502; subdivision (d) is continued in Section 13503.

Probate Code § 649.2 (repealed). Right of surviving spouse to dispose of property

Comment. Former Section 649.2 is continued in substance by the following provisions of the Probate Code: The first sentence

is continued in Sections 13540 and 13541, the second and third sentences are continued in Section 13541, and the fourth sentence is continued in Section 13540.

Probate Code § 649.3 (repealed). Property subject to administration

Comment. Former Section 649.3 is continued without substantive change in Section 13501.

Probate Code § 649.4 (repealed). Liability for debts of deceased spouse

Comment. Former Section 649.4 is continued in substance by the following provisions of the Probate Code: Subdivision (a) is continued in Section 13550; subdivision (b) is continued in Section 13551; subdivision (c) is continued in Section 13553; subdivision (d) is continued in Section 13552; subdivision (e) is continued in Section 13554.

Probate Code § 649.5 (repealed). Property held in revocable trust

Comment. Former Section 649.5 is continued in substance in Section 13504.

Probate Code § 649.6 (repealed). Reference in written instrument to repealed statutory provisions

Comment. Former Section 649.6 is continued in substance in Section 13506.

Probate Code § 650 (repealed). Contents of petition by surviving spouse

Comment. Former Section 650 is continued without substantive change by the following provisions of the Probate Code: The first sentence of subdivision (a) is continued in subdivision (a) of Section 13650 and the introductory clause of subdivision (a) of Section 13651; the remainder of subdivision (a) and all of subdivision (b) are continued in Section 13651; subdivision (c) is continued in subdivision (b) of Section 13650; subdivision (d) is continued in subdivision (c) of Section 13650.

Probate Code § 651 (repealed). Filing petition in pending proceeding or joining petition with petition for probate

Comment. The first sentence of former Section 651 is continued without substantive change in Section 13652. The second sentence is continued in Section 13653 without substantive change.

Probate Code § 652 (repealed). Probate not precluded by petition

Comment. Former Section 652 is continued without substantive change in Section 13654.

Probate Code § 653 (repealed). Hearing on petition; notice of hearing

Comment. Former Section 653 is superseded by subdivision (b) of Section 13655. See the Comment to Section 13655.

Probate Code § 654 (repealed). Notice of hearing on petition joined with petition for probate

Comment. Former Section 654 is superseded by subdivision (a) of Section 13655. See the Comment to Section 13655.

Probate Code § 655 (repealed). Court order

Comment. Subdivisions (a) and (b) of former Section 655 are continued without substantive change in Section 13656. Subdivision (c) is continued in Section 13657 without substantive change.

Probate Code § 656 (repealed). Protection of creditors of business of deceased spouse

Comment. Former Section 656 is continued without substantive change in Section 13658 except that it is made clear that the provision is limited to creditors of an "unincorporated" business. See also the Comment to Section 13658.

Probate Code § 657 (repealed). Filing of inventory and appraisal

Comment. The first three sentences of former Section 657 are continued without substantive change in Section 13659. The last sentence is superseded by the first sentence of Section 13659 and the last portion of Section 13658.

Probate Code § 658 (repealed). Applicability of article as amended

Comment. Former Section 658 is replaced by Section 13505.

CALIFORNIA LAW REVISION COMMISSION
RECOMMENDATION

relating to

SMALL ESTATE SET-ASIDE

(Revised to Reflect Changes Made in Legislature)

Editorial note. The following text is taken from the Law Revision Commission's *Recommendation Relating to Small Estate Set-Aside*, 18 Cal. L. Revision Comm'n Reports 1101 (1986). This material has been revised to reflect the changes made in the Legislature after the Commission's recommended legislation was introduced. Although these revisions were made by the Commission's legal staff, the revised text does not necessarily represent the views of the Commission.

Material added to the text of the Commission's original printed recommendation is shown in italics. The omission of material appearing in the original recommendation is also indicated. The omitted text related to the legislation as proposed by the Commission that is no longer relevant in light of the changes made in the Legislature.

RECOMMENDATION

relating to

SMALL ESTATE SET-ASIDE

EXISTING LAW

When the net value of the decedent's estate does not exceed \$20,000,¹ it may be summarily set aside to the surviving spouse if not remarried or, if there is no unmarried surviving spouse, to the minor child or children of the decedent.²

The purpose of this small estate set-aside is to make the entire estate available for the support of the surviving spouse or minor children when the breadwinner is taken by death leaving but a small estate. The surviving spouse or minor children take the estate free from the rights of those who otherwise would take all or part of it under the decedent's will or by intestate succession.³ In addition, there are some circumstances where a small estate set-aside is a useful summary method for collecting the estate or transferring the record title to estate property.⁴

¹ The net value of the decedent's estate is computed by reducing its gross value by the amount of any liens or encumbrances and by the value of any probate homestead set apart out of the property. Prob. Code §§ 640, 645. Property held by the decedent in joint tenancy and other interests that terminate at death (such as life interests in trusts, retirement, and insurance, and life estates) are not included in determining the value of the decedent's estate. Prob. Code § 647; O. McCarroll, 1 California Decedent Estate Administration Supplement § 3.24, at 84 (Cal. Cont. Ed. Bar 1985). Any multiple-party account (as defined in Prob. Code § 5101) to which the decedent was a party at the time of death is also excluded in determining the estate of the decedent or its value to the extent that the sums on deposit belong to a surviving party, pay-on-death payee, or beneficiary. Prob. Code § 647. The decedent's one-half share of the community and quasi-community property as well as the decedent's separate property must be taken into account for the purposes of determining whether the estate is under \$20,000. Estate of Pezzola, 112 Cal. App. 3d 752, 169 Cal. Rptr. 464 (1980). It is unclear whether only California property is included in computing the \$20,000 limitation. See Broll, *Summary Administration*, in 1 California Decedent Estate Administration § 3.24, at 129 (Cal. Cont. Ed. Bar 1971).

² Prob. Code §§ 640, 645.

³ Estate of Pezzola, 112 Cal. App. 3d 752, 169 Cal. Rptr. 464 (1980). See also *In re Estate of Woodburn*, 212 Cal. 683, 300 P. 22 (1931).

⁴ Ordinarily, in order to avoid the need for a court proceeding, the affidavit procedure under Prob. Code § 630 will be used to collect personal property of a decedent or to have the registrar transfer the record title. But the small estate set-aside procedure under Prob. Code §§ 640-647 must be used instead of the Prob. Code § 630 procedure where (1) the small estate includes an interest in California real property

A petition to have a small estate set aside may be filed without filing a petition for probate of the will or for letters of administration, or the petition may be joined with a petition for probate or for letters of administration.⁵ An inventory and appraisal by a probate referee is required.⁶ If the court finds that the statutory requirements concerning the size of the estate are satisfied and that the expenses of the last illness, funeral charges, and expenses of administration have been paid, the court must make an order setting aside the entire estate to the surviving spouse if unremarried or, if there is not an unmarried surviving spouse, to such child or children of the decedent as may then be minors.⁷

The surviving spouse or minor children to whom the small estate is set aside are personally liable for decedent's unsecured debts up to the net amount received, less liens, encumbrances, and probate homestead and other exempt property.⁸ This liability terminates one year after title has vested unless the creditor has filed a court action within that time.⁹

RECOMMENDATIONS

The Commission has studied the small estate set-aside provisions and recommends a new statute to replace the existing provisions.¹⁰ The new statute makes several

having a gross value of more than \$10,000, (2) the widow or minor child does not have the right (under the will or the laws of intestate succession) to inherit the property, or (3) the property set aside has a gross value of more than \$60,000, but the net value (over and above liens, encumbrances, and the value of the probate homestead) does not exceed \$20,000. See O. McCarroll, 1 California Decedent Estate Administration Supplement § 3.24, at 85 (Cal. Cont. Ed. Bar 1985). A surviving spouse will ordinarily use the procedure under Prob. Code §§ 650-658 instead of a small estate set-aside if the surviving spouse takes the property by will or intestate succession because the procedure under Prob. Code §§ 650-658 can be used without regard to the size of the deceased spouse's estate. But the liability of the surviving spouse for the unsecured debts of the deceased spouse may be greater if the procedure under Prob. Code §§ 650-658 is used. Compare Prob. Code § 649.4 with Prob. Code § 645.3.

⁵ Prob. Code § 641.

⁶ Prob. Code § 644. Use of a probate referee is not required if the estate consists entirely of property which the personal representative can appraise under Prob. Code § 605.

⁷ Prob. Code § 645.

⁸ Prob. Code § 645.3. Compare the liability of a surviving spouse under Prob. Code § 645.3 with the liability of the surviving spouse under Prob. Code § 649.4.

⁹ Prob. Code § 645.3.

¹⁰ The new small estate set-aside provisions are compiled in the portion of the Probate Code containing the other family protection provisions, since the primary purpose of the small estate set-aside is to make the entire estate available for the support of the decedent's family. See *supra* text accompanying note 3.

important substantive changes in the existing law. These changes are described below.¹¹

Small estate set-aside discretionary with court. Under existing law, the court has no discretion and is required to set aside the small estate to the unmarried surviving spouse or minor child or children if the court finds that the net value of the decedent's estate is such that it is a small estate within the statute and that the expenses of the last illness, funeral charges, and expenses of administration have been paid.¹²

The new statute gives the court discretion . . . *to decline to set aside a small estate if the court determines that it would be inequitable to do so.* The new statute requires the court in exercising its discretion to consider the same factors as the court is required to consider in determining whether to set apart a probate homestead.¹³ The small estate set-aside may give to the surviving spouse or minor children property that otherwise would go to another under the decedent's will or by intestate succession. Giving the court discretion to . . . *decline* to set aside the small estate provides the flexibility needed to treat fairly the decedent's dependents and those who otherwise would take the property¹⁴ and is consistent with the discretionary nature of the other family protection provisions.¹⁵

¹¹ Minor changes not discussed in the text are indicated in the Comments to the sections of the recommended legislation.

¹² Prob. Code § 645.

¹³ In determining whether to make a small estate set-aside, the court is required by the new statute to consider the needs of the surviving spouse and minor children, the liens and encumbrances on the property of the decedent's estate, the claims of creditors, the needs of the heirs or devisees of the decedent, the intent of the decedent with respect to the property in the estate and the estate plan of the decedent as expressed in inter vivos and testamentary transfers or by other means, and any other relevant considerations. *Cf.* Prob. Code § 6523 (probate homestead).

¹⁴ For example, the decedent may have made adequate provision for the surviving spouse and minor children by inter vivos transfers, by holding property in joint tenancy with members of the family, or by making members of the family beneficiaries of other interests that terminate at death, such as life interests in trusts, retirement, and insurance, and remainder interests upon termination of the decedent's life estate in property. The family members also may succeed to real property located in another state. Where the decedent has made adequate provision for the family members, it may be unjust and unnecessary under the circumstances to deprive the person who would take part or all of the small estate of that right by requiring the court to set aside the small estate. Giving the court discretion to . . . *decline* to make a small estate set-aside permits the court to achieve substantial justice in these cases.

¹⁵ See Prob. Code §§ 6510 (setting aside exempt property other than family dwelling), 6520-6523 (setting apart probate homestead), 6540-6541 (family allowance).

Property included in "decedent's estate." Under existing law, the small estate set-aside is available only if the "net value of the whole estate" (over and above all liens and encumbrances and the value of any probate homestead) does not exceed \$20,000.¹⁶ The meaning of the phrase "the whole estate" is unclear.¹⁷ The new statute replaces the phrase "the whole estate" with a definition that the decedent's estate means all the decedent's personal property, wherever located, and all of the decedent's real property in California. This new definition will eliminate uncertainty whether an estate qualifies for a small estate set-aside. It will not, however, preclude the court from taking into account the decedent's real property located in another state in determining whether to order a small estate set-aside.¹⁸

Persons for whom small estate may be set aside. The new statute gives the court flexibility to determine the persons to whom the small estate is to be set aside.

Existing law does not permit the estate to be assigned to the minor child or children if there is an unmarried surviving spouse.¹⁹ Under the new statute, the court may assign the estate to the minor child or minor children of the decedent even where there is a surviving spouse. This may be desirable, for example, if the minor children live apart from the surviving spouse or where the minor children are not children of the surviving spouse. This change makes the small estate set-aside consistent with other family protection provisions.²⁰

Under existing law,²¹ the court can assign the estate only to a "surviving spouse who has not theretofore remarried."

¹⁶ Prob. Code § 640. See also Prob. Code § 647.

¹⁷ See Broll, *Summary Administration*, in 1 California Decedent Estate Administration § 3.24, at 129 (Cal. Cont. Ed. Bar 1971).

¹⁸ Under the new statute, the court has discretion . . . to decline to order a small estate set-aside and can consider all relevant factors, including the disposition of the decedent's real property located in another state, in determining whether to order the small estate set-aside. See *supra* text accompanying notes 12-15.

¹⁹ Prob. Code § 645.

²⁰ Prob. Code §§ 6510 (setting aside exempt property other than family dwelling), 6521 (setting apart probate homestead), 6540 (family allowance).

²¹ Prob. Code § 645.

Under the new statute, the assignment may be made to the surviving spouse even if the surviving spouse has remarried.²² Permitting the estate to be set aside to a surviving spouse, whether or not remarried, gives the court flexibility to make an order that is appropriate under the circumstances of the particular case. It also makes the small estate set-aside consistent with other family protection provisions.²³

Under the new statute, the determination whether a child is a minor is made at the time of the death of the decedent. Under existing law, if the other statutory requirements are satisfied, the court can order that the estate be set aside "to such child or children of the decedent as may then be minors."²⁴ The apparent result of this provision is that a child who is a minor at the time of the decedent's death is deprived of the right to a small estate set-aside unless the order is made while the child is still a minor.

Application of new statute. The new statute applies only to cases where the decedent died on or after the date the new statute becomes operative. If the decedent dies before the operative date of the new statute, the case continues to be governed by existing law.

²² The new statute creates a presumption that the needs of a remarried spouse do not justify the setting aside of the small estate. This is a presumption affecting the burden of proof.

²³ Prob. Code §§ 6510 (setting aside exempt property other than family dwelling), 6521 (setting apart probate homestead), 6540 (family allowance).

²⁴ Prob. Code § 645.

Editorial note. The new statute relating to small estate set-aside was added to the Probate Code by Chapter 783 of the Statutes of 1986 and becomes operative on July 1, 1987. Each section of the new statute is followed by its official comment. The comments are taken from the Law Revision Commission's *Recommendation Relating to Small Estate Set-Aside*, 18 Cal. L. Revision Comm'n Reports 1101 (1986), and from the *Communication From California Law Revision Commission Concerning Assembly Bill 2625*, on file with the Assembly Committee on Judiciary, the Senate Committee on Judiciary, and the Legislative Counsel. Comments to conforming revisions and repealed sections are taken from the same sources.

PART 3. FAMILY PROTECTION

CHAPTER 6. SMALL ESTATE SET-ASIDE

§ 6600. "Decedent's estate" defined; exclusions in determining estate of the decedent or its value

6600. (a) Subject to subdivision (b), for the purposes of this chapter, "decedent's estate" means all the decedent's personal property, wherever located, and all the decedent's real property located in this state.

(b) For the purposes of this chapter:

(1) Any property or interest or lien thereon which, at the time of the decedent's death, was held by the decedent as a joint tenant, or in which the decedent had a life or other interest terminable upon the decedent's death, shall be excluded in determining the estate of the decedent or its value.

(2) A multiple-party account to which the decedent was a party at the time of the decedent's death shall be excluded in determining the estate of the decedent or its value, whether or not all or a portion of the sums on deposit are community property, to the extent that the sums on deposit belong after the death of the decedent to a surviving party, P.O.D. payee, or beneficiary. As used in this paragraph, the terms "multiple-party account," "party," "P.O.D. payee," and "beneficiary" have the same meaning as given those terms by Section 5101.

Comment. Subdivision (a) of Section 6600 is a new provision that defines "decedent's estate." This definition replaces the phrase "the whole estate" used in former Section 640. As defined in subdivision (a), "decedent's estate" is not limited to probate assets. The term includes all personal property, wherever located, and all real property located in this state, excluding the property described in subdivision (b).

Subdivision (a) requires, for example, that the decedent's one-half share of the community and quasi-community property be included in determining the decedent's estate or its value, whether or not the decedent's interest is set apart to the surviving spouse under Sections 13650-13660, unless the interest is excluded in determining the estate of the decedent under subdivision (b) as would be the case, for example, if the property is held in joint tenancy. This is consistent with prior law. Estate of Pezzola, 112 Cal. App. 3d 752, 169 Cal. Rptr. 464 (1980).

Subdivision (a) makes clear that real property located outside California is not included in determining the estate of the decedent or its value. The rule under former Probate Code Section 640 was unclear. See Broll, *Summary Administration*, in 1 California Decedent Estate Administration § 3.24, at 129 (Cal. Cont. Ed. Bar 1971). Apparently real property outside California was not included under former law, since former Section 644 required "an inventory and appraisal to be prepared in the manner prescribed by law and filed within such time as the court may allow," and an inventory and appraisal does not include real property located outside California.

Subdivision (b) of Section 6600 continues former Section 647 without substantive change. Subdivision (b) excludes any interest that terminates at death in determining the estate of the decedent or its value. If the interest is one that passes to another on the death of the decedent by virtue of a joint tenancy, a pay-on-death provision, or a contractual provision that provides that the interest is to be transferred or paid to another upon the death of the decedent, subdivision (b) (1) requires that the value of the interest be excluded in determining the estate of the decedent or its value. For example, if there is a policy of insurance on the decedent's life and the proceeds are payable to a named beneficiary (not to the decedent's estate), the insurance proceeds are excluded in determining the estate of the decedent or its value. Similarly, for example, if the decedent has a retirement plan that provides benefits to a surviving spouse, those benefits are excluded in determining the estate of the decedent or its value. Subdivision (b) also excludes, for example, life interests in trusts and life estates. See O. McCarroll, 1 California Decedent Estate Administration Supplement § 3.24, at 84 (Cal. Cont. Ed. Bar 1985).

Note. The Comment to Section 6600 refers to Sections 13650-13660. Those sections are recommended by the Commission to replace existing Sections 650-658 (determination or confirmation of property passing or belonging to surviving spouse) in *Recommendation Relating to Disposition of Estate Without Administration*, *supra*.

§ 6601. "Minor child" defined

6601. As used in this chapter, "minor child" means a child of the decedent who was under the age of 18 at the time of the decedent's death and who survived the decedent.

Comment. Section 6601 is a new provision that makes clear that the determination whether a child is a minor is made at the

time of the death of the decedent. Under former Section 645, if the other statutory requirements were satisfied, the court could order that the estate be set aside "to such child or children of the decedent as may then be minors." The apparent result of this provision was that a child who was a minor at the time of the decedent's death was deprived of the right to a small estate set aside if the order was not made while the child was still a minor. The definition under Section 6601 avoids this result.

§ 6602. Petition to set aside small estate

6602. A petition may be filed under this chapter requesting an order setting aside the decedent's estate to the decedent's surviving spouse and minor children, or one or more of them, as provided in this chapter, if the net value of the decedent's estate, over and above all liens and encumbrances at the date of death and over and above the value of any probate homestead interest set apart out of the decedent's estate under Section 6520, does not exceed twenty thousand dollars (\$20,000).

Comment. Section 6602 supersedes former Section 640. The purpose of this chapter is to insure the support of the dependent surviving spouse or minor children when the breadwinner is taken by death leaving but a small estate. This right to have a small estate set aside effectively forecloses the rights of a third person to inherit or otherwise receive a part of that estate under the decedent's will. Estate of Pezzola, 112 Cal. App. 3d 752, 169 Cal. Rptr. 464 (1980).

Like former Section 640, Section 6602 limits the use of this chapter to a case where the decedent's estate, less liens and encumbrances and the value of any probate homestead interest, does not exceed \$20,000. See also Section 6600 (defining "decedent's estate") and the Comment to that section. Although this chapter continues the substance of this limitation, it makes other significant changes in existing law. See the Comment to Section 6609.

§ 6603. Venue

6603. The petition shall be filed in the superior court of a county in which the estate of the decedent may be administered.

Comment. Section 6603 is a new provision that specifies the county in which the petition is to be filed. The section is consistent with a provision of Section 13650 (determination or

confirmation of property passing or belonging to surviving spouse).

Note. The Comment to Section 6603 refers to Section 13650. That section is recommended by the Commission to replace most of existing Section 650 in *Recommendation Relating to Disposition of Estate Without Administration, supra*.

§ 6604. Contents of petition

6604. (a) The petition shall allege that this chapter applies and request that an order be made setting aside the estate of the decedent as provided in this chapter.

(b) The petition shall include the following:

(1) If proceedings for administration of the estate are not pending, the facts necessary to determine the county in which the estate of the decedent may be administered.

(2) The names, ages, residences, and relation to the decedent of the heirs and devisees of the decedent, so far as known to the petitioner.

(3) A specific description and estimate of the value of the decedent's estate and a list of all liens and encumbrances at the date of death.

(4) A specific description and estimate of the value of any of the decedent's real property located outside this state that passed to the surviving spouse and minor children of the decedent, or any one or more of them, under the will of the decedent or by intestate succession.

(5) A specific description and estimate of the value of any of the decedent's property described in subdivision (b) of Section 6600 that passed to the surviving spouse and minor children of the decedent, or any one or more of them, upon the death of the decedent.

(6) A designation of any property as to which a probate homestead is set apart out of the decedent's estate under Section 6520.

(7) A statement of any unpaid liabilities for expenses of the last illness, funeral charges, and expenses of administration.

(8) The requested disposition of the estate of the decedent under this chapter and the considerations that justify the requested disposition.

Comment. Subdivision (a) of Section 6604 continues the first portion of the first sentence of former Section 641 without substantive change. Subdivision (b) supersedes the last sentence

of former Section 641 which specified the contents of the petition.

Paragraph (1) of subdivision (b) is new. This paragraph implements Section 6603 (venue).

Paragraph (2) of subdivision (b) is new and is designed to implement the provision for giving notice of the hearing on the petition under this chapter. See Section 6607.

Paragraphs (3), (4), and (5) of subdivision (b) supersede the provision of former Section 641 that required that the petition include "a specific description and an estimate of the value of all of the decedent's property" and "a list of all liens and encumbrances at the date of death."

Paragraph (6) of subdivision (b) continues a requirement of former Section 641 without substantive change.

Paragraph (7) of subdivision (b) is new and is consistent with subdivision (d) of Section 6609 (court shall ensure that expenses of last illness, funeral charges, and expenses of administration are paid).

Paragraph (8) is new. This paragraph requires that the petition contain the information necessary so that the court may make an appropriate order under Section 6609. If the court makes an order under Section 6609, the court may set aside the small estate to the surviving spouse and minor children of the decedent, or to any one or more of them. See the Comment to 6609. The petition, for example, may request that the small estate be set aside to one of the minor children and that the other minor children and the spouse be excluded, or it may request that the small estate be set aside in unequal shares to the minor children. In determining whether to make such an order, the court must take into account the various considerations listed in subdivision (b) of Section 6609.

§ 6605. Filing of petition

6605. (a) If proceedings for the administration of the estate of the decedent are pending, a petition under this chapter shall be filed in those proceedings without the payment of an additional fee.

(b) If proceedings for the administration of the estate of the decedent have not yet been commenced, a petition under this chapter may be filed concurrently with a petition for the probate of the decedent's will or for administration of the estate of the decedent, or, if no petition for probate or for administration is being filed, a petition under this chapter may be filed independently.

(c) A petition may be filed under this chapter at any time prior to the entry of the order of final distribution of the estate.

Comment. Subdivisions (a) and (b) of Section 6605 continue the substance of portions of former Section 641 with language added to subdivision (a) to provide that a petition under this chapter may be filed in a pending probate proceeding "without the payment of an additional fee." The added language is drawn from Section 13652 (determination or confirmation of property passing or belonging to surviving spouse).

Subdivision (c), which permits a petition to be filed at any time prior to the final distribution of the estate, replaces the provision of former Section 641 which permitted a petition to be "filed at any time before the hearing on the petition for probate of the will or for letters of administration or after the filing of the inventory."

Note. The Comment to Section 6605 refers to Section 13652. That section is recommended for enactment by the Commission in *Recommendation Relating to Disposition of Estate Without Administration, supra*.

§ 6606. Persons who may file petition

6606. (a) A petition may be filed under this chapter by any of the following:

- (1) The person named in the will of the decedent as executor.
- (2) The surviving spouse of the decedent.
- (3) The guardian of a minor child of the decedent.
- (4) A child of the decedent who was a minor at the time the decedent died.
- (5) The personal representative of the decedent if a personal representative has been appointed for the decedent's estate.

(b) The guardian of a minor child of the decedent may file the petition without authorization or approval of the court in which the guardianship proceeding is pending.

Comment. Section 6606 continues the provisions of former Section 641 that described the persons authorized to file a petition with two additions:

- (1) Paragraph (4) of subdivision (a) is new. This provision recognizes that the court is authorized to set aside a small estate to a child who is a minor at the time of the decedent's death (as distinguished from a requirement that the child be a minor at the time the petition is filed or the time the court order under this

chapter is made or some other time). See Section 6609(c). See also Section 6601 (defining "minor child").

(2) Subdivision (b) is a new provision that is consistent with Section 13650(c) (determination or confirmation of property passing or belonging to surviving spouse). See also Section 13051(a) (collection or transfer of small estate without administration).

Note. The Comment to Section 6606 refers to Sections 13650 and 13051. Those sections are recommended for enactment by the Commission in *Recommendation Relating to Disposition of Estate Without Administration, supra*.

§ 6607. Notice of hearing

6607. (a) Where proceedings for the administration of the estate of the decedent are not pending when the petition is filed under this chapter and the petition under this chapter is not joined with a petition for the probate of the decedent's will or for administration of the estate of the decedent, the petitioner shall give notice of the hearing by mail not less than 10 days before the hearing to each heir and devisee of the decedent, and to each person named as executor who is not petitioning, if known to the petitioner. A copy of the petition shall be sent with this notice of hearing to the surviving spouse, each child, and each devisee who is not petitioning.

(b) If the petition under this chapter is filed with a petition for the probate of the decedent's will, notice of the hearing on the petition under this chapter shall be given to the persons and in the manner prescribed by Sections 327 and 328 and shall be included in the notice of hearing required by those sections. If the petition filed under this chapter is filed with a petition for administration of the estate of the deceased spouse, notice of the hearing on the petition shall be given to the persons and in the manner prescribed by Section 441 and shall be included in the notice required by that section.

(c) If proceedings for the administration of the estate of the decedent are pending when the petition is filed under this chapter and the hearing of the petition for probate of the will or administration of the estate of the decedent is set for a day more than 10 days after the filing of the petition filed under this chapter, the petition under this chapter shall be set for hearing at the same time as

the petition for probate of the will or for administration of the estate, and notice of hearing on the petition filed under this chapter shall be given by the petitioner as provided in Section 1200.5. If the hearing of the petition for probate of the will or for administration of the estate is not set for hearing for a day more than 10 days after the filing of the petition under this chapter, (1) the petition filed under this chapter shall be set for hearing at least 10 days after the date on which it is filed, (2) notice of the hearing on the petition filed under this chapter shall be given by the petitioner as provided in Section 1200.5, and (3) if the petition for probate of the will or for administration of the estate has not already been heard, that petition shall be continued until that date and heard at the same time unless the court otherwise orders.

Comment. Subdivision (a) of Section 6607 continues the substance of subdivision (a) of former Section 643 but specifies the persons to whom the notice of hearing is to be mailed in place of the reference to former Section 1200.5 contained in former Section 643 and adds the requirement that a copy of the petition be mailed with the notice of hearing given to the surviving spouse, each child, and each devisee, who is not petitioning.

Subdivision (b) supersedes former Section 642. Subdivision (b) of Section 6607 is comparable to subdivision (a) of Section 13655 (determination or confirmation of property passing or belonging to surviving spouse).

Subdivision (c) continues subdivision (b) of former Section 643 without substantive change but with the addition of the phrase "unless the court otherwise orders" at the end of the subdivision.

Note. The Comment to Section 6607 refers to Section 13655. That section is recommended for enactment by the Commission in *Recommendation Relating to Disposition of Estate Without Administration, supra*.

§ 6608. Inventory and appraisal

6608. If a petition is filed under this chapter, the personal representative, or the petitioner if no personal representative has been appointed, shall file with the clerk of the court, prior to the hearing of the petition, an inventory and appraisal in the form set forth in Section 600. The appraisal shall be made as set forth in Chapter 9 (commencing with Section 600) of Division

3. The personal representative or the petitioner, as the case may be, may appraise the assets which a personal representative could appraise under paragraph (1) of subdivision (a) of Section 605.

Comment. Section 6608 continues the requirement of former Section 644 that an inventory and appraisement be filed. The former provision has been revised to conform to the provisions relating to inventory and appraisement. See Sections 600-611. The requirement that the inventory and appraisement be filed before the hearing of the petition has been substituted for the requirement of former Section 644 that the inventory and appraisement be filed within such time as the court may allow.

§ 6609. Court order

6609. (a) If the court determines that the net value of the decedent's estate, over and above all liens and encumbrances at the date of death of the decedent and over and above the value of any probate homestead interest set apart out of the decedent's estate under Section 6520, does not exceed twenty thousand dollars (\$20,000) as of the date of the decedent's death, the court shall make an order under this section unless the court determines that making an order under this section would be inequitable under the circumstances of the particular case.

(b) In determining whether to make an order under this section, the court shall consider the needs of the surviving spouse and minor children, the liens and encumbrances on the property of the decedent's estate, the claims of creditors, the needs of the heirs or devisees of the decedent, the intent of the decedent with respect to the property in the estate and the estate plan of the decedent as expressed in inter vivos and testamentary transfers or by other means, and any other relevant considerations. If the surviving spouse has remarried at the time the petition is heard, it shall be presumed that the needs of the surviving spouse do not justify the setting aside of the small estate, or any portion thereof, to the surviving spouse. This presumption is a presumption affecting the burden of proof.

(c) Subject to subdivision (d), if the court makes an order under this section, the court shall assign the whole of the decedent's estate, subject to all liens and

encumbrances on property in the estate at the date of the decedent's death, to the surviving spouse and the minor children of the decedent, or any one or more of them.

(d) If there are any liabilities for expenses of the last illness, funeral charges, and expenses of administration that are unpaid at the time the court makes an order under this section, the court shall make such orders as are necessary so that those unpaid liabilities are paid.

(e) Title to property in the decedent's estate vests absolutely in the surviving spouse, minor children, or any or all of them, as provided in the order, subject to all liens and encumbrances on property in the estate at the date of the decedent's death, and there shall be no further proceedings in the administration of the decedent's estate unless additional property in the decedent's estate is discovered.

Comment. Section 6609 supersedes former Section 645. Section 6609 makes significant substantive changes in the former law.

Under Section 6609, the court may decline to set aside a small estate if the court determines that it would be inequitable to do so. Under former Section 645, the court had no discretion; the court was required to set aside the small estate if the court made the findings prescribed by that section.

Under Section 6609, the court may assign the estate to the minor child or minor children of the decedent even if there is a surviving spouse. This may be desirable, for example, if the minor children live apart from the surviving spouse or where the minor children are not children of the surviving spouse. In this respect, Section 6609 is consistent with Section 6510 (setting aside exempt property other than family dwelling) and Section 6521 (setting apart probate homestead). Former law did not permit the small estate to be assigned to the minor child or children if there was an unmarried surviving spouse.

Under Section 6609, the court may assign the estate to a surviving spouse even if the surviving spouse has remarried. Under former Section 645, the small estate could be set aside only to a "surviving spouse who has not theretofore remarried." Permitting the small estate to be set aside to a surviving spouse, whether or not remarried, makes Section 6609 consistent with Section 6510 (setting aside exempt property other than family dwelling) and Section 6521 (setting apart probate homestead). The last two sentences of subdivision (b) place on the remarried surviving spouse the burden of proof to establish the need for the small estate set aside.

Subdivision (b) of Section 6609, which specifies matters to be considered in determining whether to make an order under the section, is a new provision drawn from subdivision (a) of Section 6523 which specifies matters to be considered in selecting and setting apart a probate homestead. Under some circumstances, the court may order that the small estate be set aside to one of the minor children and that the other minor children and the spouse be excluded, or that the small estate be set aside in unequal shares to the minor children, or that the small estate be set aside to the surviving spouse and that the minor children be excluded. In determining the assignment to make, the court must take into account the various considerations listed in subdivision (b). See also Section 6604(b)(8) (petition must include the requested disposition of the decedent's estate and the considerations justifying the requested disposition).

The word "mortgages," which was found in former Section 645, has been omitted as unnecessary, mortgages being included within the phrase "liens and encumbrances."

Subdivision (d) of Section 6609 supersedes the portion of the first sentence of former Section 645 that required expenses of last illness, funeral charges, and expenses of administration to be paid before the court could set aside a small estate. Under subdivision (d), the court may set aside a small estate whether or not such expenses have been paid, but the court must make an appropriate order to ensure that they will be paid.

Subdivision (e) of Section 6609 continues the last sentence of former Section 645, revised to reflect the new authority of the court to assign the small estate to one or more of the minor children of the decedent where there is a surviving spouse.

§ 6610. Effect of court order

6610. Upon becoming final, an order under Section 6609 shall be conclusive on all persons, whether or not they are then in being.

Comment. Section 6610 supersedes former Section 645.1. Section 6610 gives the order the same effect as an order under Section 13657 (effect of order determining or confirming property passing or belonging to surviving spouse).

The language in former Section 645.1 referring to fraud or the erroneously assumed deceased appearing has been omitted from Section 6610 as unnecessary. The omission of this language make no substantive change in the effect of the section. See *McMillan v. Boese*, 45 Cal. App. 2d 764, 115 P.2d 37 (1941).

Note. The Comment to Section 6610 refers to Section 13657. That section is recommended for enactment by the Commission

in *Recommendation Relating to Disposition of Estate Without Administration, supra*.

§ 6611. Liability for unsecured debts of decedent

6611. (a) Subject to the limitations and conditions specified in this section, the person or persons in whom title vested pursuant to Section 6609 are personally liable for the unsecured debts of the decedent.

(b) The personal liability of a person under this section shall not exceed the fair market value at the date of the decedent's death of the property title to which vested in that person pursuant to Section 6609, less the total of all of the following:

(1) The amount of any liens and encumbrances on that property.

(2) The value of any probate homestead interest set apart under Section 6520 out of that property.

(3) The value of any other property set aside under Section 6510 out of that property.

(c) The personal liability under this section ceases one year after the date the court makes its order under Section 6609, except with respect to an action or proceeding then pending in court.

(d) In any action or proceeding based upon an unsecured debt of the decedent, the surviving spouse of the decedent, the child or children of the decedent, or the guardian of the minor child or children of the decedent, may assert any defense, cross-complaint, or setoff which would have been available to the decedent if the decedent had not died.

(e) If proceedings are commenced in this state for the administration of the estate of the decedent and the time for filing or presenting claims has commenced, any action upon the personal liability of a person under this section is barred to the same extent as provided for claims under Article 1 (commencing with Section 700) of Chapter 12 of Division 3, except as to the following:

(1) Creditors who commence judicial proceedings for the enforcement of the debt and serve the person liable under this section with the complaint therein prior to the expiration of the time for filing or presenting claims.

(2) Creditors who have or who secure an acknowledgement in writing of the person liable under this section that that person is liable for the debts.

(3) Creditors who file a timely claim in the proceedings for the administration of the estate of the decedent.

Comment. Section 6611 continues former Section 645.3 without substantive change, except as follows:

(1) Subdivision (b) of Section 6611 makes clear that the personal liability of a person who takes only a share or portion of the decedent's estate is limited to the net value of the share or portion (fair market value less liens and encumbrances and any probate homestead or exempt property set apart out of the share), rather than the net value of the entire estate.

(2) Subdivision (e) of Section 6611 is new and is drawn from Section 13552 (liability for debts of deceased spouse). Subdivision (e) is a limitation on the one-year limitation period of subdivision (c) where estate proceedings are commenced, and provides the same period as for creditors' claims in estate proceedings generally.

§ 6612. Order where estate not set aside

6612. If a petition filed under this chapter is filed with a petition for the probate of the decedent's will or for administration of the estate of the decedent and the court determines not to make an order under Section 6609, the court shall act on the petition for probate of the decedent's will or for administration of the estate of the decedent in the same manner as if no petition had been filed under this chapter, and the estate shall then be administered in the same manner as if no petition had been filed under this chapter.

Comment. Section 6612 is drawn from former Section 646 but the language of the former section has been revised to recognize that the court has discretion to deny a petition filed under this chapter. Under Section 6609, the court is required to deny a petition filed under this chapter if the decedent's estate is not a small estate (see Sections 6600 and 6609), or if there is neither a surviving spouse nor a minor child. The court also may decline to order a small estate set-aside when it would be inequitable to do so. See Section 6609.

§ 6613. Attorney's fee

6613. The attorney's fee for services performed in connection with the filing of a petition and the obtaining of a court order under this chapter shall be determined by private agreement between the attorney and the client and is not subject to approval by the court. If there is no agreement between the attorney and the client concerning the attorney's fee for services performed in connection with the filing of a petition and obtaining of a court order under this chapter and there is a dispute concerning the reasonableness of the attorney's fee for those services, a petition may be filed with the court requesting that the court determine the reasonableness of the attorney's fee for those services. If there is an agreement between the attorney and the client concerning the attorney's fees for services performed in connection with the filing of a petition and obtaining a court order under this chapter and there is a dispute concerning the meaning of the agreement, a petition may be filed with the court requesting that the court determine the dispute.

Comment. Section 6613 is the same as Section 13660 (petition for determination or confirmation of property passing or belonging to surviving spouse). Section 6613 continues former law and practice but gives the probate court authority to determine disputes concerning the attorney's fee for services performed in connection with the filing of a petition and the obtaining of a court order under this chapter. The court has no jurisdiction to determine disputes concerning attorney's fees for other services, such as termination of joint tenancies, collection of insurance, and the like.

Note. The Comment to Section 6610 refers to Section 13660. That section is recommended for enactment by the Commission in *Recommendation Relating to Disposition of Estate Without Administration, supra*.

§ 6614. Applicability of chapter

6614. Sections 6600 to 6613, inclusive, apply only if the decedent died on or after July 1, 1987. If the decedent dies before July 1, 1987, the case shall continue to be governed by the law applicable to the case prior to July 1, 1987.

Comment. Section 6614 supersedes former Section 647.5 and makes clear that Sections 6600 to 6613, inclusive, apply only if the

decedent dies on or after July 1, 1987, the operative date of those sections. If the decedent died before that date, the right to a small estate set-aside is determined under the law that was applicable prior to July 1, 1987. The application of Sections 6600 to 6613 is limited to cases where the decedent died on or after the operative date because in a case where the decedent died before the operative date there was a right to have a small estate set-aside. Under Sections 6600 to 6613, the court may decline to order a small estate set-aside when it would be inequitable to do so. See Section 6609.

§ 6615. Reference to provision of former law deemed reference to new provision

6615. On and after July 1, 1987, a reference in any statute of this state or in a written instrument, including a will or trust, to a provision of former Sections 640 to 647.5, inclusive, shall be deemed to be a reference to the comparable provisions of this chapter.

Comment. Section 6615 is new and is drawn from Section 1490 and former Section 649.6. Section 6615 makes clear that, after the operative date of this chapter, a reference in a statute or written instrument to a provision of former law will be deemed to be a reference to the comparable provision of this chapter.

CONFORMING AMENDMENT

Probate Code § 605 (amended). Inventory and appraisement

Comment. Section 605 is amended to delete from paragraph (2) of subdivision (a) the provisions containing the references to former Sections 630 and 650, to make a technical revision in paragraph (3) of subdivision (a), and to add subdivisions (d) and (e) which contain references to special inventory and assessment provisions in the small estate set-aside statute and the disposition without administration provisions.

COMMENTS TO REPEALED SECTIONS

Probate Code § 640 (repealed). Authority to set aside estate

Comment. The portion of former Section 640 that restricted the small estate set-aside procedure to estates having a net value not exceeding \$20,000 is continued in Section 6602 but the phrase "the whole estate" in former Section 640 is superseded by subdivision (a) of Section 6600. See the Comment to Section 6600. The portion of former Section 640 relating to setting aside the estate to the surviving spouse or minor children is superseded by Section 6602 and subdivision (c) of Section 6609. See the Comment to Section 6609.

Probate Code § 641 (repealed). Petition to set aside estate

Comment. The portion of former Section 641 relating to the allegations and contents of the petition is continued in substance in Section 6604. The portions relating to the filing of a petition without filing a petition for probate of the will or for letters or including the petition alternatively in a petition for probate of the will or for letters or filing the petition in a pending probate proceeding is continued in substance in subdivisions (a) and (b) of Section 6605. The portion relating to who may file a petition is replaced by subdivision (a) of Section 6606. The portion providing that a petition may be "filed at any time before the hearing on the petition for probate of the will or for letters of administration or after the filing of the inventory" is replaced by subdivision (c) of Section 6605 which permits the petition to be filed at any time prior to final distribution of the estate.

Probate Code § 642 (repealed). Notice of hearing where petition included in petition for probate or letters

Comment. Former Section 642 is superseded by subdivision (b) of Section 6607.

Probate Code § 643 (repealed). Notice of hearing where separate petition

Comment. Subdivision (a) of former Section 643 is continued in a revised form in subdivision (a) of Section 6607. Subdivision (b) is continued in substance in subdivision (c) of Section 6607.

Probate Code § 644 (repealed). Inventory and appraisal

Comment. Former Section 644 is superseded by Section 6608.

Probate Code § 645 (repealed). Court order

Comment. Former Section 645 is superseded by Section 6609. See the Comment to Section 6609. See also the Comment to Section 6601.

Probate Code § 645.1 (repealed). Effect of order

Comment. Former Section 645.1 is superseded by Section 6610. See the Comment to Section 6610.

Probate Code § 645.3 (repealed). Liability for debts

Comment. Former Section 645.3 is continued in substance in Section 6611 with a clarifying revision in subdivision (b) of Section 6611, and with the addition of a new limitation in subdivision (e) of Section 6611 on an action to enforce personal liability where estate proceedings have been commenced.

Probate Code § 646 (repealed). Procedure where order denied

Comment. Former Section 646 is superseded by Section 6612. See the Comment to Section 6612.

Probate Code § 647 (repealed). Exclusions in determining value of estate

Comment. Former Section 647 is continued without substantive change in subdivision (b) of Section 6600.

Probate Code § 647.5 (repealed). Application of article

Comment. Former Section 647.5 is superseded by Section 6614. See the Comment to Section 6614.

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

relating to

PRORATION OF ESTATE TAXES

(Revised to Reflect Changes Made in Legislature)

Editorial note. The following text is taken from the Law Revision Commission's *Recommendation Relating to Proration of Estate Taxes*, 18 Cal. L. Revision Comm'n Reports 1127 (1986). This material is the same as that appearing in the Commission's original recommendation.



RECOMMENDATION

relating to

PRORATION OF ESTATE TAXES

The California statute governing proration of estate taxes among the beneficiaries of a decedent's estate was enacted in 1943.¹ Despite major changes in the federal and state estate and gift tax laws since that time, there have been no significant amendments to the California statute, other than in 1984 to recognize enactment of the California estate tax.² As a result, the proration statute is now obsolete in many respects and is in substantial need of modernization.

The California Law Revision Commission recommends revision of the statute in the manner described below. In addition, the revised statute incorporates numerous minor and technical improvements that are noted in the Comments following the text of the revised provisions.

Time of proration. Existing California law requires that the estate tax be actually paid before a proration may be made.³ But federal law allows for deferral of payment of estate taxes for up to 15 years in certain cases. Once the amount of tax is determined, the proration should be made, even though the tax hasn't yet been paid. This will enable settlement and closing of estates expeditiously without later disruption. The revised statute permits proration of an estate tax that has been imposed whether or not actually paid at the time of proration.

Proration by personal representative. Existing law requires the court to order the proration of estate taxes.⁴ There is no reason to involve the court in making the proration if all the persons interested in the estate agree on the proration. This is a matter within the purview of the personal representative. The revised statute eliminates

¹ Prob. Code §§ 970-977, enacted by 1943 Cal. Stat. ch. 894, § 1.

² 1984 Cal. Stat. ch. 1711.

³ Prob. Code § 970.

⁴ Prob. Code § 971.

mandatory court involvement and provides an optional procedure for obtaining a court determination of proration in the event of a dispute.

Modification of proration order. Where there is a court order for proration, the order may be rendered incorrect by a subsequent adjustment of the estate tax after the return is filed. This may be done as a result of audit, or as a result of filing an amended estate tax return upon locating additional property or discovering additional deductions. In this event, the court should modify the proration order, and the revised statute provides for this. Since there is a potential for the modification to occur many years after the estate is closed, the Commission does not recommend a limitation period for modification. Rather, the matter is left to the doctrine of laches and other judicial equitable powers in the circumstances of each case.

Uncollectable proration. A practical problem arises where the estate tax prorated against a person proves to be uncollectable, whether because the person or property is not subject to the jurisdiction of the court or for other reasons. To assist in the collection, the revised statute makes clear that a court order of proration is an enforceable judgment. If the prorated tax is uncollectable nonetheless, the uncollectable amount is apportioned among the remaining beneficiaries. A person required to pay more than his or her properly prorated share as a result is given a reimbursement right and is subrogated to the position of the personal representative in enforcing the right.

Treatment of specially valued qualified real property. Under federal law an election may be made to specially value certain qualified real property.³ The special value may be as much as \$750,000 less than the fair market value of the qualified real property, with the result of a substantial estate tax savings. If the election is made, the persons who receive the real property must continue to use the real property as a farm or other trade or business for ten years. If they dispose of the property or cease the qualified use, then the estate tax savings resulting from the special value are lost, and an additional tax is imposed, for which

³ I.R.C. § 2032A.

the persons receiving the property are personally liable. In this situation, the reduction of estate taxes resulting from the special valuation should be allocated entirely to the persons receiving the qualified real property, and any additional tax imposed as a result of cessation of a qualified use should be imposed entirely on them.

Treatment of extended estate tax. Federal law allows payment of a portion of the estate tax attributable to specified property (such as a closely held business or a remainder interest) to be extended.⁶ The present California proration statute does not require that the extended tax follow the property. The revised statute makes it clear that where tax attributable to a closely held business is extended, the privilege to pay the tax in installments goes to the person who receives the closely held business.

Conflict of state and federal law. In some cases, the manner of proration required by the California statute may conflict with the proration prescribed by federal law. For example, federal law provides that the tax on a Qualified Terminable Interest Property trust will be at the highest incremental bracket, with the effect that the other property of a decedent's estate is taxed at lower brackets.⁷ This conflicts with the present California statute. In such a situation, federal law should control, and the revised statute so provides.

Enforcement of out-of-state proration. The revised statute includes provisions to assist a nonresident personal representative in collecting amounts prorated against a person residing in or property located in California. This fills a gap in existing law.

Proration of taxes on generation-skipping transfers. Existing federal law imposes personal liability on the distributee for the generation-skipping tax, not exceeding the value of the property received by the distributee.⁸ The present California proration statute does

⁶ See e.g., I.R.C. §§ 6163-6166.

⁷ I.R.C. § 2207A.

⁸ I.R.C. § 2603.

not deal with equitable proration of the generation-skipping tax among trust beneficiaries. The Commission recommends, and the revised statute includes, generation-skipping tax proration provisions, comparable to the estate tax proration provisions. The Commission recognizes the possibility that the generation-skipping tax may be repealed or restructured by Congress in the immediate future. However, a proration statute is important in the interim.

Editorial note. The new statute relating to proration of estate taxes was added to the Probate Code by Chapter 783 of the Statutes of 1986 and becomes operative on January 1, 1987. Each section of the new statute is followed by its official comment. The comments are taken from the Law Revision Commission's *Recommendation Relating to Proration of Estate Taxes*, 18 Cal. L. Revision Comm'n Reports 1127 (1986), and from the *Communication From California Law Revision Commission Concerning Assembly Bill 2625*, on file with the Assembly Committee on Judiciary, the Senate Committee on Judiciary, and the Legislative Counsel. Comments to repealed sections are taken from the same sources.

DIVISION 10. PRORATION OF TAXES
CHAPTER 1. PRORATION OF ESTATE TAXES

Article 1. General Provisions

§ 20100. Definitions

20100. Except where the context otherwise requires, the following definitions shall govern the construction of this chapter:

(a) "Estate tax" means a tax imposed by any federal or California estate tax law, now existing or hereafter enacted, and includes interest and penalties on any deficiency.

(b) "Person interested in the estate" means any person, including a personal representative, entitled to receive, or who has received, from a decedent while alive or by reason of the death of the decedent any property or interest therein.

(c) "Personal representative" includes a guardian, conservator, trustee, or other person charged with the responsibility of paying the estate tax.

(d) "Property" means property included in the gross estate for federal estate tax purposes.

(e) "Value" means fair market value as determined for federal estate tax purposes.

Comment. Section 20100 supersedes former Section 977. The definition of "gross estate" in former Section 977 (b) erroneously had the effect of prorating taxes to adjusted taxable gifts.

The definition of "person interested in the estate" in subdivision (b) includes but is not limited to persons who receive property by nonprobate transfer, such as a joint tenant or the beneficiary of a trust.

Subdivision (c) defines "personal representative" broadly to include more than an executor, administrator, administrator with the will annexed, or special administrator.

The definition of "property" in subdivision (d) makes clear that the term includes property transferred by the decedent during life if included in the gross estate for federal estate tax purposes. See, e.g., I.R.C. § 2035; *cf.* subdivision (b) ("person interested in estate" includes person who received property from a decedent while alive).

Subdivision (e) defines the term "value" to mean fair market value as determined for federal estate tax purposes. Thus where an alternate valuation is elected pursuant to Section 2032 of the Internal Revenue Code, "value" means the fair market value determined as of the alternate valuation date for federal estate tax purposes. See Treas. Reg. § 20.2031-1(b).

§ 20101. Transitional provision

20101. (a) This chapter applies to persons interested in the estate of a decedent who dies on or after January 1, 1987.

(b) Notwithstanding the repeal of former Article 4a (commencing with Section 970) of Chapter 15 of Division 3 of the Probate Code by the act enacting this chapter, the provisions of that former article remain applicable where the decedent died before January 1, 1987. No inference as to the applicable law in effect before January 1, 1987, shall be drawn from the enactment of this chapter.

CROSS-REFERENCES

Definitions

Person interested in the estate § 20100(b)

Article 2. Proration

§ 20110. Proration among persons interested in estate

20110. (a) Except as provided in subdivision (b), any estate tax shall be equitably prorated among the persons interested in the estate in the manner prescribed in this article.

(b) This section does not apply:

(1) To the extent the decedent in a written inter vivos or testamentary instrument disposing of property specifically directs that the property be applied to the satisfaction of an estate tax or that an estate tax be prorated to the property in the manner provided in the instrument. As used in this paragraph, an "instrument disposing of property" includes an instrument that creates an interest in property or an amendment to an instrument that disposes of property or creates an interest in property.

(2) Where federal law directs otherwise. If federal law directs the manner of proration of the federal estate tax,

the California estate tax shall be prorated in the same manner.

Comment. Section 20110 restates former Section 970 without substantive change, but recognizes that federal law may provide for a different manner of proration. See, *e.g.*, I.R.C. § 2207A. In such a situation, proration of the California estate tax must conform to the federal proration.

Section 20110 allows proration of an extended estate tax prior to actual payment of the tax. Section 20115 (proration of extended estate tax). Penalties and interest on an estate tax are prorated pursuant to Section 20112 (allowance and charges for credits, deductions, interest, and other adjustments).

CROSS-REFERENCES

Definitions

- Estate tax § 20100(a)
- Person interested in the estate § 20100(b)
- Property § 20100(d)

§ 20111. Manner of proration

20111. The proration required by this article shall be made in the proportion that the value of the property received by each person interested in the estate bears to the total value of all property received by all persons interested in the estate, subject to the provisions of this article.

Comment. Section 20111 continues former Section 971 without substantive change, but does not require a court order to make the proration. *Cf.* Sections 20120-20125 for optional court procedure to determine proration. The proration is made against all property included in the decedent's gross estate for federal estate tax purposes, including gifts includible in the estate pursuant to Section 2035 of the Internal Revenue Code. See Sections 20100 (definitions) and 20110 (proration among persons interested in estate) and Comments thereto. The proration is based on fair market value as determined for federal estate tax purposes, even though the estate tax may be based on a special value. Adjustments for interest and penalties may be made on an equitable basis. See Section 20112 (allowance and charges for credits, deductions, interest, and other adjustments).

CROSS-REFERENCES

Definitions

- Person interested in the estate § 20100(b)
- Property § 20100(d)
- Value § 20100(e)

§ 20112. Allowance and charges for credits, deductions, interest, and other adjustments

20112. (a) In making a proration of the federal estate tax, allowances shall be made for credits allowed for state or foreign death taxes in determining the federal tax payable and for exemptions and deductions allowed for the purpose of determining the taxable estate.

(b) In making a proration of the California estate tax, allowances shall be made for (1) credits (other than the credit for state death taxes paid) allowed by the federal estate tax law and attributable to property located in this state, and (2) exemptions and deductions allowed by the federal estate tax law for the purpose of determining the taxable estate and attributable to property located in this state.

(c) In making a proration of an estate tax, interest on extension of taxes and interest and penalties on any deficiency shall be charged to equitably reflect the benefits and burdens of the extension or deficiency and of any tax deductions associated with the interest and penalties.

Comment. Subdivisions (a) and (b) of Section 20112 continue former Section 972 without substantive change. Although the federal estate tax exemption is replaced by a unified tax credit and other credits are allowed, subdivision (a) also refers to exemptions in anticipation of future enactment of exemptions.

Subdivision (c) is new.

§ 20113. Trusts and temporary interests

20113. If a trust is created, or other provision made whereby a person is given an interest in the income of, an estate for years or for life in, or other temporary interest in, any property, the estate tax on both the temporary interest and on the remainder thereafter shall be charged against and paid out of the corpus of the property without apportionment between remainders and temporary estates.

Comment. Section 20113 continues former Section 973 without substantive change.

CROSS-REFERENCES

Definitions

Estate tax § 20100(a)

§ 20114. Proration of additional tax on certain qualified real property

20114. (a) As used in this section, "qualified real property" means qualified real property as defined in Section 2032A of the federal Internal Revenue Code (26 U.S.C. Sec. 2032A).

(b) If an election is made pursuant to Section 2032A of the federal Internal Revenue Code (26 U.S.C. Sec. 2032A), the proration shall be based upon the amount of federal estate tax that would be payable but for the election. The amount of the reduction in federal estate tax resulting from an election pursuant to Section 2032A of the federal Internal Revenue Code (26 U.S.C. Sec. 2032A) shall reduce the tax that is otherwise attributable to the qualified real property that is the subject of the election. If the tax that is otherwise attributable to the qualified real property is reduced to zero pursuant to this subdivision, any excess amount of reduction shall reduce the tax otherwise payable with respect to the other property, this amount to be equitably prorated in accordance with Section 20111.

(c) If additional federal estate tax is imposed under subsection (c) of Section 2032A of the federal Internal Revenue Code (26 U.S.C. Sec. 2032A) by reason of early disposition or cessation of qualified use, the additional tax shall be a charge against the portion of the qualified real property to which the additional tax is attributable, and shall be equitably prorated among the persons interested in that portion of the qualified real property in proportion to their interests.

Comment. Section 20114 is new and deals with specially valued real property. Where an election is made to specially value qualified real property under Internal Revenue Code Section 2032A, the qualified heirs who receive the qualified real property receive the entire benefit of the estate tax reduction resulting from the election, and are likewise liable for the entire amount of any additional tax subsequently imposed on the property. For example, assume an estate in which, absent a special valuation election, each beneficiary receives property of equal value and shares equally in the prorated estate taxes. If one beneficiary makes a special valuation election that reduces the total estate tax, the amount of the reduction must be allocated entirely to that beneficiary, and the others must pay the amount

they would have been liable for absent the special valuation election.

To illustrate the operation of Section 20114, assume the decedent dies in 1986, leaving an estate consisting of \$500,000 cash and real property having a fair market value of \$500,000 (and a value under Internal Revenue Code Section 2032A of \$250,000). The decedent's will leaves the real property to A and the cash to B.

(1) If no election is made under Section 2032A, the taxable estate is \$1,000,000. The estate tax is \$190,000, which is prorated \$95,000 to A and \$95,000 to B.

(2) If an election is made under Section 2032A, the taxable estate is \$750,000. The estate tax is \$92,500; the reduction in estate tax is \$97,500. A is credited with \$95,000 against the fair market value proration. (This represents the amount of the reduction in tax resulting from the election, to the extent of the tax that would be attributable to the qualified real property but for the election.) A pays no tax and B pays the full tax of \$92,500, which represents a reduction of B's tax liability by \$2,500.

Subdivision (b) ensures that A receives the benefit of the tax relief under Section 2032A, up to the amount of tax that would have been prorated to the fair market value of the qualified real property. B also benefits from the election, but no further compensating adjustment is required, except that if B shares the devise with other persons, the tax obligation of each of the others is reduced by a proportionate share of the \$2,500 savings.

Subdivision (c) provides that any additional tax under Internal Revenue Code Section 2032A(c) will be imposed only upon those who received the qualified real property and benefited from the election. If A causes the full additional tax to be assessed under Internal Revenue Code Section 2032A(c), the entire additional tax of \$97,500 will be prorated to A. This is true even though B also benefited from the election under Section 2032A.

CROSS-REFERENCES

References to statutes § 7

§ 20115. Proration of extended estate tax

20115. Where the payment of any portion of the federal estate tax is extended under the provisions of the federal estate tax law, the amount of extended tax shall be a charge against the persons who receive the specific property that gives rise to the extension.

Comment. Section 20115 ensures that the persons who receive property that gives rise to the extension of estate tax are the persons who benefit from the extension privilege. With respect to allocation of any interest on the extension, see Section 20112 (allowance and charges for credits, deductions, interest, and other adjustments).

Section 20115 makes clear that where a decedent's estate consists of a closely held business with respect to which estate taxes may be extended, the deferred tax and interest thereon follow the business. If the persons who receive the property fail to pay the tax when due and the tax is collected from persons other than the persons to whom the tax is prorated, the persons from whom the tax is collected have a right of reimbursement against the persons to whom the tax is prorated. See Section 20117 (reimbursement for overpayment).

§ 20116. Where property not in possession of personal representative

20116. (a) If all property does not come into the possession of the personal representative, the personal representative is entitled, and has the duty, to recover from the persons interested in the estate the proportionate amount of the estate tax with which the persons are chargeable under this chapter.

(b) If the personal representative cannot collect from any person interested in the estate the amount of an estate tax apportioned to the person, the amount not recoverable shall be equitably prorated among the other persons interested in the estate who are subject to proration.

(c) If a person is charged with or required to pay an estate tax greater than the amount prorated to that person because another person does not pay the amount of estate tax prorated to the other person, the person charged with or required to pay the greater amount has a right of reimbursement against the other person. The right of reimbursement may be enforced through the personal representative or may be enforced directly by the person charged with or required to pay the greater amount, and for the purpose of direct enforcement the person is subrogated to the position of the personal representative.

Comment. Subdivision (a) of Section 20116 continues former Section 975 without substantive change. Subdivision (b) is new. Recovery of estate taxes pursuant to this section includes

prorated interest and penalties. See Sections 20112 (allowance and charges for credits, deductions, interest, and other adjustments) and 20100(a) ("estate tax" defined).

The court may by order direct payment of the amount of taxes owed by a person to the personal representative. Section 20123 (court order to effectuate proration). As to costs incurred in enforcing a proration order, see Code Civ. Proc. § 685.040. Failure of the personal representative to make a good faith effort to collect taxes prorated against a person is a breach of the fiduciary obligation of the personal representative, for which the personal representative is liable personally and on the bond, if any.

CROSS-REFERENCES

Definitions

- Estate tax § 20100(a)
- Person interested in the estate § 20100(b)
- Personal representative § 20100(c)
- Property § 20100(d)

§ 20117. Reimbursement for overpayment

20117. (a) If a person is charged with or required to pay an estate tax greater than the amount prorated to that person because another person does not pay the amount of estate tax prorated to the other person, the person charged with or required to pay the greater amount has a right of reimbursement against the other person.

(b) The right of reimbursement may be enforced through the personal representative in the discretion of the personal representative, or may be enforced directly by the person charged with or required to pay the greater amount, and for the purpose of direct enforcement the person is subrogated to the position of the personal representative.

(c) The personal representative or person who has a right of reimbursement may commence a proceeding to have a court determine the right of reimbursement. The provisions of Article 3 (commencing with Section 20120) shall govern the proceeding, with changes necessary to make the provisions appropriate for application to the proceeding, and the court order determining the right of reimbursement is an enforceable judgment.

Comment. Section 20117 is new. Subdivision (c) incorporates the judicial proration procedure, *mutatis mutandis*.

Article 3. Judicial Proceedings

§ 20120. Who may commence proceeding

20120. (a) The personal representative or any person interested in the estate may commence a proceeding to have a court determine the proration pursuant to this chapter.

(b) A proceeding under this article shall be commenced in the court in which the estate of the decedent was administered or, if no administration proceedings have been commenced, in the superior court of the county in which the estate of the decedent may be administered.

(c) If proceedings for the administration of the decedent's estate are pending, a proceeding under this article shall be combined with the administration proceedings. If a proceeding is commenced at any time before final distribution, there shall be no additional filing fee.

Comment. Sections 20120 to 20125 supersede a portion of former Section 971, requiring court proration, and a portion of former Section 975, providing for a court order for payment. The general rules applicable to civil actions and proceedings, including the rules applicable to parties and pleadings, govern proceedings under this article. See Section 1233 (general rules of practice govern).

CROSS-REFERENCES

Definitions

Person interested in the estate § 20100(b)
 Personal representative § 20100(c)
 Property § 20100(d)

§ 20121. Petition

20121. A proceeding under this article shall be commenced by filing a verified petition that sets forth all of the following information:

- (a) The jurisdictional facts.
- (b) Other facts necessary for the court to determine the proration of estate taxes.

Comment. See Comment to Section 20120.

CROSS-REFERENCES

Definitions

Estate tax § 20100(a)

§ 20122. Notice of hearing

20122. Not less than 30 days before the hearing, the petitioner shall do both of the following:

(a) Cause notice of the hearing and a copy of the petition to be mailed to the personal representative and to each person interested in the estate against whom prorated amounts may be charged pursuant to paragraph (1) of subdivision (a) of Section 20123.

(b) Cause a summons and a copy of the petition to be served on each person interested in the estate who may be directed to make payment of prorated amounts pursuant to paragraph (2) of subdivision (a) of Section 20123. The summons shall be in the form and shall be served in the manner prescribed in Title 5 (commencing with Section 410.10) of Part 2 of the Code of Civil Procedure.

Comment. See Comment to Section 20120.

CROSS-REFERENCES**Definitions**

Person interested in the estate § 20100(b)

Personal representative § 20100(c)

§ 20123. Court order to effectuate proration

20123. (a) The court, upon making a determination as provided in this article, shall make an order:

(1) Directing the personal representative to charge the prorated amounts against the persons against whom an estate tax has been prorated insofar as the personal representative is in possession of any property or interests of the persons against whom the charge may be made.

(2) Summarily directing all other persons against whom an estate tax has been prorated to make payment of the prorated amounts to the personal representative.

(b) An appeal may be taken from an order made or from the refusal to make an order under this section.

(c) A court order made under this section is a judgment that may be enforced against the persons against whom an estate tax has been prorated.

Comment. Subdivision (a) of Section 20123 restates former Section 976 without substantive change. Subdivisions (b) and (c) are new. The court order prorating an estate tax includes interest and penalties. See Section 20112 (allowance and charges for

credits, deductions, interest, and other adjustments); see also Section 20100(a) ("estate tax" defined).

CROSS-REFERENCES

Definitions

Estate tax § 20100(a)

Personal representative § 20100(c)

§ 20124. Modification of court order

20124. Upon petition by the personal representative or any person interested in the estate, the court shall modify an order made pursuant to this article whenever it appears that the amount of estate tax as actually determined is different from the amount of estate tax on which the court based the order.

Comment. Section 20124 provides for the possibility that subsequent to the making of an order, the taxes may be adjusted as a result of audit or the filing of an amended return. Section 20124 does not apply to any additional tax under Internal Revenue Code Section 2032A(c) resulting from a disposition or cessation of qualified use of specially valued property. See Section 20114 (proration of additional tax on certain qualified real property). Section 20124 does not provide a limitation period for modification of a proration order; the matter is left to laches and other equitable doctrines within the discretion of the court.

CROSS-REFERENCES

Definitions

Estate tax § 20100(a)

Person interested in the estate § 20100(b)

Personal representative § 20100(c)

§ 20125. Enforcement of out-of-state proration

20125. (a) A personal representative acting or resident in another state may commence an action in this state to recover from a person interested in the estate, who either is resident in this state or owns property in this state, the amount of the federal estate tax, or an estate tax or death duty payable to another state, apportioned to the person.

(b) The action shall be commenced in the superior court of any county in which administration of the estate of the decedent would be proper or, if none, in which any defendant resides.

(c) For purposes of the action the apportionment by the court having jurisdiction of the administration of the decedent's estate in the other state is prima facie correct.

Comment. Section 20125 is new. See also Code Civ. Proc. §§ 1710.10-1710.65 (sister state money-judgments).

CROSS-REFERENCES

Definitions

Person interested in the estate § 20100(b)
 Personal representative § 20100(c)

**CHAPTER 2. PRORATION OF TAXES ON
 GENERATION-SKIPPING TRANSFERS**

Note. This chapter is temporary, pending the outcome of federal legislation affecting taxes on generation-skipping transfers.

Article 1. General Provisions

§ 20200. Definitions

20200. Except where the context otherwise requires, the following definitions shall govern the construction of this chapter:

(a) "Generation-skipping transfer tax" means a tax imposed by any federal or California generation-skipping transfer tax law, now existing or hereafter enacted, and includes interest and penalties on any deficiency.

(b) "Property" means property on which a generation-skipping transfer tax is imposed.

(c) "Transferee" means any person who receives, who is deemed to receive, or who is the beneficiary of, any property.

(d) "Trustee" means any person who is a trustee within the meaning of the federal generation-skipping transfer tax law, or who is otherwise required to pay a generation-skipping transfer tax.

(e) "Value" means fair market value as determined for generation-skipping transfer tax purposes.

Comment. Sections 20200 to 20224 parallel comparable provisions of Chapter 1 (commencing with Section 20100) (proration of estate taxes).

§ 20201. Transitional provision

20201. (a) This chapter applies to transferees of property of a decedent who dies on or after January 1, 1987.

(b) No inference as to the applicable law in effect before January 1, 1987, shall be drawn from the enactment of this chapter.

CROSS-REFERENCES

Definitions

Property § 20200(b)

Transferee § 20200(c)

Article 2. Proration**§ 20210. Proration among transferees**

20210. (a) Except as provided in subdivision (b), any generation-skipping transfer tax shall be equitably prorated among the transferees in the manner prescribed in this article.

(b) This section does not apply:

(1) To the extent the transferor in a written instrument transferring property specifically directs that the property be applied to the satisfaction of a generation-skipping transfer tax or that a generation-skipping transfer tax be prorated to the property in the manner provided in the instrument.

(2) Where federal law directs otherwise. If federal law directs the manner of proration of the federal generation-skipping transfer tax, the California generation-skipping transfer tax shall be prorated in the same manner.

Comment. Proration of a generation-skipping transfer tax includes proration of interest and penalties on any deficiency. See Sections 20200(a) ("generation-skipping transfer tax" defined) and 20212 (allowance and charges for credits, deductions, and interest).

CROSS-REFERENCES

Definitions

Generation-skipping transfer tax § 20200(a)

Transferee § 20200(c)

§ 20211. Manner of proration

20211. The proration required by this article shall be made in the proportion that the value of the property received by each transferee bears to the total value of all property received by all transferees, subject to the provisions of this article.

Comment. See Comment to Section 20200.

CROSS-REFERENCES

Definitions

Property § 20200(b)
Transferee § 20200(c)
Value § 20200(e)

§ 20212. Allowance and charges for credits, deductions, and interest

20212. In making a proration required by this article:

(a) Allowances shall be made for credits, exemptions, and deductions allowed for the purpose of determining the tax payable.

(b) Interest and penalties on any deficiency shall be charged to equitably reflect the benefits and burdens of the deficiency and of any tax deductions associated with the interest and penalties.

Comment. See Comment to Section 20200.

§ 20213. Trusts and temporary interests

20213. If a trust is created or other provision made whereby a transferee is given an interest in income, or an estate for years or for life, or another temporary interest in property, the tax on both the temporary interest and other interests in the property shall be charged against and paid out of the corpus of the property without apportionment between the temporary and other interests.

Comment. See Comment to Section 20200.

CROSS-REFERENCES

Definitions

Property § 20200(b)
Transferee § 20200(c)

§ 20214. Where property not in possession of trustee

20214. (a) If all property does not come into the possession of the trustee, the trustee is entitled, and has the duty, to recover from the transferees, the proportionate amount of the tax with which the transferees are chargeable under this chapter.

(b) If the trustee cannot collect from any transferee the amount of tax apportioned to the transferee, the amount not recoverable shall be equitably prorated among the other transferees who are subject to proration.

Comment. See Comment to Section 20200.

CROSS-REFERENCES

Definitions

Property § 20200(b)
Transferee § 20200(c)
Trustee § 20200(d)

§ 20215. Reimbursement for overpayment

20215. (a) If a person is charged with, or required to pay, a generation-skipping transfer tax greater than the amount prorated to that person because another person does not pay the amount of generation-skipping transfer tax prorated to the other person, the person charged with or required to pay the greater amount has a right of reimbursement against the other person.

(b) The right of reimbursement may be enforced through the trustee in the discretion of the trustee, or may be enforced directly by the person charged with, or required to pay, the greater amount and, for the purpose of direct enforcement, the person is subrogated to the position of the trustee.

(c) The trustee or person who has a right of reimbursement may commence a proceeding to have a court determine the right of reimbursement. The provisions of Article 3 (commencing with Section 20220) shall govern the proceeding, with changes necessary to make the provisions appropriate for application to the proceeding, and the court order determining the right of reimbursement is an enforceable judgment.

Comment. See Comment to Section 20200.

Article 3. Judicial Proceedings

§ 20220. Who may commence proceeding

20220. (a) The trustee or any transferee may commence a proceeding to have a court determine the proration pursuant to this chapter.

(b) A proceeding under this article shall be commenced in the court in which the estate of the decedent was administered or, if no administration proceedings have been commenced, in the superior court of the county in which the estate of the decedent may be administered.

(c) If proceedings for the administration of the decedent's estate are pending, a proceeding under this article shall be combined with the administration proceedings. If a proceeding is commenced at any time before final distribution, there shall be no additional filing fee.

Comment. See Comment to Section 20200.

CROSS-REFERENCES

Definitions

Transferee § 20200(c)

Trustee § 20200(d)

§ 20221. Petition

20221. A proceeding under this article shall be commenced by filing a verified petition that sets forth all of the following information:

(a) The jurisdictional facts.

(b) Other facts necessary for the court to determine the proration of the generation-skipping transfer tax.

Comment. See Comment to Section 20200.

CROSS-REFERENCES

Definitions

Generation-skipping transfer tax § 20200(a)

§ 20222. Notice of hearing

20222. Not less than 30 days before the hearing the petitioner shall do both of the following:

(a) Cause notice of the hearing and a copy of the petition to be mailed to the trustee and each transferee against whom prorated amounts may be charged pursuant to paragraph (1) of subdivision (a) of Section 20223.

(b) Cause a summons and a copy of the petition to be served on each transferee who may be directed to make payment of prorated amounts pursuant to paragraph (2) of subdivision (a) of Section 20223. The summons shall be in the form and shall be served in the manner prescribed in Title 5 (commencing with Section 410.10) of Part 2 of the Code of Civil Procedure.

Comment. See Comment to Section 20200.

CROSS-REFERENCES

Definitions

Transferee § 20200(c)

§ 20223. Court order to effectuate proration

20223. (a) The court, upon making a determination as provided in this article, shall make an order:

(1) Directing the trustee to charge the prorated amounts against the transferees against whom the generation-skipping transfer tax has been prorated insofar as the trustee is in possession of any property or interests of the transferees against whom the charge may be made.

(2) Summarily directing all other transferees against whom the generation-skipping transfer tax has been prorated to make payment of the prorated amounts to the trustee.

(b) An appeal may be taken from an order made or from the refusal to make an order under this section.

(c) A court order made under this section is a judgment that may be enforced against the persons against whom a generation-skipping transfer tax has been prorated.

Comment. See Comment to Section 20200.

CROSS-REFERENCES**Definitions**

Generation-skipping transfer tax § 20200(a)

Transferee § 20200(c)

Trustee § 20200(d)

§ 20224. Modification of court order

20224. Upon petition by the trustee or any transferee, the court shall modify an order made pursuant to this article whenever it appears that the amount of generation-skipping transfer tax as actually determined is different from the amount of tax on which the court based the order.

Comment. See Comment to Section 20200.

CROSS-REFERENCES**Definitions**

Generation-skipping transfer tax § 20200(a)

Transferee § 20200(c)

Trustee § 20200(d)

§ 20225. Enforcement of out-of-state proration

20225. (a) A trustee acting or resident in another state may commence an action in this state to recover from a transferee, who either is resident in this state or owns property in this state, the amount of the federal

generation-skipping transfer tax, or a generation-skipping transfer tax payable to another state, apportioned to the person.

(b) The action shall be commenced in the superior court of any county in which administration of the estate of the decedent would be proper or, if none, in which any defendant resides.

(c) For purposes of the action an apportionment by the court having jurisdiction of the administration of the decedent's estate in the other state is prima facie correct.

Comment. Section 20225 is new. See also Code Civ. Proc. §§ 1710.10-1710.65 (sister state money-judgments).

CROSS-REFERENCES

Definitions

Transferee § 20200(c)
Trustee § 20200(d)

COMMENT TO REPEALED SECTIONS

Probate Code §§ 970-977 (repealed). Payment of federal estate tax

Comment. Sections 970-977 are superseded by Sections 20100-20125 (proration of estate taxes). Comparable provisions of the old and new law are listed below.

OLD LAW	NEW LAW
970	20110
971	20111
972	20112
973	20113
975	20116
976	20123
977	20100

EXHIBIT B



TRUSTS & ESTATES SECTION

THE STATE BAR OF CALIFORNIA

COMMENCEMENT OF DISCOVERY AND ENHANCED NOTICE IN PROBATE PROCEEDINGS

LEGISLATIVE PROPOSAL (T&E 2017-4)

TO: Office of Governmental Affairs

FROM: Patrick Kohlmann, Chair, Trusts and Estates Section Executive Committee
Gina Lera, Vice Chair, Trusts and Estates Section Executive Committee
Herbert A. Stroh, Chair, Commencement of Discovery Sub-Committee

DATE: January 15, 2016

RE: Proposal to amend Probate Code sections 851 and 1000
(Commencement of Discovery and Enhanced Notice)

SECTION ACTION AND CONTACTS:

Date of Approval by Section Executive Committee: January 15, 2016

Approval vote: For 25, Against 0, Abstain 0

Section Members:

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PURPOSE:

Trust and estate litigation procedures are generally controlled by the Code of Civil Procedure. Some variation exists to accommodate substantive differences between trust and estate and civil litigation. However, in some instances there are divergent procedures which are not warranted and are likely unintended. As much as reasonably possible, there should be conformity between trust and estate and civil litigation procedures.

The timing upon which discovery may be commenced in civil and trust proceedings is out of sync. The purpose of this proposal is to bring greater conformity to the timing rules for commencement of discovery by adding three subdivisions to Probate Code 1000 as described below.

In addition, under Probate Code section 850 an order may be sought from the court determining rights and claims to property that is in the control or possession of the estate or another party. Although the rights and claims of interested persons are being determined in the proceeding, the notice of hearing as prescribed under current law fails to convey the significance of the action, raising a due process issue. A further purpose of this proposal is to provide enhanced notice to better identify the property at issue, advise whether additional relief is sought under Probate Code section 859, and inform the recipient that there is a right to file a response to the Petition.

PROPOSAL AND REASONS FOR PROPOSAL:

This issue was referred to the Trusts and Estates Section Executive Committee ("TEXCOM") by the California Law Revision Commission, which had received a comment from an attorney noting a significant discrepancy in the commencement of discovery in trust litigation proceedings and civil actions.

The discovery procedures set forth in the Code of Civil Procedure are equally applicable to proceedings under the Probate Code (Probate Code section 1000). The triggering event for commencement of discovery is the service of a summons or appearance by the defendant (Code of Civil Procedure sections 2025.210(b); 2030.020(b); 2031.020(b); 2033.020(b)).

A *will contest* easily mirrors the civil law structure due to the issuance of a summons (Probate Code section 8250, 8271). In *trust proceedings* there is no statutory authority for issuance of a summons and therefore no triggering event to commence discovery prior to formal appearance by the Respondent. This can result in a delay and possible prejudice to a petitioning party if crowded court calendars force the initial hearing to be set months after filing.

One possible solution would be to amend the code to equate service of a trust or probate petition with service of a summons for discovery purposes. However, this ignores the difference in jurisdiction between civil and trust and estate proceedings. In a civil action, generally the court must have jurisdiction over the subject matter and authority over the parties to decide the case. But trust and estate proceedings are in rem in nature, that is, they are proceedings over the

property in the estate of the decedent, and determine interests in that property. *Abels v. Frey* (1932) 126 Cal.App. 48, 53.

When a summons is issued, the court has asserted personal jurisdiction over the defendant, compelling participation in order to protect the defendant's personal rights and interests. The court must have sufficient minimum contacts to sustain personal jurisdiction (*International Shoe Co. v. Washington* (1945) 326 US 310, 316), and the defendant may challenge that jurisdiction by a motion to quash service of summons. (Code Civ. Proc., § 418.10). An in rem proceeding asserts jurisdiction over the property, affecting the interests of all persons in that property (2 Witkin, California Procedure, Jurisdiction section 243 (5th Ed 2008) but will not result in a personal judgment against the defendant.

Given these differences, a court sitting in probate lacks jurisdiction over all "interested persons" (Prob. Code, § 48) who are otherwise entitled to notice of a particular proceeding such that they could be compelled to respond to discovery absent establishing personal jurisdiction or their voluntary participation in the action. Unless the court has personal jurisdiction over the interested person, it does not have the right to enforce rights of discovery.

A different situation exists as to a trustee of a California trust, who under the code is deemed to have submitted to personal jurisdiction by administering the trust in this state. (Prob. Code, § 17003). Since personal jurisdiction already exists, it is appropriate that service of a petition and notice of hearing alone should suffice to trigger the obligation to respond to discovery. TEXCOM recommends amendment of Probate Code section 1000 to add new subdivision (b) to effectively provide that service of a petition and notice of hearing on a trustee of a California trust will have the same impact as service of a summons for purposes of the Civil Discovery Act.

Proposed new subdivision (b) of Probate Code section 1000 would read:

(b) A petitioner in a proceeding under Section 17200 that does not require issuance of a summons may commence discovery upon a trustee who is subject personally to the jurisdiction of the court under Section 17003 in accordance with the same time periods set forth in the Civil Discovery Act, except that such time periods shall commence to run upon service of the petition and notice of hearing upon the trustee, or the trustee's appearance in the proceeding, whichever first occurs.

The above proposed amendment addresses the issue of commencement of discovery against a trustee over whom the Probate Court has personal jurisdiction by statute, but does not necessarily impact other trust and estate litigation such as a Probate Code section 850 Petition. Under Probate Code section 850, an order may be sought from the court determining rights and claims to property that is in the control or possession of the estate or another party. Probate Code section 851(a) requires notice of the hearing and the petition to be served "in the manner provided in Chapter 4 (commencing with Section 413.10)" upon a personal representative, conservator, guardian, trustee, or person claiming an interest in or having title or possession of

the property in question in a manner consistent with service of a summons in a civil proceeding. All other persons entitled to notice may be served by mail under Probate Code section 851.

Since notice in a Probate Code section 850 proceeding is served in a manner commensurate with a civil summons upon those persons considered most likely to have the greatest interest in the outcome of the proceeding, it is logical that the same rules as to commencement of discovery should apply.

TEXCOM does not believe the concerns regarding in rem jurisdiction discussed above are present in regard to Probate Code section 850 Petitions because of their already broad scope. Under current law, a Probate Code section 850 Petition may include related causes of action and claims normally raised in a civil action (Prob. Code, § 855). The court may issue an order compelling conveyance or transfer of property, "or granting other appropriate relief." In addition, if the court determines there was a wrongful taking, concealment, disposition of property, or disposition by undue influence, the offender "shall be liable for twice the value of the property recovered . . ." (Prob. Code, § 859). Thus, Probate Code section 850 Petitions currently have the potential to reach beyond mere in rem jurisdiction. The commencement of discovery rules should recognize that fact and be harmonized with the Civil Discovery Act.

Proposed new subdivision (c) of Probate Code section 1000 would read:

(c) A petitioner in a proceeding under Section 850 may commence discovery upon any person who receives notice of the hearing pursuant to Section 851(a) in accordance with the same time periods set forth in the Civil Discovery Act, except that such time periods shall commence to run upon service of the petition and notice of hearing.

Finally, commencement of discovery as to third parties is likewise tied by the Civil Discovery Act to issuance of a summons. This includes subpoenaing of business, financial, and medical records retained by third parties. As this process is always time consuming, postponing initiation until after an appearance by the Respondent further delays prosecution of the case. These records are often critical to the underlying dispute.

To address this problem, TEXCOM recommends the following additional subdivision to Probate Code 1000:

(d) For purposes of determining when a petitioner in a proceeding under this code may commence discovery as to non-parties, the time periods set forth in the Civil Discovery Act shall apply, except that such time periods shall commence to run upon service of the petition and notice of hearing upon all parties entitled to such notice.

To third parties, the timing of commencement of discovery is generally immaterial. TEXCOM believes this proposed subdivision will bring the discovery procedures in trust and estate proceedings more closely in alignment with civil discovery, enhancing efficiency without adversely affecting the rights of litigants.

While working on this project TEXCOM was also alerted to concerns regarding the Notice of Hearing as it relates to Probate Code section 850 Petitions. A due process issue was raised by an attorney and echoed by litigators on TEXCOM. Counsel had a client who was served with a Probate Code section 850 Petition and a Notice of Hearing concerning property in his possession that was claimed to belong to the petitioning estate. The language of a standard Notice of Hearing fails to convey the potential seriousness of the proceeding to an interested holder of property. It states: "This notice is required by law. This notice does not require you to appear in court, but you may attend the hearing if you wish."

Counsel's client did not realize the significance of the hearing, did not retain counsel, and when he failed to appear, the court defaulted him and entered judgment resulting in the loss of the property. Counsel was then in the position of attempting to set aside the default.

In addition to its failure to convey urgency to the interested party, a Notice of Hearing in an 850 Petition does not clearly identify the property affected by the petition, whether or not a money judgment of double the value of the property in question is being sought, or alert the recipient of the right to file a response. Even though it may not go far enough, TEXCOM believes the proper approach is found in Local Rule 4.37 of the Los Angeles County Superior Court. That Rule mandates that the Notice of Hearing on an 850 Petition shall include a description of the property in question and advise that interested persons have a right to file a response.

To address the propriety of the notice, TEXCOM suggests the following new subdivision (c) to Probate Code section 851:

(c) The Notice of Hearing must contain the following:

- (1) A description of the subject property sufficient to provide adequate notice to any party who may have an interest in the property. For real property, the notice must state the street address, or if none, a description of the property's location and assessor's parcel number.
- (2) If the petition seeks relief pursuant to Section 859, a description of the relief sought sufficient to provide adequate notice to the party against whom such relief is requested.
- (3) A statement advising any person interested in the property that he or she may file a response to the petition.

By mandating this additional language in the Notice of Hearing, a person reviewing the notice will be able to quickly determine if their interests are at risk and that they have the right to participate in the proceeding.

HISTORY:

The Trusts and Estates Section Executive Committee is not aware of any similar bill that has been introduced.

PENDING LITIGATION:

None known.

LIKELY SUPPORT & OPPOSITION:

Trust and estate litigators are likely to support the commencement of discovery consistent with the Civil Discovery Act to respondent trustees and persons entitled to notice under Probate Code section 851(a). The proposals will allow earlier discovery upon trustees already subject to court jurisdiction as well as persons who have or claim interest to property which is the subject of a Probate Code section 850 Petition.

Litigators representing both Petitioners and Respondents are likely to be in favor of clarifying and expanding the notice provisions connected to Probate Code section 850 Petitions, assuring proper notice to interested persons with a material interest in the property.

Finally, we believe trust litigators will be in favor of harmonizing commencement of discovery in regard to third parties with the Civil Discovery Act. This will allow a faster and more efficient discovery process in trust litigation.

We are not aware of any opposition to these proposals.

FISCAL IMPACT:

No anticipated fiscal impact.

GERMANENESS:

The members of the Trusts and Estates Section Executive Committee have an interest in and expertise concerning these issues from their experience in trust and estate litigation.

DISCLAIMER:

This position is only that of the Trusts and Estates Section of the State Bar of California. This position has not been adopted by either the State Bar's Board of Trustees or overall membership, and is not to be construed as representing the position of the State Bar of California.

Membership in the Trusts and Estates Section is voluntary and funding for section activities, including all legislative activities, is obtained entirely from voluntary sources.

TEXT OF PROPOSAL:

§ 851. Notice of hearing

(a) At least 30 days prior to the day of the hearing, the petitioner shall cause notice of the hearing and a copy of the petition to be served in the manner provided in Chapter 4 (commencing with Section 413.10) of Title 5 of Part 2 of the Code of Civil Procedure on all of the following persons where applicable:

- (1) The personal representative, conservator, guardian, or trustee as appropriate.
- (2) Each person claiming an interest in, or having title to or possession of, the property.

(b) Except for those persons given notice pursuant to subdivision (a), notice of the hearing, together with a copy of the petition, shall be given as provided in Section 1220 if the matter concerns a decedent estate, as provided in Section 1460 if the matter concerns a conservatorship or guardianship, or as provided in Section 17203 if the matter concerns a trust to all of the following persons:

- (1) Each person listed in Section 1220 along with any heir or devisee whose interest in the property may be affected by the petition if the matter concerns a decedent estate.
- (2) Each person listed in Section 1460 if the matter concerns a conservatorship or guardianship.
- (3) Each person listed in Section 17203 if the matter concerns a trust.

(c) The Notice of Hearing must contain the following:

(1) A description of the subject property sufficient to provide adequate notice to any party who may have an interest in the property. For real property, the notice must state the street address, or if none, a description of the property's location and assessor's parcel number.

(2) If the petition seeks relief pursuant to Section 859, a description of the relief sought sufficient to provide adequate notice to the party against whom such relief is requested.

(3) A statement advising any person interested in the property that he or she may file a response to the petition.

(ed) The court may not shorten the time for giving the notice of hearing under this section.

§ 1000. Civil action rules applicable

(a) Except to the extent that this code provides applicable rules, the rules of practice applicable to civil actions, including discovery proceedings and proceedings under Title 3a (commencing with Section 391) of Part 2 of the Code of Civil Procedure, apply to, and constitute the rules of

practice in, proceedings under this code. All issues of fact joined in probate proceedings shall be tried in conformity with the rules of practice in civil actions.

(b) A petitioner in a proceeding under Section 17200 that does not require issuance of a summons may commence discovery upon a trustee who is subject personally to the jurisdiction of the court under Section 17003 in accordance with the same time periods set forth in the Civil Discovery Act except that such time periods shall commence to run upon service of the petition and notice of hearing upon the trustee or the trustee's appearance in the proceeding, whichever first occurs.

(c) A petitioner in a proceeding under Section 850 may commence discovery upon any person who receives notice of the hearing pursuant to Section 851(a) in accordance with the same time periods set forth in the Civil Discovery Act, except that such time periods shall commence to run upon service of the petition and notice of hearing.

(d) For purposes of determining when a petitioner in a proceeding under this code may commence discovery as to non-parties, the time periods set forth in the Civil Discovery Act shall apply, except that such time periods shall commence to run upon service of the petition and notice of hearing upon all parties entitled to such notice.

PROOF OF SERVICE

**Supreme Court No. S251574
(Court of Appeal No. F076395)
(Tuolumne County Super. Ct. No. PR11414)**

I am a resident of the State of California and over the age of eighteen years and not a party to the within-entitled action; my business address is Three Embarcadero Center, Tenth Floor, San Francisco, California 94111-4024.

I am readily familiar with the practice of Arnold & Porter Kaye Scholer LLP for collection and processing of documents for delivery by overnight service by Federal Express, and that practice is that the document(s) are deposited with a regularly maintained Federal Express facility in an envelope or package designated by Federal Express fully prepaid the same day as the day of collection in the ordinary course of business.

On March 14, 2019, I served the document described as **MOTION FOR JUDICIAL NOTICE** on the persons listed below by placing the document for deposit with Federal Express through the regular collection process at the law offices of Arnold & Porter Kaye Scholer LLP, located at Three Embarcadero Center, Tenth Floor, San Francisco, California, to be served by Federal Express overnight delivery addressed as follows:

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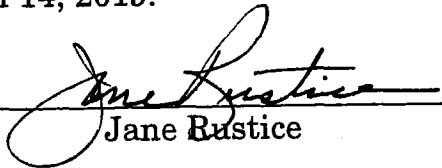
Clerk of the Court
SUPERIOR COURT OF CALIFORNIA
County of Tuolumne
41 West Yaney Avenue
Sonora, CA 95370

Clerk of the Court
FIFTH DISTRICT COURT OF
APPEAL
2424 Ventura Street
Fresno, CA 93721

Courtesy Copy:

Dana Anthony Berry, Sr.
5149 Bain Street
Mira Loma, CA 91725

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at San Francisco, California on March 14, 2019.


Jane Rustice