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Witkin Summary of California Law, Tenth Edition
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CHAPTER XX - Trusts

Witkin Summary of California Law
I. INTRODUCTION
A. Nature and Classification of Trusts.

13 Witkin Sum. Cal. Law Trusts § 1

[§ 1] Nature and Classification of Trusts.

(1) *General Law*. The usual classification employed by courts and writers is as follows: (a) *express trusts*, where the actual intent of the settlor is expressed; and (b) *implied trusts*, where the intention is not expressed, including (1) *resulting trusts*, where the intention is implied by law, and (2) *constructive trusts*, which are imposed by law regardless of intention. (See 1 Scott §2.1; Bogert §1; *Rest.3d, Trusts* §7 et seq. [resulting trusts]; *Rest., Restitution* §160 [constructive trusts].)

(2) *Restatement*. *Rest.3d, Trusts* §2 uses the following definition: "A trust, as the term is used in this Restatement when not qualified by the word 'resulting' or 'constructive,' is a fiduciary relationship with respect to property, arising from a manifestation of intention to create that relationship and subjecting the person who holds title to the property to duties to deal with it for the benefit of charity or for one or more persons, at least one of whom is not the sole trustee."

(3) *Former California Statute*. The English Statute of Uses was never in force in California; the law of trusts is established by statute. (See *McCurdy v. Otto* (1903) 140 C. 48, 53, 73 P. 748; 24 Cal. L. Rev. 471, 472; 28 So. Cal. L. Rev. 111.)

The Civil Code formerly divided trusts into those that were (a) *voluntary*, arising out of a personal confidence reposed in, and voluntarily accepted by, one person for the benefit of another, or (b) *involuntary*, created by operation of law, including resulting and constructive trusts. (See *Fulton v. Jansen* (1893) 99 C. 587, 590, 34 P. 331; *Lauricella v. Lauricella* (1911) 161 C. 61, 66, 118 P.430; *Wells Fargo Bank v. Greuner* (1964) 226 C.A.2d 454, 460, 38 C.R. 132, *infra*, §195, citing the text [term "voluntary" is used to distinguish express from resulting and constructive trusts]; 28 So. Cal. L. Rev. 118 [criticizing inept and comparatively useless definitions of California Civil Code].)

(4) *Trust Law*. For purposes of the Trust Law, "trust" includes (a) express trusts, whether private or charitable, and (b) constructive trusts "to be administered in the manner of" express trusts under a judgment or decree, but excludes (1) other constructive trusts, and (2) resulting trusts. (*Prob.C. 82(a), (b).*) (See Cal. Civil Practice, 3 Probate and Trust Proceedings, §24:1 et seq.; on charitable trusts, see *infra*, §289 et seq.; on resulting trusts, see *infra*, §311 et seq.; on constructive trusts, see *infra*, §319 et seq.; on additional specific exclusions from the definition, see *Prob.C. 82(b)*, *infra*, §2.)

(5) *Other Terminology*. A number of terms are commonly used to describe trusts with various characteristics,

including the following:

(a) *Inter vivos or living trust*. An inter vivos trust, now usually referred to as a living trust, is one created during the settlor's lifetime.

(b) *Testamentary trust*. A testamentary trust is one created in a decedent's will and funded by a distribution of probate assets.

(c) *Revocable trust*. A revocable trust is one that can be amended or revoked, usually by the settlor during life, but sometimes by a designated third person. (See C.E.B., 1 Drafting California Revocable Trusts 4th, §1.1 et seq.)

(d) *Irrevocable trust*. An irrevocable trust is one that may not or may no longer be amended or revoked. Most commonly, a revocable living trust becomes irrevocable on the settlor's death. (See C.E.B., 1 Drafting California Irrevocable Trusts 3d, §1.1 et seq.)

(e) *Marital deduction trust*. This trust is designed to qualify for a decedent's federal estate tax marital deduction. (See C.E.B., 1 Drafting California Revocable Trusts 4th, §9.1 et seq.)

(f) *Bypass, credit shelter, applicable credit, or exemption equivalent trust*. This trust is designed to qualify for a decedent's federal estate tax applicable credit amount. (See C.E.B., 2 Drafting California Revocable Trusts 4th, §14.1 et seq.)

(g) *Special needs trust*. A special needs trust is one designed to preserve governmental benefits for an elderly or disabled beneficiary. (See C.E.B., 1 Drafting California Irrevocable Trusts 3d, §13.1 et seq.; 24 J. Juvenile Law 79.)

(6) *Practice Works*. A number of useful practice works are available concerning the topics in this chapter, including the following:

West, California Transactions Forms, Estate Planning.

West, California Civil Practice, Probate and Trust Proceedings.

C.E.B., Drafting California Revocable Trusts 4th.

C.E.B., Drafting California Irrevocable Trusts 3d.

C.E.B., California Trust Administration.

C.E.B., California Trust and Probate Litigation.

C.E.B., Administering a Single-Person Trust After the Settlor's Death (action guide).

C.E.B., Funding a Revocable Trust (action guide).

C.E.B., Handling a Fiduciary Accounting (action guide).

C.E.B., Handling Postmortem Trust Administration (action guide).

C.E.B., Marital Deduction Subtrust Funding (action guide).

76 Am.Jur.2d (2005 ed.), Trusts.

17A, 17B, 17C Am.Jur. Legal Forms 2d (1995 ed.), Trusts.

24 Am.Jur. P.P. Forms (1999 ed.), Trusts.

West's Key Number Digest, Trusts k.1

SUPPLEMENT: [This section is current through the latest supplement]

(5) *Other Terminology*.

(g) *Special needs trust*. See C.E.B., Special Needs Trusts.

(6) *Practice Works*. See C.E.B., Special Needs Trusts.



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I. INTRODUCTION
B. Other Relationships Distinguished.
1. In General.

13 Witkin Sum. Cal. Law Trusts § 2

[§ 2] In General.

A number of situations giving rise to "trust relationships" in the broad sense are distinguishable from strict trusts. (See *Rest.3d, Trusts* §5 [listing relationships that are not trusts]; 1 *Scott* §5 et seq.; *Bogert* §11 et seq.; 76 *Am.Jur.2d* (2005 ed.), *Trusts* §10 et seq.) The following are illustrative:

(a) Guardianships and conservatorships. (*Prob.C. 82(b)(2)*; see 14 *Summary* (10th), *Wills and Probate*, §901 et seq.; but see *Prob.C. 2101* [guardianship and conservatorship relationships are fiduciary relationships and are governed by the law of trusts, except to the extent provided by *Prob.C. 1400* et seq. (the Guardianship-Conservatorship Law)].)

(b) Personal representative status. (*Prob.C. 82(b)(3)*; see 14 *Summary* (10th), *Wills and Probate*, §415 et seq.)

(c) Totten trust accounts. (*Prob.C. 82(b)(4)*; see *infra*, §8 et seq.)

(d) Custodianships under the Uniform Transfers to Minors Act. (*Prob.C. 82(b)(5)*; see 13 *Summary* (10th), *Personal Property*, §139 et seq.)

(e) Business trusts taxed as partnerships or corporations. (*Prob.C. 82(b)(6)*.)

(f) Regulated investment trusts. (*Prob.C. 82(b)(7)*.)

(g) Common trust funds. (*Prob.C. 82(b)(8)*.)

(h) Voting trusts. (*Prob.C. 82(b)(9)*.)

(i) Security arrangements. (*Prob.C. 82(b)(10)*; see *infra*, §3.)

(j) Transfers in trust for litigation or enforcement. (*Prob.C. 82(b)(11)*.)

(k) Liquidation trusts. (*Prob.C. 82(b)(12)*.)

(l) Trusts for paying debts, dividends, interest, salaries, wages, profits, pensions, or employee benefits. (*Prob.C. 82(b)(13)*; see *infra*, §6.)

- (m) Nominee or escrow arrangements. (*Prob.C. 82(b)(14)*; see 12 *Summary* (10th) *Real Property*, §301 et seq.)
- (n) Agency. (See 3 *Summary* (10th), *Agency and Employment*, §97 et seq.)
- (o) Powers of attorney. (See 3 *Summary* (10th), *Agency and Employment*, §207; 14 *Summary* (10th), *Wills and Probate*, §385 et seq.)
- (p) Bailments. (See 13 *Summary* (10th), *Personal Property*, §156 et seq.)
- (q) Third-party beneficiary contracts. (See 1 *Summary* (10th), *Contracts*, §685 et seq.)
- (r) Equitable charges. (See *infra*, §4.)
- (s) Interests subject to conditions. (See *infra*, §5.)
- (t) Debt relationships. (See *infra*, §3.)
- (u) Contracts to convey property.
- (v) Receiverships. (See 6 *Cal. Proc.* (4th), *Provisional Remedies*, §416 et seq.)
- (w) Corporate directorships. (See 9 *Summary* (10th), *Corporations*, §90 et seq.)
- (x) Insurance. (See *Shapiro v. Equitable Life Assur. Soc. of United States* (1946) 76 C.A.2d 75, 90, 172 P.2d 725 [relation between insured and insurer (including mutual life insurance company) is one of contract, not trust]; 2 *Summary* (10th), *Insurance*, §1 et seq.)
- (y) Joint ownership of property. (See *Estate of Drucker* (1984) 152 C.A.3d 509, 514, 199 C.R. 345 [joint bank account intended as gift is treated as legal equivalent of revocable living trust]; 4 *Summary* (10th), *Negotiable Instruments*, §76 et seq.; 12 *Summary* (10th), *Real Property*, §32 et seq.; 13 *Summary* (10th), *Personal Property*, §30 et seq.)
- (z) Surviving or liquidating partner status. (See *Metzenbaum v. Metzenbaum* (1953) 115 C.A.2d 395, 398, 252 P.2d 31, 9 *Summary* (10th), *Partnership*, §48 [liquidating partner acts as quasi-trustee in defending against adverse claims and preserving partnership assets for partners or beneficiaries].)

SUPPLEMENT: [This section is current through the latest supplement]

Trust relationship but not strict trust: See *McCann v. Lucky Money* (2005) 129 C.A.4th 1382, 1398, 29 C.R.3d 437 [foreign currency exchange and transmission company was not trustee, and thus was not subject to duties of trustees under Probate Code, even though customers' funds were "trust funds" under Financial Code].(v) *Receiverships*.

Cross-Reference: 6 *Cal. Proc.* (5th), *Provisional Remedies*, §419 et seq.



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B. Other Relationships Distinguished.

2. Debt, Security Device, or Impound Account.

13 Witkin Sum. Cal. Law Trusts § 3

[§ 3] Debt, Security Device, or Impound Account.

(1) *Debt*. A debtor-creditor relationship is distinguishable from a strict trust. (See *Rest.3d, Trusts §5(k)* [relationship of debtor to creditor is not trust]; *Symmonds v. Pacific Homes* (1964) 224 C.A.2d 507, 509, 36 C.R. 725 [debtor-creditor relationship]; *Abrams v. Crocker-Citizens Nat. Bank* (1974) 41 C.A.3d 55, 59, 114 C.R. 913 [discussing Restatement].)

(2) *Security Device*. It has been held that a trust indenture securing a bond issue creates an ordinary trust relationship between the trustee and the bondholder as beneficiary. (*Strauss v. Superior Court* (1950) 36 C.2d 396, 402, 224 P.2d 726.) However, for purposes of the Trust Law, a security arrangement, e.g., a deed of trust used as a security device in place of a mortgage, is not a trust. (See *Prob.C. 82(b)(10)*; *Rest.3d, Trusts §5(l)* [mortgage, deed of trust, pledge, lien, or other security arrangement is not trust]; *Field v. Acres* (1937) 9 C.2d 110, 113, 69 P.2d 422, 4 Summary (10th), *Security Transactions in Real Property*, §7; *Touli v. Santa Cruz County Title Co.* (1937) 20 C.A.2d 495, 496, 67 P.2d 404.) Nevertheless, specified provisions of the Trust Law may, by statute, be applicable to security devices. (See C.C. 2934b [*Prob.C. 15643* (vacancy in office of trustee) and *Prob.C. 18102* (protection of third person dealing with former trustee) apply to trustees under deeds of trust given to secure obligations].)

(3) *Impound Account*. In *Marsh v. Home Fed. Savings & Loan Assn.* (1977) 66 C.A.3d 674, 136 C.R. 180, plaintiff brought a class action on behalf of homeowners who borrowed from defendant lender, seeking the recovery of money earned from "impound" or "reserve" accounts. The deeds of trust required installment payment of the estimated amounts to become due for insurance, taxes, and other charges affecting the property, and further provided that, at the option of the beneficiary, the money could be "held by the Beneficiary in trust in the general funds without interest." *Held*, the fund was held in trust, but defendant was not liable for interest.

(a) Payment of money may create either a debt or a trust, depending on the intention of the parties. (66 C.A.3d 681.) No particular words are necessary, and under the objective test, an express trust may arise from a manifestation of intent even though the parties in their own minds did not intend a trust. (66 C.A.3d 682, citing Scott and the text.)

(b) The principal circumstance indicating a trust is the lack of a requirement that interest be paid. The sums were substantial, and the deed of trust provided for a holding period of about 13 months. This suggests a fiduciary relationship, like that involved in a deposit of funds in escrow. (66 C.A.3d 683.) Also, the provision that the money could be held "in trust in the general funds without interest" indicates that the parties intended a separate fund; and this

is confirmed by defendant's financial statements, which separated the impounds from other debts. (66 C.A.3d 683.)

(c) There was, however, no breach of trust in commingling the funds and taking the benefits of their use without paying interest. The deed of trust embodying the agreement of the parties gave defendant authority to commingle, and also expressly provided that no interest would be payable. There was nothing unusual or unconscionable in this practice, and to force the lender to account for earnings from the funds would be to make a new contract for the parties. (66 C.A.3d 684, 685.)

(d) The 1976 legislation regulating impound accounts and requiring payment of at least 2% interest per annum (C.C. 2954.8; see 4 *Summary* (10th), *Security Transactions in Real Property*, §80) does not call for a different conclusion in this case; agreements made before the effective date of the new statutes could validly provide for interest-free impound accounts. (66 C.A.3d 686.)

In *Petherbridge v. Prudential Savings & Loan Assn.* (1978) 79 C.A.3d 509, 145 C.R. 87, the court reached a different result on different facts. After restating the basic distinctions between trust and debtor-creditor relationships (79 C.A.3d 517), and pointing out that use of the word "trust" does not necessarily manifest an intent to create a trust relationship (79 C.A.3d 516), the court examined the language of the deed of trust in the light of its primary intent (79 C.A.3d 518), and found the subsequent conduct of the parties most probative (79 C.A.3d 522). *Held*, the trial judge's determination of a debtor-creditor relationship was supported by substantial evidence.

(a) "In view of the fact the dominant purpose of the impound payment arrangement was to enhance the security of the deed of trust and, thus, to benefit defendant, not plaintiff, it would not be reasonable to expect that defendant would undertake the onerous responsibilities of a trustee. The same conclusion is indicated by the relatively small sums involved and the relatively short time between defendant's receipt of impound moneys and its payment of taxes and insurance premiums." (79 C.A.3d 523.) This result is consistent with C.C. 2954.8, because payment of interest is generally regarded as characteristic of a debtor-creditor relationship. (79 C.A.3d 524.)

(b) *Marsh* is distinguishable as follows: (1) In *Marsh*, the language of the instruments was much more indicative of a trust intent; (2) the holding on the trust point was not necessary to the actual decision; and (3) the court, affirming a summary judgment, based its conclusion exclusively on the instruments. Here, the case was tried and the intent was determined on the basis of the instruments, the surrounding circumstances, and the conduct of the parties. (79 C.A.3d 525.)

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3. Equitable Charge.

13 Witkin Sum. Cal. Law Trusts § 4

[§ 4] Equitable Charge.

An equitable charge bears a close resemblance to a trust, in that the legal title to property is given to a transferee subject to an equitable interest in favor of a third person, e.g., payment of certain sums to that person. The principal difference is that the transferee becomes the owner of the property and, after the charge is paid, keeps it as his or her own, while a trustee merely gets legal title and, when the trust purpose is accomplished, holds any remaining property under a resulting trust for the settlor or the settlor's successors. (See *Rest.3d, Trusts §5(h)* [equitable charge is not trust]; *Woodley v. Woodley* (1941) 47 C.A.2d 188, 193, 117 P.2d 722; 1 Scott §10; Bogert §31.)

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4. Interest Subject to Condition.

13 Witkin Sum. Cal. Law Trusts § 5

[§ 5] Interest Subject to Condition.

In *Walton v. Red Bluff* (1991) 2 C.A.4th 117, 3 C.R.2d 275, two members of a family transferred property to defendant municipality to hold "in trust" on condition that the property be used for a public library. Years later, defendant stopped using the property for library purposes and plaintiff, a descendant of the transferors, sought reconveyance of the property. *Held*, the transaction was a transfer in fee subject to a power of termination, not a transfer in trust.

(a) "The use of the word 'trust' in a grant does not without more make a trust." There must be trust intent, trust purpose, trust property, and a beneficiary. (2 C.A.4th 124, citing the text.) Further, trust intent must be shown by more than an expression of intent to establish a moral obligation. (2 C.A.4th 124.)

(b) Under the Restatement, an interest subject to a condition is not, because of the condition, held in trust. The language (the grant and conveyance "shall cease" and title to the property "shall at once revert") evidences not a trust but only an intent to divest defendant of its interest if it fails to maintain a library. (2 C.A.4th 125.)

SUPPLEMENT: [This section is current through the latest supplement]

See *L.B. Research & Education Foundation v. UCLA Foundation* (2005) 130 C.A.4th 171, 177, 29 C.R.3d 710 [following *Walton v. Red Bluff* (1991) 2 C.A.4th 117, 3 C.R.2d 275, text, p. 572, and *Palm Springs v. Living Desert Reserve* (1999) 70 C.A.4th 613, 82 C.R.2d 859, text, §299; cash gift to university to fund chaired professorship was charitable gift subject to conditions subsequent rather than charitable trust].



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B. Other Relationships Distinguished.

5. Pension or Deferred Compensation Plan.

13 Witkin Sum. Cal. Law Trusts § 6

[§ 6] Pension or Deferred Compensation Plan.

(1) *Pension Plans*. A pension plan creates two relationships: (a) a contractual relationship between the employer and the employee, and (b) a trust relationship between the pensioner and the trustee administering the plan. (*Lix v. Edwards* (1978) 82 C.A.3d 573, 578, 147 C.R. 294; see *Lyles v. Teachers Retirement Bd.* (1963) 219 C.A.2d 523, 526, 33 C.R. 328 [designation of beneficiary of retirement fund, like tentative trust, was revocable during member's lifetime or by will]; 60A Am.Jur.2d (2003 ed.), *Pension and Retirement Funds* §1 et seq.)

(2) *Deferred Compensation Plans*. In *Herrick v. California* (1983) 149 C.A.3d 156, 196 C.R. 663, plaintiff state employees, participants in a deferred compensation plan, challenged the assessment and collection of administrative costs, alleging a breach of defendant's fiduciary duty as trustee. *Held*, the relationship between the parties was not a trust.

(a) There was no intention to create a trust. The purported trustee dictated the terms of the arrangement, including the kind and amount of property involved, the conditions governing revocation, the distribution of principal and income, and a disclaimer of liability for failure to use reasonable care in selecting investments. Further, plaintiffs had no ownership interest in the plan funds, which were available for defendant's general purposes. (149 C.A.3d 161.)

(b) There was no acceptance by the purported trustee. Defendant purposely avoided a trust relationship with plan participants in order to qualify the plan for favorable federal income tax treatment. (149 C.A.3d 162.)

(3) *Plans Excluded From Trust Law*. A trust for the primary purpose of paying salaries, wages, profits, pensions, or employee benefits is not a trust for purposes of the Trust Law. (*Prob.C. 82(b)(13)*.)

SUPPLEMENT: [This section is current through the latest supplement]



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I. INTRODUCTION

C. Public and Statutory Trusts.

13 Witkin Sum. Cal. Law Trusts § 7

[§ 7] Public and Statutory Trusts.

(1) *Public Trust.* The "public trust" on which California tidelands were granted by the state to municipalities is essentially a restriction on the use to which those lands may be put, and not a strict trust. (See *Hermosa Beach v. Superior Court* (1964) 231 C.A.2d 295, 299, 41 C.R. 796 [dedication of land to municipality for park purposes; 12 Summary (10th), *Real Property*, §211].) However, landowners within an irrigation district have been held to be beneficiaries of a trust, with the usual rights and remedies against the directors as trustees. (See *Allen v. Hussey* (1950) 101 C.A.2d 457, 467, 225 P.2d 674.)

(2) *Statutory Trust.* A special statute may create a trust or quasi-trust relationship to carry out a legislative object. (See *B. & P.C.* 7735 et seq. [deposits of money under "preneed funeral arrangements" required to be held in trust]; *Bank of America v. Bowden* (1956) 46 C.2d 863, 868, 300 P.2d 10 [Check Sellers and Cashers Law]; *IFS Industries v. Stephens* (1984) 159 C.A.3d 740, 750, 205 C.R. 915 [removal of trustee of preneed funeral trust].)

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SUPPLEMENT: [This section is current through the latest supplement]



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I. INTRODUCTION

D. Tentative Trust in Bank Deposit.

1. Nature of Trust.

13 Witkin Sum. Cal. Law Trusts § 8

[§ 8] Nature of Trust.

(1) *In General.* Under a rule established in the New York case of *Matter of Totten*, if a depositor merely opens an account in the depositor's own name as trustee for another person, intending to reserve the power to withdraw funds during his or her lifetime, a *tentative trust* is created, revocable during the trustor's lifetime or by will, and at the depositor's death presumptively an absolute trust. Partial revocation takes place whenever the depositor withdraws money from the account, and the beneficiary is entitled only to the balance on deposit at death. But if the beneficiary dies first, the tentative trust is terminated. (See *Rest.3d, Trusts* §26; 1A Scott §58; Bogert §47; *Estate of Fisher* (1988) 198 C.A.3d 418, 424, 244 C.R. 5, *infra*, §10; 64 A.L.R.3d 221 [death of beneficiary as terminating or revoking Totten trust].)

The Totten trust is now generally upheld, either by case law or statute. (On Multiple-Party Accounts Law (*Prob.C. 5100 et seq.*), see 4 *Summary* (10th), *Negotiable Instruments*, §77 *et seq.*) Despite the theoretical evasion of the statute of wills, it has proved to be a useful and inexpensive method of creating a trust by persons of moderate means. (See 10 *Am.Jur.2d* (1997 ed.), *Banks* §691; 38 A.L.R.2d 1243 [manner and sufficiency of revocation]; 10 A.L.R.4th 1229 [revocation by pledging or otherwise employing account as collateral or security].)

(2) *Challenges.* A Totten trust may be challenged or attacked in several ways:

(a) Creditors of the depositor can reach the fund. (See *Rest.3d, Trusts* §26, Comment d.)

(b) A surviving spouse may attack the trust to the extent necessary to protect a statutory intestate share in the depositor's estate. (See *Rest.3d, Trusts* §25, Comment e; 64 *Harv. L. Rev.* 1367; 65 *Harv. L. Rev.* 512; 64 A.L.R.3d 187 [inclusion of funds in Totten trust in determining surviving spouse's interest in decedent's estate].) (But see *Estate of Allen* (1993) 12 C.A.4th 1762, 1766, 16 C.R.2d 352, 14 *Summary* (10th), *Wills and Probate*, §274, quoting the text [Totten trust was not part of decedent depositor's estate and thus was not subject to claim of omitted spouse].)

(c) The guardian or conservator of a mentally incompetent depositor may apply to the court for permission to revoke the trust where the fund is necessary for the welfare of the ward or conservatee. (See *Rest.3d, Trusts* §26, Comment c.) But the guardian or conservator cannot act on his or her own authority and must petition the court for authority. (*Katz v. Greeninger* (1950) 96 C.A.2d 245, 248, 215 P.2d 121; *Guardianship of Cuen* (1956) 142 C.A.2d 258,

262, 298 P.2d 545; see *Prob.C. 2580(b)(11)*; 53 A.L.R.4th 1297 [guardian's authority to revoke trust without court approval].)

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D. Tentative Trust in Bank Deposit.

2. Adoption of Doctrine in California.

13 *Witkin Sum. Cal. Law Trusts* § 9

[§ 9] Adoption of Doctrine in California.

The early cases did not clearly indicate whether the tentative trust was accepted in California; most of them involved express declarations of trust. (See *Kuck v. Raftery* (1931) 117 C.A. 755, 757, 4 P.2d 552; *Evinger v. MacDougall* (1938) 28 C.A.2d 175, 179, 82 P.2d 194 [trust created by ordinary deposit in trust form was held revocable, and revoked where settlor pledged passbook with third party]; *Estate of Alberts* (1940) 38 C.A.2d 42, 48, 100 P.2d 538 [recognizing doctrine, but decided on other grounds]; 7 *So. Cal. L. Rev.* 116.)

The issue was resolved, however, in *Kosloskye v. Cis* (1945) 70 C.A.2d 174, 160 P.2d 565. Decedent, without the knowledge of his wife or nephews (Enrico and Clement), opened two bank accounts, entitled: "Domenico Cis, trustee for Enrico [Clement] Cis." Except for one small withdrawal, they remained untouched until his death intestate, when his widow claimed the money as his heir. *Held*, the widow was entitled. The court reviewed the history of the tentative trust doctrine, its apparent approval in prior dicta in California, and its support in the Trusts Restatement, and concluded that "[f]or the purposes of this opinion it may be assumed that a deposit in trust, and nothing more, will support a finding of an intent to create a trust." (70 C.A.2d 180.)

The court pointed out, however, that the deposit gives rise to a presumption or inference of intent to create a revocable trust, *in the absence of evidence of a different intention* (see *Rest.3d, Trusts* §26, Comment a). Here, the trial judge found against a trust intent, and that finding was supported by inferences from the following evidence: decedent and his widow lived together until his death, without the money she would be left penniless, decedent lived for some time on the charity of the wife's relatives, and decedent had quarreled with the parents of the two nephews. The decision thus left the determination of the existence of a tentative trust largely in the uncontrolled discretion of the trial judge, for the only *evidence* on trust intent was the form of the account; the contrary "inferences" were simply from arguments about what the decedent, in good conscience, should have intended. (70 C.A.2d 180.)

In *Brucks v. Home Fed. Savings & Loan Assn.* (1951) 36 C.2d 845, 228 P.2d 545, the *Kosloskye* approach was followed, establishing the tentative trust doctrine but making its application extremely uncertain. The court, citing *Totten* and the earlier California decisions, first declared that "[t]he doctrine of 'tentative trusts' created by deposits 'in trust' for some person other than the depositor appears to be accepted law in this state." (36 C.2d 849.) But the "determinative consideration is the matter of the intent of the depositor," a question of fact. (36 C.2d 850.) "Whether the form of the deposit, without other evidence, creates a 'presumption' in favor of the trust relation or an 'inference only' ...

a 'controverting demonstration' may be made either to show there was 'no initial intention' to confer the claimed benefit or that, after the opening of the account with the requisite trust intent, the 'sentiments of the depositor' on the matter changed." (36 C.2d 850.) Here, the trial court's finding of a tentative trust was upheld. But the court further held, reversing the trial court's judgment, that a subsequent holographic will (in a letter) creating an express trust revoked the tentative trust. The opinion quoted Rest., Trusts §58, Comment b (now Rest.3d, Trusts §26, Comment c) to the effect that no particular formalities are necessary to manifest the intent to revoke. (36 C.2d 851.) (See 1A Scott §58.4; 46 A.L.R.3d 487 [revocation by inter vivos declaration or will].)

In *Estate of Collins* (1978) 84 C.A.3d 928, 932, 149 C.R. 65, infra, §10, the court declared that the doctrine "is accepted law in this state." However, while Totten trusts are recognized by statute (see *Fin.C. 14868*), they are excluded from the operation of the Trust Law. (*Prob.C. 82(b)(4)*.)

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SUPPLEMENT: [This section is current through the latest supplement]



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I. INTRODUCTION

D. Tentative Trust in Bank Deposit.

3. Elements of Trust.

13 Witkin Sum. Cal. Law Trusts § 10

[§ 10] Elements of Trust.

(1) *Necessity of Actual Deposit.* In *Estate of Collins* (1978) 84 C.A.3d 928, 149 C.R. 65, decedent had funds in Home Federal Savings and Loan Association. On October 11, he signed an application for an individual trustee savings deposit account in Central Federal Savings and Loan Association, naming plaintiff as beneficiary; he signed and delivered to Central his sight draft on Home for the balance of his account there, and also delivered his Home passbook; and Central prepared a new passbook but made no entry in it. Central forwarded the sight draft to Home, which responded on October 15 with a demand that decedent's signature be notarized, but decedent died on that day. Plaintiff brought a proceeding against decedent's administrator to determine title to the funds. *Held*, judgment for defendant affirmed.

(a) Decedent's *intention* to create a tentative trust was clear, but intent is not enough; there must be an actual deposit of funds. (84 C.A.3d 932.) Acceptance of the sight draft by Home was necessary to complete the collection process and effect the deposit; and Central, by preparing a passbook with no deposit entered, clearly informed decedent that no deposit had been made. (84 C.A.3d 933.)

(b) The contention that decedent, by doing everything necessary to create the deposit, made a symbolic delivery to Central, as in gift cases, is unsound. In a tentative trust, no transfer is intended until death, and a draft does not operate as an assignment of funds. (84 C.A.3d 934, footnote 2, citing the text.)

An elaborate dissent, reviewing the authorities in great detail, argues that there was a deposit--of a passbook and a negotiable document--and that the majority's insistence that a *cash* deposit was essential to the creation of a tentative trust is contrary to the decisional law. (84 C.A.3d 947.)

(2) *Intent and Trust Res.* In *Estate of Fisher* (1988) 198 C.A.3d 418, 244 C.R. 5, a depositor opened a Totten trust account in a savings institution by signing the account card and depositing funds. The card named the depositor "or" defendant, his mother, as trustees for plaintiffs, the depositor's daughters. In a proceeding to determine entitlement to the account after the depositor's death, defendant claimed the funds as surviving joint trustee or surviving joint tenant. *Held*, summary judgment for defendant reversed; the account card did not establish defendant's right to the account as a matter of law.

(a) *No showing of trust intent.* The card is not evidence of defendant's intent to create a trust. Because she never signed the card, she did not subscribe to the declaration of trust printed on it. Nor can her attempted withdrawal of funds after the depositor's death constitute a ratification. If the depositor were the sole settlor, defendant's attempt to become a joint settlor or trustee after title to the account passed to the beneficiaries would be ineffectual. (198 C.A.3d 425.)

(b) *No showing of trust res.* The creation of a trust requires trust property. Implicit in the creation of a Totten trust is the deposit of one's own money for the benefit of a third person. Here, defendant presented no evidence that she deposited funds into the account. (198 C.A.3d 426.)

(c) *No showing of joint tenancy.* There is no evidence that the depositor intended to create a joint tenancy. The joint tenancy box on the card was not checked, and use of the word "or" was insufficient to create a joint tenancy. (198 C.A.3d 427.) Even if a joint tenancy were established, plaintiffs would be entitled to show that defendant held title as trustee for them. (198 C.A.3d 428.)

(3) *Consent of Spouse for Trust of Community Property.* In *Estate of Wilson* (1986) 183 C.A.3d 67, 227 C.R. 794, 11 Summary (10th), *Community Property*, §139, decedent husband, without informing his wife, deposited community property funds in three Totten trust accounts. *Held*, on decedent's death intestate, the surviving wife was entitled to one-half of each account as her share of community property. Although she had already received more than one-half of the total community property, decedent's right of disposition was limited to one-half of *each* community property asset. "In sum, since each Totten trust is an individual community property asset in which the decedent had only a one-half undivided interest at the time he died, he could pass on to third parties only his one-half of that asset--in this case one-half of the funds in each account. Although the practical effect of this rule limits the ability to make testamentary dispositions of community property through Totten trusts, individuals possess virtually unlimited ability to dispose of their share of the community assets at death by will." (183 C.A.3d 73.)

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D. Tentative Trust in Bank Deposit.

4. Distinction: Absolute Trust.

13 Witkin Sum. Cal. Law Trusts § 11

[§ 11] Distinction: Absolute Trust.

The doctrine of tentative trust need not be invoked to sustain a true trust in a bank deposit. Thus, in *Sherman v. Hibernia Savings & Loan Soc.* (1933) 129 C.A. Supp. 795, 20 P.2d 138, J opened an account in his own name, but also executed a separate declaration of trust in favor of S as beneficiary, the money to be payable on J's death. S died before J. *Held*, the trust was absolute. Even where the tentative trust doctrine is followed, a formal declaration of trust creates an absolute trust. (129 C.A. Supp. 797.)

In *Bank of America v. Hazelbud* (1937) 21 C.A.2d 109, 68 P.2d 385, decedent opened an account in his own name, but signed a card entitled, "Trust Fund Savings Account." This appointed the bank trustee, and provided that deposits and interest be held in trust for himself or any beneficiary he should designate, with the balance at his death to go to his sister as beneficiary. During his life he drew on and deposited in the account, and was credited with the usual interest. Upon his death, the surviving widow and the beneficiary claimed the account. The trial court awarded the widow one-half the community funds in the account and gave the balance to the beneficiary. The widow appealed, contending that there could be no trust because a debtor-creditor relationship existed between the depositor and the bank, the bank having the right to commingle and use the funds for its own profit, paying only the regular rate of interest. *Held*, a trust was created. (21 C.A.2d 112.) (See *Katz v. Greeninger* (1950) 96 C.A.2d 245, 247, 215 P.2d 121 [similar to *Hazelbud*]; *Randall v. Bank of America* (1941) 48 C.A.2d 249, 252, 119 P.2d 754 [same theory applied to savings and loan investment certificate taken out under similar trust arrangement]; 4 *Summary* (10th), *Negotiable Instruments*, §76.)

Where an absolute trust is created, the settlor does not have the unlimited power of revocation. In *Miller v. Miller* (1963) 217 C.A.2d 538, 31 C.R. 618, the parents of plaintiff established a bank account with the father as trustee. The first deposit of \$ 25 was money given to the son by his grandfather; later deposits were made by the parents, but the manner in which the money and its proceeds were handled justified the inference of an intent to create an absolute trust. The court quoted Scott on the kinds of circumstantial evidence that may be probative: "[W]here the depositor delivers the bank book to the beneficiary, this is an indication of his intention to make the trust irrevocable; but it may be shown that the book was delivered to the beneficiary only for safe keeping and not with the intention of making the trust irrevocable. So, also, where the depositor informs the beneficiary of the deposit, he may thereby indicate an intention to make the trust irrevocable. The fact that the depositor informs the beneficiary of the deposit, however, does not necessarily indicate an intention to make the trust irrevocable. Where the depositor signs an instrument declaring that he holds the deposit in trust, this may indicate an intention to create an irrevocable trust. The intention of the depositor to

make the trust irrevocable may be manifested in other ways, as by a statement to a third person of his intention." (217 C.A.2d 543, quoting 1A Scott §58.1.)

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Witkin Summary of California Law

I. INTRODUCTION

E. Restatement.

13 Witkin Sum. Cal. Law Trusts § 12

[§ 12] Restatement.

(1) *Restatement*. The original Restatement of Trusts, in two volumes, was published in 1935. It covered private and charitable trusts, including resulting trusts. It did not deal with constructive trusts, business (Massachusetts) trusts, or trusts for security, such as trust deeds and trust receipts. Constructive trusts were covered in the *Restatement of Restitution*, published in 1937.

(2) *Restatement 2d*. The Second Restatement of Trusts appeared in 1959. It preserved the original section numbering, but added a large amount of new material. It includes three Appendix volumes, containing Reporter's Notes and notes of the cases citing each section since the appearance of the first Restatement. (See *12 U.C.L.A. L. Rev.* 190 [criticism of Restatement rules and trust theories].)

(3) *Restatement 3d*. The American Law Institute began its revision of the Second Restatement of Trusts out of sequence. In 1991, as a matter of urgency, it published a new volume revising those sections dealing with the prudent investor rule, but retaining the section numbers of the Second Restatement. (See *infra*, §76 et seq.) Eventually, the prudent investor material will be renumbered and incorporated in the numbering sequence of the Third Restatement.

Two volumes of the Third Restatement of Trusts were published in 2003. They include 13 chapters in 5 parts:

Part 1: Nature, Characteristics, and Types of Trusts.

Chapter 1: Definitions and Distinctions (§§1-6).

Chapter 2: Resulting Trusts (§§7-9).

Part 2: Creation of Trusts.

Chapter 3: Basic Principles and Requirements (§§10-16).

Chapter 4: Formalities: Trusts Created by Will (§§17-19).

Chapter 5: Formalities: Creation of Inter Vivos Trusts (§§20-26).

Part 3: Elements of Trusts.

Chapter 6: Trust Purposes (§§27-30).

Chapter 7: The Trustee (§§31-39).

Chapter 8: Trust Property (§§40-42).

Chapter 9: Beneficiaries (§§43-48).

Part 4: Nature of Beneficiaries' Rights and Interests.

Chapter 10: Extent and Enforceability of Beneficial Interests (§§49-50).

Chapter 11: Voluntary and Involuntary Transfers of Beneficial Interests: General Principles (§§51-56).

Chapter 12: Spendthrift Trusts and Other Restraints on Voluntary and Involuntary Alienation (§§57-60).

Part 5: Modification and Termination of Trusts.

Chapter 13: Modification and Termination of Trusts (§§61-69).

The Restatement is particularly important in California because the current Trust Law is in large part derived from the Restatement rules. (See *infra*, §17.) The Second Restatement and the developments in case law are fully covered in two treatises cited throughout this chapter: (1) Scott, *Law of Trusts* (Fourth Edition), and (2) Bogert, *The Law of Trusts & Trustees* (Second Edition).

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Restatement 3d*. The original volume of the Third Restatement of Trusts, covering the prudent investor rule, was superseded in 2007. The topic is now covered in Volume 3. The new volume includes four chapters dealing with trust administration:

Part 6: Trust Administration.

Chapter 14: Trustee Powers and Duties: General Principles (§§70-75).

Chapter 15: Specific Duties of Trusteeship (§§76-84).

Chapter 16: Extent and Exercise of Trustees' Powers (§§85-89).

Chapter 17: Investment of Trust Funds (The "Prudent Investor Rule") (§§90-92). *Treatises:* Selected volumes of Bogert, *The Law of Trusts & Trustees* are now in the Third Edition.



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I. INTRODUCTION
F. Uniform Acts.

13 Witkin Sum. Cal. Law Trusts § 13

[§ 13] Uniform Acts.

Several uniform acts have been drafted to deal with various areas of this subject:

- (1) *Uniform Trust Code*. See 7C U.L.A. (Master Ed.), supplement.
- (2) *Uniform Fiduciaries Act*. See 7A (Part I) U.L.A. (Master Ed.), p. 364.
- (3) *Uniform Common Trust Fund Act*. See 7 (Part II) U.L.A. (Master Ed.), p. 175; *Fin. C. 1564*, *infra*, §105.
- (4) *Revised Uniform Principal and Income Act*. See 7B U.L.A. (Master Ed.), p. 131; *Prob.C. 16320* et seq., *infra*, §167 et seq.
- (5) *Uniform Supervision of Trustees for Charitable Purposes Act*. See 7C U.L.A. (Master Ed.), p. 372; *Govt.C. 12580* et seq., *infra*, §306 et seq. The California statute is called the Supervision of Trustees and Fundraisers for Charitable Purposes Act.
- (6) *Uniform Prudent Investor Act*. See 7B U.L.A. (Master Ed.), p. 280; *Prob.C. 16045* et seq., *infra*, §76 et seq.
- (7) *Uniform Testamentary Additions to Trusts Act*. See 8B U.L.A. (Master Ed.), p. 355; *Prob.C. 6300* et seq., 14 *Summary* (10th), *Wills and Probate*, §170.
- (8) *Uniform Custodial Trust Act*. See 7A (Part I) U.L.A. (Master Ed.), p. 103.
- (9) *Uniform Management of Institutional Funds Act*. See 7A (Part II) U.L.A. (Master Ed.), p. 475. The California statute (*Prob.C. 18500* et seq.) applies to private educational, religious, charitable, and eleemosynary institutions and to governmental organizations holding funds for those purposes. (*Prob.C. 18501*.)
- (10) *Uniform Statutory Rule Against Perpetuities Act*. See 8B U.L.A. (Master Ed.), p. 223; *Prob.C. 21200* et seq., 12 *Summary* (10th), *Real Property*, §175 et seq.; on duration of trusts under Statutory Rule, see *infra*, §193.

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SUPPLEMENT: [This section is current through the latest supplement]

(1) *Uniform Trust Code*. See 7C U.L.A. (Master Ed.), p. 362.

(4) *Revised Uniform Principal and Income Act*. See 7A (Part III) U.L.A. (Master Ed.), p. 363.

(5) *Uniform Supervision of Trustees for Charitable Purposes Act*. See 7C U.L.A. (Master Ed.), p. 338. (6) *Uniform Prudent Investor Act*. See 7B U.L.A. (Master Ed.), p. 1.

(9) *Uniform Management of Institutional Funds Act*. See 7A (Part III) U.L.A. (Master Ed.), p. 1. In 2008, the Uniform Management of Institutional Funds Act was replaced by the Uniform Prudent Management of Institutional Funds Act (*Prob.C. 18501 et seq.*). (See 7A (Part III) U.L.A. (Master Ed.), Supp.) The Act applies to entities holding funds for charitable purposes. (See *Prob.C. 18502.*)



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Witkin Summary of California Law

I. INTRODUCTION

G. Conflict of Laws.

1. Validity of Trust.

13 Witkin Sum. Cal. Law Trusts § 14

[§ 14] Validity of Trust.

(1) *Real Property.* The validity of a trust of an interest in land, created inter vivos or by will, is determined by the law that would be applied by the courts of the situs. (*Rest.2d, Conflict of Laws §278.*) (On rights under spendthrift trust, see *Rest.2d, Conflict of Laws §280.*)

(2) *Personal Property: Living Trust.* A living trust in movables will be upheld if it is valid under the law of the state designated by the settlor, provided that the state has a substantial relation to the trust, and that no strong public policy of the state with the most significant relationship (see 1 *Summary* (10th), *Contracts*, §61) is violated. (*Rest.2d, Conflict of Laws §270(a).*) If the settlor does not designate the governing law, validity is governed by the law of the state of most significant relationship. (*Rest.2d, Conflict of Laws §270(b)*; see 72 *Harv. L. Rev.* 698.) (On spendthrift trust, see *Rest.2d, Conflict of Laws §273(b)*; 77 *Harv. L. Rev.* 845.)

(3) *Personal Property: Testamentary Trust.* The Restatement distinguishes between matters affecting validity of the will as a testamentary disposition (governed by the law of the testator's domicile), and those affecting only the validity of the trust provisions. As to the latter: (a) The law of the state designated by the testator governs, provided that the state has a substantial relation to the trust; (b) if there is no designation, the law of the testator's domicile governs, but the law of the state of administration of the trust will be applied if necessary to sustain its validity. (*Rest.2d, Conflict of Laws §269* [adding usual qualification where strong public policy of state of testator's domicile is opposed]; see *Rest.2d, Conflict of Laws §273(a)* [spendthrift trust]; *Estate of Klinkner* (1978) 85 *C.A.3d* 942, 947, 151 *C.R.* 20 [citing Restatement but finding it unnecessary to decide whether Wisconsin or California law governed because no showing was made of any conflict].)

(4) *Powers of Appointment.* The validity of a power of appointment is determined by the law governing the validity of the trust. (See *Rest.2d, Conflict of Laws §274*, Comment a, §281, Comment a.) (On law governing exercise of power, see *Rest.2d, Conflict of Laws §§274*, 275, 281.)

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I. INTRODUCTION

G. Conflict of Laws.

2. Construction of Instrument.

13 Witkin Sum. Cal. Law Trusts § 15

[§ 15] Construction of Instrument.

If there is no satisfactory evidence of the actual intention of the settlor or testator, the forum will invoke the appropriate rule of construction to fill what would otherwise be a gap in the trust instrument or will. (See *Rest.2d, Conflict of Laws* §268, Comment a, §277, Comment a.) The designation of a state in the instrument will be controlling. (*Rest.2d, Conflict of Laws* §§268(1), 277(1).) If there is no such designation:

(1) In the case of *real property*, the rules of construction of the courts of the situs are applied. (*Rest.2d, Conflict of Laws* §277(2).)

(2) In the case of *personal property*: (a) On matters pertaining to administration, the rules of the state whose law governs administration are applied. (b) As to other matters, the rules of the state which the settlor "would probably have desired" are applied. (*Rest.2d, Conflict of Laws* §268(2).)

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G. Conflict of Laws.

3. Administration of Trust.

13 Witkin Sum. Cal. Law Trusts § 16

[§ 16] Administration of Trust.

(1) *Court Supervision.* The administration of a trust of interests in *real property* is supervised by the courts of the situs. (*Rest.2d, Conflict of Laws* §276; see *Hardy v. Hardy* (1958) 164 C.A.2d 77, 79, 330 P. 278 ["a court of one state cannot directly affect title to land in another"]); on what are matters of administration, see *Rest.2d, Conflict of Laws* §271, Comment a.) The administration of a trust of interests in *personal property* is usually supervised by the court, if any, in which the trustee has qualified as trustee, or by the courts of the state in which the trust is to be administered. (*Rest.2d, Conflict of Laws* §267.) (See *American Center for Education v. Cavnar* (1978) 80 C.A.3d 476, 486, 145 C.R. 736 [charitable trust].)

(2) *Applicable Law.* The following rules determine the law applicable to administration of a trust:

(a) *Real property:* The law that would be applied by the courts of the situs governs. (*Rest.2d, Conflict of Laws* §279.)

(b) *Personal property:* The law of the state designated by the settlor governs. (*Rest.2d, Conflict of Laws* §§271(a), 272(a).) If there is no designation, and the trust is *testamentary*, the law of the state of the testator's domicile governs, unless administration is to take place in another state, in which case its law governs. (*Rest.2d, Conflict of Laws* §271(b).) If there is no designation, and the trust is *inter vivos*, the governing law is that of the state with the most substantial relationship to administration. (*Rest.2d, Conflict of Laws* §272(b).)

(3) *Jurisdiction Over Trustee.* Personal jurisdiction over a trustee may be exercised by a competent court wherever the trustee may be found, without regard to the location of the trust res. (See *Smith v. Davis* (1891) 90 C. 25, 30, 27 P. 26; *Whitney v. Dodge* (1894) 105 C. 192, 201, 38 P. 636; *McElroy v. McElroy* (1948) 32 C.2d 828, 831, 198 P.2d 683; *Estate of Knox* (1942) 52 C.A.2d 338, 344, 126 P.2d 108; 2 Cal. Proc. (4th), *Jurisdiction*, §431.) But even if it has jurisdiction, a court will ordinarily decline to exercise it if to do so would be an undue interference with the supervision of the trust by the court that has primary supervision over the administration of the trust. (See *Rest.2d, Conflict of Laws* §267, Comment e, §276, Comment b.)

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(3) *Jurisdiction Over Trustee.*

Cross-Reference: 2 Cal. Proc. (5th), Jurisdiction, §445.



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I. INTRODUCTION

H. The Trust Law.

1. Law Revision Commission Report.

13 Witkin Sum. Cal. Law Trusts § 17

[§ 17] Law Revision Commission Report.

(1) *Nature of Proposed Law.* In 1985, the California Law Revision Commission proposed a comprehensive trust law, to be placed in the Probate Code and to replace the comparable parts of the existing Civil Code and Probate Code. The proposed law covered private express trusts and charitable trusts subject to the jurisdiction of the Attorney General. (See 18 Cal. Law Rev. Com. Reports, p. 501.) (For principal changes, see *infra*, §19.)

(2) *Background.* The Commission Report explains the reasons for the comprehensive revision as follows:

(a) "The Field Code has been the subject of serious criticism over the years; it has even been described as 'about as functional as a vermiform appendix.' " And "[d]ifferent bodies of procedural law have developed within the Probate Code, due to the separate treatment traditionally afforded testamentary trusts as opposed to living trusts." In addition, various uniform laws have been enacted, to be read with the Field Code and the procedural statutes in the Probate Code. (Report, p. 519.)

(b) "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 of Trusts nor of the provision of the Uniform Probate Code relating to trust administration." (Report, p. 519.)

(c) "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." (Report, p. 520.)

(d) "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." (Report, p. 520.)

(e) "A major source of proposed revisions is the Restatement (Second) of Trusts. To a large extent, the Restatement

is harmonious with California case law, 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. The Restatement is a widely accepted authority that has influenced the development of California law." (Report, p. 521.)

(f) "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. 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. 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 will continue to use forms otherwise available and seek the advice of counsel." (Report, p 521.)

(g) "The proposed law does not set forth the law concerning constructive and resulting trusts, termed 'involuntary trusts' in the Field Code. The statutory treatment of 'involuntary trusts' by existing law is not adequate. The proposed law leaves the law relating to constructive and resulting trusts largely untouched by preserving the most important statutory provisions 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." (Report, p. 522.)

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I. INTRODUCTION

H. The Trust Law.

2. Enactment.

13 Witkin Sum. Cal. Law Trusts § 18

[§ 18] Enactment.

(1) *The Trust Law. Prob.C. 15000* et seq., to be cited as "the Trust Law" (*Prob.C. 15000*), was enacted in 1986, effective July 1, 1987. A number of substantive and technical revisions to the original enactment were made in 1987 in an urgency measure that was also effective July 1, 1987. (On technical revisions, see *19 Pacific L. J. 713*.)

(2) *Commission Comments.* The California Law Revision Commission prepared detailed comments about each section of the proposed law, explaining its origin, scope, and effect. (See "Recommendation Proposing the Trust Law," 18 Cal. Law Rev. Com. Reports, p. 501 (1986) and "Recommendation Relating to Technical Revisions in the Trust Law," 18 Cal. Law Rev. Com. Reports, p. 1823 (1986).) The Commission's comments are cited throughout this chapter and are included in West's California Codes as annotations to the Trust Law.

(3) *Conforming Changes in Other Statutes.* The legislation enacting the Trust Law (a) repealed most of the existing Civil Code and Probate Code provisions governing trusts, (b) made technical changes in other statutes (primarily to correct cross-references to the Trust Law), and (c) revised or renumbered a handful of other statutes. These changes, and explanatory comments, are set forth in two parts of the Law Revision Commission Recommendation: "Conforming Revisions Relating to Trust Law" (18 Cal. Law Rev. Com. Reports, p. 753), and "Disposition of Existing Trust Provisions" (18 Cal. Law Rev. Com. Reports, p. 791).

(4) *Statutory Framework.* The Trust Law is Division 9 of the Probate Code and consists of nine parts:

Part 1. General Provisions. (*Prob.C. 15000* et seq.)

Part 2. Creation, Validity, Modification, and Termination of Trusts. (*Prob.C. 15200* et seq.)

Part 3. Trustees and Beneficiaries. (*Prob.C. 15600* et seq.)

Part 4. Trust Administration. (*Prob.C. 16000* et seq.)

Part 5. Judicial Proceedings Concerning Trusts. (*Prob.C. 17000* et seq.)

Part 6. Rights of Third Persons. (*Prob.C. 18000* et seq.)

Part 7. Uniform Management of Institutional Funds Act. (*Prob.C. 18500* et seq.)

Part 8. Payment of Claims, Debts, and Expenses From Revocable Trust of Deceased Settlor. (*Prob.C. 19000* et seq.)

SUPPLEMENT: [This section is current through the latest supplement]

(4) *Statutory Framework.Part 7.* In 2008, the Uniform Management of Institutional Funds Act was replaced by the Uniform Prudent Management of Institutional Funds Act (*Prob.C. 18501* et seq.).



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H. The Trust Law.

3. Principal Changes.

13 Witkin Sum. Cal. Law Trusts § 19

[§ 19] Principal Changes.

The more important changes in existing law are summarized in the California Law Revision Commission Recommendation (18 Cal. Law Rev. Com. Reports, p. 507) as follows:

(1) *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." (See *infra*, §40.)

(2) *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." (See *infra*, §30.)

(3) *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 ability of a creditor to reach the 'surplus' over the amount needed for the education and support of the beneficiary under *Civil Code Section 859* is preserved, but the wage garnishment exemption as applied to spendthrift trusts is deleted." (See *infra*, §157 et seq.)

(4) *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." (See *infra*, §231.)

(5) *Trustee's Bond*. "The proposed law makes clear that an institutional trustee 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 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." (See *infra*, §48.)

(6) *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." (See *infra*, §47.)

(7) *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." (See *infra*, §61 et seq.)

(8) *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.'" (See *infra*, §75.)

(9) *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." (See *infra*, §87 et seq.)

(10) *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 a 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." (See *infra*, §91 et seq.)

(11) *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." (See *infra*, §166 et seq.)

(12) *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." (See *infra*, §137.)

(13) *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." (See *infra*, §138.)

(14) *Liability of Trustee to Beneficiaries for Acts of Others*. "The proposed law adopts the Restatement rules

governing the trustee's liability for acts of agents or predecessor trustees, thus filling a gap in existing law. As for liability for acts of cotrustees, the proposed law also adopts the Restatement approach, with some important modifications, and thereby harmonizes existing statutory and case law." (See *infra*, §118 et seq.)

(15) *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. The right to exemplary damages is codified in the proposed law, but the amount is limited to three times the amount of compensatory or restitutionary damages awarded." (See *infra*, §121 et seq.)

(16) *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." (See *infra*, §217 et seq.)

(17) *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." (See *infra*, §145 et seq.)

(18) *Liability of Trustee to Third Persons*. "Under the proposed law, the trustee is personally liable on a contract where the contract so provides or the trustee fails to reveal its representative capacity. 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." (See *infra*, §244 et seq.)

(19) *Rights of Creditors of Settlor*. "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." (See *infra*, §258 et seq.)

(20) *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 revocability. 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." (See *infra*, §194 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



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4. Scope and Application of Trust Law.

a. General Rule: Application to All Trusts.

13 Witkin Sum. Cal. Law Trusts § 20

[§ 20] General Rule: Application to All Trusts.

The Trust Law is Division 9 of the Probate Code. Except as otherwise provided by statute, it applies to all trusts, regardless of when they were created. (*Prob.C. 15001.*)

The California Law Revision Commission Report (18 Cal. Law Rev. Com. Reports, p. 607 et seq.) lists the most important rules that would be applied to all trusts regardless of the time of creation or any other factor:

(1) "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. 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." (See *infra*, §40.)

(2) "The proposed law requires corroborative evidence of creation of certain oral trusts. 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." (See *infra*, §30.)

(3) "The proposed law gives the court a greater degree of discretion in approving termination of a trust on petition of all beneficiaries. This provision in the proposed law forwards a public policy and is made applicable to all trusts." (See *infra*, §203.)

(4) "The rules governing consent to a modification or termination by a guardian ad litem are expanded slightly by the proposed law. 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 proper case were presented, so this rule may anticipate change, rather than make it." (See *infra*, §207.)

(5) "The provision of the proposed law making the presumption of fertility rebuttable is based on public policy considerations and should apply to all trusts." (See *infra*, §208.)

(6) "The proposed law provides a special rule in the modification and termination context where a settlor has made

a disposition in favor of 'heir' or 'next of kin' of the settlor. 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." (See *infra*, §204.)

(7) "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. 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." (See *infra*, §210.)

(8) "The remedies for breach of trust in the proposed law probably break no new ground, 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." (See *infra*, §121 et seq.)

(9) "The automatic powers scheme contains the set of powers that are traditionally desired by trust drafters. Since these powers are largely the same as the powers listed in existing law, 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." (See *infra*, §90 et seq.)

(10) "The various revisions in the Revised Uniform Principal and Income Act are applied to all trusts even though they result in some substantive differences. Since the RUPIA 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." (See *infra*, §166 et seq.)

(11) "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. 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." (See *infra*, §132 et seq.)

(12) "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." (See *infra*, §217 et seq.)

(13) "The proposed law provides new rules governing the enforceability of claims of the settlor's creditors. 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 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." (See *infra*, §258 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



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b. Exceptions: Prospective Application.

13 Witkin Sum. Cal. Law Trusts § 21

[§ 21] Exceptions: Prospective Application.

To avoid disruption and protect legitimate reliance on existing law, the Trust Law makes a number of exceptions to the rule of application to all trusts regardless of the time of creation (see *supra*, §20). These are set forth in the California Law Revision Commission Recommendation (18 Cal. Law Rev. Com. Reports, p. 606) as follows:

(1) "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. Some settlors may wish the method specified in the trust to be exclusive, which it is under existing case law." (See *Prob.C. 15401(e)* [method of revocation by settlor], *infra*, §196.)

(2) "The duty to account at least annually to beneficiaries is limited to trusts created after the operative date or by wills that have been republished after the operative date. 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." (See *Prob.C. 16062(b)* [duty to account annually to beneficiaries], *infra*, §87.)

(3) "The rules relating to the liability of trustees for the acts or agents and cotrustees is altered by the proposed law. 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." (See *Prob.C. 16401(c)* [trustee's liability to beneficiary for acts of agent], *infra*, §118; *Prob.C. 16402(c)* [trustee's liability to beneficiary for acts of cotrustee], *infra*, §119; *Prob.C. 16403(c)* [trustee's liability to beneficiary for acts of predecessor trustee], *infra*, §120.)

(4) "The proposed law shortens the limitations period on proceedings by beneficiaries against trustees from four years to three years. Application of the new provision to breaches occurring before the operative date of the proposed law might deprive beneficiaries of their rights. Accordingly, the new scheme applies only to claims arising after the operative date." (See *Prob.C. 16460(a)* [limitations period in proceedings by beneficiaries against trustees], *infra*, §137.)

(5) "The proposed law alters the rule governing liability of trustees on contracts. Clearly trustees and third persons who have entered into contracts under the existing rule should not have their rights determined by the new rule." (See *Prob.C. 18000(b)* [personal liability of trustee to third persons on contracts], *infra*, §244.)

West's Key Number Digest, Trusts k.4

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c. Subjects Covered or Excluded.

13 Witkin Sum. Cal. Law Trusts § 22

[§ 22] Subjects Covered or Excluded.

(1) *Charitable Trusts*. Unless otherwise provided by statute, the Trust Law 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 *Govt.C. 12580* et seq. (Supervision of Trustees and Fundraisers for Charitable Purposes Act). (*Prob.C. 15004*, infra, §306 et seq.)

The Law Revision Commission Comment identifies the following provisions involving charitable trusts:

(a) *Prob.C. 15205(a)* (rule requiring designation of beneficiary is not applicable to charitable trusts), infra, §40.

(b) *Prob.C. 16105* (Attorney General must be party to proceedings involving designated charitable trusts), infra, §310.

(c) *Prob.C. 17203(c)* (now *Prob.C. 17203(a)(3)*) (Attorney General must be notified of proceedings involving designated charitable trusts), infra, §231.

(d) *Prob.C. 17210* (Attorney General may enforce rights of beneficiaries under designated charitable trust), infra, §228.

(2) *Relationships Other Than Express Trusts*. The repeal of former C.C. 2215 et seq. was "not intended to alter the rules applied by the courts to fiduciary and confidential relationships," except as to express trusts governed by the Trust Law. (*Prob.C. 15003(b)*.)

The Law Revision Commission Comment points out that this provision recognizes the inherent power of courts to fashion appropriate remedies, and that this power in areas of confidential relationships (e.g., husband and wife, principal and agent, corporate officers, attorney and client) does not depend on the particular language of the former Civil Code provisions.

Nothing in the Trust Law or in *Prob.C. 82* "is intended to prevent the application of all or part of the principles or procedures of this division to an entity or relationship that is excluded from the definition of 'trust' provided by Section

82 where these principles or procedures are applied pursuant to statutory or common law principles, by court order or rule, or by contract." (*Prob.C. 15003(c)*.)

The Law Revision Commission Comment indicates that the purpose of *Prob.C. 15003(c)* is to avoid the implication that the Trust Law cannot be applied, in appropriate circumstances, to entities and relationships that are not "trusts" for purposes of the Trust Law.

(3) *Constructive and Resulting Trusts*. Nothing in the Trust Law "affects the substantive law relating to constructive or resulting trusts." (*Prob.C. 15003(a)*; see *Prob.C. 82* ["trust" in Probate Code excludes resulting trusts and most constructive trusts]; on resulting trusts, see *infra*, §311 et seq.; on constructive trusts, see *infra*, §319 et seq.) The word "substantive" was added to *Prob.C. 15003(a)* in 1990 to avoid the implication in dicta in *Estate of Mullins (1988) 206 C.A.3d 924, 255 C.R. 430*, that the provision "is a limitation on the jurisdiction of the superior court in proceedings under the Trust Law." (Law Rev. Com. Comment.)

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d. Other Provisions Governing Trusts.

13 Witkin Sum. Cal. Law Trusts § 23

[§ 23] Other Provisions Governing Trusts.

While the most important statutory provisions concerning trusts are in the Trust Law, some definitions and general provisions are located elsewhere. The most significant of these are:

(1) *Definitions: Prob.C. 24* ("beneficiary"), *Prob.C. 56* ("person"), *Prob.C. 62* ("property"), *Prob.C. 82* ("trust"), *Prob.C. 83* ("trust company"), *Prob.C. 84* ("trustee"), *Prob.C. 88* ("will").

(2) *General provisions governing proceedings under the Probate Code: Prob.C. 1000 et seq.* (rules of practice; see *14 Summary* (10th), *Wills and Probate*, §§371, 372); *Prob.C. 1020 et seq.* (petitions and other papers; see *14 Summary* (10th), *Wills and Probate*, §376); *Prob.C. 1040 et seq.* (hearings and orders; see *14 Summary* (10th), *Wills and Probate*, §§378, 379); *Prob.C. 1060 et seq.* (accounts; see *14 Summary* (10th), *Wills and Probate*, §381 et seq.); *Prob.C. 1200 et seq.* (notices; see *14 Summary* (10th), *Wills and Probate*, §385 et seq.).

(3) *Construction of trusts: Prob.C. 21120* (valuation; see *14 Summary* (10th), *Wills and Probate*, §183 et seq.); *Prob.C. 21200 et seq.* (Uniform Statutory Rule Against Perpetuities; see *12 Summary* (10th), *Real Property*, §175 et seq.); *Prob.C. 21300 et seq.* (no contest clauses; see *14 Summary* (10th), *Wills and Probate*, §561 et seq.); *Prob.C. 21400 et seq.* (abatement; see *14 Summary* (10th), *Wills and Probate*, §658 et seq.); *Prob.C. 21500 et seq.* (compliance with Internal Revenue Code; see *14 Summary* (10th), *Wills and Probate*, §209).

(4) *Disclaimers: Prob.C. 260 et seq.*; see *14 Summary* (10th), *Wills and Probate*, §328 et seq.; *infra*, §42.

(5) *Rule against accumulations: C.C. 723 et seq.*, *infra*, §37.

(6) *Financial institutions: Fin.C. 1500 et seq.* (trust companies), *Fin.C. 6515* (savings and loan associations as trustees).

(7) *Charitable trusts: Govt.C. 12580 et seq.* (Supervision of Trustees and Fundraisers for Charitable Purposes Act), *infra*, §306 et seq.

(8) *Involuntary trusts: C.C. 2223 et seq.*, *infra*, §319.

(9) *Revocable living trust of community property: Family C. 761, infra, §198.*

(10) *Enforcement of judgments against interest in trust: C.C.P. 695.030, 709.010; see 8 Cal. Proc. (4th), Enforcement of Judgment, §§313, 314; infra, §§143, 165.*

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Construction of trusts:* In 2008, the existing no contest clause statutes (*Prob.C. 21300 et seq.*) were repealed and new statutes (*Prob.C. 21310 et seq.*) were adopted. (See 14 *Summary* (10th), *Wills and Probate*, Supp., §560A.)(10) *Enforcement of judgments against interest in trust:*

Cross-Reference: 8 *Cal. Proc. (5th), Enforcement of Judgment, §§321, 322.*



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5. Role of Common Law.

13 Witkin Sum. Cal. Law Trusts § 24

[§ 24] Role of Common Law.

"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." (*Prob.C. 15002*, a special application of C.C. 22.2.) The Law Revision Commission Comment points out that "common law" does not refer to the law existing in 1850 when the predecessor of C.C. 22.2 was enacted, but "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 9 *Cal. Proc. (4th), Appeal*, §920.)

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Cross-Reference: 9 *Cal. Proc. (5th), Appeal*, §484.



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II. CREATION OF EXPRESS TRUST
A. In General.
1. Methods of Creation.

13 Witkin Sum. Cal. Law Trusts § 25

[§ 25] Methods of Creation.

(1) *General Law.* An express trust is generally created in one of two ways: (a) a *declaration of trust*, by which the owner of property declares that he or she holds the property as trustee for some beneficiary; (b) a *transfer in trust*, by which the owner transfers the property to another as trustee for some beneficiary, either by deed or other transfer inter vivos, or by will. (See *Rest.3d, Trusts §10*; 1 Scott §17; 4A Scott §349; 76 *Am.Jur.2d* (2005 ed.), *Trusts §17* et seq.) In the former case, the words used must clearly disclose an intention *presently* to create the trust. (See *Fritz v. Thompson* (1954) 125 C.A.2d 858, 864, 271 P.2d 205; *Getty v. Getty* (1972) 28 C.A.3d 996, 1003, 105 C.R. 259, citing the text.) In the latter case, there must be an *effective conveyance*. (See *Rest.3d, Trusts §16* [requirement of effective transfer for creation of inter vivos trust]; 1 Scott §§31, 32.) In specified circumstances, a trust may also be created by the exercise of a power of appointment or by a promise or beneficiary designation. (See *Rest.3d, Trusts §10*.)

The *settlor* is the person creating the trust. The *trustee* holds the property in trust for the *beneficiary*. Both the Restatement and the Trust Law use these terms. (*Rest.3d, Trusts §3*; see 1 Scott §3; Bogert §1.) The settlor is sometimes but less often referred to as the *trustor*.

Anyone with capacity to transfer property may create a trust. (*Rest.3d, Trusts §11* [capacity of settlor to create trust]; see *Walton v. Bank of California, Nat. Assn.* (1963) 218 C.A.2d 527, 541, 32 C.R. 856; *Hillman v. Stults* (1968) 263 C.A.2d 848, 864, 70 C.R. 295 [paroled life prisoner]; 1 Scott §18; 4A Scott §350; Bogert §§43, 44; Chodos, *Fiduciary Duties §1:2* et seq. [fiduciary duty arising from trust agreement].)

(2) *Trust Law.* The California Law Revision Commission, noting that existing statutory law was silent on the mechanics of creating a trust, adopted the formulation of the Restatement. (18 Cal. Law Rev. Com. Reports, p. 524.) Subject to other provisions of the Trust Law, 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. (*Prob.C. 15200(a)*.)

(b) A transfer of property by the owner during the owner's lifetime to another person as trustee. (*Prob.C. 15200(b)*.)

(c) A transfer of property by the owner, by will or by other instrument taking effect upon the death of the owner, to another person as trustee. (*Prob.C. 15200(c)*.)

(d) The exercise of a power of appointment to another person as trustee. (*Prob.C. 15200(d).*)

(e) An enforceable promise to create a trust. (*Prob.C. 15200(e).*)

In *Estate of Heggstad* (1993) 16 C.A.4th 943, 20 C.R.2d 433, decedent executed a revocable living trust naming himself as trustee and identifying various items of trust property on an attached schedule, but did not execute or record a deed conveying a piece of real property to himself as trustee. Decedent later married, but failed to provide for his spouse. During probate, the successor trustee petitioned for instructions regarding disposition of the real property. *Held*, the trust document was sufficient to create a trust in the real property.

(a) *Creation of trust.* A written declaration of trust by the owner of real property identifying the property in an attached schedule is sufficient to create a revocable living trust in the property. (16 C.A.4th 948, citing the text and the Restatement.) There is no requirement that the settlor execute a separate writing conveying the property to the trust. (16 C.A.4th 950.) However, to be effective as to strangers, the declaration of trust must be recorded. (16 C.A.4th 950, footnote 7.)

(b) *Jurisdiction of probate court.* Under *Prob.C. 17000(b)(1)* (infra, §221 et seq.) and *Prob.C. 17200(b)(1)* and (b)(3) (infra, §229), a trustee's petition for instructions invokes the probate court's general jurisdiction to decide the merits of a third-party challenge to the inclusion of property in the trust. (16 C.A.4th 951.) Under former *Prob.C. 7050(b)* (now *Prob.C. 800*; see 14 *Summary* (10th), *Wills and Probate*, §348), the probate court, with general jurisdiction over the decedent's property, is empowered to resolve competing claims over the title and distribution of the decedent's property. It is of no legal significance that the trustee sought relief through a petition for instructions under *Prob.C. 17200* (infra, §229) instead of a petition for conveyance under former *Prob.C. 9860* (now *Prob.C. 850*; see 14 *Summary* (10th), *Wills and Probate*, §356). (16 C.A.4th 952.)

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2. Essential Elements.

13 Witkin Sum. Cal. Law Trusts § 26

[§ 26] Essential Elements.

The California Law Revision Commission, pointing to inconsistency in existing California statutes, set forth the necessary elements of a trust in the terms of the Restatement. (See 18 Cal. Law Rev. Com. Reports, p. 523.) These are:

- (1) Trust intent. (*Prob.C. 15201*; see *infra*, §32.)
- (2) Trust property. (*Prob.C. 15202*; see *infra*, §31.)
- (3) Trust purpose. (*Prob.C. 15203, 15204*; see *infra*, §36.)
- (4) Beneficiary. (*Prob.C. 15205*; see *infra*, §40.)

The elements of a trust created by will must be ascertained from the terms of the will. A separate writing may not be used to vary the terms of the will and ordinarily is not admissible unless incorporated by reference to it in the will itself. (*Estate of Doane* (1923) 190 C. 412, 414, 213 P. 53.) However, this rule has been relaxed to allow the proof of "facts of independent significance," e.g., an existing living trust to which the will adds property (the "pour over" doctrine). (See *Rest.3d, Trusts* §§17, 19; 1A Scott §54; 4A Scott §358; Bogert §105 et seq.; on the Uniform Testamentary Additions to Trusts Act (*Prob.C. 6300* et seq.), see 14 *Summary* (10th), *Wills and Probate*, §170.)

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A. In General.
3. Matters Not Essential.

13 Witkin Sum. Cal. Law Trusts § 27

[§ 27] Matters Not Essential.

(1) *Designation of Trustee.* A trustee is one of the characteristic elements of a trust, and is essential to its functioning. (See *Prob.C. 15200*, supra, §25.) But if none is named or the designated trustee does not act, the trust will nevertheless be created and the court will appoint a trustee. (See *Prob.C. 15660*, infra, §46.)

(2) *Consideration.* This is not necessary; the owner of property may declare himself or herself trustee or make a transfer in trust gratuitously. But a *promise* to create a trust at some future time is, like other contracts, subject to the requirement of consideration. (*Estate of Webb* (1875) 49 C. 541, 544; *Rest.3d, Trusts §15*; see 1 Scott §28 et seq.; 4A Scott §352; Bogert §202; 14 Cal. L. Rev. 188; 28 So. Cal. L. Rev. 119.) The California Law Revision Commission, pointing to confusion in the California statutes (18 Cal. Law Rev. Com. Reports, p. 526), restated the law in *Prob.C. 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."

(3) *Recording of Trust in Real Property.* A trust that "relates to real property may be recorded in the office of the county recorder in the county where all or a portion of the real property is located." (*Prob.C. 15210*.)

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B. Statute of Frauds.
1. Express Trust in Real Property.

13 Witkin Sum. Cal. Law Trusts § 28

[§ 28] Express Trust in Real Property.

(1) *General Law.* A trust in real property is within the statute of frauds. Under the former California statutes, the trust had to be evidenced by a written memorandum signed by the party to be charged or an authorized agent. (See *Barr v. O'Donnell* (1888) 76 C. 469, 471, 18 P. 429; *Rest.3d, Trusts* §20 [writing necessary as required by statute of frauds], §22 [writing requirement], §23 [signing requirement]; 1 Scott §39 et seq.; Bogert §61 et seq.; 76 *Am. Jur.2d* (2005 ed.), *Trusts* §60 et seq.) The memorandum need not have been the original instrument transferring the property or declaring the trust; a subsequent writing or an admission in a pleading was sufficient. (*Garnsey v. Gothard* (1891) 90 C. 603, 607, 27 P. 516; *Reagh v. Kelley* (1970) 10 C.A.3d 1082, 1090, 89 C.R. 425, citing the text [deed signed by decedent settlor and declaration of trust signed by trustee]; 1 Scott §§41, 42.)

An oral trust in real property is not void, but only unenforceable when its invalidity is urged by the party to be charged. Hence, only the trustee and the trustee's successors may take advantage of the statute. (*Cardoza v. White* (1933) 219 C. 474, 476, 27 P.2d 639; *Rest.3d, Trusts* §24, Comment a; see 1 Scott §51.) And the oral trust is enforceable if the beneficiary, with the consent of the trustee, enters into possession or makes improvements, or changes position in reliance on the trust. (*Rest.3d, Trusts* §24, Comment c; *Haskell v. First Nat. Bank* (1939) 33 C.A.2d 399, 402, 91 P.2d 934; *Mulli v. Mulli* (1951) 105 C.A.2d 68, 73, 232 P.2d 556; *Jose v. Pacific Tile & Porcelain Co.* (1967) 251 C.A.2d 141, 144, 58 C.R. 880 [owners of property, having marital problems, conveyed to parents of wife without consideration, under oral agreement to hold property in trust for owners; held that this could be proved against creditors of the parent trustees]; see 1 Scott §50; Bogert §92; 1 *Summary* (10th), *Contracts*, §402 et seq.) (On imposition of resulting or constructive trust, see *Rest.3d, Trusts* §7 et seq. [resulting trust], §24 [constructive trust].)

(2) *Trust Law.* The California statute is more restrictive than the Restatement. Under *Prob.C. 15206*, a trust in real property is not valid unless evidenced by one of the following methods:

- (a) A written instrument signed by the trustee (or by an agent authorized in writing to do so).
- (b) A written instrument conveying the trust property signed by the settlor (or by an agent authorized in writing to do so).
- (c) Operation of law.

A body of case law applying *Prob.C. 15206* has begun to develop. (See *Estate of Heggstad (1993) 16 C.A.4th 943, 948, 20 C.R.2d 433*, supra, §25 [written declaration by settlor that real property was held in revocable trust naming settlor as trustee satisfied statute of frauds]; *Osswald v. Anderson (1996) 49 C.A.4th 812, 819, 57 C.R.2d 23* [photocopy of quitclaim deed proffered by trust beneficiary to show that trust was properly funded failed to satisfy statute of frauds].)

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2. Oral Trust in Personal Property.
a. General Law and California Cases.

13 Witkin Sum. Cal. Law Trusts § 29

[§ 29] General Law and California Cases.

(1) *Clear and Convincing Evidence.* It is generally held that an express trust in personal property may be made orally, but because the same requirement of certainty as to all the elements applies, the evidence must be clear and convincing. (See *Lefrooth v. Prentice* (1927) 202 C. 215, 227, 259 P. 947; *Chard v. O'Connell* (1936) 7 C.2d 663, 665, 62 P.2d 369; *Kobida v. Hinkelmann* (1942) 53 C.A.2d 186, 188, 127 P.2d 657; *Camperi v. Chiechi* (1955) 134 C.A.2d 485, 510, 286 P.2d 399; *Bank of America v. Long Beach Fed. Savings & Loan Assn.* (1956) 141 C.A.2d 618, 624, 297 P.2d 443; *Rest.3d, Trusts §20* [except as required by statute of frauds, writing is not necessary to create enforceable living trust]; 1 Scott §52; Bogert §65.) (On clear and convincing evidence, see 1 *Cal. Evidence* (4th), *Burden of Proof and Presumptions*, §§38, 39.)

(2) *Circumstantial Evidence.* Circumstantial proof has been held sufficient. In *Fahrney v. Wilson* (1960) 180 C.A.2d 694, 4 C.R. 670, decedent, the owner of a business with large financial obligations, told his business associate and plaintiff creditor that he was going to take out life insurance to protect his business creditors. He already had substantial insurance protecting his wife. He took the policy for \$ 50,000, with his wife as beneficiary and double indemnity for accidental death. She had knowledge of all these facts and, after his death, she had a list of creditors prepared, and informed them that they would be paid as soon as the policy sum was received. In this action by a creditor on behalf of himself and others, against the wife, a declaratory judgment was given that she held the policy proceeds on an express trust for creditors. *Held*, affirmed. Decedent's statements, and the fact that he was already substantially insured, justified the inference that he named the wife as beneficiary upon an agreement with her that his debts would be paid from its proceeds if he died suddenly. And the wife's acquiescence after his death constituted a sufficient acceptance of the trust. (180 C.A.2d 696.)

(3) *Transfer of Property.* Even though oral words of trust are used, no trust will arise unless some property interest, present or future, passes. If the purported trustee is the agent of the purported settlor, and is not authorized to deliver property or transfer funds until after the settlor's death, the transaction will fail as an attempted oral testamentary disposition. (See *Monell v. College of Physicians & Surgeons of San Francisco* (1961) 198 C.A.2d 38, 48, 51, 17 C.R. 744; *Cohen v. Meyers* (1970) 6 C.A.3d 878, 881, 86 C.R. 456.)

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2. Oral Trust in Personal Property.

b. Trust Law.

13 Witkin Sum. Cal. Law Trusts § 30

[§ 30] Trust Law.

(1) *Law Revision Commission Recommendation.* The California Law Revision Commission points out that 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. The proposed law codifies the requirement that the existence and terms of an oral trust be established by clear and convincing evidence." (18 Cal. Law Rev. Com. Reports, p. 525.)

The Report adds that the clear and convincing evidence standard may not be sufficient to guard against overreaching 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." (18 Cal. Law Rev. Com. Reports, p. 525.)

(2) *Probate Code.* "The existence and terms of an oral trust of personal property may be established only by clear and convincing evidence." (*Prob.C. 15207(a).*) "The oral declaration of the settlor, standing alone, is not sufficient evidence of the creation of a trust of personal property." (*Prob.C. 15207(b).*) In the case of an oral trust, a reference in the Trust Law or elsewhere to a trust instrument or declaration means the terms of the trust as established pursuant to *Prob.C. 15207(a).* (*Prob.C. 15207(c).*)

The Law Revision Commission Comment provides two illustrations of valid oral trusts:

(a) Delivery of personal property to another accompanied by a declaration by the transferor that the transferee holds the property in trust for a beneficiary.

(b) Constructive delivery by earmarking or recording property in the name of the transferee.

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II. CREATION OF EXPRESS TRUST
C. Trust Property.

13 Witkin Sum. Cal. Law Trusts § 31

[§ 31] Trust Property.

(1) *In General.* "A trust is created only if there is trust property." (*Prob.C. 15202*; see *Rest.3d, Trusts* §§2, 3, 40.) The property must be in existence and ascertainable. (See *Rest.2d, Trusts* §40, Comment 3 [ascertainable], §41 [in existence]; *Molera v. Cooper* (1916) 173 C. 259, 261, 160 P. 231; *Gonsalves v. Hodgson* (1951) 38 C.2d 91, 98, 237 P.2d 656; *Ilse v. Burgess* (1938) 28 C.A.2d 654, 656, 83 P.2d 527; *Smith v. Bliss* (1941) 44 C.A.2d 171, 176, 112 P.2d 30; *Balian v. Balian's Market* (1941) 48 C.A.2d 150, 156, 119 P.2d 426; 4A Scott §363; Bogert §111; 76 *Am.Jur.2d* (2005 ed.), *Trusts* §247 et seq.; 1A Scott §74 et seq.) The trust property is sometimes called the "res," although the Restatement does not use the term. (See *Rest.3d, Trusts* §3, Comment b; 1 Scott §3.1; Bogert §1.)

(2) *Future Property.* Generally speaking, only property that is transferable may be held in trust. It may consist of intangibles such as choses in action, equitable interests, or even contingent interests, but not mere expectancies. (See *Rest.3d, Trusts* §§40, 41; 1A Scott §78 et seq.; 3 *A.L.R.3d* 1416 [creation of express trust in property to be acquired in future].)

(3) *Life Insurance.* A difficult theoretical problem is presented by a *life insurance trust*. The insured designates the beneficiary of the policy as trustee of a trust for others, or, without a designation in the policy, the beneficiary agrees to hold the proceeds in trust. Does the policy beneficiary (trustee) receive any trust res if the insured (settlor) reserves the right to change the beneficiary and thus revoke the trust? The better view appears to be that there is a property interest that is more than an expectancy, although it is subject to divestment. (See *Rest.3d, Trusts* §25, Comment c; 1A Scott §§57, 84; *Shaw v. Johnson* (1936) 15 C.A.2d 599, 605, 59 P.2d 876; *Fahrney v. Wilson* (1960) 180 C.A.2d 694, 696, 4 C.R. 670, *supra*, §29; *Estate of Anderson* (1965) 236 C.A.2d 214, 218, 45 C.R. 852; 70 *A.L.R.2d* 1358 [trust to hold proceeds of National Service life insurance].) As a practical matter, however, the settlor ordinarily gives up the right to change the beneficiary and other incidents of ownership in order to make the insurance trust irrevocable. This avoids the inclusion of the policy proceeds in the insured's taxable estate under the federal Estate Tax. (See C.E.B., 1 *Drafting California Irrevocable Trusts* 3d, §11.1 et seq.) An insurance trust is said to be "funded" if the insured also transfers property or funds to the trustee to pay the premiums. But even an "unfunded" trust, with no such fund created, has been upheld. (See 2 *U.C.L.A. L. Rev.* 151.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* See *Rest.3d, Trusts* §40, Comment e [ascertainable], §41 [in existence].



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D. Trust Intent.
1. In General.

13 Witkin Sum. Cal. Law Trusts § 32

[§ 32] In General.

"A trust is created only if the settlor properly manifests an intention to create a trust." (*Prob.C. 15201*; see *Rest.3d, Trusts §13*; *Del Costello v. California* (1982) 135 C.A.3d 887, 894, 185 C.R. 582 [necessity of trust intent]; 1 Scott §23; Bogert §45; 76 *Am.Jur.2d* (2005 ed.), *Trusts* §57 et seq.; 4 Proof of Facts 2d 41 [grantor's intent that grantee hold realty in trust].)

If it appears that the purported settlor retained title and the right of control over property deposited with another, there is no trust. (See *Carr v. Bank of Italy* (1931) 113 C.A. 6, 9, 297 P. 630.) But no particular language is necessary, and, except where the statute of frauds applies (see *supra*, §28 et seq.), oral statements or acts will be sufficient. (See *Rest.3d, Trusts §13*, Comment b; *Taber v. Bailey* (1913) 22 C.A. 617, 620, 135 P. 975; *Estate of Ingram* (1930) 104 C.A. 1, 6, 285 P. 365; *Kornbau v. Evans* (1944) 66 C.A.2d 677, 684, 152 P.2d 651; 1 Scott §24; 4A Scott §351.)

Of course, mere use of the word "trust" or the words "trust fund" in reference to money delivered does not conclusively establish a trust, where the evidence shows no trust intent; e.g., where the money was intended as a loan and the transaction was so characterized on other occasions. (*Anderson v. Hagen* (1937) 19 C.A.2d 714, 719, 66 P.2d 168.) On the other hand, a trust may be created without the use of the word "trust" or "trustee." (*Estate of Shaw* (1926) 198 C. 352, 359, 246 P. 48; *Estate of De Mars* (1937) 20 C.A.2d 514, 516, 67 P.2d 374; *Title Ins. & Trust Co. v. McGraw* (1945) 72 C.A.2d 390, 398, 164 P.2d 846; see *Hansen v. Bear Film Co.* (1946) 28 C.2d 154, 173, 168 P.2d 946 [circumstantial evidence to show trust intent].)

In *Estate of McDole* (1932) 215 C. 328, 331, 10 P.2d 75, decedent devised property to "The Stubblefield Home." His heirs contended that, because the devisee was not a corporation, it was not an entity capable of taking title to property. The court held that the devise could be given effect as a trust, and, instead of the Home being the devisee, the inmates thereof would be considered beneficiaries of a charitable trust, title being vested in the trustees of the Home. (215 C. 331.) (See *Rest.2d, Trusts* §397, Comment g; *infra*, §293.)

In *Estate of Clippinger* (1946) 75 C.A.2d 426, 434, 171 P.2d 567, the testator gave property to "the trustees of the Order of the Eastern Star Home at Rockford, Illinois." The directors of the Home claimed the property individually. *Held*, in view of a clear showing of intent to benefit the institution rather than the individual directors, the gift created a trust for the inmates. (75 C.A.2d 433.)

In *Estate of Faris* (1949) 89 C.A.2d 515, 201 P.2d 63, the testator left his estate to his son, "to be turned over to him" at age 25; "until then the estate to be handled by the executors of this will," the son to be paid "as much per month as they deem advisable." *Held*, a trust was created. (89 C.A.2d 517.) (See *Mulli v. Mulli* (1951) 105 C.A.2d 68, 73, 232 P.2d 556 [owner's agreement to hold property interest for "benefit" of another]; *Estate of Easley* (1953) 115 C.A.2d 490, 493, 252 P.2d 634 [layman's codicil to will].)

In *Nicholas v. Nicholas* (1952) 110 C.A.2d 349, 242 P.2d 679, the husband, pursuant to a contract, conveyed all community property to the wife *as her own separate estate*. It was agreed that the income was sufficient for the *support of the children* and that no payments for support would be required of the husband. Later the wife sold part of the property and used the proceeds for herself, and a child sued for support. *Held*, on defendant husband's cross-complaint, the agreement created a trust for the support of the children, despite the recital that the wife was to have title. (110 C.A.2d 353.)

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D. Trust Intent.
2. Precatory Words.
a. Words Ineffective To Create Trust.

13 Witkin Sum. Cal. Law Trusts § 33

[§ 33] Words Ineffective To Create Trust.

The settlor must express an intention to impose enforceable duties, and not a purely moral obligation. The problem is one of construction, but ordinarily words of desire, hope, or recommendation that a devisee use the property for the benefit of another do not create a trust. The direction must be imperative. (*Estate of Mitchell* (1911) 160 C. 618, 621, 117 P. 774; *Estate of Lee* (1930) 104 C.A. 15, 17, 284 P. 948; *Estate of Price* (1934) 138 C.A. 462, 464, 32 P.2d 994; *Estate of Dargie* (1937) 19 C.A.2d 215, 220, 64 P.2d 1131; *Estate of Mooney* (1938) 25 C.A.2d 481, 483, 77 P.2d 1098; *Estate of Mallon* (1939) 34 C.A.2d 147, 151, 93 P.2d 245; *Sears v. Rule* (1941) 45 C.A.2d 374, 380, 114 P.2d 57; *Estate of Cook* (1943) 58 C.A.2d 376, 378, 136 P.2d 338; *Estate of McGivern* (1947) 80 C.A.2d 508, 511, 180 P.2d 32; *Estate of Ferdun* (1949) 91 C.A.2d 622, 625, 205 P.2d 456; *Estate of Moore* (1967) 253 C.A.2d 945, 949, 61 C.R. 722; see *Rest.3d, Trusts* §13, Comment d; 1 Scott §25; 2 Scott §125; 4A Scott §351; Bogert §48; 2 *Cal. L. Rev.* 257; 18 *Cal. L. Rev.* 446; 76 *Am.Jur.2d* (2005 ed.), *Trusts* §66.)

In *Estate of Farelly* (1931) 214 C. 199, 204, 4 P.2d 948, a will provided: "All the rest, residue and remainder of my property ... I give, devise and bequeath to my said nieces. ... If said residue shall not exceed one-third of my estate I direct that the same shall be expended for charitable or philanthropic purposes and in accordance with my views as expressed." *Held*, no trust arose; there was an absolute gift of the property. (214 C. 203.)

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D. Trust Intent.

2. Precatory Words.

b. Words Addressed to Executor.

13 Witkin Sum. Cal. Law Trusts § 34

[§ 34] Words Addressed to Executor.

A different rule applies where precatory words are directed to an executor; in that case they are ordinarily construed as a command. (*Estate of Pforr* (1904) 144 C. 121, 128, 77 P. 825; see *Estate of Hood* (1943) 57 C.A.2d 782, 786, 135 P.2d 383 [same theory should apply where words are directed to trustee].)

This is true, of course, only where the words are susceptible to that construction. In *Estate of Loud* (1945) 70 C.A.2d 399, 161 P.2d 49, decedent, an attorney, provided in his will for a woman friend whom he had supported for some years. He then left a letter to the executors, his brothers, instructing them to "see that Margaret gets the money I have left her as soon as you can," and adding, "it is my hope and wish that she shall never be in want." *Held*, the letter was not a testamentary codicil, and did not create a trust for her support; it was merely a reference to the provision previously made for her by will. (70 C.A.2d 403.) (See *Estate of Tucker* (1955) 130 C.A.2d 699, 700, 279 P.2d 760.)

A difficulty arises where the person to whom the words are directed is both devisee and executor. The courts tend to regard the reference as one to a devisee, and accordingly no trust arises. (See *Estate of Collias* (1951) 37 C.2d 587, 590, 233 P.2d 554; *Estate of Moore* (1967) 253 C.A.2d 945, 950, 61 C.R. 722.)

However, the question of the testator's intent is one of fact, and evidence of such circumstances as the size of the estate, the property involved in the gift, and the relations of the parties, may be considered. In *Estate of Kearns* (1950) 36 C.2d 531, 225 P.2d 218, T, a layman, in Clause 1 gave all of his estate to his fiancée, whom he also made executor; in Clause 5 he said "I hereby direct my Executor ... to provide for my nieces ... as her judgment, kindness and honesty sees fit to do." The probate court refused to admit extrinsic evidence and ruled that there was no trust. *Held*, the uncertainty as to the testator's intent in Clause 5 (i.e., whether he used "Executor" in the technical sense and thereby made a mandatory direction) justified consideration of the circumstances, and the exclusion was reversible error. (36 C.2d 533.)

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c. Words Interpreted as Creating Trust.

13 Witkin Sum. Cal. Law Trusts § 35

[§ 35] Words Interpreted as Creating Trust.

Because the basic question is the intent of the testator, the rule against precatory words must not be applied mechanically. Sometimes the relations between the parties and other circumstances may justify the conclusion that a trust was intended. (See *Rest.3d, Trusts* §13, Comment b; *Estate of Kearns* (1950) 36 C.2d 531, 537, 225 P.2d 218, supra, §34; *Estate of Hood* (1943) 57 C.A.2d 782, 785, 135 P.2d 383; 1 Scott §25; 76 Am.Jur.2d (2005 ed.), *Trusts* §66.)

In *Estate of Tsheppe* (1937) 19 C.A.2d 314, 65 P.2d 830, the testator, creating a testamentary trust, after expressing gratitude for his housekeeper's services and commenting on her familiarity with the property, added: "I recommend that my said trustee employ her to assist in the renting and care of said property and authorize my said trustee" to pay her \$ 100 per month and give her free rent of an apartment, "or such other sum as said trustee may think expedient." The trial court interpreted the provision as *binding*, and the judgment was affirmed. (19 C.A.2d 315.) (See *Estate of Mallon* (1939) 34 C.A.2d 147, 151, 93 P.2d 245 [property willed "to my sister ... who will care for Mary L. Barrett" (housekeeper); no trust created]; *Rest.3d, Trusts* §48, Comment b [directions to *employ* a person are usually considered precatory, and designated person is merely an incidental beneficiary with no right to compel employment]; 2 Scott §126.)

In *Estate of Monticelli* (1951) 107 C.A.2d 90, 236 P.2d 661, an illiterate holographic will provided, after "all" property to Mae (appellant), "Wit[?]h 5.000.00 Dollas to be sent to Antonia Cataldi (Mother) her maden name." *Held*, affirming the trial court, a trust was created. The first quoted word could have been "Wish" or, as the lower court found, "With." But even if the word was "wish," the case was not the usual one where a devise is first made absolutely, and then a wish is expressed that the devisee give up some part of it. Here, the language was used in direct reference to the estate given, and could be regarded as mandatory. (107 C.A.2d 94.)

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1. In General.

13 Witkin Sum. Cal. Law Trusts § 36

[§ 36] In General.

(1) *Legal Purposes.* "A trust may be created for any purpose that is not illegal or against public policy." (*Prob.C. 15203.*) (See *Rest.3d, Trusts §27* et seq.; 1A Scott §60 et seq.; Bogert §211 et seq.; 76 *Am.Jur.2d* (2005 ed.), *Trusts §§19, 40.*)

(2) *Illegal Purposes.* A trust may be illegal where it involves the commission of a crime or tort, or a fraud on creditors. (*Rest.3d, Trusts §29*; see 1A Scott §60 et seq.; 76 *Am.Jur.2d* (2005 ed.), *Trusts §20.*) In addition, public policy will make a trust unenforceable where it furnishes an improper motive for the commission of certain kinds of acts; e.g., where the trust gives a financial benefit to a person for obtaining a divorce, even though the divorce is to be secured on legal grounds. (On possible liability of trustee or distributees for payments under void trust, see 65 *Harv. L. Rev.* 597.)

(3) *Distinction: Intent To Provide Support.* The primary consideration is the intent of the settlor, and if the settlor's purpose is merely to provide support after divorce (when it will presumably be needed), the trust is valid. (See *Rest.3d, Trusts §29*, Comment j; 1A Scott §62; cf. similar rule on conditions relating to support until marriage, 12 *Summary* (10th), *Real Property*, §198.) (On validity of living trust established by one spouse that impairs statutory distributive share of surviving spouse, see 2A Scott §146A; 39 *A.L.R.3d* 14.)

In *Hamilton v. Ferrall* (1949) 92 *C.A.2d* 277, 206 *P.2d* 663, a testamentary trust, incorporated in a decree of distribution, gave half the income to the testator's daughter, with a provision that, upon the death of the daughter's husband or his divorce from her, the trust would terminate and the corpus would go to her. Plaintiff daughter sought a declaration of invalidity, hoping thereby to obtain the fee by intestate succession. *Held*, the trial court properly concluded *on demurrer* that the trust was valid. Construing its terms to avoid illegality, the testator's object was not to induce his daughter to divorce her husband, but rather to provide for her better support in the event that she did lose her rights as a spouse by death or divorce. Plaintiff's complaint alleged an illegal intent, and the decision on demurrer, deriving intent solely from the instrument itself, seems erroneous in denying her the opportunity to offer extrinsic evidence of an illegal purpose. Even though she attacked the trust after the decree of distribution became final, her complaint made an attempt to plead extrinsic fraud in its procurement. (92 *C.A.2d* 280.)

(4) *Rules Restricting Creation and Duration.* Two rules place legal restrictions on the settlor in creating a private trust: (a) The rule against perpetuities (rule against remoteness of vesting). (See 12 *Summary* (10th), *Real Property*,

§171 et seq.) (b) The rule against accumulations. (See *infra*, §37.)

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SUPPLEMENT: [This section is current through the latest supplement]

(5) *(New) Trust for Care of Animals.* In 2008, extensive provisions governing the operation and enforcement of trusts for the care of animals were adopted. (See *Prob.C. 15212*.) *Prob.C. 15212(a)* provides in part that "a trust for the care of an animal is a trust for a lawful noncharitable purpose." The governing instrument of the trust must be liberally construed to bring the trust within the provisions of *Prob.C. 15212*, to carry out the general intent of the settlor, and to presume against the "merely precatory or honorary nature of the disposition."



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2. Rule Against Accumulations.

13 Witkin Sum. Cal. Law Trusts § 37

[§ 37] Rule Against Accumulations.

(1) *Nature of Rule.* The rule against *accumulations* prohibits accumulation of the income of the trust property for too long a period. (See C.C. 723 et seq.; *Rest.2d, Property (Donative Transfers)* §2.2; *Rest.3d, Trusts* §29, Comment h; 1A Scott §62.11; 4A Scott §401.9; Bogert §215 et seq.; 17 A.L.R.3d 231 [distribution of income released by declaration of invalidity of express direction for accumulation].) An accumulation is usually the result of a mandatory direction to the trustee to retain or reinvest trust income, thus increasing the corpus, without distributing it to beneficiaries. (See *Rest.2d, Property (Donative Transfers)* §2.2.) The Property Restatement also includes within the definition of an accumulation the situation where a *discretionary power* to retain is given to the trustee.

The Restatement makes an important exception to the rule against accumulations: Where the retention is in the course of judicious management of the trust, i.e., a reserve is set aside to meet future expenses rather than to increase the total funds. (*Rest.2d, Property (Donative Transfers)* §2.2.) The California Civil Code does not recognize any exceptions, and further provides that "all directions for the accumulation of the income of property except such as are allowed by this title, are void." (C.C. 723; see *Estate of Lefranc* (1952) 38 C.2d 289, 299, 239 P.2d 617.) The trend, however, is away from this kind of restriction. (See 1A Scott §62.11.)

If accumulation is to take place for a longer period than permitted by law, the direction is void *only as to the excess period* and the trust as a whole is unaffected by the void provision, regardless of whether or not it is separable. (C.C. 725.) And even though the direction is valid, if the persons for whom the accumulation is directed are *destitute*, the court may order that a suitable sum be paid to them out of the fund. (C.C. 726.)

(2) *Permissible Accumulations.* Under the common law rule, a direction for accumulation for the period of the rule against perpetuities (traditionally, lives in being plus 21 years) is valid. (*Rest.2d, Property (Donative Transfers)* §2.2; *Rest.3d, Trusts* §29, Comment h; 1A Scott §62.11.)

In California, the rule was formerly more restrictive. Under C.C. 723 and C.C. 724, directions for the accumulation of the income of property were void unless made for the benefit of a minor, and lasting only through the period of his or her minority. Upon reaching majority, the beneficiary became entitled to the entire income. (See *Estate of Yates* (1915) 170 C. 254, 256, 149 P. 555; *Hutchins v. Security Trust & Savings Bank* (1929) 208 C. 463, 468, 281 P. 1026; *Manning v. Bank of California Nat. Assn.* (1932) 216 C. 629, 637, 15 P.2d 746; 15 Cal. L. Rev. 170.)

The common law rule is now in effect in California. An accumulation of the income of property may be directed by "any will, trust or transfer in writing sufficient to pass the property or create the trust out of which the fund is to arise, ... but may not extend beyond the time permitted for the vesting of future interests." (C.C. 724(a).)

Accumulations are permitted in a trust forming (1) part of a profit-sharing plan of an employer for its employees or their beneficiaries, or (2) part of an employees' retirement plan, "until the fund is sufficient, in the opinion of the trustee or trustees, to accomplish the purposes of the trust." (C.C. 724(b).)

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3. Definiteness of Purpose.

13 Witkin Sum. Cal. Law Trusts § 38

[§ 38] Definiteness of Purpose.

(1) *California Cases*. In *Wittfield v. Forster* (1899) 124 C. 418, 57 P. 219, the grantor conveyed all of his property to F, in trust for his lodge, "[t]o have and to hold unto said trustee, his successors and assigns, forever." *Held*, no valid trust was created; there was no statement of its purpose or manner of performance. (124 C. 421.) (See *Estate of Ralston* (1934) 1 C.2d 724, 726, 37 P.2d 76 [devise of property to person "in trust" to dispose of "as he may see fit" creates no trust]; *Estate of Maloney* (1938) 27 C.A.2d 332, 333, 80 P.2d 998; *Estate of Feldman* (1947) 78 C.A.2d 778, 787, 178 P.2d 498 [will left \$ 13,000 to M, \$ 3,000 "for his personal use, and the rest to distribute according to my personal wishes"; held no trust, following *Estate of Ralston*]; *Estate of Reed* (1947) 82 C.A.2d 448, 449, 186 P.2d 147; *Rest.3d, Trusts* §30 [provision unenforceable because of impossibility or indefiniteness]; 1A Scott §65B; 10 U.C.L.A. L. Rev. 241 [indefiniteness in trusts and powers of appointment]; on possible liability of trustee or distributees for payments, see 65 Harv. L. Rev. 597.)

In *Lynch v. Rooney* (1896) 112 C. 279, 285, 44 P. 565, a declaration in a letter that the writer "resolved that he should have half of the estate" was held to show a trust intent, the purpose being to acknowledge an undivided interest in fee in the intended beneficiary. (See *Wight v. Street* (1935) 3 C.2d 146, 149, 44 P.2d 322 [holographic declaration that real property was held in trust for adopted daughter was valid]; *Estate of Berges* (1977) 76 C.A.3d 106, 108, 109, 142 C.R. 635 [trust for children with specified res (\$ 600 per child) and fixed termination (when each child reaches 18) was valid].) Where the intent is to create a charitable trust, indefinite directions will sometimes be sufficient. (See *Estate of Hood* (1943) 57 C.A.2d 782, 786, 135 P.2d 383, *infra*, §300.)

(2) *Trust Law. Prob.C. 15204* introduces an innovation: "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." (See Law Rev. Com. Comment, noting that this changes the rule applicable under cases such as *Estate of Sutro* (1909) 155 C. 727, 730, 102 P. 920, by making it possible to create a trust for indefinite or general purposes even though the trust is not limited to charitable purposes.) (On specification of charitable purpose, see *Rest.3d, Trusts* §28; 4A Scott §§395, 396.)

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1. In General.

13 Witkin Sum. Cal. Law Trusts § 39

[§ 39] In General.

(1) *Requirement.* A trust requires a beneficiary. (*Prob.C. 15205*, *infra*, §40; *Rest.3d, Trusts* §§2, 44.) The beneficiary is sometimes called the "cestui que trust," but the Restatement and the Probate Code do not use this term. (See *Rest.3d, Trusts* §3; 1 Scott §3.2; Bogert §1.)

(2) *Capacity To Be Beneficiary.* Anyone capable of taking an interest in property may be a beneficiary. (*Rest.3d, Trusts* §43.) (See *Ruddick v. Albertson* (1908) 154 C. 640, 644, 98 P. 1045 [Indian tribe]; *Wells Fargo Bank v. Marshall* (1993) 20 C.A.4th 447, 458, 24 C.R.2d 507 [gift of life income to unmarried beneficiary's "wife" if, at death, beneficiary was "married and living with his wife, if such wife was living at the time of the Trustor's death," referred to beneficiary's second wife, not to beneficiary's first wife, even though beneficiary was married to first wife at trustor's death]; 2 Scott §112 et seq.; Bogert §161 et seq.; 43 *Hastings L. J.* 1391 [application of anti-lapse statute to revocable living trusts]; 76 *Am.Jur.2d* (2005 ed.), *Trusts* §240 et seq.) However, it must clearly appear that the settlor intended to give the person a beneficial interest; those incidentally benefited cannot claim to be beneficiaries. (*Rest.3d, Trusts* §§48, 49; see 2 Scott §§126, 127; on interpretation, see *supra*, §35.)

(3) *Settlor as Beneficiary.* Except in cases of a spendthrift trust (*infra*, §151 et seq.), the settlor may create a trust for himself or herself as beneficiary. (*Bixby v. Hotchkis* (1943) 58 C.A.2d 445, 451, 136 P.2d 597; *Rest.3d, Trusts* §43; see 2 Scott §114; Bogert §168; 76 *Am.Jur.2d* (2005 ed.), *Trusts* §240.)

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2. Beneficiaries Must Be Ascertainable.

13 Witkin Sum. Cal. Law Trusts § 40

[§ 40] Beneficiaries Must Be Ascertainable.

(1) *In General.* In private trusts, the beneficiaries must be definite, ascertained persons or a class of persons, or they must be ascertainable within the period of the rule against remoteness of vesting. (*Rest.3d, Trusts §44 et seq.*; see 2 Scott §§112, 120, 122; Bogert §162; 37 A.L.R.5th 237 [adopted child as within class named in living trust]; 76 Am.Jur.2d (2005 ed.), Trusts §§553 et seq., 241 et seq.) (On class of beneficiaries and authority of trustee to designate beneficiaries, see *infra*, §41.)

(2) *Statutory Requirement.* A trust, other than a charitable trust, is created only if there is a beneficiary. (*Prob.C. 15205(a).*) This requirement is satisfied if the trust instrument provides for either of the following:

(a) "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." (*Prob.C. 15205(b)(1).*)

(b) "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." (*Prob.C. 15205(b)(2).*)

(3) *Law Revision Commission Report.* The California Law Revision Commission Report (18 Cal. Law Rev. Com Reports, p. 526) explains the policy underlying *Prob.C. 15205* as follows:

(a) "California has followed the common law by requiring a high degree of definiteness in designating beneficiaries of a 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."

(a) "Problems also arise where a settlor attempts to give the trustee the power to determine the beneficiaries. American courts have generally applied the rule that a trust is valid only if the entire membership of the class is capable of ascertainment. 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. 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."

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

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13 Witkin Sum. Cal. Law Trusts § 41

[§ 41] Class or Trustee's Selection.

Prob.C. 15205(b), supra, §40, 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." (Law Rev. Com. Comment.)

It is therefore possible to create a valid private trust for a *class* if the class is itself definite, or the trustee has a power to select the members of the class. Thus, a trust for the members of the "family" of a designated person is valid. (*Rest.3d, Trusts §45*, Comment e; see *Jue v. San Tong Jue* (1958) 163 C.A.2d 231, 240, 329 P.2d 560; 2 Scott §§120, 122; Bogert §162.) A trust for the "relatives" of a person may be valid where the trustee has power to select those who take and their proportions. (*Rest.3d, Trusts §45*, Comment d; see 2 Scott §121.)

Similarly, a will leaving property to a designated son, "to be distributed to my sons & grandchildren as he deems best," is a valid gift to a trustee with power to select beneficiaries from a class and to determine their shares. (*Estate of Davis* (1936) 13 C.A.2d 64, 66, 56 P.2d 584.) Thus, "a disposition that would be valid as a power of appointment will not fail just because it is made in trust." (Law Rev. Com. Comment to *Prob.C. 15205*.) (See 87 A.L.R.3d 925 [validity and construction of trust instrument that fails to designate respective interests of beneficiaries]; 76 Am.Jur.2d (2005 ed.), *Trusts §241 et seq.*)

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4. Disclaimer by Beneficiary.

13 Witkin Sum. Cal. Law Trusts § 42

[§ 42] Disclaimer by Beneficiary.

(1) *Trust Created Without Beneficiary's Knowledge.* Neither notice to nor acceptance by a beneficiary is necessary, and a trust may be created without the beneficiary's knowledge. (*Rest.3d, Trusts §14; Cahlan v. Bank of Lassen (1909) 11 C.A. 533, 540, 105 P. 765; Estate of Hovland (1940) 38 C.A.2d 439, 447, 101 P.2d 500* [knowledge not necessary]; see 1 Scott §36; Bogert §170 et seq.; 59 *Harv. L. Rev.* 164.)

(2) *Right To Disclaim Interest.* A beneficiary may disclaim an interest. (*Prob.C. 275; Rest.3d, Trusts §14, Comments c, d; see Prob.C. 267(b)(3)* ["interest" includes interest created under trust]; *Prob.C. 286* [interest may be disclaimed regardless of spendthrift provision]; Uniform Disclaimer of Property Interests Act, 8A U.L.A. (Master Ed.), p. 159; 11 Proof of Facts 2d 1 [beneficiary's disclaimer of trust].) An effective disclaimer is irrevocable. (*Prob.C. 281.*)

(3) *Form and Time for Disclaimer.* The disclaimer must be in writing and signed by the beneficiary, identifying the creator of the interest, describing the interest, and stating the disclaimer and the extent of the disclaimer. (*Prob.C. 278.*) The disclaimer is filed with the trustee or the settlor (*Prob.C. 280*) within a reasonable time after the beneficiary acquires knowledge of the interest (*Prob.C. 279(a)*). In the case of a living trust, a disclaimer is conclusively presumed to be filed within a reasonable time if filed within 9 months after (a) the creation of the trust, (b) the time the beneficiary acquires knowledge of the interest, or (c) the time the interest becomes indefeasibly vested, whichever is later. (*Prob.C. 279(c).*) However, an interest may not be disclaimed once it has been accepted. (*Prob.C. 285.*)

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5. Honorary Trust.

13 Witkin Sum. Cal. Law Trusts § 43

[§ 43] Honorary Trust.

At common law, if the settlor gave property to a person as trustee for a certain noncharitable purpose, but a definite *beneficiary* was lacking, no trust arose, and the person who took the property was held as a resulting trustee for the settlor or the settlor's successors. But some decisions have recognized a *power* in the trustee to carry out the terms of the "honorary trust" if the trustee elects to do so, and the Restatement adopts this view. Examples are trusts to maintain a tombstone, grave, or a particular animal. (*Rest.3d, Trusts §47*; see 2 Scott §124; Bogert §§165, 166; 47 *A.L.R.2d* 596 [validity of trust for private cemetery, burial monument, etc.]; 54 *A.L.R.5th* 681 [statute or ordinance regulating perpetual care trust funds of cemetery].)

In *Estate of Henderson* (1936) 13 *C.A.2d* 449, 57 *P.2d* 212, the testator bequeathed \$ 20,000 to a named trustee, to purchase a cemetery lot and build a mausoleum to inter the remains of herself and certain other deceased members of her family. *Held*, the court had power to enforce the testamentary directions against the objections of her next of kin, a surviving sister. The opinion distinguished *Enos v. Snyder* (1900) 131 *C.* 68, 69, 63 *P.* 170, which was decided chiefly on the ground that there was no property in a dead body sufficient to warrant valid directions as to burial. (13 *C.A.2d* 453.) The general holding of *Henderson* is that the wishes of a deceased person in respect to burial should, so far as possible, be carried out, but the court did not discuss the question whether a valid *trust* was created. (See 12 *So. Cal. L. Rev.* 435, 439.)

Of course, if a particular monument can be regarded as a public memorial, a trust to maintain it may be upheld as a charitable trust. (See *Estate of Butin* (1947) 81 *C.A.2d* 76, 84, 183 *P.2d* 304, *infra*, §299.)

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III. TRUSTEES

A. In General.

1. Capacity and Selection.

13 Witkin Sum. Cal. Law Trusts § 44

[§ 44] Capacity and Selection.

(1) *Individual or Corporation.* Any person, including a corporation, having capacity to take and hold property, may be a trustee. (See *Rest.3d, Trusts* §§32, 33; 2 Scott §89 et seq.; 4A Scott §378; Bogert §121 et seq.; 50 *So. Cal. L. Rev.* 611 [banking institutions as trustees]; 76 *Am.Jur.2d* (2005 ed.), *Trusts* §207 et seq.) A trust company may be appointed to act as a trustee in the same manner as an individual. (*Prob.C.* 300; on nonprofit charitable corporation as trustee, see *infra*, §45.) However, the authority of a foreign corporation, other than a national or sister-state bank authorized to conduct a trust business in California, is severely restricted. (See *Fin.C.* 1503.) (See 82 *A.L.R.2d* 946 [eligibility of foreign corporation]; 26 *A.L.R.3d* 1019 [same; testamentary trust].)

(2) *Settlor or Beneficiary.* The settlor may declare himself or herself a trustee. (*Prob.C.* 15200(a); *Rest.3d, Trusts* §§10, 32; see 1 Scott §17; 2 Scott §100; Bogert §168; Cal. Civil Practice, 3 Probate and Trust Proceedings, §24:39 et seq.; Cal Transactions Forms, 3 Estate Planning §§12:17 et seq., 12:106 et seq.; 76 *Am.Jur.2d* (2005 ed.), *Trusts* §208 et seq.) And a trustee may be a beneficiary, provided that the sole beneficiary is not the sole trustee. (*Rest.3d, Trusts* §32; see *Nellis v. Rickard* (1901) 133 C. 617, 619, 66 P. 32 [one of several beneficiaries may be trustee].)

(3) *Doctrine of Merger.* If the sole trustee were the sole beneficiary, the legal and beneficial title would merge in a single individual and the trust would terminate. (See *Rest.3d, Trusts* §69; 4 Scott §341; Bogert §§129, 168, 1003; 76 *Am.Jur.2d* (2005 ed.), *Trusts* §209.) However, there are statutory exceptions to the merger doctrine. "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 the following circumstances:

(a) "Where there is one settlor who is the sole trustee and the sole beneficiary during the settlor's lifetime." (*Prob.C.* 15209(a).)

(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." (*Prob.C.* 15209(b).)

(4) *Unlawful To Recommend Insolvent Trustee.* Persons in the business of setting up trusts sometimes advocate the use of out-of-state trustees that have become insolvent. To meet this evil, *B. & P.C.* 17530.1(a) provides: "It shall be unlawful for a person to recommend to a prospective trustor any person to serve as trustee with knowledge or having

reason to believe that the proposed trustee is insolvent or is about to become insolvent." The law does not apply to a trustee under a deed of trust or mortgage. (*B. & P.C. 17530.1(b).*)

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III. TRUSTEES

A. In General.

2. Nonprofit Charitable Corporation as Trustee.

13 Witkin Sum. Cal. Law Trusts § 45

[§ 45] Nonprofit Charitable Corporation as Trustee.

(1) *Conditions for Appointment.* A nonprofit charitable corporation may serve as a trustee. (*Prob.C. 15604.*) The corporation may be appointed if all the following conditions are met:

(a) The corporation is incorporated in California (*Prob.C. 15604(a)(1)*) and the articles of incorporation specifically authorize the corporation to accept appointment as a trustee (*Prob.C. 15604(a)(2)*).

(b) For the preceding 3 years the corporation has been exempt from income taxes under 26 U.S.C., §501(c)(3) and has served as a private professional conservator in California. (*Prob.C. 15604(a)(3)*.)

(c) The settlor or the existing trustee consents to the appointment (*Prob.C. 15604(a)(4)*), and the court determines that the trust is in the best interest of the settlor (*Prob.C. 15604(a)(5)*) and that the appointment is in the best interest of the settlor and the trust estate (*Prob.C. 15604(a)(6)*).

(2) *Petition and Notice.* A petition requesting appointment may be filed by the settlor, the settlor's spouse, the existing trustee, or the corporation. (*Prob.C. 15604(b)*.) It must specify why the appointment is necessary and include the name, address, and phone number of the settlor and the proposed trustee, and, to the extent known, the names and addresses of the persons entitled to notice of a conservatorship petition under *Prob.C. 1821(b)* (see 14 *Summary* (10th), *Wills and Probate*, §938). (*Prob.C. 15604(d)*, (e).) Notice of the petition is given as provided in *Prob.C. 1822* and *1824*, governing conservatorships (see 14 *Summary* (10th), *Wills and Probate*, §§939, 940). (*Prob.C. 15604(f)*.) The caption must include the name of the "responsible corporate officer" acting for the corporation. If the officer ceases to act, the corporation must file a notice with the name of the successor officer and the effective date. (*Prob.C. 15604(c)*.)

(3) *Bond.* Bond is required, and may not be waived. (*Prob.C. 15604(g)(1)*.)

(4) *Registration and Reporting Requirements.* Trustees must satisfy the registration and reporting requirements applicable to private professional conservators and private professional guardians under *Prob.C. 2340* et seq. (see 14 *Summary* (10th), *Wills and Probate*, §967 et seq.) and the inventory and appraisal requirements applicable to conservators of the estate under *Prob.C. 2600* et seq. (see 14 *Summary* (10th), *Wills and Probate*, §1032 et seq.). (*Prob.C. 15604(g)(2)*, (g)(3).) For this purpose, *Prob.C. 2340* et seq. use the term "private professional trustee." (

Prob.C. 2341(c).) (On statewide registry for private guardians, conservators, and trustees, see *Prob.C. 2850* et seq., 14 *Summary* (10th), *Wills and Probate*, §969.)

(5) *Expenses and Fees.* Expenses and compensation are governed by *Prob.C. 2640* et seq., the statutes applicable to conservators of the estate (see 14 *Summary* (10th), *Wills and Probate*, §1044 et seq.). However, compensation is allowed only for services actually rendered. (*Prob.C. 15604(g)(4).*) The same rule applies to attorneys' fees. (*Prob.C. 15604(g)(5).*)

(6) *Resignation and Removal.* Resignation and removal are governed by *Prob.C. 2650* et seq., the statutes applicable to conservators and guardians (see 14 *Summary* (10th), *Wills and Probate*, §1048 et seq.). (*Prob.C. 15604(h).*)

SUPPLEMENT: [This section is current through the latest supplement]

(4) *Registration and Reporting Requirements.* The statutes governing private professionals were extensively revised in 2006. New provisions, entitled the Professional Fiduciaries Act, were added to the Business and Professions Code. (See *B. & P.C. 6500* et seq.; 14 *Summary* (10th), *Wills and Probate*, Supp., §970A.) The Probate Code provisions dealing with private professionals (*Prob.C. 2340* to *2344*) remained in effect until July 1, 2008, and were repealed effective January 1, 2009. (*Prob.C. 2345*, added in 2006.) The Probate Code provisions dealing with the statewide registry (*Prob.C. 2850* to *2855*) remained in effect until July 1, 2008, and were repealed effective January 1, 2009. (*Prob.C. 2856*, added in 2006.)



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CHAPTER XX - Trusts

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III. TRUSTEES

A. In General.

3. Appointment by Court or Beneficiaries.

13 Witkin Sum. Cal. Law Trusts § 46

[§ 46] Appointment by Court or Beneficiaries.

(1) *General Law.* Former California statutes codified the rule that whenever there is no appointed trustee, or the trustee dies, renounces the trust, or is discharged, the court may appoint a new one. (See *Estate of McCray* (1928) 204 C. 399, 403, 268 P. 647; *Estate of Lewis* (1938) 28 C.A.2d 172, 175, 82 P.2d 32; *Baumann v. Harrison* (1941) 46 C.A.2d 84, 93, 115 P.2d 530; *Estate of Barter* (1947) 30 C.2d 549, 556, 184 P.2d 305; *Rest.3d, Trusts* §31; 2 Scott §108; Bogert §123; 59 A.L.R.3d 1129 [power to appoint additional trustees over number specified in instrument]; 76 *Am.Jur.2d* (2005 ed.), *Trusts* §214 et seq.; cf. *Estate of Butin* (1947) 81 C.A.2d 76, 83, 183 P.2d 304 ["my executors" directed to carry out charitable bequest; held that this was sufficient designation of executors as *trustees*, citing Restatement].) (On Fiduciaries' Wartime Substitution Law, see *Prob.C. 350* et seq.)

(2) *Trust Law.* *Prob.C. 15660* continues this rule:

(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 is filled as provided in *Prob.C. 15660*. (*Prob.C. 15660(a).*)

(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." (*Prob.C. 15660(b).*)

(c) If the vacancy in the office of trustee is not filled as provided in *Prob.C. 15660(b)*, "the vacancy may be filled by a trust company that has agreed to accept the trust on agreement 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 the agreement is made. If a beneficiary has a conservator, the conservator may agree to the successor trustee on behalf of the conservatee without obtaining court approval. Without limiting the power of the beneficiary to agree to the successor trustee, if the beneficiary has designated an attorney in fact who has the power under the power of attorney to agree to the successor trustee, the attorney in fact may agree to the successor trustee." (*Prob.C. 15660(c).*)

(d) If the vacancy in the office of trustee is not filled as provided in *Prob.C. 15660(b)* or (c), "on petition of any interested person or any person named as trustee in the trust instrument, 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 any

nomination by the beneficiaries who are 14 years of age or older." (*Prob.C. 15660(d)*.) The public guardian may not be appointed under *Prob.C. 15660(d)* "unless the court finds, based on reasonable inquiry, that no other qualified person is willing to act." (*Prob.C. 15660.5*.) (See *Arman v. Bank of America* (1999) 74 C.A.4th 697, 701, 88 C.R.2d 410 [following death of named trustee of charitable trust to be created after death of individual beneficiaries, trustee's daughter lacked standing to petition for appointment as successor trustee; daughter was not "interested party" as defined in *Prob.C. 48(a)* (see 14 Summary (10th), *Wills and Probate*, §553)].) (On statewide registry for private guardians, conservators, and trustees, see *Prob.C. 2850 et seq.*, 14 Summary (10th), *Wills and Probate*, §969.)

(3) *Certificate of Appointment*. "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." (*Prob.C. 15603*.) The California Law Revision Commission (18 Cal. Law Rev. Com. Reports, p. 529) explains: "A trustee may want this certificate to assist in transferring property." (On trustee's certification of trust, see *infra*, §256.)

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SUPPLEMENT: [This section is current through the latest supplement]

(2) *Trust Law.Appointment of public guardian*: *Prob.C. 15660.5* was substantially revised in 2008 and the provision quoted in the text was repealed. The statute now sets forth detailed conditions and procedural requirements for the appointment of the public guardian or the public administrator as a trustee.

Statewide registry: The Probate Code provisions dealing with the statewide registry (*Prob.C. 2850 to 2855*) remained in effect until July 1, 2008, and were repealed effective January 1, 2009. (*Prob.C. 2856*, added in 2006.)



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III. TRUSTEES

A. In General.

4. Acceptance.

13 Witkin Sum. Cal. Law Trusts § 47

[§ 47] Acceptance.

(1) *General Rule.* The general rule is that neither notice to the trustee nor the trustee's acceptance is required to create a trust. (*Rest.3d, Trusts §14*; see 1 Scott §35; 4A Scott §354; Bogert §150; 76 *Am.Jur.2d* (2005 ed.), *Trusts* §220.) Taking the trust property without any further statement is a tacit acceptance. (*Heitman v. Cutting* (1918) 37 C.A. 236, 238, 174 P. 675; see *Cooper v. Cooper* (1934) 3 C.A.2d 154, 161, 39 P.2d 820.)

Prob.C. 15600 sets forth the recognized methods of acceptance. The person named as the trustee may accept the trust, or a modification of the trust, by one of the following methods:

(a) "Signing the trust instrument or the trust instrument as modified, or signing a separate written acceptance." (*Prob.C. 15600(a)(1).*)

(b) "Knowingly exercising powers or performing duties under the trust instrument or the trust instrument as modified," except as provided in *Prob.C. 15600(b)*. (*Prob.C. 15600(a)(2).*)

"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)." (Law Rev. Com. Comment.)

(2) *Power To Act in Emergency.* "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 provision does not impose a duty on the person named as trustee to act. (*Prob.C. 15600(b).*)

SUPPLEMENT: [This section is current through the latest supplement]



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A. In General.
5. Bond.

13 Witkin Sum. Cal. Law Trusts § 48

[§ 48] Bond.

(1) *General Rule: Bond Not Required.* Generally, a trustee is not required to give a bond to secure performance of the trustee's duties. (*Prob.C. 15602(a).*) (See *Estate of Cibulk* (1998) 67 C.A.4th 690, 692, 79 C.R.2d 168 [order requiring bond was invalid where only justification for bond was protection of beneficiaries, and they had waived it; waiver was valid even though beneficiaries were minors, because no person, adult or minor, has right to require bond, and thus no fundamental right was surrendered].)

(2) *When Bond Is Required.* Bond is required in the following circumstances:

(a) A bond is required by the trust instrument. (*Prob.C. 15602(a)(1).*)

(b) Notwithstanding waiver of a bond in the trust instrument, a bond is found by the court to be necessary to protect the interests of beneficiaries. (*Prob.C. 15602(a)(2).*)

(c) An individual who is not named as a trustee in the trust instrument is appointed as a trustee by the court. (*Prob.C. 15602(a)(3).*)

(3) *Authority of Court.* Notwithstanding *Prob.C. 15602(a)(1)*, the court may excuse the 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. (*Prob.C. 15602(b).*)

(4) *Procedure and Amount.* If a bond is required, it must be filed or served and must be "in the amount and with sureties and liabilities ordered by the court." (*Prob.C. 15602(c).*)

(5) *Cost Charged Against Trust.* Except as otherwise provided in the trust instrument or ordered by the court, the cost of the bond must be charged against the trust. (*Prob.C. 15602(d).*)

(6) *No Bond Required of Trust Company.* A trust company may not be required to give a bond, notwithstanding a contrary provision in the trust instrument. (*Prob.C. 15602(e).*) (See C.R.C., Rule 7.203 [because corporate fiduciary cannot assume responsibility for acts of individual cofiduciary, individual cofiduciary required to give bond must give separate bond, except to extent that court orders assets to be held solely by corporate fiduciary]; on trust company

security deposit, see *Fin.C. 1540* et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



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A. In General.

6. Rejection.

13 Witkin Sum. Cal. Law Trusts § 49

[§ 49] Rejection.

A named trustee may decline to act, and reject the trust. (See *Rest.3d, Trusts* §35; *Smith v. Davis* (1891) 90 C. 25, 33, 27 P. 26; 2 Scott §102; Bogert §150; 14 Cal. L. Rev. 188; 76 Am.Jur.2d (2005 ed.), *Trusts* §§220, 223.) *Prob.C. 15601* states the rule as follows:

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

(b) If the person named as trustee does not accept the trust or a modification of the trust by a method provided in *Prob.C. 15600(a)* (*supra*, §47) within a reasonable time after learning of being named as trustee or of the modification, the person has rejected the trust or the modification. (*Prob.C. 15601(b).*)

(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." (*Prob.C. 15601(c).*)

The Law Revision Commission Comment discusses two effects of the provision:

(1) "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."

(2) "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."

SUPPLEMENT: [This section is current through the latest supplement]



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III. TRUSTEES

A. In General.

7. Resignation.

13 Witkin Sum. Cal. Law Trusts § 50

[§ 50] Resignation.

(1) *General Rule.* After acceptance, the trustee cannot resign except as the trust instrument provides, or with the permission of the court or the consent of the beneficiaries. (See *Rest.3d, Trusts* §36; *Hunt v. Lawton* (1926) 76 C.A. 655, 669, 245 P. 803; 2 Scott §106; Bogert §511; Cal. Civil Practice, 3 Probate and Trust Proceedings, §24:106 [resignation], §24:107 [petition for order accepting resignation], §24:108 [order accepting resignation]; 18 Cal. Law Rev. Com. Reports, p. 532; 76 *Am.Jur.2d* (2005 ed.), *Trusts* §223.)

(2) *Trust Law.* A trustee who has accepted the trust may resign only by one of the following methods:

(a) As provided in the trust instrument. (*Prob.C. 15640(a).*)

(b) In the case of a revocable trust, with the consent of the person holding the power to revoke the trust. (*Prob.C. 15640(b).*)

(c) "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. If a beneficiary has a conservator, the conservator may consent to the trustee's resignation on behalf of the conservatee without obtaining court approval. Without limiting the power of the beneficiary to consent to the trustee's resignation, if the beneficiary has designated an attorney in fact who has the power under the power of attorney to consent to the trustee's resignation, the attorney in fact may consent to the resignation." (*Prob.C. 15640(c).*)

(d) Under a court order obtained on a petition by the trustee under *Prob.C. 17200* (infra, §229). The court must accept the trustee's resignation and "may make any orders necessary for the preservation of the trust property, including the appointment of a receiver or a temporary trustee." (*Prob.C. 15640(d).*)

(3) *Liability.* "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." (*Prob.C. 15641.*)

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SUPPLEMENT: [This section is current through the latest supplement]



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III. TRUSTEES

A. In General.

8. Removal.

a. General Law and California Cases.

13 Witkin Sum. Cal. Law Trusts § 51

[§ 51] General Law and California Cases.

(1) *In General.* A trustee may be removed by the court for cause (e.g., misconduct, unfitness, or acquisition of an adverse interest). (See *Rest.3d, Trusts* §37; 2 Scott §107; 4A Scott §387; Bogert §519 et seq.; 76 *Am.Jur.2d* (2005 ed.), *Trusts* §224 et seq.; on grounds for removal of trustee of charitable trust, see *infra*, §305.) Hostility between the trustee and the beneficiary may also be a sufficient ground for removal. (*Overell v. Overell* (1926) 78 C.A. 251, 257, 248 P. 310; *Estate of Gilmaker* (1962) 57 C.2d 627, 632, 21 C.R. 585, 371 P.2d 321; see *Copley v. Copley* (1981) 126 C.A.3d 248, 286, 288, 178 C.R. 842 [no showing that hostility impaired administration of trust]; 63 A.L.R.2d 523 [hostility between trustee and beneficiary as ground for removal].)

"The court has the inherent power to remove a trustee where necessary to preserve the trust and protect beneficiaries. Removal is one of the remedies for breach of trust, 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." (18 Cal. Law Rev. Com. Reports, p. 533.)

(2) *Trustee Originally Appointed by Settlor.* The right to displace a trustee originally appointed by the settlor is said to be very limited. Upon a sufficient showing of incapacity, dishonesty, or complete lack of qualifications, the court may remove the trustee or refuse to confirm his or her appointment. But ordinarily such a trustee will not be removed upon grounds that were known to the settlor. (See *Rest.3d, Trusts* §37, Comment f.) Thus, where beneficiaries under a testamentary trust claimed that two of five trustees had conflicting personal interests and were hostile toward them, but it appeared that the testator had been fully aware of the facts and had placed confidence in them, his appointment was controlling. (*Estate of Brown* (1937) 22 C.A.2d 480, 485, 71 P.2d 345, [citing the Restatement]; see *Estate of Keyston* (1951) 102 C.A.2d 223, 228, 227 P.2d 17 [following *Brown*]; *Jones v. Stubbs* (1955) 136 C.A.2d 490, 500, 288 P.2d 939 [trial judge's discretion in denying removal upheld].)

This traditional reluctance was absent, however, in *Estate of Gilmaker, supra*, in which the court took a strong position on the right of a sole beneficiary to have a cooperative trustee. The testator's son was the life beneficiary. The trust estate consisted mainly of undivided half interests in real property, the other half being owned by the beneficiary. He had participated in the management of the property before his father's death, and the trust instrument appointed him

"Consultant." It further provided that no transfer, improvement, or investment should be made without his written approval. In this proceeding by the son for removal and by the trustee for instructions, it was established that (a) the trustee had violated express restrictions by maintaining a single bank deposit of more than the insurable amount; (b) he had failed to provide the semiannual accounting called for by the instrument, on the untenable ground that this expressly required service was extraordinary and would call for additional compensation; and (c) the parties did not get along. *Held*, reversing the trial judge, the trustee should be removed.

The opinion is mainly concerned with the third ground, describing the hostility as "constant and intense." A senior trust officer told the son: "Now, listen here. You've been coming down here at least once a week bothering us and you do not have to come back any more. I'll put a stop to this and we'll petition the Court for instructions relating to the investments." (57 C.2d 632.) This notion, that the trustee had the sole power to propose investments, with only a veto power in the beneficiary, was emphatically rejected by the court; as a "consultant" with the sole interest and a background of experience, his function was to advise, in a "close working relationship" with the trustee. And this was frustrated by the organization of the trustee's staff. Its trust committee, which did not meet with outsiders, made all the decisions; the meetings of the consultant were only with a trust officer, who lacked power to make decisions. "This conduit mechanism" magnified the existing difficulties. (57 C.2d 633.) The significance of the opinion is in its flat pronouncement that the "proper administration of the trust requires that there be no hostility between the trustee and the beneficiary-consultant." (57 C.2d 632.) (On trust advisors, see *infra*, §54.)

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SUPPLEMENT: [This section is current through the latest supplement]



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A. In General.

8. Removal.

b. Trust Law.

13 Witkin Sum. Cal. Law Trusts § 52

[§ 52] Trust Law.

(1) *In General.* A trustee may be removed in accordance with the trust instrument, by the court on its own motion, or on petition of a settlor, cotrustee, or beneficiary under *Prob.C. 17200* (infra, §229). (*Prob.C. 15642(a).*)

(2) *Grounds.* *Prob.C. 15642(b)* sets forth the following grounds for removal of a trustee by the court:

- (a) Where the trustee has committed a breach of the trust.
- (b) Where the trustee is insolvent or otherwise unfit to administer the trust.
- (c) Where hostility or lack of cooperation among cotrustees impairs the administration of the trust.
- (d) Where the trustee fails or declines to act.
- (e) Where the trustee's compensation is excessive under the circumstances.
- (f) Where the sole trustee is a disqualified person.
- (g) For other good cause.

(3) *Emergency Powers.* 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 by a cotrustee or beneficiary, compel the trustee whose removal is sought to surrender trust property to a cotrustee, receiver, or temporary trustee. The court may also suspend the powers of the trustee to the extent the court deems necessary. (*Prob.C. 15642(e).*) (On appointment of trustee ad litem, see infra, §233.)

(4) *Removal of Trustee Who Is Subject to Transfer Restriction.* *Prob.C. 21350* et seq. restrict donative transfers to an attorney who drafted or transcribed the donative instrument and to specified persons with a business or personal relationship to the drafting attorney. (See 14 Summary (10th), *Wills and Probate*, §303.)

The fact that a sole trustee is a disqualified person under *Prob.C. 21350* is a ground for removal, whether or not the trustee is the transferee of a donative transfer from the transferor, unless the court, based on "any evidence of the intent of the settlor and all other facts and circumstances," finds that it is consistent with the settlor's intent that the trustee continue to serve and that that intent was not the product of fraud, menace, duress, or undue influence. An attempted waiver of this provision by the settlor is against public policy and void. However, the provision does not apply to instruments that became irrevocable on or before January 1, 1994. (*Prob.C. 15642(b)(6)*.) The prohibition does not apply in the following circumstances:

(a) Where the settlor is related by blood or marriage or is a cohabitant with one of the trustees, the person who drafted or transcribed the instrument, or the person who caused the instrument to be transcribed. (*Prob.C. 15642(b)(6)(A)*.) For this purpose, "related by blood or marriage" includes persons within the seventh degree. (*Prob.C. 15642(f)*.)

(b) The instrument is reviewed by independent counsel who signs a certificate of independent review. (*Prob.C. 15642(b)(6)(B)*.) The form for the certificate is set forth in the statute.

(c) After full disclosure of the relationships involved, the instrument is approved under *Prob.C. 2580* et seq. (substitute judgment; see 14 *Summary* (10th), *Wills and Probate*, §1025 et seq.). (*Prob.C. 15642(b)(6)(C)*.)

(5) *Costs and Fees in Removal Proceeding*. The following provisions govern costs and fees:

(a) If, under *Prob.C. 15642(b)(6)*, the court finds that the designation of the trustee was not consistent with the intent of the settlor or was the product of fraud, menace, duress, or undue influence, the person being removed must bear all costs, including reasonable attorneys' fees. (*Prob.C. 15642(c)*.)

(b) If a petition for removal is filed in bad faith and removal would be contrary to the settlor's intent, the court may order that the person seeking removal bear all or part of the costs, including reasonable attorneys' fees. (*Prob.C. 15642(d)*.)

(c) If the trustee of an irrevocable trust refuses to transfer administration of the trust to a successor trust company on the request of the beneficiaries described in *Prob.C. 15640(c)* (supra, §50), and in a proceeding under *Prob.C. 17200* (infra, §229) the court removes the trustee and appoints a trust company as the successor trustee, the court may award costs and reasonable attorneys' fees incurred by the petitioner to be paid by the trustee or from the trust. (*Prob.C. 15645*.) This provision is intended to encourage an out-of-court solution where the beneficiaries want to transfer administration to a successor corporate trustee. (Law Rev. Com. Comment.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General*. See *Schwartz v. Labow* (2008) 164 C.A.4th 417, 428, 78 C.R.3d 838 [on trustee's petition under *Prob.C. 17200* to settle account and fix compensation, probate court had broad statutory and equitable jurisdiction to suspend trustee's powers and appoint interim trustee without waiting for beneficiary to petition for removal or suspension].

(2) *Grounds*. *Prob.C. 15642(b)* was amended in 2006 to add additional grounds for removal of a trustee: (a) where the trustee is "substantially unable" to manage the trust's financial resources or properly execute the duties of the office, and (b) where the trustee is "substantially unable" to resist fraud or undue influence. In these circumstances, if the trustee holds the power to revoke the trust, "substantial inability" may not be proved "solely by isolated incidents of negligence or improvidence." (*Prob.C. 15642(b)(7)*, (b)(8), added in 2006.)



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9. Vacancy in Office.

13 Witkin Sum. Cal. Law Trusts § 53

[§ 53] Vacancy in Office.

(1) *How Vacancy Occurs.* A vacancy in the office of trustee occurs in any of the following circumstances:

- (a) The person named as trustee rejects the trust. (*Prob.C. 15643(a).*)
 - (b) The person named as trustee cannot be identified or does not exist. (*Prob.C. 15643(b).*)
 - (c) The trustee resigns or is removed. (*Prob.C. 15643(c).*)
 - (d) The trustee dies. (*Prob.C. 15643(d).*)
 - (e) A conservator or guardian of the person or estate of an individual trustee is appointed. (*Prob.C. 15643(e).*)
 - (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." (*Prob.C. 15643(f).*)
 - (g) A trust company's charter is revoked or its powers are suspended for 30 days or more. (*Prob.C. 15643(g).*)
 - (h) A receiver is appointed for a trust company and the appointment is not vacated within 30 days. (*Prob.C. 15643(h).*)
- (2) *Delivery of Property by Trustee.* "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." (*Prob.C. 15644.*)

(3) *Continuing Power of Former Trustee.* "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." (*Prob.C. 15644.*)

SUPPLEMENT: [This section is current through the latest supplement]



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A. In General.
10. Cotrustees.

13 Witkin Sum. Cal. Law Trusts § 54

[§ 54] Cotrustees.

(1) *General Rule.* "Unless otherwise provided in the trust instrument, a power vested in two or more trustees may only be exercised by their unanimous action." (*Prob.C. 15620.*) (See *Conrad v. Hawk* (1932) 122 C.A. 649, 652, 10 P.2d 534 [powers conferred on cotrustees relating to trust property and its management must be exercised jointly, unless otherwise provided by terms of trust]; 3 Scott §194; Bogert §122; but see *Edwards v. Edwards* (1998) 61 C.A.4th 599, 603, 71 C.R.2d 653 [two of three trustees could vote corporate shares held in trust; *Corp.C. 704*, specific statute allowing majority voting by fiduciaries, prevails over *Prob.C. 15620*, general statute requiring cotrustees to act unanimously]; on duty with respect to cotrustee, see *Prob.C. 16013*, *infra*, §62; on liability for acts of cotrustee, see *infra*, §119.)

Under *Rest.3d, Trusts* §39, unless provided otherwise by the terms of the trust, if there are two trustees, their powers must be exercised concurrently, absent an emergency or proper delegation. If there are three or more trustees, their powers may be exercised by a majority.

(2) *Court Proceedings.* A trustee may act separately in a court proceeding. (*Stanton v. Preis* (1955) 138 C.A.2d 104, 107, 291 P.2d 118 [in action by beneficiaries to modify trusts, one of defendant cotrustees acted within its power in restricting action and appealing modification judgment]; see 66 A.L.R.2d 1169 [right of cotrustee to retain independent counsel]; 24 A.L.R.4th 624 [award of attorneys' fees out-of-state in action between cotrustees].) One cotrustee may, on behalf of the beneficiary, maintain an action against another cotrustee guilty of a breach or threatened breach of the trust. (*Rest.2d, Trusts* §200, Comment e; *St. James Church of Christ Holiness v. Superior Court* (1955) 135 C.A.2d 352, 360, 287 P.2d 387; see 3 Scott §200.)

(3) *Vacancy in Office.* "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." (*Prob.C. 15621.*)

The Law Revision Commission Comment states: "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." (See *Drinkhouse v. Birch Ranch & Oil Co. (1950) 97 C.A.2d 923, 927, 219 P.2d 45* [trust instrument requiring vacancy to be filled by person who made original appointment]; *Rest.3d, Trusts §34*, Comment d; 3 Scott §195.)

(4) *Temporary Incapacity*. "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, as if they are the only trustees, where necessary to accomplish the purposes of the trust or to avoid irreparable injury to the trust property." (*Prob.C. 15622*.)

(5) *Trust Advisor*. A trust may provide that a person other than the trustee has the power to control the action of the trustee in certain respects. (*Rest.2d, Trusts §185*; see 2A Scott §185.) Such a person, called a trust advisor, is a fiduciary, similar to a cotrustee, and is governed generally by the rules applicable to trustees. (*Crocker-Citizens Nat. Bank v. Younger (1971) 4 C.3d 202, 211, 93 C.R. 214, 481 P.2d 222*; see 60 *Cal. L. Rev.* 1151 [directory trusts]; 78 *Harv. L. Rev.* 1230; 56 *A.L.R.3d* 1249 [construction and operation of provision appointing advisor to trustee].)

In *Crocker-Citizens*, the settlor in 1950 created a revocable living trust, providing for monthly payments to Thomas and Marie, his children, during their life, and for other gifts to the children and charities on his death. Plaintiff bank was named trustee, and a three-member committee was appointed to determine the receipts of the ultimate charitable gifts. The committee consisted of W, a friend, Thomas, and the trustee, and a vacancy could be filled by the remaining members or by a court. A later amendment provided that, on the death of the settlor, the committee could determine the need of either child to additional payments under the "distress clause." W died, Thomas and the trustee were unable to agree on a successor, and the court designated L. In 1958 L resigned, and the committee designated Marie, but with a condition disqualifying her to act on an application by herself or her brother under the distress clause. She served for 8 years, and in 1966 sought to act on such applications. The trustee then brought this action, asserting her disqualification and seeking court appointment of a person to fill the temporary vacancy. The trial court held Marie's appointment void and appointed a new member. *Held*, affirmed.

(a) Trustees have only the authority conferred by the trust, and cotrustees or other persons holding trust powers cannot, by private agreement, restrict the powers of a comember. (4 *C.3d* 211.)

(b) A beneficiary may serve as a trustee (see *supra*, §44); hence, the fact that Marie owed fiduciary obligations to the other beneficiaries would not have invalidated her appointment or rendered voidable her exercise of trust powers. (4 *C.3d* 212.) The purported conditional or limited appointment was therefore unnecessary and an unlawful deviation from the terms of the trust. (4 *C.3d* 212.) Thus, while Marie's conditional appointment was void, she is eligible for a proper appointment. (4 *C.3d* 213.)

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SUPPLEMENT: [This section is current through the latest supplement]

(2) *Court Proceedings*. See *Rest.3d, Trusts §81*, Comment d.(5) *Trust Advisor*. See *Rest.3d, Trusts §75*.



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B. Compensation and Indemnification.
1. Compensation.
a. Where Instrument Does Not Specify.

13 Witkin Sum. Cal. Law Trusts § 55

[§ 55] Where Instrument Does Not Specify.

(1) *Reasonable Compensation*. "If the trust instrument does not specify the trustee's compensation, the trustee is entitled to reasonable compensation under the circumstances." (*Prob.C. 15681*.) (On court's power to fix periodic compensation "to continue for as long as the court determines is proper," see *Prob.C. 15682*; *Estate of Gilliland* (1971) 5 C.3d 56, 59, 95 C.R. 343, 485 P.2d 543 [court may allow periodic compensation for as long as it deems proper]; on public guardian-trustee's entitlement to reasonable compensation, see *Prob.C. 15688*.) (See *Estate of Griffith* (1950) 97 C.A.2d 651, 654, 218 P.2d 149 [ordinary and extraordinary services]; *Estate of Vokal* (1953) 121 C.A.2d 252, 254, 263 P.2d 64 [rejection of exorbitant claims]; *Estate of Gump* (1982) 128 C.A.3d 111, 116, 180 C.R. 219, citing the text; *Rest.3d, Trusts* §38; 3A Scott §242; Bogert §975; 96 A.L.R.3d 1102 [resignation or removal as affecting compensation]; 76 Am.Jur.2d (2005 ed.), *Trusts* §574 et seq.)

The amount awarded rests in the sound discretion of the trial judge. In *Estate of McLaughlin* (1954) 43 C.2d 462, 274 P.2d 868, an objecting beneficiary contended that the statutory and customary fees of trustees in other jurisdictions, based on percentages of income, should be controlling. The court, upholding the award, pointed out that income is only one of many factors; others (quoting Bogert) are "the success or failure of the administration of the trustee; any unusual skill or experience which the trustee in question may have brought to his work; the fidelity or disloyalty displayed by the trustee; the amount of risk and responsibility assumed; the time consumed in carrying out the trust; the custom in the community as to allowances to trustees by settlors or courts and as to charges exacted by trust companies and banks; the character of the work done in the course of administration, whether routine or involving skill and judgment; any estimate which the trustee has given of the value of his own services." (43 C.2d 468.) In addition, services may be compensable even though the benefits to the trust will not be realized until a later date. (43 C.2d 467.) (See *Estate of Duffill* (1922) 188 C. 536, 545, 206 P. 42 [court has discretion to fix yearly compensation]; *Estate of McLellan* (1936) 8 C.2d 49, 55, 63 P.2d 1120; *Estate of Willardson* (1951) 101 C.A.2d 777, 780, 226 P.2d 369 [unreasonable withdrawal ordered returned with interest]; *Estate of Feraud* (1979) 92 C.A.3d 717, 723, 154 C.R. 889 [fee held unreasonable].)

(2) *Payment in Advance of Court Approval*. Some superior courts have local rules or policy guidelines on payment of compensation to testamentary trustees and their attorneys, most of which require court approval. In *Estate of Gilfillan* (1978) 79 C.A.3d 429, 144 C.R. 862, a Policy Memorandum authorized payment prior to court approval, and the trustees and attorneys took their fees in advance of a court order. A beneficiary took exception to the amount of the fees,

and also objected to the advance payment, challenging the validity of the Policy Memorandum. *Held*, the policy was valid and advance payment was proper. A trustee taking advance compensation should in most cases be required to render an account within a reasonable time, in order that the court may review the reasonableness of the amount and surcharge the trustee for any portion not approved. The Policy Memorandum served the useful purpose of placing temporary trustees on notice of the risks of surcharge. (79 C.A.3d 437.)

The Law Revision Commission Comment to *Prob.C. 15681* points out that the trustee has authority to fix and pay the compensation without the necessity of prior court review. (On authority to pay reasonable compensation, see *Prob.C. 16243* *infra*, §112; on petition of beneficiary or cotrustee to review trustee's determination of compensation, see *infra*, §229.)

(3) *Factors in Determining Compensation.* C.R.C., Rule 7.756 lists factors the court may consider, among others, in determining or approving the compensation of a trustee:

- (a) The gross income of the trust estate.
- (b) The success or failure of the trustee's administration.
- (c) Any "unusual skill, expertise, or experience" brought to the work.
- (d) Fidelity or disloyalty shown by the trustee.
- (e) The risk and responsibility assumed by the trustee.
- (f) Time spent in the performance of the trustee's duties.
- (g) The customary compensation in the "community where the court is located" authorized by settlors, allowed by the court, or charged by corporate trustees "for trusts of similar size and complexity."
- (h) Whether the work was routine or required "more than ordinary skill or judgment."

(4) *Extraordinary Fees.* In *Estate of Bissinger* (1964) 60 C.2d 756, 763, 36 C.R. 450, 388 P.2d 682, the court held that defending the trustee's acts was within ordinary duties and denied extraordinary fees. "[A] trustee who has consented to act as such and has accepted the trust under an instrument specifically fixing his fee, should not be heard to claim that defending the acts of management and judgment which he undertakes to perform in return for such fee, creates an exigency or emergency for which he should receive additional compensation." (60 C.2d 769.) The additional compensation sought was for services in assisting attorneys, and the only evidence offered in support of the claim was a declaration of a trust officer that extraordinary services were performed. "Obviously, even if the award or additional compensation for allegedly extraordinary services were otherwise warranted, the trustee should be required to show in detail the nature and extent of such services rendered by it, as distinguished from its attorneys, and the time and effort entailed thereby over and beyond usual and ordinary services." (60 C.2d 770.)

(5) *Apportionment Among Trustees.* "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." (*Prob.C. 15683*; see *Bogert* §975; 76 *Am.Jur.2d* (2005 ed.), *Trusts* §586.) This requirement is for the benefit of the trustees; if the total fee is reasonable, and the trustees are satisfied with the division, a beneficiary cannot complain. (*Estate of McLaughlin* (1954) 43 C.2d 462, 469, 274 P.2d 868.)

West's Key Number Digest, Trusts k.315(1)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Reasonable Compensation.*

(New) Compensation of public guardian: Prob.C. 15688 was expanded in 2008 to also provide for the compensation of the public administrator when appointed to serve as a trustee.(3) *Factors in Determining Compensation.* C.R.C., Rule 7.756 was renumbered C.R.C., Rule 7.776 in 2007.



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1. Compensation.
b. Where Instrument Specifies.

13 Witkin Sum. Cal. Law Trusts § 56

[§ 56] Where Instrument Specifies.

(1) *Former California Statutes and Case Law.* Under the former California statutes, if a trust instrument provided for annual compensation, e.g., a sum equal to a percentage of the value of the trust property, the trustee was entitled to no more than the amount specified and the court had no discretion to award a different amount, either more or less. (See *Estate of Whitney* (1926) 78 C.A. 638, 649, 248 P. 754 [trustee improperly demanded greater sum than specified]; *Estate of Bodger* (1955) 130 C.A.2d 416, 279 P.2d 61 [court on its own initiative attempted to award lesser amount].) The rule was subject to a judicially recognized exception; the court had power to deviate on a showing of emergency or changed conditions. (See *Estate of Bissinger* (1964) 60 C.2d 756, 763, 36 C.R. 450, 388 P.2d 682, supra, §55 [denying additional compensation on record].) Subsequent statutory amendments gave courts power to grant greater compensation to a trustee than that provided by the will or trust instrument. (See *Estate of Taylor* (1970) 6 C.A.3d 16, 20, 85 C.R. 474.)

(2) *Trust Law.* "[I]f the trust instrument provides for the trustee's compensation, the trustee is entitled to be compensated in accordance with the trust instrument." (*Prob.C. 15680(a).*) However, on a 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:

(a) Where the duties of the trustee are substantially different from those contemplated when the trust was created. (*Prob.C. 15680(b)(1).*)

(b) Where the compensation in accordance with the terms of the trust would be inequitable or unreasonably low or high. (*Prob.C. 15680(b)(2).*)

(c) In extraordinary circumstances calling for equitable relief. (*Prob.C. 15680(b)(3).*)

An order fixing or allowing greater or lesser compensation "applies only prospectively to actions taken in administration of the trust after the order is made." (*Prob.C. 15680(c).*) The court may fix periodic compensation under *Prob.C. 15680* "to continue for as long as the court determines is proper." (*Prob.C. 15682.*) (See Cal. Transactions Forms, 3 Estate Planning §§12:47 et seq., 12:129 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]
(2) *Trust Law*.

Compensation of public guardian: Prob.C. 15680(a) was amended in 2008 to state an exception for *Prob.C. 15688*, providing for the compensation of the public guardian or public administrator when appointed to serve as a trustee.



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1. Compensation.
c. Notice of Increase.

13 Witkin Sum. Cal. Law Trusts § 57

[§ 57] Notice of Increase.

Prob.C. 15686 specifies the requirements that must be satisfied before the trustee may charge an increased fee:

(1) The trustee must give at least 60 days' written notice to each beneficiary who is entitled to an account under *Prob.C. 16062* (infra, §87), who was given the preceding account, or who has made a written request for notice of an increased trustee's fee. (*Prob.C. 15686(b)*.) For this purpose, the trustee's fee includes the periodic base fee, rate of percentage compensation, minimum fee, hourly rate, and transaction charge, but does not include fees for extraordinary services. (*Prob.C. 15686(a)*.) The Law Revision Commission Comment points out that notice must be given only to the specified beneficiaries. Thus, a person whose interest has terminated need not be notified even if that person has requested notice.

(2) If a beneficiary petitions under *Prob.C. 17200* (infra, §229) for review of the fee or removal of the trustee and serves a copy of the petition on the trustee before expiration of the 60-day period, the increased fee does not take effect until (a) otherwise ordered by the court, or (b) the petition is dismissed. (*Prob.C. 15686(c)*.)

SUPPLEMENT: [This section is current through the latest supplement]



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B. Compensation and Indemnification.

1. Compensation.

d. Dual Compensation as Trustee and Attorney.

13 Witkin Sum. Cal. Law Trusts § 58

[§ 58] Dual Compensation as Trustee and Attorney.

(1) *In General. Prob.C. 15687* limits the compensation of an attorney-trustee and related parties. The statute applies to services rendered on or after January 1, 1994. (*Prob.C. 15687(f)*.) However, it does not apply if the trustee is related by blood or marriage to the settlor or is a cohabitant. (*Prob.C. 15687(c)*.)

(2) *Compensation of Attorney-Trustee.* A trustee who is an attorney may receive either (a) the trustee's compensation provided by the trust or by *Prob.C. 15680* et seq., or (b) compensation for legal services performed for the trustee. This restriction applies notwithstanding any contrary provision in the trust. (*Prob.C. 15687(a)*.)

(3) *Compensation of Related Parties.* Specified persons are not entitled to compensation for legal services performed for the trustee unless the trustee waives trustee compensation. This prohibition applies to the trustee's parents, children, siblings, and spouse, and a law partnership or corporation in which the trustee is a partner, shareholder, or employee. (*Prob.C. 15687(b)*.)

(4) *Approval of Dual Compensation. Prob.C. 15687(d)* provides two methods for the approval of dual compensation otherwise prohibited under *Prob.C. 15687(a)* and (b):

(a) The trustee may petition for an order approving dual compensation. A petition is authorized by *Prob.C. 17200(b)(21)*. (See *infra*, §229.)

(b) The trustee may give 30 days' written notice of the proposed action to those persons entitled to notice under *Prob.C. 17203* (see *infra*, §231). Any notified person may object within the 30-day period by writing to the trustee or by filing a petition under *Prob.C. 17200(b)(21)*. If the trustee receives an objection within the 30-day period and wishes dual compensation, a petition for approval under *Prob.C. 17200(b)(21)* is required.

In either case, "full disclosure of the nature of the compensation and relationship of the trustee to all persons receiving compensation" is required. (*Prob.C. 15687(d)*.)

(5) *Waiver Prohibited.* An attempted waiver of the requirements of *Prob.C. 15687* is against public policy and void. (*Prob.C. 15687(e)*.)

SUPPLEMENT: [This section is current through the latest supplement]



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2. Indemnity.
a. In General.

13 Witkin Sum. Cal. Law Trusts § 59

[§ 59] In General.

(1) *General Law.* The trustee is entitled to indemnity or reimbursement for expenses necessarily incurred in administration, and that entitlement gives rise to a lien on the trust property. (See *Bixby v. Hotchkis* (1943) 58 C.A.2d 445, 452, 136 P.2d 597; *Rest.3d, Trusts* §38; 3A Scott §244 et seq.; Bogert §718; 76 *Am.Jur.2d* (2005 ed.), *Trusts* §564 et seq.) The trustee has no personal claim for indemnity against the beneficiary in the absence of a special agreement. (*Rest.2d, Trusts* §249; 3A Scott §249; Bogert §718.)

(2) *Trust Law.* 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." (*Prob.C. 15684(a).*)

(b) "To the extent that they benefited the trust, expenditures that were not properly incurred in the administration of the trust." (*Prob.C. 15684(b).*)

The California Law Revision Commission (18 Cal. Law Rev. Com. Reports, pp. 590, 591) notes the kind of expenses that have been allowed: brokerage fees, insurance premiums, interest, litigation expenses, the cost of obtaining a patent, and, where the trustee was not personally at fault, tort liability for the acts of an agent committed in the course of trust administration.

(3) *Trustee's Lien.* "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." (*Prob.C. 15685.*)

The Law Revision Commission Comment explains:

(a) The reference to the equitable nature of the lien makes it clear that the lien is not good against a bona fide transferee of trust property without knowledge of the lien.

(b) The reference to liabilities because of ownership or control involves liability for taxes and assessments on trust property and tort liability arising out of trust property.

West's Key Number Digest, Trusts k.315(1)

SUPPLEMENT: [This section is current through the latest supplement]



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2. Indemnity.
b. Attorneys' Fees and Costs.

13 Witkin Sum. Cal. Law Trusts § 60

[§ 60] Attorneys' Fees and Costs.

(1) *In General.* An attorney for a testamentary trustee is entitled to reasonable fees for services in connection with the trust administration. (See *Estate of Lair* (1945) 70 C.A.2d 330, 335, 161 P.2d 288; *Estate of Griffith* (1950) 97 C.A.2d 651, 654, 218 P.2d 149.) And, a trustee who defends the trust in a civil action is entitled to expenses for attorneys' fees and costs. (See *Estate of Spencer* (1936) 18 C.A.2d 220, 222, 63 P.2d 875 [trustee may, in court's discretion, be allowed greater sum than was awarded as costs; e.g., where trustee procures daily transcript without court order]; *Bank of America v. Long Beach Fed. Savings & Loan Assn.* (1956) 141 C.A.2d 618, 624, 297 P.2d 443.) (See *Hollaway v. Edwards* (1998) 68 C.A.4th 94, 97, 80 C.R.2d 166 [trustee was entitled to recover attorneys' fees incurred in defending against cotrustee's petition to remove her, despite noncompliance with time requirements of C.R.C., Rule 870.2 (see 7 Cal. Proc. (4th), *Judgment*, §260); rule governs fees in ordinary civil actions and presumes rendition of judgment, which does not occur in most probate proceedings].)

(2) *When Reimbursement Will Be Denied.* In *Estate of Gilmaker* (1962) 57 C.2d 627, 21 C.R. 585, 371 P.2d 321, supra, §51, the trustee was removed for hostility and failure to perform its trust obligations. In *Estate of Gilmaker* (1964) 226 C.A.2d 658, 38 C.R. 270, the trial judge found that the trustee had acted reasonably and in good faith and was entitled to reimbursement for the expenses of litigation with the beneficiary. *Held*, reversed. The Supreme Court decision conclusively established the lack of merit in the trustee's position; in the light of that decision, "it is not reasonable or fair to rely upon the element of good faith, standing alone, as the criterion by which to determine whether the trust estate should bear the cost of the trustee's defense of its untenable position." (226 C.A.2d 663.) (See *Estate of Miller* (1968) 259 C.A.2d 536, 546, 66 C.R. 756.)

In *Estate of Vokal* (1953) 121 C.A.2d 252, 260, 263 P.2d 64, S, cotrustee acting as the attorney for the trust, petitioned for attorneys' fees. When objection was made, S engaged another attorney to represent him in the contest. The objections were sustained on the ground of excessive, exorbitant, and duplicating charges, but S then sought an order for payment of the other attorneys' fee. *Held*, this was properly denied; these legal services were not incurred in the management and preservation of the trust estate. "When a beneficiary finds it necessary to contest the unfair charges of a trustee and to have the latter's account surcharged for sums that have already been paid, it is shocking to say that he must pay not only his own attorney to effect his purpose, but also, the fees of the counsel employed by the faithless or careless trustee for resisting such action of the beneficiary." (121 C.A.2d 258.) (See *Metzenbaum v. Metzenbaum* (1953)

115 C.A.2d 395, 401, 252 P.2d 31 [no recovery of attorneys' fees by trustee unsuccessfully contesting accounting]; *Whittlesey v. Aiello* (2002) 104 C.A.4th 1221, 1228, 128 C.R.2d 742 [attorney who unsuccessfully represented trustee in litigation over validity of amendment changing allocation of trust benefits was not entitled to recover attorneys' fees from trust; dispute was essentially between beneficiaries, and litigation did not benefit trust].)

The Law Revision Commission Comment on *Prob.C. 15684* (supra, §59), citing *Gilmaker* and *Vokal*, states that under this section, a trustee is not entitled to attorneys' fees and expenses of a proceeding where it is determined that the trustee breached the trust, unless the court otherwise orders.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* C.R.C., Rule 870.2 was renumbered C.R.C., Rule 3.1702 in 2006.

Cross-Reference: 7 Cal. Proc. (5th), *Judgment*, §300.

(2) *When Reimbursement Will Be Denied.* See *Terry v. Conlan* (2005) 131 C.A.4th 1445, 1461, 33 C.R.3d 603 [following *Whittlesey v. Aiello* (2002) 104 C.A.4th 1221, 128 C.R.2d 742, text, p. 635; trustee was not entitled to recover attorneys' fees from trust where she litigated to protect her own interests as beneficiary, not to defend trust and protect assets as neutral trustee].



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III. TRUSTEES

C. Duties.

1. In General.

a. Trust Law Revision.

13 Witkin Sum. Cal. Law Trusts § 61

[§ 61] Trust Law Revision.

The California Law Revision Commission (18 Cal. Law Rev. Com. Reports, p. 537), after a brief review of the principal former statutes, makes the following observations:

(1) "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 cannot read the various sections pertaining to trustees' duties with the confidence that the governing law has been found."

(2) "The proposed law replaces these archaic formulations with a set of trustees' duties drawn largely from the Restatement. The proposed law codifies the duties to administer the trust, of loyalty, to deal impartially with beneficiaries, to avoid conflicts of interest, 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, 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. This more modern and comprehensive list of trustees' duties should provide additional guidance to trustees, particularly to nonprofessional trustees."

(3) "In the case of revocable living trusts, the proposed law also makes clear that the trustee owes the duties primarily 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."

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SUPPLEMENT: [This section is current through the latest supplement]



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C. Duties.

1. In General.

b. Administration of Trust.

13 Witkin Sum. Cal. Law Trusts § 62

[§ 62] Administration of Trust.

(1) *Duty To Administer Trust.* "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 the Trust Law. (*Prob.C. 16000.*) (See *Rest.2d, Trusts* §§164 and 169; 2A Scott §164, 169; Chodos, *Fiduciary Duties* §3:1 et seq. [scope of fiduciary duty]; Cal. Civil Practice, 3 Probate and Trust Proceedings, §24:49 et seq.; Cal Transactions Forms, 3 Estate Planning §12:23 et seq.; 76 *Am.Jur.2d* (2005 ed.), *Trusts* §344.)

(2) *Duty of Trustee of Revocable Trust.* The trustee of a revocable trust must 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." (*Prob.C. 16001(a).*) However, if a written direction given under *Prob.C. 16001(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." (*Prob.C. 16001(b).*)

The Law Revision Commission Comment makes these observations:

(a) The qualification in subdivision (a) ("acceptable to the trustee") does not mean that the trustee is required to determine the propriety of the direction.

(b) The provision in subdivision (b) clarifies the relationship between the duty to follow directions and the rules governing modification of trusts (see *infra*, §194 et seq.).

(3) *Duty of Cotrustees.* If a trust has more than one trustee, each has a duty to do the following:

(a) To participate in the administration of the trust. (*Prob.C. 16013(a).*)

(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." (*Prob.C. 16013(b).*)

The Comment adds: "If one cotrustee is also a settlor under a revocable trust, another cotrustee who is not a settlor

has a duty to follow the directions of the settlor-cotrustee pursuant to Section 16001. That duty supersedes the general duty under this section." (See 2A Scott §184; Bogert §584; on cotrustees generally, see *supra*, §54; on liability for acts of cotrustee, see *Prob.C. 16402*, *infra*, §119.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Duty To Administer Trust*. See *Rest.3d, Trusts* §§70, 76.



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C. Duties.

1. In General.

c. Loyalty.

1. General Law and California Cases.

13 Witkin Sum. Cal. Law Trusts § 63

[§ 63] General Law and California Cases.

(1) *Nature of Duty.* The trustee is a fiduciary, and as such must act in the highest good faith towards the beneficiary, must make full disclosure of material facts, must not acquire an adverse interest, and must not use the position to gain any advantage over the beneficiary or to make any special profit. (See *Overell v. Overell* (1926) 78 C.A. 251, 256, 248 P. 310; *Kinert v. Wright* (1947) 81 C.A.2d 919, 925, 185 P.2d 364; *Estate of Vokal* (1953) 121 C.A.2d 252, 257, 263 P.2d 64; *Lix v. Edwards* (1978) 82 C.A.3d 573, 581, 147 C.R. 294, citing the text [nondisclosure of adverse consequences of transfer of assets]; *Werschull v. United Calif. Bank* (1978) 85 C.A.3d 981, 1001, 1002, 149 C.R. 829 [breach of duty by nondisclosure of pension funds supported judgment for punitive damages]; *Vale v. Union Bank* (1979) 88 C.A.3d 330, 339, 151 C.R. 784 [punitive damages may be recovered if fraud or oppression is shown]; *Rest.2d, Trusts* §§170 et seq., 203; 2A Scott §170 et seq.; 3 Scott §203; Bogert §543; Chodos, *Fiduciary Duties* §§3:8, 3:18; Cal. Civil Practice, 3 Probate and Trust Proceedings, §24:51; Cal. Transactions Forms, 3 Estate Planning §12:25; 37 Cal. L. Rev. 551 [duty to share opportunities]; 76 Am.Jur.2d (2005 ed.), *Trusts* §349 et seq.)

The trustee cannot receive a commission or bonus from a purchaser of trust property, or for placing insurance on trust property, etc. (*Rest.2d, Trusts* §170, Comment o; see 2A Scott §170.22.) But the trustee may remain an officer of a corporation controlled by the trust, and receive a salary or other compensation that is proper for the actual duties performed. (*Rest.2d, Trusts* §170, Comment o; see *Estate of McLaughlin* (1954) 43 C.2d 462, 470, 274 P.2d 868; 2A Scott §170.22.)

(2) *Self-Dealing.* Self-dealing is a violation of the duty. If a trustee sells his or her own property to the trust, the beneficiary may either affirm or set aside the sale, and may hold the trustee to account for any personal profit made or loss suffered by the trust. Similarly, where the trustee has power to sell property, and purchases himself or herself, this is a breach of trust regardless of good faith or lack of injury to the beneficiary. (See *Differding v. Ballagh* (1932) 121 C.A. 1, 6, 8, 8 P.2d 201; *Rest.2d, Trusts* §§170, 206; 2A Scott §170; 3 Scott §206; Bogert §543; 37 Cal. L. Rev. 543; 6 A.L.R.4th 786 [enforceability of trustee's contract right to purchase trust property]; 76 Am.Jur.2d (2005 ed.), *Trusts* §§467 et seq., 519 et seq.)

Among exceptions to the rule against purchase by the trustee are the following:

(a) Where the trust has terminated, and the trustee does not take advantage of information acquired as the trustee. (*Rest.2d, Trusts §170, Comment g*; see *Tognazzini v. Tognazzini (1954) 125 C.A.2d 679, 690, 271 P.2d 77.*)

(b) Where the trustee acts in good faith, the consideration is fair, and the court authorizes it as in the interest of the beneficiary. (*Rest.2d, Trusts §170, Comment f.*)

(c) Where the trust instrument authorizes purchase by the trustee. (See *Rest.2d, Trusts §170, Comment t*; 39 *A.L.R.3d 836* [validity and construction of provision authorizing trustee to purchase trust property].)

(d) Where a trustee under one trust deals with himself or herself as trustee under another. This is not actually self-dealing, and the transaction is generally upheld if fair, or if approved by the court. (See *Rest.2d, Trusts §170, Comment r.*)

In *Estate of Pitzer (1984) 155 C.A.3d 979, 202 C.R. 855*, defendant trustee, a commercial bank, lent its own funds to a third party to finance the purchase of trust property. *Held*, the transaction constituted impermissible self-dealing.

(a) The interest the trustee earned during escrow was a result of dealing with the trust property for its own profit. (*155 C.A.3d 991, 992.*)

(b) The trustee's security (the deed of trust) was antagonistic to the interest of plaintiff beneficiaries. In the event of default, the trustee could purchase the property at foreclosure, thereby gaining trust property personally as a result of action initiated as trustee. (*155 C.A.2d 992 and footnote 18.*)

(3) *Contrary Provision in Trust Instrument.* The duty of loyalty and the prohibitions against self-dealing give way to directions contained in the trust instrument. (*Copley v. Copley (1981) 126 C.A.3d 248, 278, 279, 178 C.R. 842.*)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Nature of Duty.* See *Rest.3d, Trusts §78.* *Commission or bonus:* See *Rest.3d, Trusts §78, Comment d(1).*

Compensation as corporate officer: See *Rest.3d, Trusts §78, Comment d(1).*

(2) *Self-Dealing.* See *Rest.3d, Trusts §78(2).*

Exceptions to rule against purchase by trustee:

(a) See *Rest.3d, Trusts §78, Comment h.*

(b) See *Rest.3d, Trusts §78, Comment c(1).*

(c) See *Rest.3d, Trusts §78, Comment c(2).*

(d) See *Rest.3d, Trusts §78, Comment c(7).*



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1. In General.

c. Loyalty.

2. Trust Law.

13 Witkin Sum. Cal. Law Trusts § 64

[§ 64] Trust Law.

(1) *General Duty of Loyalty.* "The trustee has a duty to administer the trust solely in the interest of the beneficiaries." (*Prob.C. 16002(a)*.) This provision codifies the substance of *Rest.2d, Trusts §170(1)* and restates the general duty expressed in a number of former Civil Code sections. The Law Revision Commission Comment states that this provision does not attempt to state all aspects of the trustee's duty of loyalty. (See *Estate of Gump (1991) 1 C.A.4th 582, 596, 2 C.R.2d 269, infra, §128* [trustee's threat to charge cost of audit to income shares of beneficiaries objecting to management of trust assets was breach of duty of loyalty under *Prob.C. 16002(a)*].)

(2) *Transactions Between Trusts.* It is not a violation of the trustee's duty of loyalty "for a trustee who administers two trusts to sell, exchange, or participate in the sale or exchange of trust property between the trusts," if the sale or exchange is "fair and reasonable with respect to the beneficiaries of both trusts," and the trustee gives the beneficiaries of both trusts "notice of all material facts related to the sale or exchange that the trustee knows or should know." (*Prob.C. 16002(b)*.) The Law Revision Commission Comment notes that *Prob.C. 16002(b)* does not require the trustee to give notice to all beneficiaries of both trusts. (On notice to beneficiaries, see *Prob.C. 15802, 15804, infra, §147*.)

(3) *Services Provided by Financial Institutions.* Providing services for compensation by a regulated financial institution or its affiliates in the ordinary course of business either to a trust of which the institution is a trustee or to a person dealing with the trust is not a violation of the duty of loyalty provided in *Prob.C. 16002* or the duty to avoid conflicts of interest provided in *Prob.C. 16004* (*infra, §66*). For this purpose, "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." (*Prob.C. 16015*.) (See Law Rev. Com. Comment [*Prob.C. 16015* is consistent with the rule stated in *Estate of Pitzer (1984) 155 C.A.3d 979, 988, 202 C.R. 855, supra, §63*]; *Van de Kamp v. Bank of America (1988) 204 C.A.3d 819, 251 C.R. 530, infra, §107* [self-deposit practices authorized by *Prob.C. 16225* (*infra, §106*) do not violate duties of loyalty and against self-dealing].)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *General Duty of Loyalty.* See *Rest.3d, Trusts §78(1)*.



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1. In General.

d. Deal Impartially With Beneficiaries.

13 Witkin Sum. Cal. Law Trusts § 65

[§ 65] Deal Impartially With Beneficiaries.

"If a trust has two or more beneficiaries, the trustee has a duty to deal impartially with them and shall act impartially in investing and managing the trust property, taking into account any differing interests of the beneficiaries." (*Prob.C. 16003*.) This provision is based on *Rest.2d, Trusts §183*, and Section 6 of the national Uniform Prudent Investor Act (see *Prob. C. 16045* infra, §79). (See *Penny v. Wilson (2004) 123 C.A.4th 596, 603, 20 C.R.3d 212* [on death of deceased settlor of living trust, surviving settlor has duty to divide assets into survivor's trust and decedent's trust, but failed to do so for 16 years; by allocating most valuable assets to survivor's trust without taking appreciation into account and then creating residence trust for benefit of one child, settlor breached trust purpose of dividing assets equally among four children].)

SUPPLEMENT: [This section is current through the latest supplement]
See *Rest.3d, Trusts §79*.



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C. Duties.

1. In General.

e. Avoid Conflict of Interest.

13 Witkin Sum. Cal. Law Trusts § 66

[§ 66] Avoid Conflict of Interest.

(1) *In General*. "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." (*Prob.C. 16004(a)*.) (See Chodos, Fiduciary Duties §3:13 et seq.) Certain dealings by regulated financial institutions and their affiliates are not in violation of *Prob.C. 16004*. (See *Prob.C. 16015*, supra, §64.)

(2) *Claim Against Trust Property*. "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." (*Prob.C. 16004(b)*.) The court may be the one where the trust is administered (as where the trustee seeks reimbursement), or the court where enforcement of the claim is sought (as where the trustee seeks to foreclose a lien or seeks recognition of his or her claim in proceedings commenced by some other creditor). (Law Rev. Com. Comment.)

(3) *Transactions With Beneficiary*. "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." However, this provision does not apply to the portions of an agreement between a trustee and a beneficiary concerning hiring or compensation. (*Prob.C. 16004(c)*.) (See 38 Proof of Facts 3d 279 [self-dealing by trustee].) (On presumptions affecting burden of proof, see 1 *Cal. Evidence* (4th), *Burden of Proof and Presumptions*, §§56, 57.)

(4) *Trusts With Adverse Interests*. "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." (*Prob.C. 16005*.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General*. See *Rest.3d, Trusts* §78(2).



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C. Duties.

1. In General.

f. Control and Preserve Property.

13 Witkin Sum. Cal. Law Trusts § 67

[§ 67] Control and Preserve Property.

"The trustee has a duty to take reasonable steps under the circumstances to take and keep control of and to preserve the trust property." (*Prob.C. 16006.*) (See Law Rev. Com. Comment [statute is in accord with *Purdy v. Bank of America* (1935) 2 C.2d 298, 303, 40 P.2d 481, *Estate of Duffill* (1922) 188 C. 536, 547, 206 P. 42, and *Martin v. Bank of America* (1935) 4 C.A.2d 431, 41 P.2d 200]; *Rest.2d, Trusts* §§175, 176; 2A Scott §§175, 176; Bogert §582; 76 *Am.Jur.2d* (2005 ed.), *Trusts* §404; on invalid payment or distribution of trust property as breach of duty, see *Rest.2d, Trusts* §226A; 3 Scott §226A; 65 *Harv. L. Rev.* 597; 6 *A.L.R.4th* 1196 [payment or distribution under invalid instruction as breach of trustee's duty]; 77 *A.L.R.4th* 1177 [liability of trustee for payments or conveyances under trust subsequently held to be invalid].)

West's Key Number Digest, Trusts k.272.2

SUPPLEMENT: [This section is current through the latest supplement]
See *Rest.3d, Trusts* §76(2).



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C. Duties.

1. In General.

g. Make Property Productive.

13 Witkin Sum. Cal. Law Trusts § 68

[§ 68] Make Property Productive.

(1) *General Law and California Cases.* The trustee is under a duty to use reasonable care and skill to make trust property productive. (*Rest.2d, Trusts §181*; see 2A Scott §181; Bogert §611; 76 *Am.Jur.2d* (2005 ed.), *Trusts §432*.) Trustees who neglect to do so and permit the trust assets to remain unproductive are liable. (See *Gaver v. Early* (1923) 191 C. 123, 125, 215 P. 394; *Estate of McCabe* (1950) 98 C.A.2d 503, 505, 220 P.2d 614; *Estate of Prior* (1952) 111 C.A.2d 464, 469, 244 P.2d 697; *Lynch v. John M. Redfield Foundation* (1970) 9 C.A.3d 293, 298, 88 C.R. 86 [trustee of charitable trust is subject to same obligation]; 51 *A.L.R.3d* 1293.) Generally, a trustee who surrenders or limits his or her control over trust funds is absolutely liable for their loss. (*Martin v. Bank of America* (1935) 4 C.A.2d 431, 435, 41 P.2d 200.)

The trust instrument, however, may enlarge or restrict the trustee's investment powers. (See *Stanton v. Wells Fargo Bank* (1957) 150 C.A.2d 763, 777, 310 P.2d 1010 [trust instrument specifying particular investments and prohibiting others]; *Rest.3d, Trusts* (Prudent Investor Rule) §228; 3 Scott §227; 39 *Cal. L. Rev.* 393; 78 *A.L.R.2d* 7 [authorization of nonlegal investments].)

(2) *Trust Law.* "The trustee has a duty to make the trust property productive under the circumstances and in furtherance of the purposes of the trust." (*Prob.C. 16007*, codifying the substance of *Rest.2d, Trusts §181*.) (See *Cal. Civil Practice*, 3 Probate and Trust Proceedings, §24:55.) The Comment adds two qualifications to the rule:

(a) "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."

(b) "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."

SUPPLEMENT: [This section is current through the latest supplement]

(1) *General Law and California Cases.* Instrument may enlarge or restrict investment powers: See *Rest.3d, Trusts §91*.



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C. Duties.

1. In General.

h. Dispose of Improper Investments.

13 Witkin Sum. Cal. Law Trusts § 69

[§ 69] Dispose of Improper Investments.

Under the general rule (except as the trust instrument otherwise provides or statutory provisions authorize retention), a trustee must eliminate undesirable property from the trust assets as follows:

(1) Within a reasonable time after creation of the trust, the trustee must review the original assets and retain or dispose of them in order to conform to the prudent investment requirements. (*Rest.3d, Trusts (Prudent Investor Rule) §229*; see 3 *Scott §230*; *Bogert §611*; 63 *Harv. L. Rev. 1076*; 88 *A.L.R.3d 894* [absence of market as justifying retention of unauthorized or nonlegal securities]; 47 *A.L.R.2d 187* [effect of retention clause in trust instrument].)

(2) The trustee must dispose of unproductive property. (*Rest.2d, Trusts §240*; see 3A *Scott §240*; 59 *Harv. L. Rev. 196*; cf. *Estate of Gross (1963) 216 C.A.2d 563, 568, 31 C.R. 281* [discretion to retain unproductive property given by trust instrument].)

Prob.C. 16049, part of the Uniform Prudent Investor Act, now governs the retention and disposition of assets. (See *infra*, §81.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Trustee must review original assets:* See *Rest.3d, Trusts §92*.

(2) *Trustee must dispose of unproductive property:* See *Rest.3d, Trusts §79*.



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C. Duties.

1. In General.

i. Keep Property Separate and Identified.

13 Witkin Sum. Cal. Law Trusts § 70

[§ 70] Keep Property Separate and Identified.

Under the general rule, the trustee should, where possible, keep trust property separate from his or her individual property and from the property of other trusts. A trustee who wilfully and unnecessarily mingles trust funds or property with his or her own is absolutely liable for their safety and for the value of their use. (See *In re Bane* (1898) 120 C. 533, 536, 52 P. 852; *Estate of Hinkel* (1933) 218 C. 614, 619, 24 P.2d 778; *Estate of McLellan* (1936) 8 C.2d 49, 54, 63 P.2d 1120; *Estate of McCabe* (1948) 87 C.A.2d 430, 434, 197 P.2d 35; *Estate of McCabe* (1950) 98 C.A.2d 503, 505, 220 P.2d 614; *Rest.2d, Trusts* §§179, 180; 2A Scott §§179, 180; Bogert §596; 17 A.L.R.3d 937 [distribution of commingled trust funds].)

However, the frequent necessity for quick transfer of shares of stock has given rise to the practice of placing trust shares in the name of a third person as nominee (e.g., a trust company officer or employee). Though technically this is improper as a failure to earmark, the practice has been sanctioned by statutes in a number of states including California (see *Fin.C. 1563*; *Prob.C. 16238*, *infra*, §109). And even where not expressly authorized by statute or by the trust instrument, the same effect is obtained under the rule that failure to earmark does not render the trustee liable for the loss resulting from an investment. (See *Rest.2d, Trusts* §179, Comment d, §205, Comment f; 2A Scott §179; 3 Scott §205; Bogert §596.) Common trust funds are another practical exception to the rule against commingling. (See *infra*, §105.)

Prob.C. 16009, codifying the substance of *Rest.2d, Trusts* §179, states the rule as follows: The trustee has a duty to keep the trust property separate from property that is not subject to the trust and to see that the trust property is designated as property of the trust.

West's Key Number Digest, Trusts k.270

SUPPLEMENT: [This section is current through the latest supplement]
General rule: See *Rest.3d, Trusts* §84.

Duty to earmark: See *Rest.3d, Trusts* §84, Comment d.



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C. Duties.

1. In General.

j. Enforce Claims and Defend Actions.

13 Witkin Sum. Cal. Law Trusts § 71

[§ 71] Enforce Claims and Defend Actions.

(1) *Enforce Claims*. "The trustee has a duty to take reasonable steps to enforce claims that are part of the trust property." (*Prob.C. 16010*, codifying the substance of *Rest.2d, Trusts §177*.) (See Law Rev. Com. Comment ["it may not be reasonable to enforce a claim depending upon the likelihood of recovery and the cost of suit and enforcement"]; 2A Scott §177; Bogert §§592, 594; Cal. Civil Practice, 3 Probate and Trust Proceedings, §24:58.)

(2) *Defend Actions*. "The trustee has a duty to take reasonable steps to defend actions that may result in a loss to the trust." (*Prob.C. 16011*, codifying a portion of *Rest.2d, Trusts §178*.) (See Law Rev. Com. Comment ["[d]epending on the circumstances of the case, it might be reasonable to settle an action or suffer a default rather than to defend an action"]; 2A Scott §178; Bogert §§593, 594.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Enforce Claims*. See *Rest.3d, Trusts §76(2)* [duty to collect and protect trust property].

(2) *Defend Actions*. See *Rest.3d, Trusts §76(2)* [duty to collect and protect trust property].



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C. Duties.

1. In General.

k. Use Special Skills.

13 Witkin Sum. Cal. Law Trusts § 72

[§ 72] Use Special Skills.

"The trustee has a duty to apply the full extent of the trustee's skills." (*Prob.C. 16014(a)*; *Coberly v. Superior Court* (1965) 231 C.A.2d 685, 689, 42 C.R. 64.)

"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." (*Prob.C. 16014(b)*, derived from *Rest.2d, Trusts §174* and the Uniform Probate Code.) The Law Revision Commission Comment points out that this provision does not limit the duty under *Prob.C. 16014(a)*: "Thus, the nature of the trustee's representations to the settlor ... does not affect the trustee's duty to use the full extent of his or her skills." (See 2A Scott §174; Bogert §541; 91 A.L.R.3d 904 [standard of care required of trustee representing itself to have expert knowledge or skill]; 76 Am.Jur.2d (2005 ed.), *Trusts* §362; 19 Proof of Facts 2d 45 [trustee's representation that it possessed expert knowledge or skill].)

West's Key Number Digest, Trusts k.270

SUPPLEMENT: [This section is current through the latest supplement]
See *Rest.3d, Trusts §77(3)*.



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1. In General.

k. Use Special Skills.

13 Witkin Sum. Cal. Law Trusts § 73

[§ 73] (l) Delegate Powers Appropriately.

"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." (*Prob.C. 16012(a)*, based on *Rest.2d, Trusts §171* and the Uniform Trustee's Powers Act.) (See *Gaver v. Early* (1923) 191 C. 123, 127, 215 P. 394 [liable for surrendering complete control over estate to attorney].)

"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." (*Prob.C. 16012(b)*, based on *Rest.2d, Trusts §171*, Comment k.) (See 2A Scott §171; Bogert §555; 76 *Am.Jur.2d* (2005 ed.), *Trusts §347*.) A trust company may delegate matters involved in trust administration to its affiliates. (See *infra*, §114.)

Prob.C. 16012 does not apply to investment and management functions under *Prob.C. 16052*, the delegation provision of the Uniform Prudent Investment Act (see *infra*, §82). (*Prob.C. 16012(c)*.)

SUPPLEMENT: [This section is current through the latest supplement]
See *Rest.3d, Trusts §80* and Comment d(2).



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C. Duties.

1. In General.

m. File Change of Ownership Statement.

13 Witkin Sum. Cal. Law Trusts § 74

[§ 74] File Change of Ownership Statement.

Where an interest in real property is transferred by reason of death, and the transfer is "through the medium of a trust," the trustee must file a change of ownership statement with the county recorder or assessor in the appropriate county within 150 days after the date of death. (Rev.C. 480(b), (e); see 9 *Summary* (10th), *Taxation*, §229.)

SUPPLEMENT: [This section is current through the latest supplement]



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C. Duties.

2. Standard of Care.

a. In General.

13 Witkin Sum. Cal. Law Trusts § 75

[§ 75] In General.

(1) *General Standard.* "The trustee shall administer the trust with the reasonable care, skill, and caution under the circumstances then prevailing that a prudent person acting in a like capacity 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." (*Prob.C. 16040(a)*.) This general standard applies to such functions as "determining whether to make discretionary distributions, communicating with beneficiaries, and relations with creditors." (Law. Rev. Com. Comment.) (See Cal. Civil Practice, 3 Probate and Trust Proceedings, §24:60; 76 *Am.Jur.2d* (2005 ed.), *Trusts* §476 et seq.)

(2) *Investment and Management.* The standard of care applicable to investment and management duties is set forth in the Uniform Prudent Investor Act. (See *infra*, §§77, 80.) *Prob.C. 16040* does not apply to those functions governed by the Act. (*Prob.C. 16040(c)*.)

(3) *Express Provisions in Trust Instrument.* The settlor may expand or restrict the standard provided in *Prob.C. 16040(a)* 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." (*Prob.C. 16040(b)*.)

(4) *Standard Is Not Affected by Compensation.* "A trustee's standard of care and performance in administering the trust is not affected by whether or not the trustee receives any compensation." (*Prob.C. 16041*.)

SUPPLEMENT: [This section is current through the latest supplement]



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1. General Law and California Cases.

13 Witkin Sum. Cal. Law Trusts § 76

[§ 76] General Law and California Cases.

The modern prudent investor rule, developed by the case law (mainly in Massachusetts) and by legislation in other states, is the majority rule. (See *Estate of Talbot* (1956) 141 C.A.2d 309, 317, 296 P.2d 848, *infra*, §132; *Lynch v. John M. Redfield Foundation* (1970) 9 C.A.3d 293, 301, 88 C.R. 86 [rule applies to trustee of charitable trust]; Chodos, *Fiduciary Duties* §3:7; 3 Scott §227; Bogert §612 et seq.; 39 *Cal. L. Rev.* 380 [exhaustive discussion of rule in light of decisions of other states following it]; 68 *Cal. L. Rev.* 518 [whether investment to foster political, social, or other nontraditional objectives complies with rule]; 26 *So. Cal. L. Rev.* 85 [trustee of charitable trust]; 35 *A.L.R.2d* 991 [retroactive application]; 76 *Am.Jur.2d* (2005 ed.), *Trusts* §476 et seq.)

Whether an investment is proper depends upon the circumstances existing at the time it was made, rather than upon subsequent events. Thus, where a trustee invested in mortgages that depreciated in value during the depression of 1932, he was not liable, for most persons of ordinary prudence did not foresee the losses in such favored forms of trust investment as mortgages and corporate bonds. (*Day v. First Trust & Savings Bank* (1941) 47 C.A.2d 470, 476, 118 P.2d 51 [decided before adoption of California statute but applying prudent investor doctrine]; see 39 *Cal. L. Rev.* 382; 3 Scott §227.)

An important implication of the prudent investor rule is the requirement of reasonable diversification to distribute the risk of loss. (See 39 *Cal. L. Rev.* 384, 391; 24 *A.L.R.3d* 730 [liability for failure to diversify investments]; 14 *Proof of Facts* 2d 253 [trustee's failure to diversify investments].)

Estate of Collins (1977) 72 C.A.3d 663, 139 C.R. 644, examined the prudent investor rule and held the individual trustees liable for a loss resulting from improper investments.

(a) The trustee is ordinarily under a duty to distribute the risk of loss by a reasonable diversification. (72 C.A.3d 669, citing the text.) Here, the trustees totally failed to diversify. (72 C.A.3d 670.)

(b) Ordinarily, second or junior mortgages are not proper trust investments. (72 C.A.3d 670.) Here, the trustees invested in a junior mortgage on unimproved real property with an inadequate margin of security. (72 C.A.3d 670.)

(c) In buying a mortgage, the trustee should investigate the status of the property and of the mortgage, as well as the financial situation of the mortgagor, and give careful attention to the valuation of the property. (72 C.A.3d 670.) Here, the trustees made no investigation and accepted a claimed value shown in an unaudited statement. (72 C.A.3d 671.)

(d) The court answered the argument that the trust instrument conferred an "absolute discretion" as follows: "While the declaration of trust may possibly enlarge the prudent-investor standard as far as the *type* of investment is concerned, it cannot be construed as permitting deviations from that standard in investigating the soundness of a specific investment." (72 C.A.3d 672.)

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2. Restatement and Uniform Act.

13 Witkin Sum. Cal. Law Trusts § 77

[§ 77] Restatement and Uniform Act.

(1) *Third Restatement.* The first volume of the Third Restatement of Trusts, published in 1992, supersedes Topic 5 of Chapter 7 of the Second Restatement (Investment of Trust Funds, §227 et seq.) and restates the prudent investor rule in §227 et seq. "This formulation of the prudent investor rule affords more latitude for exercise of judgment by the trustee than had been thought permitted by the Restatement Second of Trusts. Moreover, the revised rule focuses on the trust's portfolio as a whole and the investment strategy on which it is based, rather than viewing a specific investment in isolation. Accordingly, it is not a proper ground for challenging a specific trust investment that it entailed substantial risk, if that investment was appropriate considering the trust's assets, purposes, and circumstances as a whole." (Rest.3d, Trusts (Prudent Investor Rule), p. ix.)

(2) *Uniform Act.* In 1994, the National Conference of Commissioners on Uniform State Laws approved the Uniform Prudent Investor Act, which draws upon the standards of prudent trust investment set forth in the Restatement. (See 7B U.L.A. (Master Ed.), p. 280.) A copy of the Act is set forth as an appendix to a related recommendation of the California Law Revision Commission. (See 25 Cal. Law Rev. Com. Reports, p. 589; *infra*, §78.) The Prefatory Note to the Uniform Act lists the following "fundamental alterations" in the former criteria for prudent investing:

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

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

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

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

(e) "The much criticized former rule of trust law forbidding the trustee to delegate investment and management functions has been reversed. Delegation is now permitted, subject to safeguards." (7B U.L.A. (Master Ed.), p. 282.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Third Restatement*. The original volume of the Third Restatement of Trusts, covering the prudent investor rule, was superseded in 2007. The topic, without substantive change, is now covered in Part 6, Chapter 17: Investment of Trust Funds (The "Prudent Investor Rule"), §§90-92. (See Rest.3d, Trusts, Volume 3, p. 287 et seq.)



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3. Law Revision Commission Report.

13 Witkin Sum. Cal. Law Trusts § 78

[§ 78] Law Revision Commission Report.

In 1994, the California Law Revision Commission recommended adoption of the Uniform Prudent Investor Act as part of the Trust Law, with conforming amendments to existing statutes. (See 25 Cal. Law Rev. Com. Reports, p. 543.) The Commission's recommendation makes the following points:

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

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

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

(4) *Liability of agent*: "An agent who performs a delegated function owes a duty to the trust and, by accepting the delegation, would be deemed to submit to the jurisdiction of California courts."

(5) *Standard of compliance*: " 'Compliance with the prudent investment rule is determined in light of the facts and circumstances existing at the time of a trustee's decision or action and not by hindsight.' This rule emphasizes and protects reliance on the fundamental rule of prudence in adopting an investment strategy and managing the trust. It is consistent with the principle in existing law protecting a trustee who has acted 'reasonably and in good faith under the circumstances as known to the trustee.' "

(6) *Application to existing trusts*: "The prudent investor rule would apply to existing trusts but not to decisions or actions occurring before it became operative."

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4. Nature and Scope of Rule.

13 Witkin Sum. Cal. Law Trusts § 79

[§ 79] Nature and Scope of Rule.

(1) *Enactment.* In response to the recommendation of the California Law Revision Commission (supra, §78), the Legislature adopted the Uniform Prudent Investor Act in 1995. Most of the Act is set forth in *Prob.C. 16045* et seq., but some rules that already existed in other parts of the Trust Law are included by reference. (*Prob.C. 16045.*) (See *Prob.C. 16002(a)*, supra, §64 [duty of loyalty], and *Prob.C. 16003*, supra, §65 [duty to deal impartially with beneficiaries].) Conforming amendments were made in other Probate Code sections.

(2) *Prospective Operation.* The Act applies to trusts existing on and created after January 1, 1996. With respect to trusts existing on that date, the Act governs only decisions or actions occurring after that date. (*Prob.C. 16054.*)

(3) *Scope of Duty.* "[A] trustee who invests and manages trust assets owes a duty to the beneficiaries of the trust to comply with the prudent investor rule." (*Prob.C. 16046(a).*) However, the settlor may expand or restrict the rule by express provisions in the trust instrument, and a trustee is not liable to a beneficiary for the trustee's good faith reliance on these express provisions. (*Prob.C. 16046(b).*) This provision is based on Section 1 of the national Uniform Prudent Investor Act (1994). However, *Prob.C. 16046(b)* continues the good faith standard of *Prob.C. 16040* in place of the reasonable reliance rule of the national Uniform Prudent Investor Act (1994). (Law Rev. Com. Comment.)

(4) *Language Invoking the Rule.* *Prob.C. 16053* identifies language invoking the prudent investor rule. It is the same as Section 10 of the national Uniform Prudent Investor Act (1994). (Law Rev. Com. Comment.) The following terms or "comparable language" in a trust, unless otherwise limited or modified, authorizes any investment or strategy permitted by *Prob.C. 16000* et seq.:

- (a) "[I]nvestments permissible by law for investment of trust funds."
- (b) "[L]egal investments."
- (c) "[A]uthorized investments."
- (d) "[P]rudent man rule."

(e) "[P]rudent trustee rule."

(f) "[P]rudent person rule."

(g) "[P]rudent investor rule."

(h) "[U]sing the judgment and care under the circumstances then prevailing that persons of prudence, discretion, and intelligence exercise in the management of their own affairs, not in regard to speculation but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of their capital."

(5) *Determining Compliance*. "Compliance with the prudent investor rule is determined in light of the facts and circumstances existing at the time of a trustee's decision or action and not by hindsight." (*Prob.C. 16051*.) This provision is the same as Section 8 of the national Uniform Prudent Investor Act (1994). (Law Rev. Com. Comment.)

(6) *Public Guardian*. Trust property in the custody of the public guardian is subject to the terms and conditions set forth in *Prob.C. 7640* et seq. for the deposit and investment of estate funds by the public administrator. By depositing or investing property pursuant to *Prob.C. 7640* et seq., the public guardian is deemed to have met the standard of care specified in *Prob.C. 16045* et seq. (*Prob.C. 16042*.) (On *Prob.C. 7640* et seq., see 14 *Summary* (10th), *Wills and Probate*, §421.)

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5. Standard of Care.

13 Witkin Sum. Cal. Law Trusts § 80

[§ 80] Standard of Care.

Prob.C. 16047 sets forth the standard of care required by the prudent investor rule. It is based in part on Section 2 of the national Uniform Prudent Investor Act (1994) and Rest.3d, Trusts (Prudent Investor Rule) §227 (1992), and replaces the portfolio investment rule of former *Prob.C. 16040(b)*.

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

"A trustee's investment and management decisions respecting individual assets and courses of action must be evaluated not in isolation, but in the context of the trust portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the trust." (*Prob.C. 16047(b)*.) The trustee must make a reasonable effort to ascertain facts relevant to the investment and management of trust assets. (*Prob.C. 16047(d)*; see *See 48 Stanf. L. Rev. 419* [speculation with trust assets in light of portfolio theory].)

(2) *Elements of Prudence*. The Law Revision Commission Comment notes that *Prob.C. 16047* states the basic elements of prudence. Thus, where "prudence" is used in *Prob.C. 16045* et seq., it includes "reasonable care, skill, and caution." These elements are delineated in the comments to Rest.3d, Trusts (Prudent Investor Rule) §227 (1992):

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

(b) *Skill*. "The exercise of care alone is not sufficient, however, because a trustee is liable for losses resulting from failure to use the skill of an individual of ordinary intelligence. This is so despite the careful use of all the skill of which the particular trustee is capable. On the other hand, it follows from the requirement of care as well as from sound policy that, if the trustee possesses a degree of skill greater than that of an individual of ordinary intelligence, the trustee is liable for a loss that results from failure to make reasonably diligent use of that skill."

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

(3) *Relevant Circumstances.* *Prob.C. 16047(c)* sets forth circumstances that are appropriate to consider in investing and managing trust assets, to the extent relevant to the trust or its beneficiaries:

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

(4) *Authorized Investments.* A trustee may "invest in any kind of property or type of investment or engage in any course of action or investment strategy" consistent with the standards of *Prob.C. 16000* et seq. (*Prob.C. 16047(e)*.) The Law Revision Commission Comment makes the following points:

(a) There are no "categorical restrictions" on proper investments. "Any form of investment is permissible in the absence of a prohibition in the trust instrument or an overriding duty." *Prob.C. 16047(e)* is "intended to permit investment in investment company shares, mutual funds, index funds, and other modern vehicles for collective investments." However, "the trustee is ultimately subject to fiduciary standards" in making the investment.

(b) Statutes pertaining to legal investments appear in other codes. (See, e.g., *Fin.C. 1561.1, 1564; Govt.C. 971.2, 17202, 61673; Harb. & Nav.C. 6331, 6931; Health & Saf.C. 33663, 34369, 37649, 52040, 52053.5; Pub.Res.C. 26026; Sts. & H.C. 8210, 25371, 31173; Water C. 9526, 20064.*)

SUPPLEMENT: [This section is current through the latest supplement]
Restatement standard of care: See *Rest.3d, Trusts §90*.

(2) *Elements of Prudence.* See *Rest.3d, Trusts §90*, Comments d and e.(4) *Authorized Investments.*(b) *Statutes pertaining to legal investments:* *Govt.C. 61673* was repealed in 2005.



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6. Duties of Trustee.

13 Witkin Sum. Cal. Law Trusts § 81

[§ 81] Duties of Trustee.

(1) *Diversification*. "In making and implementing investment decisions, the trustee has a duty to diversify the investments of the trust unless, under the circumstances, it is prudent not to do so." (*Prob.C. 16048*.) This provision is based on Rest.3d, Trusts (Prudent Investor Rule) §227(b) (1992), and Section 3 of the national Uniform Prudent Investor Act (1994). (Law Rev. Com. Comment.)

(2) *Review of Assets*. Within a reasonable time after accepting a trusteeship or receiving trust assets, the trustee must "review the trust assets and make and implement decisions concerning the retention and disposition of assets, in order to bring the trust portfolio into compliance with the purposes, terms, distribution requirements, and other circumstances of the trust," and with the requirements of *Prob.C. 16000* et seq. (*Prob.C. 16049*.) This provision is the same as Section 4 of the national Uniform Prudent Investor Act (1994). (Law Rev. Com. Comment.)

(3) *Costs*. In investing and managing trust assets, the trustee may only incur costs "appropriate and reasonable in relation to the assets, overall investment strategy, purposes, and other circumstances of the trust." (*Prob.C. 16050*.) This provision is based on Section 7 of the national Uniform Prudent Investor Act (1994) and Rest.3d, Trusts (Prudent Investor Rule) §227(c)(3) (1992). (Law Rev. Com. Comment.)

The Law Revision Commission Comment notes: "The duty to minimize costs applies to delegation to agents and hiring advisers as well as to other aspects of fiduciary investing. In deciding whether to delegate, the trustee must balance the projected benefits against the likely costs. Similarly, in deciding how to delegate, the trustee must take costs into account. The trustee must be alert to protect the beneficiary from 'double dipping.' If, for example, the trustee's regular compensation schedule presupposes that the trustee will conduct the investment management function, it should ordinarily follow that the trustee will lower its fee if delegating the investment function to an outside manager." (On delegation, see *infra*, §82.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Diversification*. See *Rest.3d, Trusts §90(b)*.

(3) *Costs.* See *Rest.3d, Trusts* §90(c)(3).



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7. Delegation.

13 Witkin Sum. Cal. Law Trusts § 82

[§ 82] Delegation.

(1) *Authority To Delegate.* "A trustee may delegate investment and management functions as prudent under the circumstances." (*Prob.C. 16052(a)*.) The trustee must exercise prudence in the following:

(a) Selecting an agent. (*Prob.C. 16052(a)(1)*.)

(b) Establishing the scope and terms of the delegation, consistent with the purposes and terms of the trust. (*Prob.C. 16052(a)(2)*.)

(c) Periodically reviewing the agent's overall performance and compliance with the terms of the delegation. (*Prob.C. 16052(a)(3)*.)

The duty to review the agent's overall performance includes "the periodic evaluation of the continued need for and appropriateness of the delegation of authority." In particular circumstances, the trustee may need to terminate the delegation to comply with the duty to use prudence. (Law Rev. Com. Comment.)

(2) *Agent.* In performing a delegated function, the agent has a duty to exercise reasonable care to comply with the terms of the delegation. (*Prob.C. 16052(b)*.) By accepting the delegation, the agent submits to the jurisdiction of the California courts. (*Prob.C. 16052(d)*.)

(3) *Liability of Trustee.* Except as otherwise provided in *Prob.C. 16401* (trustee's liability to beneficiary for acts of agent; see *infra*, §118), a trustee who complies with *Prob.C. 16052(a)* is not liable to the beneficiaries or to the trust for the decisions or actions of the agent. (*Prob.C. 16052(c)*.)

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3. Duty To Report and Account.

a. In General.

1. General Law and California Cases.

13 Witkin Sum. Cal. Law Trusts § 83

[§ 83] General Law and California Cases.

A trustee is under a continuing duty to keep accurate accounts of dealings with the trust property, and to render an accounting to a beneficiary on demand. (*Estate of De Laveaga* (1958) 50 C.2d 480, 487, 326 P.2d 129; *Rest.2d, Trusts §172*; see 2A Scott §172; Bogert §963; 76 *Am.Jur.2d* (2005 ed.), *Trusts §371* et seq.; Chodos, *Fiduciary Duties §3:26* et seq. [fiduciary duty to account]; Cal. Civil Practice, 3 Probate and Trust Proceedings, §24:64 et seq.; 71 *Harv. L. Rev.* 40 [suggested trust-instrument provision on nonjudicial settlement of accounts]; 36 *A.L.R.3d* 1071 [duty of personal representative of deceased trustee].)

Where there is a negligent failure to keep accounts, the burden is on the trustee to prove the items by satisfactory evidence. (*Estate of McCabe* (1950) 98 C.A.2d 503, 505, 220 P.2d 614 [strong condemnation of failure to keep records; order approving account reversed]; see *Purdy v. Johnson* (1917) 174 C. 521, 527, 163 P. 893; *Estate of Keyston* (1951) 102 C.A.2d 223, 229, 227 P.2d 17 [order of approval reversed where account was not sufficiently specific].)

The trustee must also, on request at reasonable times, furnish information about the nature and amount of the trust property, and must permit the beneficiary or an authorized agent to inspect the subject matter, accounts, and other documents. (*Rest.2d, Trusts §173*; see *Strauss v. Superior Court* (1950) 36 C.2d 396, 401, 224 P.2d 726; 2A Scott §173.)

West's Key Number Digest, Trusts k.289

SUPPLEMENT: [This section is current through the latest supplement]

See *Rest.3d, Trusts §82* [duty to furnish information to beneficiaries], §83 [duty to keep records and provide reports].



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3. Duty To Report and Account.

a. In General.

2. Law Revision Commission Report.

13 Witkin Sum. Cal. Law Trusts § 84

[§ 84] Law Revision Commission Report.

The California Law Revision Commission Recommendation on "Trustee's Duty to Report Information and Account to Beneficiaries" (18 Cal. Law Rev. Com. Reports, p. 540) gives the following background:

(1) "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. 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. 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 required information on petition. The California Supreme Court has also ruled that a 'trustee has the duty to the beneficiaries to give them upon their request at reasonable times complete and accurate information relative to the administration of the trust.' "

(2) "The proposed law codifies the general duty to keep the beneficiaries informed. 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. 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."

(3) "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. 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."

(4) "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."

(5) "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. 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."

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b. Duty To Report to Beneficiaries.

1. Scope of Requirement.

13 Witkin Sum. Cal. Law Trusts § 85

[§ 85] Scope of Requirement.

(1) *General Duty*. "The trustee has a duty to keep the beneficiaries of the trust reasonably informed of the trust and its administration." (*Prob.C. 16060*, based on the Uniform Probate Code.) (See Chodos, *Fiduciary Duties* §3:34 et seq.)

The Law Revision Commission Comment, citing *Rest.2d, Trusts* §173, adds: "Ordinarily, the trustee is not under a duty to furnish information to the beneficiary in the absence of a request for the information. ... 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." (On duty to provide notice of changes in irrevocable trust, see *infra*, §86.)

During the time that a revocable trust can be revoked, the duty to report is not owed to the beneficiaries but to the settlor or other person having the power to revoke. (Law Rev. Com. Comment.)

(2) *Duty To Report on Request*. "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." (*Prob.C. 16061*, based on the Uniform Probate Code.) (For exceptions, see *Prob.C. 16064*, *infra*, §89.)

The Law Revision Commission Comment makes the following observations:

(a) The availability of information on request under this section does not negate the trustee's duty to provide information under *Prob.C. 16060*.

(b) A beneficiary who is not entitled to an annual account under *Prob.C. 16062* (*infra*, §87) may be entitled to

information under this section.

(c) "In an appropriate case, more or different information may be required under this section than through the duty to account annually."

(3) *Attorney-Client Privilege*. The duty under *Prob.C. 16060* and *16061* to keep the beneficiaries informed does not create an exception to the attorney-client privilege. (See *Wells Fargo Bank v. Superior Court* (2000) 22 C.4th 201, 206, 91 C.R.2d 716, 990 P.2d 591, 2 Cal. Evidence (4th), Witnesses, Supp., §64 [in action by beneficiaries for accounting, trustee could not be compelled to disclose confidential communications with attorneys; attorney-client privilege extends to communications about both trust administration and litigation]; on attorney-client privilege of trustee, see *infra*, §115.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *General Duty*. See *Rest.3d, Trusts* §82.

(2) *Duty To Report on Request*. In *Esslinger v. Cummins* (2006) 144 C.A.4th 517, 50 C.R.3d 538, plaintiff remainder beneficiary sought documents and information from defendant trustee. When defendant failed to comply, plaintiff petitioned under *Prob.C. 17200(b)(7)* (text, §229) for an order to compel defendant to provide an account under *Prob.C. 16061*. *Held*, plaintiff was entitled to an account. Although a trustee does not have a statutory duty to account to a remainder beneficiary and a remainder beneficiary does not have a right to an accounting under *Prob.C. 16062* (text, §87), a remainder beneficiary may request information from the trustee under *Prob.C. 16061*, and the probate court has discretion to order an accounting under *Prob.C. 17200(b)(7)* if the trustee fails to comply. The Law Revision Commission Comment to *Prob.C. 16061* notes that a beneficiary who is not entitled to an annual account under *Prob.C. 16062* may be entitled to "information or a particular account" under *Prob.C. 16061*. (144 C.A.4th 526.) This interpretation of the statutory provisions "harmonizes" *Prob.C. 16061*, *16062*, and *17200*, and is consistent with *Rest.2d, Trusts* §172 (now *Rest.3d, Trusts* §83). (144 C.A.4th 528.)



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2. Notice of Changes Affecting Irrevocable Trust.

13 Witkin Sum. Cal. Law Trusts § 86

[§ 86] Notice of Changes Affecting Irrevocable Trust.

(1) *In General.* A trustee is required to provide notice of various changes affecting irrevocable trusts and, on request, copies of the terms of the trust. For this purpose, "terms of the trust" means "the written trust instrument of an irrevocable trust or those provisions of a written trust instrument in effect at the settlor's death that describe or affect that portion of a trust that has become irrevocable at the death of the settlor." The term includes, but is not limited to, "signatures, amendments, disclaimers, and any directions or instructions to the trustee that affect the disposition of the trust." The phrase "terms of the trust" does not include documents intended to affect disposition only while the trust was revocable. (*Prob.C. 16060.5.*) (See 32 *McGeorge L. Rev.* 670.)

(2) *When Notice Is Required.* A trustee must provide notice (a) when all or part of a revocable trust becomes irrevocable because of the death of a settlor or because, by its terms, the trust becomes irrevocable within 1 year of the death of a settlor because of a contingency related to the death of a settlor, and (b) when there is a change of trustee of an irrevocable trust. The duty to serve the notice is a duty of the successor or continuing trustee. (*Prob.C. 16061.7(a).*) A settlor's waiver of this requirement is void as against public policy. (*Prob.C. 16061.7(i).*)

(3) *Persons Notified.* *Prob.C. 16061.7(b)* and (d) govern those entitled to notice:

(a) The beneficiaries of the irrevocable trust or the irrevocable portion of the trust must be notified, subject to *Prob.C. 15804* (notice concerning future interest of beneficiary; see *infra*, §147). (*Prob.C. 16061.7(b)(1).*)

(b) If the event that requires notice is the death of a settlor or irrevocability within 1 year of the death of a settlor by the express terms of the trust because of a contingency related to the death of a settlor, the settlor's heirs must be notified. (*Prob.C. 16061.7(b)(2).*)

(c) If the trust is a charitable trust subject to supervision by the Attorney General, the Attorney General must be notified. (*Prob.C. 16061.7(b)(3).*)

(d) The trustee need not notify beneficiaries or heirs who are unknown to the trustee or who cannot be located

"after reasonable diligence." (*Prob.C. 16061.7(d).*)

The notice may be served on others, but the trustee is not liable to any person for serving or not serving the notice on any person in addition to those to whom notice is required. (*Prob.C. 16061.7(j).*)

(4) *Service.* The notice must be served (a) by personal delivery, or (b) by mail at the last known address pursuant to *Prob.C. 1215* (see 14 *Summary* (10th), *Wills and Probate*, §392). (*Prob.C. 16061.7(e).*) The notice must be served not later than 60 days after the occurrence of the event requiring notice or, if a person entitled to notice was not known to the trustee on the occurrence of the event, not later than 60 days after the trustee becomes aware of the existence of that person. (*Prob.C. 16061.7(f).*)

(5) *Contents of Notice.* The notice must contain the following information:

(a) The identity of the settlors and the date of execution of the trust instrument. (*Prob.C. 16061.7(g)(1).*)

(b) The name, mailing address, and telephone number of each trustee. (*Prob.C. 16061.7(g)(2).*)

(c) The address of the physical location of the principal place of administration of the trust. (*Prob.C. 16061.7(g)(3).*)

(d) Any additional information required by the terms of the trust. (*Prob.C. 16061.7(g)(4).*)

(e) Notice that the recipient is entitled to receive a copy of the terms of the trust. (*Prob.C. 16061.7(g)(5).*)

(f) If the notice is served because all or part of a revocable trust becomes irrevocable because of the death of a settlor or because, by its terms, the trust becomes irrevocable within 1 year of the death of a settlor because of a contingency related to the death of a settlor, the notice must include a warning, set forth in a separate paragraph in at least 10-point boldface type (or a "reasonable equivalent"), that states: "You may not bring an action to contest the trust more than 120 days from the date this notification by the trustee is served upon you or 60 days from the date on which a copy of the terms of the trust is mailed or personally delivered to you during that 120-day period, whichever is later." (*Prob.C. 16061.7(h).*) (See *Harustak v. Wilkins* (2000) 84 C.A.4th 208, 215, 100 C.R.2d 718 [notice that was not bolded, italicized, underlined, printed in all capitals, or differentiated by type style or color was insufficient, even though printed in separate paragraph in 12-point type]; *Germino v. Hillyer* (2003) 107 C.A.4th 951, 955, 132 C.R.2d 478 [strict compliance with *Prob.C. 16061.7* was not required; failure of notice to state that recipient was entitled to receive copy of trust on request, as required by *Prob.C. 16061.7(g)(5)*, was not prejudicial where trustee had already provided copy of trust instrument].)

(6) *Failure To Serve Notice.* A trustee who fails to serve the notice on a beneficiary as required is responsible for damages caused by failure to do so, including attorneys' fees and costs, "unless the trustee makes a reasonably diligent effort to comply." (*Prob.C. 16061.9(a).*) A trustee who fails to serve the notice on a known heir who is not a beneficiary as required is responsible for damages caused by failure to do so unless the trustee "made a reasonably diligent effort to comply." (*Prob.C. 16061.9(b).*) For this purpose, "reasonably diligent effort" means that the trustee has sent notice by first class mail to the heir's last known mailing address. (*Prob.C. 16061.9(b).*)

(7) *Limitation on Time for Contesting Trust.* A person on whom notice is served may not bring an action to contest the trust more than (a) 120 days from the date notice is served, or (b) 60 days from the date on which a copy of the terms of the trust is mailed or personally delivered during the 120-day period, whichever is later. (*Prob.C. 16061.8.*)

(8) *Effect of Limitation on Distribution of Assets.* In exercising discretion with respect to "the timing and nature of distributions of trust assets," the trustee may consider that the period during which a beneficiary or heir could bring an action to contest the trust has not expired. (*Prob.C. 16061.9(c).*)

(9) *Duty To Provide Copy of Trust*. When all or part of a revocable trust becomes irrevocable because of the death of a settlor or because, by its terms, the trust becomes irrevocable within 1 year of the death of a settlor because of a contingency related to the death of a settlor, the trustee must, on request, provide a copy of the terms of the irrevocable trust, or the irrevocable portion of the trust, to any beneficiary of the trust or any heir of a deceased settlor. (*Prob.C. 16061.5(a)*.) For this purpose, the trustee may rely on a final judicial determination of heirship, but in the absence of a final judicial determination known to the trustee, the trustee has "discretion to make a good faith determination by any reasonable means of the heirs of a deceased settlor." (*Prob.C. 16061.5(b)*.)

SUPPLEMENT: [This section is current through the latest supplement]

(7) *Limitation on Time for Contesting Trust*. See *Safai v. Safai* (2008) 164 C.A.4th 233, 243, 78 C.R.3d 759 [proceeding under *Prob.C. 21320* (14 Summary (10th), *Wills and Probate*, §562) to determine whether action would violate trust's no contest clause is not itself action to contest trust and is not subject to *Prob.C. 16061.8*].



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c. Duty To Account to Beneficiaries.

1. Scope of Requirement.

13 Witkin Sum. Cal. Law Trusts § 87

[§ 87] Scope of Requirement.

(1) *When Account Is Required.* Except as provided in *Prob.C. 16064* (infra, §89), the trustee is required to account "to each beneficiary to whom income or principal is required or authorized in the trustee's discretion to be currently distributed" (a) at least annually, (b) on the termination of the trust, and (c) on a change of trustee. (*Prob.C. 16062(a).*)

(2) *Trusts Covered by Prior Law.* The duty to account does not apply to the following: (a) A living trust created by an instrument executed before July 1, 1987. (*Prob.C. 16062(b).*) (b) A testamentary trust created by a will executed before July 1, 1987, that is subject to continuing court jurisdiction. (*Prob.C. 16062(c).*)

Under former *Prob.C. 1120.1a*, the trustee of a testamentary trust created by a will executed before July 1, 1977, which has been removed from continuing court jurisdiction, had a duty to account to beneficiaries. This duty continues to apply under the Trust Law and may be satisfied by an account meeting the requirements of *Prob.C. 16063* (infra, §88). It is subject to the exceptions stated in *Prob.C. 16064* (infra, §89). (*Prob.C. 16062(d).*)

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SUPPLEMENT: [This section is current through the latest supplement]

(1) *When Account Is Required.* See *Esslinger v. Cummins* (2006) 144 C.A.4th 517, 50 C.R.3d 538, Supp., supra, §85 [court has discretion to order trustee to account to remainder beneficiary]; on special requirement applicable to trust for care of animal, see *Prob.C. 15212(e)*, adopted in 2008.



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2. Contents of Account.

13 Witkin Sum. Cal. Law Trusts § 88

[§ 88] Contents of Account.

An account to be approved by the court must be "presented in the manner provided" in *Prob.C. 1060* et seq. (see 14 *Summary* (10th), *Wills and Probate*, §381 et seq.). (*Prob.C. 16063(b)*.) An account furnished pursuant to *Prob.C. 16062* (supra, §87) must contain the following:

(1) A statement of receipts and disbursements of principal and income during the previous fiscal year or since the last account. (*Prob.C. 16063(a)(1)*.)

(2) A statement of assets and liabilities at the end of the previous fiscal year or at the end of the period covered by the account. (*Prob.C. 16063(a)(2)*.)

(3) A statement of the trustee's compensation for the previous fiscal year or since the last account. (*Prob.C. 16063(a)(3)*.)

(4) A statement of the agents hired by the trustee, their relationship to the trustee, and their compensation for the previous fiscal year or since the last account. (*Prob.C. 16063(a)(4)*.)

(5) A statement that the recipient may petition under *Prob.C. 17200* (infra, §229) to obtain court review of the account and of the acts of the trustee. (*Prob.C. 16063(a)(5)*.)

(6) "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 or report disclosing facts giving rise to the claim." (*Prob.C. 16063(a)(6)*.)

A beneficiary who receives an accounting that satisfies *Prob.C. 16063* may also request additional information under *Prob.C. 16061* (supra, §85). (Law Rev. Com. Comment.)

C.R.C., Rules 7.901 and 7.902 provide additional requirements:

- (a) The account must state the period covered. (C.R.C., Rule 7.901(a).)
- (b) The first account in a testamentary trust must reconcile the initial assets on hand with the decree of distribution of the estate. (C.R.C., Rule 7.901(b).)
- (c) An account in a trust that distributes income to a beneficiary must allocate receipts and disbursements between principal receipts and disbursements and income receipts and disbursements. (C.R.C., Rule 7.901(c).)
- (d) The account must state the names and last known addresses of vested and contingent beneficiaries, including "all persons in being who may or will receive income or corpus of the trust," with two exceptions: (a) If the trust is revocable and the person holding the power to revoke is competent, names and addresses of beneficiaries who do not hold that power need not be given. (b) Names and addresses of beneficiaries not entitled to notice under *Prob.C. 15804* (infra, §147) need not be given. (C.R.C., Rule 7.902.)

SUPPLEMENT: [This section is current through the latest supplement]



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d. Exceptions to Duties To Report and Account.

13 Witkin Sum. Cal. Law Trusts § 89

[§ 89] Exceptions to Duties To Report and Account.

Prob.C. 16064 specifies the circumstances in which the trustee "is not required to report information or account to a beneficiary":

(1) *Waiver in trust instrument.* A report or account is not required to the extent the trust instrument waives the requirement. However, the waiver described in *Prob.C. 16062(e)* (waiver of account obligation as to sole trustee who is disqualified person under *Prob.C. 21350.5*; see 14 *Summary* (10th), *Wills and Probate*, §303) is not valid or enforceable. Moreover, the court may compel the trustee to report information about the trust and to account, regardless of any waiver of accounting in the trust instrument, "upon a showing that it is reasonably likely that a material breach of the trust has occurred." (*Prob.C. 16064(a)*; see Cal. Civil Practice, 3 Probate and Trust Proceedings, §24:113 [waiver of accounting].)

(2) *Beneficiary of revocable trust.* A report or account is not required in the case of a beneficiary of a revocable trust, as provided in *Prob.C. 15800* (infra, §145), "for the period when the trust may be revoked." (*Prob.C. 16064(b)*; see *Johnson v. Kotyck* (1999) 76 C.A.4th 83, 89, 90 C.R.2d 99 [trustee was not required to account to beneficiary of revocable trust under *Prob.C. 15800*, even though settlor was subject to conservatorship, where conservator held right to revoke trust under *Prob.C. 2580* (substituted judgment; see 14 *Summary* (10th), *Wills and Probate*, §1025 et seq.).)

(3) *Waiver by beneficiary.* A beneficiary may waive, in writing, the right to a report or account. The waiver may be withdrawn in writing at any time as to the most recent account and future accounts, and a waiver of this type has no effect on the beneficiary's right to petition for a report or account pursuant to *Prob.C. 17200* (infra, §229). (*Prob.C. 16064(c).*)

(4) *Beneficiary and trustee are same person.* The duty to report and account is inapplicable where the beneficiary and the trustee are the same person. (*Prob.C. 16064(d).*)

The Law Revision Commission Comment adds a caution: "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." (On limitations on actions against trustee, see *Prob.C. 16460*, infra, §137.)

SUPPLEMENT: [This section is current through the latest supplement]



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D. Powers.

1. In General.

a. Law Revision Commission Report.

13 Witkin Sum. Cal. Law Trusts § 90

[§ 90] Law Revision Commission Report.

The California Law Revision Commission (18 Cal. Law Rev. Com. Reports, p. 543) described the defects in existing statutory law and the nature of the proposed law as follows:

(1) "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. 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.' "

(2) "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. 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."

(3) "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. 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. 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.' 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."

(4) "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. The proposed law makes this principle explicit."

SUPPLEMENT: [This section is current through the latest supplement]



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1. In General.

b. Nature and Scope of Powers.

13 Witkin Sum. Cal. Law Trusts § 91

[§ 91] Nature and Scope of Powers.

(1) *Sources of Trustee's Powers.* *Prob.C. 16200* sets forth the general powers of trustees without the need to obtain court authorization:

(a) The powers conferred by the trust instrument. (*Prob.C. 16200(a).*)

(b) Except as limited in the trust instrument, the powers conferred by statute. (*Prob.C. 16200(b).*) *Prob.C. 16220* et seq. sets forth the specific statutory powers of trustees. (See *infra*, §91 et seq.)

(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 *Prob.C.16040* (*supra*, §75) or *Prob.C. 16047* (*supra*, §80). (*Prob.C. 16200(c).*)

(2) *Instructions.* A trustee who is in doubt as to his or her powers or duties may ask for instructions. (*Rest.2d, Trusts* §259; see 3A *Scott* §259.) The Law Revision Commission Comment points out that the trustee has the powers of a prudent person, without the need to obtain prior court approval; but if the trustee desires court approval before exercising a power, or court review after its exercise, the instruction procedure of *Prob.C. 17200* is available (see *infra*, §229). (See *Cal. Civil Practice*, 3 *Probate and Trust Proceedings*, §24:115 [petition for grant of additional powers], §24:116 [order granting trustee additional powers].)

(3) *Exercise of Powers Is Subject to Fiduciary Duties.* "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." (*Prob.C. 16202.*) (On fiduciary duties, see *supra*, §63 et seq.)

(4) *Agent for Trust.* A trustee has been described as a general agent for the trust property. (See *Duncan v. Dormer* (1928) 94 C.A. 218, 221, 270 P. 1003; *Rest.2d, Trusts* §193; 3 *Scott* §193; *Cal. Civil Practice*, 3 *Probate and Trust Proceedings*, §24:71 et seq.; *Cal Transactions Forms*, 3 *Estate Planning* §§12:37 et seq., 12:138 et seq.; 76 *Am.Jur.2d* (2005 ed.), *Trusts* §316 et seq.)

(5) *Reference to Powers Under Former Statute.* Former Prob.C. 1120.2 authorized the court, on petition of the trustee, to confer on the trustee of a testamentary trust powers "necessary and desirable" to carry out the purposes of the trust where those powers were not expressly conferred and not inconsistent with the provisions or purposes of the trust. (See *Estate of Gilliland* (1974) 44 C.A.3d 32, 39, 118 C.R. 447 [deviation from trust terms requires substantial evidence of sufficiently "unusual or emergent" circumstances]; *Estate of Mabury* (1976) 54 C.A.3d 969, 983, 984, 127 C.R. 233 [jurisdiction to resolve federal tax dispute between trustee and beneficiaries].)

Under Prob.C. 16203, an instrument that incorporates the powers provided in former Prob.C. 1120.2 is "deemed to refer to" the powers provided in Prob.C. 16220 et seq. (infra, §100 et seq.). For this purpose, the trustee's powers under the former statute "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."

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SUPPLEMENT: [This section is current through the latest supplement]

(2) *Instructions.* See Rest.3d, Trusts §71.(4) *Agent for Trust.* See Rest.3d, Trusts §85.



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1. In General.

c. Incidental Powers.

13 Witkin Sum. Cal. Law Trusts § 92

[§ 92] Incidental Powers.

A trustee has the powers that are necessary or appropriate to the accomplishment of the objects of the trust and that are not expressly denied by the instrument as interpreted. (See *Rest.2d, Trusts §186*; *Purdy v. Bank of America (1935) 2 C.2d 298, 302, 40 P.2d 481* [trustee of ranch property frequently unproductive during dry seasons has implied power to borrow money to carry on operations]; 3 *Scott §186*; *Bogert §551*; 23 *Cal. L. Rev. 538*.)

In *Estate of Kessler (1953) 120 C.A.2d 383, 386, 261 P.2d 27*, the testator created a trust for her 3-year-old daughter. Her parents, the trustees, were directed to use the income for her care and education in their sole discretion. The child's father, having custody (and living with his own parents), refused to allow the trustees to see the child. Their petition for instructions and for a reasonable right of visitation was denied by the trial judge for supposed lack of power. *Held*, reversed, with directions to the judge to fix times, places, and circumstances under which the trustees might see and talk with the beneficiary. The duty to carry out the purpose of the trust necessarily implied this power, and the trustees were not required to rely on information obtained by an agent. (*120 C.A.2d 387*.)

"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." (*Prob.C. 16248*.)

SUPPLEMENT: [This section is current through the latest supplement]
See *Rest.3d, Trusts §85* [extent of powers].



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d. Deviation From Trust Restrictions.

1. In General.

13 Witkin Sum. Cal. Law Trusts § 93

[§ 93] In General.

Prob.C. 16200 et seq., setting forth the statutory powers of trustees, do not affect the power of a court to relieve a trustee from restrictions on the exercise of powers under the trust instrument. (*Prob.C. 16201.*)

The court has power to order modification of or deviation from administrative or dispositive provisions of a trust "if because of circumstances not anticipated by the settlor the modification or deviation will further the purposes of the trust." (*Rest.3d, Trusts §66*; see *Estate of Loring* (1946) 29 C.2d 423, 436, 175 P.2d 524, *infra*, §303; *Estate of Bissinger* (1964) 60 C.2d 756, 766, 36 C.R. 450, 388 P.2d 682 [power to deviate to change trustee's compensation]; *Estate of Mabury* (1976) 54 C.A.3d 969, 984, 127 C.R. 233; 2A Scott §167; Bogert §561, 562; 16 *Hastings L. J.* 632; 18 *Hastings L. J.* 267 [distributive deviation]; 50 *A.L.R.3d* 1116 [modification of restrictions on amount of donation or expenditure by trustee of charitable trust]; 57 *A.L.R.3d* 1044 [power to authorize modification because of changes in tax law].) (On petition to modify or terminate trust because of changed circumstances, see *Prob.C. 15409*, *infra*, §210.)

The trustee has a duty to petition the court for modification of or deviation from an administrative provision if the trustee knows or should know of circumstances that justify judicial action "and of the potential of those circumstances to cause substantial harm to the trust or its beneficiaries." (*Rest.3d, Trusts §66*; see *Security-First Nat. Bank v. Easter* (1934) 136 C.A. 691, 697, 29 P.2d 422; *Stanton v. Wells Fargo Bank* (1957) 150 C.A.2d 763, 770, 310 P.2d 1010; 2A Scott §167; 23 *Cal. L. Rev.* 86; 28 *Cal. L. Rev.* 785; 39 *Cal. L. Rev.* 395; *infra*, §94.)

The Restatement also recognizes the power of a trustee, at his or her own risk, to deviate in an *emergency* when there is no time to seek prior court approval. (*Rest.3d, Trusts §66*; see 2A Scott §167.)

In *Adams v. Cook* (1940) 15 C.2d 352, 101 P.2d 484, the trustee of oil land was not authorized to make an oil lease without a provision that it was subject to sale. No oil company would consent to this term and, meanwhile, adjacent wells were draining oil and gas. *Held*, the court could authorize a lease free from the restriction. (15 C.2d 358.)

The doctrine was applied with great liberality in *Estate of Traung* (1962) 207 C.A.2d 818, 24 C.R. 872. The testator left his estate in trust for his wife, daughter, and son. The provision for the son called for termination and payment of his

part of the corpus at age 40, if he gave evidence that, and in the judgment of trustee J, he was capable of handling it. An unanticipated contingency occurred: At age 40 he was incompetent and under guardianship. The lower court, against J's objection, ordered the termination and delivery of two-thirds of the son's share to his guardian. *Held*, affirmed. The general intent of the testator was that the son should enjoy the corpus at age 40, provided that it would be managed properly; the deviation (disregarding his inability to manage and the objection of the trustee J) was a permissible means of carrying out the probable intent of the testator. (207 C.A.2d 833.)

The dissent argued that it was wholly improper to substitute for the trustees named in the will a new party (guardian), unknown to the testator, and that it was equally improper to override the discretion given trustee J by the will. (207 C.A.2d 837.)

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1. In General.

d. Deviation From Trust Restrictions.

2. When Deviation Will Be Denied.

13 Witkin Sum. Cal. Law Trusts § 94

[§ 94] When Deviation Will Be Denied.

(1) *Conflict Among Beneficiaries.* Even if there is a showing of changed conditions and necessity, modification will rarely be made at the request of *some* beneficiaries without the consent of *others* whose property interests are thereby affected. In *Estate of Van Deusen* (1947) 30 C.2d 285, 292, 182 P.2d 565, the testator created a trust, with the net income payable to her two daughters for life, and the corpus to go to her grandchildren. The daughters sought modification to give them payments of \$ 200 per month, partly out of the corpus, on a showing that the testator had indicated an intent to provide for their support, and that the property had greatly declined in value between the time of the execution of the will and the death of the testator. Two grandchildren, appearing by counsel, stated that they had no objection to increasing payments to \$ 150. *Held*, the probate judge erred in ordering the \$ 200 payments, which invaded the interests of the remainder beneficiaries. "Sympathy for the needs of the respondents does not empower the court to deprive the residuary beneficiaries of their interests in the corpus of the trust without their consent." (30 C.2d 295.) (See 21 So. Cal. L. Rev. 433; 39 Cal. L. Rev. 395.)

(2) *No Showing of Benefit to Estate.* In *Security-First Nat. Bank v. Easter* (1934) 136 C.A. 691, 29 P.2d 422, hotel property during a financial depression suffered a 40% decrease in income. The return was barely sufficient for maintenance and taxes, and an unsubstantial sum was left for the beneficiaries. There was no showing that the trustee could obtain any reasonable price for the property, nor any suggestion of the character of any new investment of the proceeds of a sale. *Held*, the trial judge erred in ordering its sale contrary to the trust terms. (136 C.A. 698.) (See 23 Cal. L. Rev. 86.)

(3) *Trust Purpose Opposed.* In *Leonardini v. Wells Fargo Bank* (1955) 131 C.A.2d 9, 13, 280 P.2d 81, a spendthrift trust was created for L as life tenant, with remainder to her son B "or his heirs." Both L and B consented to the invasion of the corpus to permit payments to B, in ill health. *Held*, the trial judge correctly refused to deviate. The unborn heirs of B had an interest that was not effectively represented and could not be disregarded. (131 C.A.2d 13, 17; see 4 Cal. Proc. (4th), Pleading, §251.) The purpose of the spendthrift trust was to protect L, and her consent to diminution of the trust estate was the very thing the testator had tried to prevent. (131 C.A.2d 14; on spendthrift trusts generally, see *infra*, §151 et seq.)

In *Stanton v. Wells Fargo Bank* (1957) 150 C.A.2d 763, 310 P.2d 1010, the testator's will, made in 1930, provided that investments by the trustees should only be made in high-grade bonds. The beneficiaries sought a modification to permit the trustee to follow the prudent investor rule (*supra*, §76). The trial judge so ordered, but, on appeal by the corporate trustee, the judgment was reversed. (a) In support of the order of modification, it appeared that all existing beneficiaries requested it; the matter involved was only one of trust administration and no rights of beneficiaries between themselves were involved; and the restrictive provision was presently ill-advised. (b) Against the order, it appeared that the testator preserved a fortune of over \$ 2 million during the depression; he deliberately chose this method of protecting the beneficiaries from a possible recurrence of the conditions which led to it; no beneficiary was in want, and the income was sufficient to supply all their reasonable needs. Thus, there was no emergency to justify contravention of the testator's express directions. (150 C.A.2d 771.)

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Trust Purpose Opposed.*

Interest of unborn heirs:

Cross-Reference: 4 Cal. Proc. (5th), Pleading, §272.



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2. Discretionary Powers.

a. In General.

13 Witkin Sum. Cal. Law Trusts § 95

[§ 95] In General.

(1) *General Law and California Cases.* If a discretionary power is given to a trustee, it is not subject to control by the court except for abuse. (*Estate of Marre* (1941) 18 C.2d 184, 190, 114 P.2d 586; *Estate of Traung* (1962) 207 C.A.2d 818, 834, 24 C.R. 872, *supra*, §93; *Estate of Gross* (1963) 216 C.A.2d 563, 566, 31 C.R. 281; *Estate of Gilliland* (1977) 73 C.A.3d 515, 527, 140 C.R. 795; *Copley v. Copley* (1981) 126 C.A.3d 248, 284, 178 C.R. 842; *Rest.3d, Trusts* §50; see 3 Scott §187; *Bogert* (2d rev. ed.), §560.)

Thus, where a trust calls for payments of income for support of a beneficiary in those amounts the trustee deems proper, the court may compel the trustee to make *some payment*, but it will not interfere with his or her discretion in *fixing the amount* unless there is a showing of abuse of discretion. (*Estate of Marre, supra*; see *infra*, §152.) And where one trustee is succeeded by another, ordinarily the latter has the same discretionary powers the former had; i.e., "normally the powers of the original trustee attach to the office rather than to the person of the trustee unless the trust provides otherwise." (*Estate of Canfield* (1947) 80 C.A.2d 443, 447, 181 P.2d 732, *infra*, §155 [discussing the meaning and effect of provision giving trustee "absolute discretion" in allocation of income to beneficiaries].)

The court will review the exercise of discretion and make a contrary determination where the trustee acts in bad faith or outside the bounds of reasonable judgment. (*Estate of Greenleaf* (1951) 101 C.A.2d 658, 662, 225 P.2d 945, *infra*, §98; *Estate of Heard* (1951) 107 C.A.2d 225, 233, 236 P.2d 810; *Estate of Lackmann* (1958) 156 C.A.2d 674, 678, 681, 320 P.2d 186, *infra*, §154; see 3 Scott §187.) But in testing the discretion of the trustee, the primary inquiry is into the intention of the settlor as manifested in the trust instrument. (*Estate of Ferrall* (1953) 41 C.2d 166, 175, 176, 258 P.2d 1009, *infra*, §98, citing the Restatement.)

(2) *Trust Law.* Except as provided in *Prob.C. 16081* (absolute power; see *infra*, §97), a discretionary power conferred upon a trustee is not left to the trustee's arbitrary discretion, but must be exercised reasonably. (*Prob.C. 16080.*)

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b. Where Absolute Power Is Conferred.

1. California Cases.

13 Witkin Sum. Cal. Law Trusts § 96

[§ 96] California Cases.

In *Coberly v. Superior Court* (1965) 231 C.A.2d 685, 689, 42 C.R. 64, the beneficiary of a testamentary trust filed objections to the trustee bank's petition for approval of its first account, alleging negligence in administering the trust; in particular, the delayed sale of the principal asset, resulting in a loss of over \$ 50,000. The trustee, relying on a provision in the instrument giving it absolute discretion in management, successfully moved to strike the objections and prevent discovery proceedings. *Held*, mandamus granted to allow discovery and trial of the issue.

A grant of absolute discretion will waive the strict requirements of the prudent investment rule (*supra*, §76) and authorize the trustee "to speculate, concentrate, buy and sell for appreciation, assume large risks." (231 C.A.2d 689.) But the trustee is still liable for neglect of duty. "When a specific charge of neglect of duty is raised we do not believe a trustee may hide behind the skirts of an absolute discretion. Trustees are bound to use such talents as they possess. Absolute discretion may excuse a trustee from acting prudently but not from tending to business. The exercise of judgment by a professional trustee, even if not required to satisfy the standard of a reasonable, prudent man, is the very purpose for which the trustee was employed, and exculpatory powers in the trust instrument are strictly construed. It ill behooves a professional trustee, holding itself out during the solicitation of business as a repository of special competence and expertise, to claim on an accounting it need not answer the charge of neglect of duty. A banker, a doctor, a lawyer, may not gain business as a specialist and defend mistakes as a layman." (231 C.A.2d 689.)

Equally strong language was used in *Estate of Miller* (1964) 230 C.A.2d 888, 41 C.R. 410. A testator with three daughters divided her estate equally among them; but, because daughter M was an alcoholic, her share was left in trust. M became rehabilitated, her medical license was reinstated, and she sought to reestablish her professional practice. The trustee, with power to invade the corpus for her support and maintenance, refused to give her the money for necessary office equipment. The record showed that the trustee, though long in possession of cash, had only paid \$ 150 to M; that she owed attorneys' fees, income tax, a funeral bill and other debts; and that she was working as a clerk-typist, unable to engage in medical practice. The lower court approved the trustee's account. *Held*, reversed with directions to make findings that the trustee inexcusably failed to exercise discretion, and that the intent of the trustor was to furnish support for M in the manner requested.

"It is unthinkable that Mrs. Miller could have wished to deprive her daughter completely of continued support and maintenance at the unbridled whim of the person named as trustee. He owed and presently owes a duty to make allowances for her support and maintenance within the general boundaries of what [M] and her family were accustomed to as a standard of living. For a trustee to say, 'I will give her nothing' or 'next to nothing' is to say, 'I am not performing my duty.' " (230 C.A.2d 909.)

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b. Where Absolute Power Is Conferred.

2. Trust Law.

13 Witkin Sum. Cal. Law Trusts § 97

[§ 97] Trust Law.

(1) *Exercise of Discretion Under Fiduciary Principles.* If a trust confers "absolute," "sole," or "uncontrolled" discretion, "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." (*Prob.C. 16081(a).*)

(2) *Reasonable Exercise of Discretion.* Notwithstanding use of terms like "absolute," "sole," or "uncontrolled" by a settlor or testator, if a trust permits a beneficiary, either individually or as a trustee or cotrustee, to make discretionary distributions of income or principal to or for the benefit of himself or herself pursuant to a standard, the beneficiary must exercise the power reasonably and in accordance with the standard. (*Prob.C. 16081(b).*)

(3) *Restricted Exercise of Discretion for Health, Education, Support, or Maintenance.* "Unless a settlor or a testator clearly indicates that a broader power is intended by express reference" to *Prob.C. 16081(c)*, if a trust permits a beneficiary, as trustee or cotrustee, to make discretionary distributions of income or principal to or for the benefit of himself or herself, the beneficiary may exercise the power in his or her own favor only for "health, education, support, or maintenance" within the meaning of Internal Revenue Code §§2041 and 2514. (*Prob.C. 16081(c).*)

(4) *Exercise of Discretion by Trustee Who Is Not Current Beneficiary.* Notwithstanding *Prob.C. 16081(c)*, or *Prob.C. 15620*, requiring cotrustees to exercise powers unanimously unless otherwise provided, if a power to make discretionary distributions of principal or income is conferred on two or more trustees, the power may be exercised by any trustee who is not a "current permissible beneficiary" of the power. In addition, if there is no trustee who is not a current permissible beneficiary, any party in interest may apply to a court of competent jurisdiction to appoint a trustee who may exercise the power. (*Prob.C. 16081(c).*) (For definition of "party in interest," see *Prob.C. 16081(g).*)

(5) *Powers Not Subject to Restricted Exercise Statute.* *Prob.C. 16081(c)* does not apply to either (a) a power held by the settlor of a revocable or amendable trust, or (b) a power held by the settlor's or testator's spouse as the trustee of a trust for which a federal estate tax marital deduction has been allowed. (*Prob.C. 16081(d).*)

(6) *Effective Date.* *Prob.C. 16081(c)* applies to (a) any trust executed on or after January 1, 1997, and to (b) any

testamentary trust created under a will executed on or after January 1, 1997. (*Prob.C. 16081(e)(1), (e)(2).*) The statute also applies to (a) an irrevocable trust under a document created before that date, and (b) a revocable trust executed before that date if the settlor was incapacitated as of that date, unless "all parties in interest" have elected not to be subject to the statute by a written instrument delivered to the trustee. (*Prob.C. 16081(e)(3).*)

(7) *Purpose.* The apparent intent of *Prob.C. 16081(c)* is to prevent inadvertent creation of a general power of appointment. (See C.E.B., *Drafting California Irrevocable Trusts* 3d, §9.52.)

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c. Power To Invade Corpus.

13 Witkin Sum. Cal. Law Trusts § 98

[§ 98] Power To Invade Corpus.

The trust instrument may contain a clause allowing the trustee discretion to invade the corpus where necessary to provide for a life beneficiary. A provision of this type creates serious problems of construction and enforcement. (See *Rest.3d, Trusts §50*; 2 Scott §128.7; *Estate of Miller (1964) 230 C.A.2d 888, 893, 41 C.R. 410*; 18 A.L.R.2d 1236 [propriety of invasion to pay funeral expenses of life beneficiary]; 67 A.L.R.2d 1393 [invasion to pay stated sum that trust instrument directs to be paid periodically to beneficiary out of income]; 41 A.L.R.3d 255 [consideration of beneficiary's other means].)

In *Estate of Ferrall (1949) 92 C.A.2d 712, 207 P.2d 1077*, a testamentary trust gave the trustees sole discretion to make payments out of corpus if the income was insufficient for the support of the testator's daughter, the beneficiary. *Held*, the probate judge erred in ordering them to pay her \$ 400 per month from the corpus without any finding of fraud or abuse of discretion. Under such a clause, the court is not deprived of power to determine the *fact of insufficiency of income to meet the beneficiary's needs*, but it cannot determine *the amount to be paid out of corpus*. (92 C.A.2d 715.)

The problem was more extensively considered in *Estate of Ferrall (1953) 41 C.2d 166, 258 P.2d 1009*, a later appeal involving the same parties. At the time of execution of the will, the testator knew that his daughter had an incurable disease. Subsequently, she was placed in a sanitarium, and some years after the testator's death, she was declared incompetent and her husband was appointed her guardian. He demanded that the trustees meet her increased needs out of corpus; they contended that his community income was sufficient and that he had the primary obligation. The trial judge ordered the trustees to make payments in an amount determined by them. *Held*, reversed.

(a) The trust terms showed an unmistakable intent to keep the corpus intact for the remainderpersons--lineal descendants of the testator--except where the income was insufficient for the daughter's needs; and a similar intent appeared that her husband should have no interest whatever. If his primary duty of support were disregarded and the daughter's "needs" deemed the total amount she required, the corpus would be invaded for the husband's benefit. (41 C.2d 175, 176.)

(b) The weight of authority holds that, in the absence of clear trust language to the contrary, the trustee should consider other means of the beneficiary before using corpus; and here the husband failed to show any actual need of the

beneficiary not being met by other means. (41 C.2d 176, 177.)

Estate of Greenleaf (1951) 101 C.A.2d 658, 225 P.2d 945, deals with a distinguishable situation. The instrument provided for payment of a monthly income of \$ 60 to the widow for life, and further stated that, if she needed additional funds, the trustee was "to use and apply sufficient of the income and principal" for her support, comfort, etc. On her petition, the trial judge ordered payment of money for refurnishing of her home, clothes, travel expenses, and an automobile. *Held*, affirmed. This was not a review of the exercise of discretion; the instrument directed payment for a stated purpose, and the trustee's authority was not discretionary. Payment was simply conditional on the existence of necessity, and necessity was a question of law. (101 C.A.2d 664.)

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See *Thomas v. Gustafson* (2006) 141 C.A.4th 34, 41, 45 C.R.3d 639 [on death of first spouse, living trust was split into survivor's trust and residuary trust, with income of both trusts payable to survivor for life and remaining corpus of each trust payable to separate family members on death of survivor; in determining whether to invade corpus of residuary trust to support survivor, trustee of that trust could consider other available assets, including real property purchased for remainder beneficiary of survivor's trust with corpus of survivor's trust].



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d. Use of Power To Discharge Holder's Obligations.

13 Witkin Sum. Cal. Law Trusts § 99

[§ 99] Use of Power To Discharge Holder's Obligations.

"Except as otherwise specifically provided in the trust instrument, a person who holds a power to appoint or distribute income or principal to or for the benefit of others, either as an individual or as trustee, may not use the power to discharge the legal obligations of the person holding the power." (*Prob.C. 16082.*) The Comment points out that this provision is intended to deal with problems that may arise under federal tax law.

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3. Specific Powers.

a. Property.

1. Collecting and Holding Property.

13 Witkin Sum. Cal. Law Trusts § 100

[§ 100] Collecting and Holding Property.

(1) *In General*. "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." (*Prob.C. 16220.*)

(2) *Receiving Additions to Trust*. "The trustee has the power to accept additions to the property of the trust from a settlor or any other person." (*Prob.C. 16221.*)

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3. Specific Powers.

a. Property.

2. Purchase, Sale, and Exchange.

13 Witkin Sum. Cal. Law Trusts § 101

[§ 101] Purchase, Sale, and Exchange.

(1) *In General*. "The trustee has the power to acquire or dispose of property, for cash or on credit, at public or private sale, or by exchange." (*Prob.C. 16226*.) (See *Rest.2d, Trusts* §§189, 190; *Church v. Church (1940) 40 C.A.2d 696, 700, 105 P.2d 640*; 3 *Scott* §§189, 190; *Bogert* §§741 et seq., 781 et seq.; *Cal Transactions Forms, 3 Estate Planning* §12:154 et seq.; *100 A.L.R.2d 1049* [sale at price less than that specified in trust]; *1 A.L.R.3d 629* [second, higher bid]; *20 A.L.R.3d 841* [authority to exchange property for shares of corporation organized to hold property]; *21 A.L.R.3d 801* [authority to make gift of trust property]; *39 A.L.R.4th 158* [propriety of sale without required consent].) (On leases, see *infra*, §103.)

(2) *Options*. "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." (*Prob.C. 16233*.)

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(1) *In General*. See *Rest.3d, Trusts* §85 [broad statement of powers], §86 [fiduciary exercise of powers].



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a. Property.

3. Management, Maintenance, and Development.

13 Witkin Sum. Cal. Law Trusts § 102

[§ 102] Management, Maintenance, and Development.

(1) *Management*. "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." (*Prob.C. 16227*.)

(2) *Repairs and Improvements*. The trustee has the power to do the following:

(a) Make "ordinary or extraordinary repairs, alterations, or improvements" in trust property. (*Prob.C. 16229(a)*.)

(b) Demolish improvements. (*Prob.C. 16229(b)*.)

(c) Demolish or erect party walls or buildings. (*Prob.C. 16229(c)*.)

(3) *Insurance*. "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." (*Prob.C. 16240*.) (See 2A Scott §176; 76 *Am.Jur.2d* (2005 ed.), *Trusts* §423.)

(4) *Development of Land*. The trustee has the power to do any of the following:

(a) Subdivide or develop land. (*Prob.C. 16230(a)*.)

(b) Dedicate land to public use. (*Prob.C. 16230(b)*.)

(c) Make or vacate plats and adjust boundaries. (*Prob.C. 16230(c)*.)

(d) Adjust differences in valuation on exchange or partition by giving or receiving consideration. (*Prob.C. 16230(d)*.)

(e) Dedicate easements to public use without consideration. (*Prob.C. 16230(e)*.)

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a. Property.

4. Leases and Encumbrances.

13 Witkin Sum. Cal. Law Trusts § 103

[§ 103] Leases and Encumbrances.

(1) *Ordinary Lease*. "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." (*Prob.C. 16231*.) (See 67 A.L.R.2d 978 [term of lease]; 76 Am.Jur.2d (2005 ed.), *Trusts* §538 et seq.)

(2) *Mineral Lease*. "The trustee has the power to enter into a lease or arrangement for exploration and removal of gas, oil, or other minerals or geothermal energy, 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." (*Prob.C. 16232*.) (See generally 22 So. Cal. L. Rev. 115; 7 U.C.L.A. L. Rev. 358.)

(3) *Encumbrance*. "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." (*Prob.C. 16228*.)

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b. Participating in Business.

13 Witkin Sum. Cal. Law Trusts § 104

[§ 104] Participating in Business.

(1) *Continuation of Business or Enterprise Pending Hearing or Sale.* "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." (*Prob.C. 16222(c).*)

(2) *Continuation of Business or Enterprise as Authorized by Trust or Court.* Except as provided in *Prob.C. 16222(c)*, the trustee may continue the operation of a business or other enterprise only as authorized by the trust instrument or by the court. For this purpose, the lease of four or fewer residential units is not considered to be the operation of a business or other enterprise. (*Prob.C. 16222(b).*)

(3) *General Authority To Participate in Business.* Subject to *Prob.C. 16222(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." (*Prob.C. 16222(a).*) The limitation in *Prob.C. 16222(b)* does not affect the trustee's power to continue or participate in the operation of a business or other enterprise under a trust instrument executed before July 1, 1987. (*Prob.C. 16222(d).*)

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c. Investments.

13 Witkin Sum. Cal. Law Trusts § 105

[§ 105] Investments.

(1) *In General.* Under the older "statutory list" or "legal list" theory, certain types of investments were approved, such as government securities, corporate bonds, and first mortgages on land; unsecured loans, second mortgages, and speculative stocks or bonds were ordinarily disapproved. (See 39 Cal. L. Rev. 380.) This was formerly the California law, but was replaced in 1943 by the modern prudent investor rule. (See *supra*, §76.) Authorized investments under the rule are set forth in *Prob.C. 16047(e)* (*supra*, §80).

(2) *Common Trust Fund.* Modern legislation allows a corporate trustee to invest money from several trusts in a common trust fund. This joint plan facilitates diversification and permits quick and convenient investment. The objection that it involves a mingling of trust property (see *supra*, §70) is overcome by the statutory authorization. (See *Corp.C. 10250* [investment in common trust funds by nonprofit corporations]; *Fin.C. 1564* [similar to Section 1 of Uniform Common Trust Fund Act, 7 (Part II) U.L.A. (Master Ed.), p. 183]; *Rest.3d, Trusts (Prudent Investor Rule)* §227, Comment m; 3 *Scott* §227; *Bogert* §677; 64 *Harv. L. Rev.* 473 [accounting procedure]; 82 *Harv. L. Rev.* 435 [federal regulation of commingled investment funds]; 26 *So. Cal. L. Rev.* 86 [nonprofit corporations].)

(3) *United States Government Obligations.* "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." (*Prob.C. 16224(a)*.) This provision applies only to trusts created on or after January 1, 1985. (*Prob.C. 16224(b)*.)

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SUPPLEMENT: [This section is current through the latest supplement]

(2) *Common Trust Fund.* See *Rest.3d, Trusts* §90, Comment m.



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d. Deposits.

1. In General.

13 Witkin Sum. Cal. Law Trusts § 106

[§ 106] In General.

(1) *Authorized Accounts.* A trustee has the power to deposit trust funds at reasonable interest in any of the following accounts:

(a) An insured account in a financial institution. (*Prob.C. 16225(a)(1).*) (See *Prob.C. 21* ["account" defined]; *Prob.C. 40* ["financial institution" defined]; *Prob.C. 46* ["insured account in a financial institution" defined].)

(b) To the extent that the account is collateralized, an account in a bank, an insured savings and loan association, or an insured credit union. (*Prob.C. 16225(a)(2).*) (See *Prob.C. 22* ["account in an insured credit union" defined]; *Prob.C. 23* ["account in an insured savings and loan association" defined].) (See *Rest.2d, Trusts §180*; 2A Scott §180; Bogert §598; 76 *Am.Jur.2d* (2005 ed.), *Trusts §424* et seq.)

(2) *Withdrawal Restrictions.* This provision does not limit the power of a trustee "in a proper case" to deposit trust funds in one of these account "subject to notice or other conditions respecting withdrawal prescribed by law or government regulation." (*Prob.C. 16225(c).*)

(3) *Deposit in Excess of Insured or Collateralized Amount.* The court may authorize the deposit of trust funds in one of these accounts in an amount greater than the maximum insured or collateralized amount. (*Prob.C. 16225(d).*)

(4) *Exception to Interest Requirement.* Nothing in *Prob.C. 16225* 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." (*Prob.C. 16225(e).*)

West's Key Number Digest, Trusts k.221

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Authorized Accounts.* See *Rest.3d, Trusts §76*, Comment d(1).



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d. Deposits.

2. Deposit in Affiliated Institution.

13 Witkin Sum. Cal. Law Trusts § 107

[§ 107] Deposit in Affiliated Institution.

(1) *In General.* A trustee may deposit trust funds in a financial institution operated by the trustee or an affiliate. For this purpose, "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." (*Prob.C. 16225(b)*.) (See *Fin.C. 1562* [bank or trust company depositing trust funds with itself or its parent must pledge security for deposit]; *Prob.C. 9705* [trust company personal representative depositing estate funds with itself is chargeable with interest at locally prevailing rate].)

(2) *Authorized Deposit Practices.* In *Van de Kamp v. Bank of America* (1988) 204 C.A.3d 819, 251 C.R. 530, plaintiff beneficiaries challenged a variety of deposit practices of defendant, a corporate trustee. *Held*, the self-deposit statutes (*Fin.C. 1562*, *Prob.C. 9705*, and *Prob.C. 16225*) excuse defendant from statutory duties of loyalty (*Prob.C. 16002*, *supra*, §64) and against self-dealing (*Prob.C. 16004*, *supra*, §66).

(a) Without statutory authorization for a trustee to deposit trust funds with itself, "it would be a clear violation of the duty of loyalty to make such self-deposits, placing the trustee in a position where it would benefit by violating the duty of loyalty, obtaining an advantage from the use of self-deposited funds to the detriment or exclusion of the beneficiary." (204 C.A.3d 835.) However, as special statutes, the self-deposit provisions impliedly repeal the general loyalty and self-dealing statutes to the extent self-deposit is specifically authorized. (204 C.A.3d 838.) "Where it is not a breach of trust for the trustee to self-deposit trust funds, the trustee is permitted to profit from the use of such self-deposited funds. It is not a breach of trust to self-deposit trust funds where the funds are necessary for the administration of the trust or are awaiting investment or distribution." (204 C.A.3d 839, 840, citing 3 Scott §203.)

(b) The following practices are authorized:

(1) *Self-pooling and self-depositing:* The trustee pools cash balances in its trust accounts, invests them on a short-term basis, and retains the investment profits. (204 C.A.3d 840.)

(2) *Fail float:* When purchasing and selling trust securities, the trustee debits or credits the trust account on a

contractual settlement date (5 business days after the trade date) regardless of whether the purchased securities or funds for sold securities have been received. Funds to purchase securities are held in a suspense account, at the trustee's disposal, until the securities are delivered, and when funds from an outside purchaser do not arrive on time, a suspense account is debited. (204 C.A.3d 851.)

(3) *Disbursing float*: When a check is issued to pay trust obligations, the trust account is immediately charged. Until the check clears, funds to cover it are available for the trustee's use. (204 C.A.3d 852.)

(3) *Appropriate Rate of Return*. In *Conservatorship of Pelton* (1982) 132 C.A.3d 496, 183 C.R. 188, defendant bank, conservator of the estate of P, pursuant to the former statute authorizing the investment of trust funds in a bank acting as the trustee, deposited estate assets in excess of \$ 264,000 in one of its own passbook accounts, for a period of 17 months during which a substitution of conservators was being arranged. The new conservators contended that the bank should be surcharged for the difference between the passbook interest rate and the rate that could have been obtained from successive high-yield certificates. The bank's position was that, under the statute, a deposit of funds in a bank savings account, even in the savings department of the trustee, is a qualified investment. The probate judge refused to order a surcharge. *Held*, reversed for redetermination of the issue.

(a) The purpose of the statute was merely to allow what would otherwise be a direct conflict of interest on the part of the trustee in depositing trust funds with itself; the duty to reasonably maximize the estate assets remains. "The statutory authority to invest trust funds was never intended to act as a cloak exculpating trustees from the performance of their duties as prudent men. ... [W]hen a fiduciary, over a long period of time, retains as an investment a bank deposit, without ascertaining or considering the advisability of other forms of investment productive of greater return of income and an equal degree of safety of principal, then such trustee by his non-action and passive course of conduct is negligent." (132 C.A.3d 501, quoting New York case.)

(b) The practice authorized by the statute is contrary to the general law of trusts, and the inherent conflict of interest cannot be ignored. "We therefore conclude that where a bank-trustee places trust funds on deposit with itself at a rate of interest which is less than would have been earned by a deposit of a like size over a similar period of time, the bank bears the burden of proving that the circumstances reasonably known to it at the time the investment decision was made justified the lower interest account." (132 C.A.3d 502.)

SUPPLEMENT: [This section is current through the latest supplement]



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e. Corporate Shares and Memberships.

13 Witkin Sum. Cal. Law Trusts § 108

[§ 108] Corporate Shares and Memberships.

(1) *Voting Rights.* With respect to shares of stock of domestic or foreign corporations, memberships in nonprofit corporations, or any other property, a trustee has the power to do any of the following:

(a) Exercise voting rights with respect to the shares, memberships, or property, in person or by proxy. (*Prob.C. 16234(a).*) (On corporate voting rights, see 9 *Summary* (10th), *Corporations*, §159 et seq.)

(b) Waive notice of a meeting or give consent to a meeting. (*Prob.C. 16234(b).*)

(c) "Authorize, ratify, approve, or confirm any action that could be taken by shareholders, members, or property owners." (*Prob.C. 16234(c).*)

(2) *Calls and Assessments.* "The trustee has the power to pay calls, assessments, and any other sums chargeable or accruing against or on account of securities." (*Prob.C. 16235.*) (On calls and assessments, see 9 *Summary* (10th), *Corporations*, §§182, 183.)

(3) *Subscriptions and Conversions.* "The trustee has the power to sell or exercise stock subscription or conversion rights." (*Prob.C. 16236.*) (On corporate subscriptions and conversions, see 9 *Summary* (10th), *Corporations*, §§124, 127.)

(4) *Changes in Form of Business.* "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 discretion to any protective or other committee as the trustee may deem advisable." (*Prob.C. 16237.*)

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f. Securities.

13 Witkin Sum. Cal. Law Trusts § 109

[§ 109] Securities.

(1) *Securities Held by Nominee.* "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." (*Prob.C.* 16238.) (See *Fin.C.* 1563 [trust company may register securities in name of nominee].)

(2) *Use of Securities Depository.* A trustee may deposit securities in a securities depository (licensed or exempt from licensing under the Financial Code), and securities may be held by the depository as authorized by *Fin.C.* 775. (*Prob.C.* 16239.)

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SUPPLEMENT: [This section is current through the latest supplement]

(2) *Use of Securities Depository.* *Fin.C.* 775 was repealed in 2008. Comparable provisions are now in *Fin.C.* 1592.



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g. Borrowing Money.

13 Witkin Sum. Cal. Law Trusts § 110

[§ 110] Borrowing Money.

"The trustee has the power to borrow money for any trust purpose to be repaid from trust property. The lender may include, but is not limited to, a bank holding company, affiliate, or subsidiary of the trustee." (*Prob.C. 16241.*)

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SUPPLEMENT: [This section is current through the latest supplement]



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h. Payment, Settlement, and Release of Claims.

13 Witkin Sum. Cal. Law Trusts § 111

[§ 111] Payment, Settlement, and Release of Claims.

The trustee has the power to pay or contest a claim (*Prob.C. 16242(a)*), settle a claim "by or against the trust by compromise, arbitration, or otherwise" (*Prob.C. 16242(b)*), and release a claim of the trust, in whole or in part (*Prob.C. 16242(c)*). "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." (Law Rev. Com. Comment.) (See *Rest.2d, Trusts §192* [power to compromise, arbitrate, and abandon claims]; 3 Scott §192; Bogert §592; 35 *A.L.R.2d* 967 [power to compromise claims].)

SUPPLEMENT: [This section is current through the latest supplement]
See *Rest.3d, Trusts §85* [broad statement of powers].



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i. Payment of Taxes and Expenses.

13 Witkin Sum. Cal. Law Trusts § 112

[§ 112] Payment of Taxes and Expenses.

"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."
(*Prob.C. 16243.*)

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j. Loans and Distributions to Beneficiaries.

13 Witkin Sum. Cal. Law Trusts § 113

[§ 113] Loans and Distributions to Beneficiaries.

(1) *Loans to Beneficiary.* The trustee has the power to make loans from trust property to a beneficiary "on terms and conditions that the trustee determines are fair and reasonable under the circumstances" (*Prob.C. 16244(a)*) and to guarantee loans to a beneficiary "by encumbrances on trust property" (*Prob.C. 16244(b)*).

The Law Revision Commission Comment explains: "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."

(2) *Distribution to Beneficiaries Under Legal Disability.* "The trustee has the power to pay any sum of principal or income 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." (*Prob.C. 16245.*)

(3) *Distribution to Minor Beneficiary.* A sum distributable to a custodian under the California Uniform Transfers to Minors Act (*Prob.C. 3900 et seq.*) is subject to *Prob.C. 3906* (transfers by fiduciaries where the underlying will or trust does not authorize a transfer, see *13 Summary* (10th), *Personal Property*, §144). (*Prob.C. 16245.*)

(4) *Nature and Value of Distributions.* "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, and may be made pursuant to any written agreement providing for a non pro rata division of the aggregate value of the community property assets or quasi-community property assets, or both." (*Prob.C. 16246.*)

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k. Hiring Agents.

13 Witkin Sum. Cal. Law Trusts § 114

[§ 114] Hiring Agents.

"The trustee has the power to hire persons, including accountants, attorneys, auditors, investment advisers, appraisers ... , 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." (*Prob.C. 16247*.) (On liability for acts of agent, see *Prob.C. 16401*, *infra*, §118.)

The Law Revision Commission Comment makes the following points:

(1) "If the trustee is in doubt concerning the propriety of hiring an agent, the judicial procedure for obtaining instructions is available." (On instructions, see *Prob.C. 17200*, *infra*, §229 *et seq.*)

(2) "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 ... and the duty to avoid conflicts of interest ... , and particularly as to routine matters; but in situations involving substantial matters, it is best to hire outside agents." (On duty of loyalty, see *Prob.C. 16002*, *supra*, §64; on duty to avoid conflict of interest, see *Prob.C. 16004*, *supra*, §66.)

(3) "The trustee has a duty to inform certain beneficiaries of agents hired, their relationship to the trustee, if any, and their compensation." (On duty to inform beneficiaries, see *Prob.C. 16063(a)(4)*, *supra*, §88.)

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k. Hiring Agents.

13 Witkin Sum. Cal. Law Trusts § 115

[§ 115] (l) Actions and Proceedings.

(1) *In General*. "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." (*Prob.C.* 16249.) The trustee may sue without joining the beneficiaries. (*C.C.P.* 369; see 9 *A.L.R.2d* 10; 4 *Cal. Proc.* (4th), *Pleading*, §118; on propriety of reimbursement for attorneys' fees and other expenses of action or proceeding, see *Prob.C.* 15684, *supra*, §59.)

(2) *Nonattorney Trustee May Not Represent Trust*. A trustee who is not an attorney may not represent the trust in an action involving trust property. (*Ziegler v. Nickel* (1998) 64 *C.A.4th* 545, 75 *C.R.2d* 312, 1 *Cal. Proc.* (4th), *Attorneys*, Supp., §400A.)

(3) *Attorney-Client Privilege of Trustee*. A trustee's power to assert the attorney-client privilege with respect to communications that occur in the trustee's fiduciary capacity passes to the successor trustee. Thus, the successor trustee can discover communications on trust administration between the predecessor trustee and the trustee's attorney. (*Moeller v. Superior Court* (1997) 16 *C.4th* 1124, 69 *C.R.2d* 317, 947 *P.2d* 279, 2 *Cal. Evidence* (4th), *Witnesses*, §107.) (On disclosure of privileged information in report to beneficiaries, see *supra*, §85.)

(4) *Double Damages for Bad Faith Disposition of Trust Property*. If the court finds that a person has, in bad faith, "wrongfully taken, concealed, or disposed of property" belonging to a trust, that person is liable for twice the value of the property recovered in an action under *Prob.C.* 850 et seq. This remedy is in addition to any other available remedies. (*Prob.C.* 859; see 14 *Summary* (10th), *Wills and Probate*, §359.)

West's Key Number Digest, Trusts k.245.1 et seq.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General*.

Trustee may sue without joining beneficiaries:

Cross-Reference: 4 *Cal. Proc.* (5th), *Pleading*, §137.

(2) *Nonattorney Trustee May Not Represent Trust*. See *Finkbeiner v. Gavid* (2006) 136 C.A.4th 1417, 1420, 39 C.R.3d 871, 1 Cal. Proc. (5th), Attorneys, §379 [distinguishing *Ziegler v. Nickel* (1998) 64 C.A.4th 545, 75 C.R.2d 312, text, p. 682; trustee who was not suing third party and who appeared in pro. per. to petition for modification and termination of trust of low value was not engaged in unauthorized practice].

Ziegler case:

Cross-Reference: 1 Cal. Proc. (5th), Attorneys, §379.

(3) *Attorney-Client Privilege of Trustee*. See *Schwartz v. Labow* (2008) 164 C.A.4th 417, 431, 78 C.R.3d 838 [on appointment of successor trustee, prior trustee had no attorney-client privilege with respect to communications about trust administration and was required to turn over documents to successor].



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4. Notice of Proposed Action.

13 Witkin Sum. Cal. Law Trusts § 116

[§ 116] Notice of Proposed Action.

(1) *In General.* *Prob.C. 16500* et seq. establish a procedure for a trustee to give notice of a proposed action regarding a matter governed by *Prob.C. 16200* et seq. (powers of trustees; see *supra*, §90 et seq.) or *Prob.C. 16320* et seq. (Uniform Principal and Income Act; see *infra*, §166 et seq.). For this purpose, a proposed action includes a course of action or a decision not to take action. (*Prob.C. 16500.*) The procedure is optional (*Prob.C. 16504*), and other available rights and remedies are preserved (*Prob.C. 16500*). A similar procedure is available for estates under the Independent Administration of Estates Act. (On estate procedure, see *Prob.C. 10580* et seq., 14 *Summary* (10th), *Wills and Probate*, §745 et seq.)

(2) *Persons Entitled to Notice.* The trustee mails notice of the proposed action to all beneficiaries receiving or entitled to receive income or entitled to receive a distribution of principal if the trust were to be terminated at the time the notice is given. (*Prob.C. 16501(a).*) Notice need not be given to persons who consent in writing to the proposed action. Consent may be executed at any time before or after the proposed action is taken. (*Prob.C. 16501(b).*)

(3) *Contents of Notice.* The notice must state that it is given pursuant to *Prob.C. 16502* and must include the following:

(a) The name and mailing address of the trustee. (*Prob.C. 16502(a).*)

(b) The name and telephone number of a person who may be contacted for additional information. (*Prob.C. 16502(b).*)

(c) A description of the action proposed to be taken and an explanation of the reasons for the action. (*Prob.C. 16502(c).*)

(d) The time within which objections to the proposed action may be made, which must be at least 45 days from the mailing. (*Prob.C. 16502(d).*)

(e) The date on or after which the proposed action may be taken or is effective. (*Prob.C. 16503(e).*)

(4) *Objection.* A beneficiary may object to the proposed action by mailing a written objection to the trustee at the

address stated in the notice within the time period specified in the notice. (*Prob.C. 16503(a).*)

(5) *Court Proceeding Following Objection.* "If the trustee receives a written objection within the applicable period, either the trustee or a beneficiary may petition the court to have the proposed action taken as proposed, taken with modifications, or denied. In the proceeding, a beneficiary objecting to the proposed action has the burden of proving that the trustee's proposed action should not be taken. A beneficiary who has not objected is not estopped from opposing the proposed action in the proceeding." (*Prob.C. 16503(c).*) "If the trustee decides not to implement the proposed action, the trustee shall notify the beneficiaries of the decision not to take the action and the reasons for the decision, and the trustee's decision not to implement the proposed action does not itself give rise to liability to any current or future beneficiary. A beneficiary may petition the court to have the action taken, and has the burden of proving that it should be taken." (*Prob.C. 16503(d).*)

(6) *Immunity of Trustee in Absence of Objection.* The trustee is not liable to a beneficiary for an action governed by the Trust Law if the trustee does not receive a written objection to the proposed action from the beneficiary within the applicable period and the other requirements of *Prob.C. 16503* are satisfied. If no beneficiary entitled to notice objects, the trustee is not liable to any current or future beneficiary with respect to the proposed action. (*Prob.C. 16503(b).*) However, *Prob.C. 16503(b)* does not apply to a person who is a minor or incompetent adult at the time of the notice unless the notice is served on the guardian or conservator of the estate of the person. (*Prob.C. 16503(b).*)

(7) *When Procedure May Not Be Used.* The notice procedure set forth in *Prob.C. 16500* et seq. may not be used for the following actions:

- (a) Allowance of the trustee's compensation. (*Prob.C. 16501(d)(1).*)
- (b) Allowance of the compensation of the trustee's attorney. (*Prob.C. 16501(d)(2).*)
- (c) Settlement of accounts. (*Prob.C. 16501(d)(3).*)
- (d) Preliminary and final distributions and discharge. (*Prob.C. 16501(d)(4).*)
- (e) Sale of trust property to the trustee or the trustee's attorney. (*Prob.C. 16501(d)(5).*)
- (f) Exchange of trust property for property of the trustee or the trustee's attorney. (*Prob.C. 16501(d)(6).*)
- (g) Grant of an option to the trustee or the trustee's attorney to purchase trust property. (*Prob.C. 16501(d)(7).*)
- (h) Allowance, payment, or compromise of a claim of the trustee or the trustee's attorney against the trust. (*Prob.C. 16501(d)(8).*)
- (i) Compromise or settlement of a claim, action, or proceeding of the trust against the trustee or the trustee's attorney. (*Prob.C. 16501(d)(9).*)
- (j) Extension, renewal, or modification of the terms of a debt or obligation of the trustee or the trustee's attorney owing to or in favor of the trust. (*Prob.C. 16501(d)(10).*)

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E. Liability to Beneficiaries.

1. Liability for Breach of Trust.

a. What Constitutes Breach of Trust.

13 Witkin Sum. Cal. Law Trusts § 117

[§ 117] What Constitutes Breach of Trust.

"A violation by the trustee of any duty that the trustee owes the beneficiary is a breach of trust." (*Prob.C. 16400*, based on *Rest.2d, Trusts §201.*) (See *Estate of Gump (1991) 1 C.A.4th 582, 595, 2 C.R.2d 269*, *infra*, §128 [negligent administration of trust that fell below standard of care of professional trustee was breach of trust under *Prob.C. 16400*]; Chodos, *Fiduciary Duties §1:19 et seq.* [elements affecting existence of fiduciary duty]; *Cal. Civil Practice, 3 Probate and Trust Proceedings, §24:90 et seq.*)

However, while the trust is revocable, the trustee owes duties to the person holding the power to revoke, not to the named beneficiaries. (Law Rev. Com. Comment to *Prob.C. 16400*; see *Prob.C. 15800*, *infra*, §145.)

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b. Liability for Acts of Agent.

13 Witkin Sum. Cal. Law Trusts § 118

[§ 118] Liability for Acts of Agent.

The trustee is liable to the beneficiary for an act or omission of an agent only as provided in *Prob.C. 16401(b)*. (*Prob.C. 16401(a)*.) In the following circumstances, the trustee is liable if the act or omission of the agent in the administration of the trust "would be a breach of the trust if committed by the trustee":

(1) Where the trustee directs the act of the agent. (*Prob.C. 16401(b)(1)*.)

(2) Where the trustee delegates to the agent the authority to perform an act that the trustee is under a duty not to delegate. (*Prob.C. 16401(b)(2)*.)

(3) Where the trustee does not use reasonable prudence in the selection or retention of the agent. (*Prob.C. 16401(b)(3)*.)

(4) Where the trustee does not periodically review the agent's overall performance and compliance with the terms of the delegation. (*Prob.C. 16401(b)(4)*.)

(5) Where the trustee conceals the act of the agent. (*Prob.C. 16401(b)(5)*.)

(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. (*Prob.C. 16401(b)(6)*.)

The Law Revision Commission Comment makes the following points:

(a) "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." (On *Prob.C. 16040*, see *supra*, §75; on *Prob.C. 16462*, see *infra*, §139.)

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

SUPPLEMENT: [This section is current through the latest supplement]



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c. Liability for Acts of Cotrustee.

13 Witkin Sum. Cal. Law Trusts § 119

[§ 119] Liability for Acts of Cotrustee.

(1) *General Law and California Cases.* One trustee may be liable for the wrongful act of a cotrustee in cases of consent, negligence, acquiescence, improper delegation, and failure to compel redress of a breach. (*Rest.2d, Trusts* §224; see *Birmingham v. Wilcox* (1898) 120 C. 467, 471, 52 P. 822; *Blackmon v. Hale* (1970) 1 C.3d 548, 559, 83 C.R. 194, 463 P.2d 418 [negligent inattention to duties]; 3 Scott §224; Bogert §584 et seq.; 65 A.L.R.2d 1019 [liability for act of cotrustee].) Each cotrustee is under a duty to the beneficiary to exercise reasonable care to prevent another from committing a breach of trust, or to compel another to redress a breach of trust. (*Estate of Hensel* (1956) 144 C.A.2d 429, 438, 301 P.2d 105.) A cotrustee who consents to a breach of trust or negligently permits it to occur may sue the wrongdoing trustee for contribution. (*Gbur v. Cohen* (1979) 93 C.A.3d 296, 300, 302, 155 C.R. 507.)

(2) *Trust Law.* The trustee is liable to the beneficiary for a breach of trust committed by a cotrustee only as provided in *Prob.C. 16402(b)*. (*Prob.C. 16402(a)*.) In the following circumstances, the trustee is liable for a breach committed by a cotrustee:

(a) Where the trustee participates in a breach of trust committed by the cotrustee. (*Prob.C. 16402(b)(1)*.)

(b) Where the trustee improperly delegates the administration of the trust to the cotrustee. (*Prob.C. 16402(b)(2)*.)

(c) Where the trustee approves, knowingly acquiesces in, or conceals a breach of trust committed by the cotrustee. (*Prob.C. 16402(b)(3)*.)

(d) Where the trustee negligently enables the cotrustee to commit a breach of trust. (*Prob.C. 16402(b)(4)*.)

(e) 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. (*Prob.C. 16402(b)(5)*.)

However, while the trust is revocable, the trustee owes duties to the person holding the power to revoke, not to the named beneficiaries. (Law Rev. Com. Comment to *Prob.C. 16402*; see *Prob.C. 15800*, *infra*, §145.)

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SUPPLEMENT: [This section is current through the latest supplement]

(1) *General Law and California Cases*. See *Rest.3d, Trusts §81(2)* [duty to prevent cotrustee from committing breach].



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d. Liability for Acts of Predecessor.

13 Witkin Sum. Cal. Law Trusts § 120

[§ 120] Liability for Acts of Predecessor.

A successor trustee is not liable to the beneficiary for a breach of trust committed by a predecessor trustee, except as provided in *Prob.C. 16403(b)*. (*Prob.C. 16403(a)*.) The successor trustee is liable for a breach of trust involving the acts or omissions of a predecessor trustee in 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. (*Prob.C. 16403(b)(1)*.)

(2) Where the successor trustee neglects to take reasonable steps to compel the predecessor trustee to deliver the trust property to the successor trustee. (*Prob.C. 16403(b)(2)*.)

(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. (*Prob.C. 16403(b)(3)*.)

However, while the trust is revocable, the trustee owes duties to the person holding the power to revoke, not to the named beneficiaries. (Law Rev. Com. Comment to *Prob.C. 16403*; see *Prob.C. 15800*, *infra*, §145.)

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2. Remedies for Breach of Trust.

a. In General.

13 Witkin Sum. Cal. Law Trusts § 121

[§ 121] In General.

(1) *Actions by Beneficiary or Cotrustee.* The trustee's obligations can be enforced only by the beneficiary or one who sues on the beneficiary's behalf, e.g., a cotrustee. (*Rest.2d, Trusts §§199, 200, 214*; see *Purdy v. Johnson* (1917) 174 C. 521, 527, 163 P. 893 [accounting may be sought in separate suit or petition, or may constitute part of demand in action for removal of trustee]; *St. James Church of Christ Holiness v. Superior Court* (1955) 135 C.A.2d 352, 360, 287 P.2d 387 [action by cotrustee]; *Martin v. Kehl* (1983) 145 C.A.3d 228, 240, 193 C.R. 312, citing the text [resulting trust]; 3 Scott §§199, 200, 214; Bogert §861; Chodos, *Fiduciary Duties* §5:1 et seq.; 76 *Am.Jur.2d* (2005 ed.), *Trusts* §594 et seq.; 5 *Cal. Proc.* (4th), *Pleading*, §789 et seq.)

(2) *Law Revision Commission Report.* "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. 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. 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." (18 Cal. Law Rev. Com. Reports, p. 550.)

(3) *Available Remedies.* If a trustee commits or threatens to commit a breach of trust, a beneficiary or cotrustee may commence a proceeding for any of the following purposes that is appropriate:

- (a) To compel the trustee to perform the trustee's duties. (*Prob.C. 16420(a)(1).*) (See *infra*, §122.)
- (b) To enjoin the trustee from committing a breach of trust. (*Prob.C. 16420(a)(2).*) (See *infra*, §123.)
- (c) To compel the trustee to redress a breach of trust by the payment of money or otherwise. (*Prob.C. 16420(a)(3).*) (See *infra*, §124.)
- (d) To appoint a receiver or temporary trustee to take possession of the trust property and administer the trust. (

Prob.C. 16420(a)(4).) (See *infra*, §125.)

(e) To remove the trustee. (*Prob.C. 16420(a)(5).*) (See *infra*, §126.)

(f) To set aside acts of the trustee, subject to *Prob.C. 18100* (rights of third party acting in good faith; see *infra*, §255). (*Prob.C. 16420(a)(6).*) (See *infra*, §127.)

(g) To reduce or deny the compensation of the trustee. (*Prob.C. 16420(a)(7).*) (See *infra*, §128.)

(h) To impose an equitable lien or a constructive trust on trust property, subject to *Prob.C. 18100*. (*Prob.C. 16420(a)(8).*) (See *infra*, §129.)

(i) To trace trust property that has been wrongfully disposed of and recover the property or its proceeds, subject to *Prob.C. 18100*. (*Prob.C. 16420(a)(9).*) (See *infra*, §129.)

The remedies for breach of trust set forth in *Prob.C. 16420(a)* do not preclude "any other appropriate remedy provided by statute or the common law." (*Prob.C. 16420(b).*)

(4) *Equitable Remedies Only*. "The remedies of a beneficiary against the trustee are exclusively in equity." (*Prob.C. 16421*, based on *Rest.2d, Trusts* §197.) The Comment points out that the beneficiary cannot sue the trustee for breach of contract, but that the trustee may be found liable for repayment of money on account of the breach under *Prob.C. 16420(a)(3)*.

The California Law Revision Commission makes the following points:

(a) In appropriate circumstances, a petitioner may seek more than one remedy. (Law Rev. Com. Comment.)

(b) The availability of a particular remedy and its application under the circumstances are governed by common law. (Law Rev. Com. Comment.)

(c) "The beneficiary has the right to obtain information necessary to secure performance of the trust or to obtain a redress of breach. Hence, the beneficiary has a right to an accounting and may be permitted to inspect trust property." (18 Cal. Law Rev. Com. Reports, p. 555.) (On accounting, see *supra*, §§87, 88.)

(d) "A trustee who misappropriates trust property may be criminally liable for embezzlement." (18 Cal. Law Rev. Com. Reports, p. 556.) (See P.C. 506, 2 Cal. Crim. Law (3d), *Crimes Against Property*, §29.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Actions by Beneficiary or Cotrustee*.

Cross-Reference: 5 Cal. Proc. (5th), *Pleading*, §833 et seq.



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b. Compelling Performance of Duty.

13 Witkin Sum. Cal. Law Trusts § 122

[§ 122] Compelling Performance of Duty.

The beneficiary may sue to compel the trustee to perform the trustee's duties. (*Prob.C. 16420(a)(1).*) (See *Rest.2d, Trusts §199(a)*; *Leitch v. Gay* (1944) 64 C.A.2d 16, 21, 147 P.2d 631; 3 Scott §199; Bogert §861; on specific performance, see 5 *Cal. Proc. (4th), Pleading, §740 et seq.*)

SUPPLEMENT: [This section is current through the latest supplement]
Specific performance:

Cross-Reference: 5 *Cal. Proc. (5th), Pleading, §784 et seq.*



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c. Enjoining Threatened Breach.

13 Witkin Sum. Cal. Law Trusts § 123

[§ 123] Enjoining Threatened Breach.

The beneficiary may sue to enjoin the trustee from committing a breach of trust. (*Prob.C. 16420(a)(2).*) (See *Rest.2d, Trusts* §199(b); C.C. 3422, C.C.P. 526(a)(7); *Quist v. Empire Water Co.* (1928) 204 C. 646, 269 P. 533; *St. James Church of Christ Holiness v. Superior Court* (1955) 135 C.A.2d 352, 359, 287 P.2d 387; 3 Scott §199; 5 *Cal. Proc.* (4th), *Pleading*, §778 et seq.)

"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." (18 Cal. Law Rev. Com. Reports, p. 551.)

SUPPLEMENT: [This section is current through the latest supplement]

Cross-Reference: 5 *Cal. Proc.* (5th), *Pleading*, §822 et seq.



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d. Action for Damages.

13 Witkin Sum. Cal. Law Trusts § 124

[§ 124] Action for Damages.

The beneficiary may sue the trustee "to redress a breach of trust by payment of money or otherwise." (*Prob.C. 16420(a)(3).*) (See *Rest.2d, Trusts §§199(c)*, 205; *Work v. County Nat. Bank & Trust Co. of Santa Barbara* (1935) 4 C.2d 532, 536, 51 P.2d 90; *Edgar v. Bank of America* (1942) 50 C.A.2d 827, 833, 123 P.2d 885; *Estate of Talbot* (1956) 141 C.A.2d 309, 322, 296 P.2d 848, *infra*, §132; 3 Scott §§199, 205; Bogert §862; 68 A.L.R.3d 1265 [liability of testamentary trustee for failure to assert claim against executor of testator's estate for mistake resulting in overpayment of taxes].)

The California Law Revision Commission makes the following points:

(1) The reference to payment of money "is comprehensive and includes liability that might be characterized as damages, restitution, or surcharge." (Law Rev. Com. Comment.)

(2) "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." (Law Rev. Com. Comment.)

(3) "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." (18 Cal. Law Rev. Com. Reports, p. 550.)

The liability of the trustee for improperly handling trust property will survive the trustee's death and may be made the basis of a claim against his or her estate. (*Fields v. Michael* (1949) 91 C.A.2d 443, 447, 205 P.2d 402, 11 Summary (10th), *Community Property*, §145.) But a beneficiary who fails to present the claim can recover only property that can be traced and identified as belonging to the trust. (*Noble v. Noble* (1926) 198 C. 129, 136, 243 P. 439; on tracing, see *infra*, §129 et seq.)

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e. Receiver or Temporary Trustee.

13 Witkin Sum. Cal. Law Trusts § 125

[§ 125] Receiver or Temporary Trustee.

The beneficiary may seek appointment of "a receiver or temporary trustee to take possession of the trust property and administer the trust." (*Prob.C. 16420(a)(4)*.) This provision makes explicit the authority stated in *C.C.P. 564*, recognized in *Bowles v. Superior Court* (1955) 44 C.2d 574, 583, 283 P.2d 704, and supported by *Rest.2d, Trusts §199(d)*. (Law Rev. Com. Comment.)

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f. Removal of Trustee.

13 Witkin Sum. Cal. Law Trusts § 126

[§ 126] Removal of Trustee.

The beneficiary may sue to remove the trustee. (*Prob.C. 16240(a)(5)*; see *Rest.2d, Trusts §§107, 199(e)*; *Overell v. Overell (1926) 78 C.A. 251, 256, 248 P. 310.*) (On removal, see *supra*, §§51, 52.) "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." (18 Cal. Law Rev. Com. Reports, p. 553.)

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SUPPLEMENT: [This section is current through the latest supplement]
See *Rest.3d, Trusts §37, Comment b.*



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g. Setting Aside Action of Trustee.

13 Witkin Sum. Cal. Law Trusts § 127

[§ 127] Setting Aside Action of Trustee.

The beneficiary may sue to set aside actions of the trustee, subject to *Prob.C. 18100* (rights of third party acting in good faith; see *infra*, §255). (*Prob.C. 16420(a)(6).*) This authority is a corollary of the power to enjoin a threatened breach (see *supra*, §123), and may be employed to avoid conveyances. (Law Rev. Com. Comment.)

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h. Reduction or Denial of Compensation.

13 Witkin Sum. Cal. Law Trusts § 128

[§ 128] Reduction or Denial of Compensation.

The beneficiary may sue "to reduce or deny compensation of the trustee." (*Prob.C. 16420(a)(7)*, based on *Rest.2d, Trusts §243*.) This new remedy was not authorized before the adoption of the Trust Law. (Law Rev. Com. Comment; see 18 Cal. Law Rev. Com. Reports, p. 553.)

The scope of this remedy was at issue in *Estate of Gump (1991) 1 C.A.4th 582, 2 C.R.2d 269*. Beneficiaries of a testamentary trust and the institutional trustee were engaged in protracted litigation over the administration of the trust. In a proceeding to settle the final account and for compensation of the trustee, the trial judge denied the trustee recovery of extraordinary compensation, attorneys' fees, and expenses incurred in defending against the claims of the beneficiaries. *Held*, compensation, fees, and expenses related to (a) administration of property as to which the trustee was negligent, and (b) litigation involving that administration, were properly denied. Ordinary compensation, fees, and expenses not connected with the administration of that property should have been allowed.

(a) *Breach of trust*. The major asset of the trust was property subject to a retail lease. The trustee failed to monitor and enforce the provisions of the lease, to demand compliance with the terms of the lease, to require the lessee to maintain records necessary to compute the rent, to monitor the lessee's sales records, and to obtain assistance in administering the property. This negligent administration of the trust did not meet the standard of care of a professional trustee and was a breach of trust under *Prob.C. 16400* (supra, §117). (*1 C.A.4th 595*.) Further, by threatening to charge the cost of an audit to the income shares of objecting beneficiaries, the trustee breached its duty of loyalty under *Prob.C. 16002(a)* (supra, §64). (*1 C.A.4th 596*.)

(b) *Denial of compensation*. Compensation may be reduced or denied where the trustee acts negligently or in breach of the trust. However, in the absence of fraud, personal benefit by the trustee, or loss to the beneficiaries, compensation may only be denied for services attributable to the mismanaged asset. (*1 C.A.4th 597*, citing *Estate of Gump (1982) 128 C.A.3d 111, 180 C.R. 219*.) Here, there is no evidence of fraud or personal benefit, and compensation, fees, and expenses may be disallowed only so far as they are sought in connection with the leased property. (*1 C.A.4th 599*.) Although the trustee prevailed in some of the prior litigation on which the claim for fees is based, its intentional breach in using the threat of an audit to gain an advantage during that litigation warrants denial of all fees for that litigation. (*1 C.A.4th 610*.)

(3) *Exercise of discretion.* *Prob.C. 16420(a)(7)* provides ample authority for the trial judge to deny fees incurred in litigation over the previous account for misconduct in a later accounting period. (*1 C.A.4th 610.*) However, it was an abuse of discretion to deny ordinary compensation and fees for services not connected with administration of the lease property and related litigation. (*1 C.A.4th 611.*)

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i. Recovering Trust Property or Proceeds.

1. In General.

13 Witkin Sum. Cal. Law Trusts § 129

[§ 129] In General.

(1) *Right To Recover Property or Product.* If the trustee wrongfully disposes of the trust property, e.g., by selling land and receiving money, or taking trust funds and buying other property, the beneficiary, instead of suing the trustee personally (*supra*, §121), may elect to recover the property or its product.

(2) *Equitable Lien or Constructive Trust.* The beneficiary may sue "to impose an equitable lien or a constructive trust on trust property." (*Prob.C. 16420(a)(8)*.) By the constructive trust, the beneficiary gets the benefit of the transaction if it is a profitable one; by the equitable lien the beneficiary gets security for his or her personal claim against the trustee; but in either case the beneficiary has priority over other creditors of the trustee. (See *Rest.2d, Trusts* §202; *Rest., Restitution* §202 et seq.; *Citizens' Bank of Paso Robles v. Rucker* (1903) 138 C. 606, 609, 610, 72 P. 46; *Noble v. Noble* (1926) 198 C. 129, 132, 243 P. 439; *Keeney v. Bank of Italy* (1917) 33 C.A. 515, 517, 165 P. 735; *Carlin v. Masten* (1931) 118 C.A. 373, 376, 5 P.2d 65; 3 Scott §202; 5 Scott §507 et seq.; Bogert §866; Chodos, *Fiduciary Duties* §5:19 et seq.; 66 *Harv. L. Rev.* 872; 76 *Am.Jur.2d* (2005 ed.), *Trusts* §272 et seq.)

The California Law Revision Commission explains: "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. 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. 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. ... The details of this sort of equitable remedy are best left to case law." (18 Cal. Law Rev. Com. Reports, p. 555.)

(3) *Tracing Trust Property.* The beneficiary may "trace trust property that has been wrongfully disposed of and recover the property or its proceeds." (*Prob.C. 16420(a)(9)*.) The Law Revision Commission notes that the statute does not "codify the extensive detail involved in tracing principles." (18 Cal. Law Rev. Com. Reports, p. 555.)

(4) *Limitation on Rights.* Both *Prob.C. 16420(a)(8)* and (a)(9) are expressly subject to *Prob.C. 18100* (rights of third party acting in good faith; see *infra*, §255). (See *Rest.2d, Trusts* §284; *Firato v. Tuttle* (1957) 48 C.2d 136, 139, 308 P.2d 333; *Ruth v. Lytton Savings & Loan Assn. of Northern Calif.* (1968) 266 C.A.2d 831, 836, 72 C.R. 521; 4 Scott

§284; Bogert §881 et seq.) If the trust property cannot be identified, the beneficiary is in the same position as any other creditor. (*People v. California Safe Deposit & Trust Co.* (1917) 175 C. 756, 759, 167 P. 388; *Holland v. Bank of Italy Nat. Trust & Saving Assn.* (1931) 115 C.A. 472, 479, 1 P.2d 1031.)

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i. Recovering Trust Property or Proceeds.

2. Tracing Mixed Trust Funds.

13 Witkin Sum. Cal. Law Trusts § 130

[§ 130] Tracing Mixed Trust Funds.

The problem of identification or tracing of the original trust property into its product may arise where the trustee, in making bank deposits, mingles several trust funds, or trust funds with personal funds, and then makes withdrawals. In these cases, certain presumptions have been developed for the protection of the beneficiary. Where two trust funds are mingled, under the doctrine of *Clayton's Case*, 1 Meriv. 572, the money first paid in is presumed to be first drawn out. But the Restatement repudiates this arbitrary rule and provides for proportionate sharing by beneficiaries. (*Rest.2d, Trusts* §202, Comment n; see *Rest., Restitution* §213; 3 Scott §202; 5 Scott §519; Bogert §927; 76 *Am.Jur.2d* (2005 ed.), *Trusts* §278 et seq.)

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3. Tracing Mixed Trust and Personal Funds.

13 Witkin Sum. Cal. Law Trusts § 131

[§ 131] Tracing Mixed Trust and Personal Funds.

(1) *Withdrawals and Dissipation, Leaving Balance.* It is ordinarily presumed that the trustee acted lawfully, withdrawing his or her own money and leaving the trust funds intact. Hence, the balance in the account will be applied to the trust. (*Elizalde v. Elizalde* (1902) 137 C. 634, 641, 66 P. 369, 70 P. 861; *Keeney v. Bank of Italy* (1917) 33 C.A. 515, 517, 165 P. 735; *Armstrong v. Schoenborn* (1933) 130 C.A. 501, 506, 20 P.2d 79; *Rest.2d, Trusts* §202, Comment i; see 3 Scott §202; 5 Scott §517; Bogert §929.) This presumption has been held inapplicable to acts of a wrongdoer sued as a constructive trustee. (*People v. California Safe Deposit & Trust Co.* (1917) 175 C. 756, 760, 167 P. 388; see *Rest., Restitution* §211.)

(2) *Withdrawals, Purchase of Property, and Dissipation of Balance.* The foregoing presumption will not be applied to the disadvantage of the beneficiary. In *Mitchell v. Dunn* (1930) 211 C. 129, 294 P. 386, the trustee purchased certain real property in her own name with a check drawn on the trust account. Later she replaced the sum taken, and subsequently dissipated the entire estate. The effect of the ordinary presumption would be to deprive the beneficiary of the real property purchased with the money originally withdrawn, and the court therefore held it inapplicable, permitting him to take the property. (211 C. 134.) (See *Rest., Restitution* §§210, 211.)

(3) *Withdrawals, Dissipation, and Subsequent Deposits.* If the trustee withdraws money and dissipates it, the trust funds are only those that remain on deposit. Subsequent deposits ordinarily do not inure to the benefit of the trust. Hence, the beneficiary can have a prior lien only upon the *lowest intermediate balance* left in the account. And if at any time the trustee withdraws and dissipates the entire fund, the beneficiary loses all prior claim and is merely a general creditor of the trustee. (See *Rest.2d, Trusts* §202, Comments j, k; *Rest., Restitution* §212; 5 Scott §518; Bogert §929.) This rule is, however, subject to two well-recognized exceptions:

(a) If the trustee merely withdraws but does not dissipate the funds, and subsequently redeposits the identical money, it still belongs to the trust; i.e., it is part of the trust res whether in the bank or out of it. (*Rest.2d, Trusts* §202, Comment l; see *Rest., Restitution* §212, Comment d.)

(b) If the trustee withdraws and dissipates, but later, at the time of making subsequent deposits, manifests an

intention to make restitution of the funds withdrawn, this intention may be given effect, and the trust res, by this act of the trustee, is replenished. (*Rest.2d, Trusts* §202, Comment m; see *Rest., Restitution* §212, Comment c.) This same result follows where the account is in the name of the *trustee as such*: Subsequent deposits are treated as replacements. This is for the reason that, by depositing in a *trust account*, the trustee manifests an intention to make restitution. (See *Rest.2d, Trusts* §202, Comment m; *Rest., Restitution* §212, Comment c.)

The general rule that the beneficiary is restricted to the lowest intermediate balance where the account is personal was rejected with little discussion in *Church v. Bailey* (1949) 90 C.A.2d 501, 203 P.2d 547. The trustee, an agent, embezzled his employer's money and placed it in a bank account with other personal funds. He then withdrew practically all of the money, but later deposited substantial amounts of personal funds. Then he contracted to buy a piece of land on installments, making payments out of the account. After his death, it was held that the beneficiary (his employer) was entitled to a constructive trust in the land, on the theory that his later deposit of personal money restored the trust fund. "Where a trustee deposits in a single account in a bank trust funds and his individual funds and makes withdrawals from the account, dissipates the money so withdrawn, and subsequently makes additional deposits of his individual funds in the account, the money which the trustee has deposited becomes a trust fund and the beneficiary is entitled to hold the funds so deposited, and it is unnecessary to show an express intent upon the part of the trustee to replace the trust funds." (90 C.A.2d 504.)

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a. General Law and California Cases.

13 Witkin Sum. Cal. Law Trusts § 132

[§ 132] General Law and California Cases.

A trustee is liable for losses sustained through any breach of duty; e.g., negligent or mistaken payment to the wrong person. This liability extends not only to losses actually suffered, but to the failure to make a profit. (*Rest.2d, Trusts §205*; see *Corbett v. Benioff* (1932) 126 C.A. 772, 775, 14 P.2d 1028; *White v. Citizens Nat. Trust & Savings Bank of Los Angeles* (1941) 46 C.A.2d 418, 422, 116 P.2d 117; 3 Scott §205; Bogert §862; Chodos, Fiduciary Duties §5:9 et seq.; 59 Harv. L. Rev. 189 [view that good faith may mitigate recovery against trustee]) (See *Estate of Evans* (1944) 62 C.A.2d 249, 257, 144 P.2d 625 [power to surcharge trustee on supplemental account after decree settling final account]; *Estate of Prior* (1952) 111 C.A.2d 464, 471, 244 P.2d 697 [in settling account, court may charge trustee for amount due beneficiary, with interest]; *Estate of Hensel* (1956) 144 C.A.2d 429, 437, 301 P.2d 105 [petition of one trustee to surcharge cotrustee's account].)

In *Estate of Talbot* (1956) 141 C.A.2d 309, 296 P.2d 848, the trust contained half bonds and half stocks. In February 1951, the trustee, acting on the suggestion of one of the three income beneficiaries, sold many common stocks and bought government bonds. *Held*, although the trustee could have sold if it had independently decided to do so, it failed to exercise its discretion, and therefore committed a breach of trust. (141 C.A.2d 317, 320.)

(a) The difficult question presented is the measure of recovery. The trial judge ordered the trustee to pay into the trust, for the benefit of the beneficiary who challenged its account, one-third of all actual *and potential* losses suffered by the sale; in other words, the damages included the probable loss of all future earnings and appreciation in value of the stocks sold. This was improper. Former C.C. 2237, clearly permitting such a recovery, applies only to a breach in bad faith; former C.C. 2238, dealing with good faith breach, is not clear (trustee is liable "to make good whatever is lost") but was obviously intended to prescribe a lesser recovery than for bad faith breach; the Trusts Restatement (§205 et seq.) would indicate that liability for lost profits should be limited to cases of breach of the duty of loyalty or failure to retain or acquire specific assets. (141 C.A.2d 323 et seq.)

(b) "[W]e are of the opinion that, on principle and as a matter of statutory interpretation, the words 'make good whatever is lost' in section 2238 of the Civil Code should be interpreted to mean that for a breach of the type here involved liability is limited to the loss to the corpus, plus interest. Stated another way, in such a situation there is no liability for loss of all income and appreciation that would have resulted had the sale not been made. Certainly, on

principle, this is a sufficient burden to place on the trustee in such a situation. To require a trustee who acts in good faith to be a guarantor of all profits that would have been made would be to place such a trustee in the same position as the defaulting trustee who breaches the duty of loyalty. In the latter situation, where there is fraud or self-dealing, or where there is no power to sell, there is moral turpitude in a very real sense, which is not involved in the type of breach here under consideration." (141 C.A.2d 326.) (See 4 U.C.L.A. L. Rev. 314; 58 A.L.R.2d 674 [measure of liability for good faith breach in dealing with investments].)

In *Estate of De Laveaga* (1958) 50 C.2d 480, 326 P.2d 129, the trustee of a testamentary trust treated income received during probate administration as principal, thereby wrongfully withholding it from the life tenant. In settlement of the trustee's final account, the life tenant's executor was awarded the amount of that income (\$ 26,240) together with interest (\$ 31,066.43). In reversing the judgment, the court pointed out that the \$ 26,240, though not paid to the life tenant as income, was invested and produced earnings which were paid to the life tenant as income. To allow the life tenant to keep those earnings and also receive interest on the same fund would constitute double recovery, and violate the fundamental principle that benefits conferred by a wrongful act must be deducted from the amount of loss to reach a net sum representing actual damages sustained. (50 C.2d 489.)

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b. Law Revision Commission Report.

13 Witkin Sum. Cal. Law Trusts § 133

[§ 133] Law Revision Commission Report.

The California Law Revision Commission (18 Cal. Law Rev. Com. Reports, p. 556 et seq.) reviewed the background law and proposed a revision of the California rules based on the Restatement. The following excerpts explain the purpose and scope of *Prob.C. 16440, 16441, and 16442* (infra, §134 et seq.).

(1) "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. The accomplishment of this principle varies depending on the circumstances and the equities of the case."

(2) Under the Restatement rules, the beneficiary generally may recover any loss or depreciation in value of the trust estate, or any profit that has been made through the breach or that would have accrued if there had been no breach. "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.' 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.' "

(3) "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."

(4) "California statutory law is in general accord with the Restatement although the Field Code language is archaic and subject to some doubt."

(5) "The Restatement also provides detailed rules where the trustee has committed a breach by an improper failure to sell trust property. 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.' " (On *Estate of Talbot* (1956) 141 C.A.2d 309, 296 P.2d 848, see supra, §132.)

(6) "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. California law makes the trustee liable 'to make good whatever is lost' where an improper investment is made in good faith. This standard would seem to afford the court a broad discretion to fix the amount of liability."

(7) "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."

(8) "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. 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."

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c. Damages.

13 Witkin Sum. Cal. Law Trusts § 134

[§ 134] Damages.

A trustee who commits a breach of trust 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. (*Prob.C. 16440(a)(1).*)

(2) Any profit made by the trustee through the breach of trust, with interest. (*Prob.C. 16440(a)(2).*)

(3) Any profit that would have accrued to the trust estate if the loss of profit is the result of the breach of trust. (*Prob.C. 16440(a)(3).*) (See *Noggle v. Bank of America* (1999) 70 C.A.4th 853, 862, 82 C.R.2d 829 [damages for improper investment were properly calculated using appreciation experienced by common equity funds of defendant institutional trustee ("amount the trusts actually would have earned") rather than "objective market criteria"].)

If the trustee has acted "reasonably and in good faith" under the circumstances known to the trustee, the court has discretion to excuse the trustee in whole or in part from liability under *Prob.C. 16440(a)* where it would be "equitable to do so." (*Prob.C. 16440(b).*) This provision codifies the good faith exception to the general Restatement liability rules, and expands the rule of *Estate of Talbot* (1956) 141 C.A.2d 309, 296 P.2d 848, *supra*, §132. (Law Rev. Com. Comment.)

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d. Interest.

13 Witkin Sum. Cal. Law Trusts § 135

[§ 135] Interest.

If the trustee is liable for interest under *Prob.C. 16440* (supra, §134), the trustee is liable for the greater of the following amounts:

(1) The amount of interest that accrues at the legal rate on judgments in effect during the period when the interest accrued. (*Prob.C. 16441(a)(1).*)

(2) The amount of interest actually received. (*Prob.C. 16441(a)(2).*)

If the trustee has acted "reasonably and in good faith" under the circumstances known to the trustee, the court has discretion to excuse the trustee in whole or in part from liability under *Prob.C. 16441(a)* where it would be "equitable to do so." (*Prob.C. 16441(b).*)

The Comment points out that interest is not compounded, as it was under former law.

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e. Other Remedies.

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[§ 136] Other Remedies.

The provisions in *Prob.C. 16440* and *16441* (supra, §§134, 135) governing liability of a trustee for breach of trust "do not prevent resort to any other remedy available under the statutory or common law." (*Prob.C. 16442*.) (On statutory remedies, see *Prob.C. 16420(a)*, supra, §121; and see *Prob.C. 16420(b)* [remedies for breach of trust in *Prob.C. 16420(a)* do not preclude "any other appropriate remedy provided by statute or the common law"].)

The California Law Revision Commission (18 Cal. Law Rev. Com. Reports, p. 560) states that whether a trustee may be held liable for punitive damages for a breach of trust is unsettled. (See *Werschull v. United Calif. Bank* (1978) 85 C.A.3d 981, 1001, 1002, 149 C.R. 829 [breach of duty by nondisclosure of diversion of pension funds supported judgment for punitive damages]; *Vale v. Union Bank* (1979) 88 C.A.3d 330, 339, 151 C.R. 784 [punitive damages may be recovered if fraud or oppression is shown]; cf. *Flyer's Body Shop Profit Sharing Plan v. Ticor Title Ins. Co.* (1986) 185 C.A.3d 1149, 1154, 230 C.R. 276 [breach of fiduciary duty is insufficient basis by itself for punitive damages].)

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4. Limitations and Exculpation.

a. Limitations and Laches.

13 Witkin Sum. Cal. Law Trusts § 137

[§ 137] Limitations and Laches.

(1) *Case Law Development.* The remedies of the beneficiary may be barred by *limitations*. Generally, the statute does not run against the beneficiary's right of action to enforce an *express trust* until the beneficiary has knowledge of repudiation or breach of trust. (*Cortelyou v. Imperial Land Co.* (1913) 166 C. 14, 20, 134 P. 981; *Kroger v. Truitt* (1945) 27 C.2d 288, 293, 163 P.2d 735; see 54 A.L.R.2d 13 [sufficient repudiation by trustee to start running of statute of limitations]; 3 Cal. Proc. (4th), *Actions*, §616.) The same is true in the case of a *resulting trust*. (*Lezinsky v. Mason Malt Whiskey Distilling Co.* (1921) 185 C. 240, 244, 196 P. 884; *Berniker v. Berniker* (1947) 30 C.2d 439, 447, 182 P.2d 557; see 45 A.L.R.2d 382 [statute of limitations on enforcement of resulting trust]; 3 Cal. Proc. (4th), *Actions*, §618.) But it begins to run upon the right to enforce a *constructive trust* from the time the beneficiary has notice or should know of the wrongful holding of the property. (*Norton v. Bassett* (1908) 154 C. 411, 416, 97 P. 894; *Bainbridge v. Stoner* (1940) 16 C.2d 423, 429, 106 P.2d 423; *Bell v. Bayly Bros. of Calif.* (1942) 53 C.A.2d 149, 159, 127 P.2d 662; see 55 A.L.R.2d 220 [statute of limitations on enforcement of constructive trust]; 3 Cal. Proc. (4th), *Actions*, §620 et seq.)

(2) *Statutory Requirements.* Unless a claim is previously barred by adjudication, consent, limitation, or otherwise, the following rules apply:

(a) "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." (*Prob.C. 16460(a)(1).*)

(b) "If an interim or final account in writing or other written report does not adequately disclose the existence of a claim against the trustee for breach of trust or if a beneficiary does not receive any written account or report, 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." (*Prob.C. 16460(a)(2).*)

For this purpose, 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." (*Prob.C. 16460(b)(1)*.)

(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." (*Prob.C. 16460(b)(2)*.)

(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." (*Prob.C. 16460(b)(3)*.)

A written account or report under *Prob.C. 16460* may, but need not, satisfy the requirements of *Prob.C. 16061* or *16063* or any other provision. (*Prob.C. 16460(c)*.) (On *Prob.C. 16061* [duty to report in response to request by beneficiary], see *supra*, §85; on *Prob.C. 16063* [required contents of account], see *supra*, §88.)

The Comment makes the following observations:

(a) "The reference in the introductory clause to claims 'otherwise' barred also includes principles such as estoppel and laches that apply under the common law."

(b) 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.

(c) Under prior law, the 4-year period of *C.C.P. 343* was applied to actions for breach of express trusts (see 3 *Cal. Proc.* (4th), *Actions*, §616); *Prob.C. 16460* is an exception to this rule.

(d) Under *Prob.C. 16460(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."

(3) *Applicability of 1996 Amendment.* In *Di Grazia v. Anderlini* (1994) 22 *C.A.4th* 1337, 1348, 28 *C.R.2d* 37, 3 *Cal. Proc.* (4th), *Actions*, §616, the court held that an accountant's schedule of sales and expenses provided insufficient information about administration of the trust to trigger the limitations period of *Prob.C. 16460*. The Legislature amended *Prob.C. 16460(a)(2)* in 1996 to make it applicable to a "final account in writing or other written report" and to extend the bar of the statute to a situation in which the beneficiary does not receive a written account or report. In *Noggle v. Bank of America* (1999) 70 *C.A.4th* 853, 82 *C.R.2d* 829, an action filed in 1993 by trust beneficiaries against the trustee for breach of fiduciary duties, the question was whether the 1996 amendment or prior law applied. *Held*, the 1996 amendment applied even though the action was filed before 1996. The amendment did not change existing law, but was intended to clarify it by correcting the misinterpretation of *Di Grazia*. Retroactive application of the amendment to facts in existence prior to the amendment was not prohibited in this context. (70 *C.A.4th* 859.)

(4) *Laches.* Independently of the statute of limitations, *laches*, i.e., unexcused delay resulting in prejudice, may bar the rights of the beneficiary. (See *Kleinclaus v. Dutard* (1905) 147 *C.* 245, 249, 81 *P.* 516; *Rest.2d, Trusts* §§219, 409; 3 *Scott* §219; 5 *Scott* §409; 13 *Summary* (10th), *Equity*, §16 et seq.) The defense is sometimes rejected. (See *Taber v. Bailey* (1913) 22 *C.A.* 617, 622, 135 *P.* 975.)

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SUPPLEMENT: [This section is current through the latest supplement]

(1) *Case Law Development*. *Express trust*:

Cross-Reference: 3 *Cal. Proc.* (5th), *Actions*, §676.

Resulting trust:

Cross-Reference: 3 Cal. Proc. (5th), Actions, §678.

Constructive trust:

Cross-Reference: 3 Cal. Proc. (5th), Actions, §680 et seq.

(2) Statutory Requirements. Action for breach of express trust:

Cross-Reference: 3 Cal. Proc. (5th), Actions, §676.

(3) Applicability of 1996 Amendment.

Di Grazia case:

Cross-Reference: 3 Cal. Proc. (5th), Actions, §676.



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4. Limitations and Exculpation.

b. Exculpation of Trustee.

13 Witkin Sum. Cal. Law Trusts § 138

[§ 138] Exculpation of Trustee.

(1) *In General.* "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." (*Prob.C. 16461(b)*, based on *Rest.2d, Trusts §222.*)

A provision that releases a trustee from liability if a beneficiary fails to object to an item in an account or other written report within a specified time is effective only if the account or report sets forth the item, the time period is not less than 180 days, and written notice in 12-point boldface type is provided. (*Prob.C. 16461(c)* [setting forth language required for notice]; on election by trustee of noncomplying trust to be governed by *Prob.C. 16461(c)*, see *Prob.C. 16461(d).*) If the account or report complies with the statutory requirements and the beneficiary fails to object in writing within the time specified, a claim against the trustee regarding an item that is adequately disclosed is barred. (*Prob.C. 16461(e).*) (On joinder of one beneficiary where another objects, see *Prob.C. 16461(f)*; on supplemental objection, see *Prob.C. 16461(g).*)

Except as provided in *Prob.C. 16461(b)*, (c), or (d), the trustee may be relieved of liability for a breach of trust by provisions in the trust instrument. (*Prob.C. 16461(a).*)

The Law Revision Commission Comment adds: "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."

(2) *Exculpation in Connection With Distribution or Payment.* Under *Prob.C. 16004.5(a)*, a trustee may not require a beneficiary to relieve the trustee of liability as a condition for making a required distribution or payment to or for the benefit of the beneficiary. Despite this prohibition, however, the trustee may do the following:

(a) Maintain a reserve for "reasonably anticipated expenses." (*Prob.C. 16004.5(b)(1).*)

(b) Seek a voluntary release or discharge of the trustee's liability from the beneficiary. (*Prob.C. 16004.5(b)(2).*)

(c) Require indemnification against a claim by another that might "reasonably arise" as the result of the distribution to the beneficiary. (*Prob.C. 16004.5(b)(3).*)

(d) Withhold a portion of a required distribution that is "reasonably in dispute." (*Prob.C. 16004.5(b)(4).*)

(e) Seek approval from the court or the beneficiary of an accounting. (*Prob.C. 16004.5(b)(5).*)

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c. Nonliability Where Directions Are Followed.

13 Witkin Sum. Cal. Law Trusts § 139

[§ 139] Nonliability Where Directions Are Followed.

Notwithstanding *Prob.C. 16461* (supra, §138), "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." (*Prob.C. 16462(a)*.) This provision applies to a trust that is revocable in part with respect to the interest of the beneficiary in that part of the trust property. (*Prob.C. 16462(b)*.)

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d. Consent of Beneficiary.

13 Witkin Sum. Cal. Law Trusts § 140

[§ 140] Consent of Beneficiary.

(1) *In General.* Consent of the beneficiary may be considered in determining liability of the trustee. (See *Rest.2d, Trusts* §216; 3 *Scott* §216; 37 *Cal. L. Rev.* 541; 29 *A.L.R.2d* 1034 [beneficiary's consent to or ratification of improper allocation or distribution of assets].)

(2) *Liability Despite Consent.* 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:

(a) Where the beneficiary was under an incapacity at the time of the consent or of the act or omission. (*Prob.C. 16463(b)(1).*)

(b) Where the beneficiary at the time of the consent did not know of his or her rights and of material facts (1) that the trustee knew or should have known and (2) that the trustee did not reasonably believe that the beneficiary knew. (*Prob.C. 16463(b)(2).*)

(c) Where the consent of the beneficiary was induced by improper conduct of the trustee. (*Prob.C. 16463(b)(3).*)

(3) *Effect of Conflict of Interest.* "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 the circumstances described in *Prob.C. 16463(b)* or "where the transaction to which the beneficiary consented was not fair and reasonable to the beneficiary." (*Prob.C. 16463(c).*)

(4) *When Consent Precludes Liability.* Except as provided in *Prob.C. 16463(b)* and *Prob.C. 16463(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." (*Prob.C. 16463(a).*)

SUPPLEMENT: [This section is current through the latest supplement]



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III. TRUSTEES

E. Liability to Beneficiaries.

4. Limitations and Exculpation.

e. Discharge of Liability.

1. By Release or Contract.

13 Witkin Sum. Cal. Law Trusts § 141

[§ 141] By Release or Contract.

A release or contract is not effective to discharge the trustee's liability for a breach of trust in the following circumstances:

(1) Where the beneficiary was under an incapacity at the time of the release or contract. (*Prob.C. 16464(b)(1).*)

(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. (*Prob.C. 16464(b)(2).*)

(3) Where the release or contract was induced by improper conduct of the trustee. (*Prob.C. 16464(b)(3).*)

(4) Where the transaction involved a bargain with the trustee that was not "fair and reasonable." (*Prob.C. 16464(b)(4).*)

Except as provided in *Prob.C. 16464(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." (*Prob.C. 16464(a).*)

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III. TRUSTEES

E. Liability to Beneficiaries.

4. Limitations and Exculpation.

e. Discharge of Liability.

2. By Subsequent Affirmance.

13 Witkin Sum. Cal. Law Trusts § 142

[§ 142] By Subsequent Affirmance.

The affirmance of a transaction by the beneficiary does not preclude the beneficiary from holding the 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. (*Prob.C. 16465(b)(1).*)
- (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. (*Prob.C. 16465(b)(2).*)
- (3) The affirmance was induced by improper conduct of the trustee. (*Prob.C. 16465(b)(3).*)
- (4) The transaction involved a bargain with the trustee that was not "fair and reasonable." (*Prob.C. 16465(b)(4).*)

Except as provided in *Prob.C. 16465(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 may not thereafter reject it and hold the trustee liable for any loss occurring after the trustee entered into the transaction. (*Prob.C. 16465(a).*) (See *Rest.2d, Trusts §218*; 3 Scott §218.)

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IV. BENEFICIARIES

A. In General.

1. Beneficiary's Equitable Estate.

13 Witkin Sum. Cal. Law Trusts § 143

[§ 143] Beneficiary's Equitable Estate.

(1) *Former In Personam Theory.* The Civil Code originally provided that, in a trust in real property, the trustee takes *legal title* to the trust property, though the trustee's estate and powers are limited to the requirements of performance of the trust. This *in personam* view, that the beneficiary has only a personal right against the trustee, and no equitable estate in the property, was implied by the further provision in former C.C. 863 that the beneficiaries "take no estate or interest in the property, but may enforce the performance of the trust." A number of cases made statements in conformity with this language. (*Estate of Troy* (1931) 214 C. 53, 56, 3 P.2d 930; *Finnie v. Smith* (1927) 83 C.A. 707, 710, 257 P. 866; *Houghton v. Pacific Southwest Trust & Savings Bank* (1931) 111 C.A. 509, 511, 295 P. 1079.)

(2) *Beneficiary's Equitable Estate: In Rem Theory.* The Restatement adopted the *in rem* theory that the beneficiary has an equitable title to the trust property. If the property is personalty, the interest is personal property; if realty, the interest is real property, except where the trustee is directed to sell it, in which case equitable conversion makes it personalty. (*Rest.3d, Trusts* §2; see 2 Scott §§130, 131; Bogert §183; 76 *Am.Jur.2d* (2005 ed.), *Trusts* §258 et seq.) Several California cases have used the terminology of the *in rem* theory, and it would seem clear that the beneficiary has, in addition to personal rights against the trustee, an equitable estate in the trust property that is both alienable and subject to the claims of creditors. Thus, where the beneficiary is to receive at some time not merely money, but property constituting the corpus, the beneficiary's interest has been characterized as "a present equitable estate." (*Title Ins. & Trust Co. v. Duffill* (1923) 191 C. 629, 646, 218 P. 14; see *Hoffman v. Connell* (1999) 73 C.A.4th 1194, 1199, 87 C.R.2d 272 [beneficiary who received income from QTIP trust established by her husband did not own trust property under federal, state, or common law and thus her executors did not owe California "pickup" estate tax].)

In *Lynch v. Cunningham* (1933) 131 C.A. 164, 173, 21 P.2d 154, the court, following the doctrine of *Duffill*, held that a levy of execution on the interest of the beneficiary of a trust in real property should be made as in the case of real property. (See 13 *Cal. L. Rev.* 76; 21 *Cal. L. Rev.* 153; 28 *So. Cal. L. Rev.* 116.)

(3) *Transfer of Beneficiary's Interest.* If the beneficiary has capacity to transfer property, the beneficiary has power to transfer his or her equitable interest without consent of the trustee, unless restricted by the terms of the trust. (*Rest.3d, Trusts* §51; see *Title Ins. & Trust Co. v. Duffill*, *supra*, 191 C. 649; *Hunt v. Lawton* (1926) 76 C.A. 655, 666, 245 P. 803; 2A Scott §132 et seq.; Bogert §188; 76 *Am.Jur.2d* (2005 ed.), *Trusts* §267.)

The equitable interest of the beneficiary is ordinarily subject to the claims of the beneficiary's individual creditors, who may reach it by a petition under *C.C.P. 709.010*. (See generally *Houghton v. Pacific Southwest Trust & Savings Bank, supra*; *Lynch v. Cunningham, supra*; *Rest.3d, Trusts* §56; 2A Scott §§147, 148; Bogert §193; 76 *Am.Jur.2d* (2005 ed.), *Trusts* §271; 8 *Cal. Proc. (4th), Enforcement of Judgment*, §314; 21 *A.L.R.4th* 729, 743 [right of public authorities to reach trust for benefit of incompetent supported in public institution].)

The beneficiary is not personally liable, of course, to creditors of the trustee, or to persons with tort or contract claims against the trust estate. (*Rest.2d, Trusts* §§274 et seq.; *Hall v. Jameson* (1907) 151 C. 606, 612, 91 P. 518; 3A Scott §274 et seq.; Bogert §721.)

(4) *Trustee's Right of Retainer*. If a beneficiary is liable to the trust estate (e.g., because of an overpayment, advance, or misappropriation of trust property), the beneficiary is not entitled to receive his or her share of income or corpus without discharging that liability. The trustee has a "right of retainer," i.e., a right to deduct the charge from the amount otherwise payable to the beneficiary or the beneficiary's assignee. (*Rest.2d, Trusts* §251; see *County Nat. Bank & Trust Co. of Santa Barbara v. Sheppard* (1955) 136 C.A.2d 205, 218, 288 P.2d 880; 3A Scott §251; Bogert §592; 8 *A.L.R.2d* 209 [right of trustee to set-off personal debt of beneficiary to trustee from trust distribution].)

The same rule is applied where the beneficiary was indebted to the *testator* who created the trust, unless the will manifests an intention to discharge the debt or to give the interest irrespective of failure to do so. (*Rest.2d, Trusts* §251A; *County Nat. Bank & Trust Co. v. Sheppard, supra*.)

The problem is more difficult where the testator creates a spendthrift trust, for the intention would appear to be to protect the interest against claims of any creditors, including the testator's estate. But a different intention may be shown. (See *Rest.2d, Trusts* §251A, Comment b.) Thus, in *Sheppard*, a spendthrift trust was created for the testator's widow and children, but only in the *income*. The trustee obtained judgment against the debtor children, which the court held could be satisfied out of the *corpus*. (136 C.A.2d 217.)

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(3) *Transfer of Beneficiary's Interest*.

Claims of creditors:

Cross-Reference: 8 *Cal. Proc. (5th), Enforcement of Judgment*, §322.



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IV. BENEFICIARIES

A. In General.

2. Interest Vests on Termination of Trust.

13 Witkin Sum. Cal. Law Trusts § 144

[§ 144] Interest Vests on Termination of Trust.

In *Salvation Army v. Price* (1995) 36 C.A.4th 1619, 42 C.R.2d 925, a testamentary trust provided for termination on the death of the life income beneficiary and distribution of the assets in specific bequests of \$ 240,000 to various named charities, with any remainder being paid to five residuary beneficiaries. When the income beneficiary died, the assets had an approximate value of \$ 180,000 and were insufficient to satisfy the charitable bequests. However, the trust assets could not be distributed until several lawsuits were resolved almost 20 years later, at which time they had appreciated in value to approximately \$ 900,000. The trustee petitioned to distribute all the appreciated assets to the charities, but a residuary beneficiary objected, asserting that the appreciation in value should accrue to the residuary beneficiaries. The trial court determined that the interests of the charitable and residuary beneficiaries vested on the testator's death and, until distribution, remained contingent only as to amount; thus, the charitable beneficiaries were entitled to pecuniary gifts totaling \$ 240,000 plus 4% interest, and the residuary beneficiaries were entitled to all remaining assets. *Held*, reversed. The charities were entitled to all the assets.

On the income beneficiary's death, the trust was fully performed, it terminated, and the beneficiaries' rights vested. Because the trust assets were insufficient to fully satisfy the specific pecuniary charitable bequests at that time, the charitable beneficiaries each received a vested beneficial interest in the assets proportionate to their specific bequest. Because there was no residue at the time the trust terminated and the beneficial interests vested, the residuary beneficiaries' interests were extinguished. That actual physical distribution of the trust assets was postponed 20 years did not affect the earlier vesting of title on termination. (36 C.A.4th 1624.)

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IV. BENEFICIARIES

A. In General.

3. Beneficiary of Revocable Trust.

a. Limits on Rights.

13 Witkin Sum. Cal. Law Trusts § 145

[§ 145] Limits on Rights.

"Except to the extent that the trust instrument otherwise provides or where the joint action of the settlor and all beneficiaries is required," the following rules apply "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, not the beneficiary, has the rights of beneficiaries under the Trust Law. (*Prob.C. 15800(a).*)

(b) The duties of the trustee are owed to the person holding the power to revoke. (*Prob.C. 15800(b).*) (See *Johnson v. Kotyck* (1999) 76 C.A.4th 83, 89, 90 C.R.2d 99 [trustee was not required to account to beneficiary of revocable trust under *Prob.C. 15800*, even though settlor was subject to conservatorship, where conservator held right to revoke trust under *Prob.C. 2580* (substituted judgment; see 14 *Summary* (10th), *Wills and Probate*, §1025 et seq.)]; *Prob.C. 15805* [Attorney General is subject to limitations on rights of beneficiaries of revocable trusts provided by *Prob.C. 15800*].)

The California Law Revision Commission covers a number of aspects of the statute:

(1) "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. ... Section 15800 thus recognizes that the holder of a power of revocation is in control of the trust and should have the right to enforce the trust. ... A corollary principle is that the holder of the power of revocation may direct the actions of the trustee." (Law Rev. Com. Comment.)

(2) "[T]he 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." (Law Rev. Com. Comment.)

(3) "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. ... 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." (Law Rev. Com. Comment.)

(4) "[T]he beneficiaries of a revocable living trust do not have the right to petition the court concerning the internal affairs of the trust until such 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." (18 Cal. Law Rev. Com. Reports, p. 584.)

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IV. BENEFICIARIES

A. In General.

3. Beneficiary of Revocable Trust.

b. Consent by Beneficiary.

13 Witkin Sum. Cal. Law Trusts § 146

[§ 146] Consent by Beneficiary.

"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." (*Prob.C. 15801(a)*.) This provision does not apply where the joint consent of the settlor and all beneficiaries is required by statute. (*Prob.C. 15801(b)*.) (See *Prob.C. 15805* [Attorney General is subject to limitations on rights of beneficiaries of revocable trusts provided by *Prob.C. 15801*].)

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IV. BENEFICIARIES

A. In General.

3. Beneficiary of Revocable Trust.

c. Notice to Beneficiary.

13 Witkin Sum. Cal. Law Trusts § 147

[§ 147] Notice to Beneficiary.

(1) *In General.* "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." (*Prob.C. 15802.*) (See *Prob.C. 15805* [Attorney General is subject to limitations on rights of beneficiaries of revocable trusts provided by *Prob.C. 15802*].)

(2) *Case Involving Future Interest of Beneficiary.* Ordinarily, it is sufficient compliance with a requirement of the Trust Law that notice (or other papers) be given to a beneficiary, or to a person interested in the trust, if notice is given as follows:

(a) "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 proceeding or if there is no proceeding, if the event had happened immediately before notice is given." (*Prob.C. 15804(a)(1).*)

(b) "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." (*Prob.C. 15804(a)(2).*)

(c) "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." (*Prob.C. 15804(a)(3).*)

"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 *Prob.C. 15804(a)*, notice must also be given to persons not otherwise entitled to notice under *Prob.C. 15804(a)* with respect to whom the conflict of interest exists. (*Prob.C. 15804(b).*)

Nothing in *Prob.C. 15804* affects any 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, or the availability of a guardian ad litem pursuant to *Prob.C. 1003*. (*Prob.C. 15804(c)*.)

The Law Revision Commission Comment makes the following points:

(1) The statute applies to notices given outside judicial proceedings, such as notice of an increase in the trustee's fee under *Prob.C. 15686* (*supra*, §57).

(2) The rules governing notice apply to papers such as accounts to beneficiaries under *Prob.C. 16062* (*supra*, §87).

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Case Involving Future Interest of Beneficiary*. See 10 (#4) California Trusts and Estates Quarterly 25 (Winter 2004) [virtual representation of incapacitated, minor, unborn, or unascertained beneficiaries].



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IV. BENEFICIARIES

A. In General.

3. Beneficiary of Revocable Trust.

d. Holder of Power of Appointment.

13 Witkin Sum. Cal. Law Trusts § 148

[§ 148] Holder of Power of Appointment.

"The holder of a presently exercisable general power of appointment or power to withdraw property from the trust has the rights of a person holding the power to revoke the trust" provided by *Prob.C. 15800 to 15802*, "to the extent of the holder's power over the trust property." (*Prob.C. 15803*.)

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IV. BENEFICIARIES

A. In General.

4. Rights Against Third Persons.

a. In General.

13 Witkin Sum. Cal. Law Trusts § 149

[§ 149] In General.

(1) *General Rule: Trustee Acts.* Ordinarily, the trustee is the proper party to bring actions on behalf of the trust, and the beneficiary is neither a necessary nor a proper party. (See 76 *Am.Jur.2d* (2005 ed.), *Trusts* §609 et seq.; 4 *Cal. Proc.* (4th), *Pleading*, §118 et seq.; supra, §115.)

(2) *Where Trustee Fails To Act.* Where the trustee fails or refuses to act, the beneficiary may bring an equitable action against the third person, joining the trustee. (See *Saks v. Damon Raike & Co.* (1992) 7 *C.A.4th* 419, 8 *C.R.2d* 869, *infra*, §222; *Pillsbury v. Karmgard* (1994) 22 *C.A.4th* 743, 756, 27 *C.R.2d* 491 [beneficiary lacks standing to sue third party unless trustee's failure to sue is "negligent, wrongful or otherwise improper"]; *Rest.2d, Trusts* §282; 4 *Scott* §282; 4 *Cal. Proc.* (4th), *Pleading*, §119.)

(3) *Where Trust Property Is Wrongfully Transferred.* The beneficiary may sue persons (other than bona fide purchasers) to whom the trustee has wrongfully transferred trust property, to recover the property or its product. (*Wolf v. Mitchell, Silberberg & Knupp* (1999) 76 *C.A.4th* 1030, 1038, 90 *C.R.2d* 792, *infra*, §150; *Rest.2d, Trusts* §§290, 291; 4 *Scott* §§290, 291; 76 *Am.Jur.2d* (2005 ed.), *Trusts* §532; on bona fide purchasers, see *infra*, §255; on tracing of trust property, see supra, §129 et seq.)

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SUPPLEMENT: [This section is current through the latest supplement]

(1) *General Rule: Trustee Acts.* *Cross-Reference:* 4 *Cal. Proc.* (5th), *Pleading*, §137.

(2) *Where Trustee Fails To Act.*

Cross-Reference: 4 *Cal. Proc.* (5th), *Pleading*, §138.



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IV. BENEFICIARIES

A. In General.

4. Rights Against Third Persons.

b. Where Third Person Participates in Breach of Trust.

13 Witkin Sum. Cal. Law Trusts § 150

[§ 150] Where Third Person Participates in Breach of Trust.

The beneficiary may sue third persons who participate in breaches of trust. (See *Rest.2d, Trusts* §§291 et seq., 327; 4 Scott §§291 et seq., 327; Chodos, *Fiduciary Duties* §2:23; see also *Rest.2d, Trusts* §326 [third person who has notice that trustee is committing breach of trust and who participates in breach is liable to beneficiary for loss caused by breach].)

In *Pierce v. Lyman* (1991) 1 C.A.4th 1093, 3 C.R.2d 236, plaintiff beneficiaries of a testamentary trust sued the former trustees and their attorneys, alleging that improper investment activity dissipated the trust assets and constituted a breach of trust. The trial court sustained the attorneys' demurrers. *Held*, reversed; the complaint stated a cause of action.

(a) *Attorney has no fiduciary duty to beneficiary.* An attorney's fiduciary obligation is based on the existence of an attorney-client relationship. Here, that relationship existed with the trustees, not with the beneficiaries. Thus, defendants owed no fiduciary obligation to the beneficiaries. (1 C.A.4th 1102.)

(b) *Attorney's participation in breach of trust by trustee.* At common law, a cause of action against an attorney for active participation in a breach of trust by the trustee required an allegation that the attorney actively colluded with the trustee in breaching the trustee's fiduciary duty; rendering legal advice to the trustee was insufficient. (1 C.A.4th 1103.) This right is circumscribed by *Doctors' Co. v. Superior Court* (1989) 49 C.3d 39, 260 C.R. 183, 775 P.2d 508, 2 Summary (10th), *Insurance*, §253, which limits liability for conspiracy to violate a statutory duty. The conduct here, however, is within a recognized exception for activity to further the attorney's own financial gain. (1 C.A.4th 1104.)

(c) *Sufficiency of complaint.* The complaint here alleges that the defendants (1) purposefully drafted and filed accountings to conceal the trustees' breaches from the court, (2) used their authority over trust assets to make personal investments on a preferential basis, (3) concealed self-dealing and made numerous misrepresentations to the court, and (4) advanced their own gain in the form of fees and investment opportunities and in order to avoid liability for earlier activity. Thus, the exception in *Doctors' Co.* for personal financial advantage has been adequately pleaded. (1 C.A.4th 1106.) "These allegations demonstrate that respondents are accused of active participation in breaches of fiduciary duty by the former trustees. More than the simple rendering of legal advice to respondents' clients is alleged. More than mere

knowledge of the breach of fiduciary duty is alleged. Active concealment, misrepresentations to the court, and self-dealing for personal financial gain are described. We find that this is sufficient to state a cause of action for breach of fiduciary duty." (1 C.A.4th 1106.)

A different conclusion was reached in *Saks v. Damon Raike & Co.* (1992) 7 C.A.4th 419, 8 C.R.2d 869, *infra*, §222, holding that beneficiaries lacked standing to sue third parties in the superior court; under *Prob.C. 17000*, the probate department has exclusive jurisdiction.

Atascadero v. Merrill Lynch (1998) 68 C.A.4th 445, 80 C.R.2d 329, citing the text, arose from improper investments resulting in the bankruptcy of Orange County. The county was the trustee of an investment trust administered on behalf of various public entities, including plaintiffs. Defendant was the broker and financial advisor. The investment scheme collapsed, the county filed for bankruptcy protection, and plaintiffs suffered large losses. The county sued defendant in bankruptcy court, and entered into a settlement with the investment participants, who could either settle with the county by releasing their claims against the county and assigning to it any claims against third parties (Option A) or choose not to waive their rights and proceed directly on claims against the county and third parties (Option B). The Option B plaintiffs then sued the county, and the resulting settlement recognized their rights to proceed directly against third parties. These plaintiffs then brought the present action. Defendant demurred on the ground that, because the county was already suing defendant in a separate action, plaintiffs, as beneficiaries of the trust, were not the real parties in interest and lacked standing to pursue causes of action against defendant for injury to trust property. *Held*, judgment for defendant on demurrer reversed; plaintiffs could sue defendant directly.

(a) *Trust law*. Generally the trustee is the real party in interest with legal title to any cause of action on behalf of the trust. However, trust beneficiaries may sue a third party directly where the third party participates in a breach of a fiduciary duty by the trustee. (68 C.A.4th 462, citing *Rest.2d*, *Trusts* §326, Comment a, and *Pierce*.) But, the right to sue the third party directly is limited to situations where the third party's participation was both active and for the purpose of advancing that party's own interests or financial advantage. (68 C.A.4th 463, 464.)

(b) *Settlements*. Both settlements here explicitly preserved plaintiffs' rights to pursue direct claims against third parties, while retaining the county's own right to assert claims for itself and Option A participants. The county's complaint against defendant indicated that it was asserting claims as the assignee of the Option A participants, and made no mention of asserting claims on behalf of the Option B participants. (68 C.A.4th 470.)

(c) *Federal bankruptcy law*. The bankruptcy court expressly approved the settlements in their entirety. Thus, the bankruptcy court ruled that plaintiffs have the right to pursue direct claims against defendant, and this determination is binding and *res judicata* in this action. (68 C.A.4th 476.) Federal bankruptcy law preempts any conflicting California trust law with regard to the debtor-creditor status of the county and trust depositors such as plaintiffs. For purposes of bankruptcy law, the county investment pool is a debtor, and a debtor-creditor relationship exists between the pool and its depositors, even though the pool is also a trust and the participants are trust beneficiaries. The bankruptcy court determined that, when a trustee-debtor controls assets consisting of commingled funds of the debtor and the trust itself, the assets are property of the debtor subject to the equitable jurisdiction of the bankruptcy court to ensure appropriate distribution to the debtor's general creditors. Because plaintiffs cannot trace the funds they invested, they have the status of general creditors of the county and the pool irrespective of the trust. Accordingly, plaintiffs' contractual rights to pursue claims directly against third parties has been specifically authorized and affirmed by the bankruptcy court itself, and those rights now have an independent basis in federal law, regardless of any conflicting principle of California trust law. (68 C.A.4th 477.)

(d) *Effect of same action by county*. As long as plaintiffs have adequately alleged breaches of duty by defendant owed *directly to themselves*, the fact that they are seeking recovery for the same monetary losses as the county is seeking in its own complaint on behalf of the Option A participants will not by itself prevent plaintiffs from pursuing this action separately. Because the county is proceeding against defendant as a debtor in bankruptcy on behalf of itself and the Option A participants only, the county's claims against defendant do not conflict with or overlap those of

plaintiffs in this action. (68 C.A.4th 479, 486.)

In *Wolf v. Mitchell, Silberberg & Knupp* (1999) 76 C.A.4th 1030, 90 C.R.2d 792, plaintiff, the beneficiary of a trust, sued defendant attorneys, who had advised the trustee, alleging active participation in the trustee's breach of the trust. *Held*, summary judgment for defendants reversed. Under *Pierce* and *Atascadero*, the complaint was sufficient to state a cause of action. Plaintiff alleged that defendants performed legal services intending to prevent plaintiff from discovering the dissipation of trust assets, advised him to waive his rights to accountings that would have revealed the trustee's wrongful conduct, made material misrepresentations of fact about the trust, and intended that he not learn of misconduct in order to increase their fees. (76 C.A.4th 1040.)

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CHAPTER XX - Trusts

Witkin Summary of California Law

IV. BENEFICIARIES

B. Spendthrift and Other Protective Trusts.

1. General Law and California Cases.

a. Nature and Validity of Spendthrift Trusts.

13 Witkin Sum. Cal. Law Trusts § 151

[§ 151] Nature and Validity of Spendthrift Trusts.

A *spendthrift trust* is created where the settlor gives property in trust for another, and provides that the beneficiary cannot assign or otherwise alienate his or her interest, and that it shall not be subject to the claims of the beneficiary's creditors. A few states hold it void as an objectionable restraint on alienation or liability. Most states uphold the arrangement, but there is wide variance in the limitations imposed by the statutes and case law. (See generally *Rest.3d, Trusts* §§57, 58, 59; 2A *Scott* §152; *Bogert* §221 et seq.; 21 *Cal. L. Rev.* 142; 22 *Cal. L. Rev.* 471; 40 *Cal. L. Rev.* 441; 44 *Cal. L. Rev.* 615; 61 *Harv. L. Rev.* 687 [provisions in life insurance settlements]; 63 *Harv. L. Rev.* 714; 72 *Harv. L. Rev.* 1185 [provisions in employees' profit sharing trusts]; 77 *Harv. L. Rev.* 845 [conflict of laws]; 7 *Hastings L. J.* 220; 23 *So. Cal. L. Rev.* 629; 34 *A.L.R.2d* 1335 [validity of spendthrift trust]; 14 *A.L.R.3d* 1437 [beneficiary's right to renounce before acceptance]; 76 *Am.Jur.2d* (2005 ed.), *Trusts* §94 et seq.)

The original California statutes contained no clear provisions on the subject. (See 28 *So. Cal. L. Rev.* 113.) But judicial decisions filled the gap, sustaining the device on the generally prevailing theory that the settlor is free to make any desired disposition of his or her property. (See *Seymour v. McAvoy* (1898) 121 C. 438, 442, 53 P. 946; *San Diego Trust & Savings Bank v. Heustis* (1932) 121 C.A. 675, 684, 10 P.2d 158; *Canfield v. Security-First Nat. Bank of Los Angeles* (1939) 13 C.2d 1, 11, 87 P.2d 830, *infra*, §155; *Jacks v. Monterey County Trust & Savings Bank* (1942) 20 C.2d 494, 502, 127 P.2d 532; *Leonardini v. Wells Fargo Bank* (1955) 131 C.A.2d 9, 14, 280 P.2d 81, *supra*, §94; *Estate of Johnston* (1967) 252 C.A.2d 923, 925, 60 C.R. 852; 21 *Cal. L. Rev.* 142; 22 *Cal. L. Rev.* 471; 27 *Cal. L. Rev.* 626; 40 *Cal. L. Rev.* 441; 23 *So. Cal. L. Rev.* 629.) Subject to restrictions, spendthrift provisions are now authorized by statute. (See *Prob.C.* 15300 et seq.; *infra*, §156 et seq.)

The usual spendthrift provision states that the interest shall be "free from the interference and control of creditors," and that the beneficiary "shall not anticipate by way of assignment." But no particular language is required, nor is it necessary that the trust instrument fully describe all of its incidents. In *Estate of De Lano* (1944) 62 C.A.2d 808, 812, 145 P.2d 672, the testator declared that he was creating a "spendthrift trust" for his daughters, for the purpose of preventing diversion of its principal or income to creditors' claims. *Held*, this was a valid spendthrift trust, despite the lack of an express provision against alienation by the beneficiary and the absence of a statement that the trust was for support of the beneficiaries. (62 C.A.2d 813; see *County Nat. Bank & Trust Co. of Santa Barbara v. Sheppard* (1955) 136 C.A.2d 205, 208, 215, 288 P.2d 880 [spendthrift trust in income only held sufficient]; 40 *Cal. L. Rev.* 448

[discussing different forms and sources of forms].) (For forms of spendthrift provisions, see C.E.B., 2 Will Drafting 3d, §27.1 et seq.; 17B Am.Jur. Legal Forms 2d (1995 ed.), §251:984.)

Although the beneficiary cannot actually alienate his or her interest, a beneficiary to whom the trust corpus is distributed on termination of the trust may, of course, dispose of it. (*Frazier v. Wasserman* (1968) 263 C.A.2d 120, 127, 69 C.R. 510.) An attempted assignment prior to that time gives the assignee no rights in the property or against the trustee, and the latter may deliver the property to the beneficiary in accordance with the terms of the trust. But the purported assignment is treated as a *contract* to assign, between the beneficiary and assignee, giving the latter the usual remedies for breach. (*Kelly v. Kelly* (1938) 11 C.2d 356, 363, 79 P.2d 1059, 1 Summary (10th), *Contracts*, §722; see 24 A.L.R.2d 1105 [transfer of interest in spendthrift trust by beneficiary]; 83 A.L.R.3d 1142 [validity and construction of beneficiary's arrangement for payment of sums as they become due].)

In *De Mille v. Ramsey* (1989) 207 C.A.3d 116, 254 C.R. 573, two daughters agreed to share equally whatever property they inherited from their mother, regardless of an unequal division under the mother's will. The mother's will left the bulk of the estate in a trust, containing spendthrift language, for defendant daughter. Plaintiff daughter sought to enforce the agreement. *Held*, the agreement was enforceable, and defendant was properly ordered to pay plaintiff one-half of all proceeds she received from the trust.

(a) *Kelly v. Kelly*, disapproving an assignee's lien on the proceeds of a spendthrift trust received by the beneficiary, is distinguishable. There, the settlor clearly intended to prevent the beneficiary from assigning his interest in advance of receipt. Here, though containing spendthrift language, the trust is not a spendthrift trust; the sole purpose of the spendthrift provision is to protect the trust from the creditors of defendant's estranged husband. Thus, the order enforcing the agreement does not frustrate the purposes of the trust and is "not inconsistent with the principles expressed in *Kelly*." (207 C.A.3d 125.)

(b) Enforcement of the agreement against defendant after trust funds are paid to her is also consistent with *Prob.C.* 15300 and 15301 (infra, §157), which "simply clarify prior law that restraints on the transfer of trust income or principal are valid." Here, defendant did not technically transfer any present interest in the trust. (207 C.A.3d 126.) In addition, because plaintiff does not hold a money judgment and is not seeking enforcement against the trustee, the procedures required by *C.C.P.* 709.010 and *Prob.C.* 15306.5 (infra, §164) are not applicable. (207 C.A.3d 127.)

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IV. BENEFICIARIES

B. Spendthrift and Other Protective Trusts.

1. General Law and California Cases.

b. Support and Discretionary Trusts.

13 Witkin Sum. Cal. Law Trusts § 152

[§ 152] Support and Discretionary Trusts.

A *trust for support* is one under which the trustee is to pay or apply no more than is necessary to educate or support the beneficiary. A *discretionary trust* is one that directs the trustee to pay or apply only what the trustee sees fit. (See *Rest.3d, Trusts* §50, Comment a, §60, Comment a; *Estate of Lackmann* (1958) 156 C.A.2d 674, 676, 320 P.2d 186, *infra*, §154; 2A Scott §§154, 155; Bogert §§228, 229; 76 Am.Jur.2d (2005 ed.), *Trusts* §108 et seq.)

A discretionary trust is similar to a spendthrift trust in keeping the interest initially free from creditors. If the beneficiary cannot compel the trustee to pay or apply any sum, an assignee or creditor of the beneficiary is in no better position. (See *Rest.3d, Trusts* §60, Comment e; 2A Scott §155.)

But there is one fundamental difference: If the trustee in the exercise of his or her discretion elects to pay or apply some amount of the trust income, the right to it vests in the beneficiary. The beneficiary may then assign it, and his or her creditors may then reach it. (See *Rest.3d, Trusts* §60 [transferee or creditor of beneficiary is entitled to receive or attach distributions trustee makes or is required to make in exercise of discretion after trustee has knowledge of transfer or attachment]; *Canfield v. Security-First Nat. Bank of Los Angeles* (1939) 13 C.2d 1, 12, 87 P.2d 830, *infra*, §155; 27 Cal. L. Rev. 626, 629.) If the trustee, after notice of the creditor's suit, pays the full income to the beneficiary, the trustee is personally liable to the creditor for the excess. (*Canfield v. Security-First Nat. Bank*, *supra*, 13 C.2d 30; see *Rest.3d, Trusts* §60, Comment b; 2A Scott §155; 27 Cal. L. Rev. 626.)

In *Di Maria v. Bank of California Nat. Assn.* (1965) 237 C.A.2d 254, 46 C.R. 924, W created an irrevocable trust of all her assets, naming defendant trustee. The entire income was payable to her for life, and the trustee had power to invade the corpus in its discretion if income from other sources was insufficient for her support. The following year W, represented by attorney D, sued unsuccessfully to cancel the trust. D then obtained a confession of judgment from W for \$ 10,498 for legal services in the action, and attempted to levy against the corpus of the trust. *Held*, not entitled. This was not an invalid spendthrift trust created by the settlor to defeat creditors, for there was no prohibition against alienation of the beneficiary's interest. Hence, plaintiff creditor, like the beneficiary, could reach only the income.

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1. General Law and California Cases.

c. No Spendthrift Trust for Settlor.

13 Witkin Sum. Cal. Law Trusts § 153

[§ 153] No Spendthrift Trust for Settlor.

The settlor cannot create a spendthrift trust in his or her own favor. "It is against public policy to permit a man to tie up his property in such a way that he can enjoy it but prevent his creditors from reaching it, and where the settlor makes himself a beneficiary of a trust any restraints in the instrument on the involuntary alienation of his interest are invalid and ineffective." (*Nelson v. California Trust Co. (1949) 33 C.2d 501, 202 P.2d 1021*; see *Prob.C. 15304*, infra, §160; *Rest.3d, Trusts §58*; 2A *Scott §156*; *Bogert §223*; 4 *Cal. L. Rev. 426*; 40 *Cal. L. Rev. 441*; 72 *Harv. L. Rev. 1185*; 3 *So. Cal. L. Rev. 75*; 34 *A.L.R.2d 1335* [validity of spendthrift trust]; 76 *Am.Jur.2d (2005 ed.)*, *Trusts §102*; cf. *Coughran v. First Nat. Bank (1937) 19 C.A.2d 152, 155, 64 P.2d 1013* [spendthrift trust in favor of one settlor and other beneficiaries, though invalid as to that settlor, may be good as to the other beneficiaries].)

In *McColgan v. Walter Magee (1916) 172 C. 182, 186, 155 P. 995*, an ordinary trust provided that three out of four beneficiaries could terminate it and that, upon termination, each should take one-fourth of the property. The beneficiaries agreed to terminate, and in their agreement attempted to create a spendthrift trust of the interest of one of them. *Held*, the latter's interest vested absolutely in him upon the termination of the trust, and the new trust was invalid.

In *Estate of Camm (1946) 76 C.A.2d 104, 172 P.2d 547*, the settlor created an inter vivos trust, with all income payable to the settlor for life, and on her death the income "together with any accrued, accumulated income" to go to her son for life. When she died, leaving an estate insufficient to pay a creditor's claim of \$ 540, the accumulated trust income was over \$ 2,000. The son claimed it absolutely as the remainderman. *Held*, the accumulated income was part of decedent settlor's estate, and subject to the creditor's claim. The court thought that the son's contention attributed an unnecessarily dishonest intention to the settlor, but that if this were in fact the correct construction of the instrument, the trust would be unenforceable on two grounds: (a) one cannot place property or income beyond reach of creditors while retaining the right to receive and use it; (b) vesting of the assets in the decedent's son so as to render the estate insolvent at her death would be a fraudulent conveyance (see 8 *Cal. Proc. (4th)*, *Enforcement of Judgment*, §454). (76 *C.A.2d 112.*)

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Fraudulent conveyance:

Cross-Reference: 8 Cal. Proc. (5th), *Enforcement of Judgment*, §488 et seq.



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1. General Law and California Cases.
d. Rights of Favored Creditors.

13 Witkin Sum. Cal. Law Trusts § 154

[§ 154] Rights of Favored Creditors.

(1) *General Law.* In a number of jurisdictions, by statute or case law, certain favored creditors may reach the beneficiary's interest. The Restatement enumerates (though not by way of limitation) three types of enforceable claims: (a) by a child, spouse, or former spouse for support; (b) for necessary services or supplies provided to the beneficiary; (c) for services or supplies provided for the protection of the beneficiary's interest in the trust. (*Rest.3d, Trusts* §59; see 2A Scott §157; Bogert §227; 43 *Harv. L. Rev.* 63; 44 *Cal. L. Rev.* 615 [alimony]; 7 *Hastings L. J.* 220 [same]; 91 *A.L.R.2d* 262 [trust income or assets as subject to claim against beneficiary for alimony, maintenance, or child support]; 76 *Am.Jur.2d* (2005 ed.), *Trusts* §117 et seq.) The Restatement also recognizes that federal or state law may provide special status for governmental claims. (*Rest.3d, Trusts* §59, Comment a.)

(2) *California Law.* Originally California did not recognize exceptions to the immunity. Thus, in *San Diego Trust & Savings Bank v. Heustis* (1932) 121 C.A. 675, 683, 10 P.2d 158, the interest of the beneficiary was held immune from the claims of a wife under a separate maintenance decree. (See 21 *Cal. L. Rev.* 23, 142; 40 *Cal. L. Rev.* 447.) In *Estate of Edwards* (1932) 217 C. 25, 28, 17 P.2d 116, the interest under a testamentary spendthrift trust was held not subject to the claims of the estate based on debts that had been owed to the testator. (See 21 *Cal. L. Rev.* 402; 6 *So. Cal. L. Rev.* 347; cf. *County Nat. Bank & Trust Co. of Santa Barbara v. Sheppard* (1955) 136 C.A.2d 205, 217, 288 P.2d 880, *supra*, §143 [distinguishing *Edwards* and holding that trustee's right of retainer could be exercised against beneficiary's interest in corpus because spendthrift clause only applied to income].)

But in *Estate of Lackmann* (1958) 156 C.A.2d 674, 320 P.2d 186, the court applied the *necessaries* exception in an extreme case. The testamentary trust (termed spendthrift by the court) gave the trustee complete discretion to provide for the support of the testator's son G. G was committed to the state hospital for the mentally incompetent, and the state demanded payment of his expense. The trustee contended that the state was just a creditor who could not reach the assets of a discretionary or spendthrift trust, and that the trustee was entitled to determine that G was receiving adequate support and was therefore not in need of trust funds. *Held*, the trust estate was liable. (a) Welf.C. 19 (as it then provided), former Welf.C. 6650 (now Welf.C. 7275), and former Welf.C. 6655 (now Welf.C. 7279) made it clear that the state provides only for persons in need, not those with resources such as the trust for G; and although the statutes refer only to a *guardian* of an incompetent, the same rule should apply to a *trustee* for an incompetent. (b) The beneficiary's equitable interest in a trust is an "estate of such mentally ill person" within the meaning of former Welf.C.

6650. (c) The interest of a beneficiary in a spendthrift trust can be reached to satisfy a claim for necessities, including the claim of a public agency for support of an insane beneficiary in a public institution. (156 C.A.2d 679, citing the Restatement.)

Under the Trust Law, claims for child and spousal support (*Prob.C. 15305*, infra, §161), public support (*Prob.C. 15306*, infra, §162), and restitution for commission of a felony (*Prob.C. 15305.5*, infra, §163) enjoy favored status.

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1. General Law and California Cases.
e. Right of General Creditors.

13 Witkin Sum. Cal. Law Trusts § 155

[§ 155] Right of General Creditors.

Under former C.C. 859, where a trust was created to receive rents and profits and no valid direction for accumulation was given, any surplus beyond the sum necessary for the *education and support* of the person for whose benefit the trust was created, was liable to the claims of that person's creditors. The statute was applied to spendthrift, discretionary, and support trusts, with the result that any income in excess of the beneficiary's needs could be reached by the beneficiary's creditors. (See *Estate of Setrakian* (1960) 178 C.A.2d 833, 836, 3 C.R. 444; *Estate of Lawrence* (1968) 267 C.A.2d 77, 83, 72 C.R. 851 [creditor who offered no evidence did not sustain burden of proof to show surplus income]; 27 Cal. L. Rev. 626; 40 Cal. L. Rev. 442; 23 So. Cal. L. Rev. 629; 36 A.L.R.2d 1215 [surplus income as subject to claims of creditors]; 76 Am.Jur.2d (2005 ed.), *Trusts* §114.)

In *Magner v. Crooks* (1903) 139 C. 640, 642, 73 P. 585, the court approved the New York theory that the "station in life" of the beneficiary would be considered, so that the amount needed for support and therefore immune from creditors' claims would be affected by the comparative wealth and past mode of life of the beneficiary. (See 27 Cal. L. Rev. 626; 40 Cal. L. Rev. 446; 23 So. Cal. L. Rev. 629.)

In *Alvis v. Bank of America* (1949) 95 C.A.2d 118, 122, 212 P.2d 608, the beneficiary of a spendthrift trust, after an arrest, jumped bail and was never heard from again. His creditor, the bondsman, was allowed to reach the accumulated income. The creditor did not have to prove the surplus amount over the beneficiary's needs, for none of the income had ever been used, i.e., it was all surplus. (See 23 So. Cal. L. Rev. 629.)

In *Canfield v. Security-First Nat. Bank of Los Angeles* (1939) 13 C.2d 1, 87 P.2d 830, the testator left \$ 900,000 in trust for his son Charles, the trustee being instructed to pay \$ 1,200 per year *and as much more* as the trustee in its *absolute discretion* considered advisable, up to the full income. For years the trustee paid the full income, \$ 30,000 per year. Plaintiff, the divorced wife of the beneficiary, sought to reach surplus income. The lower court determined that the entire \$ 30,000 was necessary for education and support, following the "station in life" theory. *Held*, the sum was excessive; the amount "is not to be measured by his ability to spend" but by his reasonable needs; and these "do not include extravagances or luxuries, nor the expenses for lavish entertainment, nor gambling losses." (13 C.2d 28.) (See 27 Cal. L. Rev. 626; 40 Cal. L. Rev. 446.)

But the foregoing decision merely created a desirable precedent; it accomplished nothing in the particular case. The trustee had absolute discretion to allocate income for support to the son Charles and his sister Laura. In *Estate of Canfield* (1947) 80 C.A.2d 443, 181 P.2d 732, after the Supreme Court decision, the trial court determined that \$ 14,500 was necessary for Charles' support, and that the balance of the income allocated to him should be paid to his creditors. In 1945, a successor trustee changed the allocations so as to give Charles only the amount adjudged necessary for his support (\$ 14,500), and the entire balance (about \$ 16,000) to Laura, who had previously received only up to \$ 9,000 a year, and whose needs were not consulted in the new division. Charles' judgment creditor challenged this act by objecting to the settlement of the trustee's account. *Held*, the account was properly settled. (a) Because the trustee had "absolute discretion," his acts were subject to control only for abuse. The inquiry is always "whether the trustee acted in the state of mind contemplated by the trustor," and the soundness of his judgment is not open to question. (b) The primary purpose of the trustor was to prevent dissipation of the property and income among the creditors of Charles, and to accomplish this purpose he established both a spendthrift and a discretionary trust. "For the trustee to allocate the income between the beneficiaries so as to prevent the lien of a creditor of the son from attaching is exactly what the trustor contemplated that the administrator of his trust should do." (80 C.A.2d 450.) (But see *Canfield v. Security-First Nat. Bank of Los Angeles*, *supra*, 13 C.2d 17: "No matter what the desires of the trustor may be, he is prohibited from creating a trust of the type here involved that will successfully place the surplus income beyond the reach of the beneficiary's creditors.")

Under the Trust Law, surplus income may be reached to satisfy creditors' claims. (See *Prob.C. 15307*, *infra*, §165.)

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2. Law Revision Commission Report.

13 Witkin Sum. Cal. Law Trusts § 156

[§ 156] Law Revision Commission Report.

The California Law Revision Commission (18 Cal. Law Rev. Com. Reports, p. 596) concluded that "[e]xisting California statutory law contains an incomplete and confusing statement of the California law relating to spendthrift and other protective trusts." The Commission recommended enactment of a new statute based mainly on the Trusts Restatement, to include 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. 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 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."

"(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. 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."

"(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. 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."

"(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. 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. Claims for reimbursement may arise when a person is supported in a public institution or is the recipient of welfare outside an institution. 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 cannot compel payment. However, in any of these situations the court has discretion 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. 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. 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."

"(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) *Repeal of wage garnishment exemption as applied to trusts.* The Commission recommends the repeal of the part of *Code of Civil Procedure Section 709.010* that permits a creditor to reach approximately the same amount of a periodic payment from a trust as could be reached on a like amount of earnings under the wage garnishment law. Although the wage garnishment provisions are widely used with little difficulty in collecting judgments, the Commission has been informed that the provision permitting a creditor to reach approximately the same amount of a periodic payment from a trust has caused difficulty and confusion in the probate courts. There is also uncertainty concerning the meaning of 'periodic payments' upon which turns the wage garnishment exemption of *Section 709.010*. The Commission also is informed that creditors not infrequently file a petition in the probate court to reach a portion of the periodic payments from the trust and, because the trust beneficiary seldom appears to oppose the proceeding, the creditor obtains an order that takes so much of the periodic payments that the beneficiary is left without sufficient resources to obtain the necessities of life." (18 Cal. Law Rev. Com. Reports, pp. 599-603.)

These recommendations resulted in the enactment of *Prob.C. 15300* et seq. (See *infra*, §157 et seq.)

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3. Restraints on Transfer.

13 Witkin Sum. Cal. Law Trusts § 157

[§ 157] Restraints on Transfer.

(1) *Transfer of Income.* Except as provided in *Prob.C. 15304-15307* (infra, §160 et seq.), "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." (*Prob.C. 15300.*)

(2) *Transfer of Principal.* After an amount of principal has become due and payable to the beneficiary under the trust instrument, upon petition to the court under *C.C.P. 709.010* 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." (*Prob.C. 15301(b).*)

Except as provided in *Prob.C. 15301(b)* and in *Prob.C. 15304-15307* (infra, §160 et seq.), "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." (*Prob.C. 15301(a).*) This rule is consistent with *Seymour v. McAvoy* (1898) 121 C. 438, 53 P. 946, *San Diego Trust & Savings Bank v. Heustis* (1932) 121 C.A. 675, 10 P.2d 158, and *Coughran v. First Nat. Bank* (1937) 19 C.A.2d 152, 64 P.2d 1013. (Law Rev. Com. Comment.)

(3) *Effect of Disclaimer.* "A disclaimer or renunciation by a beneficiary of all or part of his or her interest under a trust" is not a transfer for purposes of *Prob.C. 15300* or *15301*. (*Prob.C. 15309.*)

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4. Trust for Support.

13 Witkin Sum. Cal. Law Trusts § 158

[§ 158] Trust for Support.

Except as provided in *Prob.C. 15304-15307* (infra, §160 et seq.), "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." (*Prob.C. 15302.*)

"[T]he 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." (Law Rev. Com. Comment.)

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SUPPLEMENT: [This section is current through the latest supplement]



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5. Discretionary Trust.

13 Witkin Sum. Cal. Law Trusts § 159

[§ 159] Discretionary Trust.

"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." (*Prob.C. 15303(a).*)

If the trustee has knowledge of the transfer of the beneficiary's interest or has been served with process in a proceeding under *C.C.P. 709.010* 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 "impairs the right" of the transferee or creditor. This provision does not apply if the beneficiary's interest in the trust is subject to a valid restraint on transfer under *Prob.C. 15300* or *15301* (*supra*, §157). (*Prob.C. 15303(b).*)

Prob.C. 15303 applies regardless of whether the trust instrument provides a standard for the exercise of the trustee's discretion. (*Prob.C. 15303(c).*)

Nothing in *Prob.C. 15303* 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." (*Prob.C. 15303(d).*)

The Comment covers several points:

(1) *Prob.C. 15303(a)* and *15303(b)* are consistent with *Canfield v. Security-First Nat. Bank of Los Angeles* (1939) 13 C.2d 1, 87 P.2d 830, *supra*, §155, and *Alvis v. Bank of America* (1949) 95 C.A.2d 118, 122, 212 P.2d 608, *supra*, §155.

(2) *Prob.C. 15303(c)* differs from *Rest.2d, Trusts §155*, which applies only where the trustee has "uncontrolled discretion." Under *Prob.C. 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."

SUPPLEMENT: [This section is current through the latest supplement]
See *Rest.3d, Trusts* §60 [transfer or attachment of discretionary interests].



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6. Where Settlor Is a Beneficiary.

13 Witkin Sum. Cal. Law Trusts § 160

[§ 160] Where Settlor Is a Beneficiary.

"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." (*Prob.C. 15304(a).*)

"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." (*Prob.C. 15304(b).*)

The Law Revision Commission Comment points out that one who furnishes consideration for the creation of a trust is a settlor, citing *McColgan v. Walter Magee* (1916) 172 C. 182, 155 P. 995, *supra*, §153 [beneficiary transferred assets into trust], and *Parscal v. Parscal* (1983) 148 C.A.3d 1098, 1104, 196 C.R. 462 [trust was created by the beneficiary's employer].

SUPPLEMENT: [This section is current through the latest supplement]



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a. Claims for Child or Spousal Support.

13 Witkin Sum. Cal. Law Trusts § 161

[§ 161] Claims for Child or Spousal Support.

"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." (*Prob.C. 15305(b)*.)

"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." (*Prob.C. 15305(c)*.) (See *Ventura County Dept. of Child Support Services v. Brown (2004) 117 C.A.4th 144, 155, 11 C.R.3d 489*, citing the text [under *Prob.C. 15305(c)*, court had authority to compel trustee of spendthrift trust to exercise discretion to satisfy enforceable child support judgment and pay ongoing child support obligations of trust beneficiary].)

Prob.C. 15305 applies to a support judgment notwithstanding any provision in the trust instrument. (*Prob.C. 15305(d)*.)

For this purpose, "support judgment" means a money judgment for support of the trust beneficiary's spouse or former spouse or minor child. (*Prob.C. 15305(a)*.)

The order is subject to modification. (*Prob.C. 15308*.)

The Law Revision Commission Comment to *Prob.C. 15305* deals with the purpose, scope, and effect of the section:

(1) To obtain relief under *Prob.C. 15305*, the judgment creditor under a support judgment must file a petition under *C.C.P. 709.010* (see 8 *Cal. Proc. (4th)*, *Enforcement of Judgment*, §313).

(2) "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. ... 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."

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SUPPLEMENT: [This section is current through the latest supplement]
Petition to enforce support judgment:

Cross-Reference: 8 Cal. Proc. (5th), Enforcement of Judgment, §321.



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b. Liability for Public Support.

13 Witkin Sum. Cal. Law Trusts § 162

[§ 162] Liability for Public Support.

Notwithstanding any provision in the trust instrument, if a California statute makes the beneficiary liable for reimbursement to the state or a local public entity for public support furnished to the beneficiary or to the beneficiary's spouse or minor child, upon petition to the court under *C.C.P. 709.010* 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." (*Prob.C. 15306(a)(1).*)

(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." (*Prob.C. 15306(a)(2).*)

(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." (*Prob.C. 15306(a)(3).*)

Prob.C. 15306(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." (*Prob.C. 15306(b).*) If, however, the trust results in the individual being ineligible for needed public social services under Welf. C. 10000 et seq., *Prob.C. 15306(b)* is not applicable and *Prob.C. 15306(a)* applies. (*Prob.C. 15306(b).*)

The order is subject to modification. (*Prob.C. 15308.*)

The Law Revision Commission Comment makes the following points:

(a) *Prob.C. 15306(a)* is generally consistent with prior California law, citing *Estate of Lackmann (1958) 156 C.A.2d 674, 320 P.2d 186*, supra, §154. This section "applies to reimbursement for public support provided in the form of aid 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. ... However, subdivision (a) ... 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."

(b) The limitation on the right of the public agency to reach the beneficiary's interest under *Prob.C. 15306(b)* "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." (See *37 U.C.L.A. L. Rev. 595* [discretionary trust for disabled person].)

SUPPLEMENT: [This section is current through the latest supplement]



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c. Restitution Judgment Against Convicted Felon.

13 Witkin Sum. Cal. Law Trusts § 163

[§ 163] Restitution Judgment Against Convicted Felon.

Prob.C. 15305.5 extends favored creditor status to the holder of "a judgment awarding restitution for the commission of a felony or a money judgment for damages incurred as a result of conduct for which the defendant was convicted of a felony." (*Prob.C. 15305.5(a)*.) The statute applies notwithstanding any provision in the trust instrument. (*Prob.C. 15305.5(d)*.) The judgment may be satisfied as follows:

(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, 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 restitution judgment out of all or part of those payments as they become due and payable, presently or in the future." (*Prob.C. 15305.5(b)*.)

(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, 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 restitution 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." (*Prob.C. 15305.5(c)*.)

SUPPLEMENT: [This section is current through the latest supplement]

In *Young v. McCoy* (2007) 147 C.A.4th 1078, 54 C.R.3d 847, plaintiff's brother was the beneficiary of a discretionary support trust, which gave the trustee discretion to determine the needs of the beneficiary. Plaintiff, the victim of attempted murder perpetrated by the brother, recovered a restitution judgment against the brother and sought an order under *Prob.C. 15305.5(c)* to require defendant trustee to satisfy the judgment from the assets of the trust. Defendant resisted, contending that the beneficiary's needs were satisfied from other sources (state prison). *Held*, plaintiff could not compel payment from the trust. The statutory language "clearly and unambiguously" limits the court's power to ordering the trustee to satisfy a restitution judgment only from payments the trustee first determines to make "pursuant to the exercise of the trustee's discretion." (147 C.A.4th 1084.) If the court could compel the satisfaction of the judgment despite the trustee's determination not to make a payment to the beneficiary, the statutory language about the exercise of the trustee's discretion would be surplusage. (147 C.A.4th 1084.) Here, the settlor gave the trustee broad discretion to determine the beneficiary's needs, and there is no evidence of bad faith or unreasonable conduct, which would be

required to find an abuse of discretion. (*147 C.A.4th 1087*, citing the text.)



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8. Rights of General Creditors.
a. In General.

13 Witkin Sum. Cal. Law Trusts § 164

[§ 164] In General.

(1) *Order To Satisfy Judgment.* Notwithstanding a restraint on transfer of the beneficiary's interest in the trust under *Prob.C. 15300* or *15301* (supra, §157), and subject to the limitations of *Prob.C. 15306.5*, upon a judgment creditor's petition under *C.C.P. 709.010*, "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." (*Prob.C. 15306.5(a)*.) The order may be modified. (*Prob.C. 15308*.)

(2) *Limitations.* An order under *Prob.C. 15306.5* "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." (*Prob.C. 15306.5(b)*); see *Prob.C. 15306.5(f)* [aggregate of all orders for satisfaction of money judgments against beneficiary's interest may not exceed 25% of the payment that otherwise would be made to or for beneficiary].) The order "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." (*Prob.C. 15306.5(c)*.)

(3) *Priority of Support Judgment.* An order for satisfaction of a support judgment under *Prob.C. 15305* has priority over an order to satisfy a judgment under *Prob.C. 15306.5*. Any amount ordered to be applied to the satisfaction of a judgment under *Prob.C. 15306.5* must be reduced by the amount of an order for satisfaction of a support judgment under *Prob.C. 15305*, regardless of whether the order for satisfaction of the support judgment was made before or after the order under *Prob.C. 15306.5*. (*Prob.C. 15306.5(d)*.)

(4) *Acts of Trustee.* If the trust gives the trustee discretion over the payment of either principal or income of a trust, or both, nothing in *Prob.C. 15306.5* "affects or limits that discretion in any manner." The trustee has no duty to oppose a petition to satisfy a judgment 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 *Prob.C. 15306.5*. (*Prob.C. 15306.5(e)*.)

(5) *Law Revision Commission Comment.* The Comment to *Prob.C. 15306.5* makes the following observations:

(a) The provisions in subdivisions (b), (c) and (d) are comparable, respectively, to wage garnishment provisions in *C.C.P. 706.050*, *706.051*, and *706.030*.

(b) Although support judgments may be enforced under *Prob.C. 15306.5*, support creditors will generally use *Prob.C. 15305*, which is not subject to the limitations of *Prob.C. 15306.5*.

SUPPLEMENT: [This section is current through the latest supplement]



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8. Rights of General Creditors.
b. Reaching Surplus Income.

13 Witkin Sum. Cal. Law Trusts § 165

[§ 165] Reaching Surplus Income.

Notwithstanding a restraint on transfer of a beneficiary's interest in the trust under *Prob.C. 15300* or *15301* (supra, §157), "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." (*Prob.C. 15307*.) On the judgment creditor's petition under *C.C.P. 709.010*, "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." (*Prob.C. 15307*.) The order may be modified. (*Prob.C. 15308*.)

The Law Revision Commission Comment to *Prob.C. 15307* describes its effect:

(1) An ordinary creditor may reach income under limited circumstances by filing a petition under *C.C.P. 709.010(b)* (see 8 *Cal. Proc. (4th)*, *Enforcement of Judgment*, §313), and the court may make a continuing order for application of future payments to satisfaction of the judgment.

(2) *Prob.C. 15307* applies only to a trust in which transfer of the beneficiary's interest is restrained. It 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 *C.C.P. 709.010*.

(3) A station-in-life test is used to determine the amount necessary for education and support, citing *Canfield v. Security-First Nat. Bank of Los Angeles* (1939) 13 *C.2d* 1, 87 *P.2d* 830, supra, §155, and *Magner v. Crooks* (1903) 139 *C.* 640, 73 *P.* 585, supra, §155. "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. ... 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."

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SUPPLEMENT: [This section is current through the latest supplement]

Petition to enforce money judgment:

Cross-Reference: 8 Cal. Proc. (5th), *Enforcement of Judgment*, §321.



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A. In General.
1. Early Development.

13 Witkin Sum. Cal. Law Trusts § 166

[§ 166] Early Development.

(1) *Nature of Problem.* A trust may be created to pay the income of property to one beneficiary for life or a term of years, and thereafter to give the corpus or principal to another. (See *Rest.2d, Trusts* §233 et seq.; 3A Scott §233 et seq.; Bogert §816 et seq.; C.E.B., 2 Will Drafting 3d §30.8.) In such a case, it is often necessary to determine whether certain kinds of enhancement in value represent *income* (going to the life tenant) or *principal* (going to the remainder beneficiary). The rules governing this apportionment (except where otherwise provided in the trust instrument) were formerly in great conflict. (See generally 76 A.L.R.2d 162 [apportionment of gains and enhanced value between income and remainder beneficiaries]; 51 Am.Jur.2d (2000 ed.), *Life Tenants and Remaindermen* §122 et seq.) The same problem of apportionment exists as to expenses. (See *Rest.2d, Trusts* §§233, 237; 3A Scott §§233, 237; Bogert §801 et seq.)

(2) *Original Act.* The original Principal and Income Act, completed in 1931 (see 7B U.L.A. (Master Ed.), p. 242), was adopted in California in 1941 with substantial modifications. It brought considerable stability to the rules governing apportionment. (See 28 So. Cal. L. Rev. 121.)

(3) *1962 Revision.* A revised version of the Act was approved in 1962. The revision was undertaken mainly because of the development of new forms of investment property, particularly in the field of corporate distributions and mineral resources. (See Com. Note, 7B U.L.A. (Master Ed.), p. 194.) California repealed the original Act and adopted the revised version with some changes in 1967 (former C.C. 730 et seq.). The original Act was not retroactive. (*Estate of Page* (1962) 199 C.A.2d 550, 553, 18 C.R. 886.) To avoid difficulties confronting trustees administering several trusts under different rules, the 1962 Act was made applicable to "any trust whether established before or after" its operative date. (Former C.C. 730.15; see 69 A.L.R.2d 1137 [retroactive application].) The Act's provisions were transferred to the Probate Code in 1986. (Former Prob.C. 16300 et seq.)

(4) *Case Law.* Despite the substantial changes effected by the 1997 Revised Uniform Principal and Income Act (infra, §168), some of the cases decided under prior law remain relevant. (See *Estate of Bothwell* (1944) 65 C.A.2d 598, 604, 151 P.2d 298 [underproductive property; see infra, §185]; *Estate of Hill* (1957) 149 C.A.2d 779, 784, 309 P.2d 39 [apportionment of receipts during trust administration; see infra, §182 et seq.]; *Getty v. Getty* (1972) 28 C.A.3d 996, 1004, 105 C.R. 259 [allocation of stock dividends to principal; see infra, §178]; *Estate of Wetherby* (1983) 150 C.A.3d 225, 230, 197 C.R. 689 [same]; *Estate of Ivey* (1994) 22 C.A.4th 873, 883, 884, 28 C.R.2d 16 [payment of sanctions for

frivolous objection to trustee's accounting out of future income distributions to which objecting beneficiary would otherwise be entitled].)

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SUPPLEMENT: [This section is current through the latest supplement]



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A. In General.
2. Adoption of Revised Act.

13 Witkin Sum. Cal. Law Trusts § 167

[§ 167] Adoption of Revised Act.

(1) *Uniform Act.* The National Conference of Commissioners on Uniform State Laws adopted a new Uniform Principal and Income Act in 1997. (See 7B U.L.A. (Master Ed.), p. 131.) The Prefatory Note to the Uniform Act (p. 132) explains that the Act deals with four questions affecting the rights of beneficiaries:

(a) "How is income earned during the probate of an estate to be distributed to trusts and to persons who receive outright bequests of specific property, pecuniary gifts, and the residue?"

(b) "When an income interest in a trust begins (i.e., when a person who creates the trust dies or when she transfers property to a trust during life), what property is principal that will eventually go to the remainder beneficiaries and what is income?"

(c) "When an income interest ends, who gets the income that has been received but not distributed, or that is due but not yet collected, or that has accrued but is not yet due?"

(d) "After an income interest begins and before it ends, how should its receipts and disbursements be allocated to or between principal and income?"

(2) *Law Revision Commission Report.* The California Law Revision Commission recommended adoption of the new Uniform Act with substantive and technical revisions aimed at coordinating the Uniform Act with other California statutes, such as the Uniform Prudent Investor Act (*Prob.C. 16045* et seq.; see *supra*, §77 et seq.) and the statutes governing interest and income during administration (*Prob.C. 12000* et seq.; see 14 *Summary* (10th), *Wills and Probate*, §246), and "eliminating or restricting elements in the uniform act that could unfairly expose trustees to liability for breach of trust." (See 29 Cal. Law Rev. Com. Reports, pp. 245 et seq., 256.) The Commission's comments to the new law are cited throughout this discussion. The Commission recommended two significant changes in the Uniform Act adopted by the National Conference:

(a) "The most controversial feature of the uniform act has been the power to adjust between principal and income accounts. Institutional trustees are concerned that the standards for exercise of the discretion are too complicated and vague, resulting in exposure to litigation over whether the discretion to adjust should or should not have been exercised.

The proposed law addresses this concern by removing the mandatory factors the trustee would have to consider before exercising the power to adjust and providing a streamlined procedure for giving notice of proposed action to beneficiaries before making the adjustment." (29 Cal. Law Rev. Com. Reports, p. 257.)

(b) "[T]he uniform act contains some statements of general fiduciary principles that would duplicate or overlap general provisions in the California Trust Law, or perhaps even result in substantive changes." A provision of the Uniform Act "overlaps the duty of impartiality in the Trust Law and adds a 'fair and reasonable' standard that is not explicitly provided in California statutory law. Having a convenient statement of the standard in the principal and income law is useful, particularly since it applies to both wills and trusts, but it needs to be consistent with the general Trust Law rule. Accordingly, the proposed law eliminates the 'fair and reasonable' statement to avoid any implication that some special duty applies in principal and income matters." (29 Cal. Law Rev. Com. Reports, p. 257.)

(3) *Enactment and Scope*. In 1999, California repealed the previous Principal and Income Act (former Prob.C. 16300 et seq.), adopted the new Uniform Act (Prob.C. 16320 et seq.), and made a number of conforming amendments. The Act may be cited as the Uniform Principal and Income Act. (Prob.C. 16320.) It "applies to every trust or decedent's estate existing on or after January 1, 2000, except as otherwise expressly provided in the trust or will or in the Act." (Prob.C. 16339.) (See generally Cal Transactions Forms, 3 Estate Planning §§12:60 et seq., 12:208 et seq.; 31 *McGeorge L. Rev.* 463.) The Act applied only to trusts and decedent's estates. Transactions by which a principal is established without the interposition of a trust are covered by the Legal Estates Principal and Income Law, C.C. 731 et seq., enacted in 1968. (See 12 *Summary* (10th), *Real Property*, §170.)

(4) *Statutory Framework*. The Uniform Act consists of the following articles:

(a) Article 1. Short Title and Definitions. (See *infra*, §169.)

(b) Article 2. General Provisions and Fiduciary Duties. (See *infra*, §170 et seq.)

(c) Article 3. Decedent's Estate or Terminating Income Interest. (See *infra*, §§174, 175.)

(d) Article 4. Apportionment at Beginning and End of Income Interest. (See *infra*, §§176, 177.)

(e) Article 5.1. Allocation of Receipts During Administration of Trust: Receipts From Entities. (See *infra*, §§178, 179.)

(f) Article 5.2. Allocation of Receipts During Administration of Trust: Receipts Not Normally Apportioned. (See *infra*, §§180, 181.)

(g) Article 5.3. Allocation of Receipts During Administration of Trust: Receipts Normally Apportioned. (See *infra*, §182 et seq.)

(h) Article 6. Allocation of Disbursements During Administration of Trust. (See *infra*, §189 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Enactment and Scope*. See 39 *U.S.F. L. Rev.* 261 [statutory techniques for balancing interests of current and future trust beneficiaries].



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A. In General.
3. Major Changes From Prior Law.

13 Witkin Sum. Cal. Law Trusts § 168

[§ 168] Major Changes From Prior Law.

The Prefatory Note to the Uniform Act (see 7B U.L.A. (Master Ed.), p. 132 et seq.) and the California Law Revision Commission Recommendation (quoting the Prefatory Note) (see 29 Cal. Law Rev. Com. Reports, p. 254 et seq.) highlight the major changes in the new Uniform Act.

(1) *Situations Not Covered by Prior Act.*

(a) The application of the probate administration rules to revocable living trusts after the settlor's death and to other terminating trusts. (See *Prob.C. 16340* et seq., *infra*, §174.)

(b) The payment of interest or some other amount on the delayed payment of an outright pecuniary gift made pursuant to a trust agreement instead of a will when the agreement or state law does not provide for such a payment. (See *Prob.C. 16340(b)*, *infra*, §174.)

(c) The allocation of net income from partnership interests acquired by the trustee other than from a decedent (the prior Act dealt only with partnership interests acquired from a decedent). (See *Prob.C. 16350*, *infra*, §178.)

(d) An "unincorporated entity" concept has been introduced to deal with businesses operated by a trustee, including farming and livestock operations, and investment activities in rental real estate, natural resources, timber, and derivatives. (See *Prob.C. 16352*, *infra*, §179.)

(e) The allocation of receipts from discount obligations such as zero-coupon bonds. (See *Prob.C. 16357(b)*, *infra*, §181.)

(f) The allocation between principal and income of net income from harvesting and selling timber. (See *Prob.C. 16364*, *infra*, §184.)

(g) The allocation between principal and income of receipts from derivatives, options, and asset-backed securities. (See *Prob.C. 16366*, *16367*, *infra*, §§186, 187.)

(h) Disbursements made because of environmental laws. (See *Prob.C. 16371(a)(7)*, *infra*, §190.)

(i) Income tax obligations resulting from the ownership of S corporation stock and interests in partnerships. (See *Prob.C. 16374*, *infra*, §192.)

(j) The power to make adjustments between principal and income to correct inequities caused by tax elections or peculiarities in the way the fiduciary income tax rules apply. (See *Prob.C. 16375*, *infra*, §192.)

(2) Clarifications and Changes in Existing Act.

(a) An income beneficiary's estate is entitled to receive only net income actually received by a trust before the beneficiary's death and not items of accrued income. (See *Prob.C. 16347*, *infra*, §177.)

(b) Income from a partnership is based on actual distributions from the partnership, in the same manner as corporate distributions. (See *Prob.C. 16350*, *infra*, §178.)

(c) Distributions from corporations and partnerships that exceed 20% of the entity's gross assets are principal whether or not intended by the entity to be a partial liquidation. (See *Prob.C. 16350(d)(1)(B)*, *infra*, §178.)

(d) Deferred compensation is dealt with in greater detail in a separate section. (See *Prob.C. 16361*, *infra*, §182.)

(e) The former rule for property subject to depletion (patents, copyrights, royalties, and the like), which authorized an allocation of up to 5% of the asset's inventory value to income and the balance to principal, has been replaced by a rule that allocates 10% of the amounts received to income and 90% to principal. (See *Prob.C. 16362*, *infra*, §183.)

(f) The percentage used to allocate amounts received from oil and gas has been changed. 90% of those receipts are allocated to principal and 10% to income. (See *Prob.C. 16363*, *infra*, §184.)

(g) The unproductive property rule has been eliminated for trusts other than marital deduction trusts. (See *Prob.C. 16365*, *infra*, §185.)

(h) Charging depreciation against income is no longer mandatory, and is left to the discretion of the trustee. (See *Prob.C. 16372*, *infra*, §191.)

(3) Coordination With Uniform Prudent Investor Act. The law of trust investment has been modernized by the adoption of the Uniform Prudent Investor Act (1994) and the Restatement (Third) of Trusts: Prudent Investor Rule (1992). "This revision deals conservatively with the tension between modern investment theory and traditional income allocation. The starting point is to use the traditional system. If prudent investing of all the assets in a trust viewed as a portfolio and traditional allocation effectuate the intent of the settlor, then nothing need be done. The Act, however, helps the trustee who has made a prudent, modern portfolio-based investment decision that has the initial effect of skewing return from all the assets under management, viewed as a portfolio, as between income and principal beneficiaries. The Act gives that trustee a power to reallocate the portfolio return suitably. To leave a trustee constrained by the traditional system would inhibit the trustee's ability to fully implement modern portfolio theory." (29 Cal. Law Rev. Com. Reports, p. 255.)

SUPPLEMENT: [This section is current through the latest supplement]

(3) Coordination With Uniform Prudent Investor Act. The original volume of the Third Restatement of Trusts, covering the prudent investor rule, was superseded in 2007. The topic, without substantive change, is now covered in Volume 3 of Rest.3d, Trusts, in Chapter 17: Investment of Trust Funds (The "Prudent Investor Rule"), §§90-92.



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A. In General.
4. Definitions.

13 Witkin Sum. Cal. Law Trusts § 169

[§ 169] Definitions.

The following definitions govern the construction of the Uniform Act (*Prob.C. 16321*):

(1) "Accounting period" means a calendar year, unless another 12-month period is selected by a fiduciary. The term includes a portion of a 12-month period that begins when an income interest begins or ends when an income interest ends. (*Prob.C. 16322.*)

(2) "Fiduciary" means a personal representative or a trustee. (*Prob.C. 16323.*)

(3) "Income" means money or property a fiduciary receives as "current return from a principal asset." The term includes a portion of the receipts from a sale, exchange, or liquidation of a principal asset, to the extent provided in *Prob.C. 16350* (*infra*, §178), *Prob.C. 16355* (*infra*, §180), or *Prob.C. 16360* (*infra*, §188). (*Prob.C. 16324.*)

(4) "Income beneficiary" means a person to whom net income of a trust is or may be payable. (*Prob.C. 16325.*)

(5) "Income interest" means the right of an income beneficiary to receive all or part of net income, whether the trust requires it to be distributed or authorizes it to be distributed in the trustee's discretion. (*Prob.C. 16326.*)

(6) "Mandatory income interest" means the right of an income beneficiary to receive net income that the trust requires to be distributed. (*Prob.C. 16327.*)

(7) "Net income" means "the total receipts allocated to income during an accounting period minus the disbursements made from income during the accounting period," plus or minus transfers under the Uniform Act to or from income during the accounting period. (*Prob.C. 16328.*) The Law Revision Commission Comment notes that these transfers include transfers under the following code sections: *Prob.C. 16336(a)* (*infra*, §172), *Prob.C. 16364(b)* (*infra*, §184), *Prob.C. 16371(b)* (*infra*, §190), *Prob.C. 16372(b)* (*infra*, §191), *Prob.C. 16373(a)* (*infra*, §191), and *Prob.C. 16375(a)* (*infra*, §192).

The general definitions of the Probate Code may also be relevant, including the following:

(1) Beneficiary. (See *Prob.C. 24.*)

(2) Person. (See *Prob.C.* 56.)

(3) Personal representative. (See *Prob.C.* 58.)

(4) Property. (See *Prob.C.* 62.)

(5) Trust. (See *Prob.C.* 82.)

(6) Trustee. (See *Prob.C.* 84.)

The term "principal" is not defined "because it is not needed." (Law Rev. Com. Comment to *Prob.C.* 16324.) The same is true of the term "remainder beneficiary." (Law Rev. Com. Comment to *Prob.C.* 16325.)

West's Key Number Digest, Trusts k.4, 126

SUPPLEMENT: [This section is current through the latest supplement]

(7) *Net income*: *Prob.C.* 16328 was amended in 2005 to include a special definition of "net income" during any period in which a trust is being administered as a unitrust. (On conversion to unitrust, see Supp., *infra*, §171A.)



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A. In General.
5. Fiduciary Duties.

13 Witkin Sum. Cal. Law Trusts § 170

[§ 170] Fiduciary Duties.

(1) *In General. Prob.C. 16335* sets forth the general fiduciary duties governing allocating receipts and disbursements to or between principal and income under the Uniform Act.

(a) A fiduciary must administer a trust or estate in accordance with the trust or the will, even if there is a different provision in the Uniform Act. (*Prob.C. 16335(a)(1).*)

(b) A fiduciary may administer a trust or estate by the exercise of a discretionary power of administration given to the fiduciary by the trust or the will, "even if the exercise of the power produces a result different from a result required or permitted by" the Uniform Act; "no inference that the fiduciary has improperly exercised the discretion arises from the fact that the fiduciary has made an allocation contrary to" the Uniform Act. (*Prob.C. 16335(a)(2).*)

(c) The fiduciary must administer a trust or estate in accordance with the Uniform Act "if the trust or the will does not contain a different provision or does not give the fiduciary a discretionary power of administration." (*Prob.C. 16335(a)(3).*)

(d) The fiduciary must add a receipt or charge a disbursement to principal to the extent that the trust or the will and the Uniform Act do not provide a rule for allocating the receipt or disbursement to or between principal and income. (*Prob.C. 16335(a)(4).*)

(2) *Duty To Be Impartial.* In exercising a discretionary power of administration regarding a matter within the scope of the Uniform Act, whether granted by a trust, a will, or the Uniform Act, including a trustee's power to adjust under *Prob.C. 16336(a)* (*infra*, §172), the fiduciary must administer the trust or estate impartially, "except to the extent that the trust or the will expresses an intention that the fiduciary shall or may favor one or more of the beneficiaries." The exercise of discretion in accordance with the Uniform Act "is presumed to be fair and reasonable to all beneficiaries." (*Prob.C. 16335(b).*)

(3) *Law Revision Commission Comments.* The Law Revision Commission Comment makes the following points:

(a) *Prob.C. 16335(a)(4)* allocates receipts and disbursements to principal when there is no provision for a different allocation in the terms of the trust, the will, or the Uniform Act. This "preserves the income beneficiary's level of

income in the year it is allocated to principal, but thereafter will reduce the amount of income produced by the principal. Allocating to principal a receipt for which there is no provision will increase the income received by the income beneficiary in subsequent years, and will eventually, upon termination of the trust, also favor the remainder beneficiary. Allocating these items to principal implements the rule that requires a trustee to administer the trust impartially." However, if the trustee decides that an adjustment between principal and income is needed to enable the trustee to comply with *Prob.C. 16335(b)*, after considering the return from the portfolio as a whole, the trustee may make an appropriate adjustment under *Prob.C. 16336(a)*.

(b) Under *Prob.C. 16003* (supra, §65), a trustee is under a duty to deal impartially with multiple beneficiaries. "This rule applies whether the beneficiaries' interests in the trust are concurrent or successive. If the terms of the trust give the trustee discretion to favor one beneficiary over another, a court will not control the exercise of such discretion except to prevent the trustee from abusing it. ... The fact that a person is named an income beneficiary or a remainder beneficiary is not by itself an indication of partiality for that beneficiary."

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Duty To Be Impartial.* *Prob.C. 16335(b)* was amended in 2005 to also apply to the trustee's power to convert the trust to or from a unitrust or change the unitrust payment percentage under *Prob.C. 16336.4* et seq. (Supp., infra, §171A).



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A. In General.
6. Notice of Proposed Action.

13 Witkin Sum. Cal. Law Trusts § 171

[§ 171] Notice of Proposed Action.

Prob.C. 16337 authorizes notice of a proposed action by a trustee regarding matters governed by the Uniform Act. For this purpose, "a proposed action includes a course of action and a decision not to take action." (*Prob.C. 16337.*) The notice procedure is set forth in *Prob.C. 16500* et seq. (*supra*, §116).

SUPPLEMENT: [This section is current through the latest supplement]



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A. In General.
7. (New) Unitrust Conversion.

13 Witkin Sum. Cal. Law Trusts § 171A

[§ 171A] (New) Unitrust Conversion.

Prob.C. 16336.4 et seq., added in 2005, authorize a trustee to convert a trust into a unitrust unless "expressly prohibited" by the terms of the governing instrument. (*Prob.C. 16336.4(a).*) (On conversion without court order, see *Prob.C. 16336.4(b)*, *16336.5(a)*; on conversion with court order, see *Prob.C. 16336.5(b)*; on income, distributions, and computation of unitrust amount, see *Prob.C. 16336.4(e)*; on trustee's discretion in administration of unitrust, see *Prob.C. 16336.4(f)*; on circumstances in which conversion is not authorized, see *Prob.C. 16336.4(h)*; on reconversion from unitrust or change in payout percentage of unitrust, see *Prob.C. 16336.6*; for special definition of "net income" during period in which trust is being administered as unitrust, see *Prob.C. 16328.*)

SUPPLEMENT: [This section is current through the latest supplement]



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B. Adjustments Between Principal and Income.
1. Trustee's Power To Make Adjustments.

13 Witkin Sum. Cal. Law Trusts § 172

[§ 172] Trustee's Power To Make Adjustments.

(1) *Conditions for Exercise of Power To Make Adjustment.* Unless prohibited, a trustee may make an adjustment between principal and income "to the extent the trustee considers necessary." (*Prob.C. 16336(a)*; see *51 Am.Jur.2d (2000 ed.)*, *Life Tenants and Remaindermen* §49 et seq.; on effect of trust provision limiting power of trustee to make adjustments between principal and income, see *Prob.C. 16336(f)*.) The following conditions must be satisfied:

- (a) "The trustee invests and manages trust assets under the prudent investor rule." (*Prob.C. 16336(a)(1)*.)
 - (b) "The trust describes the amount that shall or may be distributed to a beneficiary by referring to the trust's income." (*Prob.C. 16336(a)(2)*.)
 - (c) The trustee determines, after applying the rules in *Prob.C. 16335(a)* and considering any power the trustee may have to invade principal or accumulate income, that the trustee is unable to comply with *Prob.C. 16335(b)* (duty to be impartial; see *supra*, §170). (*Prob.C. 16336(a)(3)*.)
- (2) *When Adjustment Is Prohibited.* A trustee may not make an adjustment between principal and income in any of the following circumstances:
- (a) "Where it would diminish the income interest in a trust (A) that requires all of the income to be paid at least annually to a spouse and (B) for which, if the trustee did not have the power to make the adjustment, an estate tax or gift tax marital deduction would be allowed, in whole or in part." (*Prob.C. 16336(b)(1)*.)
 - (b) "Where it would reduce the actuarial value of the income interest in a trust to which a person transfers property with the intent to qualify for a gift tax exclusion." (*Prob.C. 16336(b)(2)*.)
 - (c) "Where it would change the amount payable to a beneficiary as a fixed annuity or a fixed fraction of the value of the trust assets." (*Prob.C. 16336(b)(3)*.)
 - (d) "Where it would be made from any amount that is permanently set aside for charitable purposes under a will or trust, unless both income and principal are so set aside." (*Prob.C. 16336(b)(4)*.)

(e) "Where possessing or exercising the power to make an adjustment would cause an individual to be treated as the owner of all or part of the trust for income tax purposes, and the individual would not be treated as the owner if the trustee did not possess the power to make an adjustment." (*Prob.C. 16336(b)(5)*.) A cotrustee to whom this provision does not apply may make the adjustment unless doing so is not permitted by the trust. (*Prob.C. 16336(c)*.)

(f) "Where possessing or exercising the power to make an adjustment would cause all or part of the trust assets to be included for estate tax purposes in the estate of an individual who has the power to remove a trustee or appoint a trustee, or both, and the assets would not be included in the estate of the individual if the trustee did not possess the power to make an adjustment." (*Prob.C. 16336(b)(6)*.) A cotrustee to whom this provision does not apply may make the adjustment unless doing so is not permitted by the trust. (*Prob.C. 16336(c)*.)

(g) "Where the trustee is a beneficiary of the trust." (*Prob.C. 16336(b)(7)*.) A cotrustee to whom this provision does not apply may make the adjustment unless doing so is not permitted by the trust. (*Prob.C. 16336(c)*.)

(3) *Release of Power To Make Adjustment.* A trustee may release the entire power to make an adjustment between principal and income or may release only the power to adjust from income to principal or the power to adjust from principal to income in either of the following circumstances:

(a) If the trustee is uncertain about whether possessing or exercising the power will cause a result described in *Prob.C. 16336(b)(1)-(b)(6)*. (*Prob.C. 16336(d)(1)*.)

(b) If the trustee determines that possessing or exercising the power will or may deprive the trust of a tax benefit or impose a tax burden not described in *Prob.C. 16336(b)*. (*Prob.C. 16336(d)(2)*.)

The release may be permanent or for a specified period, including a period measured by the life of an individual. (*Prob.C. 16336(e)*.)

(4) *Factors Considered in Making Adjustment.* In deciding whether and to what extent to exercise the power to make adjustments, the trustee may consider, but is not limited to, any of the following:

(a) "The nature, purpose, and expected duration of the trust." (*Prob.C. 16336(g)(1)*.)

(b) "The intent of the settlor." (*Prob.C. 16336(g)(2)*.)

(c) "The identity and circumstances of the beneficiaries." (*Prob.C. 16336(g)(3)*.)

(d) "The needs for liquidity, regularity of income, and preservation and appreciation of capital." (*Prob.C. 16336(g)(4)*.)

(e) "The assets held in the trust; the extent to which they consist of financial assets, interests in closely held enterprises, tangible and intangible personal property, or real property; the extent to which an asset is used by a beneficiary; and whether an asset was purchased by the trustee or received from the settlor." (*Prob.C. 16336(g)(5)*.)

(f) "The net amount allocated to income under other statutes and the increase or decrease in the value of the principal assets, which the trustee may estimate as to assets for which market values are not readily available." (*Prob.C. 16336(g)(6)*.)

(g) "Whether and to what extent the trust gives the trustee the power to invade principal or accumulate income or prohibit the trustee from invading principal or accumulating income, and the extent to which the trustee has exercised a power from time to time to invade principal or accumulate income." (*Prob.C. 16336(g)(7)*.)

(h) "The actual and anticipated effect of economic conditions on principal and income and effects of inflation and deflation." (*Prob.C. 16336(g)(8)*.)

(i) "The anticipated tax consequences of an adjustment." (*Prob.C. 16336(g)(9).*)

(5) *No Duty To Make Adjustment.* Nothing in the Uniform Act "is intended to create or imply a duty to make an adjustment, and a trustee is not liable for not considering whether to make an adjustment or for choosing not to make an adjustment." (*Prob.C. 16336(h).*)

(6) *Remedies Available in Judicial Proceeding.* In a proceeding with respect to a trustee's exercise or nonexercise of the power to make an adjustment, the sole remedy is to direct, deny, or revise an adjustment between principal and income. (*Prob.C. 16338.*) "This rule recognizes that if there is a dispute concerning exercise of the adjustment power, it is between the affected beneficiaries, and not between the trustee and the beneficiaries. Accordingly, the trustee is not liable for a surcharge or denial of fees where the dispute relates to the exercise or nonexercise of the power to adjust or the proper level of an adjustment, if any." (Law Rev. Com. Comment.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *When Adjustment Is Prohibited.* A trustee may not make an adjustment between principal and income in the following circumstance:(h) (*New*) "During any period in which the trust is being administered as a unitrust" (see Supp., supra, §171A). (*Prob.C. 16336(b)(8)*, added in 2005.)(6) *Remedies Available in Judicial Proceeding.* In a proceeding involving a unitrust conversion (see Supp., supra, §171A), the only available remedies are an order directing the trustee to convert to a unitrust, reconvert from a unitrust, or change the distribution percentage, or an order for "administrative procedures the court determines to be necessary or helpful for the proper functioning of the trust." (*Prob.C. 16338*, as amended in 2005.)



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B. Adjustments Between Principal and Income.
2. Law Revision Commission Comments.

13 Witkin Sum. Cal. Law Trusts § 173

[§ 173] Law Revision Commission Comments.

The Law Revision Commission Comment makes the following observations about the adjustments authorized by *Prob.C. 16336* (supra, §172).

(1) The purpose of *Prob.C. 16336* is to provide a way to reconcile the tension between the trustee's duties under the Uniform Prudent Investor Act (*Prob.C. 16045* et seq.) and the Uniform Principal and Income Act. That is, "to enable a trustee to select investments using the standards of a prudent investor without having to realize a particular portion of the portfolio's total return in the form of traditional trust accounting income such as interest, dividends, and rents."

(2) *Prob.C. 16336* "does not empower a trustee to increase or decrease the degree of beneficial enjoyment to which a beneficiary is entitled under the terms of the trust; rather, it authorizes the trustee to make adjustments between principal and income that may be necessary if the income component of a portfolio's total return is too small or too large because of investment decisions made by the trustee under the prudent investor rule."

(3) The power to adjust is a discretionary power. It is subject to control by the court to prevent an abuse of discretion.

(4) *Prob.C. 16336(a)(2)* "will be met when the terms of the trust require all of the 'income' to be distributed at regular intervals; or when the terms of the trust require a trustee to distribute all of the income, but permit the trustee to decide how much to distribute to each member of a class of beneficiaries; or when the terms of a trust provide that the beneficiary shall receive the greater of the trust accounting income and a fixed dollar amount (an annuity), or of trust accounting income and a fractional share of the value of the trust assets (a unitrust amount). If the trust authorizes the trustee in its discretion to distribute the trust's income to the beneficiary or to accumulate some or all of the income, the condition will be met because the terms of the trust do not permit the trustee to distribute more than the trust accounting income."

(5) To meet *Prob.C. 16336(a)(3)*, the trustee must first meet the requirements of *Prob.C. 16335(a)* (supra, §170), i.e., "she must apply the terms of the trust, decide whether to exercise the discretionary powers given to the trustee under the terms of the trust, and must apply the provisions of the Act if the terms of the trust do not contain a different provision or give the trustee discretion. Second, the trustee must determine the extent to which the terms of the trust

clearly manifest an intention by the settlor that the trustee may or must favor one or more of the beneficiaries. To the extent that the terms of the trust do not require partiality, the trustee must conclude that she is unable to comply with the duty to administer the trust impartially. To the extent that the terms of the trust do require or permit the trustee to favor the income beneficiary or the remainder beneficiary, the trustee must conclude that she is unable to achieve the degree of partiality required or permitted. If the trustee comes to either conclusion--that she is unable to administer the trust impartially or that she is unable to achieve the degree of partiality required or permitted--she may exercise the power to adjust."

(6) *Prob.C. 16047(c)* (see *supra*, §80) sets forth circumstances that a trustee is to consider in investing and managing trust assets under the Uniform Prudent Investor Act. Those circumstances are the source of the relevant factors listed in *Prob.C. 16336(g)*. "[T]o the extent possible, comparable factors will apply to investment decisions and decisions involving the power to adjust. ... If a trustee who is operating under the prudent investor rule decides that the portfolio should be composed of financial assets whose total return will result primarily from capital appreciation rather than dividends, interest, and rents, the trustee can decide at the same time the extent to which an adjustment from principal to income may be necessary. ... On the other hand, if a trustee decides that the risk and return objectives for the trust are best achieved by a portfolio whose total return includes interest and dividend income that is sufficient to provide the income beneficiary with the beneficial interest to which the beneficiary is entitled under the terms of the trust, the trustee can decide that it is unnecessary to exercise the power to adjust."

(7) Under *Prob.C. 16336(b)(1)*, "a trustee cannot make an adjustment that diminishes the income interest in a trust that requires all of the income to be paid at least annually to a spouse and for which an estate tax or gift tax marital deduction is allowed; but this subsection does not prevent the trustee from making an adjustment that increases the amount of income paid from a marital deduction trust to the spouse." It "applies to a trust that qualifies for the marital deduction because the spouse has a general power of appointment over the trust, but it applies to a qualified terminable interest property (QTIP) trust only if and to the extent that the fiduciary makes the election required to obtain the tax deduction." It does not apply to a so-called "estate" trust. "This type of trust qualifies for the marital deduction because the terms of the trust require the principal and undistributed income to be paid to the surviving spouse's estate when the spouse dies; it is not necessary for the terms of an estate trust to require the income to be distributed annually."

(8) *Prob.C. 16336(b)(3)* "applies to annuity trusts and unitrusts with no charitable beneficiaries as well as to trusts with charitable income or remainder beneficiaries; its purpose is to make it clear that a beneficiary's right to receive a fixed annuity or a fixed fraction of the value of a trust's assets is not subject to adjustment." It "does not apply to any additional amount to which the beneficiary may be entitled that is expressed in terms of a right to receive income from the trust. For example, if a beneficiary is to receive a fixed annuity or the trust's income, whichever is greater," *Prob.C. 16336(b)(3)* does not prevent a trustee from making an adjustment in determining the amount of the trust's income.

The following examples from the Law Revision Commission Comment illustrate the application of *Prob.C. 16336*:

Example (1). "T is the successor trustee of a trust that provides income to A for life, remainder to B. T has received from the prior trustee a portfolio of financial assets invested 20% in stocks and 80% in bonds. Following the prudent investor rule, T determines that a strategy of investing the portfolio 50% in stocks and 50% in bonds has risk and return objectives that are reasonably suited to the trust, but T also determines that adopting this approach will cause the trust to receive a smaller amount of dividend and interest income. After considering the [relevant] factors ... , T may transfer cash from principal to income to the extent T considers it necessary to increase the amount distributed to the income beneficiary."

Example (2). "T is the trustee of a trust that requires the income to be paid to the settlor's son C for life, remainder to C's daughter D. In a period of very high inflation, T purchases bonds that pay double-digit interest and determines that a portion of the interest, which is allocated to income under" *Prob.C. 16357* (*infra*, §181), "is a return of capital. In consideration of the loss of value of principal due to inflation and other factors that T considers relevant, T may transfer part of the interest to principal."

Example (3). "T is the trustee of a trust that requires the income to be paid to the settlor's sister E for life, remainder to charity F. E is a retired schoolteacher who is single and has no children. E's income from her social security, pension, and savings exceeds the amount required to provide for her accustomed standard of living. The terms of the trust permit T to invade principal to provide for E's health and to support her in her accustomed manner of living, but do not otherwise indicate that T should favor E or F. Applying the prudent investor rule, T determines that the trust assets should be invested entirely in growth stocks that produce very little dividend income. Even though it is not necessary to invade principal to maintain E's accustomed standard of living, she is entitled to receive from the trust the degree of beneficial enjoyment normally accorded a person who is the sole income beneficiary of a trust, and T may transfer cash from principal to income to provide her with that degree of enjoyment."

Example (4). "T is the trustee of a trust that is governed by the law of State X. The trust became irrevocable before State X adopted the prudent investor rule. The terms of the trust require all of the income to be paid to G for life, remainder to H, and also give T the power to invade principal for the benefit of G for 'dire emergencies only.' The terms of the trust limit the aggregate amount that T can distribute to G from principal during G's life to 6% of the trust's value at its inception. The trust's portfolio is invested initially 50% in stocks and 50% in bonds, but after State X adopts the prudent investor rule T determines that, to achieve suitable risk and return objectives for the trust, the assets should be invested 90% in stocks and 10% in bonds. This change increases the total return from the portfolio and decreases the dividend and interest income. Thereafter, even though G does not experience a dire emergency, T may exercise the power to adjust ... to the extent that T determines that the adjustment is from only the capital appreciation resulting from the change in the portfolio's asset allocation. If T is unable to determine the extent to which capital appreciation resulted from the change in asset allocation or is unable to maintain adequate records to determine the extent to which principal distributions to G for dire emergencies do not exceed the 6% limitation, T may not exercise the power to adjust."

Example (5). "T is the trustee of a trust for the settlor's child. The trust owns a diversified portfolio of marketable financial assets with a value of \$ 600,000, and is also the sole beneficiary of the settlor's IRA, which holds a diversified portfolio of marketable financial assets with a value of \$ 900,000. The trust receives a distribution from the IRA that is the minimum amount required to be distributed under the Internal Revenue Code, and T allocates 10% of the distribution to income under" *Prob.C. 16361(c)* (infra, §182). "The total return on the IRA's assets exceeds the amount distributed to the trust, and the value of the IRA at the end of the year is more than its value at the beginning of the year. Relevant factors that T may consider in determining whether to exercise the power to adjust and the extent to which an adjustment should be made to comply with" the duty to act impartially "include the total return from all of the trust's assets, those owned directly as well as its interest in the IRA, the extent to which the trust will be subject to income tax on the portion of the IRA distribution that is allocated to principal, and the extent to which the income beneficiary will be subject to income tax on the amount that T distributes to the income beneficiary."

Example (6). "T is the trustee of a trust whose portfolio includes a large parcel of undeveloped real estate. T pays real property taxes on the undeveloped parcel from income each year pursuant to" *Prob.C. 16370(c)* (infra, §189). "After considering the return from the trust's portfolio as a whole and other relevant factors ... , T may exercise the power to adjust ... to transfer cash from principal to income in order to distribute to the income beneficiary an amount that T considers necessary to comply with" the duty to act impartially.

Example (7). "T is the trustee of a trust whose portfolio includes an interest in a mutual fund that is sponsored by T. As the manager of the mutual fund, T charges the fund a management fee that reduces the amount available to distribute to the trust by \$ 2,000. If the fee had been paid directly by the trust, one-half of the fee would have been paid from income under" *Prob.C. 16370(a)* (infra, §189) and the other one-half would have been paid from principal under *Prob.C. 16371(a)(1)* (infra, §190). "After considering the total return from the portfolio as a whole and other relevant factors ... , T may exercise its power to adjust ... by transferring \$ 1,000, or half of the trust's proportionate share of the fee, from principal to income."

SUPPLEMENT: [This section is current through the latest supplement]



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C. Distributions With Respect to Decedent's Estate or Terminating Income Interest.
1. Specific and Pecuniary Devises and Gifts.

13 Witkin Sum. Cal. Law Trusts § 174

[§ 174] Specific and Pecuniary Devises and Gifts.

(1) *Scope of Provisions.* *Prob.C. 16340* applies (a) in the case of a decedent's estate, after the decedent's death, and (b) in the case of a trust, after an income interest ends.

"A trust that provides for a single income beneficiary and an outright distribution of the remainder ends when the income interest ends. A more complex trust may have a number of income interests, either concurrent or successive, and the trust will not necessarily end when one of the income interests ends. For that reason, the Act speaks in terms of income interests ending and beginning rather than trusts ending and beginning. When an income interest in a trust ends, the trustee's powers continue during the winding up period required to complete its administration. A terminating income interest is one that has ended but whose administration is not complete." (Law Rev. Com. Comment to *Prob.C. 16340*.)

(2) *Distribution With Respect to Specific Devise or Gift.* If property is specifically given to a beneficiary, by will or trust, the fiduciary distributes net income and principal receipts to the beneficiary, subject to the following rules:

(a) The net income and principal receipts from the specific property are determined "by including all of the amounts the fiduciary receives or pays with respect to the property" (whether accrued or due before, on, or after the date of death or the date the income interest ends), and "by making a reasonable provision for amounts the fiduciary believes the estate or terminating income interest may become obligated to pay after the property is distributed." (*Prob.C. 16340(a)(1)*.)

(b) The fiduciary may not reduce income and principal receipts from the specific property on account of a payment described in *Prob.C. 16370* (disbursements from income; *infra*, §189) or *Prob.C. 16371* (disbursements from principal; *infra*, §190), to the extent that the will, the trust, or *Prob.C. 12002* (income on specific devise; see 14 *Summary* (10th), *Wills and Probate*, §246) requires payment from other property or to the extent that the fiduciary recovers the payment from a third person. (*Prob.C. 16340(a)(2)*.)

(3) *Distribution With Respect to Pecuniary Devise or Gift.* The fiduciary distributes to a beneficiary who receives a pecuniary amount, whether outright or in trust, the interest or any other amount provided by the will, the trust, or *Prob.C. 12000* et seq. (interest and income during estate administration; see 14 *Summary* (10th), *Wills and Probate*,

§246), from the remaining net income, or from principal to the extent that net income is insufficient. (*Prob.C. 16340(b)*.) (On determination of remaining net income, see *Prob.C. 16340(c)*, *infra*, §175.)

(4) *Reference to Testator's Death*. For purposes of *Prob.C. 16340*, a reference in *Prob.C. 12000* et seq. to the date of the testator's death means the date of the settlor's death or "the occurrence of some other event on which the distributee's right to receive the gift depends." (*Prob.C. 16340(e)*.)

(5) *Effective Date of Provision Governing Interest on Trust Distribution*. Effective July 1, 1989, the former Principal and Income Act was amended to add a statute providing for the payment of interest on trust distributions. However, that provision, former *Prob.C. 16314*, was not applicable to trusts created before July 1, 1989. Thus, the beneficiary of a general pecuniary gift distributed from a living trust created before that date was not entitled to interest on the gift despite a considerable delay in distribution. (*Remsen v. Lavacot* (2001) 87 C.A.4th 421, 429, 104 C.R.2d 612.) While *Prob.C. 16340* governs the appropriate allocation of an interest payment, it is unclear whether that section creates a substantive right to interest on pecuniary gifts distributed from trusts.

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Distribution With Respect to Specific Devise or Gift.(c) (New) Specific gift in trust*: A specific gift distributable under a trust carries with it the same benefits and burdens as a specific devise under a will, as set forth in *Prob.C. 12000* et seq. (14 *Summary* (10th), *Wills and Probate*, §246). (*Prob.C. 16340(a)(3)*, added in 2006.)

(3) *Distribution With Respect to Pecuniary Devise or Gift*. "A general pecuniary gift, an annuity, or a gift of maintenance distributable under a trust carries with it income and bears interest in the same manner as a general pecuniary devise, an annuity, or a gift of maintenance under a will," as set forth in *Prob.C. 12000* et seq. (*Prob.C. 16340(b)*, as amended in 2006.)



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2. Remainder and Residuary Devises and Gifts.

13 Witkin Sum. Cal. Law Trusts § 175

[§ 175] Remainder and Residuary Devises and Gifts.

(1) *Determining Remaining Net Income.* The fiduciary determines the remaining net income of the estate or the terminating income interest as provided in the Uniform Act and by doing the following:

(a) "Including in net income all income from property used to discharge liabilities." (*Prob.C. 16340(c)(1).*)

(b) "Paying from income or principal, in the fiduciary's discretion, fees of attorneys, accountants, and fiduciaries, court costs and other expenses of administration, and interest on death taxes." However, "the fiduciary may pay these expenses from income of property passing to a trust for which the fiduciary claims an estate tax marital or charitable deduction only to the extent that the payment of these expenses from income will not cause the reduction or loss of the deduction." (*Prob.C. 16340(c)(2).*)

(c) Paying from principal all other disbursements made or incurred in connection with the settlement of a decedent's estate or the winding up of a terminating income interest, including debts, funeral expenses, disposition of remains, family allowances, and death taxes and related penalties that are apportioned to the estate or terminating income interest by the will, the trust, or *Prob.C. 20100* et seq. (see 14 *Summary* (10th), *Wills and Probate*, §662 et seq.). (*Prob.C. 16340(c)(3).*)

"[A] fiduciary may pay administration expenses and interest on death taxes from either income or principal. An advantage of permitting the fiduciary to choose the source of the payment is that, if the fiduciary's decision is consistent with the decision to deduct these expenses for income tax purposes or estate tax purposes, it eliminates the need to adjust between principal and income that may arise when, for example, an expense that is paid from principal is deducted for income tax purposes or an expense that is paid from income is deducted for estate tax purposes." (Law Rev. Com. Comment to *Prob.C. 16340.*)

(2) *Distribution to Residuary and Remainder Beneficiaries.* After the pecuniary distributions required by *Prob.C. 16340(b)* (supra, §174), the fiduciary distributes the remaining net income in the manner provided in *Prob.C. 16341(a)* to all other beneficiaries. (*Prob.C. 16340(d).*)

(a) Each of those beneficiaries is entitled to a portion of the net income "equal to the beneficiary's fractional interest

in undistributed principal assets, using values as of the distribution dates and without reducing the values by any unpaid principal obligations." (*Prob.C. 16341(a).*)

(b) If the fiduciary does not distribute all the collected but undistributed net income to each beneficiary as of a distribution date, the fiduciary must maintain appropriate records showing the interest of each beneficiary in that net income. (*Prob.C. 16341(b).*)

(c) For this purpose, the distribution date "may be the date as of which the fiduciary calculates the value of the assets if that date is reasonably near the date on which assets are actually distributed." (*Prob.C. 16341(c).*)

The Law Revision Commission Comment to *Prob.C. 16341* makes the following points:

(1) "If a fiduciary makes more than one distribution of assets to beneficiaries to whom this section applies, each beneficiary, including one who does not receive part of the distribution, is entitled, as of each distribution date, to the net income the fiduciary has received after the date of death or terminating event or earlier distribution date but has not distributed as of the current distribution date."

(2) *Prob.C. 16341* retains the concept of former *Prob.C. 16305* that "the residuary legatees of estates are to receive net income earned during the period of administration on the basis of their proportionate interests in the undistributed assets when distributions are made. It changes the basis for determining their proportionate interests by using asset values as of a date reasonably near the time of distribution instead of inventory values."

SUPPLEMENT: [This section is current through the latest supplement]



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D. Apportionment at Beginning and End of Income Interest.
1. In General.

13 Witkin Sum. Cal. Law Trusts § 176

[§ 176] In General.

(1) *Right of Income Beneficiary.* An income beneficiary is entitled to net income from the date on which the income interest begins. An income interest begins on the date specified in the trust or, if no date is specified, on the date an asset becomes subject to a trust or a successive income interest. (*Prob.C. 16345(a).*)

(2) *When Asset Becomes Subject to Trust.* An asset becomes subject to a trust at the following times:

(a) For an asset transferred to a trust during the transferor's life, on the date of transfer to the trust. (*Prob.C. 16345(b)(1).*)

(b) For an asset that becomes subject to a trust by reason of a will, on the date of the testator's death, even if there is an intervening period of administration. (*Prob.C. 16345(b)(2).*)

(c) For an asset that is transferred to a fiduciary by a third party because of an individual's death, on the date of the individual's death. (*Prob.C. 16345(b)(3).*)

(3) *When Asset Becomes Subject to Successive Income Interest.* An asset becomes subject to a successive income interest on the day after the preceding income interest ends, even if there is an intervening period of administration. (*Prob.C. 16345(c).*) "An income interest ends on the day before an income beneficiary dies, or another terminating event occurs, or on the last day of a period during which there is no beneficiary to whom a trustee may distribute income." (*Prob.C. 16345(d).*) The Law Revision Commission Comment notes that the trustee applies the same apportionment rules at the end of a period during which there is no income beneficiary as when a mandatory income interest ends. *Prob.C. 16345(d)* would apply, for example, "if a settlor creates a trust for grandchildren before any grandchildren are born. When the first grandchild is born, the period preceding the date of birth is treated as having ended, followed by a successive income interest."

(4) *Allocation of Income Receipt or Disbursement to Principal or Income.* The following rules govern the allocation of income receipts and disbursements:

(a) A trustee must allocate an income receipt or disbursement (other than one attributable to a specific gift or devise under *Prob.C. 16340(a)*, supra, §174) to principal if its due date occurs (1) before the decedent dies in the case of an

estate or (2) before an income interest begins in the case of a trust or successive income interest. (*Prob.C. 16346(a).*)

(b) A trustee must allocate an income receipt or disbursement to income if (1) the due date occurs on or after the date on which the decedent dies or an income interest begins, and (2) it is a periodic due date. (*Prob.C. 16346(b).*)

(c) An income receipt or disbursement is treated as accruing from day to day if its due date is not periodic or it has no due date. The portion of the receipt or disbursement accruing before the date on which the decedent dies or an income interest begins is allocated to principal and the balance is allocated to income. (*Prob.C. 16346(b).*)

The Law Revision Commission Comment makes the following points:

(a) "[A] periodic payment is principal if it is due but unpaid before a decedent dies or before an asset becomes subject to a trust, but the next payment is allocated entirely to income and is not apportioned. Thus, periodic receipts such as rents, dividends, interest, and annuities, and disbursements such as the interest portion of a mortgage payment, are not apportioned."

(b) Interest on an obligation that does not provide a due date for the interest payment, such as interest on an income tax refund, is apportioned to principal to the extent it accrues before a person dies or an income interest begins unless the obligation is specifically given to a devisee or remainder beneficiary, in which case all of the accrued interest passes under *Prob.C. 16340(a)* (supra, §174) to the person who receives the obligation. The same rule applies to interest on an obligation that has a due date but does not provide for periodic payments. If there is no stated interest on the obligation, such as a zero-coupon bond, and the proceeds from the obligation are received more than one year after it is purchased or acquired by the trustee, the entire amount received is principal under *Prob.C. 16357* (infra, §181).

(5) *Due Date*. "An item of income or an obligation is due on the date the payer is required to make a payment." If no payment date is stated, there is no due date. Distributions to shareholders or other owners from an entity to which *Prob.C. 16350* applies (see infra, §178) are deemed due on the date fixed by the entity for determining who is entitled to receive the distribution or, if no date is fixed, on the date the distribution is declared. A due date is periodic (a) for receipts or disbursements that must be paid at regular intervals under a lease or an obligation to pay interest, or (b) if an entity customarily makes distributions at regular intervals. (*Prob.C. 16346(c).*)

SUPPLEMENT: [This section is current through the latest supplement]



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2. Distributon of Undistributed Income.

13 Witkin Sum. Cal. Law Trusts § 177

[§ 177] Distributon of Undistributed Income.

On the date on which a mandatory income interest ends, the trustee must pay a surviving mandatory income beneficiary, or the estate of a deceased mandatory income beneficiary whose death causes the interest to end, the beneficiary's share of undistributed income that is not disposed of under the trust. (*Prob.C. 16347(b)*.) However, if the beneficiary had an unqualified power to revoke more than 5% of the trust immediately before the income interest ended, the undistributed income from the portion of the trust that may be revoked is added to principal. (*Prob.C. 16347(c)*.) For this purpose, "undistributed income" means "net income received before the date on which an income interest ends." The term does not include "an item of income or expense that is due or accrued or net income that has been added or is required to be added to principal by the trust." (*Prob.C. 16347(a)*.) When a trustee's obligation to pay a fixed annuity or a fixed fraction of the value of the trust's assets ends, the trustee must prorate the final payment. (*Prob.C. 16347(d)*.)

The Law Revision Commission Comment makes a number of points:

(1) *Prob.C. 16347(a)* changes former law by providing that accrued periodic payments are not included in undistributed income. The items affected include periodic payments of interest, rent, and dividends, as well as items of income that accrue over a longer period of time; the rule also applies to expenses that are due or accrued. As an example, assume that a periodic payment of rent that is due on July 20 has not been paid when an income interest ends on July 30; the successive income interest begins on July 31, and the rent payment that was due on July 20 is paid on August 3. Under *Prob.C. 16346(a)*, the July 20 payment is added to the principal of the successive income interest when received. Under *Prob.C. 16346(b)*, the entire periodic payment of rent that is due on August 20 is income when received by the successive income interest. Under *Prob.C. 16347*, neither the income beneficiary nor the beneficiary's estate is entitled to any part of either the July 20 or the August 20 payments because neither one was received before the income interest ended on July 30.

(2) Without the exception in *Prob.C. 16347(c)*, *Prob.C. 16347(b)* "would apply to a revocable living trust whose settlor is the mandatory income beneficiary during her lifetime, even if her will provides that all of the assets in the probate estate are to be distributed to the trust."

(3) If a trust permits the beneficiary to withdraw all or a part of the trust principal after attaining a specified age and the beneficiary attains that age but fails to withdraw all the principal permitted, a trustee is not required to pay the

beneficiary or the beneficiary's estate the undistributed income attributable to the portion of the principal left in the trust. The assumption underlying this rule is that the beneficiary has either provided for the disposition of the trust assets (including the undistributed income) by exercising a power of appointment or has not withdrawn the assets because the beneficiary is willing to have the principal and undistributed income distributed under the terms of the trust. If the beneficiary has the power to withdraw 25% of the trust principal, the trustee must pay the beneficiary or the estate the undistributed income from the 75% that cannot be withdrawn.

SUPPLEMENT: [This section is current through the latest supplement]



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E. Allocation of Receipts From Entities During Trust Administration.
1. In General.

13 Witkin Sum. Cal. Law Trusts § 178

[§ 178] In General.

(1) *"Entity" Defined.* An "entity" is a corporation, partnership, limited liability company, regulated investment company, real estate investment trust, common trust fund, or "any other organization in which a trustee has an interest" other than a trust or estate to which *Prob.C. 16351* applies, a business or activity to which *Prob.C. 16352* applies, or an asset-backed security to which *Prob.C. 16367* applies. (*Prob.C. 16350(a)*.) (On *Prob.C. 16352*, see *infra*, §179; on *Prob.C. 16367*, see *infra*, §187; and see *81 A.L.R.3d 876* [allocation of corporate dividends and distributions]; *51 Am.Jur.2d (2000 ed.)*, *Life Tenants and Remaindermen* §223 et seq.)

(2) *Allocations to Principal.* The following receipts from an entity are allocated to principal:

(a) Property other than money. (*Prob.C. 16350(c)(1)*.)

(b) Money received in a distribution or a series of related distributions in exchange for all or part of a trust's interest in the entity. (*Prob.C. 16350(c)(2)*.)

(c) Money received in total or partial liquidation of the entity. (*Prob.C. 16350(c)(3)*.) (On when money is received in partial liquidation, see *Prob.C. 16350(d)*.)

(d) Money received from a regulated investment company or a real estate investment trust if the distribution is a capital gain dividend for federal income tax purposes. (*Prob.C. 16350(c)(4)*.)

The Law Revision Commission Comment makes the following points:

(a) If a trustee elects or continues an election to reinvest dividends in shares of stock of a distributing corporation or fund, the new shares would be principal. Making or continuing the election would be equivalent to deciding under *Prob.C. 16336* (*supra*, §172) to transfer income to principal in order to comply with the duty to be impartial under *Prob.C. 16335(b)*. However, if the trustee makes or continues the election for a reason other than to comply with *Prob.C. 16335(b)*, e.g., to make an investment without incurring brokerage commissions, the trustee should transfer cash from principal to income in an amount equal to the reinvested dividends.

(b) In some circumstances, the characteristics of a large cash distribution suggest that it should be treated as

principal rather than income, and the trustee may make an adjustment between principal and income under *Prob.C. 16336* (supra, §172). The following are illustrative: (1) sale of an investment asset; (2) sale of a business asset other than one held for sale to customers in the normal course of business; (3) loan secured by a substantial asset; (4) cash from assets such as mineral interests, 90% of which would have been allocated to principal if the trust had owned the assets directly.

(3) *Allocations to Income*. Except as otherwise provided in *Prob.C. 16350*, money received from an entity is allocated to income. (*Prob.C. 16350(b)*.) Under the Internal Revenue Code and the Income Tax Regulations, a "capital gain dividend" from a mutual fund or real estate investment trust is the excess of net long-term capital gain over its net short-term capital loss. As a result, a capital gain dividend does not include any net short-term capital gain, and cash received by a trust because of a net short-term capital gain is income. (Law Rev. Com. Comment.)

(4) *Reliance on Entity's Characterization*. "A trustee may rely on a statement made by an entity about the source or character of a distribution if the statement is made at or near the time of distribution by the entity's board of directors or other person or group of persons authorized to exercise powers to pay money or transfer property comparable to those of a corporation's board of directors." (*Prob.C. 16350(e)*.)

(5) *Distribution From Trust or Estate*. A distribution of income from a trust or estate (other than an interest in an investment entity) in which the trust has an interest other than a purchased interest is allocated to income, and a distribution of principal is allocated to principal. (*Prob.C. 16351*.)

The Law Revision Commission Comment notes as follows:

(a) In determining whether a distribution from another trust or an estate is income or principal, the trustee should determine what the terms of the distributing trust or estate say about the distribution, e.g., "whether they direct that the distribution, even though made from the income of the distributing trust or estate, is to be added to principal of the recipient trust." Such a provision should override the terms of the Uniform Act, "but if the terms of the recipient trust contain a provision requiring such a distribution to be allocated to income, the trustee may have to obtain a judicial resolution of the conflict between the terms of the two documents."

(b) An investment entity includes a mutual fund, a common trust fund, a business trust or other entity organized as a trust for the purpose of receiving and investing capital contributed by investors, and managing investment assets, including asset-backed security arrangements.

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Allocations to Principal*.

(b) *Money received in exchange for all or part of trust's interest in entity*: See *Hasso v. Hasso* (2007) 148 C.A.4th 329, 342, 55 C.R.3d 667 [series of distributions to trust from S corporation's sale of stock and real estate was not exchange transaction under *Prob.C. 16350(c)(2)* where distributions did not alter or reduce trust's share ownership or percentage ownership in corporation; thus, money received was properly allocated to income under *Prob.C. 16350(b)*]. (c) *Money received in total or partial liquidation of entity*: *Prob.C. 16350(d)(1)(A)* provides that money is received in partial liquidation to the extent that the entity making the distribution indicates, at or near the time of distribution, that the distribution is in partial liquidation. Alternatively, *Prob.C. 16350(d)(1)(B)* provides in part that money is received in partial liquidation if "the total amount of money or property received in a distribution or series of related distributions is greater than 20 percent of the entity's gross assets."

In *Estate of Thomas* (2004) 124 C.A.4th 711, 21 C.R.3d 741, an S corporation distributed more than 20% of its gross assets to shareholders, but a trust that owned some of the shares received less than 20% as its pro rata share. *Held*, the money received by the trust was not in partial liquidation and thus was properly allocated to income. The phrase, "total amount of money or property received in a distribution" in *Prob.C. 16350(d)(1)(B)*, means the total amount

received by the trust, not the total amount of the distribution. This construction is consistent with the plain meaning of "received" and "receipts" in other subdivisions of *Prob.C. 16350* and other parts of the Uniform Principal and Income Act. "Thus, money 'received in a distribution' necessarily refers only to money that the trustee has the power to allocate" and cannot reasonably be construed to refer to money over which the trustee has no control. (124 C.A.4th 720, 721.)

In response to *Estate of Thomas*, the 2005 Legislature, in an urgency measure, amended *Prob.C. 16350(d)(1)(B)* (a) to refer to "money and property received by all owners, collectively, in a distribution," and (b) to relieve from liability trustees who made allocations based on the reasoning of *Estate of Thomas* between the date of the decision (December 2, 2004) and the operative date of the amendment (July 18, 2005). (See Stats. 2005, Chap. 51, §2.)

See *Hasso v. Hasso*, *supra*, 148 C.A.4th 340 [series of distributions to trust from S corporation's sale of stock and real estate was not liquidating transaction under *Prob.C. 16350(c)(3)* where total received did not exceed 20% of corporation's gross assets under *Prob.C. 16350(d)(1)(B)* and corporation did not indicate that payments were distribution in partial liquidation under *Prob.C. 16350(d)(1)(A)*; thus, money received was properly allocated to income under *Prob.C. 16350(b)*].



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2. Separate Accounting for Business or Activity.

13 Witkin Sum. Cal. Law Trusts § 179

[§ 179] Separate Accounting for Business or Activity.

A trustee who conducts a business or other activity may determine that it is in the best interest of the beneficiaries to account separately for the business or activity instead of accounting for it as part of the trust's general accounting records. If so, the trustee may maintain separate accounting records for the transactions of the business or activity, whether or not its assets are segregated from other trust assets. (*Prob.C. 16352(a).*) A trustee who accounts separately may determine (1) the extent to which net cash receipts must be retained for working capital, the acquisition or replacement of fixed assets, and other reasonably foreseeable needs, and (2) the extent to which the remaining net cash receipts are accounted for as principal or income in the trust's general accounting records. A trustee who sells assets, other than in the ordinary course of the business or activity, must account for the net amount received as principal in the trust's general accounting records to the extent that the amount received is no longer required to conduct the business or activity. (*Prob.C. 16352(b).*)

Businesses and activities for which a trustee may maintain separate accounting records include (1) retail, manufacturing, service, and other traditional business activities, (2) farming, (3) raising and selling animals, (4) managing rental properties, (5) extracting minerals and other natural resources, (6) timber operations, and (7) activities involving derivatives and options governed by *Prob.C. 16366* (*infra*, §186). (*Prob.C. 16352(c).*)

The Law Revision Commission Comment makes the following points:

(1) *Prob.C. 16352* is intended to give flexibility to a trustee who operates a business or other activity in proprietorship form rather than in a wholly owned corporation or a limited liability company, and to facilitate the trustee's ability to determine the allocation of net receipts to income, just as the board of directors of a corporation owned by the trust would decide the annual dividend to be paid to the trust. It is not intended, however, to permit a trustee to account separately for a traditional securities portfolio to avoid the provisions of the Uniform Act.

(2) *Prob.C. 16352* gives the trustee broad authority to select business recordkeeping methods that best suit the activity in which the trustee is engaged. For example, a trustee may continue to use the business and recordkeeping methods employed by the decedent or transferor who may have conducted the business under an assumed name. The trustee may or may not maintain separate bank accounts. "A professional trustee may decide not to maintain separate bank accounts, but an individual trustee, especially one who has continued a decedent's business practices, may

continue the same banking arrangements that were used during the decedent's lifetime."

(3) If a fiduciary liquidates a sole proprietorship or other activity, the proceeds would be added to principal, even though derived from the liquidation of accounts receivable, because the proceeds would no longer be needed in the conduct of the business. If the liquidation occurs during probate or during the winding up of an income, none of the proceeds would be income for purposes of *Prob.C. 16340* (supra, §§174, 175).

SUPPLEMENT: [This section is current through the latest supplement]



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F. Allocation of Receipts Not Normally Apportioned During Trust Administration.
1. In General.

13 Witkin Sum. Cal. Law Trusts § 180

[§ 180] In General.

(1) *Principal Receipts*. The following items are allocated to principal:

(a) To the extent not allocated to income under the Uniform Act, assets received from (1) a transferor during the transferor's lifetime, (2) a decedent's estate, (3) a trust with a terminating income interest, or (4) a payer under a contract naming the trust or its trustee as beneficiary. (*Prob.C. 16355(a).*)

(b) Subject to any contrary rules in *Prob.C. 16350* to *16367*, money or property received from the sale, exchange, liquidation, or change in form of a principal asset, including realized profit. (*Prob.C. 16355(b).*)

(c) Amounts recovered from third parties to reimburse the trust because of environmental disbursements under *Prob.C. 16371(a)(7)* (infra, §190) or for other reasons to the extent not based on the loss of income. (*Prob.C. 16355(c).*)

(d) Proceeds of property taken by eminent domain. However, a separate award for the loss of income with respect to an accounting period during which a current income beneficiary had a mandatory income interest is income. (*Prob.C. 16355(d).*)

(e) Net income received in an accounting period during which there is no beneficiary to whom a trustee may or must distribute income. (*Prob.C. 16355(e).*)

(f) Other receipts allocated to principal under *Prob.C. 16360* et seq. (receipts normally apportioned; infra, §182 et seq.). (*Prob.C. 16355(f).*)

(2) *Rental Property*. Unless the trustee accounts for receipts from rental property under *Prob.C. 16352* (accounting for separate business; supra, §179), the trustee must allocate amounts received as rent of real or personal property to income, including amounts received for cancellation or renewal of a lease. A refundable deposit, including a security deposit or a deposit to be applied as rent for future periods, is added to principal and held subject to the terms of the lease, and is not available for distribution to a beneficiary until the trustee's contractual obligations with respect to that amount have been satisfied. (*Prob.C. 16356.*) "A portion of the payment under a lease may be a reimbursement of principal expenditures for improvements to the leased property that is characterized as rent for purposes of invoking contractual or statutory remedies for nonpayment." In this situation, a transfer from income to reimburse principal may

be appropriate under *Prob.C. 16373* (infra, §191) to the extent that some of the "rent" is really a reimbursement for improvements. An adjustment between principal and income under *Prob.C. 16336(a)* (supra, §172) might also be relevant. (Law Rev. Com. Comment.)

(3) *Insurance Contracts*. Proceeds of a contract that insures the trustee against (a) loss of occupancy or other use by an income beneficiary, (b) loss of income, or, (c) subject to *Prob.C. 16352* (accounting for separate business; supra, §179), loss of profits from a business are allocated to income. (*Prob.C. 16358(b)*.) Except as otherwise provided in *Prob.C. 16358(b)*, proceeds of a life insurance policy or other contract in which the trust or the trustee is named as beneficiary, including a contract that insures the trust or the trustee against loss for damage, destruction, or loss of title to a trust asset, are allocated to principal. Dividends on an insurance policy are allocated to income if the premiums on the policy are paid from income, and to principal if the premiums are paid from principal. (*Prob.C. 16358(a)*.) These provisions do not apply to a contract governed by *Prob.C. 16361* (deferred compensation and similar payments; infra, §182). (*Prob.C. 16358(c)*.)

SUPPLEMENT: [This section is current through the latest supplement]



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2. Obligation To Pay Money.

13 Witkin Sum. Cal. Law Trusts § 181

[§ 181] Obligation To Pay Money.

The following provisions apply to obligations to pay money:

(1) An amount received as interest, whether determined at a fixed, variable, or floating rate, on an obligation to pay money to the trustee, including an amount received as consideration for prepaying principal, is allocated to income without any provision for amortization of premium. (*Prob.C. 16357(a)*.) Even though an interest rate may change from time to time based upon changes in an index or other market indicator, an obligation to pay money under a variable or floating rate is subject to *Prob.C. 16357* and is not to be treated as a derivative financial instrument under *Prob.C. 16366* (*infra*, §186). (Law Rev. Com. Comment.)

(2) An amount received from the sale, redemption, or other disposition of an obligation to pay money to the trustee more than 1 year after it was purchased or acquired by the trustee, including an obligation whose purchase price (or value if otherwise acquired) is less than the value at maturity, is allocated to principal. If the obligation matures within 1 year after purchase or acquisition by the trustee, the amount received in excess of the purchase price (or value if otherwise acquired) is allocated to income. (*Prob.C. 16357(b)*.) This provision applies to all obligations acquired at a discount, including U.S. Treasury Bills, U.S. Savings Bonds, zero-coupon bonds, and discount bonds that pay interest only during part of the period before maturity. The entire increase in value of these obligations is principal when the trustee receives the proceeds unless the obligation, when acquired, has a maturity of less than 1 year. The statute also applies to inflation-indexed bonds. An increase in principal due to inflation after issuance is principal upon redemption if the bond matures more than 1 year after the trustee acquires it; if it matures within 1 year, the increase, including any attributable to an inflation adjustment, is income. (Law Rev. Com. Comment.)

(3) The foregoing rules do not apply to an obligation governed by *Prob.C. 16361, 16362, 16363, 16364, 16366, or 16367* (see *infra*, §182 et seq.). (*Prob.C. 16357(c)*.)

SUPPLEMENT: [This section is current through the latest supplement]



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G. Allocation of Receipts Normally Apportioned During Trust Administration.
1. Deferred Compensation and Similar Payments.

13 Witkin Sum. Cal. Law Trusts § 182

[§ 182] Deferred Compensation and Similar Payments.

(1) *Scope of Statute.* For purposes of *Prob.C. 16361*, "payment" means "a payment that a trustee may receive over a fixed number of years or during the life of one or more individuals because of services rendered or property transferred to the payer in exchange for future payments. The term includes a payment made in money or property from the payer's general assets or from a separate fund created by the payer, including a private or commercial annuity, an individual retirement account, and a pension, profit-sharing, stock-bonus, or stock-ownership plan." (*Prob.C. 16361(a)*.) However, the statute does not apply to payments governed by *Prob.C. 16362* (liquidating assets; *infra*, §183). (*Prob.C. 16361(e)*.)

Prob.C. 16361 "applies to receipts from all forms of annuities and deferred compensation arrangements, whether the payment will be received by the trust in a lump sum or in installments over a period of years. It applies to bonuses that may be received over two or three years and payments that may last for much longer periods, including payments from an individual retirement account (IRA), deferred compensation plan (whether qualified or not qualified for special federal income tax treatment), and insurance renewal commissions. It applies to a retirement plan to which the settlor has made contributions, just as it applies to an annuity policy that the settlor may have purchased individually, and it applies to variable annuities, deferred annuities, annuities issued by commercial insurance companies, and 'private annuities' arising from the sale of property to another individual or entity in exchange for payments that are to be made for the life of one or more individuals. The section applies whether the payments begin when the payment right becomes subject to the trust or are deferred until a future date, and it applies whether payments are made in cash or in kind, such as employer stock." (Law Rev. Com. Comment.)

(2) *Payment Characterized as Interest or Dividend.* To the extent that a payment is characterized as interest, a dividend, or a payment in lieu of interest or a dividend, it is allocated to income. The balance of the payment, and any other payment received in the same accounting period that is not characterized as interest, a dividend, or an equivalent payment, is allocated to principal. (*Prob.C. 16361(b)*.)

The Law Revision Commission Comment gives the following examples: "[S]ome deferred compensation plans that hold debt obligations or stock of the plan's sponsor in an account for future delivery to the person rendering the services provide for the annual payment to that person of dividends received on the stock or interest received on the debt obligations. Other plans provide that the account of the person rendering the services shall be credited with 'phantom' shares of stock and require an annual payment that is equivalent to the dividends that would be received on that number

of shares if they were actually issued; or a plan may entitle the person rendering the services to receive a fixed dollar amount in the future and provide for the annual payment of interest on the deferred amount during the period prior to its payment." Interest and dividend payments and equivalent payments under plans of this type are allocated to income; all other payments received under these plans are allocated to principal.

(3) *Payment Not Characterized as Interest or Dividend.* If no part of a payment is characterized as interest, a dividend, or an equivalent payment, and all or part of the payment is required to be made, 10% of the part that is required to be made during the accounting period is allocated to income and 90% to principal. If no part of the payment is required to be made or the payment is the entire amount to which the trustee is entitled, the entire payment is allocated to principal. For this purpose, a payment is not "required to be made" to the extent that it is made because the trustee exercises a right of withdrawal. (*Prob.C. 16361(c)*.)

The California Law Revision Commission makes the following points:

(a) An amount received from an IRA or a similar plan is allocated under *Prob.C. 16361(c)*. For allocation purposes, the focus of *Prob.C. 16361(c)* is on the payment right rather than on assets that may be held in a fund from which the payments are made. "Thus, if an IRA holds a portfolio of marketable stocks and bonds, the amount received by the IRA as dividends and interest is not taken into account in determining the principal and income allocation except to the extent that the Internal Revenue Service may require them to be taken into account when the payment is received by a trust that qualifies for the estate tax marital deduction. ... An IRA is subject to federal income tax rules that require payments to begin by a particular date and be made over a specific number of years or a period measured by the lives of one or more persons. The payment right of a trust that is named as a beneficiary of an IRA is not a right to receive particular items that are paid to the IRA, but is instead the right to receive an amount determined by dividing the value of the IRA by the remaining number of years in the payment period. This payment right is similar to the right to receive a unitrust amount, which is normally expressed as an amount equal to a percentage of the value of the unitrust assets without regard to dividends or interest that may be received by the unitrust." To the extent that a payment is required to be made, 10% of the amount received is allocated to income and the balance is allocated to principal. All other payments are allocated to principal because they represent a change in the form of a principal asset. Under the general rule of *Prob.C. 16355(b)* (*supra*, §180), money or property received from a change in the form of a principal asset is allocated to principal.

(b) The amount allocated to income is not dependent upon the interest rate used for valuation purposes when the decedent dies, and if payments received by the trust increase or decrease from year to year because the fund from which the payment is made increases or decreases in value, the amount allocated to income will also increase or decrease.

(4) *Marital Deduction.* If a trustee allocates more of a payment to income than provided by *Prob.C. 16361* in order to obtain an estate tax marital deduction for the trust, the trustee must allocate the additional amount necessary to obtain the marital deduction to income. (*Prob.C. 16361(d)*.)

"When an IRA is payable to a QTIP marital deduction trust, the IRS treats the IRA as separate terminable interest property and requires that a QTIP election be made for it. In order to qualify for QTIP treatment, an IRS ruling states that all of the IRA's income must be distributed annually to the QTIP marital deduction trust and then must be allocated to trust income for distribution to the spouse. *Rev. Rul. 89-89, 1989-2 C.B. 231*. If an allocation to income under this Act of 10% of the required distribution from the IRA does not meet the requirement that all of the IRA's income be distributed from the trust to the spouse, the provision in subsection (d) requires the trustee to make a larger allocation to income to the extent necessary to qualify for the marital deduction. The requirement of *Rev. Rul. 89-89* should also be satisfied if the IRA beneficiary designation permits the spouse to require the trustee to withdraw the necessary amount from the IRA and distribute it to her, even though the spouse never actually requires the trustee to do so." (Law Rev. Com. Comment.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Scope of Statute.* The scope of *Prob.C. 16361* was revised in 2006. *Prob.C. 16361(e)* was deleted. The term "payment" now means the following:

(a) A payment that a trustee may receive over a fixed number of years or during the life of an individual because of services rendered or property transferred to the payer in exchange for future payments. (*Prob.C. 16361(a)(1).*)

(b) A payment that a trustee may receive pursuant to "an income tax advantaged contractual, custodial, or trust arrangement" including a private or commercial annuity, a pension or profit-sharing plan, an individual retirement account, Roth IRA, or a similar arrangement. (*Prob.C. 16361(a)(2).*)(3) *Payment Not Characterized as Interest or Dividend.* The provisions of *Prob.C. 16361(c)* were revised in 2006. The following provisions now apply where the payment is not characterized as interest or dividend:

(a) Where the payment is received from an individual account, the payment is allocated to income to the extent that all payments from the account during the accounting period ("cumulative amount received") do not exceed 4% of the account value ("income allocation amount"). Excess amounts received during the accounting period are allocated to principal. (*Prob.C. 16361(c)(1).*) (See *Prob.C. 16361(c)(1)(A)* ["individual account" defined]; *Prob.C. 16361(c)(1)(B)* ["account value" defined]; *Prob.C. 16361(c)(1)(C)* [proration for period less than 365 days].)

(b) Where the payment is received from a plan, account, or arrangement that is not an individual account, (1) if all or part of the payment is required to be made to the trustee, 10% of the part that is required to be made during the accounting period is allocated to income and the rest is allocated to principal, and (2) if no part of the payment is required to be made to the trustee or the payment received is the entire amount to which the trustee is entitled, the entire payment is allocated to principal. A payment is not required to be made to the extent that it is made because the trustee exercises a right of withdrawal. (*Prob.C. 16361(c)(2).*)



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2. Liquidating Assets.

13 Witkin Sum. Cal. Law Trusts § 183

[§ 183] Liquidating Assets.

(1) *Scope of Statute.* For purposes of *Prob.C. 16362*, "liquidating asset" means an asset the value of which "will diminish or terminate because the asset is expected to produce receipts for a period of limited duration." The term includes a leasehold, patent, copyright, royalty right, and the right to receive payments under an arrangement that does not provide for the payment of interest on the unpaid balance. The term does not include a deferred payment subject to *Prob.C. 16361* (supra, §182), natural resources subject to *Prob.C. 16363* (infra, §184), timber subject to *Prob.C. 16364* (infra, §184), derivatives and options subject to *Prob.C. 16366* (infra, §186), an asset-backed security subject to *Prob.C. 16367* (infra, §187), or an asset for which the trustee establishes a reserve for depreciation under *Prob.C. 16372* (infra, §191). (*Prob.C. 16362(a).*)

A right to receive payments under an arrangement that does not provide for the payment of interest includes state lottery prizes and similar fixed amounts payable over time that are not deferred compensation arrangements. (Law Rev. Com. Comment.)

(2) *Allocation.* 10% of the receipts from a liquidating asset are allocated to income and 90% to principal. (*Prob.C. 16362(b).*)

Former *Prob.C. 16310* used a 5% fixed annuity approach for allocating receipts from property subject to depletion. "A fixed payment can produce unfair results. The remainder beneficiary receives all of the receipts from unexpected growth in the asset, e.g., if royalties on a patent or copyright increase significantly. Conversely, if the receipts diminish more rapidly than expected, most of the amount received by the trust will be allocated to income and little to principal. Moreover, if the annual payments remain the same for the life of the asset, the amount allocated to principal will usually be less than the original inventory value." For these reasons, *Prob.C. 16362* abandons the annuity approach under the 5% rule. (Law Rev. Com. Comment.)

SUPPLEMENT: [This section is current through the latest supplement]



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3. Natural Resources and Timber.

13 Witkin Sum. Cal. Law Trusts § 184

[§ 184] Natural Resources and Timber.

(1) *Natural Resources*. The following rules apply to the extent that a trustee accounts for receipts from an interest in minerals or other natural resources:

(a) An amount received as a nominal bonus, nominal delay rental, or nominal annual rent on a lease is allocated to income. (*Prob.C. 16363(a)(1).*)

(b) An amount received from a production payment is allocated to income if and to the extent the agreement creating the production payment provides a factor for interest or its equivalent. The balance is allocated to principal. (*Prob.C. 16363(a)(2).*)

(c) If an amount received as a royalty, shut-in-well payment, take-or-pay payment, bonus, or delay rental is more than nominal, 90% is allocated to principal and 10% is allocated to income. (*Prob.C. 16363(a)(3).*)

(d) If an amount is received from a working interest or any other interest in mineral or other natural resources not described above, 90% of the net amount received is allocated to principal and 10% is allocated to income. (*Prob.C. 16363(a)(4).*)

(e) An amount received on account of an interest in water that is renewable is allocated to income. If the water is not renewable, 90% of the amount is allocated to principal and 10% is allocated to income. (*Prob.C. 16363(b).*)

(f) The Uniform Act applies whether or not a decedent or donor was extracting minerals, water, or other natural resources before the interest became subject to the trust. (*Prob.C. 16363(c).*)

The Law Revision Commission Comment makes the following observations:

(a) A depletion provision that causes a large portion of oil and gas receipts to be paid out as income is undesirable. "As wells are depleted, the amount received by the income beneficiary falls drastically. Allocating a larger portion of the receipts to principal enables the trustee to acquire other income producing assets that will continue to produce income when the mineral reserves are exhausted."

(b) *Prob.C. 16363* applies to the extent that the trustee does not account separately for receipts from minerals and other natural resources under *Prob.C. 16352* (supra, §179) or allocate all of the receipts to principal under *Prob.C. 16360* (infra, §188).

(c) The purpose of *Prob.C. 16363(c)* is to abolish the "open mine doctrine" as it may apply to the rights of income and remainder beneficiaries in receipts from the production of minerals from land owned or leased by a trust. Instead, these receipts are allocated to principal and income under the Uniform Act.

(2) *Timber and Related Products*. The following rules apply to the extent that a trustee accounts for receipts from the sale of timber and related products:

(a) Net receipts are allocated to income to the extent that the amount of timber removed from the land does not exceed the rate of growth of the timber during the accounting periods in which a beneficiary has a mandatory income interest. (*Prob.C. 16364(a)(1)*.)

(b) Net receipts are allocated to principal to the extent that (a) the amount of timber removed from the land exceeds the rate of growth of the timber or (b) the net receipts are from the sale of standing timber. (*Prob.C. 16364(a)(2)*.)

(c) Net receipts from the lease of timberland or from a contract to cut timber from land owned by a trust are allocated to income and principal by determining the amount of timber removed from the land under the lease or contract and applying the rules in *Prob.C. 16364(a)(1)* and (a)(2). (*Prob.C. 16364(a)(3)*.)

(d) Net receipts are allocated to principal to the extent that advance payments, bonuses, and other payments are not allocated pursuant to *Prob.C. 16364(a)(1)*, (a)(2) and (a)(3). (*Prob.C. (a)(4)*.)

(e) In determining net receipts to be allocated under *Prob.C. 16364(a)*, the trustee deducts and transfers to principal a reasonable amount for depletion. (*Prob.C. 16364(b)*.)

(f) The Uniform Act applies whether or not a decedent or transferor was harvesting timber from the property before it became subject to the trust. (*Prob.C. 16364(c)*.)

The Law Revision Commission Comment makes the following points:

(a) The rules in *Prob.C. 16364* "apply to net receipts from the sale of trees and by-products from harvesting and processing trees without regard to the kind of trees that are cut or whether the trees are cut before or after a particular number of years of growth. The rules apply to the sale of trees that are expected to produce lumber for building purposes, trees sold as pulpwood, and Christmas and other ornamental trees."

(b) The Act is not intended to prevent a tenant in possession of the property from using wood that he or she cuts on the property for personal, noncommercial purposes, such as a Christmas tree, firewood, mending old fences or building new fences, or making repairs to structures on the property.

(c) "The method of determining the amount of timber removed and the rate of growth is up to the trustee, based on methods customarily used for the kind of timber involved."

(d) *Prob.C. 16364* applies to the extent that the trustee does not account separately for receipts from timber and related products under *Prob.C. 16352* (supra, §179) or allocate all of the receipts to principal under *Prob.C. 16360* (infra, §188). The option to account for net receipts separately "takes into consideration the possibility that timber harvesting operations may have been conducted before the timber property became subject to the trust, and that it may make sense to continue using accounting methods previously established for the property. It also permits a trustee to use customary accounting practices for timber operations even if no harvesting occurred on the property before it became subject to the trust."

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Natural Resources*. *Prob.C. 16363* was expanded in 2006 to cover water.(3) *(New) Choice of Allocation Rules*. For purposes of the allocation rules applicable to natural resources and timber, the following provisions apply:

(a) If the trust owned the interest on January 1, 2000, the trustee may "at all times" allocate under the provisions of the Revised Principal and Income Act or "in the manner reasonably used by the trustee prior to that date." (*Prob.C. 16363(d)*, added in 2006; *Prob.C. 16364(d)*, added in 2006.) Under former *Prob.C. 16310*, the trustee could allocate to principal for reasonable depletion or amortization.

(b) If the trust acquired the interest after January 1, 2000, the trustee must allocate under the provisions of the Act. (*Prob.C. 16363(d)*, added in 2006; *Prob.C. 16364(d)*, added in 2006.)

(c) If the trust owned the interest on January 1, 2000, and the trustee allocated between January 1, 2000, and December 31, 2006, under the provisions of the Act, the trustee has no duty to review that allocation or to allocate in the prior manner, and is not liable for failing to review the allocation or failing to allocate in the prior manner. (*Prob.C. 16363(d)*, added in 2006; *Prob.C. 16364(d)*, added in 2006.)



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4. Non-Income-Producing Assets.

13 Witkin Sum. Cal. Law Trusts § 185

[§ 185] Non-Income-Producing Assets.

If a marital deduction is allowed for all or part of a trust, the assets of which consist substantially of property that does not provide the spouse with sufficient income from the trust or use of the trust assets, and if the amounts the trustee transfers from principal to income under *Prob.C. 16336* (supra, §172) and distributes to the spouse from principal pursuant to the terms of the trust are insufficient to provide the spouse with the beneficial enjoyment required to obtain the marital deduction, the spouse may require the trustee to make property productive of income or convert it into productive property or exercise the adjustment power under *Prob.C. 16336(a)* within a reasonable time. The trustee may decide which action or combination of actions to take. (*Prob.C. 16365(a).*)

In cases not governed by *Prob.C. 16365(a)*, proceeds from the sale or disposition of a trust asset are principal without regard to the amount of income the asset produces during an accounting period. (*Prob.C. 16365(b).*) (See 3A Scott §240 et seq.; Bogert §824; *51 Am.Jur.2d* (2000 ed.), *Life Tenants and Remaindermen* §199 et seq.)

The Law Revision Commission Comment notes the following:

(1) Under *Prob.C. 16047(b)* (supra, §80), a portion of the Uniform Prudent Investor Act, investment and management decisions respecting individual assets are evaluated not in isolation but in the context of the trust portfolio as a whole. This rule is inconsistent with provisions of the former Principal and Income Act giving an income beneficiary a right to receive a portion of the proceeds from the sale of underproductive property as "delayed income." In order to implement the Uniform Prudent Investor Act, the Uniform Principal and Income Act "abolishes the right to receive delayed income from the sale proceeds of an asset that produces little or no income, but it does not alter existing state law regarding the income beneficiary's right to compel the trustee to make property productive of income. As the law continues to develop in this area, the duty to make property productive of current income in a particular situation should be determined by taking into consideration the performance of the portfolio as a whole and the extent to which a trustee makes principal distributions to the income beneficiary under the terms of the trust."

(2) Once the two conditions of *Prob.C. 16365(a)* have occurred--insufficient beneficial enjoyment from the property and the spouse's demand that the trustee take action--the trustee must act. The trustee may decide to make the property productive of income, to convert it, to transfer funds from principal to income, or to take some combination of those actions. Given the purpose of *Prob.C. 16365*, the power under *Prob.C. 16336(a)* to adjust principal and income

would be exercised to transfer principal to income and not to transfer income to principal.

(3) *Prob.C. 16365* does not apply to an "estate" trust, which will qualify for the marital deduction, even though the income may be accumulated for a term of years or for the life of the surviving spouse, if the terms of the trust require the principal and undistributed income to be paid to the surviving spouse's estate when the spouse dies.

SUPPLEMENT: [This section is current through the latest supplement]



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5. Derivatives and Options.

13 Witkin Sum. Cal. Law Trusts § 186

[§ 186] Derivatives and Options.

(1) *Derivatives.* To the extent that a trustee does not account for transactions in derivatives as a separate activity under *Prob.C. 16352* (supra, §179), receipts and disbursements in connection with those transactions are allocated to principal. (*Prob.C. 16366(b).*) For this purpose, "derivative" means "a contract or financial instrument or a combination of contracts and financial instruments that gives a trust the right or obligation to participate in some or all changes in the price of a tangible or intangible asset or group of assets, or changes in a rate, an index of prices or rates, or other market indicator for an asset or a group of assets." (*Prob.C. 16366(a).*)

The Law Revision Commission Comment explains as follows:

(a) "It is difficult to predict how frequently and to what extent trustees will invest directly in derivative financial instruments rather than participating indirectly through investment entities that may utilize these instruments in varying degrees." If the trust participates in derivatives indirectly through an entity, an amount received from the entity will be allocated under *Prob.C. 16350* (supra, §178). If a trustee invests directly in derivatives to a significant extent, the expectation is that receipts and disbursements related to derivatives will be accounted for under *Prob.C. 16352* (supra, §179); if a trustee chooses not to account under *Prob.C. 16352*, *Prob.C. 16366(b)* provides the default rule.

(b) "A gain or loss that occurs because the trustee marks securities to market or to another value during an accounting period is not a transaction in a derivative financial instrument that is income or principal under the Act--only cash receipts and disbursements, and the receipt of property in exchange for a principal asset, affect a trust's principal and income accounts."

(c) Property other than cash received on the settlement of a derivatives transaction is principal under *Prob.C. 16355(b)*.

(2) *Options.* If a trustee grants an option to buy property from the trust (whether or not the trust owns the property when the option is granted), grants an option that permits another person to sell property to the trust, or acquires an option to buy property for the trust or an option to sell an asset owned by the trust, and the trustee or other owner of the asset is required to deliver the asset if the option is exercised, an amount received for granting the option is allocated to principal. An amount paid to acquire the option is paid from principal. A gain or loss realized upon the exercise of an

option, including an option granted to a settlor of the trust for services rendered, is allocated to principal. (*Prob.C. 16366(c).*)

Options to which *Prob.C. 16366(c)* applies include (a) an option to purchase real estate owned by the trustee, (b) a put option purchased by a trustee to guard against a drop in value of a large block of marketable stock that must be liquidated to pay estate taxes, (c) a continuing and regular practice of selling call options on securities owned by the trust, if the terms of the option require delivery of the securities. *Prob.C. 16366(c)* does not apply if the consideration for the option is something other than cash or property, such as cross-options granted in a buy-sell agreement between the owners of an entity. (Law Rev. Com. Comment.)

SUPPLEMENT: [This section is current through the latest supplement]



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V. REVISED PRINCIPAL AND INCOME ACT
G. Allocation of Receipts Normally Apportioned During Trust Administration.
6. Asset-Backed Securities.

13 Witkin Sum. Cal. Law Trusts § 187

[§ 187] Asset-Backed Securities.

(1) *Allocation Rules.* The following rules govern the allocation of payments with respect to asset-backed securities:

(a) If a trust receives a payment from interest or other current return and from other proceeds of collateral financial assets, the portion of the payment that the payer identifies as being from interest or other current return is allocated to income and the balance of the payment is allocated to principal. (*Prob.C. 16367(b).*)

(b) If a trust receives one or more payments in exchange for the trust's entire interest in an asset-backed security in one accounting period, the payments are allocated to principal. (*Prob.C. 16367(c).*)

(c) If a payment is one of a series of payments that will result in the liquidation of the trust's interest in the security over more than one accounting period, 10% of the payment is allocated to income and 90% to principal. (*Prob.C. 16367(c).*)

(2) *"Asset-Backed Security" Defined.* "Asset-backed security" means an asset the value of which is based on "the right it gives the owner to receive distributions from the proceeds of financial assets that provide collateral for the security." The term includes an asset that gives the owner the right to receive only interest or other current return from the collateral financial assets or only proceeds other than interest or current return. The term does not include assets governed by *Prob.C. 16350* (receipts from entity; *supra*, §178) or *Prob.C. 16361* (deferred payments; *supra*, §182). (*Prob.C. 16367(a).*)

The Law Revision Commission Comment explains: "Typical asset-backed securities include arrangements in which debt obligations such as real estate mortgages, credit card receivables and auto loans are acquired by an investment trust and interests in the trust are sold to investors. The source for payments to an investor is the money received from principal and interest payments on the underlying debt. An asset-backed security includes an 'interest only' or a 'principal only' security that permits the investor to receive only the interest payments received from the bonds, mortgages or other assets that are the collateral for the asset-backed security, or only the principal payments made on those collateral assets. An asset-backed security also includes a security that permits the investor to participate in either the capital appreciation of an underlying security or in the interest or dividend return from such a security." An asset-backed security does not include an interest in a corporation, partnership, or investment trust described in the

Comment to *Prob.C. 16351* (supra, §178), the assets of which consist significantly or entirely of investment assets.

SUPPLEMENT: [This section is current through the latest supplement]



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7. Insubstantial Allocation Is Not Required.

13 Witkin Sum. Cal. Law Trusts § 188

[§ 188] Insubstantial Allocation Is Not Required.

An allocation is presumed to be insubstantial in either of the following circumstances:

- (1) "Where the amount of the allocation would increase or decrease net income in an accounting period, as determined before the allocation, by less than 10 percent." (*Prob.C. 16360(b)(1).*)
- (2) "Where the value of the asset producing the receipt for which the allocation would be made is less than 10 percent of the total value of the trust's assets at the beginning of the accounting period." (*Prob.C. 16360(b)(2).*)

If a trustee determines that an allocation between principal and income required by *Prob.C. 16361, 16362, 16363, 16364, or 16367* is insubstantial, the trustee may allocate the entire amount to principal unless *Prob.C. 16336(b)* (supra, §172) applies to the allocation. This power may be exercised by a cotrustee under *Prob.C. 16336(c)* and may be released under *Prob.C. 16336(d)* and (e). (*Prob.C. 16360(a).*) The trustee has no duty to make this allocation and is not liable for failure to do so. (*Prob.C. 16360(c).*)

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H. Allocation of Disbursements During Trust Administration.
1. Disbursements From Income.

13 Witkin Sum. Cal. Law Trusts § 189

[§ 189] Disbursements From Income.

A trustee must make the following disbursements from income to the extent that they are not disbursements governed by *Prob.C. 16340(c)(2)* or *(c)(3)* (expenses of administering estate or winding up terminating income interest; *supra*, §175):

(1) *Regular Compensation*. "Except as otherwise ordered by the court, one-half of the regular compensation of the trustee and of any person providing investment advisory or custodial services to the trustee." (*Prob.C. 16370(a)*.)

(2) *Expenses Related to Both Income and Remainder Interests*. "Except as otherwise ordered by the court, one-half of all expenses for accountings, judicial proceedings, or other matters that involve both the income and remainder interests." (*Prob.C. 16370(b)*.)

(3) *Ordinary Expenses*. "All of the other ordinary expenses incurred in connection with the administration, management, or preservation of trust property and the distribution of income, including interest, ordinary repairs, regularly recurring taxes assessed against principal, and expenses of a proceeding or other matter that concerns primarily the income interest." (*Prob.C. 16370(c)*.) The Law Revision Commission Comment notes that the term "regularly recurring taxes" includes taxes imposed on real and personal property.

(4) *Insurance Premiums*. "All recurring premiums on insurance covering the loss of a principal asset or the loss of income from or use of the asset." (*Prob.C. 16370(d)*.) The Law Revision Commission Comment notes that title insurance premiums would be a principal disbursement under *Prob.C. 16371(a)(5)* (*infra*, §190).

SUPPLEMENT: [This section is current through the latest supplement]



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H. Allocation of Disbursements During Trust Administration.
2. Disbursements From Principal.

13 Witkin Sum. Cal. Law Trusts § 190

[§ 190] Disbursements From Principal.

A trustee must make the following disbursements from principal:

(1) *Compensation*. Except as otherwise ordered by the court, the remaining one-half of the disbursement for regular compensation described in *Prob.C. 16370(a)* (supra, §189) (*Prob.C. 16371(a)(1)*) and "all of the trustee's compensation calculated on principal as a fee for acceptance, distribution, or termination" (*Prob.C. 16371(a)(2)*).

(2) *Expenses Related to Both Income and Remainder Interests*. Except as otherwise ordered by the court, the remaining one-half of the disbursement for expenses related to both income and remainder interests described in *Prob.C. 16370(b)* (supra, §189). (*Prob.C. 16371(a)(1)*.)

(3) *Expenses of Preparing Property for Sale*. Except as otherwise ordered by the court, disbursements made to prepare property for sale. (*Prob.C. 16371(a)(2)*.)

(4) *Principal Payments on Debts*. Payments on the principal of a trust debt. (*Prob.C. 16371(a)(3)*.)

(5) *Expenses of Proceedings Concerning Principal*. "Expenses of a proceeding that concerns primarily principal, including a proceeding to construe the trust or to protect the trust or its property." (*Prob.C. 16371(a)(4)*.)

(6) *Insurance Premiums*. Premiums paid on insurance policies not described in *Prob.C. 16370(d)* (supra, §189) of which the trust is the owner and beneficiary. (*Prob.C. 16371(a)(5)*.) Premiums paid from principal include title insurance premiums and premiums on life insurance policies owned by the trust, which represent the trust's periodic investment in the policy. (Law Rev. Com. Comment.)

(7) *Transfer Taxes*. "Estate, inheritance, and other transfer taxes, including penalties, apportioned to the trust." (*Prob.C. 16371(a)(6)*.) Generation skipping transfer taxes are paid from principal. (Law Rev. Com. Comment.)

(8) *Environmental Expenses*. "Disbursements related to environmental matters, including reclamation, assessing environmental conditions, remedying and removing environmental contamination, monitoring remedial activities and the release of substances, preventing future releases of substances, collecting amounts from persons liable or potentially liable for the costs of those activities, penalties imposed under environmental laws or regulations and other payments

made to comply with those laws or regulations, statutory or common law claims by third parties, and defending claims based on environmental matters." (*Prob.C. 16371(a)(7)*.)

Subject to the power of the trustee to transfer funds to principal from income under *Prob.C. 16373* (infra, §191), environmental expenses are payable from principal, "on the assumption that they will usually be extraordinary in nature." (Law Rev. Com. Comment.) However, environmental expenses might be paid from income if the trustee is carrying on a business that uses or sells toxic substances, in which case environmental cleanup costs would be a normal cost of doing business and would be accounted for under *Prob.C. 16352* (supra, §179). "Paying all other environmental expenses from principal is consistent with this Act's approach regarding receipts--when a receipt is not clearly a current return on a principal asset, it should be added to principal because over time both the income and remainder beneficiaries benefit from this treatment. Here, allocating payments required by environmental laws to principal imposes the detriment of those payments over time on both the income and remainder beneficiaries." (Law Rev. Com. Comment.)

(9) *Offset for Income Paid Directly to Creditor*. "If a principal asset is encumbered with an obligation that requires income from that asset to be paid directly to the creditor, the trustee shall transfer from principal to income an amount equal to the income paid to the creditor in reduction of the principal balance of the obligation." (*Prob.C. 16371(b)*.)

SUPPLEMENT: [This section is current through the latest supplement]

(5) *Expenses of Proceedings Concerning Principal*. See *Thomas v. Gustafson* (2006) 141 C.A.4th 34, 43, 45 C.R.3d 639 [where judicial proceedings primarily concerned principal, trustee was required by *Prob.C. 16371(a)(4)* to pay attorneys' fees and costs from principal, and court lacked discretion to order otherwise under *Prob.C. 16370(b)* (text, §189)].



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3. Transfers From Income.

13 Witkin Sum. Cal. Law Trusts § 191

[§ 191] Transfers From Income.

(1) *Transfers From Income for Depreciation.* The following provisions govern transfers from income:

(a) *"Depreciation" defined.* "Depreciation" means "a reduction in value due to wear, tear, decay, corrosion, or gradual obsolescence of a fixed asset having a useful life of more than one year." (*Prob.C. 16372(a).*)

(b) *General rule authorizing transfer.* "A trustee may transfer from income to principal a reasonable amount of the net cash receipts from a principal asset that is subject to depreciation, under generally accepted accounting principles." (*Prob.C. 16372(b).*) The amount transferred need not be held as a separate fund. (*Prob.C. 16372(c).*) (See *Stahl v. Wells Fargo Bank* (1998) 63 C.A.4th 396, 401, 73 C.R.2d 667 [depreciation reserve, once set aside, is principal, and trustee lacks power to reallocate reserve to income on determination that no depreciation in fact occurred; construing former statute].)

(c) *Exceptions.* A depreciation transfer is not authorized in the following circumstances:

(1) "As to the portion of real property used or available for use by a beneficiary as a residence or of tangible personal property held or made available for the personal use or enjoyment of a beneficiary." (*Prob.C. 16372(b)(1).*)

(2) During the administration of a decedent's estate. (*Prob.C. 16372(b)(2).*)

(3) If the trustee is accounting under *Prob.C. 16352* (supra, §179) for the business or activity in which the asset is used. (*Prob.C. 16372(b)(3).*)

(2) *Transfers To Reimburse Principal.* In designated circumstances, a trustee who "makes or expects to make" a principal disbursement may transfer an appropriate amount from income to principal in one or more accounting periods to reimburse principal or to provide a reserve for future principal disbursements, "to the extent that the trustee has not been and does not expect to be reimbursed by a third party." (*Prob.C. 16373(a), (b).*) The following disbursements are authorized:

(a) "An amount chargeable to income but paid from principal because it is unusually large, including extraordinary repairs." (*Prob.C. 16373(b)(1).*)

(b) "A capital improvement to a principal asset, whether in the form of changes to an existing asset or the construction of a new asset, including special assessments." (*Prob.C. 16373(b)(2).*)

(c) "Disbursements made to prepare property for rental, including tenant allowances, leasehold improvements, and broker's commissions." (*Prob.C. 16373(b)(3).*)

(d) "Periodic payments on an obligation secured by a principal asset to the extent that the amount transferred from income to principal for depreciation is less than the periodic payments." (*Prob.C. 16373(b)(4).*)

(e) Disbursements for environmental expenses described in *Prob.C. 16371(a)(7)* (*supra*, §190). (*Prob.C. 16373(b)(5).*)

If the asset giving rise to the disbursements becomes subject to a successive income interest after an income interest ends, the trustee may continue to transfer amounts from income to principal. (*Prob.C. 16373(c).*)

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4. Taxes and Related Adjustments.

13 Witkin Sum. Cal. Law Trusts § 192

[§ 192] Taxes and Related Adjustments.

(1) *Allocation of Income Tax Payments.* The following rules govern the allocation of disbursements for income taxes:

(a) A tax required to be paid by a trustee based on receipts allocated to income is paid from income. (*Prob.C. 16374(a).*)

(b) A tax required to be paid by a trustee based on receipts allocated to principal is paid from principal, even if the tax is called an income tax by the taxing authority. (*Prob.C. 16374(b).*)

(c) A tax required to be paid by a trustee on the trust's share of an entity's taxable income is paid proportionately as follows:

(1) From income to the extent that receipts from the entity are allocated to income. (*Prob.C. 16374(c)(1).*)

(2) From principal to the extent that (a) receipts from the entity are allocated to principal, and (b) the trust's share of the entity's taxable income exceeds the total receipts from the entity allocated to income and principal. (*Prob.C. 16374(c)(2).*)

For purposes of *Prob.C. 16374*, receipts allocated to principal or income are "reduced by the amount distributed to a beneficiary from principal or income for which the trust receives a deduction in calculating the tax." (*Prob.C. 16374(d).*) This provision takes into account the possibility that an electing small business trust may not receive a deduction for trust accounting income that is distributed to the beneficiaries. (Law Rev. Com. Comment.)

(2) *Mandatory Adjustment.* "If the amount of an estate tax marital deduction or charitable contribution deduction is reduced because a fiduciary deducts an amount paid from principal for income tax purposes instead of deducting it for estate tax purposes, and as a result estate taxes paid from principal are increased and income taxes paid by a decedent's estate, trust, or beneficiary are decreased, each estate, trust, or beneficiary that benefits from the decrease in income tax shall reimburse the principal from which the increase in estate tax is paid. The total reimbursement must equal the increase in the estate tax to the extent that the principal used to pay the increase would have qualified for a marital deduction or charitable contribution deduction but for the payment. The proportionate share of the reimbursement for each estate, trust, or beneficiary whose income taxes are reduced must be the same as its proportionate share of the total

decrease in income tax. An estate or trust shall reimburse principal from income." (*Prob.C. 16375(b)*.)

The Law Revision Commission Comment gives the following explanation: *Prob.C. 16375(b)* provides for a mandatory adjustment from income to principal to the extent needed to preserve an estate tax marital deduction or charitable contributions deduction. It limits mandatory reimbursement to cases in which a marital deduction or a charitable contributions deduction is reduced by the payment of additional estate taxes because of the fiduciary's income tax election. "Because a fiduciary will elect to deduct administration expenses for income tax purposes only when the income tax reduction exceeds the estate tax reduction, the effect of this adjustment is that the principal is placed in the same position it would have occupied if the fiduciary had deducted the expenses for estate tax purposes, but the income beneficiaries receive an additional benefit. For example, if the income tax benefit from the deduction is \$ 30,000 and the estate tax benefit would have been \$ 20,000, principal will be reimbursed \$ 20,000 and the net benefit to the income beneficiaries will be \$ 10,000."

(3) *Discretionary Adjustments*. A fiduciary may make adjustments between principal and income "to offset the shifting of economic interests or tax benefits between income beneficiaries and remainder beneficiaries" that arise from the following circumstances:

(a) Elections and decisions, other than those described in *Prob.C. 16375(b)*, that the fiduciary makes from time to time regarding tax matters. (*Prob.C. 16375(a)(1)*.)

(b) An income or other tax imposed on the fiduciary or a beneficiary as a result of a transaction involving or a distribution from the estate or trust. (*Prob.C. 16375(a)(2)*.)

(c) The ownership by an estate or trust of an interest in an entity the taxable income of which, whether or not distributed, is includable in the taxable income of the estate, trust, or a beneficiary. (*Prob.C. 16375(a)(3)*.)

The Law Revision Commission Comment illustrates allowable discretionary adjustments:

(a) "A fiduciary elects to deduct administration expenses that are paid from principal on an income tax return instead of on the estate tax return."

(b) "[A] distribution of a principal asset to a trust or other beneficiary causes the taxable income of an estate or trust to be carried out to the distributee and relieves the persons who receive the income of any obligation to pay income tax on the income."

(c) "[A] trustee realizes a capital gain on the sale of a principal asset and pays a large state income tax on the gain, but under applicable federal income tax rules the trustee may not deduct the state income tax payment from the capital gain in calculating the trust's federal capital gain tax, and the income beneficiary receives the benefit of the deduction for state income tax paid on the capital gain."

(d) *Prob.C. 16375(a)(3)* "applies to a qualified Subchapter S trust (QSST) whose income beneficiary is required to include a pro rata share of the S corporation's taxable income in his return. If the QSST does not receive a cash distribution from the corporation that is large enough to cover the income beneficiary's tax liability, the trustee may distribute additional cash from principal to the income beneficiary. In this case the retention of cash by the corporation benefits the trust principal. This situation could occur if the corporation's taxable income includes capital gain from the sale of a business asset and the sale proceeds are reinvested in the business instead of being distributed to shareholders."

SUPPLEMENT: [This section is current through the latest supplement]

(4) *(New) Source of Distributions to Beneficiaries*. Under *Prob.C. 16374.5*, added in 2006, distributions to beneficiaries are "considered paid in the following order from the following sources" unless provided otherwise by the governing instrument, the trustee, or the court:

- (a) From net taxable income other than capital gains.
- (b) From net realized short-term capital gains.
- (c) From net realized long-term capital gains.
- (d) From tax-exempt and other income.
- (e) From principal of the trust.



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VI. DURATION, MODIFICATION, AND TERMINATION
A. Duration of Trusts.

13 Witkin Sum. Cal. Law Trusts § 193

[§ 193] Duration of Trusts.

In the absence of an applicable statutory restriction, a trust generally lasts until its purposes have been accomplished or until the arrival of a date or event specified in the trust instrument. (See Cal Transactions Forms, 3 Estate Planning §12:93 et seq.; 116 *Harv. L. Rev.* 2588 [dynasty trusts]; 50 *U.C.L.A. L. Rev.* 1303 [perpetual trusts]; 76 *Am.Jur.2d* (2005 ed.), *Trusts* §71 et seq.)

(1) *Trust for Noncharitable Purpose.* "A trust for a noncharitable corporation or unincorporated society or for a lawful noncharitable purpose may be performed by the trustee for only 21 years, whether or not there is a beneficiary who can seek enforcement or termination of the trust and whether or not the terms of the trust contemplate a longer duration." (*Prob.C. 15211*, based on *Unif.Prob.C.*, §2-907(a).) The Law Revision Commission Comment points out that this provision adopts a 21-year limitation in place of the 90-year period that would otherwise apply under the Uniform Statutory Rule Against Perpetuities. (See *Prob.C. 21205*, 12 *Summary* (10th), *Real Property*, §180.)

(2) *Trust for Care of Animals.* "A trust for the care of a designated domestic or pet animal may be performed by the trustee for the life of the animal, whether or not there is a beneficiary who can seek enforcement or termination of the trust and whether or not the terms of the trust contemplate a longer duration." (*Prob.C. 15212*, based on *Unif.Prob.C.*, §2-907(b).) (See 40 *Santa Clara L. Rev.* 617 [care of pet after owner's death].)

(3) *Nontermination Provision.* An express or implied provision that a trust may not be terminated is ineffective insofar as it purports to be applicable after the longer of the two periods provided by the statutory rule against perpetuities (lives in being plus 21 years; 90 years after the creation of the interest). (*Prob.C. 15413*.) (On statutory rule against perpetuities, see 12 *Summary* (10th), *Real Property*, §175 et seq.)

(4) *Violation of Rule Against Perpetuities.* If a trust continues in existence after the longer of the two periods provided by the statutory rule against perpetuities, the trust may be terminated (a) on petition by a majority of the beneficiaries, or (b) on petition by the Attorney General or by any person who would be affected by the termination if the court finds that termination would be in the public interest or the best interest of a majority of those affected by the termination. (*Prob.C. 15414*.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Trust for Care of Animals.* In 2008, the statute quoted in the text was repealed and more extensive provisions

governing trusts for the care of animals were adopted. Unless the trust instrument expressly provides otherwise, a trust for the care of animals terminates when no animal living on the date of the settlor's death remains alive. (*Prob.C. 15212(a)*, added in 2008.)



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B. Revocation and Modification of Revocable Trust.
1. Law Revision Commission Report.

13 Witkin Sum. Cal. Law Trusts § 194

[§ 194] Law Revision Commission Report.

The California Law Revision Commission (18 Cal. Law Rev. Com. Reports, p. 565) discusses the background law and the nature and purpose of its recommendations on modification and termination of revocable and irrevocable trusts. (For a background study on termination, see 36 *Hastings L. J.* 563.)

(1) "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. 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. 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."

(2) "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, but California law since 1931 has provided a contrary rule that presumes transfers in trust to be revocable unless the trust instrument provides otherwise. 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 trusts became inadequate to support the trustors, who found themselves precluded from reaching the trust corpus', an acute problem in 1929 and 1930. 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."

(3) "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. 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."

(4) "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, but problems may still arise 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. 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 revocability of 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."

SUPPLEMENT: [This section is current through the latest supplement]



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B. Revocation and Modification of Revocable Trust.
2. Presumption of Revocability.

13 Witkin Sum. Cal. Law Trusts § 195

[§ 195] Presumption of Revocability.

(1) *Trusts Created Prior to 1931: General Rule.* A reserved power of revocation does not affect the validity of a trust. And the general rule, applicable in California to trusts created prior to 1931, is that the settlor can revoke only if he or she originally reserved an express power of revocation in the trust instrument, and then only upon compliance with its terms. (See *Nichols v. Emery* (1895) 109 C. 323, 331, 41 P. 1089; *Gray v. Union Trust Co. of San Francisco* (1915) 171 C. 637, 641, 154 P. 306; *Rest.3d, Trusts* §63 [power to revoke]; 1 Scott §37; 1A Scott §57; 4 Scott §330; 4A Scott §367; Bogert §1000; 76 Am.Jur.2d (2005 ed.), *Trusts* §76.)

(2) *Trusts Created After 1931: California Rule.* Under former C.C. 2280, applicable to trusts created after 1931, unless expressly made irrevocable, a voluntary trust was revocable by the settlor by a writing filed with the trustee. (See *Fernald v. Lawsten* (1938) 26 C.A.2d 552, 560, 79 P.2d 742; *Title Ins. & Trust Co. v. McGraw* (1945) 72 C.A.2d 390, 400, 164 P.2d 846 [settlor may revoke trust, without consent of beneficiaries]; *Fleishman v. Blechman* (1957) 148 C.A.2d 88, 93, 306 P.2d 548.) (On the tax consequences of this rule, see 28 So. Cal. L. Rev. 120.)

(3) *Express Power of Revocation.* If the trust instrument reserves power to revoke the trust in a specified form or manner, this must be followed to make the revocation effective. Thus, if the settlor of a living trust reserves the power to revoke during his or her lifetime by written instrument delivered to the trustee, the trust is not revoked by the settlor's will delivered to the trustee after the settlor's death. (*Rosenauer v. Title Ins. & Trust Co.* (1973) 30 C.A.3d 300, 303, 106 C.R. 321; see *Estate of Lindstrom* (1987) 191 C.A.3d 375, 385, 236 C.R. 376 [trust revocable during settlor's lifetime was not revoked by contrary disposition of trust estate in settlor's will; following *Rosenauer*]; *Rest.3d, Trusts* §§63, 64, Comment i; 4 Scott §330; Bogert §1001; 17 *Pacific L. J.* 941 [termination where statute and trust instrument are inconsistent]; 81 A.L.R.3d 959 [*Rosenauer*]; 53 A.L.R.4th 1297 [authority of guardian to revoke on behalf of ward].)

In *Crook v. Contreras* (2002) 95 C.A.4th 1194, 116 C.R.2d 319, a married couple executed a revocable living trust that, by its terms, would be divided into two irrevocable trusts on the death of the first spouse to die. The surviving spouse had the power to make unlimited withdrawals from one of the trusts and was authorized to exercise a power of appointment over the remainder of that trust by will. The first spouse died 3 years after execution. Seven years later, the survivor executed two notarized instruments purporting to be amendments to the trust authorizing the survivor to exercise the power by any written instrument and exercising the power. *Held*, the instruments were not valid amendments. The trust expressly prohibited the survivor from revoking, modifying, or amending the trust after the first

spouse's death. The survivor's power to withdraw all or part of the assets of one of the trusts during her lifetime did not by implication permit her to revoke or amend that trust notwithstanding the express prohibition. The original trust instrument "manifestly and unambiguously" demonstrates that the settlors did not intend to confer a right to revoke on the survivor. (95 C.A.4th 1208, 1209.) (For holding that the instruments were not valid codicils to the survivor's will, see 14 Summary (10th), *Wills and Probate*, §144.)

However, in *Wells Fargo Bank v. Greuner* (1964) 226 C.A.2d 454, 38 C.R. 132, defendant's father, owner of seven insurance policies on his own life, assigned them to defendant under an oral agreement that he in turn would assign them to plaintiff bank in trust for the benefit of the father's family. Defendant gave no consideration and did not pay any premiums. He did, however, execute a trust agreement approved by the father, with defendant son as settlor and plaintiff bank as trustee, and assigned the policies to the trustee. The father died, the policies matured, and the trustee bank held the money as trust assets. Thereafter, defendant gave written notice of revocation of the trust, and plaintiff trustee sought declaratory relief. *Held*, reversing the trial court, the trust was revocable.

(a) The instrument expressly gave the power to revoke during the father's lifetime. This did not authorize revocation after his death, but neither did it make the trust irrevocable after death, for, under former C.C. 2280, only an express provision can prevent revocation. (226 C.A.2d 458.)

(b) Plaintiff's theory that the father was the true settlor was inconsistent with the language of the instrument. Under that language, defendant was the settlor and entitled to revoke. (226 C.A.2d 461.)

In *Huscher v. Wells Fargo Bank* (2004) 121 C.A.4th 956, 18 C.R.3d 27, a decision applying former C.C. 2280, the court, reviewed *Fernald*, *Rosenauer*, and other decisions, reached the following conclusions:

(a) If the trust contains a revocation or modification procedure that is either explicitly or implicitly exclusive, that procedure must be followed and former C.C. 2280 does not apply. (121 C.A.4th 970.)

(b) If the revocation or modification procedure is not explicitly exclusive and not sufficiently detailed to be considered implicitly exclusive, former C.C. 2280 does not preempt the nonexclusive procedure and either method may be used to revoke or modify the trust. (121 C.A.4th 970.)

(4) *Trust Law*. "Unless a trust is expressly made irrevocable by the trust instrument, the trust is revocable by the settlor." (*Prob.C. 15400*.) (See *Bank of America v. Angel View Crippled Children's Foundation* (1999) 72 C.A.4th 451, 459, 85 C.R.2d 117 [otherwise revocable trust did not become irrevocable when another trust that was to pour over into that trust became irrevocable]; *California-Nevada Annual Conference of the United Methodist Church v. St. Luke's United Methodist Church* (2004) 121 C.A.4th 754, 768, 17 C.R.3d 442, citing the text [local church, as settlor of trust covering church property, was entitled to revoke trust following split with national denomination].)

But the statute adds a limitation on application of the California rule: "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." (*Prob.C. 15400*.)

And the Comment to *Prob.C. 15207* (supra, §30) notes another exception: An oral trust may be shown to be irrevocable by "clear and convincing evidence" under *Prob.C. 15207*.

West's Key Number Digest, Trusts k.59(1)

SUPPLEMENT: [This section is current through the latest supplement]

(3) *Express Power of Revocation*. On revocation by settlor's will delivered to trustee during settlor's life, see *Gardenhire v. Superior Court* (2005) 127 C.A.4th 882, 26 C.R.3d 143, Supp., infra, §196 [distinguishing *Rosenauer v. Title Ins. & Trust Co.* (1973) 30 C.A.3d 300, 106 C.R. 321, text, p. 779, and *Estate of Lindstrom* (1987) 191 C.A.3d 375, 236 C.R. 376, text, p. 779].



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3. Methods of Revocation.

13 Witkin Sum. Cal. Law Trusts § 196

[§ 196] Methods of Revocation.

(1) *In General.* A trust that is revocable by the settlor may be revoked in whole or in part by the following methods:

(a) By compliance with any method of revocation provided in the trust instrument. (*Prob.C. 15401(a)(1).*)

(b) By a writing (other than a will) signed by the settlor and delivered to the trustee during the lifetime of the settlor. However, this provision is inapplicable if the trust instrument explicitly makes the method of revocation provided in the trust instrument the exclusive method of revocation. (*Prob.C. 15401(a)(2).*) The settlor may revoke in the manner provided in *Prob.C. 15401(a)(2)*, unless there is a contrary provision in the trust. This changes the rule of *Rosenauer v. Title Ins. & Trust Co.* (1973) 30 C.A.3d 300, 303, 106 C.R. 321, *supra*, §195.

(2) *Revocation by Will.* The settlor may not revoke a trust by a will under *Prob.C. 15401(a)(2)*, even if the will purporting to revoke is delivered to the trustee during the lifetime of the settlor. However, under *Prob.C. 15401(a)(1)*, the settlor may revoke by will if the trust so provides. (Law Rev. Com. Comment.)

(3) *Revocation by Attorney in Fact.* "A trust may not be modified or revoked by an attorney in fact under a power of attorney unless it is expressly permitted by the trust instrument." (*Prob.C. 15401(c).*) "[A] provision in the power of attorney permitting the attorney in fact to revoke or modify the trust is ineffective unless the trust instrument expressly authorizes revocation by the attorney in fact." (Law Rev. Com. Comment.)

(4) *Revocation Under Prior Law.* "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." (*Prob.C. 15401(e)*; see Cal Transactions Forms, 3 Estate Planning §§13:8 et seq., 13:42 et seq.) Hence, if a trust created by an instrument executed before July 1, 1987, provides the manner of revocation, the statutory method provided in *Prob.C. 15401(a)(2)* is not available. (Law Rev. Com. Comment.)

(5) *Partial Revocation by Joint Settlor.* The courts had held that one of two joint settlors could not unilaterally revoke. (See *Estate of Khan* (1985) 168 C.A.3d 270, 214 C.R. 109, and *Estate of Wernicke* (1993) 16 C.A.4th 1069, 1075, 20 C.R.2d 481 [joint settlor could not unilaterally revoke trust as to corpus he contributed; mutual revocation by all settlors was required in absence of express provision otherwise in trust instrument].) The rule in these cases was

changed by statute. Unless a trust created by more than one settlor provides otherwise, each settlor may revoke the trust as to the portion of the trust contributed by that settlor, except as provided by *Family C. 761* (status of community property in revocable trust; see *infra*, §198). (*Prob.C. 15401(b)*.)

In *Estate of Powell* (2000) 83 C.A.4th 1434, 100 C.R.2d 501, a husband and wife created a revocable trust of community property that could be revoked by either of them. After the wife's death, the husband revoked the entire trust. *Held*, the husband's revocation was effective only as to his half of the community assets. To give meaning to the clause of *Prob.C. 15401(b)* excepting *Family C. 761*, the power to revoke in *Family C. 761* must be interpreted to cover the entire trust corpus. Thus, revocation of a joint trust by one spouse is effective as to all the community property, but, under *Prob.C. 15401(b)*, as to only the revoking spouse's share of other property. Here, on the wife's death, half the community property belonged to her and to the extent she retained a reversionary property interest in the trust assets during her lifetime by virtue of the right of revocation in the trust, that property interest was transmuted to separate property on her death. Under her will, it was subject to disposition under the terms of the trust. (83 C.A.4th 1440, 1441.)

(6) *Revocation by Settlor and Beneficiaries*. The settlor and the beneficiaries together may compel modification or termination of a trust. (*Prob.C. 15404*; see *infra*, §204.)

West's Key Number Digest, Trusts k.59(1)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General*. In *Heaps v. Heaps* (2004) 124 C.A.4th 286, 21 C.R.3d 239, a married couple created a revocable living trust with themselves as trustees and transferred their residence to the trust by a quitclaim deed. The deed was not recorded, and when the couple later sold the residence, they took title to the proceeds of the sale in their individual names as joint tenants. On the wife's death, the trust became irrevocable, and the issue was whether the proceeds of the sale remained in the trust or passed to the husband outside the trust as the surviving joint tenant. *Held*, the change of title was insufficient to remove the proceeds from the trust.

(a) A clause governing the manner of holding title to trust assets authorized the trustee to hold trust property in the trustee's individual name without designating the trust. "By saying that title to trust property could be held *in any way*, it necessarily meant that selling an asset and taking title in a name other than that of the trust's would not, by itself, take the property out of the trust." (124 C.A.4th 291.)

(b) A clause governing the manner of amending or revoking the trust required "a duly executed instrument" delivered to the trustee, and here, there was nothing, delivered or undelivered, indicating that by selling the property the proceeds were to be taken out of the trust. (124 C.A.4th 291.) (2) *Revocation by Will*. Revocation of a living trust by the settlor's will was upheld in *Gardenhire v. Superior Court* (2005) 127 C.A.4th 882, 26 C.R.3d 143. The trust authorized revocation by a "written notice" signed by the settlor during her lifetime and delivered to the trustee. While serving as trustee, the settlor executed a will that disposed of property in the trust. *Held*, the will was effective to revoke the trust.

(a) The term "written notice" was neither limited nor qualified; it authorized revocation by any writing that unambiguously manifested an intent to revoke. Because the settlor was the trustee, she could revoke by giving herself written notice of her intent to do so. "Since she could not be mistaken about her own intent no matter how she chose to manifest it in writing, the broad, unqualified language of the trust reasonably implies that she did not intend to restrict the form of written notice or the nature of the documents used to provide it. Rather, any writing that unambiguously manifested her intent would do." (127 C.A.4th 888.) Thus, the trust permitted revocation by will. *Rosenauer v. Title Ins. & Trust Co.* (1973) 30 C.A.3d 300, 106 C.R. 321, and *Estate of Lindstrom* (1987) 191 C.A.3d 375, 236 C.R. 376, which involved notice to a third-party trustee, are distinguishable. (127 C.A.4th 890.)

(b) *Prob.C. 15401(a)* does not require that the trust expressly authorize revocation by will. *Prob.C. 15401(a)(1)* allows any method of revocation. It is not limited by *Prob.C. 15401(a)(2)*, which is applicable only if the trust is silent. (127 C.A.4th 894.) Any apparent ambiguity in the Law Revision Commission Comment (text, p. 781) "does not mean

that the statute is ambiguous." (127 C.A.4th 895.)

(5) *Partial Revocation by Joint Settlor*. See *Masry v. Masry* (2008) 166 C.A.4th 738, 742, 82 C.R.3d 915 [husband and wife were settlors and trustees of revocable living trust; husband's revocation of his interest by delivering notice to himself as trustee without notice to wife was proper under *Prob.C. 15401(a)(2)* and *15401(b)*, even though trust's revocation provision required notice to wife, where provision was not explicitly the exclusive method of revocation].



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4. Power To Modify.

13 Witkin Sum. Cal. Law Trusts § 197

[§ 197] Power To Modify.

"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." (*Prob.C. 15402.*) This provision codifies the general rules of *Heifetz v. Bank of America* (1957) 147 C.A.2d 776, 777, 305 P.2d 979, that a power of revocation implies the power of modification and that an unrestricted power to modify also includes the power to revoke. (Law Rev. Com. Comment.) (See *Conservatorship of Irvine* (1995) 40 C.A.4th 1334, 1343, 47 C.R.2d 587 [purported amendment not properly served on trustee as required by trust instrument was invalid]; *Rest.3d, Trusts* §63, Comment g; 4 Scott §331; Bogert §993; 45 Cal. L. Rev. 556.)

SUPPLEMENT: [This section is current through the latest supplement]



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5. Trust of Community Property.

13 Witkin Sum. Cal. Law Trusts § 198

[§ 198] Trust of Community Property.

Family C. 761, based on former C.C. 5110.150, is intended to preserve favorable income tax treatment for community property under the Internal Revenue Code. (See Law Rev. Com. Comment.) The statute provides as follows:

(1) *Character of Property*. Unless the trust or the instrument of transfer expressly provides otherwise, community property transferred in trust remains community property during the marriage, regardless of the identity of the trustee, if the trust, originally or as amended, provides that (a) the trust is revocable as to that property during the marriage, and (b) any power to modify the trust as to the rights and interests in that property during the marriage requires the joinder or consent of both spouses. (*Family C. 761(a)*.) Community property distributed or withdrawn from a trust retains its character as community property in the absence of a valid transmutation at the time of revocation or withdrawal. (*Family C. 761(b)*.)

Where community and quasi-community property assets are transferred to a revocable trust, it is presumed that those assets "retain their character in the aggregate for purposes of any division provided by the trust." (*Prob.C. 104.5*.)

(2) *Revocation*. Unless the trust expressly provides otherwise, a power to revoke as to community property may be exercised by either spouse acting alone. (*Family C. 761(b)*.)

(3) *Management of Property*. Unless the trust expressly requires the joinder or consent of one or both spouses, the trustee may convey and otherwise manage and control the trust property in accordance with the trust without consent or joinder. (*Family C. 761(c)*.)

(4) *Scope of Provisions*. *Family C. 761* applies to transfers made before, on, or after July 1, 1987 (*Family C. 761(d)*), but it does not affect the community character of property transferred at any time in any manner or to a trust not within the scope of the statute (*Family C. 761(e)*).

The Law Revision Commission Comment makes the following points:

(1) The trust property is subject to the claims of creditors and to division on dissolution to the same extent as other community property. (On liability generally, see *Family C. 910* et seq., *11 Summary* (10th), *Community Property*, §177 et seq.; on creditors' rights against revocable trust during settlor's lifetime, see *Prob.C. 18200*, *infra*, §259.)

(2) The interest of the decedent in community property is subject to testamentary disposition at death, unless a contrary method of disposition is provided by the trust, which is typically the case. However, the traditional community property right of testamentary disposition is preserved by the unilateral power of revocation.

(3) Where the trust requires joint 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 that spouse's share of the community property.

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a. General Law and California Cases.
1. Modern Rule.

13 Witkin Sum. Cal. Law Trusts § 199

[§ 199] Modern Rule.

When all of the beneficiaries join in the suit, and each is *sui juris*, and the purposes of the trust have been accomplished, they have a *right* to terminate. The objection of a trustee is immaterial, and it has been said that the court has no discretion to refuse when the facts are clear. (See *Eakle v. Ingram* (1904) 142 C. 15, 16, 75 P. 566; *Rest.3d, Trusts* §65; 4 Scott §337; Bogert §1007; 59 A.L.R.2d 1229 [cancellation on ground of mistake or misunderstanding]; 76 *Am.Jur.2d* (2005 ed.), *Trusts* §74; Cal. Civil Practice, 3 Probate and Trust Proceedings, §24:118 et seq.)

Thus, in *Moor v. Vawter* (1927) 84 C.A. 678, 682, 258 P. 622, the trust was for the testator's widow and sons. The widow died and the sons petitioned to terminate, showing that the trustee was accumulating substantial amounts in excess of the fixed monthly payments to them. *Held*, termination should be ordered. (84 C.A. 682.)

The situation is the same where one beneficiary acquires all the other interests, e.g., where a life beneficiary purchases the interest of the remainder beneficiary. (See *Rest.3d, Trusts* §65, Comment d; Bogert §1003; 50 A.L.R.2d 1161 [termination where life interest and remainder are acquired by same person].) "Where the trustor is the sole beneficiary, no problem arises of defeating the trust against the trustor's wishes, and it has been held that, even where the trust instrument contains spendthrift provisions, he can compel termination in the absence of a showing of incapacity or other reason why he should not be permitted to exercise control over his property." (*Bixby v. California Trust Co.* (1949) 33 C.2d 495, 497, 202 P.2d 1018, 12 Summary (10th), *Real Property*, §12; see *Rest.3d, Trusts* §65, Comment e; 4 Scott §339; Bogert §1004; 65 *Harv. L. Rev.* 617.)

Similarly, a settlor who has unrestricted power to modify the trust can exercise that power to exclude all other beneficiaries, and thereby establish his or her right to revoke. (*Heifetz v. Bank of America* (1957) 147 C.A.2d 776, 784, 305 P.2d 979; see *Rest.3d, Trusts* §63, Comment g; 4 Scott §331; 45 *Cal. L. Rev.* 556.) However, where a settlor made a trust in which he was income beneficiary for life and in which he had a testamentary power of appointment of the corpus, but in default of appointment the corpus would go to his surviving issue, he was not the sole beneficiary and hence could not terminate. (*Levy v. Crocker-Citizens Nat. Bank* (1971) 14 C.A.3d 102, 106, 94 C.R. 1.)

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2. Beneficiary's Waiver as Means of Termination.

13 Witkin Sum. Cal. Law Trusts § 200

[§ 200] Beneficiary's Waiver as Means of Termination.

Estate of Nicely (1965) 235 C.A.2d 174, 44 C.R. 804, approved an ingenious solution to a peculiar problem. The testator left an estate of over \$ 300,000, with a spendthrift trust for her daughter and sole heir, paying \$ 250 per month for life. On her death, the trust was to terminate and go to five charities, four of which were subject to former Prob.C. 41, restricting charitable devises to one-third of the testator's estate where the testator was survived by designated family members. The charitable gift in remainder was clearly violative of the statute, and the daughter would normally have received the excess at once as in intestacy. But the trust instrument contained a corpus-invasion clause, and this, the judge thought, made it impossible to determine in advance of trust termination whether the gifts would exceed one-third of the estate. Accordingly, he ruled that distribution of the intestate excess should await termination of the trust by the daughter's death. *Held*, reversed with directions for a practical solution.

(a) *The impossible solution: direct termination.* The simplest solution, termination by the sole life beneficiary, was precluded by the spendthrift clause. (235 C.A.2d 181.)

(b) *The untenable solution: renunciation.* The charities suggested that the daughter could accomplish the effect of termination by renouncing the gift, thus preventing the trust from coming into being, and taking her intestate interest in the assets of the failed trust. The court denounced the idea: "This is a proposition which no one could dispute under circumstances where the renunciation not only eschews the benefits of the trust but also receipt of the trust *funds*. But to renounce a trust only to effect transfer of its moneys into the intestate portion of an estate is quite another matter. That is not a renunciation; it is only an evasion of the trust's restrictions. And a rule permitting such manipulation would have monstrous implications. One cannot even guess how many wills are now in existence containing testamentary trusts with spendthrift provisions for the protection of improvident sole beneficiaries who are also the sole heirs at law of testators still alive. Under the rule sought here all such trust restrictions could be wiped out by the simple sleight-of-hand of renunciation followed by a retrieval according to the laws of intestate succession." (235 C.A.2d 182.)

(c) *The appropriate solution: waiver of corpus-invasion right.* The stumbling block--the corpus-invasion clause--was a provision for the daughter's benefit, and therefore could be waived by her. The waiver would defeat an expressed wish of the trustor, but denial of the right would be contrary to her probable intent. (235 C.A.2d 182.)

Eliminating this uncertain factor, the present value of the life estate and charitable bequests would be subject to actuarial determination, and the extent to which former Prob.C. 41 was violated could be computed. (235 C.A.2d 183.)

(d) *The result.* The trust without the corpus-invasion clause would be nothing more than an annuity, and the daughter could apply to the probate court for the purchase of an annuity to pay \$ 250 per month for life, subject to the spendthrift restrictions of the trust. Thereafter, the trust could be terminated. (235 C.A.2d 186.) (See 14 A.L.R.3d 1437 [disclaimer or renunciation of spendthrift trust].)

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SUPPLEMENT: [This section is current through the latest supplement]



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3. Settlor's Purpose To Continue Trust.

13 Witkin Sum. Cal. Law Trusts § 201

[§ 201] Settlor's Purpose To Continue Trust.

The theory on which the courts order termination is that there is no further reason to continue the trust. If, however, there is some purpose still to be served, termination will not be permitted, despite consent, and irrespective of the interests of all living beneficiaries. This is the majority American rule, established by the Massachusetts case of *Clafin v. Clafin* (1889) 149 Mass. 19, 20 N.E. 454. (See *Rest.3d, Trusts* §65; 4 Scott §337; Bogert §1008; 40 Cal. L. Rev. 445.)

Thus, the settlor may desire to keep the trust property intact, or to place its management in the hands of a trustee without any control by the beneficiary, or to provide for payment of income to the beneficiary only when he or she is in need. Purposes of this sort may be stated in the trust instrument or proved by extrinsic evidence, and when shown, will prevent termination. (*Estate of Easterday* (1941) 45 C.A.2d 598, 604, 114 P.2d 669 [testator's attorney testified to instructions to keep estate intact because beneficiary needed looking after]; *Rest.3d, Trusts* §65.) The fact that the beneficiary, if not restricted by a spendthrift provision, might be able to circumvent the purpose by assigning to creditors or selling his or her interest, is not a justification for court termination. (*Estate of Easterday, supra*, 45 C.A.2d 607.)

The *Easterday* case left open the question whether, in exceptional situations and for compelling reasons, the court has discretion to depart from the settlor's intent and authorize termination. (See 45 C.A.2d 608, noting criticisms of inflexible rule.) But the strict *Clafin* rule was reaffirmed by the Supreme Court in *Moxley v. Title Ins. & Trust Co.* (1946) 27 C.2d 457, 165 P.2d 15. Plaintiff's mother created a trust for plaintiff's support, giving the trustees broad powers of investment and absolute discretion in making payments of income, and providing for termination and delivery of the corpus to plaintiff when she reached 35. At age 26, she brought an action to terminate, alleging that the income was insufficient for her support. Objection was made by defendant trustee and by a guardian ad litem appointed to represent plaintiff's possible unborn children (although she had alleged that adequate provision for unborn children had been made by her exercise of a power of appointment in their favor). *Held*, on demurrer, she had no right to terminate. The court found it unnecessary to consider the jurisdictional problem of the absence of an indispensable party--the unborn remainderman (see *infra*, §205). It rested its decision on the propositions that (a) an *active* trust cannot be terminated by the court during the period fixed by the settlor, even though all beneficiaries are *sui juris* and give their consent, and that (b) changed conditions may sometimes justify *modification* or deviation, but not termination. (See 34

Cal. L. Rev. 453.) (On statutory relaxation of rule in *Moxley*, see *infra*, §203.)

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13 Witkin Sum. Cal. Law Trusts § 202

[§ 202] Application by Fewer Than All Beneficiaries.

Termination will ordinarily be refused unless all beneficiaries are before the court, or are represented in some way so that their interests may be protected. (See *Estate of Gallimore* (1950) 99 C.A.2d 664, 667, 222 P.2d 259 [objection by a beneficiary adversely affected; "all of the beneficiaries must consent to a termination unless there is no possible purpose to be accomplished in continuing the trust"]; *Wogman v. Wells Fargo Bank & Union Trust Co.* (1954) 123 C.A.2d 657, 665, 267 P.2d 423 [two classes of beneficiaries did not join in petition]; *Rest.3d, Trusts* §65, Comment b; 4 Scott §340; Bogert §§1005, 1006.)

In *Estate of Feuereisen* (1971) 17 C.A.3d 717, 722, 95 C.R. 165, the testator created a testamentary trust, providing for payment of \$ 270 per month to his sister M for life, and on her death termination and payment of the corpus to charitable beneficiaries. These remainder beneficiaries filed a petition under former Prob.C. 584 (investment of money in insurance annuity) for an order directing the executor to purchase an annuity for \$ 56,700, which would pay M the required monthly sum, and on her death would give \$ 54,000 to the remainder beneficiaries. It was alleged that this would save trustee's fees and enable the remainder beneficiaries to have the balance of the estate at once. In effect, therefore, they were seeking to substitute for the trust created by the will an insurance annuity, and thereupon to terminate the trust and distribute the corpus to the remainder beneficiaries. *Held*, the statute did not authorize the procedure urged. (a) It would change the will plan without any showing of reason for it. (b) It would deprive the life beneficiary of her equitable estate by substitution of a contract right against an insurance company. (c) It would effect a termination of the trust without consent of M, the life beneficiary, who was not made a party to the proceedings. (17 C.A.3d 722.)

But *representation* will in some situations be sufficient; e.g., one beneficiary, or the trustee, may represent another, where no conflict of interest arises. (See *Mabry v. Scott* (1942) 51 C.A.2d 245, 253, 124 P.2d 659, *infra*, §205.) And special protection may take the place of representation; e.g., a partial termination, with protection for nonconsenting or incapacitated beneficiaries. (*Rest.3d, Trusts* §65, Comment c; see 4 Scott §340.)

SUPPLEMENT: [This section is current through the latest supplement]



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1. Modification or Termination by Beneficiaries.

b. Trust Law.

1. Beneficiaries.

13 Witkin Sum. Cal. Law Trusts § 203

[§ 203] Beneficiaries.

(1) *In General.* Generally, if all the beneficiaries of an irrevocable trust consent, they may compel modification or termination of the trust on a petition to the court. (*Prob.C. 15403(a)*.) This provision applies only to irrevocable trusts; if the trust is revocable, the method of revocation is governed by *Prob.C. 15401* (*supra*, §196). (Law Rev. Com. Comment.) (See also 18 Cal. Law Rev. Com. Reports, p. 569.)

(2) *Termination Contrary to Material Purpose.* If the continuance of the trust is necessary to carry out a material purpose, 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." The court does not have discretion to permit termination of a trust that is subject to a valid spendthrift provision under *Prob.C. 15300* et seq. (*Prob.C. 15403(b)*.) Unlike the Restatement, *Prob.C. 15403(b)* gives the court some discretion in applying the material purposes doctrine, except where the beneficiary's interest is restrained, as by a spendthrift provision. This discretionary power changes the California case law rule of *Moxley v. Title Ins. & Trust Co. (1946) 27 C.2d 457, 165 P.2d 15*, *supra*, §201. (Law Rev. Com. Comment.) (See Cal Transactions Forms, 3 Estate Planning §§13:23 et seq., 13:51 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* See *Laycock v. Hammer (2006) 141 C.A.4th 25, 30, 31, 44 C.R.3d 921* [irrevocable character of life insurance trust could be terminated only under *Prob.C. 15403*, not by settlor's conduct after trust had been established].



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b. Trust Law.
2. Beneficiaries and Settlor.

13 Witkin Sum. Cal. Law Trusts § 204

[§ 204] Beneficiaries and Settlor.

(1) *In General.* "If the settlor and all beneficiaries of a trust consent, they may compel the modification or termination of the trust." (*Prob.C. 15404(a)*.) (See Cal. Civil Practice, 3 Probate and Trust Proceedings, §24:131 [petition for modification], §24:132 [order accepting modification].)

(2) *Where Not All Beneficiaries Consent.* If any beneficiary does not consent, the other beneficiaries, with the consent of the settlor, on petition to the court, may compel modification or partial termination of the trust as long as the interests of the beneficiaries who do not consent are not "substantially impaired." (*Prob.C. 15404(b)*.)

(3) *Remote Beneficiaries.* "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." (*Prob.C. 15404(c)*.) *Prob.C. 15404(c)* "reinstates a limited form of the doctrine of worthier title. ... [T]he 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." (Law Rev. Com. Comment.)

(4) *Law Revision Commission.* The California Law Revision Commission makes the following points:

(a) A trust may be modified or terminated under *Prob.C. 15404* without court approval, but a court order may be sought by a petition under *Prob.C. 17200* (infra, §229). (Law Rev. Com. Comment.)

(b) A revocable trust may be modified or terminated under *Prob.C. 15404*, as in a case where the method of modification or revocation specified in the trust is found to be overly restrictive. (Law Rev. Com. Comment.)

(c) A trust may be modified or terminated under *Prob.C. 15404* "regardless of any provision in the trust restraining

transfer of the beneficiary's interest and regardless of whether its purposes have been achieved." (Law Rev. Com. Comment.)

(d) "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. This rule stands on the firm footing 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. 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." (18 Cal. Law Rev. Com. Reports, p. 568.)

West's Key Number Digest, Trusts k.61(3)

SUPPLEMENT: [This section is current through the latest supplement]



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a. In General.

13 Witkin Sum. Cal. Law Trusts § 205

[§ 205] In General.

(1) *Unborn Beneficiaries or Remaindermen: Necessity of Representation.* The problem of termination becomes particularly difficult where the trust instrument includes unborn children as beneficiaries or remaindermen, vested or contingent. In any attempt by living persons to terminate, the possible unborn children are not before the court, and termination is impossible unless they are represented or their interests are protected. Formerly, the California courts almost always refused to terminate in these cases. (See *Gray v. Union Trust Co. of San Francisco* (1915) 171 C. 637, 641, 154 P. 306; *Bixby v. Hotchkis* (1943) 58 C.A.2d 445, 451, 136 P.2d 597.)

(2) *Representation or Protection: Restatement Doctrine.* In *Mabry v. Scott* (1942) 51 C.A.2d 245, 124 P.2d 659, the settlor gave his entire estate in trust to defendant trust company. The instrument provided for monthly payments for his wife, four living children, and himself; on their death, the trust was to terminate and the property to go to the issue of the children or, if none, to the heirs of the settlor. A subsequent suit by the settlor to cancel for fraud, etc., was compromised by revision of the instrument, under which some of the corpus was paid to the husband and wife. The trustee alone objected, contending that the unborn contingent remaindermen (issue of the children) were indispensable parties in any proceeding affecting their interest in the corpus. *Held*, the compromise was proper. (a) These unborn remaindermen were *virtually represented* by the children (their prospective parents), there being no basis for assuming hostility between them. (b) They were *protected* against unfairness in the settlement by the appointment of a guardian ad litem to take care of their interests. The court placed great reliance on the *Restatement of Property*, §182, and observed that "[b]ecause parties are not in being, and therefore cannot be brought before the tribunal, is not sufficient reason for a court to stand by, helpless and impotent, when rights of living persons, in ordinary common sense, ought to be adjudicated." (51 C.A.2d 252.) (On representation theory, see 5 *Hastings L. J.* 199; 76 *Am.Jur.2d* (2005 ed.), *Trusts* §72.)

(3) *California Representation Statute.* A statutory codification of the doctrine of virtual representation took place in 1949 by the enactment of C.C.P. 373.5. It provides that an unascertained or unborn person with a present or prospective interest in property may be conclusively represented by a guardian ad litem, appointed at the suggestion of a party or of any person interested. There must, however, be an effective representation; a perfunctory appearance without participation does not satisfy the statutory requirement. (See *Wogman v. Wells Fargo Bank & Union Trust Co.* (1954) 123 C.A.2d 657, 666, 267 P.2d 423, 4 *Cal. Proc.* (4th), *Pleading*, §251.)

West's Key Number Digest, Trusts k.61(3)

SUPPLEMENT: [This section is current through the latest supplement]

(3) *California Representation Statute*.

Wogman case:

Cross-Reference: 4 *Cal. Proc.* (5th), *Pleading*, §272.



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b. Law Revision Commission Report.

13 Witkin Sum. Cal. Law Trusts § 206

[§ 206] Law Revision Commission Report.

The California Law Revision Commission (18 Cal. Law Rev. Com. Reports, p. 570) discusses methods of dealing with the problem of unborn or unascertained remaindermen as follows:

(1) *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. 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. The consent of the guardian ad litem should be based on a quid pro quo offered the incapacitated beneficiary. 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. This will enable a guardian ad litem to consent on behalf of unborn beneficiaries where the family is the beneficiary of the 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."

(2) *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 attorney or by a conservator."

(3) *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. 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 cannot be applied. The proposed law does not disturb existing law in this area."

SUPPLEMENT: [This section is current through the latest supplement]



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13 Witkin Sum. Cal. Law Trusts § 207

[§ 207] Guardian Ad Litem.

For purposes of *Prob.C. 15403* (supra, §203) and *Prob.C. 15404* (supra, §204), "the consent of a beneficiary who lacks legal capacity, including a minor, or who is an unascertained or unborn person may be given in proceedings before the court by a guardian ad litem, if it would be appropriate to do so. In determining whether to give consent, 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." (*Prob.C. 15405*.)

Prob.C. 1003 provides for the appointment of a guardian ad litem in proceedings under the Probate Code, and the Judicial Council has adopted forms for this purpose. (See Judicial Council Form No. DE-350 [Petition for Appointment of Guardian Ad Litem--Probate]; Judicial Council Form No. DE-351 [Order Appointing Guardian Ad Litem--Probate].)

West's Key Number Digest, Trusts k.61(3)

SUPPLEMENT: [This section is current through the latest supplement]



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d. No Conclusive Presumption of Fertility.

13 Witkin Sum. Cal. Law Trusts § 208

[§ 208] No Conclusive Presumption of Fertility.

(1) *General Law and California Cases.* Suppose the living children or other beneficiaries offer proof of the fact that the woman whose unborn children are beneficiaries or remaindermen, by reason of advanced age or other cause, is incapable of bearing other children. Does this sufficiently establish the right of the living children to terminate the trust? In California and some other jurisdictions, the answer was no; the courts applied a conclusive presumption that a woman was capable of bearing children, and evidence of age to show sterility was inadmissible. (*Fletcher v. Los Angeles Trust & Savings Bank* (1920) 182 C. 177, 184, 187 P. 425; *Wogman v. Wells Fargo Bank & Union Trust Co.* (1954) 123 C.A.2d 657, 665, 267 P.2d 423; see 21 Cal. L. Rev. 26; 7 Cal. L. Rev. 353.) The conclusive presumption has been abandoned in some jurisdictions. (See 18 Cal. Law Rev. Com. Reports, p. 571.)

(2) *Trust Law. Prob.C. 15406*, rejecting the prior California rule, states that in determining the class of beneficiaries whose consent is necessary to modify or terminate a trust under *Prob.C. 15403* (supra, §203) or *Prob.C. 15404* (supra, §204), the presumption of fertility is rebuttable. Under *Prob.C. 15406*, "the way is open for the court to approve a termination where the possibility of the birth of additional beneficiaries is negligible." (Law Rev. Com. Comment.)

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a. Uneconomically Low Principal.

13 Witkin Sum. Cal. Law Trusts § 209

[§ 209] Uneconomically Low Principal.

On a petition by a trustee or a beneficiary, "if the court determines that the fair market value of the principal of a trust has become so low in relation to the cost of administration that continuation of the trust under its existing terms will defeat or substantially impair the accomplishment of its purposes, the court may, in its discretion and in a manner that conforms as nearly as possible to the intention of the settlor," order the termination or modification of the trust or the appointment of a new trustee. (*Prob.C. 15408(a).*)

"The existence of a trust provision restraining transfer of the beneficiary's interest does not prevent application of this section." (*Prob.C. 15408(c).*)

West's Key Number Digest, Trusts k.61(1)

SUPPLEMENT: [This section is current through the latest supplement]

See *Finkbeiner v. Gavid* (2006) 136 C.A.4th 1417, 1421, 39 C.R.3d 871 [trust for educational needs of settlor's grandchildren; trial court abused discretion in denying trustee's petition to modify and terminate trust by distributing assets into blocked educational accounts for minor beneficiaries, where annual administrative cost over projected 16-year duration of trust was disproportionate to size of trust estate].



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13 Witkin Sum. Cal. Law Trusts § 210

[§ 210] Changed Circumstances.

"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." (*Prob.C. 15409(a).*)

"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." (*Prob.C. 15409(b).*)

Modification for the support of a beneficiary may be appropriate where the beneficiary is no longer self-supporting because of poor health or serious injury. (Law Rev. Com. Comment, citing *Whittingham v. California Trust Co.* (1931) 214 C. 128, 4 P.2d 142.) (See C.C. 726 [accelerated distribution of accumulations to destitute beneficiary].)

SUPPLEMENT: [This section is current through the latest supplement]



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3. Modification or Termination by Court.
c. Ambiguous Language.

13 Witkin Sum. Cal. Law Trusts § 211

[§ 211] Ambiguous Language.

In *Ike v. Doolittle* (1998) 61 C.A.4th 51, 70 C.R.2d 887, a husband and wife created a revocable living trust. At the time of creation, approximately 39% of the assets were community property, 56% were the wife's separate property, and 5% were the husband's separate property. The trust instrument recited that the trust assets would retain their character as separate or community property, but a contemporaneous property agreement appeared to transmute the separate property into community property. The trust provided for the division of the trust into a decedent's trust and a survivor's trust on the death of the first spouse, and designated beneficiaries for each share following the death of both spouses. As the result of various drafting errors, the trust failed to provide for the distribution of the wife's share in the event that she died first. She did so, and after the husband's death, by which time both trusts had become irrevocable, (a) the husband's designated beneficiaries claimed the entire trust estate, arguing that the unambiguous language of the trust made them the only beneficiaries, (b) the wife's designated beneficiaries claimed her share, arguing for construction of the trust to allow distribution of the shares to the designated beneficiaries regardless of which settlor died first, and (c) the wife's intestate heirs claimed her share under the trust's intestacy clause. The trial court found that the trust was patently ambiguous, considered extrinsic evidence of the intent of the parties, and reformed the trust to provide for distribution of the wife's share to her designated beneficiaries. *Held*, affirmed.

(a) *Admission of extrinsic evidence to resolve patent ambiguities.* Where a trust instrument contains some expression of the settlor's intent but that expression is ambiguous because of a drafting error, the court may consider extrinsic evidence, including the testimony of the lawyer who drafted the instrument, to resolve the ambiguity and give effect to the settlor's expressed intent. (61 C.A.4th 74, citing *Lissauer v. Union Bank & Trust Co. of Los Angeles* (1941) 45 C.A.2d 468, 114 P.2d 367.) Here, the drafter's testimony was sufficient to resolve three patent ambiguities: the character of the property in the trust, the nature of an amendment that may have revoked the intestacy clause, and the intended distribution of the spouses' shares to designated beneficiaries. (61 C.A.4th 75.)

(b) *Equitable power to modify trust.* The trial court has equitable power, founded in common law, to modify a trust if "peculiar" or "exceptional" circumstances "make modification necessary to accomplish the purpose of the trustors" and that purpose is expressed in the trust instrument. (61 C.A.4th 80, citing *Rest.2d, Trusts* §167, *Adams v. Cook* (1940) 15 C.2d 352, 101 P.2d 484, *supra*, §93, and other cases.) For this purpose, a drafting error that renders ambiguous an expression of the administrative or distributive intentions of the trustor constitutes a "peculiar" or "exceptional"

circumstance. (61 C.A.4th 83.) This equitable power is not restricted by statute. Nothing in the modification statutes (*Prob.C. 15400* et seq.) limits the grounds for modification to those set forth in the statutes. Without a limitation, the broader equitable power of the court to reform a trust is preserved by *Prob.C. 15002* (supra, §24), adopting the common law of trusts as the law of *California*. (61 C.A.4th 84.)

SUPPLEMENT: [This section is current through the latest supplement]
See *Rest.3d, Trusts* §66 [power of court to modify trust].



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d. (New) Drafting Error.

13 Witkin Sum. Cal. Law Trusts § 211A

[§ 211A] (New) Drafting Error.

In *Bilafer v. Bilafer* (2008) 161 C.A.4th 363, 73 C.R.3d 880, the settlor of two irrevocable trusts petitioned to modify the trusts to correct drafting errors. *Held*, in a case of first impression, the settlor had standing to seek modification of the trusts to reflect his dispositive intent.

(a) Under *Ike v. Doolittle* (1998) 61 C.A.4th 51, 70 C.R.2d 887, text, §211, the trial court has equitable common law power, not restricted by statute, to correct a drafting error that defeats the settlor's intention. (161 C.A.4th 369.)

(b) Here, the settlor has standing to seek reformation, even though he is not a beneficiary and has no pecuniary interest. If the trusts are not reformed, "he suffers a real and substantial injury: his estate will pass to his children and grandchildren in a manner contrary to his wishes." (161 C.A.4th 370.)

(c) The holding here does not authorize settlors to "unilaterally rewrite" irrevocable trusts; it permits a nonbeneficiary settlor to seek reformation on the narrow ground that the trust does not accurately the settlor's intent due to a drafting error. (161 C.A.4th 371.)

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4. Termination of Small Trust by Trustee.

13 Witkin Sum. Cal. Law Trusts § 212

[§ 212] Termination of Small Trust by Trustee.

Notwithstanding *Prob.C. 15408(a)* (supra, §209), if the trust principal does not exceed \$ 20,000 in value, the trustee has the power to terminate the trust. (*Prob.C. 15408(b).*)

The statute presumes such trusts to be inherently uneconomical, and the trustee need not go to the expense of seeking court approval. However, a trustee may seek approval under *Prob.C. 17200(b)(5)* (approval of accounts; infra, §229); and a trustee who has decided to terminate under *Prob.C. 15408(b)* may seek instructions on the correct manner of distributing the trust property (*Prob.C. 15410, 17200(b)(4)*, infra, §§215, 229). (Law Rev. Com. Comment.) (See Cal. Civil Practice, 3 Probate and Trust Proceedings, §24:129 [petition], §24:130 [order].)

The existence of a provision restraining transfer of the beneficiary's interest does not prevent application of the section. (*Prob.C. 15408(c).*)

SUPPLEMENT: [This section is current through the latest supplement]

On exception to termination power applicable to trust for care of animal, see *Prob.C. 15212(g)*, adopted in 2008.



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5. Termination by Operation of Law.

13 Witkin Sum. Cal. Law Trusts § 213

[§ 213] Termination by Operation of Law.

(1) *In General.* A trust terminates when any of the following occurs:

(a) The term of the trust expires. (*Prob.C. 15407(a)(1).*) (See *Rest.3d, Trusts* §61; *Estate of Hanson* (1911) 159 C. 401, 405, 114 P. 810; 4 Scott §334; Bogert §996; 76 *Am.Jur.2d* (2005 ed.), *Trusts* §71.)

(b) The trust purpose is fulfilled. (*Prob.C. 15407(a)(2).*) (See *Ball v. Mann* (1948) 88 C.A.2d 695, 699, 199 P.2d 706 [trust for benefit of minor becomes passive and terminates by operation of law when child reaches age of majority].)

(c) The trust purpose becomes unlawful. (*Prob.C. 15407(a)(3).*)

(d) The trust purpose becomes impossible to fulfill. (*Prob.C. 15407(a)(4).*) (See *Rest.3d, Trusts* §61; 4 Scott §335; Bogert §1002.)

(e) The trust is revoked. (*Prob.C. 15407(a)(5).*)

Unlike a will, a trust in favor of a third person is not terminated or otherwise affected by the subsequent *marriage* of the settlor. (*Bank of America v. Hazelbud* (1937) 21 C.A.2d 109, 115, 68 P.2d 385.)

(2) *Merger.* A trust also terminates where there is a *merger* of the legal title and equitable interest in one person, unless inequitable results would follow. (*Rest.3d, Trusts* §69; see *Estate of Washburn* (1910) 11 C.A. 735, 746, 106 P. 415; *People v. Long Beach* (1962) 200 C.A.2d 609, 615, 19 C.R. 585; 4 Scott §341; Bogert §1003; 7 *A.L.R.4th* 621 [merger where sole trustees are sole beneficiaries].)

In *Ammco Ornamental Iron v. Wing* (1994) 26 C.A.4th 409, 418, 419, 31 C.R.2d 564, defendant, plaintiff's judgment debtor, was the income beneficiary and successor trustee of a spendthrift trust, which gave defendant a special testamentary power of appointment over the trust corpus, and provided for a gift in default of appointment to defendant's issue. In this action to satisfy the judgment from the assets of the trust, the trial judge held that the legal title and equitable interest merged when defendant became the sole trustee on the settlor's death. *Held*, there was no merger.

(a) Although a trust terminates and the legal title and equitable interest merge when the sole trustee is the sole beneficiary, the remainder interest in the trustee's children prevented merger. "A remainder interest is vested, subject to complete divestment, when the remainderman is in existence and ascertained and his interest is not subject to a condition precedent, although his right to possession or enjoyment on the expiration of the prior interests is subject to termination by reason, e.g., of a power of appointment." (26 C.A.4th 418.) Under C.C. 781, a future interest, though subject to complete divestment, is a valid vested interest, and under C.C. 740, a future interest is not invalid even if a subsequent event may completely divest a beneficiary. Thus, the children are additional beneficiaries, and their interests may not be disregarded in applying the merger doctrine. (26 C.A.4th 419.)

(b) Nor is the trustee the sole beneficiary merely because he has the power to invade the principal for his own support, health, and maintenance. A trustee-beneficiary with discretion to invade the principal has a fiduciary obligation to remainder beneficiaries "to confine his demands within reasonable limits," and the better course to reduce the risk that a trustee-beneficiary will unduly favor himself is to appoint a cotrustee. (26 C.A.4th 419.) Here, although defendant became the sole trustee on the settlor's death, he declined to serve and a successor named in the trust became trustee. Thus, there was no basis for treating him as the sole beneficiary. (26 C.A.4th 420.)

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SUPPLEMENT: [This section is current through the latest supplement]



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C. Revocation and Modification of Irrevocable Trust.
6. Trustee's Powers on Termination.

13 Witkin Sum. Cal. Law Trusts § 214

[§ 214] Trustee's Powers on Termination.

A trustee may bring an action for declaratory relief to adjudge the trust terminated, and obtain a discharge. (*In re Bauer* (1936) 17 C.A.2d 426, 429, 62 P.2d 150.)

"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." (*Prob.C. 15407(b).*) This is also the rule of *Rest.2d, Trusts §344*. (See *Botsford v. Haskins & Sells* (1978) 81 C.A.3d 780, 784, 146 C.R. 752; 4 Scott §344; Bogert §1010.)

SUPPLEMENT: [This section is current through the latest supplement]
See *Rest.3d, Trusts §89*.



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7. Disposition of Property on Termination.

13 Witkin Sum. Cal. Law Trusts § 215

[§ 215] Disposition of Property on Termination.

The California Law Revision Commission (18 Cal. Law Rev. Com. Reports, p. 574) pointed out that existing law did not provide for the manner of disposition of property on termination of a trust, except where it was one with uneconomically low principal (*supra*, §209). *Prob.C. 15410* remedies this deficiency:

At the termination of a trust, the trust property is disposed of as follows:

- (1) In the case of a trust that is revoked by the settlor, as directed by the settlor. (*Prob.C. 15410(a).*)
- (2) 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. (*Prob.C. 15410(b).*)
- (3) 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. (*Prob.C. 15410(c).*) This provision applies where a trust terminates (a) by its own terms (e.g., expiration of term of years or occurrence of an event), (b) by a court order without consent of the settlor and beneficiaries (e.g., where circumstances change or the trust purpose becomes unlawful or impossible), and (c) by action of the trustee where the principal value is less than \$ 20,000. (Law Rev. Com. Comment.) (See *Estate of Stoddart (2004) 115 C.A.4th 1118, 1130, 9 C.R.3d 770* [where living trust provided for distribution for benefit of settlors' son on death of surviving settlor, son predeceased, and no alternate distribution was provided, trust residue was properly distributed under terms of will of first settlor to die, which gave estate to surviving settlor as trustee and provided for alternate distribution if trust failed or was revoked].)
- (4) If a trust is terminated by the trustee under *Prob.C. 15408(b)* (principal less than \$ 20,000; see *supra*, §212), the trust property may be distributed as determined by the trustee under the standard provided in *Prob.C. 15410(c)* without the need for a court order. "Where the trust instrument does not provide a manner of distribution at termination and the settlor's intent is not adequately expressed in the trust instrument, the trustee may distribute the trust property to the living beneficiaries on an actuarial basis." (*Prob.C. 15410(d).*) (See Cal Transactions Forms, 3 Estate Planning §13:60 et seq.)

In appropriate circumstances, a termination distribution may be made to a custodian for a minor under the Uniform

Transfers to Minors Act. (Law Rev. Com. Comment.) (See *Prob.C. 3905, 3906, 13 Summary (10th), Personal Property, §144.*)

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8. Combination and Division of Trusts.

13 Witkin Sum. Cal. Law Trusts § 216

[§ 216] Combination and Division of Trusts.

(1) *Combination*. "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." (*Prob.C. 15411.*) (See *Rest.3d, Trusts §68.*)

(2) *Division*. "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." (*Prob.C. 15412.*) "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." (Law Rev. Com. Comment.)

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A. Jurisdiction and Venue.
1. Approach of Trust Law.

13 Witkin Sum. Cal. Law Trusts § 217

[§ 217] Approach of Trust Law.

The California Law Revision Commission (18 Cal. Law Rev. Com. Reports, p. 580) discusses the nature of its recommendations on jurisdiction over the trust, trust property, and parties.

(1) "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. Personal jurisdiction may thus be exercised over a trustee where the trustee is found, regardless of the location of trust property. 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. The exercise of jurisdiction is also subject to the basic constitutional requirements of fairness and substantial justice."

(2) "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. The concept of primary supervision in the context of trust administration is a special application of the doctrine of *forum non conveniens*. If the court has acquired 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."

(3) "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. 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." (See Cal. Civil Practice, 3 Probate and Trust Proceedings, §24:11.)

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A. Jurisdiction and Venue.
2. Bases of Jurisdiction.

13 Witkin Sum. Cal. Law Trusts § 218

[§ 218] Bases of Jurisdiction.

The court may exercise jurisdiction in proceedings under the Trust Law on any basis permitted by *C.C.P. 410.10*. (*Prob.C. 17004*.)

The Law Revision Commission Comment explains the scope and effect of this statement.

(1) In proceedings relating to internal trust affairs or other purposes described in *Prob.C. 17000*, the court may exercise jurisdiction on any basis that is not inconsistent with the California or United States Constitution, as provided in *C.C.P. 410.10*. (See 2 *Cal. Proc. (4th)*, *Jurisdiction*, §§8, 109.)

(2) 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 *Rest.2d, Conflict of Laws* §276 and Comments; 5A *Scott* §644 et seq.; 2 *Cal. Proc. (4th)*, *Jurisdiction*, §151.)

(3) "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 *Schuster v. Superior Court* (1929) 98 *C.A.* 619, 628, 277 *P.* 509, 2 *Cal. Proc. (4th)*, *Jurisdiction*, §429; *Estate of Knox* (1942) 52 *C.A.2d* 338, 344, 126 *P.2d* 108, 2 *Cal. Proc. (4th)*, *Jurisdiction*, §431; and *Rest.2d, Conflict of Laws* §267 and Comments.) "This concept of primary supervision in the context of trust administration is a special application of the doctrine of forum non conveniens." (See *C.C.P. 410.30*.)

(4) "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 *C.C.P. 410.50(b)*; 2 *Cal. Proc. (4th)*, *Jurisdiction*, §401.)

SUPPLEMENT: [This section is current through the latest supplement]
Internal affairs of trust:

Cross-Reference: 2 *Cal. Proc. (5th)*, *Jurisdiction*, §107.

Property located in California:

Cross-Reference: 2 Cal. Proc. (5th), *Jurisdiction*, §158.

Schuster case:

Cross-Reference: 2 Cal. Proc. (5th), *Jurisdiction*, §443.

Knox case:

Cross-Reference: 2 Cal. Proc. (5th), *Jurisdiction*, §445.

Continuing jurisdiction:

Cross-Reference: 2 Cal. Proc. (5th), *Jurisdiction*, §415.



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A. Jurisdiction and Venue. 3. Subject Matter Jurisdiction. a. Law Revision Commission Report.

13 Witkin Sum. Cal. Law Trusts § 219

[§ 219] Law Revision Commission Report.

The California Law Revision Commission Report (18 Cal. Law Rev. Com. Reports, p. 578) traces the history of the California probate court as a background to its recommendations concerning exclusive and concurrent jurisdiction of the court. (For discussion of former limitations on court's jurisdiction and legislative changes in 1988, see 14 *Summary* (10th), *Wills and Probate*, §§347, 348.)

(1) "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. 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. 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."

(2) "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* [(1966) 65 C.2d 192, 196, 53 C.R. 139, 417 P.2d 683] 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."

(3) "Until late 1970, questions arising in the administration of living trusts were determined as an exercise of the general equitable powers of the superior court, not the limited and special jurisdiction of the probate court. 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."

(4) "This situation of having separate and limited probate courts has long been criticized by commentators. 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 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. This leaves in place the existing division of labor in the superior court system."

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- A. Jurisdiction and Venue.
- 3. Subject Matter Jurisdiction.
- b. Exclusive and General Jurisdiction.

13 Witkin Sum. Cal. Law Trusts § 220

[§ 220] Exclusive and General Jurisdiction.

The superior court having jurisdiction over a trust pursuant to *Prob.C. 17000* et seq. has exclusive jurisdiction of proceedings concerning the internal affairs of the trust. (*Prob.C. 17000(a)*.)

"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." (Law Rev. Com. Comment.) (See *Stewart v. Towse (1988) 203 C.A.3d 425, 430, 249 C.R. 622* [jurisdiction of probate court to change successor trustee of irrevocable trust]; *2 Cal. Proc. (4th), Courts, §227*.)

In proceedings commenced pursuant to the Trust Law, "the court is a court of general jurisdiction and has all the powers of the superior court." (*Prob.C. 17001*.) The Comment makes the following points:

(1) The intent of *Prob.C. 17000, 17001, and 17004* is to "eliminate any limitations on the power of the court hearing matters under this division, whether or not it is called the 'probate court,' to exercise jurisdiction over all parties constitutionally before it and completely dispose of the dispute."

(2) *Prob.C. 17000, 17001, and 17004* are "intended to eliminate any notion that the 'probate court' is one of limited power or that it cannot dispose of matters properly before it, while preserving the power of the superior court in a particular county to organize itself into divisions for the efficient conduct of judicial business."

SUPPLEMENT: [This section is current through the latest supplement]

See *David v. Hermann (2005) 129 C.A.4th 672, 683, 28 C.R.3d 622* [proceeding challenging dispositive provisions of living trust was proceeding to determine validity of trust provisions and was thus proceeding concerning internal affairs of trust under *Prob.C. 17200(b)(3)* (text, §229); because trustee resided in Marin County, Marin superior court had jurisdiction, even though San Francisco probate court had earlier exercised jurisdiction over related trust].

Jurisdiction of probate court:

Cross-Reference: *2 Cal. Proc. (5th), Courts, §224*.



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- 3. Subject Matter Jurisdiction.
- c. Concurrent Jurisdiction.

13 Witkin Sum. Cal. Law Trusts § 221

[§ 221] Concurrent Jurisdiction.

The superior court having jurisdiction over a trust pursuant to *Prob.C. 17000* et seq. has concurrent jurisdiction of the following:

- (1) Actions and proceedings to determine the existence of trusts. (*Prob.C. 17000(b)(1).*)
- (2) Actions and proceedings by or against creditors or debtors of trusts. (*Prob.C. 17000(b)(2).*)
- (3) Other actions and proceedings involving trustees and third persons. (*Prob.C. 17000(b)(3).*)

"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. 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 the exclusive jurisdiction of the superior court in proceedings under the special procedure provided by statute." (18 Cal. Law Rev. Com. Reports, p. 581.) (See *In re Marriage of Perry* (1997) 58 C.A.4th 1104, 1111, 68 C.R.2d 445 [under *Prob.C. 17000(b)(2)*, family court had jurisdiction to enforce deceased settlor's continuing child support obligations from assets of living trust]; *Dabney v. Dabney* (2002) 104 C.A.4th 379, 382, 127 C.R.2d 917 [when no cognizable cause of action is alleged, court lacks subject matter jurisdiction; thus, probate court lacked authority to order cotenant who was also trust beneficiary to execute documents for lot line adjustment].)

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A. Jurisdiction and Venue. 3. Subject Matter Jurisdiction. d. Illustrative Cases.

13 Witkin Sum. Cal. Law Trusts § 222

[§ 222] Illustrative Cases.

In *Saks v. Damon Raika & Co.* (1992) 7 C.A.4th 419, 8 C.R.2d 869, the institutional cotrustee of a testamentary trust, which was required by the trust document to concur in decisions about the sale and acquisition of real property, sold income property of the trust in Oakland on the advice of defendant attorney and purchased replacement property in Folsom on the advice of defendant real estate broker. Within a year, the tenant of the Folsom property and its guarantor declared bankruptcy, toxic waste was discovered, the property could not be rented, and the fair market value became substantially less than the trust had paid. Plaintiffs, individual cotrustees and beneficiaries of the trust, sought damages in the superior court from defendants, alleging that the trust had been depleted by their failure to adequately investigate retaining the Oakland property and to disclose relevant information about the suitability of the Folsom property. *Held*, demurrers were properly sustained; an action in the probate department joining the corporate trustee was required.

(a) *Standing to sue.* Under C.C.P. 367, an action must be prosecuted in the name of the real party in interest, but C.C.P. 369 provides an exception: the trustee of an express trust may sue without joining those for whose benefit the action is prosecuted. (7 C.A.4th 427.) At common law, where a cause of action is prosecuted on behalf of an express trust, the trustee is the real party in interest and has legal title to the cause of action. The corollary is that the beneficiary is not the real party in interest and may not sue in the name of the trust. The beneficiary has no legal title to trust assets and his or her right to sue is ordinarily limited to enforcement of the trust. (7 C.A.4th 427, citing *Powers v. Ashton* (1975) 45 C.A.3d 783, 119 C.R.2d 729.) "However, where a trustee cannot or will not enforce a valid cause of action that the trustee ought to bring against a third person, a trust beneficiary may seek judicial compulsion against the trustee," joining the third person and the trustee. (7 C.A.4th 427, 428.) And a beneficiary may sue a third person who directly participates in the trustee's breach of trust. (7 C.A.4th 428, citing *Pierce v. Lyman* (1991) 1 C.A.4th 1093, 3 C.R.2d 236, supra, §150, and the text.)

(b) *Exclusive jurisdiction of probate department.* The Probate Code sets out a trustee's duties with respect to trust administration, specifies the trustee's standard of care, defines breach of trust, and provides for the trustee's liability for various acts and omissions of agents. It also establishes the procedure beneficiaries may invoke to remedy a breach of trust. Under *Prob.C. 17000* (supra, §220), the superior court with jurisdiction over the trust has exclusive jurisdiction of proceedings concerning the internal affairs of the trust and concurrent jurisdiction over proceedings involving trustees and third parties. The Law Revision Commission Comment states that the intent of the statute is that the department of

the superior court that customarily deals with probate matters exercise exclusive jurisdiction relating to internal trust affairs. Under these provisions, the probate department has exclusive jurisdiction in the present case. (7 C.A.4th 429.)

(c) *Appropriate procedure in this case.* Under both common law and the Probate Code, plaintiffs' only proper course was to proceed against the institutional trustee in the probate court, seeking either to compel it to proceed against defendants or to remove it and appoint a trustee ad litem to sue the third parties. Their claim on behalf of the trust in a civil lawsuit, rather than a verified petition in the probate department, was improper. Because of the nature of their claim and the particular jurisdictional and procedural requirements pertaining to it, they lacked standing to bring the claim in the trial court. (7 C.A.4th 430.)

Pierce, supra, reaches a different conclusion on the jurisdictional issue. (See *supra*, §150.)

In *Harnedy v. Whitty* (2003) 110 C.A.4th 1333, 2 C.R.3d 798, a dispute in the Alameda County Superior Court between siblings about the ownership of property in their parents' living trust, plaintiff, a beneficiary, sued his sister, the successor trustee of the trust, to rescind, on the basis of fraud and elder abuse, their father's quitclaim deed transferring the family home from the trust to the sister. *Held*, plaintiff had standing to sue and the court had subject matter jurisdiction.

(a) *Standing to sue.* Defendant waived her lack of standing claim by failing to raise it at trial. (110 C.A.4th 1338.) Further, defendant's standing argument is incorrect. *Saks v. Damon Raika & Co., supra*, *Pillsbury v. Karmgard* (1994) 22 C.A.4th 743, 756, 27 C.R.2d 491, and following cases mean that "when the claim being asserted rests in whole or in part on alleged breaches of trust by the trustee, a beneficiary has standing to pursue such a claim against either (1) the trustee directly, (2) the trustee *and* third parties participating in or benefiting from his, her or its breach of trust, or (3) such third parties alone. *Only* in circumstances such as those present in *Saks* and *Pillsbury*, where no misfeasance or breach of trust by the trustee is asserted and the beneficiary is effectively seeking to step into the shoes of the trustee and enforce the trust agreement directly, does the beneficiary lack standing." (110 C.A.4th 1341.)

(b) *Subject matter jurisdiction.* Defendant waived her jurisdictional claim by failing to raise it at trial. (110 C.A.4th 1342.) Further, the superior court department that heard this case did not lack jurisdiction in any fundamental sense. It was competent and had authority to hear the case, despite apparently contrary language in *Saks*. (110 C.A.4th 1344.) Although the probate department has exclusive jurisdiction over the internal affairs of trusts under *Prob.C. 17000(a)*, the jurisdiction provided by the statute is not the sort of fundamental jurisdiction the lack of which would render the judgment void. In addition, the claims here are clearly not involved with internal affairs (e.g., modification of the terms of the trust, change in a designated successor trustee). (110 C.A.4th 1345.)

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4. Principal Place of Administration.

13 Witkin Sum. Cal. Law Trusts § 223

[§ 223] Principal Place of Administration.

"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." (*Prob.C. 17002(a).*)

If the principal place of administration of the trust cannot be determined under *Prob.C. 17002(a)*, it is 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." (*Prob.C. 17002(b)(1).*)

(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." (*Prob.C. 17002(b)(2).*)

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5. Jurisdiction Over Parties.

13 Witkin Sum. Cal. Law Trusts § 224

[§ 224] Jurisdiction Over Parties.

"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 the Trust Law. (*Prob.C. 17003(a)*.)

"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 the Trust Law. (*Prob.C. 17003(b)*.)

These provisions are subject to *Prob.C. 17004* (supra, §218). (*Prob.C. 17003*.)

The Law Revision Commission Comment makes the following points:

(1) *Prob.C. 17004* "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 2 *Cal. Proc. (4th)*, *Jurisdiction*, §178.)

(2) Constitutional limitations on the assertion of jurisdiction apply to the exercise of jurisdiction under *Prob.C. 17003*. Thus, "appropriate notice must be given to a trustee or beneficiary as a condition of jurisdiction."

(3) *Prob.C. 17003* "is not a limitation on the jurisdiction of the court over the trust, trust property, or parties to the trust."

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SUPPLEMENT: [This section is current through the latest supplement]
Personal jurisdiction over trustee:

Cross-Reference: 2 *Cal. Proc. (5th)*, *Jurisdiction*, §186.



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13 Witkin Sum. Cal. Law Trusts § 225

[§ 225] Venue.

(1) *Administration in California.* The proper county for commencement of a proceeding pursuant to the Trust law is either of the following:

(a) "In the case of a living trust, the county where the principal place of administration of the trust is located." (*Prob.C. 17005(a)(1).*)

(b) "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." (*Prob.C. 17005(a)(2).*)

(2) *Appointment of Trustee.* "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." (*Prob.C. 17005(b).*) "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." (Law Rev. Com. Comment.)

(3) *Other Situations.* Except as otherwise provided in *Prob.C. 17005(a)* and *17005(b)*, the proper county for a proceeding under the Trust Law is determined by the rules applicable to civil actions generally. (*Prob.C. 17005(c).*) *Prob.C. 17005(c)* provides venue rules "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." (Law Rev. Com. Comment.) (On general rules governing venue, see *C.C.P. 392, 395*; 3 *Cal. Proc. (4th), Actions*, §716 et seq.) (See *Cal. Civil Practice*, 3 Probate and Trust Proceedings, §24:12.)

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SUPPLEMENT: [This section is current through the latest supplement]

(3) *Other Situations.*

General rules of venue:

Cross-Reference: 3 *Cal. Proc. (5th), Actions*, §793 et seq.



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Witkin Summary of California Law VII. JUDICIAL PROCEEDINGS CONCERNING TRUSTS B. Proceedings. 1. In General.

13 Witkin Sum. Cal. Law Trusts § 226

[§ 226] In General.

(1) *Expeditious Administration.* "The administration of trusts is intended to proceed expeditiously and free of judicial intervention, subject to the jurisdiction of the court." (*Prob.C. 17209.*) (See Cal. Civil Practice, 3 Probate and Trust Proceedings, §24:14 et seq.)

(2) *Notice.* *Prob.C. 1200* et seq., the general notice provisions of the Probate Code, apply to notice required by the Trust Law or in proceedings pursuant to the Trust Law, unless the Trust Law provides otherwise. (*Prob.C. 17100.*) (See Cal. Civil Practice, 3 Probate and Trust Proceedings, §24:13; on *Prob.C. 1200*, see 14 *Summary* (10th), *Wills and Probate*, §385 et seq.) "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." (*Prob.C. 17105.*)

(3) *No Jury Trial.* Under *Prob.C. 825*, there is no right to a jury trial in proceedings under the Probate Code except as "expressly provided" otherwise in the Code. *Prob.C. 17006*, codifying the rule of case law, specifies that there is no right to a jury trial in proceedings under the Trust Law "concerning the internal affairs of trusts." (See *People v. One 1941 Chevrolet Coupe* (1951) 37 C.2d 283, 286, 231 P.2d 832; *Estate of Beach* (1975) 15 C.3d 623, 642, 125 C.R. 570, 542 P.2d 994; 7 Cal. Proc. (4th), *Trial*, §106.)

(4) *Rules of Court.* Title 7 of the California Rules of Court (C.R.C., Rule 7.1 et seq.) applies to proceedings under the Probate Code, including proceedings under the Trust Law. (See 14 *Summary* (10th), *Wills and Probate*, §372.) The rules specific to trust proceedings include the following:

Chapter 5, Bonding of Personal Representatives, Guardians, Conservators, and Trustees: C.R.C., Rule 7.201 et seq.

Chapter 16, Compensation in All Matters Other Than Decedents' Estates: C.R.C., Rule 7.750 et seq. (See C.R.C., Rule 7.756, *supra*, §55.)

Chapter 19, Trusts: C.R.C., Rules 7.901, 7.902 (*supra*, §88).

(5) *Judicial Council Forms.* If a document to be submitted to the court is one for which the Judicial Council has adopted a form, the form must be used. If the form is "inadequate in a particular situation," an addendum may be attached. (C.R.C., Rule 7.101.)

(6) *Titles of Pleadings and Orders.* The title of each pleading and proposed order must clearly and completely identify the nature of the relief sought or granted. (C.R.C., Rule 7.102.)

(7) *Objections and Responses.* Where the court continues a matter to allow a written objection or response and the responding party fails to serve and file a timely objection or response, the court may deem the objection or response waived. (C.R.C., Rule 7.801.)

Filing a formal objection or response in a trust proceeding is required in order to conduct discovery. (See *Forthmann v. Boyer* (2002) 97 C.A.4th 977, 988, 118 C.R.2d 715 [trust beneficiary was not entitled to continuance to conduct discovery related to annual accounting where no formal objection or response to accounting had been filed].)

(8) *Names and Addresses of Beneficiaries.* Petitions and accounts involving trusts must state the names and last known addresses of vested and contingent beneficiaries, including "all persons in being who may or will receive income or corpus of the trust," with two exceptions: (a) If the trust is revocable and the person holding the power to revoke is competent, names and addresses of beneficiaries who do not hold that power need not be given. (b) Names and addresses of beneficiaries not entitled to notice under *Prob.C. 15804* (supra, §147) need not be given. (C.R.C., Rule 7.902.)

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SUPPLEMENT: [This section is current through the latest supplement]

(3) *No Jury Trial.*

Cross-Reference: 7 Cal. Proc. (5th), Trial, §96.

(4) *Rules of Court.* C.R.C., Rule 7.756 was renumbered C.R.C., Rule 7.776 in 2007.

(5) *Judicial Council Forms.* The portion of C.R.C., Rule 7.101 discussed in the text is now C.R.C., Rule 7.101(a). It was amended in 2006 to add that, where the Judicial Council has adopted a mandatory form in alternative versions, one of the alternate versions must be used.

(7) *Objections and Responses.*

Right to discovery: See *Mota v. Superior Court* (2007) 156 C.A.4th 351, 355, 67 C.R.3d 303 [beneficiary who files objection to trustee's distribution petition has right to conduct discovery relevant to objection; one beneficiary who alleged that second beneficiary had stolen money from trust was entitled to discover documents reflecting sudden change in second beneficiary's financial position].

(9) *(New) Filing Fee.* The fee for filing a petition or opposition to a petition concerning the internal affairs of a trust under *Prob.C. 17200* et seq. is \$ 350. (See *Govt.C. 70652*, as amended in 2008; 14 *Summary* (10th), *Wills and Probate*, Supp., §380C.)



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Witkin Summary of California Law VII. JUDICIAL PROCEEDINGS CONCERNING TRUSTS B. Proceedings. 2. Petition.

a. Law Revision Commission Report.

13 Witkin Sum. Cal. Law Trusts § 227

[§ 227] Law Revision Commission Report.

The California Law Revision Commission (18 Cal. Law Rev. Com. Reports, p. 583) explains its recommendations on grounds and notice of the petition as follows:

(1) "Existing law provides a list of grounds for a petition to the superior court concerning the internal affairs of a trust. 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."

(2) "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."

(3) "[T]he proposed law recognizes that the special proceedings are not limited to 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."

(4) "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. 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 orders 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."

SUPPLEMENT: [This section is current through the latest supplement]



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B. Proceedings.

2. Petition.

b. Nature and Scope.

13 Witkin Sum. Cal. Law Trusts § 228

[§ 228] Nature and Scope.

(1) *Commencement of Proceeding.* A proceeding under *Prob.C. 17200* et seq. is commenced by a petition stating (a) facts showing that the petition is authorized under *Prob.C. 17200* et seq., (b) the grounds of the petition, and (c) the names and addresses of the persons entitled to notice of the petition. (*Prob.C. 17201.*) (On grounds for petition, see *infra*, §229; on setting matter for hearing, see *Prob.C. 1041*, 14 *Summary* (10th), *Wills and Probate*, §378.)

(2) *Dismissal of Petition.* "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." (*Prob.C. 17202.*)

(3) *Attorney General's Petition.* In a case involving a charitable trust subject to the jurisdiction of the Attorney General, the Attorney General may petition. (*Prob.C. 17210.*) The Law Revision Commission Comment points out that this codifies the general rule that the Attorney General stands in place of the beneficiaries of a charitable trust for purposes of enforcement of the trust. (See *People v. Cogswell* (1896) 113 C. 129, 136, 45 P. 270; *Estate of Schloss* (1961) 56 C.2d 248, 257, 14 C.R. 643, 363 P.2d 875; *infra*, §305.)

(4) *Request for Copy.* "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." (*Prob.C. 17205.*)

SUPPLEMENT: [This section is current through the latest supplement]

(3a) (*New*) *Charitable Trust.* The settlor of a charitable trust who reserves the right to do so may petition to enforce the terms of the trust. (See *Patton v. Sherwood* (2007) 152 C.A.4th 339, 61 C.R.3d 289, Supp., *infra*, §305.)



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B. Proceedings.

2. Petition.

c. Grounds.

13 Witkin Sum. Cal. Law Trusts § 229

[§ 229] Grounds.

Except as provided in *Prob.C. 15800* (supra, §145), a trustee or beneficiary may petition the court "concerning the internal affairs of the trust or to determine the existence of the trust." (*Prob.C. 17200(a)*; see *Johnson v. Tate* (1989) 215 C.A.3d 1282, 1286, 264 C.R. 68 [*Prob.C. 15800*, vesting right to petition in person holding right to revoke, precludes contingent beneficiary of revocable trust from petitioning concerning internal affairs]; *Conservatorship of Irvine* (1995) 40 C.A.4th 1334, 1341, 1342, 47 C.R.2d 587 [jurisdiction of probate court under *Prob.C. 17200* extends to petitions involving both living and testamentary trusts; legislative intent was to authorize probate court to hear and decide any petition for instructions filed by trustee regarding trust's internal affairs]; Cal. Civil Practice, 3 Probate and Trust Proceedings, §24:111 [petition to compel trustee to account], §24:112 [order compelling trustee to account], §24:114 [objection to account].)

Under *Prob.C. 17200(b)*, proceedings concerning the internal affairs include, but are not limited to, proceedings for the following purposes:

(1) To determine questions of construction of a trust instrument. (*Prob.C. 17200(b)(1)*; see *Estate of Heggstad* (1993) 16 C.A.4th 943, 951, 20 C.R.2d 433, supra, §25 [jurisdiction to decide merits of third-party challenge to inclusion of specific property in trust].)

(2) To determine the existence or nonexistence of any immunity, power, privilege, duty, or right. (*Prob.C. 17200(b)(2)*.)

(3) To determine the validity of a trust provision. (*Prob.C. 17200(b)(3)*.)

(4) To ascertain beneficiaries and determine to whom property is to pass or be delivered upon final or partial termination of the trust, to the extent the determination is not made by the trust instrument. (*Prob.C. 17200(b)(4)*.)

(5) To settle the accounts and pass upon the acts of the trustee, including the exercise of discretionary powers. (*Prob.C. 17200(b)(5)*.)

(6) To instruct the trustee. (*Prob.C. 17200(b)(6)*.)

(7) To compel 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 by the beneficiary, and (b) no report or account has been made within 6 months preceding the request. (*Prob.C. 17200(b)(7)*; see *Purdy v. Johnson* (1917) 174 C. 521, 527, 163 P.893 [accounting may be sought in action to remove trustee or in separate action]; *Evangelho v. Presoto* (1998) 67 C.A.4th 615, 621, 79 C.R.2d 146 [after settlor's death, beneficiaries could compel accounting of both trust and joint account in names of settlor and trustee, for full term of trust, including period before death, where evidence showed that trustee transferred trust assets to joint account and used account for personal expenses]; 5 *Cal. Proc.* (4th), *Pleading*, §775 et seq.)

(8) To grant powers to the trustee. (*Prob.C. 17200(b)(8)*.)

(9) To fix or allow payment of the trustee's compensation or review the reasonableness of that compensation. (*Prob.C. 17200(b)(9)*.)

(10) To appoint or remove a trustee. (*Prob.C. 17200(b)(10)*.)

(11) To accept the resignation of a trustee. (*Prob.C. 17200(b)(11)*.)

(12) To compel redress of a breach of the trust by any available remedy. (*Prob.C. 17200(b)(12)*.)

(13) To approve or direct the modification or termination of the trust. (*Prob.C. 17200(b)(13)*.)

(14) To approve or direct the combination or division of trusts. (*Prob.C. 17200(b)(14)*.)

(15) To amend or conform 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. (*Prob.C. 17200(b)(15)*.)

(16) To authorize or direct transfer of a trust or trust property to or from another jurisdiction. (*Prob.C. 17200(b)(16)*.)

(17) To direct transfer of a testamentary trust subject to continuing court jurisdiction from one county to another. (*Prob.C. 17200(b)(17)*.)

(18) To approve removal of a testamentary trust from continuing court jurisdiction. (*Prob.C. 17200(b)(18)*.)

(19) To reform or excuse compliance with the governing instrument of an organization under *Prob.C. 16105*. (*Prob.C. 17200(b)(19)*.)

(20) To determine a trust's liability for debts of a deceased settlor. (*Prob.C. 17200(b)(20)*), further specifying that a person whose only claim to assets of the decedent is as a creditor does not have standing to bring an action concerning internal affairs of the trust.)

(21) To determine a petition under *Prob.C. 15687* (restricting dual compensation as attorney and trustee; see *supra*, §58) and review the reasonableness of compensation for legal services. (*Prob.C. 17200(b)(21)*), further specifying that, in determining the reasonableness of compensation, the court may consider whether prior approval was obtained under *Prob.C. 15687*.)

(22) To appoint a practice administrator, where an attorney has transferred the economic interest in a law practice to a trustee and the attorney is disabled or deceased. (*Prob.C. 17200(b)(22)*, (b)(23); on practice administrator, see 1 *Cal. Proc.* (4th), *Attorneys*, Supp., §115A.)

The Law Revision Comment deals with several aspects of this lengthy section:

(a) "The introductory clause of subdivision (a) 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."

(b) "The list of grounds ... 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."

(c) "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."

West's Key Number Digest, Trusts k.371(8)

SUPPLEMENT: [This section is current through the latest supplement]

Proceedings concerning internal affairs:(7) *To compel trustee to account:* See *Esslinger v. Cummins* (2006) 144 C.A.4th 517, 526, 50 C.R.3d 538, Supp., supra, §85 [remainder beneficiary had standing to petition for accounting under Prob.C. 17200(b)(7)].

Cross-Reference: 5 Cal. Proc. (5th), *Pleading*, §819 et seq.(22) *To appoint practice administrator:*

Cross-Reference: 1 Cal. Proc. (5th), *Attorneys*, §87.



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B. Proceedings.

2. Petition.

d. Property Claims.

13 Witkin Sum. Cal. Law Trusts § 230

[§ 230] Property Claims.

Proceedings concerning the transfer of trust property must be conducted under *Prob.C. 850* et seq. (14 *Summary* (10th), *Wills and Probate*, §356 et seq.). (*Prob.C. 17200.1.*) A petition under *Prob.C. 850* et seq. is authorized in the following cases:

(1) Where the trustee has possession or title to real or personal property and an interest is claimed to belong to another. (*Prob.C. 850(a)(3)(A).*)

(2) Where the trustee has a claim to real or personal property, and title or possession is held by another. (*Prob.C. 850(a)(3)(B).*)

(3) Where property of the trust is claimed to be subject to a creditor of the settlor. (*Prob.C. 850(a)(3)(C).*)

SUPPLEMENT: [This section is current through the latest supplement]



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13 Witkin Sum. Cal. Law Trusts § 231

[§ 231] Notice.

(1) *General Requirement.*

(a) At least 30 days before the time set for the hearing, the petitioner must cause notice of the hearing to be mailed to all trustees, all beneficiaries (subject to *Prob.C. 15800* et seq.), and the Attorney General, if the petition relates to a charitable trust under the Attorney General's jurisdiction. (*Prob.C. 17203(a)*.)

(b) At least 30 days before the time set for the hearing, the petitioner must cause notice of the hearing and a copy of the petition to be served as provided by *C.C.P. 413.10* et seq. (service of summons; see 3 *Cal. Proc.* (4th), *Actions*, §919 et seq.) on any person, other than a trustee or beneficiary, whose "right, title, or interest" would be affected by the petition and who does not receive notice under *Prob.C. 17203(a)*. The court may not shorten this time. (*Prob.C. 17203(b)*.) Other rules governing which beneficiaries are entitled to notice (see *Prob.C. 15802, 15804*, supra, §147) "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." (Law Rev. Com. Comment.)

(c) If a person to whom notice would otherwise be given has been deceased for at least 40 days, no personal representative has been appointed, and the decedent's interest has not passed to another person, notice may instead be given heirs and devisees of the decedent, persons named as executors in the decedent's will, and persons serving as guardians or conservators of the decedent at the time of death, "so far as known to the petitioner." (*Prob.C. 17203(c)*.) (See *Estate of Sigourney* (2001) 93 *C.A.4th* 593, 601, 113 *C.R.2d* 274 [1989 order amending provisions governing selection of cotrustee of testamentary charitable trust was void where named organization with contingent right to select cotrustee had never received notice of proceeding].)

(2) *Request for Special Notice.*

(a) "If proceedings involving a trust are pending, a beneficiary of the trust may, in person or by attorney, 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. A copy of the request shall be personally delivered or mailed to the trustee or the trustee's attorney. If personally delivered, the request is effective when it is delivered. If mailed, the request is effective

when it is received. When the original of the request is filed with the court clerk, it shall be accompanied by a written admission or proof of service. A request for special service may be modified or withdrawn in the same manner as provided for the making of the initial request." (*Prob.C. 17204(a)*.)

(b) A request for special notice made by a beneficiary whose right to notice is restricted by *Prob.C. 15802* (beneficiary of revocable trust; see *supra*, §147) is not effective. (*Prob.C. 17204(d)*.)

(c) A request for special notice may be made in specified circumstances by an "interested person" (a creditor of the trust or, if the trust has become irrevocable on the death of the trustor, a creditor of the trustor). (*Prob.C. 17204(b)(3)*.) Under *Prob.C. 17204(b)(1)*, an interested person may request special notice in the same manner as a beneficiary for the purpose set forth in *Prob.C. 17200(b)(9)* (trustee's compensation; *supra*, §229). A verified statement of the person's interest is required. Under *Prob.C. 17204(b)(2)*, an interested person may petition the court, ex parte, for an order for special notice for the purposes set forth in *Prob.C. 17200(b)(2)*, (4), (5), (6), (8), (12), (16), (20), or (21) (*supra*, §229). A verified statement of the person's interest is required and the petition may be served on the trustee or the trustee's attorney.

(d) Except as provided in *Prob.C. 17204(d)*, after serving and filing a request and proof of service under *Prob.C. 17204(a)* or *17204(b)(1)*, the beneficiary or interested person is entitled to notice pursuant to *Prob.C. 17203*. If the petition of an interested person filed under *Prob.C. 17204(b)(2)* is granted, the interested person is entitled to notice pursuant to *Prob.C. 17203*. (*Prob.C. 17204(c)*.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *General Requirement.*

Service of summons:

Cross-Reference: 3 Cal. Proc. (5th), Actions, §1001 et seq.



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13 Witkin Sum. Cal. Law Trusts § 232

[§ 232] Orders and Appeal.

(1) *Scope of Court's Authority.* "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." (*Prob.C. 17206.*) (On appointment of trustee ad litem, see *infra*, §233; see also C.C. 3422(4) and C.C.P. 526(7) [authorizing injunction to enforce obligation arising from trust].)

(2) *Appeal From Grant or Denial of Final Order.* A general statute applies to appeals from orders common to all Probate Code proceedings, including various orders related to fiduciaries. (See *Prob.C. 1300*, 14 *Summary* (10th), *Wills and Probate*, §401 et seq.) Additional specific statutes apply to particular proceedings. *Prob.C. 1304*, governing trusts, provides that granting or denying the following orders is appealable:

(a) A final order under *Prob.C. 17200* et seq. (proceedings concerning trusts), except an order compelling the trustee to submit an account or to report acts as trustee or an order accepting the resignation of a trustee. (*Prob.C. 1304(a).*)

(b) A final order under *Prob.C. 19020* et seq. (settlement of claims against deceased settlor). (*Prob.C. 1304(b).*)

(c) A final order involving proration of taxes. (*Prob.C. 1304(c).*)

(d) An order determining whether an act constitutes a contest. (*Prob.C. 1304(d).*)

West's Key Number Digest, Trusts k.375(1)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Appeal From Grant or Denial of Final Order.*(a) *Final order under Prob.C. 17200 et seq.:* See *Esslinger v. Cummins* (2006) 144 C.A.4th 517, 522, 50 C.R.3d 538, Supp., supra, §85 [despite exception in *Prob.C. 1304(a)*, order to account is appealable where it expressly or implicitly decides other issues that could be subject of appealable probate order, e.g., determination that remainder beneficiary has standing to petition for accounting].

(d) *Order determining whether act constitutes contest:* See *Betts v. City Nat. Bank* (2007) 156 C.A.4th 222, 230, 67 C.R.3d 152 [in safe harbor proceeding under *Prob.C. 21320* (see 14 *Summary* (10th), *Wills and Probate*, §562), probate

court ruled that claims against trustee would violate trust's no contest clause but that claims against beneficiary would not violate no contest clause; petitioner did not waive right to appeal ruling on claims against trustee by pursuing claims against beneficiary].*Correction:* Page 814, sixth line of section, "C.C.P. 526(7)" should be "C.C.P. 526(a)(7)".



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B. Proceedings.

5. Appointment of Trustee Ad Litem.

13 Witkin Sum. Cal. Law Trusts § 233

[§ 233] Appointment of Trustee Ad Litem.

An unusual procedure--the suspension of the trustee's power to defend pending actions and appointment of a trustee ad litem--was approved in *Getty v. Getty* (1988) 205 C.A.3d 134, 252 C.R. 342. The trust corpus consisted of approximately 40% of the stock of Getty Oil Company, which plaintiff trustee sold to Texaco, despite a pending tender offer from Pennzoil. Texaco agreed to indemnify plaintiff against damages arising from the sale. Pennzoil obtained a judgment against Texaco for \$ 2 billion, and Texaco shareholders brought derivative actions against plaintiff and the trust to set aside the indemnification agreement. Defendant beneficiaries petitioned to suspend plaintiff's power to defend because of an alleged conflict between plaintiff's personal interest as a shareholder in Getty Oil Company and the interests of the trust and the beneficiaries. *Held*, the appointment of a trustee ad litem was proper.

(a) *Actual wrongdoing is not required.* The purpose of removing a trustee is not to punish past action but to preserve the trust assets. Thus, the appropriate question is whether continuation of the trustee in office will be detrimental to the trust, not whether there is evidence of actual wrongdoing. (205 C.A.3d 139, 140.)

(b) *Removal is justified by conflict.* The conflict here arises from the rules governing the rights of creditors and the indemnification of trustees. A trustee is entitled to indemnification from the trust for expenses properly incurred in administration and, where the trustee exceeded his powers, to the extent of any benefit conferred on the trust estate. In either case, the rights of creditors are no greater than those of the trustee. Thus, it is in the interest of the trustee and the third-party plaintiffs to show that the trustee is entitled to exoneration. (205 C.A.3d 140.) This interest is "inimical" to the interest of beneficiaries seeking to preserve the trust assets. (205 C.A.3d 141.)

(c) *Trustee ad litem is appropriate remedy.* "The appointment of a trustee ad litem was a proper exercise of the court's general equity jurisdiction." (205 C.A.3d 141.) "As courts may entirely remove a trustee and appoint a replacement ... , appointment of a trustee ad litem with limited powers to conduct certain litigation is an intrinsically included exercise of the court's inherent equity power within its greater power to remove and replace the trustee." (205 C.A.3d 142.)

SUPPLEMENT: [This section is current through the latest supplement]



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B. Proceedings.
6. Costs and Expenses in Contest of Account.

13 Witkin Sum. Cal. Law Trusts § 234

[§ 234] Costs and Expenses in Contest of Account.

If a beneficiary contests a trustee's account and the court determines that the contest was "without reasonable cause and in bad faith," the court may order the contestant to pay the compensation of the trustee and other expenses of litigation, including attorneys' fees, incurred in defending the account. The amount awarded is a charge against any interest of the beneficiary in the trust. The contestant is personally liable for any amount that remains unsatisfied. (*Prob.C. 17211(a).*)

If a beneficiary contests a trustee's account and the court determines that the trustee's opposition to the contest was "without reasonable cause and in bad faith," the court may award the contestant the expenses of litigation, including attorneys' fees, incurred in contesting the account. The amount awarded is a charge against the compensation or other interest of the trustee in the trust, who is liable personally and on any bond for any amount that remains unsatisfied. (*Prob.C. 17211(b).*)

Comparable provisions apply to decedents' estates (see *Prob.C. 11003*, 14 *Summary* (10th), *Wills and Probate*, §717) and to guardianships and conservatorships (see *Prob.C. 2622.5*, 14 *Summary* (10th), *Wills and Probate*, §1037).

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C. Testamentary Trusts Subject to Continuing Jurisdiction.
1. Former Statutes and Cases.

13 Witkin Sum. Cal. Law Trusts § 235

[§ 235] Former Statutes and Cases.

(1) *Original Jurisdiction Over Testamentary Trusts.* Former Prob.C. 1120 et seq. gave the superior court broad equity jurisdiction over testamentary trusts, including continuing jurisdiction to determine distribution on partial or final termination of the trust, to settle accounts and pass on acts of the trustee, and to authorize additions to the trust. (See *Estate of De Laveaga* (1958) 50 C.2d 480, 487, 326 P.2d 129 [order settling trustee's account was conclusive as to all matters passed on but not binding as to those not passed on]; *Estate of Schloss* (1961) 56 C.2d 248, 253, 14 C.R. 643, 363 P.2d 875; *Estate of Smith* (1935) 4 C.A.2d 548, 552, 41 P.2d 565 [statute gave probate court jurisdiction over "practically all controversies which might arise between the trustees and those claiming to be beneficiaries under the trust"]; *Estate of McCabe* (1947) 80 C.A.2d 823, 183 P.2d 72 [action to compel trustee to account]; *Estate of Lacy* (1975) 54 C.A.3d 172, 189, 190, 126 C.R. 432 [scope of notice requirement]; *Estate of Howard* (1976) 58 C.A.3d 250, 257, 258, 129 C.R. 836 [beneficiary may raise matters of trustee misconduct at hearing on account]; *Estate of Schneider* (1979) 95 C.A.3d 55, 58, 156 C.R. 838 [order on accounting was final only to extent income and assets were accurately accounted for by trustee; reversal of order overruling prior account that did not disclose gross income and expenses]; *Lazzarone v. Bank of America* (1986) 181 C.A.3d 581, 591, 592, 226 C.R. 855 [order approving accounting was conclusive on trustee's veracity and exercise of due care, in absence of allegation of extrinsic fraud].)

(2) *Expanded Jurisdiction Over Living Trusts.* Until 1970, private living trusts were not subject to judicial supervision. (See *Wells Fargo Bank v. Superior Court* (1948) 32 C.2d 1, 5, 193 P.2d 721 [court had no jurisdiction over trust merely because will left property to trust]; *Estate of Hubbell* (1932) 121 C.A. 38, 41, 8 P.2d 530 [probate court cannot declare, enforce, or terminate living trust]; 22 So. Cal. L. Rev. 205.) Unless the settlor reserved the power to revoke, problems of trust administration had to be resolved by the slow and expensive procedure of a civil action. (See 14 Stanf. L. Rev. 231.) The 1970 Legislature filled this gap by enacting a statute extending to living trusts superior court jurisdiction similar to that which the probate court exercised over testamentary trusts. (Former Prob.C. 1138 et seq.) The legislative intent was that administration of trusts proceed "expeditiously and free of judicial intervention" unless jurisdiction was invoked by a petition pursuant to the statute. (Former Prob.C. 1138.12.) Subject to specified exceptions and exclusions, the statute applied to trusts created on or after July 1, 1971. (Former Prob.C. 1138.13.) (See *Copley v. Copley* (1978) 80 C.A.3d 97, 104, 145 C.R. 437; *Estate of Parrette* (1985) 165 C.A.3d 157, 165, 211 C.R. 313 [testamentary provision restricting probate court supervision of living and testamentary trusts did not preclude action by beneficiaries for accounting and to remove trustee].)

(3) *Consolidation of Jurisdiction Over Testamentary and Living Trusts.* Former Prob.C. 1120 et seq. were revised in 1976 and 1982 to limit continuing probate court jurisdiction over testamentary trusts. Trusts created by wills executed on or after July 1, 1977, to the extent not provided otherwise, became subject to former Prob.C. 1138 et seq. (See *Prob.C. 17200* et seq., *supra*, §228 et seq.) Trusts created before that date remained subject to continuing jurisdiction unless the trust was a trust company, but could petition to be removed from continuing jurisdiction. (See *8 Pacific L. J.* 192; *14 Pacific L. J.* 376; *15 Pacific L. J.* 466.) (See *Prob.C. 17300* et seq., *infra*, §237.)

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2. Law Revision Commission Report.

13 Witkin Sum. Cal. Law Trusts § 236

[§ 236] Law Revision Commission Report.

The California Law Revision Commission (18 Cal. Law Rev. Com. Reports, p. 575) gives the background for its Recommendation.

(1) "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. Until relatively recently, parties to living trusts were relegated to formal actions in equity for redress of breach or for instructions and approval of accountings."

(2) "In 1967, the court was given specific statutory authority to grant powers to trustees of testamentary trusts upon petition. The area of judicial administration of living trusts remained uncertain until 1971 when a new procedure applicable to written living trusts became operative. 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."

(3) "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. The removal procedure is mandatory for testamentary trusts that have at least one trustee which is a trust company, but is optional for trusts that do not have a trust company as a trustee. No provision is made for removal of a post-1977 testamentary trust that provides for continuing jurisdiction."

(4) "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. In addition, venue is restricted to the court where the estate was administered, unless jurisdiction is transferred to another county. Retention of the continuing jurisdiction scheme also honors the reliance interest of settlors who may have counted on the assumed protections of the scheme."

(5) "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. ... 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 then the special continuing jurisdiction procedures will become unnecessary."

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C. Testamentary Trusts Subject to Continuing Jurisdiction.
3. Nature and Scope of Continuing Jurisdiction.

13 Witkin Sum. Cal. Law Trusts § 237

[§ 237] Nature and Scope of Continuing Jurisdiction.

(1) *Scope of Provisions.* *Prob.C. 17300* et seq. apply 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." (*Prob.C. 17300(a).*)

(b) "A trust created by a will which provides that the trust is subject to the continuing jurisdiction of the superior court." (*Prob.C. 17300(b).*)

(2) *Continuing Court Jurisdiction.* If a trust described in *Prob.C. 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 *Prob.C. 17200*. (*Prob.C. 17301.*)

(3) *Applicable Procedures.* Except as otherwise provided in *Prob.C. 17300* et seq., proceedings relating to trusts under continuing court jurisdiction are governed by the general procedures applicable to judicial proceedings involving trusts (*Prob.C. 17000* et seq.; supra, §220 et seq.). (*Prob.C. 17302.*) (See Cal. Civil Practice, 3 Probate and Trust Proceedings, §24:20 et seq.) The alternate venue provision of *Prob.C. 17005* (supra, §225) is not applicable. (On fee for filing account where trust is subject to continuing jurisdiction, see *Govt.C. 26827, 26827.4; 14 Summary* (10th), *Wills and Probate*, §585.)

(4) *Effect of Removal From Continuing Jurisdiction.* *Prob.C. 17300* et seq. do not apply to a trust described in *Prob.C. 17300* that has been removed from continuing court jurisdiction. (*Prob.C. 17303.*) (On removal, see *Prob.C. 17350* et seq., infra, §238.) After a trust is removed from continuing court jurisdiction, the general provisions of *Prob.C. 17000* et seq. apply. (Comment to *Prob.C. 17303.*)

(5) *Transfer of Jurisdiction to Different County.* *Prob.C. 17304* governs the transfer of a trust that is subject to continuing jurisdiction:

(a) At any time after final distribution of the decedent's estate, the trust may be transferred to a different county in California as provided in *Prob.C. 17304*. (*Prob.C. 17304(a).*)

(b) The contents of the petition are set forth in *Prob.C. 17304(b)*.

(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." (*Prob.C. 17304(c)*.)

(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." (*Prob.C. 17304(d)*.)

(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." (*Prob.C. 17304(e)*.)

SUPPLEMENT: [This section is current through the latest supplement]
(3) *Applicable Procedures.*

Fee for filing account: In 2005, *Govt.C. 26827* was amended and renumbered as *Govt.C. 70650*, and *Govt.C. 26827.4* was repealed. In 2008, the portion of *Govt.C. 70650* concerning the fee for a trust account was repealed. The fee for filing the first trust account or an objection or other paper in opposition is \$ 350. (See *Govt.C. 70652*, as amended in 2008; 14 *Summary* (10th), *Wills and Probate*, Supp., §380C.)



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4. Removal of Trust From Continuing Jurisdiction.

13 Witkin Sum. Cal. Law Trusts § 238

[§ 238] Removal of Trust From Continuing Jurisdiction.

Prob.C. 17350 et seq. establish a notice procedure for removal of a trust from continuing jurisdiction. The statutes apply "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." (*Prob.C. 17350*.) Once a trust is removed, no event will cause the trust to become subject to continuing jurisdiction under *Prob.C. 17300* et seq. (*Prob.C. 17354*.) Where a trust company is a trustee, removal is mandatory. (See *Prob.C. 17351, 17353*.) Where no trustee is a trust company, the court has discretion to order removal on a petition by the trustee. (See *Prob.C. 17352*.)

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D. Transfer of Trust to or From Another Jurisdiction.

1. Transfer to Another Jurisdiction.

a. In General.

13 Witkin Sum. Cal. Law Trusts § 239

[§ 239] In General.

(1) *Application of Statutes.* *Prob.C. 17400* et seq. apply to trusts subject to the Trust Law, trusts subject to *Prob.C. 6320* et seq. (nonprobate transfers to testamentary trusts), and trusts to which *Prob.C. 17400* et seq. are made applicable by statute or the trust instrument. (*Prob.C. 17400(a).*)

(2) *Transfer of Place of Administration or Property.* "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 California, as provided in *Prob.C. 17400* et seq. (*Prob.C. 17401(a).*) *Prob.C. 17400* et seq. do not prevent "the transfer of the place of administration of a trust or of trust property to another jurisdiction by any other available means." (*Prob.C. 17400(b).*)

(3) *Procedure.* Except as otherwise provided in *Prob.C. 17400* et seq., proceedings under *Prob.C. 17400* et seq. are governed by *Prob.C. 17000* et seq. (*Prob.C. 17401(b).*) (See Cal. Civil Practice, 3 Probate and Trust Proceedings, §24:135 et seq.)

(4) *Petition.* *Prob.C. 17402* specifies the contents of the petition.

(5) *Notice.* "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." (*Prob.C. 17403(a).*)

(6) *Appearance and Opposition.* "Any person interested in the trust, as trustee, beneficiary, or otherwise, may appear and file written grounds in opposition to the petition." (*Prob.C. 17403(b).*)

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D. Transfer of Trust to or From Another Jurisdiction.

1. Transfer to Another Jurisdiction.

b. Transfer and Discharge of Trustee.

13 Witkin Sum. Cal. Law Trusts § 240

[§ 240] Transfer and Discharge of Trustee.

(1) *Order Granting Transfer.* "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," the court determines all of the following:

(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." (*Prob.C. 17404(a).*)

(b) "The transfer will not violate the trust instrument." (*Prob.C. 17404(b).*)

(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." (*Prob.C. 17404(c).*)

(2) *Manner of Transfer.* If a transfer is ordered, "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." (*Prob.C. 17405.*)

(3) *Discharge of Trustee.* "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." (*Prob.C. 17405.*)

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D. Transfer of Trust to or From Another Jurisdiction.

2. Transfer From Another Jurisdiction.

a. In General.

13 Witkin Sum. Cal. Law Trusts § 241

[§ 241] In General.

(1) *Application of Statutes.* *Prob.C. 17450* et seq. apply to a trust or a portion of a trust administered in a jurisdiction outside California. (*Prob.C. 17450(a).*)

(2) *Transfer of Place of Administration or Property.* "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 *Prob.C. 17450* et seq. (*Prob.C. 17451(a).*) *Prob.C. 17450* et seq. do not prevent "the transfer of the place of administration of a trust or of trust property to this state by any other available means." (*Prob.C. 17450(b).*)

(3) *Procedure.* Except as otherwise provided in *Prob.C. 17450* et seq., proceedings under *Prob.C. 17450* et seq. are governed by *Prob.C. 17000* et seq. (*Prob.C. 17451(b).*) (See Cal. Civil Practice, 3 Probate and Trust Proceedings, §24:140 et seq.)

(4) *Venue.* If the petition requests that a resident of California be appointed trustee, the petition must be filed in the court of the county where the proposed principal place of administration of the trust under *Prob.C. 17002* is located. (*Prob.C. 17452(a).*) If the petition requests that only a nonresident of California be appointed trustee, the petition must be filed in the court of the county where either (a) a beneficiary resides or (b) a substantial portion of the trust property to be transferred is located or will be located. (*Prob.C. 17452(b).*)

(5) *Petition.* *Prob.C. 17453* specifies the contents of the petition.

(6) *Notice.* "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." (*Prob.C. 17454(a).*)

(7) *Appearance and Opposition.* "Any person interested in the trust, as trustee, beneficiary, or otherwise, may appear and file written grounds in opposition to the petition." (*Prob.C. 17454(b).*)

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2. Transfer From Another Jurisdiction.

b. Transfer and Administration of Trust.

13 Witkin Sum. Cal. Law Trusts § 242

[§ 242] Transfer and Administration of Trust.

(1) *Order.* "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," the court determines all of the following:

(a) "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." (*Prob.C. 17455(a)(1).*)

(b) "The transfer will not violate the trust instrument." (*Prob.C. 17455(a)(2).*)

(c) "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." (*Prob.C. 17455(a)(3).*)

(d) "The proper court in the other jurisdiction has approved the transfer if approval is necessary under the law of the other jurisdiction." (*Prob.C. 17455(a)(4).*)

(2) *Bond.* If the court grants the petition, it must require the trustee to give a bond, if necessary under the law of the other jurisdiction or of California, and may require a bond as provided in *Prob.C. 15602* (*supra*, §48). (*Prob.C. 17455(b).*)

(3) *Approval of Court in Other Jurisdiction.* The order may be made conditional on approval by the court of the other jurisdiction: "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." (*Prob.C. 17456.*)

(4) *Administration.* After the trust is transferred, it is administered "in the same manner as a trust of that type created in this state." The validity of the trust and the construction of the beneficial provisions of the trust are not

affected by *Prob.C. 17457*. (*Prob.C. 17457*.) The Law Revision Commission Comment notes that a trust subject to judicial supervision in another state will not be subject to continuing jurisdiction in California unless the trust instrument and the transfer order provide for continuing jurisdiction.

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A. Liability of Trust and Trustee.
1. Restatement and Prior California Law.

13 Witkin Sum. Cal. Law Trusts § 243

[§ 243] Restatement and Prior California Law.

(1) *Liability of Trustee.* The Trusts Restatement takes the position that, absent an express contractual exemption, a trustee is personally liable on all obligations, including tort and contract, incurred in the administration of the trust, to the same extent as if the trustee held the property free from trust. (*Rest.2d, Trusts* §261 et seq.; see 3A Scott §261 et seq.; Bogert §§711, 731 et seq.; Cal. Civil Practice, 3 Probate and Trust Proceedings, §24:146 et seq.; 76 *Am.Jur.2d* (2005 ed.), *Trusts* §409 et seq.) This was apparently the view of several California cases. (See *Hall v. Jameson* (1907) 151 C. 606, 611, 91 P. 518; *Duncan v. Dormer* (1928) 94 C.A. 218, 221, 270 P. 1003; *Rapaport v. Forer* (1937) 20 C.A.2d 271, 278, 66 P.2d 1242; 2 *Hastings L. J.* 53; 1 *So. Cal. L. Rev.* 490.)

(2) *Liability of Trust Estate.* Under the Restatement, a creditor to whom a trustee has incurred a liability in the course of administration of the trust may, in equity, reach trust property to satisfy the claim where (a) the trustee is entitled to exoneration, (b) the trust estate benefited, (c) the terms of the trust provide for liability, (d) a contract properly entered into binds the trust estate, and (e) in other situations, it is equitable to permit the creditor to do so. (*Rest.2d, Trusts* §267 et seq.) Under Former C.C. 2267, the trustee was a general agent for the trust property and acts within the trustee's authority were binding on the trust property to the same extent as acts of an agent binding the principal. A number of cases held that under this section, the contracts of a trustee constitute an obligation of the trust estate, which is therefore subject to creditors' claims. (*Irvine v. McGregor* (1928) 203 C. 583, 585, 265 P. 218; *Cullinan v. Mercantile Trust Co. of Calif.* (1926) 80 C.A. 377, 385, 252 P. 647; *Purdy v. Bank of America* (1935) 2 C.2d 298, 301, 40 P.2d 481; see 3A Scott §267 et seq.; 23 *Cal. L. Rev.* 538; 1 *So. Cal. L. Rev.* 490; 2 *Hastings L. J.* 53; Bogert §714 et seq.; 76 *Am.Jur.2d* (2005 ed.), *Trusts* §366 et seq.)

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A. Liability of Trust and Trustee.
2. Contracts.

13 Witkin Sum. Cal. Law Trusts § 244

[§ 244] Contracts.

Unless otherwise provided in the contract or in *Prob.C. 18000* et seq., "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 and identify the trust in the contract." (*Prob.C. 18000(a)*.) The personal liability of a trustee on a contract entered into before July 1, 1987, is governed by prior law, not by *Prob.C. 18000*. (*Prob.C. 18000(b)*.)

The California Law Revision Commission deals with several aspects of this provision:

(1) "[U]nlike 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." (Law Rev. Com. Comment.)

(2) "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." (Law Rev. Com. Comment.)

(3) "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 and identify the trust estate in the contract. 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." (18 Cal. Law Rev. Com. Reports, p. 588.)

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A. Liability of Trust and Trustee.
3. Ownership or Control of Property.

13 Witkin Sum. Cal. Law Trusts § 245

[§ 245] Ownership or Control of Property.

"A trustee is personally liable for obligations arising from ownership or control of trust property only if the trustee is personally at fault." (*Prob.C. 18001.*)

The California Law Revision Commission (18 Cal. Law Rev. Com. Reports, p. 588) explains its recommendation as follows:

(1) "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. 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. The common law liability for calls and assessments on stock in the trust estate has been largely relieved by statute."

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

SUPPLEMENT: [This section is current through the latest supplement]



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A. Liability of Trust and Trustee.
4. Torts.

13 Witkin Sum. Cal. Law Trusts § 246

[§ 246] Torts.

"A trustee is personally liable for torts committed in the course of administration of the trust only if the trustee is personally at fault." (*Prob.C. 18002.*)

The California Law Revision Commission (18 Cal. Law Rev. Com. Reports, p. 589) explains its recommended change in the law as follows:

(1) "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. 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."

(2) "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. 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."

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A. Liability of Trust and Trustee.
5. Dissenting Trustee.

13 Witkin Sum. Cal. Law Trusts § 247

[§ 247] Dissenting Trustee.

"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." (*Prob.C. 18003(a).*)

"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." (*Prob.C. 18003(b).*)

Prob.C. 18003 does not excuse a cotrustee from liability for failure to discharge the cotrustee's duties as a trustee. (*Prob.C. 18003(c).*)

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6. Claims Against Trust.

13 Witkin Sum. Cal. Law Trusts § 248

[§ 248] Claims Against Trust.

"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." (*Prob.C. 18004.*) (See *Galdjie v. Darwish* (2003) 113 C.A.4th 1331, 1349, 7 C.R.3d 178 [purchaser of trust real property was entitled to specific performance of contract of sale with trustees even though complaint named trustees as individuals, rather than in their fiduciary capacity; as settlors and beneficiaries of revocable living trust, trustees had power to direct sale of trust property, and their signatures on deed as required by judgment conveyed good title].)

In *Haskett v. Villas at Desert Falls* (2001) 90 C.A.4th 864, 108 C.R.2d 888, a trustee acting in a representative capacity was held not personally liable for attorneys' fees and costs awarded to opposing parties in the absence of a showing that the trustee intentionally or negligently acted in a manner that established personal fault. The phrase "whether or not the trustee is personally liable on the claim" in *Prob.C. 18004* does not confer on a creditor an absolute right to proceed against the trustee's personal assets, but suggests that the creditor may enforce the claim from personal assets only if the trustee is personally liable. (90 C.A.4th 880.)

The California Law Revision Commission (18 Cal. Law Rev. Com. Reports, p. 591) discusses the procedural problems involved in handling claims of unpaid creditors:

(1) "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. 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. 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."

(2) "The third person should not have to be concerned with the source of the fund that will be used to pay the claim.

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."

(3) "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."

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7. Liability as Between Trustee and Estate.

13 Witkin Sum. Cal. Law Trusts § 249

[§ 249] Liability as Between Trustee and Estate.

"The question of liability as between the trust estate and the trustee personally may be determined in a proceeding under" *Prob.C. 17200. (Prob.C. 18005.)*

The Law Revision Commission Comment explains: "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."

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8. Liability to Omitted Spouse or Child.

13 Witkin Sum. Cal. Law Trusts § 250

[§ 250] Liability to Omitted Spouse or Child.

The statutory provisions governing omitted spouses and omitted children apply both to wills and to revocable trusts that become irrevocable on the death of the settlor. (See *Prob.C. 21600* et seq.; 14 *Summary* (10th), *Wills and Probate*, §273 et seq.) Prior law applies where the decedent died before January 1, 1998. (*Prob.C. 21630*.)

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B. Protection of Third Persons.

1. Restatement and General Law.

a. Title.

13 Witkin Sum. Cal. Law Trusts § 251

[§ 251] Title.

The general rule, under the common law and the Restatement, is that a bona fide purchaser takes trust property free of the trust and has no obligations to the beneficiary. (See *Rest.2d, Trusts* §284 [defining bona fide purchaser as "a person who takes for value and without notice of the breach of trust, and who is not knowingly taking part in an illegal transaction"].) However, bona fide purchaser status is achieved only if requirements as to title, value, and notice are satisfied. (On value and notice, see *infra*, §§252, 253.)

To satisfy the title requirement, the property or interest must be transferred to the purchaser. Although the general rule requires that the purchaser get *legal title* (*Taylor v. Weston* (1888) 77 C. 534, 537, 20 P. 62; see *Mills v. Rossiter* (1909) 156 C. 167, 169, 103 P. 896), under the Restatement, the transfer of an equitable estate may make one a bona fide purchaser (*Rest.2d, Trusts* §285; see *Rest., Restitution* §172; 4 Scott §285; 5 Scott §474; Bogert §885; 12 *Summary* (10th), *Real Property*, §328 et seq.; 13 *Summary* (10th), *Equity*, §8).

In California, a *mortgagee* or other encumbrancer for value and without notice comes within the protection of the rule. (C.C. 1214; *Estate of Lyon* (1912) 163 C. 803, 806, 127 P. 75.)

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1. Restatement and General Law.

b. Value.

13 Witkin Sum. Cal. Law Trusts § 252

[§ 252] Value.

To qualify for bona fide purchaser status, the purchaser must have given value. This may be money, property, or services, and may be paid prior or subsequent to the transfer. (See *Rest.2d, Trusts* §§289, 298 et seq.; *Rest., Restitution* §173; 4 Scott §§289, 298 et seq.; 5 Scott §475; Bogert §887.)

An *antecedent debt* is value, and therefore the cancellation of an antecedent debt makes the creditor a bona fide purchaser of the property taken in satisfaction of the debt. This is not only a general equitable doctrine, but is codified in the Commercial Code. (See *Rest.2d, Trusts* §§304, 305; *Fairbanks v. Crump Irr. & Supply Co. (1930) 108 C.A. 197, 221, 291 P. 629, 292 P. 529*; *Schumann-Heink & Co. v. United States Nat. Bank (1930) 108 C.A. 223, 234, 291 P. 684, 292 P. 547*; *Pacific Nat. Bank of San Francisco v. Corona Nat. Bank (1931) 113 C.A. 366, 371, 298 P. 144* [actual discharge of preexisting debt required]; 4 Scott §§304, 305; Bogert §889; 5 *So. Cal. L. Rev.* 51; U.C.C. 3303(b); 4 *Summary* (10th), *Sales*, §16; 4 *Summary* (10th), *Negotiable Instruments*, §29.)

A mere *promise* to make payment in the future is ordinarily not value within the rule. (*Rest.2d, Trusts* §302; see 4 Scott §302; Bogert §887.) Where *part* of an agreed price has been paid, the purchaser is protected only in that amount. (*Davis v. Ward* (1895) 109 C. 186, 191, 41 P. 1010; *Henry v. Phillips* (1912) 163 C. 135, 140, 124 P. 837; *Rest.2d, Trusts* §303; see 4 Scott §303; Bogert §890.)

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B. Protection of Third Persons.
1. Restatement and General Law.
c. Notice.

13 Witkin Sum. Cal. Law Trusts § 253

[§ 253] Notice.

(1) *In General.* In addition to having taken title and paid value, a bona fide purchaser must have done so without notice of the breach of trust. (*Wood v. American Nat. Bank* (1932) 125 C.A. 248, 260, 14 P.2d 110; see *Rest.2d, Trusts* §§288, 291, 296, 297; *Rest., Restitution* §174; 4 Scott §§288, 291, 296, 297; 5 Scott §476; Bogert §891 et seq.; 4 So. Cal. L. Rev. 72; 76 Am.Jur.2d (2005 ed.), *Trusts* §292.) (On what constitutes notice, see 4 *Summary* (10th), *Negotiable Instruments*, §28; 12 *Summary* (10th), *Real Property*, §331; on rights of transferee with notice from bona fide purchaser, see 4 *Summary* (10th), *Negotiable Instruments*, §21; 12 *Summary* (10th), *Real Property*, §330.) A distinction must be made, however, between *notice of the trust* and *notice of a breach of trust*. (*Rest.2d, Trusts* §§296, 297.)

(2) *Notice of the Trust.* Third persons dealing with the trustee of funds may be charged with notice of the trust by the form of the bank account. Where it is in the name of a depositor as trustee, the bank is put upon inquiry as to the rights of the beneficiary, and cannot exercise its banker's lien or setoff for a personal claim against the trustee. (*Keeney v. Bank of Italy* (1917) 33 C.A. 515, 517, 165 P. 735; see *Rest.2d, Trusts* §§323, 324; 4 Scott §§323, 324; cf. *Boston Ins. Co. v. Wells Fargo Bank* (1947) 80 C.A.2d 59, 64, 181 P.2d 84 [no notice where ordinary commercial account of corporation].) But the word "trustee" on a stock certificate is not enough to constitute notice. (See *Northwestern Portland Cement Co. v. Atlantic Portland Cement Co.* (1917) 174 C. 308, 311, 163 P. 47.)

(3) *Notice of Breach of Trust.* Even though the third person has notice of the trust, a particular unauthorized transaction by the trustee may not necessarily give notice that the trustee is acting in breach of the trust. Thus, where the trustee draws a check in favor of a third party, or to himself or herself, on the trust account, cashes it and later uses the money for his or her own purposes, the bank is not liable. It is charged only with notice of the trust, and is under no duty to inquire into the purpose for which the money is to be used. It is entitled to assume that the trustee is taking the money out for a proper trust purpose. (*United States Fidelity & Guaranty Co. v. First Nat. Bank of Monrovia* (1912) 18 C.A. 437, 440, 123 P. 352; *Keeney v. Bank of Italy*, *supra*; see *Rest.2d, Trusts* §324; 4 Scott §324; 12 Cal. L. Rev. 356; 8 A.L.R.3d 235 [bank's right to apply third person's funds, deposited in debtor's name, on debtor's obligation]; Uniform Fiduciaries Act, 7A (Part II) U.L.A. (Master Ed.), §5; on duty of corporation transfer agent to investigate authority of trustee or other fiduciary to transfer stock, see 9 *Summary* (10th), *Corporations*, §§143, 146.)

Fin.C. 952 codifies this principle for banks and relieves banks from any general duty to police fiduciary accounts.

(See *Desert Bermuda Properties v. Union Bank* (1968) 265 C.A.2d 146, 151, 71 C.R. 93.) The section provides that a bank must disregard an adverse claim to a deposit or personal property held by it, unless a specified affidavit or court order is delivered to or served on the bank by the adverse claimant. On receipt of the specified affidavit, the bank must "freeze" the account of the alleged fiduciary, but for no more than 3 days without a court order. (See 4 *Pacific L. J.* 322.)

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2. Trust Law.
a. Law Revision Commission Report.

13 Witkin Sum. Cal. Law Trusts § 254

[§ 254] Law Revision Commission Report.

The California Law Revision Commission (18 Cal. Law Rev. Com. Reports, p. 593) explains its recommendation that the established law on bona fide purchasers be retained:

(1) "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. 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.' "

(2) "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."

(3) "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. This rule is generally consistent with changes that have been made in the law concerning negotiable instruments, securities, and bank accounts."

(4) "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."

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2. Trust Law.
b. Third Person Acting in Good Faith.

13 Witkin Sum. Cal. Law Trusts § 255

[§ 255] Third Person Acting in Good Faith.

(1) *In General*. "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," the following rules apply:

(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." (*Prob.C. 18100(a)*.)

(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." (*Prob.C. 18100(b)*.)

In *Adler v. Manor Healthcare Corp.* (1992) 7 C.A.4th 1110, 9 C.R.2d 732, plaintiffs were residents of a retirement community and beneficiaries of the trust holding title to the common areas. Defendant trustee, expressly representing that it had authority to do so, granted an easement over certain common areas to defendant developer, which incorporated the easement into its conveyance of an enclosed parcel to a third party. Plaintiffs challenged the grant of the easement as a violation of the trust. *Held*, summary judgment for defendant purchaser affirmed.

(a) Plaintiff's contention, that *Prob.C. 18103* (infra, §257) negates *Prob.C. 18100*, is incorrect; the statutes are not in conflict. To protect the interest of a trust against third parties, *Prob.C. 18103* provides that an express trust of real property must be recorded or disclosed in a grant of real property to the trustee. It does not impose duties of constructive or inquiry notice on third-party purchasers of real property from trustees of recorded trusts. (7 C.A.4th 1116.)

(b) *Prob.C. 18100* deals with the effect on third parties of the improper exercise of a trustee's powers. It is not limited to personal property, and protects third parties in all transactions where the existence of the trust and the status of the trustee are known. "Only where third parties have *actual knowledge* that trustees are exceeding or improperly exercising their powers do the third parties lose this protection." (7 C.A.4th 1116.) (See *Vournas v. Fidelity Nat. Title Ins. Co.* (1999) 73 C.A.4th 668, 672, 86 C.R.2d 490 [unauthorized sale of trust property; escrow agent, title insurer, and trustee of deed of trust, acting without knowledge of impropriety of sale, were protected from liability by *Prob.C. 18100*].)

(2) *Application of Property Delivered to Trustee.* "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." (*Prob.C. 18101.*)

(3) *Dealings With Former Trustee.* "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." (*Prob.C. 18102.*)

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2. Trust Law.

c. Trustee's Certification of Trust.

13 Witkin Sum. Cal. Law Trusts § 256

[§ 256] Trustee's Certification of Trust.

(1) *Law Revision Commission Recommendation and Enactment.* In 1990, the California Law Revision Commission recommended an affidavit procedure to improve the efficiency of transactions between trustees and third parties by avoiding the need for judicial confirmation of the existence of the trustee's powers. (See Recommendation Relating to Recognition of Trustees' Powers, 20 Cal. Law Rev. Com. Reports, p. 2849.) The recommendation was adopted in 1993.

(2) *Execution and Form of Certification.* Either voluntarily or at the request of a person with whom the trustee is dealing, the trustee may execute a certification of trust and present it to establish the existence or terms of the trust in lieu of providing a copy of the trust instrument. (*Prob.C. 18100.5(a).*) The certification must be in the form of an acknowledged declaration signed by all currently acting trustees. (*Prob.C. 18100.5(c).*) (For forms, see Cal Transactions Forms, 3 Estate Planning §§14:76; C.E.B., 2 Drafting California Revocable Trusts 4th, §22.2.)

(3) *Content.* The certification must state (a) that the trust has not been revoked, modified, or amended "in any manner which would cause the representations contained in the certification of trust to be incorrect," and (b) that the certification is being signed by all currently acting trustees. (*Prob.C. 18100.5(c).*) Under *Prob.C. 18100.5(b)*, the certification may state the following:

- (a) The existence of the trust and the date of execution.
- (b) The identity of the settlors and current trustees.
- (c) The powers of the trustees.
- (d) The revocability or irrevocability of the trust and the identity of any person holding the power to revoke.
- (e) The signature authority of multiple trustees.
- (f) The trust identification number.
- (g) The manner in which the title to trust assets should be taken.

(h) The legal description of any interest in real property held in the trust.

(4) *Access to Trust Documents.* A person whose interest is or may be affected by the certification may require that the trustee provide excerpts from the trust documents or other documents that designate, evidence, or pertain to the succession of the trustee or confer on the trustee the power to act in the pending transaction. However, nothing in *Prob.C. 18100.5* is intended to require or imply an obligation to provide either the dispositive provisions of the trust or the entire trust. (*Prob.C. 18100.5(e).*) And, the certification may not be required to contain the dispositive provisions of the trust. (*Prob.C. 18100.5(d).*)

(5) *Refusal To Accept Certification.* Except as provided by *Prob.C. 18100.5(e)* or when requested by a beneficiary or in litigation concerning the trust, a person who demands trust documents in addition to the certification to prove facts set forth in the certification is liable for damages incurred as a result of the refusal to accept the certification in lieu of the documents, including attorneys' fees, if the court determines that the person acted in bad faith. (*Prob.C. 18100.5(h).*)

(6) *Reliance on Certification.* A person relying on the certification without actual knowledge that the representations in the certification are incorrect is not liable to any person for doing so and may assume the existence of facts contained in the certification without inquiry. Actual knowledge may not be inferred solely from possession of all or part of the trust documents. A transaction between the trustee and a person relying on the certification is enforceable against trust assets unless the person has actual knowledge that the trustee was acting outside the scope of the trust. However, nothing in this provision limits the rights of beneficiaries against the trustee. (*Prob.C. 18100.5(f).*)

(7) *Failure To Request Certification.* A person's failure to request a certification does not affect the protection provided by *Prob.C. 18100* (supra, §255), and no inference about the person's good faith may be drawn from failure to do so. Further, nothing in *Prob.C. 18100.5* is intended to create an implication that a person is liable for relying on a certification under circumstances where the requirements of *Prob.C. 18100.5* are not satisfied. (*Prob.C. 18100.5(g).*)

(8) *Recordation.* A trustee's certification that relates to real property may be recorded in the county in which all or part of the property is located. It is a public record of the property involved. However, this provision does not create a requirement that a certification be recorded in conjunction with recording a transfer of title to real property involving the trust. (*Prob.C. 18100.5(i).*)

(9) *Affidavit of Change of Trustee.* Where title to an interest in real property is affected by a change of trustee, the successor trustee may execute an affidavit of change of trustee including the legal description of the property and the names of the former and successor trustees. The affidavit may include excerpts from documents evidencing or pertaining to the succession. The affidavit may be recorded in the county in which the property is located. (*Prob.C. 18105.*) (On indexing recorded affidavit in grantor-grantee index, see *Prob.C. 18106*; on recorded document as prima facie evidence of change of trustee, see *Prob.C. 18107*; on obligation of trustee to provide excerpts of documents pertaining to succession to interested person, see *Prob.C. 18108.*)

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2. Trust Law.

d. Transfer of Real Property.

13 Witkin Sum. Cal. Law Trusts § 257

[§ 257] Transfer of Real Property.

(1) *Omission of Trust From Grant.* "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 a person dealing with the trustee without notice and for a valuable consideration." (*Prob.C. 18103.*)

(2) *Beneficiary Not Disclosed.* Where the beneficiary is not disclosed, the following provisions apply:

(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." (*Prob.C. 18104(a).*)

(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 person acting in good faith and for valuable consideration." (*Prob.C. 18104(b).*)

The presumption has been held rebuttable. (Law Rev. Com. Comment; see *Hansen v. G & G Trucking Co.* (1965) 236 C.A.2d 481, 46 C.R. 186, Ev.C. 605.)

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C. Rights of Settlor's Creditors Where Trust Is Revocable.
1. Law Revision Commission Report.

13 Witkin Sum. Cal. Law Trusts § 258

[§ 258] Law Revision Commission Report.

The California Law Revision Commission (18 Cal. Law Rev. Com. Reports, p. 594) explains the necessity for clarification of the uncertain California law on this subject.

(1) "With the increasing use of revocable living trusts as probate-avoidance devices, concern has developed over the problems faced by creditors of settlors. 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."

(2) "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. *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."

(3) "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. 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 not a completed transfer and that the transfer only takes place at death when it makes the estate insolvent in fraud of creditors. To avoid this problem, drafters of revocable living trusts commonly insert a provision in the trust authorizing but not directing the payment of debts. 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."

(4) "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. 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 trustee have the same effective control over the property. 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. Upon the death of a settlor who had the power of revocation, property subject to the power of revocation at the settlor's 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."

SUPPLEMENT: [This section is current through the latest supplement]



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13 Witkin Sum. Cal. Law Trusts § 259

[§ 259] Rights During Settlor's Lifetime.

"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." (*Prob.C. 18200.*)

The Comment points out that this provision is analogous to the rule applicable to property subject to an exercised power of appointment created in favor of the donor. (See *Prob.C. 683*; 12 *Summary* (10th), *Real Property*, §168.)

A settlor whose trust property is subject to the claims of creditors under *Prob.C. 18200* is entitled to all the exceptions provided by *C.C.P. 703.010* et seq. (property exempt from enforcement of money judgment; see 8 *Cal. Proc.* (4th), *Enforcement of Judgment*, §181 et seq.). (*Prob.C. 18201.*)

SUPPLEMENT: [This section is current through the latest supplement]
Property exempt from enforcement of money judgment:

Cross-Reference: 8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §187 et seq.



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3. Rights After Settlor's Death.
a. In General.

13 Witkin Sum. Cal. Law Trusts § 260

[§ 260] In General.

(1) *Enactment. Prob.C. 19000* et seq. provide a creditors' claims procedure applicable to revocable trusts where a petition to administer the decedent's estate has not been filed. The procedure is substantially the same as the creditors' claims procedure provided for decedents' estates. (See *Prob.C. 9000* et seq., 14 *Summary* (10th), *Wills and Probate*, §612 et seq.)

(2) *Procedure Optional*. Nothing in *Prob.C. 19000* et seq. imposes any duty on the trustee to initiate the claims procedure, and the trustee is not liable for failure to do so. (*Prob.C. 19010*.)

(3) *Effect of Failure To Use Procedure*. Where there is no estate administration, and the procedure provided by *Prob.C. 19000* et seq. is not used, the liability of the trust to a creditor of the deceased settlor is as otherwise provided by law. (*Prob.C. 19008*.)

(4) *Priority of Sources for Paying Claims*. The settlor may provide direction in the trust instrument for the priority of sources for the payment of debts, but this direction cannot alter the priority of payment set forth in *Prob.C. 11420* (see 14 *Summary* (10th), *Wills and Probate*, §649), which applies to the trust as it applies to a probate estate. (*Prob.C. 19001(b)*.)

(5) *Scope of Liability to Decedent's Creditors*. "Upon the death of a settlor, the property of the deceased settlor 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 deceased settlor's estate and to the expenses of administration of the estate to the extent that the deceased settlor's estate is inadequate to satisfy those claims and expenses." (*Prob.C. 19001(a)*.) (See *In re Marriage of Perry* (1997) 58 C.A.4th 1104, 1109, 68 C.R.2d 445 [living trust was liable for deceased settlor's continuing child support obligations].)

In *Dobler v. Arluk Med. Center Industrial Group* (2001) 89 C.A.4th 530, 107 C.R.2d 478, creditors of a decedent filed a timely claim in decedent's probate proceeding and, after protracted litigation, recovered a judgment. Because the probate estate was insufficient to satisfy the judgment, the judgment creditors attempted to satisfy the judgment from assets in the decedent's revocable living trust, even though neither the trust nor the trustees had been named as parties in the suit to enforce the claim. *Held*, the claim could be satisfied from trust assets.

(a) To invoke the payment procedure of *Prob.C. 19001(a)*, a judgment creditor need only establish a money judgment against the settlor. Under *Prob.C. 19300(a)* (infra, §267), the judgment is paid in the normal course of administration of the trust. It is not necessary to name the trust or trustee as parties or to file a separate action. (89 C.A.4th 541.)

(b) Under *Prob.C. 19003(a)* (infra, §261), a claim is filed in the probate proceedings if the decedent has a probate estate. Only a single claim is required. The request for payment from trust assets is a step in the process initiated by the original claim. "The ... orderly and expeditious administration of estates would be quickly defeated if creditors were required to simultaneously file identical claims against both the decedent's estate and trust." (89 C.A.4th 541.)

In *Arluk Med. Center Industrial Group v. Dobler* (2004) 116 C.A.4th 1324, 11 C.R.3d 194, the judgment creditors in *Dobler v. Arluk Med. Center Industrial Group*, supra, attempted to satisfy the judgment from the assets of the trust. However, while the litigation was pending, the trustees had distributed substantial assets to the beneficiaries and the remainder of the trust was insufficient to satisfy the claim. The creditors then sought to surcharge the trustees for distributing the assets while the action was pending. *Held*, in the absence of bad faith, the trustees had no duty to preserve trust assets for the benefit of creditors.

(a) Under *Prob.C. 16002(a)* (supra, §64) the trustee has a duty to administer the trust solely in the interest of the beneficiaries. "Nothing in the statutory scheme governing trusts, either expressly or implicitly, establishes a competing duty to withhold otherwise authorized distribution to beneficiaries to preserve trust assets in favor of a third party with a disputed claim." (116 C.A.4th 1335.) Once a judgment is obtained, it is payable in the ordinary course of administration of the trust if the settlor's estate is inadequate. However, the potential availability of trust assets to a judgment creditor in the course of administration does not create a statutory duty in the trustee "to prefer a claimant with an unresolved claim against the estate to the interests of the trust's beneficiaries." (116 C.A.4th 1335.)

(b) "If both the estate and the trust are insufficient to satisfy the judgment, however, the trust assets distributed to the beneficiaries remain available to satisfy the judgment to the same extent they would have been prior to the distribution." (116 C.A.4th, 1338, 1339.)

(c) The distributions at issue here were completed before the judgment in the estate proceeding was final, and there is no suggestion that the distributions were motivated by a desire to put trust assets beyond the reach of creditors. In an appropriate case, the rules governing fraudulent conveyances would apply, but absent affirmative wrongdoing amounting to a violation of a legally cognizable duty, "there is no legal authority for subjecting the trustee to personal liability for distributing assets to the trust beneficiaries to the potential detriment of a disputed claimant who later obtains a judgment against the decedent's estate." (116 C.A.4th 1341.) One justice dissented.

SUPPLEMENT: [This section is current through the latest supplement]

(5) *Scope of Liability to Decedent's Creditors.* In *Laycock v. Hammer* (2006) 141 C.A.4th 25, 44 C.R.3d 921, decedent, 13 years before death, had assigned a life insurance policy on his own life to an irrevocable life insurance trust. He later suffered an adverse judgment, which his creditors sought to satisfy from the policy proceeds after his death, contending that various acts before death (e.g., gift to grandchild; loan to family trust; acting as cotrustee) rendered the trust revocable. *Held*, the assets of the trust were not available to satisfy the judgment. Under *Prob.C. 18200* (text, §259) and *Prob.C. 19001(a)* (text, p. 838), the creditors' claims procedure is available only with respect to property subject to the power to revoke. Here, the life insurance trust was irrevocable and the only means of terminating its revocable nature was under *Prob.C. 15403* (text, §203). (141 C.A.4th 30.) Consistent with federal tax cases applying a broader "incidents of ownership" test to alleged breaches of trust by settlors, "a settlor's conduct after an irrevocable trust has been established will not alter the nature of such a trust." (141 C.A.4th 31.)



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b. Notice to Creditors.
1. In General.

13 Witkin Sum. Cal. Law Trusts § 261

[§ 261] In General.

(1) *Notice Procedure Authorized.* After the death of the settlor, the trustee of a revocable trust, if he or she has no actual knowledge that a petition to administer the estate of the deceased has been filed in this state, may file a proposed notice to creditors with the court. Once the court has assigned a proceeding number to the notice, the trustee must publish and serve the notice to creditors of the deceased settlor in the form and within the time provided in *Prob.C. 19040* et seq. (see *infra*, §262) and *Prob.C. 19050* et seq. (see *infra*, §263). (*Prob.C. 19003(a).*)

(2) *Filing and Venue.* The proposed notice to creditors must be filed with the superior court for the county of the deceased settlor's residence at death, or if none, in any county where trust property was located at the settlor's death, or if none, in the county that was the principal place of administration of the trust at the settlor's death. (*Prob.C. 19003(b).*)

(3) *Effect of Notice by Trustee.* Filing, publishing, and serving notice as provided in *Prob.C. 19003* have the following consequences:

(a) All claims against the trust must be filed within the time and in the manner provided in *Prob.C. 19000* et seq. (*Prob.C. 19004(a).*)

(b) Any claim against the trust that is not filed is barred from collection from trust assets. (*Prob.C. 19004(b).*)

(c) The holder of a claim that is not filed may not maintain an action on the claim. (*Prob.C. 19004(c).*)

(d) The protection from creditors afforded the trustee and the trust applies to any other trusts established by the settlor and their trustees and beneficiaries. (*Prob.C. 19006(a).*)

(4) *Effect of Notice by Personal Representative of Settlor's Estate.* If the personal representative of the settlor's estate has published notice under *Prob.C. 8120* (see 14 *Summary* (10th), *Wills and Probate*, §589) and given notice of administration under *Prob.C. 9050* et seq. (see 14 *Summary* (10th), *Wills and Probate*, §614), the protection from creditors afforded the personal representative must also be afforded to the trustee and the trust beneficiaries. (*Prob.C. 19006(b).*)

(5) *Effect of Subsequent Estate Proceeding.* If, following the filing and publication of notice pursuant to *Prob.C. 19003*, a proceeding is commenced requiring notice under *Prob.C. 8120*, the trustee can recover from the estate any debts paid from trust assets which could have been satisfied by property subject to the probate proceedings. (*Prob.C. 19006(c).*)

(6) *Trustee's Options.* The trustee may at any time pay, reject, or contest any claim against the deceased settlor or settle any claim by compromise, arbitration, or otherwise, or may file a petition to settle a claim under *Prob.C. 19020* et seq. (see *infra*, §278 et seq.). (*Prob.C. 19005.*)

SUPPLEMENT: [This section is current through the latest supplement]

(1a) (*New*) *Who Is Creditor.* For purposes of *Prob.C. 19000* et seq., the term "creditor" means a person who may have a claim against the trust property. (*Prob.C. 19000(c)*, as amended in 2007.)



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2. Publication of Notice.

13 Witkin Sum. Cal. Law Trusts § 262

[§ 262] Publication of Notice.

(1) *Time and Place of Publication.* Notice to creditors must be published for at least 15 days. Three publications in a newspaper published at least once a week, with at least 5 days intervening between the first and last publication dates (not counting the first and last dates), are sufficient. The notice must be published in a newspaper of general circulation in the city or county in this state where the settlor resided at death, or if none, where trust property was located at the settlor's death, or if none, where the principal place of trust administration was located at the settlor's death. If there is no such newspaper, notice must be written or printed and posted at three of the most public places within the community. (*Prob.C. 19040(a).*)

(2) *Manner of Publication.* Under *Prob.C. 19040(b)*, the caption of the notice, the settlor's name, and the name of the trustee must be in at least 8-point type, and the text of the notice must in at least 7-point type. A statutory form for the notice is set forth in *Prob.C. 19040*.

(3) *Sufficiency of Notice.* Notice published in a good faith attempt to comply with *Prob.C. 19040* is sufficient to provide notice to creditors and establish jurisdiction if the court expressly finds that the notice was published in a newspaper of general circulation within the city or county, and widely circulated within a true cross section of the community in substantial compliance with *Prob.C. 19040*. (*Prob.C. 19041.*)

(4) *Affidavit.* On completion of publication, an affidavit containing a copy of the notice and stating the date of its first publication and showing due publication of the notice must be filed with the clerk. (*Prob.C. 19040(c).*)

SUPPLEMENT: [This section is current through the latest supplement]



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3. Service of Notice.

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[§ 263] Service of Notice.

(1) *When Notice Is Required.* In addition to the publication of notice under *Prob.C. 19040* (supra, §262), the trustee must give notice under *Prob.C. 1215* (see 14 *Summary* (10th), *Wills and Probate*, §392) to known creditors of the deceased settlor. For this purpose, "a trustee has knowledge of a creditor of the deceased settlor if the trustee is aware that the creditor has demanded payment from the deceased settlor or the trust estate." (*Prob.C. 19050.*)

(2) *When Notice Is Not Required.* Notwithstanding *Prob.C. 19050*, the trustee need not give notice to a known creditor where the creditor has filed a claim as provided in *Prob.C. 19000* et seq., or the creditor has demanded payment and the trustee elects to treat the demand as a claim under *Prob.C. 19154* (see infra, §273). (*Prob.C. 19054.*)

(3) *Time for Giving Notice.* Notice must be given within 4 months after the first publication of notice under *Prob.C. 19040*. (*Prob.C. 19051(a).*) However, where the trustee first has knowledge of a creditor less than 30 days before expiration of the 4-month period or after expiration of the 4-month period, the notice must be given within 30 days after the trustee first has knowledge of the creditor. (*Prob.C. 19051(b).*) (On notice requirements in decedents' estates, see 14 *Summary* (10th), *Wills and Probate*, §614 et seq.)

(4) *Form of Notice.* A statutory form of notice is set forth in *Prob.C. 19052*. A similar form of notice is used in connection with decedents' estates. (See 14 *Summary* (10th), *Wills and Probate*, §614.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *When Notice Is Required.* *Prob.C. 19050* was amended in 2007 to delete the reference to notice under *Prob.C. 19040* and to provide that the notice under *Prob.C. 19050* is required "[e]xcept as provided in" *Prob.C. 19054.* (3) *Time for Giving Notice.* *Prob.C. 19051*, as amended in 2007, provides that notice must be given before the expiration of the later of the following times:

(a) Four months after the first publication of notice under *Prob.C. 19040*. (*Prob.C. 19051(a).*)

(b) Thirty days after the trustee first has knowledge of the creditor. (*Prob.C. 19051(b).*)



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4. Immunity for Good Faith Acts or Omissions.

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[§ 264] Immunity for Good Faith Acts or Omissions.

(1) *No Liability for Giving Notice.* A trustee who believes that notice to a particular creditor is or may be required and gives notice based on that belief is not liable to any person for giving the notice, whether required or not. (*Prob.C. 19053(a).*) (On immunity for good faith acts or omission in giving notice in decedents' estates, see 14 *Summary* (10th), *Wills and Probate*, §616.)

(2) *Limited Liability for Failure To Give Notice.* The trustee is not liable to any person for failure to give notice unless the creditor establishes all of the following:

(a) The failure was in bad faith. (*Prob.C. 19053(b)(1).*)

(b) Neither the creditor nor the creditor's attorney had actual knowledge of the proceeding under *Prob.C. 19000* et seq. sooner than 1 year after publication of notice to creditors under *Prob.C. 19040*, and payment would have been made on the creditor's claim if it had been properly filed. (*Prob.C. 19053(b)(2).*)

(c) Within 16 months after the first publication of notice under *Prob.C. 19040*, the creditor (1) filed a petition requesting the court in which proceedings under *Prob.C. 19000* et seq. were initiated to determine the liability of the trustee under this provision, and (2) at least 30 days before the hearing on the petition caused a notice of hearing and a copy of the petition to be served on the trustee as provided in *C.C.P. 413.10* (see 3 *Cal. Proc.* (4th), *Actions*, §919 et seq.). (*Prob.C. 19053(b)(3).*)

(3) *Liability of Trust Estate.* Nothing in *Prob.C. 19053* affects any liability of the trust estate for a creditor's claim, and the trustee is not liable to the extent the claim is paid from the trust estate. (*Prob.C. 19053(c).*)

(4) *No Duty To Search for Creditors.* Nothing in *Prob.C. 19050* et seq. imposes a duty on the trustee to search for creditors. (*Prob.C. 19053(d).*)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Limited Liability for Failure To Give Notice.* Prob.C. 19053(b)(2) was amended in 2007 to delete the reference to the creditor's attorney. *Service of notice and petition:*

Cross-Reference: 3 Cal. Proc. (5th), Actions, §1001 et seq.



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c. Claims That Must Be Filed.
1. In General.

13 Witkin Sum. Cal. Law Trusts § 265

[§ 265] In General.

For purposes of *Prob.C. 19000* et seq., a claim is a *demand for payment* of any of the following, "whether due, not due, accrued or not accrued, or contingent, and whether liquidated or unliquidated":

(1) "Liability of the deceased settlor, whether arising in contract, tort, or otherwise." (*Prob.C. 19000(a)(1)*); on filing requirement in decedent's estates where liability arises from contract, see 14 *Summary* (10th), *Wills and Probate*, §619; where liability arises from tort, see 14 *Summary* (10th), *Wills and Probate*, §620.)

(2) "Liability for taxes incurred before the deceased settlor's death, whether assessed before or after the deceased settlor's death, other than property taxes and assessments secured by real property liens." (*Prob.C. 19000(a)(2)*.)

(3) "Liability for the funeral expenses of the deceased settlor." (*Prob.C. 19000(a)(3)*.)

For purposes of *Prob.C. 19000* et seq., "claim" does not include "a dispute regarding title to specific property alleged to be included in the trust estate." (*Prob.C. 19000(b)*.) (On claims that need not be filed in decedents' estates, see 14 *Summary* (10th), *Wills and Probate*, §629 et seq.)

SUPPLEMENT: [This section is current through the latest supplement]



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2. Claims by Public Entities.

13 Witkin Sum. Cal. Law Trusts § 266

[§ 266] Claims by Public Entities.

(1) *Statutory Requirement.* A claim by a public entity must be filed within the statutory claim period, except as provided in *Prob.C. 19200* et seq. "A claim not so filed is barred, including any lien imposed for the claim." (*Prob.C. 19200(a)*); for definition of "public entity," see *Prob.C. 19200(b)*.) However, *Prob.C. 19200* et seq. do not apply to "liability for the restitution of amounts illegally acquired through the means of a fraudulent, false, or incorrect representation, or a forged or unauthorized endorsement." (*Prob.C. 19205*.) (On filing requirements for claims by public entities in decedents' estates, see 14 *Summary* (10th), *Wills and Probate*, §621 et seq.)

(2) *Priority of Claims Is Not Affected.* Nothing in *Prob.C. 19200* et seq. "shall be construed to affect the order of priority of debts provided for under other provisions of law." (*Prob.C. 19204*.)

(3) *Special Form and Notice Requirements.* *Prob.C. 19201(b)* lists laws, acts, and codes governed by the special form and notice requirements of *Prob.C. 19200(a)*. Notwithstanding any other statute, if a claim of a public entity arises under *Prob.C. 19201(b)*, the following rules apply:

(a) The public entity may provide its own form to be used for the written notice or request to the public entity required by *Prob.C. 19200* et seq. The form may, where appropriate, require the decedent's Social Security number, if known. (*Prob.C. 19201(a)(1)*.)

(b) "The claim is barred only after written notice or request to the public entity and expiration of the period provided in the applicable section. If no written notice or request is made, the claim is enforceable by the remedies, and is barred at the time, otherwise provided in the law, act, or code." (*Prob.C. 19201(a)(2)*.)

(4) *Notice to Director of Health Services.* If the trustee knows, or has reason to believe, that the settlor received health care under *Welf.C. 14000* et seq. (health care for persons qualified to receive state benefits) or *Welf.C. 14200* et seq. (prepaid health plan coverage for persons qualified to receive state benefits), the trustee must give the notice of the settlor's death to the State Director of Health Services in the manner provided in *Prob.C. 215* (see 14 *Summary* (10th), *Wills and Probate*, §16). (*Prob.C. 19202(a)*.) The director has 4 months after notice is given in which to file a claim. (

Prob.C. 19202(b).)

(5) *Claim Against Distributees.* If trust property is distributed before expiration of the time allowed for a public entity to file a claim, the public entity has a claim against the distributees to (a) the full extent of its claim, or (b) each distributee's share of the distributed property as set forth in *Prob.C. 19402* (see *infra*, §288), whichever is less. The claim includes (a) interest from the date of distribution or the date of filing the claim by the public entity, whichever is later, at a rate equal to that earned in the Pooled Money Investment Account (see *Govt.C. 16480 et seq.*), and (b) "other accruing costs as in the case of enforcement of a money judgment." (*Prob.C. 19203.*)

SUPPLEMENT: [This section is current through the latest supplement]

(4) *Notice to Director of Health Services.* If the deceased settlor was the surviving spouse of a person who received specified health care, the trustee must also give notice of the death to the Director of Health Services. (*Prob.C. 19202(a)*, as amended in 2007.)

(5) *Claim Against Distributees.* *Prob.C. 19203* was amended in 2007 to refer to the rate of interest specified in *Rev.C. 19521*.



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3. Claims Established by Judgment.

13 Witkin Sum. Cal. Law Trusts § 267

[§ 267] Claims Established by Judgment.

(1) *Property Subject to Execution Lien.* If trust property of the deceased settlor is subject to an execution lien at the time of the settlor's death, enforcement against the property may proceed under the Enforcement of Judgments Law to satisfy the judgment. The levying officer must account to the trustee for any surplus. "If the judgment is not satisfied, the balance of the judgment remaining unsatisfied is payable in the course of administration." (*Prob.C. 19303.*)

(2) *Enforcement of Money Judgment.* Except as provided by *Prob.C. 19303*, money judgments against the deceased settlor on a claim against the settlor or against the trustee on a claim against the settlor or the trust estate are payable in the course of administration and are not enforceable against property in the trust estate under the Enforcement of Judgments Law (*C.C.P. 680.010 et seq.*; see 8 *Cal. Proc. (4th), Enforcement of Judgment*, §9 et seq.). (*Prob.C. 19300(a).*) (On filing requirements for claims established by judgment in decedents' estates, see 14 *Summary (10th), Wills and Probate*, §626 et seq.)

(3) *Filing and Effect of Money Judgment.* When a money judgment against a trustee in a representative capacity becomes final, it conclusively establishes the validity of the claim for the amount of the judgment. The judgment must provide that it is payable out of property in the deceased settlor's trust estate in the course of administration. An abstract of the judgment must be filed in the trust administration proceeding. (*Prob.C. 19301.*) Subject to the foregoing provision, money judgments under *Prob.C. 19300(a)* must be filed in the same manner as other claims. (*Prob.C. 19300(b).*)

(4) *Nonmoney Judgment.* "Notwithstanding the death of the settlor, a judgment for possession of trust property or a judgment for sale of trust property may be enforced under the Enforcement of Judgments Law." However, "[n]othing in this subdivision authorizes enforcement under the Enforcement of Judgments Law against any property in the trust estate of the deceased settlor other than property described in the judgment for possession or sale." (*Prob.C. 19302(a).*) "After the death of the settlor, a demand for money that is not satisfied from the trust property described in a judgment for sale of property shall be filed as a claim in the same manner as other claims and is payable in the course of administration." (*Prob.C. 19302(b).*)

(5) *Conversion of Attachment Lien to Judgment Lien.* An attachment lien may be converted to a judgment lien on property in the trust estate subject to the attachment lien *with the same priority as the attachment lien* in either of the following circumstances:

(a) "Where the judgment debtor dies after entry of judgment in an action in which the property was attached."
(*Prob.C. 19304(a)(1).*)

(b) "Where a judgment is entered after the death of the defendant in an action in which the property was attached."
(*Prob.C. 19304(a)(2).*)

Prob.C. 19304(b) sets forth the procedure for converting an attachment lien into a judgment lien.

Any member of the deceased settlor's family who was supported in whole or in part by the settlor may claim an exemption provided in *C.C.P. 487.020* (see 6 *Cal. Proc.* (4th), *Provisional Remedies*, §82) for property levied on under the writ of attachment if the right to the exemption exists at the time the exemption is claimed. The claim may be made by the trustee on behalf of a family member. The claim may be made at any time before the abstract and notice are served, recorded, or filed under *Prob.C. 19304(b)* with respect to the property claimed to be exempt. The claim is made in the same manner as an exemption is claimed under *C.C.P. 485.610* (see 6 *Cal. Proc.* (4th), *Provisional Remedies*, §139). (*Prob.C. 19304(c).*)

SUPPLEMENT: [This section is current through the latest supplement]
(2) *Enforcement of Money Judgment.*

Enforcement of Judgments Law:

Cross-Reference: 8 *Cal. Proc.* (5th), *Enforcement of Judgment*, §18 et seq.(5) *Conversion of Attachment Lien to Judgment Lien.* *Prob.C. 19304(c)* was amended in 2007 to refer to a claim of exemption under *C.C.P. 482.100* (see 6 *Cal. Proc.* (5th), *Provisional Remedies*, §222).

Support exemption:

Cross-Reference: 6 *Cal. Proc.* (5th), *Provisional Remedies*, §83.

Manner of making claim:

Cross-Reference: 6 *Cal. Proc.* (5th), *Provisional Remedies*, §140.



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d. Time for Filing Claims.
1. In General.

13 Witkin Sum. Cal. Law Trusts § 268

[§ 268] In General.

(1) *Time Limits.* A creditor must file a claim before expiration of the later of the following times:

(a) Four months after the first publication of notice to creditors under *Prob.C. 19040*. (*Prob.C. 19100(a)(1).*)

(b) Thirty days after the date actual notice is mailed or personally delivered to the creditor, if notice is given within the time provided in *Prob.C. 19051(a)* or (b) (*supra*, §263). (*Prob.C. 19100(a)(2).*) (On time period for filing claims in decedents' estates, see 14 *Summary* (10th), *Wills and Probate*, §633)

(2) *Effect of Vacancy in Office of Trustee.* "A vacancy in the office of the trustee that occurs before expiration of the time for filing a claim does not extend the time." (*Prob.C. 19101.*)

(3) *Effect of Timely Filing.* "A claim that is filed before expiration of the time for filing the claim is timely even if acted on by the trustee or the court after expiration of the time for filing claims." (*Prob.C. 19102.*)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Time Limits.* *Prob.C. 19100(a)(2)* was amended in 2007 to (a) increase the time period to 60 days, (b) delete the condition of notice given under *Prob.C. 19051*, and (c) add that the 60-day provision does not extend the time provided in *C.C.P. 366.2* (limitation of action against decedent; see 14 *Summary* (10th), *Wills and Probate*, §517). (See *Prob.C. 19100(c)*, added in 2007 [Prob.C. 19100 does not extend or toll any statute of limitations].)



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2. Amended and Revised Claims.

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[§ 269] Amended and Revised Claims.

(1) *Statutory Authorization.* If a claim is filed within the time provided by *Prob.C. 19100* et seq., it may later be amended or revised, but the amendment or revision may not increase the amount of the claim after the time for filing the claim has expired. The amendment or revision must be filed in the same manner as the claim. (*Prob.C. 19104(a), (b).*) (On amended and revised claims in decedents' estates, see 14 *Summary* (10th), *Wills and Probate*, §634.)

(2) *Time Limit.* An amendment or revision may not be made *for any purpose* after the earlier of (a) the time the court makes an order approving settlement of the claim under *Prob.C. 19020* et seq. (see *infra*, §278 et seq.), or (b) 1 year after the date of first publication of notice to creditors under *Prob.C. 19040* (*supra*, §262). (*Prob.C. 19104(b).*)

(3) *Claims Barred by C.C.P. 366.2.* Nothing in *Prob.C. 19104(b)* authorizes allowance or approval of a claim barred by *C.C.P. 366.2* (limitation of action against decedent; see 14 *Summary* (10th), *Wills and Probate*, §517) or extends the time provided in that section. (*Prob.C. 19104(b)(2).*)

SUPPLEMENT: [This section is current through the latest supplement]



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3. Petition To File Late Claim.

13 Witkin Sum. Cal. Law Trusts § 270

[§ 270] Petition To File Late Claim.

(1) *Conditions for Authorizing Late Filing.* On petition by the claimant and notice of hearing as provided by *Prob.C. 19024* (infra, §280), the court may allow a late claim to be filed in either of the following circumstances:

(a) Neither the claimant nor the attorney representing the claimant had actual knowledge of the proceeding under *Prob.C. 19000* et seq. more than 15 days before expiration of the time provided in *Prob.C. 19100* (supra, §268), and the claimant's petition was filed within 30 days after either the claimant or the attorney had actual knowledge of the proceedings, whichever occurred first. (*Prob.C. 19103(a)(1).*)

(b) Neither the claimant nor the attorney representing the claimant had knowledge of the existence of the claim more than 15 days before expiration of the time provided in *Prob.C. 19100*, and the claimant's petition was filed within 30 days after either the claimant or the attorney had knowledge of the existence of the claim, whichever occurred first. (*Prob.C. 19103(a)(2).*)

The court may condition the claim on terms that are "just and equitable." (*Prob.C. 19103(c).*) (On petition to file late claim in decedents' estates, see 14 *Summary* (10th), *Wills and Probate*, §635.)

(2) *Time Limit.* A late claim may not be filed more than 1 year after the date of first publication of notice to creditors under *Prob.C. 19040* (supra, §262). Nothing in *Prob.C. 19103(b)* authorizes allowance or approval of a claim barred by *C.C.P. 366.2* (limitation of action against decedent; see 14 *Summary* (10th), *Wills and Probate*, §517) or extends the time provided in that section. (*Prob.C. 19103(b).*)

(3) *Effect of Prior Distributions and Payments.* "The court may deny the claimant's petition if a distribution to trust beneficiaries or payment to general creditors has been made and it appears the filing or establishment of the claim would cause or tend to cause unequal treatment among beneficiaries or creditors." (*Prob.C. 19103(c).*) Regardless of whether a claim is later established in whole or in part, property distributed under the terms of the trust subsequent to an order settling claims under *Prob.C. 19020* et seq. (see infra, §278 et seq.) and payments otherwise properly made before a claim is filed under *Prob.C. 19103* are not subject to the claim. Except as provided in *Prob.C. 19400* et seq. (infra,

§§287, 288), and subject to *Prob.C. 19053* (*supra*, §264), the trustee, distributee, or payee is not liable on account of the prior distribution or payment. (*Prob.C. 19103(d)*.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Conditions for Authorizing Late Filing.* *Prob.C. 19103(a)* was amended in 2007. The statute now provides that, except as provided in *Prob.C. 19103(b)*, on a petition by a creditor or a trustee, the court may allow a claim to be filed after the time for filing a claim provided by *Prob.C. 19100* in either of the following circumstances:

(a) The trustee failed to send proper and timely notice to the creditor and the petition is filed within 60 days after the creditor has actual knowledge of the administration of the trust. (*Prob.C. 19103(a)(1)*.)

(b) The creditor did not have knowledge of the facts giving rise to the existence of the claim more than 30 days before the time for filing a claim provided in *Prob.C. 19100* and the petition is filed within 60 days after the creditor has actual knowledge of both the existence of the facts reasonably giving rise to the existence of the claim and the administration of the trust. (*Prob.C. 19103(a)(2)*.) (3) *Effect of Prior Distributions and Payments.* *Prob.C. 19103(d)* "does not limit the liability of a person who receives a preliminary distribution of property to restore to the trust an amount sufficient for payment of the beneficiary's proper share of the claim, not exceeding the amount distributed." (*Prob.C. 19103(d)*, as amended in 2007.)



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1. In General.

13 Witkin Sum. Cal. Law Trusts § 271

[§ 271] In General.

(1) *Who May File Claim.* A claim may be filed by the claimant or by a person acting on the claimant's behalf. (*Prob.C. 19150(a).*)

(2) *Where Claim Is Filed.* "A claim shall be filed with the court and a copy shall be mailed to the trustee. Failure to mail a copy to the trustee does not invalidate a properly filed claim, but any loss that results from the failure shall be borne by the claimant." (*Prob.C. 19150(b).*)

(3) *Form and Content.* The Judicial Council may adopt a claim form that (a) informs the creditor that the claim must be filed with the court and a copy mailed or delivered to the trustee, and (b) includes proof of mailing or delivery of a copy of the claim to the trustee, to be completed by the creditor. (*Prob.C. 19011(b), 19153.*) (On claim filing procedure and form in decedents' estates, see 14 *Summary* (10th), *Wills and Probate*, §§636, 637.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Who May File Claim.* *Prob.C. 19150(a)* was amended in 2007 to refer to the "creditor" rather than the "claimant."

(2) *When Claim Is Filed.* *Prob.C. 19150(b)* was amended in 2007 to refer to the "creditor" rather than the "claimant."



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2. Documentary Support.

13 Witkin Sum. Cal. Law Trusts § 272

[§ 272] Documentary Support.

(1) *Affidavit*. A claim must be supported by an affidavit stating (a) that the claim is a just claim, (b) if the claim is due, the facts supporting the claim, the amount of the claim, and that all payments and offsets have been credited, (c) if the claim is contingent or not due, or the amount is not yet ascertainable, the facts that support the claim, and (d) if the affidavit is made by a person other than the claimant, the reason the affidavit is not made by the claimant. (*Prob.C. 19151(a)*.) (On documentary support of claims in decedents' estates, see 14 *Summary* (10th), *Wills and Probate*, §638.)

(2) *Vouchers*. The trustee may require satisfactory vouchers or proof to support the claim. An original voucher may be withdrawn after a copy is provided. If a copy is provided, it must be attached to the claim. (*Prob.C. 19151(b)*.)

(3) *Claim Based on Written Instrument*. If a claim is based on a written instrument, either the original or a copy with all endorsements must be attached to the claim. If a copy is attached, the original must be exhibited to the trustee on demand unless it is lost or destroyed, in which case that fact must be stated in the claim. (*Prob.C. 19152(a)*.)

(4) *Secured Claim*. If the claim or part of the claim is secured by a mortgage, deed of trust, or other lien that is recorded in the county in which the property subject to the lien is located, it is sufficient to describe the mortgage, etc., and the recording reference for the instrument that created it. (*Prob.C. 19152(b)*.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Affidavit*. *Prob.C. 19151(a)* was amended in 2007 to refer to the "creditor" rather than the "claimant."



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3. Waiver of Formal Defects.

13 Witkin Sum. Cal. Law Trusts § 273

[§ 273] Waiver of Formal Defects.

If a creditor makes a written demand for payment within the time specified in *Prob.C. 19100* (supra, §268), the trustee may waive formal defects and treat the demand as a claim that is filed and established under *Prob.C. 19000* et seq. by paying the amount demanded. (*Prob.C. 19154(a)*.) Nothing in this provision limits application of the doctrines of waiver, estoppel, laches, or detrimental reliance, or any other equitable principle. (*Prob.C. 19154(b)*.) (On waiver of formal defects in decedents' estates, see 14 *Summary* (10th), *Wills and Probate*, §639.)

SUPPLEMENT: [This section is current through the latest supplement]



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f. Response by Trustee.
1. Allowance or Rejection.

13 Witkin Sum. Cal. Law Trusts § 274

[§ 274] Allowance or Rejection.

(1) *In General.* When a claim is filed, the trustee must allow or reject the claim in whole or in part. (*Prob.C. 19250.*) (On allowance or rejection of claims by personal representative, see 14 *Summary* (10th), *Wills and Probate*, §640.)

(2) *Form and Content.* The allowance or rejection must be in writing. (*Prob.C. 19251(a).*) It must contain (a) the name of the claimant, (b) the date of the settlor's death, (c) the total amount of the claim, (d) the amount allowed or rejected by the trustee, (e) a statement that the claimant has 90 days to bring an action on a rejected claim, running from the time the notice of rejection is given or the time the claim becomes due, whichever is later. (*Prob.C. 19251(b).*)

(3) *Judicial Council Form.* The Judicial Council must prescribe a form for allowance or rejection, which may be part of the claim form. (*Prob.C. 19011(a).*) Use of the Judicial Council form is deemed to satisfy the requirements of *Prob.C. 19251.* (*Prob.C. 19251(c).*)

(4) *Filing and Notice.* The trustee must file the allowance or rejection with the court and give notice to the claimant as provided by *Prob.C. 1215* (see 14 *Summary* (10th), *Wills and Probate*, §392), together with a copy of the allowance or rejection. (*Prob.C. 19251(a).*)

(5) *Effect of Failure To Act.* If the trustee refuses or neglects to act on a claim within 30 days after it is filed, this refusal or neglect may, at the claimant's option, "be deemed equivalent to the giving of a notice of rejection on the 30th day." (*Prob.C. 19254.*)

(6) *Where Trustee or Trustee's Attorney Is Claimant.* If the trustee or the trustee's attorney is a claimant, the trustee has the same powers regarding the allowance and rejection of claims set forth in *Prob.C. 19250* et seq. (*Prob.C. 19252.*)

(7) *Statute of Limitations.* The trustee may not allow a claim barred by the statute of limitations. (*Prob.C. 19253(a).*)

(8) *Scope of Requirements.* *Prob.C. 19251* does not apply to a demand the trustee elects to treat as a claim under *Prob.C. 19154* (supra, §273). (*Prob.C. 19251(d).*)

SUPPLEMENT: [This section is current through the latest supplement]

(6) *Where Trustee or Trustee's Attorney Is Claimant.* *Prob.C. 19252* was amended in 2007 to refer to a "creditor" rather than a "claimant."



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f. Response by Trustee.

2. Payment or Compromise.

13 Witkin Sum. Cal. Law Trusts § 275

[§ 275] Payment or Compromise.

The trustee may pay all or part of any claim, and payment constitutes allowance of the claim to the extent of the payment. The trustee may compromise all or part of any claim. If the trustee or the trustee's attorney is a claimant, the trustee has the same powers regarding payment or compromise of a claim set forth in *Prob.C. 19250 et seq. (Prob.C. 19252.)*

SUPPLEMENT: [This section is current through the latest supplement]
Prob.C. 19252 was amended in 2007 to refer to a "creditor" rather than a "claimant."



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g. Action on Rejected Claim.
1. Statute of Limitations.

13 Witkin Sum. Cal. Law Trusts § 276

[§ 276] Statute of Limitations.

(1) *When Statute Is Tolloed.* Filing a claim tolls the statute of limitations otherwise applicable to the claim until the trustee gives notice of allowance or rejection of the claim. (*Prob.C. 19253(b).*) The allowance of a claim further tolls the statute as to the allowed portion until the allowed portion is paid. (*Prob.C. 19253(c).*)

(2) *When Action Must Be Commenced.* Notwithstanding the statute of limitations otherwise applicable to a claim, a rejected claim is barred unless the claimant brings an action on the claim, or the matter is referred to a referee or to arbitration, within the following times:

(a) If the claim is due when notice of rejection is given, 90 days after notice is given. (*Prob.C. 19253(d), 19255(a)(1).*)

(b) If the claim is not due when notice of rejection is given, 90 days after the claim becomes due. (*Prob.C. 19253(d), 19255(a)(2).*)

For this purpose, any time during which there is a vacancy in the office of trustee is excluded. (*Prob.C. 19255(a).*) (On statute of limitations in decedents' estates, see 14 *Summary* (10th), *Wills and Probate*, §646.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *When Action Must Be Commenced.* *Prob.C. 19255(a)* was amended in 2007 to refer to the "creditor" rather than the "claimant."



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2. Procedure.

13 Witkin Sum. Cal. Law Trusts § 277

[§ 277] Procedure.

The procedural steps to be taken following rejection of a claim are set forth in *Prob.C. 19255*. (On procedure in decedents' estates, see 14 *Summary* (10th), *Wills and Probate*, §647.)

(1) *Venue*. In addition to any other county in which an action on a rejected claim may be commenced, the action may be commenced in the county where the principal place of administration of the trust is located. (*Prob.C. 19255(b)*.)

(2) *Lis Pendens*. The claimant must file a notice of the pendency of the action, or the referral to a referee or to arbitration, with the court clerk in the trust proceeding, together with proof of giving notice to the trustee as provided by *Prob.C. 1215* (see 14 *Summary* (10th), *Wills and Probate*, §392). Personal service of a copy of the summons and complaint on the trustee is equivalent to filing and giving the notice. (*Prob.C. 19255(c)*.)

(3) *Prior Payments and Distributions Are Not Affected by Action*. Any property distributed by the trustee under the terms of the trust *after* 120 days from the later of the time the notice of rejection is given or the claim is due and *before* notice of pendency of action or referral or arbitration is filed and given (excluding time during which there is a vacancy in the office of trustee) is not subject to the claim. Neither the trustee nor the distributee is liable by reason of the distribution. (*Prob.C. 19255(d)*.)

(4) *Costs*. The prevailing party must be awarded costs and, if the court determines that the prosecution or defense of the action against the prevailing party was unreasonable, the prevailing party must be awarded reasonable litigation expenses, including attorneys' fees. (*Prob.C. 19255(e)*.)

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Lis Pendens*. *Prob.C. 19255(c)* was amended in 2007 to refer to the "creditor" rather than the "claimant."



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h. Approval, Compromise, Settlement, or Allocation by Court.

1. In General.

13 Witkin Sum. Cal. Law Trusts § 278

[§ 278] In General.

A trustee or a trust beneficiary may petition the court under *Prob.C. 19020* et seq. to approve either:

(1) Allowance, compromise, or settlement of a claim that has not been rejected by the trustee under *Prob.C. 19000* et seq. and for which trust property may be liable. (*Prob.C. 19020(a)*.)

(2) Where an amount is due by reason of an action described in *Prob.C. 19020(a)*, an allocation of that amount to two or more trusts which may be liable for the claim. (*Prob.C. 19020(b)*.) (On approval or rejection of claims by court in decedents' estates, see 14 *Summary* (10th), *Wills and Probate*, §641.)

Nothing in *Prob.C. 19000* et seq. determines the liability of one trust established by the deceased settlor against another, except to the extent the trustee of the other trust files, publishes, and serves notice as specified in *Prob.C. 19003* (supra, §§260, 261) and seeks a determination of relative liability pursuant to *Prob.C. 19020* et seq. (*Prob.C. 19007*.)

Where a case involves a charitable trust subject to the jurisdiction of the Attorney General, the Attorney General may petition under *Prob.C. 19020* et seq. (*Prob.C. 19030*.)

SUPPLEMENT: [This section is current through the latest supplement]



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2. Petition.

13 Witkin Sum. Cal. Law Trusts § 279

[§ 279] Petition.

(1) *In General.* A proceeding for allowance, compromise, or settlement of a claim or allocation of an amount due under *Prob.C. 19020* (supra, §278) is commenced by filing a verified petition stating facts showing that the petition is authorized under *Prob.C. 19020* et seq. and the grounds for the petition. (*Prob.C. 19022(a).*)

(2) *Time for Filing.* The petition may be filed at any time after the filing and first publication of notice pursuant to *Prob.C. 19040* et seq. (supra, §262) and after expiration of the time to file claims provided in *Prob.C. 19040* et seq. (*Prob.C. 19020.*)

(3) *Place for Filing.* The petition must be filed in the county determined under *Prob.C. 19003* (supra, §261). If the action seeks approval of allocation to two or more trusts for which the notice proceeding under *Prob.C. 19003* would prescribe superior courts for more than one county, the court located in the county prescribed by *Prob.C. 19003* for the trustee initiating the proceeding under *Prob.C. 19020* et seq. has jurisdiction. (*Prob.C. 19021.*)

(4) *Content.* The petition must set forth (a) a description of the trust, (b) the names of claimants with respect to whom action is requested, (c) a description of each claim, together with the requested determination by the court, (d) the beneficiaries of the trust, (e) those claimants whose interest in the trust may be affected by the petition, and (f) the trustees of any other trust to which an allocation of liability may be approved by the court under the petition. This provision does not require filing a copy of the trust or disclosing the beneficial interests. (*Prob.C. 19022(b).*)

SUPPLEMENT: [This section is current through the latest supplement]

(4) *Content.* *Prob.C. 19022(b)* was amended in 2007 to refer to "creditors" rather than "claimants."

(5) *(New) Filing Fee.* The fee for filing a petition under *Prob.C. 19020* or an objection or other paper in opposition to the petition is \$ 350. (*Govt.C. 70655(c)(9)*, added in 2007 and amended in 2008.)



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3. Notice of Hearing.

13 Witkin Sum. Cal. Law Trusts § 280

[§ 280] Notice of Hearing.

(1) *Notice to Claimants.* At least 30 days before the time set for the hearing on the petition, the petitioner must cause notice of the time and place of the hearing and a copy of the petition to be served on claimants whose interests in the estate may be affected. The notice must be served in the manner provided by *C.C.P. 413.10* et seq. (see 3 *Cal. Proc. (4th), Actions*, §919 et seq.). (*Prob.C. 19023.*)

(2) *Notice to Other Interested Persons.* At least 30 days before the time set for the hearing on the petition, the petitioner must cause notice of the time and place of the hearing, together with a copy of the petition, to be mailed to each of the following persons who is not a petitioner:

(a) All trustees of the trust and of any other trusts to which an allocation of liability may be approved by the court under the petition. (*Prob.C. 19024(a).*)

(b) All beneficiaries affected. (*Prob.C. 19024(b).*)

(c) The personal representative of the settlor's estate, if known to the trustee. (*Prob.C. 19024(c).*)

(d) The Attorney General, if the petition relates to a charitable trust subject to the Attorney General's jurisdiction, unless notice is waived. (*Prob.C. 19024(d).*)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Notice to Claimants.* *Prob.C. 19023* was amended in 2007 to refer to "creditors" rather than "claimants."

Manner of service:

Cross-Reference: 3 *Cal. Proc. (5th), Actions*, §1001 et seq.



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13 Witkin Sum. Cal. Law Trusts § 281

[§ 281] Failure To File Pleading.

If a claimant, beneficiary, or trustee fails to file a timely written pleading, the case is at issue despite the failure. The case may proceed on the petition and written statements filed by the time of the hearing, and no further pleadings are necessary. The claimant, beneficiary, or trustee may not participate further in the proceeding and is bound by the decision. (*Prob.C. 19025(a)*.)

SUPPLEMENT: [This section is current through the latest supplement]
Prob.C. 19025(a) was amended in 2007 to refer to a "creditor" rather than a "claimant."



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h. Approval, Compromise, Settlement, or Allocation by Court.

5. Disposition by Court.

13 Witkin Sum. Cal. Law Trusts § 282

[§ 282] Disposition by Court.

(1) *Action by Court.* The court may make orders and take any other action necessary or proper to dispose of the matters presented by the petition. (*Prob.C. 19027(a).*) If the court determines that the trust assets are insufficient to pay all debts, the court must order payment as specified by *Prob.C. 11420* (see 14 *Summary* (10th), *Wills and Probate*, §649). (*Prob.C. 19027(b).*)

(2) *Dismissal of Petition.* The court may dismiss the petition if it appears that the proceeding is not reasonably necessary to protect the interests of the trustee or any trust beneficiary. (*Prob.C. 19026.*)

(3) *Appointment of Guardian Ad Litem.* The court may, on its own motion or at the request of a trustee or other person interested in the trust, appoint a guardian ad litem in accordance with *Prob.C. 1003* (see 14 *Summary* (10th), *Wills and Probate*, §374). (*Prob.C. 19029.*)

(4) *Effect of Court's Order.* The court's order, when final, is conclusive as to the liability of the trust property with respect to the claims at issue in the petition. If there is a subsequent administration of the settlor's estate, the order is binding on the personal representative as well as all claimants and beneficiaries who had notice of the petition. (*Prob.C. 19025(b).*)

SUPPLEMENT: [This section is current through the latest supplement]

(4) *Effect of Court's Order.* *Prob.C. 19025(b)* was amended in 2007 to refer to "creditors" rather than "claimants."



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3. Rights After Settlor's Death.
i. Allocation of Debts Between Trust and Surviving Spouse.
1. Petition and Order To Show Cause.

13 Witkin Sum. Cal. Law Trusts § 283

[§ 283] Petition and Order To Show Cause.

(1) *In General.* If it appears that a debt of the deceased settlor has been paid or is payable (in whole or in part) from the settlor's trust, the trustee, the surviving spouse, the personal representative of the settlor's probate estate, or a beneficiary may petition for an order to allocate the debt. (*Prob.C. 19320.*)

(2) *Contents of Petition.* The petition must state the following:

(a) All debts of the deceased settlor and the surviving spouse known to the petitioner that are alleged to be subject to allocation and whether they have been paid in full or in part or are unpaid. (*Prob.C. 19321(a).*)

(b) The reasons the debts should be allocated. (*Prob.C. 19321(b).*)

(c) The proposed allocation and the basis for it. (*Prob.C. 19321(c).*)

(3) *Order To Show Cause.* If it appears from the petition that allocation would be affected by the value of the surviving spouse's separate property and any community and quasi-community property not administered in the trust, and if no inventory and appraisal of the property has been provided by the surviving spouse, the court must make an order to show cause why the information should not be provided. (*Prob.C. 19322.*)

SUPPLEMENT: [This section is current through the latest supplement]



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2. Notice of Hearing.

13 Witkin Sum. Cal. Law Trusts § 284

[§ 284] Notice of Hearing.

(1) *Notice to Surviving Spouse.* At least 30 days before the time set for the hearing on the petition, the petitioner must cause notice of the time and place of the hearing and a copy of the petition to be served on the surviving spouse. The notice must be served in the manner provided by *C.C.P. 413.10* et seq. (see 3 *Cal. Proc. (4th), Actions*, §919 et seq.). (*Prob.C. 19323.*)

(2) *Notice to Other Persons.* At least 30 days before the time set for the hearing on the petition, the petitioner must cause notice of the time and place of the hearing, together with a copy of the petition, to be mailed to each of the following persons who is not a petitioner:

(a) All trustees of the trust and of any other trusts to which an allocation of liability may be approved by the court under the petition. (*Prob.C. 19323(b)(1).*)

(b) All beneficiaries affected. (*Prob.C. 19323(b)(2).*)

(c) The personal representative of the settlor's estate, if known to the trustee. (*Prob.C. 19323(b)(3).*)

(d) The Attorney General, if the petition relates to a charitable trust subject to the Attorney General's jurisdiction, unless notice is waived. (*Prob.C. 19323(b)(4).*)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Notice to Surviving Spouse.*

Manner of service:

Cross-Reference: 3 *Cal. Proc. (5th), Actions*, §1001 et seq.



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3. Allocation of Debts.

13 Witkin Sum. Cal. Law Trusts § 285

[§ 285] Allocation of Debts.

(1) *By Agreement.* The trustee, the personal representative of the settlor's probate estate, and the surviving spouse may provide for an allocation of debts by agreement, so long as the allocation protects the rights of other interested persons. The trustee, the personal representative, or the surviving spouse may obtain court approval of the agreed allocation. (*Prob.C. 19324(a).*)

(2) *Without Agreement.* *Prob.C. 19324* sets forth the following rules for allocation in the absence of an agreement. Comparable provisions apply to the allocation of debts between a decedent's probate estate and a surviving spouse. (See *Prob.C. 11444*, 14 *Summary* (10th), *Wills and Probate*, §§655, 656.)

(a) *Characterization of debts.* In the absence of an allocation agreement, debts subject to allocation are first characterized as separate or community, using the law applicable to marital dissolution. (*Prob.C. 19324(b).*)

(b) *General allocation of debts.* Separate debts are allocated to the appropriate spouse's separate assets, and community debts are allocated to community assets. (*Prob.C. 19324(b)(1).*)

(c) *Secured separate debt insufficient.* If a spouse's separate asset is subject to a secured debt that is characterized as that spouse's separate debt, and the net equity in the asset is less than the secured debt, the unsatisfied portion of the debt is treated as an unsecured separate debt and allocated to that spouse's other separate assets. (*Prob.C. 19324(b)(2).*)

(d) *Unsecured separate debt insufficient.* If the net value of a spouse's separate assets is less than that spouse's unsecured separate debts, the unsatisfied portion of the debts is allocated first to that spouse's share of community assets and then to the other spouse's share of community assets. (*Prob.C. 19324(b)(3).*)

(e) *Secured community debt insufficient.* If a community asset is subject to a secured debt that is characterized as a community debt, and the net equity in the asset is less than the secured debt, the unsatisfied portion of the debt is treated as an unsecured community debt and allocated to other community assets. (*Prob.C. 19324(b)(4).*)

(f) *Unsecured community debt insufficient.* If the net value of community assets is less than unsecured community

debts, the unsatisfied portion of the debts is first allocated equally between the separate assets of the deceased settlor and the separate assets of the surviving spouse. If the net value of either spouse's separate assets is less than that spouse's share of unsecured community debts, the remaining unsecured community debts are allocated to the other spouse's separate assets. (*Prob.C. 19324(b)(5).*)

(g) *Net value.* The net value of a spouse's separate asset is the fair market value on the date of the deceased settlor's death, minus the date-of-death balance of liens and encumbrances on that asset that are characterized as that spouse's separate debts. (*Prob.C. 19324(c)(1).*) The net value of a community asset is the fair market value on the date of the deceased settlor's death, minus the date-of-death balance of liens and encumbrances on that asset that are characterized as community debts. (*Prob.C. 19324(c)(2).*)

(h) *Nonrecourse debt.* In the case of a nonrecourse debt, the amount of the debt is limited to the net equity in the collateral available to satisfy the debt, based on the fair market value of the collateral on the date of the decedent's death. (*Prob.C. 19324(c)(3).*)

(i) *Different allocation by court order.* Notwithstanding any provision of *Prob.C. 19324*, a different allocation may be ordered if the court finds that allocation to be "equitable under the circumstances." (*Prob.C. 19324(d).*)

(j) *Damages and expenses.* If either the trustee, the personal representative of the deceased settlor's probate estate, or the surviving spouse incurs damages or expenses, including attorneys' fees, because of the nonpayment of a debt that was allocated to another party under *Prob.C. 19324(b)*, or as the result of a misallocation due to fraud or intentional misrepresentation by that party, the damaged party is entitled to receive reasonable damages and expenses from the other party. (*Prob.C. 19324(e).*)

(3) *Funeral and Last Illness Expenses Are Not Allocated.* Notwithstanding any other statute, funeral and last illness expenses, where there are no specific provisions in a will or trust to the contrary, must be charged against the deceased settlor's probate estate, and thereafter, against the deceased settlor's share of the trust, and may not be allocated to or charged against the community share of the surviving spouse, whether or not the surviving spouse is able to pay the expenses or is liable for them. (*Prob.C. 19326.*)

(4) *Court Order.* On making a determination under *Prob.C. 19320* et seq., the court must make an order that:

(a) Directs the trustee to pay the amounts allocated to the trust by paying the surviving spouse or creditors. (*Prob.C. 19325(a).*)

(b) Directs the trustee to charge amounts allocated to the surviving spouse against any property or interests of the surviving spouse in the possession or control of the trustee. To the extent that the property or interests are insufficient to satisfy the allocation, the court order must summarily direct the surviving spouse to pay the allocation to the trustee. (*Prob.C. 19325(b).*)

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j. Liability of Surviving Spouse.

13 Witkin Sum. Cal. Law Trusts § 286

[§ 286] Liability of Surviving Spouse.

If proceedings are commenced under *Prob.C. 19000* et seq. for settlement of claims against the trust, and the time for filing claims has commenced, any action on the liability of the surviving spouse under *Prob.C. 13550* et seq. (see 14 *Summary* (10th), *Wills and Probate*, §823) is barred to the same extent provided for claims under *Prob.C. 19000* et seq., except as to:

- (1) A creditor who commences judicial proceedings to enforce a claim and serves the surviving spouse with the complaint prior to the end of the time for filing claims. (*Prob.C. 19330(a).*)
- (2) A creditor who has or who secures the surviving spouse's acknowledgment in writing of liability for the claim. (*Prob.C. 19330(b).*)
- (3) A creditor who files a timely claim in the proceedings for the administration of the estate of the deceased spouse. (*Prob.C. 19330(c).*)

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k. Personal Liability of Distributee.
1. In General.

13 Witkin Sum. Cal. Law Trusts § 287

[§ 287] In General.

(1) *Requirements Where Estate Is Not Administered and Notice Is Not Filed and Published by Trustee.* Subject to C.C.P. 366.2 (limitation of action against decedent; see 14 *Summary* (10th), *Wills and Probate*, §517), if there is no proceeding to administer the estate of a deceased settlor, and if the trustee does not file a proposed notice to creditors under *Prob.C. 19003* (supra, §261) and does not publish notice to creditors under *Prob.C. 19040* and *19041* (supra, §262), a beneficiary of the trust to whom payment, delivery, or transfer of the deceased settlor's property is made under the terms of the trust is personally liable, to the extent provided in *Prob.C. 19402* (infra, §288), for the unsecured claims of the creditors of the settlor's estate. (*Prob.C. 19400.*)

(2) *Requirements Where Notice Is Filed and Published by Trustee and Creditor Is Ascertainable.* Subject to *Prob.C. 19402* (infra, §288), if the trustee filed a proposed notice to creditors pursuant to *Prob.C. 19003* and published notice to creditors pursuant to *Prob.C. 19040*, and the identity of the creditor was known to, or reasonably ascertainable by, the trustee within 4 months of the first publication of notice, a person to whom property is distributed is personally liable for the creditor's claim, without a claim having first been filed, if:

(a) The claim was not merely conjectural. (*Prob.C. 19401(a).*)

(b) Notice was not given to the creditor under *Prob.C. 19050* et seq. (supra, §263 et seq.) and neither the creditor nor the creditor's attorney had actual knowledge of the administration of the trust estate sooner than 1 year after the date of first publication of notice under *Prob.C. 19040*. (*Prob.C. 19401(b).*)

(c) The statute of limitations applicable to the claim under C.C.P. 366.2 has not expired at the time of the commencement of an action under *Prob.C. 19401*. (*Prob.C. 19401(c).*)

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k. Personal Liability of Distributee.
2. Limitations.

13 Witkin Sum. Cal. Law Trusts § 288

[§ 288] Limitations.

(1) *In General.* Personal liability under *Prob.C. 19400* et seq. applies only to the extent the creditor's claim cannot be satisfied out of the trust estate, and it is limited to a pro rata portion of the creditor's claim, based on the proportion that the value of the property distributed to the person out of the trust estate bears to the total value of all property distributed. Personal liability for all creditors' claims is limited to the value of the property distributed to the person out of the trust estate. As used in *Prob.C. 19400* et seq., the value of the property is its fair market value on the date of distribution less liens and encumbrances on the property at that time. (*Prob.C. 19402(b)*.)

In *Valentine v. Read* (1996) 50 C.A.4th 787, 57 C.R.2d 836, plaintiffs sued for breach of a will contract and recovered a judgment against the decedent's living trust, the trustee, and the residuary beneficiary of the trust. Judgment was entered against the beneficiary to the extent she received assets from the trust and against the trustee individually. *Held*, the beneficiary's liability must be proportional to her share of trust distributions, and the trustee may not be held individually liable.

(a) The residuary beneficiary's personal liability is limited by *Prob.C. 19402(b)*. Here, because neither probate nor trust creditor claims proceedings were instituted, the other beneficiaries were not exposed to liability. Had they been sued, they would have been alerted to their potential liability and could have notified the trustee not to make distributions that would subject them to personal liability. They might also have petitioned for the institution of creditor claims proceedings. Even in the absence of creditor claims proceedings, the statutory scheme provides plaintiffs with a complete remedy for recovery of their claims. Any beneficiaries who might have been exposed to liability had remedies to protect their own interests, and thus there is no reason why the pro rata scheme of *Prob.C. 19402(b)* should not be applied to defendant beneficiary. (50 C.A.4th 793.)

(b) There is no basis for holding the trustee individually liable. In the absence of creditor claims proceedings, the statutory scheme contemplates satisfaction of claims first from the trust estate, and then from beneficiaries who receive distributions. It does not contemplate that a trustee who makes distributions would incur personal liability to the settlor's creditors. (50 C.A.4th 794.)

(2) *Availability of Settlor's Defenses.* In an action under *Prob.C. 19400* et seq., subject to *C.C.P. 366.2* (limitation of action against decedent; see 14 *Summary* (10th), *Wills and Probate*, §517), the distributee may assert any defense, cross-complaint, or setoff that would have been available to the settlor had the settlor not died. (*Prob.C. 19402(a).*)

(3) *Rights of Good Faith Purchaser or Encumbrancer.* Nothing in *Prob.C. 19400* et seq. affects the rights of a purchaser or encumbrancer of property in good faith and for value from a person who is personally liable. (*Prob.C. 19403.*)

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IX. CHARITABLE TRUSTS

A. In General.

1. Nature of Charitable Trust.

13 Witkin Sum. Cal. Law Trusts § 289

[§ 289] Nature of Charitable Trust.

(1) *Public Purpose.* A charitable trust is a trust for a charitable purpose, created in the same manner as a private trust. (*Rest.3d, Trusts §28*; see 4A Scott §§348, 349; Bogert §321 et seq.; Cal. Civil Practice, 3 Probate and Trust Proceedings, §24:5 et seq.; 15 *Am.Jur.2d* (2000 ed.), *Charities §5* et seq.; supra, §25.)

In a private trust, the property is devoted to the use of particular persons; in a charitable trust, the property is used for "charitable" or "public" purposes--those deemed beneficial to the community. *Rest.3d, Trusts, §28* identifies the following charitable purposes: (a) the relief of poverty, (b) the advancement of knowledge or education, (c) the advancement of religion, (d) the promotion of health, (e) governmental or municipal purposes, and (f) other purposes that are beneficial to the community. (See *infra*, §295 et seq.)

The purpose must be *public*, i.e., it must be of some social benefit. But it need not be for the benefit of the poor. If it aids in some way in the physical, spiritual, or mental improvement of society, it will be upheld. (*Collier v. Lindley* (1928) 203 C. 641, 648, 266 P. 526; see 4A Scott §§368, 374; Bogert §368 et seq.; 16 *Cal. L. Rev.* 478; 59 *Harv. L. Rev.* 204; 5 *Hastings L. J.* 101; 1 *So. Cal. L. Rev.* 180; 4 *So. Cal. L. Rev.* 418; 15 *Am.Jur.2d* (2000 ed.), *Charities §6*; *infra*, §295 et seq.) (On testamentary gift to preexisting charitable trust or corporation, see *Rest.2d, Trusts §358*; on fiduciary duty of charity or its solicitor to use contributions for charitable purposes for which they were sought, see *B. & P.C. 17510.8*, *infra*, §307; on foundations, see 13 *U.C.L.A. L. Rev.* 933 [symposium]; on validity of provision for accumulation of income, see 6 *A.L.R.4th* 903.)

To determine whether a nonprofit corporation is a charitable trust, the court may examine its articles and extrinsic evidence of its activities. (See *Lynch v. Spilman* (1967) 67 *C.2d* 251, 261, 264, 62 *C.R.* 12, 431 *P.2d* 636 [triable issue of fact, summary judgment improper]; *Lynch v. Surprise Valley Lodge No. 2* (1972) 26 *C.A.3d* 265, 271, 103 *C.R.* 1.)

(2) *Private trusts distinguished.* Charitable trusts are favored by the law, and in several important respects are treated differently from private trusts:

(a) *Rule against perpetuities.* They are not subject to the rule against perpetuities. (See 12 *Summary* (10th), *Real Property*, §188.)

(b) *Liberal construction.* Liberal rules of construction are applied to the trust instrument. (*Estate of McDole* (1932) 215 C. 328, 332, 10 P.2d 75, supra, §32; *Dingwell v. Seymour* (1928) 91 C.A. 483, 507, 267 P. 327; *Estate of Somerville* (1936) 12 C.A.2d 430, 433, 55 P.2d 597; *Estate of Tarrant* (1951) 38 C.2d 42, 46, 237 P.2d 505, infra, §294; *Estate of De Mars* (1937) 20 C.A.2d 514, 517, 67 P.2d 374; *Estate of Faulkner* (1954) 128 C.A.2d 575, 578, 275 P.2d 818; *Estate of Quinn* (1958) 156 C.A.2d 684, 686, 320 P.2d 219; *Estate of Rollins* (1958) 163 C.A.2d 225, 227, 328 P.2d 1005; *Estate of Moore* (1961) 190 C.A.2d 833, 839, 12 C.R. 436, infra, §301 ["Thus, in approaching the doorway of the testator's mind through the words of her bequest, courts do not now adopt an antagonistic spirit toward her charitable intent for it is the rule that where doubt exists, a gift must be interpreted in favor of a charity"]; see 15 *Am.Jur.2d* (2000 ed.), *Charities* §118 et seq.)

(c) *Cy pres.* Under the doctrine of *cy pres*, the trust may be given effect in some cases although the designated charitable purpose fails. (See infra, §§302, 303.)

(d) *Tax exemption.* Property "used exclusively" for charitable purposes may be exempt from property taxation (see 9 *Summary* (10th), *Taxation*, §187 et seq.), and qualifying nonprofit entities may be exempt from income taxation (see infra, §310). However, a trust may be charitable even though it is not tax-exempt. (*Estate of Breeden* (1989) 208 C.A.3d 981, 992, 256 C.R. 813 [trust to promote socialism]; see 64 *So. Cal. L. Rev.* 461 [scope of term "charitable"].)

(e) *State supervision.* Charitable trusts are subject to official supervision and their terms may be enforced by the Attorney General. (See infra, §305 et seq.)

West's Key Number Digest, *Charities* k.1

SUPPLEMENT: [This section is current through the latest supplement]

(2) *Private Trusts Distinguished.*

(b) *Liberal construction.* See *Estate of Clementi* (2008) 166 C.A.4th 375, 385, 82 C.R.3d 685 ["I give the balance of my assets to a charitable foundation or trust in my name" was sufficient to manifest intent to create charitable trust].



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IX. CHARITABLE TRUSTS

A. In General.

2. Law Revision Commission Report.

13 Witkin Sum. Cal. Law Trusts § 290

[§ 290] Law Revision Commission Report.

The California Law Revision Commission (18 Cal. Law Rev. Com. Reports, p. 603) describes its limited treatment of this subject as follows:

(1) "The law governing charitable trusts is largely the same as that governing private trusts. 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. 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. Probate Code Sections 1138-1138.14 governing judicial proceedings concerning internal affairs of trusts exclude charitable trusts subject to supervision by the Attorney General. 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. 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."

(2) "The most important body of statutory law relating to charitable trusts is the Uniform Supervision of Trustees for Charitable Purposes Act 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."

(3) "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. 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. 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. The proposed law also 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. The proposed law also codifies the case-law rule that a trustee of a charitable trust may petition to enforce the trust."

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IX. CHARITABLE TRUSTS
B. Indefinite Beneficiaries.
1. In General.

13 Witkin Sum. Cal. Law Trusts § 291

[§ 291] In General.

A charitable trust cannot have specific, ascertained beneficiaries. They must consist of some *class of persons* selected from the public generally or from some particular part of it. (*People v. Cogswell* (1896) 113 C. 129, 136, 45 P. 270; *Collier v. Lindley* (1928) 203 C. 641, 648, 266 P. 526; *Estate of Huebner* (1932) 127 C.A. 244, 246, 15 P.2d 758; see *Rest.3d, Trusts* §28, Comment c; 4A Scott §375; Bogert §363; 30 Cal. L. Rev. 218; 15 Am.Jur.2d (2000 ed.), *Charities* §§68, 69, 106 et seq.)

The class of beneficiaries must be large enough so that there is a public interest to be served. Thus, trust for the assistance of "worthy, talented, industrious and needy young men or young women" studying in California schools, selected by the trustees, has a large enough class. (*Estate of Bartlett* (1932) 122 C.A. 375, 377, 10 P.2d 126; see 33 A.L.R.2d 1183 [charitable character of trust to lend money to students]; 90 A.L.R.4th 836 [validity of charitable gift or trust containing gender restrictions on beneficiaries].)

If the beneficiaries are indefinite, it is not a valid objection that the *class* from which they are chosen is definite, provided that it is large enough, e.g., the members of a particular fraternal organization. (See 30 Cal. L. Rev. 218; *infra*, §§293, 294.) In *Estate of De Mars* (1937) 20 C.A.2d 514, 67 P.2d 374, a holographic will contained a residuary clause reading: "Any amount left go to the poor soldiers Letterman Hospital." *Held*, a charitable trust was created, in favor of a definite class, the poor soldiers of the Letterman General Hospital in San Francisco, and distribution was ordered to the commanding officer as trustee. (20 C.A.2d 516.) (See *Estate of Tarrant* (1951) 38 C.2d 42, 47, 237 P.2d 505, *infra*, §294 [bequest to pension funds of particular railroad companies].)

West's Key Number Digest, Charities k.21(1)

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B. Indefinite Beneficiaries.
2. Single Beneficiary.

13 Witkin Sum. Cal. Law Trusts § 292

[§ 292] Single Beneficiary.

It has generally been assumed that there cannot be a valid charitable trust with only a single beneficiary. (See *Estate of Huebner* (1932) 127 C.A. 244, 246, 15 P.2d 758 [trust to educate "some girl or boy in music or art"]; *Rest.3d, Trusts* §28, Comment f; 4A Scott §375; Bogert §362; 15 Am.Jur.2d (2000 ed.), *Charities* §69.)

The supposed rule was, however, rejected in *Estate of McKenzie* (1964) 227 C.A.2d 167, 38 C.R. 496. The testator left his residuary estate by a holographic will in "a trust ... payable as a reward to the person" who finds the cause and cure of a disease ("Rhomatoid" arthritis) to the satisfaction of the U.C. "Medical Board." The Regents of the University expressed willingness to serve as testamentary trustee, but the trial judge found no valid trust and ordered distribution to the heirs. *Held*, reversed. The purpose of the trust is to stimulate research and thus benefit the public by the discovery or by the efforts of many doctors, not only the one who gets the prize. The incidental benefit to a particular person is no more than the usual incidental benefit to compensated employees of a charitable trust. "In reality, the public is the true beneficiary of what will result from the operation of this trust. The fact that a particular individual some day may qualify to receive the reward is but the instrumentality through which the benefits that will be bestowed upon the public are brought about. To consider such individual the beneficiary of the trust is to confuse the trust purpose with the means provided for achieving that purpose." (227 C.A.2d 172.) (See 7 A.L.R.3d 1281 [charitable character of trust to provide prize or award for persons accomplishing specified results].)

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3. Gift Directly to Charitable Institution.

13 Witkin Sum. Cal. Law Trusts § 293

[§ 293] Gift Directly to Charitable Institution.

A charitable gift may be upheld though made directly to the trustees of an unincorporated charitable association, or even directly to the association itself; equity will treat the gift as one in trust for the inmates. (*Estate of Upham* (1899) 127 C. 90, 93, 59 P. 315; *Estate of McDole* (1932) 215 C. 328, 331, 10 P.2d 75, supra, §32; *Estate of Henderson* (1941) 17 C.2d 853, 861, 112 P.2d 605, infra, §294; *Estate of Weis* (1964) 224 C.A.2d 19, 22, 36 C.R. 266 [nonprofit home for children of Christian Science faith, charging \$ 150 per month per child]; see *Rest.2d, Trusts* §397, Comments f, g; 4A Scott §397; Bogert §§324, 328, 362; 81 A.L.R.2d 819 [charitable character of trust for church, etc., without specification of use or purpose].)

A gift may also be made directly to a charitable *corporation* to be used for its purposes, and, although this does not create a charitable trust with new trustees, it has practically the same effect. Thus, a gift to a Masonic lodge, where the evidence showed that it was a nonprofit organization devoted to charitable purposes, was held not subject to the rule against perpetuities. (*Estate of Wirt* (1932) 124 C.A. 7, 11, 12 P.2d 95; see *In re Los Angeles County Pioneer Soc.* (1953) 40 C.2d 852, 860, 257 P.2d 1; *Estate of Clippinger* (1946) 75 C.A.2d 426, 433, 171 P.2d 567, supra, §32; *Estate of Faulkner* (1954) 128 C.A.2d 575, 578, 275 P.2d 818; *Estate of Connolly* (1975) 48 C.A.3d 129, 133, 121 C.R. 325 [gift to nonprofit corporation supporting agnosticism]; 30 Cal. L. Rev. 218; 1 So. Cal. L. Rev. 180, 303; 26 So. Cal. L. Rev. 80.)

Some authorities hold that a charitable corporation not formally dissolved continues in existence for the purpose of taking under a will even though it has ceased to function. The opposing line of authority was followed in *Estate of Klinkner* (1978) 85 C.A.3d 942, 151 C.R. 20. The testator made a bequest of a remainder after termination of a trust to a named church in Wisconsin, with a gift over in part to another charity in the event that any remainderman no longer was in existence. The church had ceased to function as such, and its properties had been sold, but its corporate existence had not been terminated. *Held*, it was not entitled to take. (85 C.A.3d 951.) (For holding on *cy pres*, see infra, §304.)

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IX. CHARITABLE TRUSTS

B. Indefinite Beneficiaries.

4. Charitable Gift to Noncharitable Institution.

13 Witkin Sum. Cal. Law Trusts § 294

[§ 294] Charitable Gift to Noncharitable Institution.

A charitable gift may be made to a noncharitable institution so long as the *purpose of the gift* is charitable. Thus, in *Estate of Henderson (1941) 17 C.2d 853, 112 P.2d 605*, a will left property to the Eastern Star Homes, a nonprofit corporation, to be used for its inmates. The institution took care of aged or infirm members, the major cost being borne by the fraternal order. It was objected that the organization was similar to a mutual benefit society, in which individuals contribute for the benefit of all, and which is not considered a charity. *Held*, the *gift* was charitable, even though the *institution* itself might be considered in the nature of a mutual benefit society. (*17 C.2d 857.*) (See *30 Cal. L. Rev. 218.*)

The *Henderson* case was followed in *Estate of Tarrant (1951) 38 C.2d 42, 237 P.2d 505*. The testator left \$ 6,000 in equal parts to certain railway company pension funds and the Railroad Retirement Board. The probate court held the bequest invalid on the theory that the railroad's fund was maintained in part by voluntary employer contributions, that the gift would relieve the railway company from making some contributions, and that in consequence a private corporation would be a direct beneficiary of the testator's bounty, contrary to the restriction contained in former Prob.C. 27. In upholding the gift, the court said:

"But even assuming the propriety of the observations as to the benefit that the company might sustain if it should elect to reduce its future contributions to the pension fund--a conjecture based wholly on surmise and speculation--the charitable purpose of the testator as *one outsider* making a contribution to the fund without benefit to himself, in establishing the nature of his bequest, cannot be affected because *another outsider* may make a less contribution *pro tanto*. Rather, within the contemplation of the law, the company, like the testator, occupies the status of an 'outsider' contributing as a donor to the pension fund and without benefit to itself; and its status does not change to a beneficiary merely because of any *pro tanto* reduction it may make in its future contributions. All the gifts of the donors to such fund remain charitable regardless of what their effect may be on other possible 'outside contributors.' " (*38 C.2d 48.*)

It was similarly argued that the gift to the Railroad Retirement Board merely operated to relieve federal taxpayers by decreasing the amounts Congress must appropriate for pension payments. And the answer was similar: Benefit to federal taxpayers does not change the charitable nature of the gift; i.e., a gift for charitable purposes to a governmental agency is different from a gift to the United States without qualification as to purpose. (*38 C.2d 51.*)

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C. Charitable Purposes.
1. Health and Relief of Poverty.

13 Witkin Sum. Cal. Law Trusts § 295

[§ 295] Health and Relief of Poverty.

The relief of *poverty* is of course a proper charitable purpose. (*Rest.3d, Trusts* §28; see 4A Scott §369; Bogert §373; 15 *Am.Jur.2d* (2000 ed.), *Charities* §51 et seq.) So is the advancement of *health*; and a trust for a hospital may be charitable despite the charging of fees, provided the proceeds are used for charitable purposes. (See *Dingwell v. Seymour* (1928) 91 C.A. 483, 493, 267 P. 327; *Estate of McKenzie* (1964) 227 C.A.2d 167, 169, 38 C.R. 496, supra, §292 [cure of disease]; *Rest.3d, Trusts* §28; 4A Scott §§372, 376; Bogert §374; 15 *Am.Jur.2d* (2000 ed.), *Charities* §§53, 54.)

The same is true of care of the *aged*; the purpose is charitable even though the care extends to aged persons who are not indigent. (*Estate of Henderson* (1941) 17 C.2d 853, 858, 112 P.2d 605, supra, §294; see *Estate of Tarrant* (1951) 38 C.2d 42, 47, 237 P.2d 505, supra, §294 ["a bequest in aid of pension relief for retired, non-self-supporting railroad men and their dependents is a charitable use in the classic sense"]; *Estate of Faulkner* (1954) 128 C.A.2d 575, 579, 275 P.2d 818 [bequest to organization devoted to rehabilitation of alcoholics]; Bogert §373; 28 *A.L.R.2d* 428 [pension fund]; 51 *A.L.R.2d* 1290 [employees].)

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2. Religion.

13 Witkin Sum. Cal. Law Trusts § 296

[§ 296] Religion.

Gifts for the advancement of any religion or religious purpose are valid. (*Rest.3d, Trusts* §28.) Examples are bequests for the erection, repair, or maintenance of church buildings. (*Estate of Graham* (1923) 63 C.A. 41, 43, 218 P. 84; see 4A Scott §371; Bogert §376; 15 *Am.Jur.2d* (2000 ed.), *Charities* §§38 et seq., 113.)

The constitutional guarantee of freedom of religion does not prevent a religious sect from maintaining its own parochial education system (see 7 *Summary* (10th), *Constitutional Law*, §519), and likewise does not preclude a charitable gift for the benefit of "Christian" women and students. (*Estate of Zahn* (1971) 16 C.A.3d 106, 116, 93 C.R. 810; see 25 *A.L.R.3d* 736 [validity of gift excluding otherwise qualified beneficiaries because of race or religion].)

Bequests to have masses said for the repose of the testator's soul have been the subject of some uncertainty in California. In *Estate of Lennon* (1907) 152 C. 327, 330, 92 P. 870, the bequest was held to be a private gift to the pastor directly. But in *Estate of Hamilton* (1919) 181 C. 758, 762, 186 P. 587, the court considered testimony to the effect that the mass for the testator's soul was practically indistinguishable from other masses of a public nature, and held that the bequest for masses (as distinguished from the bequest directly to a priest) was charitable. (See *Estate of Ward* (1932) 125 C.A. 717, 719, 14 P.2d 91 [held no trust]; *Rest.3d, Trusts* §28, Comment i; 4A Scott §371; Bogert §376; 8 *Cal. L. Rev.* 272; 6 *So. Cal. L. Rev.* 342; 17 *So. Cal. L. Rev.* 144; 15 *Am.Jur.2d* (2000 ed.), *Charities* §41.)

A trust for the perpetual care of a *private cemetery lot* is lacking in a charitable purpose and the disposition is valid only to the extent permitted by statute. (*Estate of Gay* (1903) 138 C. 552, 555, 71 P. 707; *Rest.3d, Trusts* §47, Comment d; see *Estate of Pfund* (1949) 93 C.A.2d 444, 445, 209 P.2d 52 [void unless made to cemetery authority under *Health & Saf.C.* 8736, 8737]; Bogert §377; 47 *A.L.R.2d* 596 [validity of trust for private cemetery, burial monument, etc.]; 15 *Am.Jur.2d* (2000 ed.), *Charities* §64.)

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C. Charitable Purposes.

3. Educational and Cultural Objects.

13 Witkin Sum. Cal. Law Trusts § 297

[§ 297] Educational and Cultural Objects.

Educational objects are clearly valid. (See *Estate of Peck* (1959) 168 C.A.2d 25, 28, 335 P.2d 185, *infra*, §298; *Rest.3d, Trusts* §28; 25 A.L.R.2d 1114 [trust for school-children].) Examples are the establishment of schools or colleges (*People v. Cogswell* (1896) 113 C. 129, 137, 45 P. 270) and scholarships for needy or talented students (*Estate of Bartlett* (1932) 122 C.A. 375, 377, 10 P.2d 126). And a school or college is a valid charitable object though it charges tuition or fees, provided the charges are wholly used for the benefit of the institution and not for private profit. (*Estate of Bailey* (1937) 19 C.A.2d 135, 139, 65 P.2d 102, citing the Restatement.)

The object need not, of course, be related to an educational institution. (See *Estate of Moore* (1961) 190 C.A.2d 833, 840, 12 C.R. 436, *infra*, §301 ["The extension of the boundaries of human knowledge is a valid trust purpose of this type"]; *Estate of Connolly* (1975) 48 C.A.3d 129, 132, 121 C.R. 325 [gift to nonprofit corporation sponsoring agnosticism]; 4A Scott §370; Bogert §375; 22 A.L.R.3d 886 [to promote change in laws or systems of government]; 15 *Am.Jur.2d* (2000 ed.), *Charities* §42 et seq., 114.)

A civic theatre is a valid charitable object. (*Stockton Civic Theatre v. Board of Supervisors of San Joaquin* (1967) 66 C.2d 13, 20, 56 C.R. 658, 423 P.2d 810, 9 *Summary* (10th), *Taxation*, §197.)

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4. Social and Political Objects.

13 Witkin Sum. Cal. Law Trusts § 298

[§ 298] Social and Political Objects.

The investigation of economic and social conditions with a view to their improvement is a proper object. (*Collier v. Lindley* (1928) 203 C. 641, 649, 266 P. 526; see 16 Cal. L. Rev. 478; 4 So. Cal. L. Rev. 418; cf. *Estate of Mealy* (1949) 91 C.A.2d 371, 374, 204 P.2d 971 [upholding validity of gift by will (not in trust) to left-wing newspaper ("People's Daily World")]; and see *Rest.3d, Trusts* §28, Comments a and l; 4A Scott §374 et seq.; Bogert §378; 34 A.L.R.4th 419 [publication of particular books or writings]; 15 Am.Jur.2d (2000 ed.), *Charities* §§37, 60, 61.)

In *Estate of Murphey* (1936) 7 C.2d 712, 62 P.2d 374, the court reaffirmed the rule that *political* purposes, seeking economic or social reform, are valid charitable objects provided the changes are not *contra bonos mores* and are to be brought about by peaceful means. The court upheld the finding that the American Jewish Congress, a corporation, was a charitable organization, where its chief purposes were to secure and safeguard civil, political, economic, and religious rights of Jews, and to further the development of the Jewish National Home in *Palestine*. (7 C.2d 715.)

In *Estate of Peck* (1959) 168 C.A.2d 25, 335 P.2d 185, the court upheld a gift to the trustees of Stanford University to establish a Foundation of World Relations, the principal function of which would be to educate newspapermen to mold public opinion in the direction of world peace. Answering the argument that the trust was one "solely for propaganda," the court said: "Even if this were so, a trust with the object of creating a more enlightened public opinion and a bequest to an organization with political purposes have been held to be valid charitable trusts in this state." (168 C.A.2d 28.) (See *Estate of Breeden* (1989) 208 C.A.3d 981, 989, 256 C.R. 813 [trust to promote socialism was charitable].)

Politically and socially unpopular motives of the testator do not invalidate a trust. In *Estate of Robbins* (1962) 57 C.2d 718, 21 C.R. 797, 371 P.2d 573, the will created a fund in trust for the support, education, and custody of "such minor Negro child or children, whose father or mother, or both, have been incarcerated ... as a result of the conviction of a crime or misdemeanor of a political nature." For the guidance of the trustee, the testator listed nonexclusive examples, such as convictions under the Smith Act, contempt of congressional committees dealing with subversive activity, convictions for violation of the non-Communist affidavit provisions of the Taft-Hartley Act, etc. The trial judge, the Court of Appeal, and three dissenting justices thought the trust invalid, as tending to induce or encourage criminal conduct. The administrator and amici curiae argued for a construction of the will to refer only to unlawful convictions for engaging in constitutionally protected activity in these areas where the line is difficult to draw. But the majority

found it unnecessary so to limit the application of the trust: "We may assume that the testator intended to benefit the children of those convicted of even valid laws of which he disapproved and that his motive in part at least was to encourage challenges to such laws by violations of them. It is the purpose for which the property is to be used, however, not the motives of the testator that determines whether a trust is a valid charitable trust." (57 C.2d 724.)

The purpose, the majority held, was not the encouragement of crime, but the entirely proper one of furnishing care and support for children deprived of a normal home life by imprisonment of one or both of their parents. "Any risk that a parent might be induced to commit a crime he otherwise would not commit because of the possibility that his child might become a beneficiary of this trust is far outweighed by the interests of the innocent children involved and society's interest in them." (57 C.2d 723.) Furthermore, "[t]he risk that such assistance may serve to encourage crime is far more remote than that which the Legislature itself may have created by provision for the care of children that extends to those of convicted prisoners." (57 C.2d 725.) (See 50 Cal. L. Rev. 885; 36 So. Cal. L. Rev. 309.)

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5. Miscellaneous Objects.

13 Witkin Sum. Cal. Law Trusts § 299

[§ 299] Miscellaneous Objects.

(1) *Governmental Purposes.* Trusts to benefit government, as by construction or maintenance of public buildings or parks, are charitable. (*Estate of Hart* (1957) 151 C.A.2d 271, 284, 311 P.2d 605; cf. *Palm Springs v. Living Desert Reserve* (1999) 70 C.A.4th 613, 620, 82 C.R.2d 859, citing the text [deed granting land to city on condition that it be used as desert park and that it revert to third party on breach of condition created fee simple subject to condition subsequent, rather than charitable trust]; and see *Rest.3d, Trusts* §28; 4A Scott §373; Bogert §378; 15 *Am.Jur.2d* (2000 ed.), *Charities* §57.)

(2) *Animals.* Trusts for the benefit of animals, e.g., to prevent cruelty, or a bequest to a city to build a fountain for thirsty animals and birds, may be sustained. (*Estate of Coleman* (1914) 167 C. 212, 214, 138 P. 992; *Rest.3d, Trusts* §28, Comment l; see *Estate of Heil* (1989) 210 C.A.3d 1503, 1510, 259 C.R. 28 [trust in favor of wild horses]; 4A Scott §374.2; Bogert §379; 15 *Am.Jur.2d* (2000 ed.), *Charities* §67; on noncharitable trust for particular animal, see *Prob.C.* 15212, *supra*, §193; *Rest.3d, Trusts* §47, Comment d(2); 2 Scott §124; Bogert §165.)

(3) *Memorials.* "Monuments or memorial structures which have been erected in public places to beautify parks or public buildings, to commemorate historical events or prominent citizens for the benefit of the general public, as distinguished from private monuments in memory of the donor or his immediate relatives, have uniformly been held to be charitable in their nature." (*Estate of Butin* (1947) 81 C.A.2d 76, 84, 183 P.2d 304 [memorial to "all those who ... strove to make Madera and Madera County all that it is," with name of trustor and her husband to be conspicuously displayed, was charitable gift, despite the additional private motive behind the personal inscription]; see 4A Scott §374.9; Bogert §366; 15 *Am.Jur.2d* (2000 ed.), *Charities* §§36, 58, 64.)

(4) *Absurd or Disfavored Objects.* There has been some critical discussion, but no square California authority, on the power of a court to hold unacceptable a purpose that seems irrational or contrary to generally accepted beliefs. (See *Rest.3d, Trusts* §28, Comment f; 4A Scott §374.7; Bogert §379; 15 *Am.Jur.2d* (2000 ed.), *Charities* §37; cf. *Estate of Mealy* (1949) 91 C.A.2d 371, 374, 204 P.2d 971 [gift to left-wing newspaper].)

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C. Charitable Purposes.
6. Coupling of Noncharitable Object.

13 Witkin Sum. Cal. Law Trusts § 300

[§ 300] Coupling of Noncharitable Object.

(1) *General Principles.* A trust may be created for a combination of charitable and private purposes. (*Rest.3d, Trusts* §27.) However, if charitable and noncharitable purposes are coupled together, the trust usually fails unless, by interpretation, the noncharitable provisions may be severed and part of the property applied to the charitable purpose. (See *Estate of Sutro* (1909) 155 C. 727, 734, 102 P. 920; *Davenport v. Davenport Foundation* (1950) 36 C.2d 67, 72, 74, 222 P.2d 11; 4A Scott §398; Bogert §372; 5 *Hastings L. J.* 99; 1 *So. Cal. L. Rev.* 180; 15 *Am.Jur.2d* (2000 ed.), *Charities* §§18, 116, 117.) On the other hand, a discretionary power in trustees to devote some of the funds to a noncharitable use, which is not the dominant purpose of the settlor, will not invalidate the trust. (*Estate of Bartlett* (1932) 122 C.A. 375, 378, 10 P.2d 126; see 4A Scott §398; Bogert §391.) (On problem of "honorary trust" involving noncharitable purpose and indefinite beneficiary, see *supra*, §43.)

(2) *Earlier Strict Decisions.* A number of California cases departed from the policy of liberal construction in favor of the charitable gift (see *supra*, §289) and held that even though a charitable intent and purpose are expressed, if organizations operated for profit may possibly be beneficiaries, no valid charitable trust is created. (See *Estate of Vance* (1931) 118 C.A. 163, 164, 4 P.2d 977 [estate given "in trust ... to be invested in Bibles, to be distributed in home and foreign lands in such quantities and in such places as may to my said executors seem best" was invalid as charitable trust; it could permit distribution of Bibles to private schools and libraries for profit]; *Estate of Kline* (1934) 138 C.A. 514, 520, 32 P.2d 677 [gift in trust to "such persons, charitable organizations and/or corporations ... organized for the purpose of aiding and for the betterment of crippled children" to be selected by trustee was invalid; corporations other than charitable could be possible beneficiaries]; *Estate of Peabody* (1937) 21 C.A.2d 690, 692, 70 P.2d 249 [will directed that residue of estate should go "to an institution for old people in memory of my beloved Mother and Father" and provided that executor should make choice of institution; gift was void, as it permitted use of money for institution run for profit]; *Estate of Steinman* (1939) 35 C.A.2d 95, 101, 94 P.2d 821 [deceased, within 30 days of death, left estate to "Scandinavian Faith Mission," and evidence showed that woman had organized and conducted Mission with her own funds and under her own control, giving beds and meals to indigent persons, and holding religious meetings; Mission was not charity, and bequest was absolute and valid].)

(3) *Liberal Decisions.* Later cases appear to have undermined the authority of the decisions set forth above.

In *Estate of Hood* (1943) 57 C.A.2d 782, 135 P.2d 383, the testator left the residue of her estate in trust to named

trustees, to pay the income or principal "to such charities or to such individuals ... as they shall see fit." Later provisions of the will expressed her desire that the funds be used for the "sick, blind and those in need of support." *Held*, a valid charitable trust was created. (57 C.A.2d 786.)

In *Estate of Rollins* (1958) 163 C.A.2d 225, 328 P.2d 1005, a will read: "The remainder to go to some charitable institute, or research fund, or for a suitable memorial to my mother and father (no statue or monument)." The probate judge held the gift invalid. In reversing the decree, the court first observed that the earlier decisions were "somewhat quick to find the possibility of a non-charitable use," and that the *Peabody*, *Kline*, and *Vance* cases have been criticized for failure to follow the general rule of liberal construction. (163 C.A.2d 228.) As to the present will, "charitable institute" and "research fund" are clearly charitable objects. "Suitable memorial" alone would not be, but the qualifying phrase makes it charitable, for it would be difficult to conceive of a memorial other than a statue or monument which is not charitable in purpose, and a commercial use would not be consistent with a "suitable" memorial. "Further, a fair construction of the language of the will shows that the charitable purpose is controlling in the clause as a whole." (163 C.A.2d 229.) (See *Estate of Peck* (1959) 168 C.A.2d 25, 28, 335 P.2d 185 [reaffirming *Rollins* approach]; on effect of words "charitable or benevolent," see 58 Harv. L. Rev. 548.)

Estate of Campbell (1971) 20 C.A.3d 474, 97 C.R. 726, illustrates the liberal trend. Decedent bequeathed her \$15,000 interest in an investors trust to C Church, located in a small town in Brooke County, West Virginia. The shares and proceeds of any sales were to constitute a permanent endowment fund, the income to be "used by said church as may be determined by the rector and vestry." The gift, however, was on condition that "in accepting the same said church shall agree in writing to provide adequate perpetual care" for decedent's family cemetery lot in the county. The lower court followed the settled rule that a gift for upkeep of a grave is not charitable (see *supra*, §296) and found the bequest invalid as a violation of the rule against perpetuities. *Held*, reversed. The gift imposed the condition on *acceptance of the bequest*, not on *use of the fund*; it merely required that the legatee church execute a collateral written agreement to provide care for the lot, which it did. And it may be assumed that the church will discharge the obligation out of its own income, collections, general contributions or outside funds, or, as in most rural communities, by church employees or volunteers. (20 C.A.3d 479.)

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7. No Purpose Stated.

13 Witkin Sum. Cal. Law Trusts § 301

[§ 301] No Purpose Stated.

The requirement of a stated charitable purpose where there is a complete failure to state *any purpose* has been relaxed in two situations:

(1) Where the purpose, though not specifically designated, can be ascertained by construction. (See *Estate of De Mars* (1937) 20 C.A.2d 514, 516, 67 P.2d 374 ["to the poor soldiers" of a hospital]; supra, §289.)

(2) Where the trustee is empowered to select objects or purposes. (*Rest.3d, Trusts* §28, Comment a.) Thus, in *Estate of Bunn* (1949) 33 C.2d 897, 206 P.2d 635, the will provided that property should be "sold and given to a worthy charity selected by my executors." Quoting extensively from Bogert, the court pointed out that, although the trustee's problem of selection from the almost unlimited objects was a difficult one, and the duty of judicial supervision was onerous, the policy in favor of charitable trusts called for sustaining the trust. (33 C.2d 903.) (See *Estate of Hurwitz* (1952) 109 C.A.2d 302, 303, 240 P.2d 990; 4A Scott §396; Bogert §391; 23 So. Cal. L. Rev. 634; 15 Am.Jur.2d (2000 ed.), *Charities* §115.)

A further advanced step has been taken by progressive courts where no specific purpose or beneficiaries are stated and no trustee is named to make the selection. In *Estate of Quinn* (1958) 156 C.A.2d 684, 320 P.2d 219, the will directed that the residue "go to charity." *Held*, a valid charitable trust was created, and it was proper for the court to frame a scheme and appoint trustees to administer the trusts for specific selected objects. (156 C.A.2d 688.) (See *Estate of Rollins* (1958) 163 C.A.2d 225, 229, 328 P.2d 1005, supra, §300; *Rest.3d, Trusts* §28, Comment a; 4A Scott §397; Bogert §371; 67 A.L.R.3d 442 [division of charitable gift among several claimants where named donee is nonexistent]; 15 Am.Jur.2d (2000 ed.), *Charities* §112.)

The purpose stated in *Estate of Moore* (1961) 190 C.A.2d 833, 12 C.R. 436, was scarcely more specific. Decedent made a holographic will leaving considerable property to her sister. The disputed clause read: "She is to use this property as long as she lives and then it is to be given to some creditable non profit Science investigation Society, of her choice." *Held*, under the modern liberal approach, this language created a valid charitable trust. "She was a layman, writing a holographic will. We think her words were as guarded and careful as an ordinary layman might use. ... Investigation simply means inquiry or search for truth. The use of the term 'non profit' and the fact that no individual or corporation is named to benefit can fairly mean only that she intended mankind generally to be the beneficiary of the

truths revealed. This does not involve rewriting or adding words to the will. It merely means giving a fair and reasonable interpretation to the words used." (190 C.A.2d 841.)

Estate of Cafferty (1966) 246 C.A.2d 711, 55 C.R. 173, is equally liberal. The testator by a holographic will directed that the balance of his estate "be divided between help for the blind the Lepor Colony & Brightside orfonage Holyoke Mass." The probate judge gave one-third to Brightside Orphanage and one-third to Maryknoll Fathers, who operate a leper colony, but found no basis for a charity in the other--"help for the blind." *Held*, reversed. Though indefinite in who was to get it, what manner of help was to be given, and what persons were to receive it, nevertheless the provision was a charitable bequest, and *cy pres* should have been applied. (246 C.A.2d 714; on *cy pres* doctrine, see *infra*, §302.)

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 D. Cy Pres Rule.
 1. Nature of Doctrine.

13 Witkin Sum. Cal. Law Trusts § 302

[§ 302] Nature of Doctrine.

(1) *In General.* Where the settlor with a general charitable intent gives property in trust for a specific purpose, and for some reason that purpose cannot be carried out, a court of equity will, under the rule of *cy pres*, direct the disposition of the property to some related charitable purpose, in order to carry out the settlor's intention as nearly as possible. (See *Estate of Hinckley* (1881) 58 C. 457, 496, 512; *O'Hara v. Grand Lodge Independent Order of Good Templars of California* (1931) 213 C. 131, 140, 2 P.2d 21; *Society of Calif. Pioneers v. McElroy* (1944) 63 C.A.2d 332, 337, 146 P.2d 962; *Estate of Loring* (1946) 29 C.2d 423, 436, 175 P.2d 524, *infra*, §303 ["The *cy pres* doctrine has meant many things to many courts and its limits have rarely been defined"]; *Estate of Faulkner* (1954) 128 C.A.2d 575, 579, 275 P.2d 818, *infra*, §303; *Estate of Cafferty* (1966) 246 C.A.2d 711, 714, 55 C.R. 173; *Estate of Zahn* (1971) 16 C.A.3d 106, 113, 93 C.R. 810; *Estate of Vanderhoofven* (1971) 18 C.A.3d 940, 943, 96 C.R. 260, *infra*, §303; *Estate of Lamb* (1971) 19 C.A.3d 859, 866, 97 C.R. 46, *infra*, §303; *Rest.3d, Trusts* §67; 4A Scott §399; Bogert §431 *et seq.*; 15 *Am.Jur.2d* (2000 *ed.*), *Charities* §148 *et seq.*) (On application of doctrine to state or subdivision as trustee of land for public use, see *Hart v. Los Angeles* (1968) 260 C.A.2d 512, 516, 67 C.R. 242; on application of *cy pres* doctrine to instruments that violate rule against perpetuities, see *Prob.C. 21220, 12 Summary* (10th), *Real Property*, §186; on application where the trustor himself or herself anticipates impossibility, see *Estate of Butin* (1947) 81 C.A.2d 76, 85, 183 P.2d 304 [direction to create memorial bell tower, with provision that if this is impracticable "my executors" (trustees) are authorized to use their discretion as to the type of memorial to be erected].)

(2) *Charitable Purpose Accomplished.* A similar rule has been recognized where the settlor's specific purpose is fully carried out without exhausting the property given: The *surplus* will be devoted to a related charitable purpose. (See *Rest.3d, Trusts* §67; 4A Scott §400; *Estate of Puckett* (1980) 111 C.A.3d 46, 51, 168 C.R. 311 [following Restatement]; 96 A.L.R.3d 954 [disposition of surplus trust income after payment to charity]; 15 *Am.Jur.2d* (2000 *ed.*), *Charities* §§171, 172.)

(3) *Operation of Doctrine To Prevent Reverter.* California does not recognize a possibility of reverter in the settlor or the settlor's successors on dissolution of a charitable corporation to which real property has been conveyed in trust. The doctrine of *cy pres* is applied to prevent that result. (*In re Los Angeles County Pioneer Soc.* (1953) 40 C.2d 852, 866, 257 P.2d 1.) The court in *Pioneer Society* stated: "[A] court of equity should appoint a successor trustee to carry out the charitable intent of the donor whether the charitable purpose is found in the terms of the conveyance to the corporation or in the articles thereof, or whether the failure of the corporation is through dissolution or other

disqualification. The policy of the law in favor of charitable gifts requires a court to carry out the dominant purpose of the donor to make a charitable gift for the purposes expressed in the articles of the original corporate donee." (40 C.2d 865; see 1 U.C.L.A. L. Rev. 117.)

In *McCarthy v. Poulsen* (1985) 173 C.A.3d 1212, 1218, 219 C.R. 375, the doctrine was applied to prevent an involuntary reverter to the settlors. The trust corpus consisted of real property held as a nature preserve. After mudslides on the property damaged neighboring homes, the trustee resigned and no other trustee was willing to serve. *Held*, the settlors, who had conveyed valuable property to the trust in good faith, could not be compelled to serve as trustees against their will. Under the *cy pres* doctrine, the broad charitable purpose of the trust could be fulfilled by appointing a receiver (1) to sell or manage the property, free from personal liability, and (2) to apply the proceeds of any sale to charitable purposes. (173 C.A.3d 1219.)

(4) *Commentary and Practice Works*. The doctrine has been the subject of extensive discussion. (See 65 *Harv. L. Rev.* 704; 5 *Hastings L. J.* 98; 16 *Hastings L. J.* 630; 23 *Hastings L. J.* 604; 44 *Hastings L. J.* 1111 [Reforming Cy Pres Reform]; 6 *Stanf. L. Rev.* 729; 40 *Stanf. L. Rev.* 973; 36 *U.C. Davis L. Rev.* 1145 [charitable giving and variance power]; 21 *U.S.F. L. Rev.* 41; 3 *A.L.R.2d* 78 [*cy pres* doctrine as affected by sectarian or doctrinal differences or factor]; 34 *A.L.R.3d* 749 [merger of corporation which was beneficiary of charitable trust]; 67 *A.L.R.3d* 417 [application of doctrine to trust to promulgate political or philosophical doctrines]; 68 *A.L.R.3d* 997 [trust for school or school district or students or graduates; effect of change in school or district structure or organization]; 68 *A.L.R.3d* 1049 [extension of benefits to persons residing outside geographic area prescribed by trust instrument]; 9 *Proof of Facts* 2d 199 [charitable intent of trust settlor--*cy pres* doctrine].)

West's Key Number Digest, Charities k.37(.5)

SUPPLEMENT: [This section is current through the latest supplement]

(4) *Commentary and Practice Works*. See 88 *Proof of Facts* 3d 469 [circumstances warranting application of *cy pres* doctrine], superseding 9 *Proof of Facts* 2d 199, cited in the text, p. 875.



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D. Cy Pres Rule.
2. Illustrations.

13 Witkin Sum. Cal. Law Trusts § 303

[§ 303] Illustrations.

In *Estate of Loring* (1946) 29 C.2d 423, 175 P.2d 524, the testator left \$ 75,000 in trust to a small Iowa town for a memorial hospital, but provided that, if the town failed to secure a site, the bequest should lapse and pass under the residuary clause of the will. After the decree of distribution the assets shrank in value, making the amount insufficient for the building as planned. The residuary legatees contended that the testator's charitable intent was not general but specific, and that his direction for a gift over (to residuary legatees) if the specific purpose were not carried out made the *cy pres* doctrine inapplicable. *Held*, the smaller sum should be devoted to the building of a smaller hospital, for the court has equitable power to modify the trust to carry out the specific charitable intention of the donor. Thus, the power of modification or deviation in emergencies, applicable to private as well as charitable trusts (see *supra*, §93), serves to extend the *cy pres* doctrine. "[T]here is no reason why a particular charitable purpose may not be substantially carried out, even though there is a provision for a gift over and the testator may not have had an intention to aid charity in general." (29 C.2d 437.)

In *Estate of Tarrant* (1951) 38 C.2d 42, 237 P.2d 505, the testator made a gift to a railway company's pension fund. In fact the fund was maintained not by the railway but by a nonprofit corporation formed for this purpose. Although it would seem that the proper result could have been reached simply by construction (mistake in description of legatee), the court thought it appropriate also to invoke the doctrine: "[A]pplication of the doctrine of *cy pres* would reasonably accomplish the dominant purpose of the testator to make a charitable bequest for the benefit and assistance of the company's employees." (38 C.2d 49.)

In *Estate of Faulkner* (1954) 128 C.A.2d 575, 275 P.2d 818, a bequest to Alcoholics Anonymous was declined because of the organization's policy against accepting gifts from nonmembers, although other organizations with similar objectives would accept such gifts. *Held*, reversing the trial court, a trustee should be appointed to devote the funds to the carrying out of the testatrix' purpose--rehabilitation of alcoholics. (128 C.A.2d 581.)

In *Estate of Gatlin* (1971) 16 C.A.3d 644, 94 C.R. 295, the testator left the balance of his estate to "the home for the blind and home for crippled children here in San Francisco" No organizations with these names were found, but the trial court was directed to select any suitable organization as trustee to carry out the broad charitable purpose to benefit the classes indicated. (16 C.A.3d 650.)

In *Estate of Vanderhoofven* (1971) 18 C.A.3d 940, 96 C.R. 260, decedent's semi-literate holographic will contained this provision: "I do give one dollar each to my brothers & sisters and the rest to some Protestant school that is all white of Engineering training, I care not which." The probate court concluded that the "all white" qualification was illegal and that the testator died intestate. *Held*, reversed. (a) The "Protestant" provision was not significant (see *supra*, §296), but the condition of "all-white" school raised a difficult problem. In *Evans v. Abney* (1970) 396 U.S. 435, 90 S.Ct. 628, 24 L.Ed.2d 634, a racial use restriction in a gift of a park was held an inseparable part of the testator's intent, and the state court's refusal to apply the *cy pres* doctrine was held to involve no denial of constitutional rights. (See 8 *Summary* (10th), *Constitutional Law*, §700.) (b) However, the issue is always the dominant intent of the testator, and the probate court decided it on the face of the will. This was erroneous: Extrinsic evidence should be taken to determine whether the testator's intent was for the entire estate to go to his brothers and sisters rather than to have students trained in a school which might admit Blacks, or whether his expressed wish for an all-white school was subordinate to his general charitable desire. (18 C.A.3d 948.) (See 23 *Hastings L. J.* 604.)

Estate of Lamb (1971) 19 C.A.3d 859, 97 C.R. 46, applied the doctrine to sustain a gift to a corporation not in existence at the time of the testatrix' death. She had been aided by ear surgeon S, and had expressed gratitude and an interest in his object of creating a foundation for training of otologists. She obtained a slip of paper from his secretary, with the name "The San Francisco Foundation of Otology," and left the residue of her estate to that institution. Actually Dr. S had been studying at the Los Angeles institution of that name, and did not incorporate the San Francisco institution until 4 months after the testator's death. *Held*, the residue should go to that institution. It could not take directly, under former Prob.C. 27, for the will spoke as of the time of death; but the elements necessary to bring *cy pres* into operation where the donee does not exist were present: There was a clear and dominant intent to make a charitable gift to some institution, without regard to any particular institution named, of which she knew nothing. (19 C.A.3d 867.)

In re Metropolitan Baptist Church of Richmond (1975) 48 C.A.3d 850, 121 C.R. 899, involved a nonprofit religious corporation formed to operate a Baptist church in Contra Costa County. It dissolved and petitioned to distribute its assets to five designated successors, including two local churches, an out-of-state church, a seminary, and a servicemen's center. *Held*, in applying the *cy pres* doctrine, the trial court properly ordered distribution to the two churches in adjacent counties. Distribution to the out-of-state church, the nonsectarian serviceman's center, and the seminary would be inconsistent with the corporation's stated purpose. (48 C.A.3d 860.) (See *Estate of Connolly* (1975) 48 C.A.3d 129, 132, 121 C.R. 325 [on failure of original nonprofit corporation to survive testator's death, court properly appointed successor trustee under *cy pres* doctrine].)

SUPPLEMENT: [This section is current through the latest supplement]



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D. Cy Pres Rule.

3. Rule Inapplicable.

13 Witkin Sum. Cal. Law Trusts § 304

[§ 304] Rule Inapplicable.

The *cy pres* rule will not be applied unless the settlor's specific charitable purpose has become permanently impossible or impracticable. (See *Estate of Mabury* (1976) 54 C.A.3d 969, 985, 127 C.R. 233 [possibility that trust might become subject to federal tax on undistributed trust income did not render charitable purpose permanently impossible]; *Estate of Jackson* (1979) 92 C.A.3d 486, 490, 155 C.R. 380 [rule was inapplicable where apparent ambiguity in devise to "heart fund" was resolved by extrinsic evidence; specific charitable purpose was possible].)

The rule is also inapplicable where a general charitable intent has not been expressed; to apply the doctrine in that circumstance would frustrate the settlor's intent. (*Estate of Klinkner* (1978) 85 C.A.3d 942, 951, 151 C.R. 20 [settlor intended to benefit specific parish and provided alternative charitable gift in event primary beneficiary ceased to exist].)

The celebrated Buck trust litigation involved a trust that limited spending to Marin County, California. A charitable foundation serving as the "distribution trustee" sought modification on the ground that unanticipated growth in the trust corpus made the settlor's charitable purposes in that county impracticable. Although the case did not result in an appellate decision, it inspired considerable commentary on the scope and application of the *cy pres* doctrine. (See 20 U.S.F. L. Rev. 577; 21 U.S.F. L. Rev. 585; 22 U.S.F. L. Rev. 841.)

West's Key Number Digest, Charities k.37(2)

SUPPLEMENT: [This section is current through the latest supplement]



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E. Enforcement and Supervision.
1. In General.

13 Witkin Sum. Cal. Law Trusts § 305

[§ 305] In General.

Charitable trusts are normally enforced and protected by the Attorney General or a similar public officer. (See *Corp.C.* 9230, 9 Summary (10th), *Corporations*, §390 [enforcement of charitable religious trusts by Attorney General]; *People v. Cogswell* (1896) 113 C. 129, 136, 45 P. 270; *Estate of Schloss* (1961) 56 C.2d 248, 257, 14 C.R. 643, 363 P.2d 875 [Attorney General must be given notice of all proceedings in which notice to trust beneficiaries is required; e.g., proceedings for removal of trustees for misconduct]; *Estate of Quinn* (1958) 156 C.A.2d 684, 690, 320 P.2d 219; *Corp.C.* 5142, 9 Summary (10th), *Corporations*, §257 [action to remedy breach of charitable trust]; Rest.3d., Trusts §28, Comment c; 4A Scott §391; Bogert §411; 64 Harv. L. Rev. 1177; 73 Harv. L. Rev. 433; 15 Am.Jur.2d (2000 ed.), *Charities* §136; 4 Cal. Proc. (4th), *Pleading*, §120; on Uniform Supervision Act, see *infra*, §306 et seq.; on proceeding to impress a trust on property of social corporation on ground that its purposes are predominantly charitable, see *Lynch v. Spilman* (1967) 67 C.2d 251, 260, 62 C.R. 12, 431 P.2d 636.)

In *Brown v. Memorial Nat. Home Foundation* (1958) 162 C.A.2d 513, 534, 329 P.2d 118, defendant B, an officer of Gold Star Mothers, a charitable trust, formed defendant Foundation with money raised by the parent organization. Then she secretly incorporated the Foundation and sought to operate it independently. In this action by the Attorney General, it was held that the Foundation was a trustee of a charitable trust and was properly removed for misconduct. The court, citing the Restatement and Scott, pointed out that a charitable trustee may be removed on the same grounds as the trustee of a private trust. "That diversion of trust funds to unauthorized uses, inefficiency and mismanagement, hostility to the beneficiaries, assumption of an adverse trust, afford good grounds for such removal is well established." (162 C.A.2d 534.) (See 75 A.L.R.2d 449 [grounds for removal of trustee of charitable trust].)

For purposes of removing a charitable trustee, the articles of incorporation and bylaws of the corporate trustee have been held the functional equivalent of a declaration of trust. (*American Center for Education v. Cavnar* (1978) 80 C.A.3d 476, 497, 145 C.R. 736.)

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SUPPLEMENT: [This section is current through the latest supplement]

In *Patton v. Sherwood* (2007) 152 C.A.4th 339, 61 C.R.3d 289, plaintiff settlor created three charitable remainder unitrusts, reserving the right to receive and object to accountings. The trial court ruled that the settlor lacked standing to

challenge the trustees' fees by objecting to their accounting because he was not a beneficiary. *Held*, the settlor had standing. Under *Prob.C. 17200* (text, §229), a trustee or a beneficiary may petition concerning the internal affairs of the trust. For this purpose, "beneficiary" is defined in *Prob.C. 24* (see 14 *Summary* (10th), *Wills and Probate*, §49). Under the general provision of *Prob.C. 24*, a "beneficiary" is a person to whom a donative transfer of property is made (or that person's successor) and under *Prob.C. 24(d)*, the term, as it relates to a charitable trust, "includes any person entitled to enforce the trust." Here, the phrase "includes any person" is a term of enlargement, not a term of limitation, and expands the class of persons who may bring an action to enforce a charitable trust to include a settlor who has reserved the power to do so. (152 *C.A.4th* 346, 347.)

Enforcement by Attorney General:

Cross-Reference: 4 *Cal. Proc.* (5th), *Pleading*, §139.



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E. Enforcement and Supervision.

2. Supervision of Trustees and Fundraisers for Charitable Purposes Act.

a. Nature, Purpose, and Scope of Act.

13 Witkin Sum. Cal. Law Trusts § 306

[§ 306] Nature, Purpose, and Scope of Act.

The Uniform Supervision of Trustees for Charitable Purposes Act was approved in 1954. (See 7C U.L.A. (Master Ed.), p. 372; 73 Harv. L. Rev. L. Rev. 457; 32 *Hastings L. J.* 433; 15 *Am.Jur.2d* (2000 ed.), *Charities* §130.) The Act was adopted in California in 1955 as *Govt.C. 12580* et seq. In 1998, it was amended and renamed the Supervision of Trustees and Fundraisers for Charitable Purposes Act. (See *Govt.C. 12580*.) The Act provides for reports by trustees and investigation and enforcement by the Attorney General. It is effective regardless of any contrary provisions in the trust instrument. (*Govt.C. 12592*.)

The Act applies to "all charitable corporations, unincorporated associations, trustees, and other legal entities holding property for charitable purposes, commercial fundraisers for charitable purposes, fundraising counsel for charitable purposes, and commercial coventurers, over which the state or the Attorney General has enforcement or supervisory powers." (*Govt.C. 12581*; on commercial fundraising, see *infra*, §307.)

The Act does not apply to (1) governmental agencies, (2) religious corporations or organizations or trustees holding property for religious purposes, (3) cemetery corporations (separately regulated), (4) charitable corporations and unincorporated associations organized and operated primarily as religious organizations, educational institutions, hospitals, or licensed health care service plans, and (5) political action committees (separately regulated). (*Govt.C. 12583*.)

"The primary responsibility for supervising charitable trusts in California, for insuring compliance with trusts and articles of incorporation, and for the protection of assets held by charitable trusts and public benefit corporations, resides in the Attorney General. The Attorney General has broad powers under common law and California statutory law to carry out these charitable trust enforcement responsibilities." (*Govt.C. 12598(a)*.)

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E. Enforcement and Supervision.

2. Supervision of Trustees and Fundraisers for Charitable Purposes Act.

b. Register, Instruments, and Reports.

13 Witkin Sum. Cal. Law Trusts § 307

[§ 307] Register, Instruments, and Reports.

(1) *In General.* The Attorney General must maintain a *register* of charitable corporations, unincorporated associations, and trustees and their trusts. (*Govt.C. 12584.*) Within 30 days of receiving property, every charitable corporation, unincorporated association, and trustee subject to the Act must file a copy of its articles or other governing instrument. A trustee need not register as long as the charitable interest in the trust is a future interest, but must register within 30 days after a charitable interest in the trust becomes a present interest. (*Govt.C. 12585.*) All trustees (except corporate trustees regulated by bank authorities) must also file periodic written reports as to the assets and administration, in the manner required by regulations adopted by the Attorney General. The first periodic report must be filed within 4 months and 15 days after the close of the fiscal or calendar year in which property is received. (*Govt.C. 12586, 12587*; see *Younger v. Wisdom Society (1981) 121 C.A.3d 683, 687, 175 C.R. 542* [nonprofit corporation with educational purpose was charitable corporation subject to reporting requirements of *Govt.C. 12585, 12586*]; on required review of compensation and benefits of specified officers, see *Govt.C. 12586(g).*) The register, instruments, and reports are open to public inspection. (*Govt.C. 12590.*) Additional requirements apply to entities that receive or accrue annual gross revenues of \$ 2 million or more. (See *Govt.C. 12586(e).*)

A person offering for probate a will establishing a testamentary charitable trust, or recording an inter vivos transfer for charitable purposes, must furnish a copy to the Attorney General. (*Govt.C. 12593.*) The custodian of records of the court having jurisdiction of the trust must furnish records required by the Attorney General. (*Govt.C. 12593.*) A state agency receiving applications for exemption from taxation of trusts subject to the Act must annually file with the Attorney General a list of all applications. (*Govt.C. 12594.*)

(2) *Commercial Fundraising.* *Govt.C. 12599* et seq. impose registration and reporting requirements on the following: (a) commercial fundraisers for charitable purposes (*Govt.C. 12599*); (b) fundraising counsel for charitable purposes (individuals, corporations, unincorporated associations, and other legal entities who, for compensation, plan, manage, advise, counsel, consult, or prepare materials for charitable solicitation but do not solicit, receive, or control funds or property, or employ others to do so; *Govt.C. 12599.1*); and (c) commercial coventurers (persons engaged in trade or commerce (other than charitable solicitations) who represent to the public that the purchase or use of a good or service will benefit a charitable organization or be used for a charitable purpose; *Govt.C. 12599.2*). (See *Govt.C. 12599(a)* [defining "charitable purposes"]; *Govt. C. 12599(b)* [registration requirement applies to fundraisers soliciting

property as well as those soliciting money].) A written contract with the charitable organization, meeting detailed statutory requirements, is required. (*Govt.C. 12599(i)* [commercial fundraiser]; *Govt.C. 12599.1(f)* [fundraising counsel].) The contract is voidable by the charitable organization if the commercial fundraiser or fundraising counsel is not registered with the Attorney General. (*Govt.C. 12599.3.*)

Charitable solicitations themselves are governed by *B. & P.C. 17510* et seq. (See 4 *Summary* (10th), *Sales*, §341.) Among other things, these provisions impose reporting and disclosure requirements and limit fees for fundraising services. The following provisions are of note:

(a) The solicitation of a charitable contribution creates a fiduciary relationship and the acceptance of a charitable contribution creates a charitable trust. (*B. & P.C. 17510.8.*)

(b) A soliciting charity that collects more than half its annual income and more than \$ 1 million from California donors and spends more than a quarter of its annual income on nonprogram activities must report annually to the Attorney General. The report, which must be made available to the public by the charity and by the Attorney General, provides information about salaries, travel expenses, overhead, and other costs. (*B. & P.C. 17510.9.*) The Attorney General must publish an annual report collecting the information reported under *B. & P.C. 17510.9.* (*B. & P.C. 17510.95.*)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *In General.* In 2006, *Govt.C. 12585* was amended to require those subject to the Act to file a registration form and documents prescribed by the Attorney General rather than the entity's governing instrument.



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E. Enforcement and Supervision.

2. Supervision of Trustees and Fundraisers for Charitable Purposes Act.

c. Securing Compliance.

13 Witkin Sum. Cal. Law Trusts § 308

[§ 308] Securing Compliance.

(1) *Investigation.* The Attorney General may investigate transactions and relationships to ascertain whether the trust purposes are being carried out. In this connection, the Attorney General may require the trustee or any other person to appear and to produce records, and an order to this effect has the same force as a subpoena. (*Govt.C. 12588, 12589.*) (See *86 A.L.R.2d 1375* [duty of trustees to furnish information and records to Attorney General].)

(2) *Proceedings To Secure Compliance.* The Attorney General may institute appropriate proceedings to secure compliance with the Act, and "no court shall have jurisdiction to modify or terminate any trust of property for charitable purposes unless the Attorney General is a party to the proceedings." (*Govt.C. 12591.*) (See *People v. Orange County Charitable Services (1999) 73 C.A.4th 1054, 1071, 87 C.R.2d 253* [operation of "boiler room" and other predatory practices of commercial charitable fundraisers; evidence was sufficient to prove multiple violations of Act]; on Attorney General's intervention in will contest involving charitable trust, see *74 A.L.R.2d 1066*; on enforcement actions authorized under designated statutes, see *Govt.C. 12598(a).*)

In a case in which the Attorney General could institute an action under the Act, an assurance of voluntary compliance may be accepted. The written assurance must be filed with the superior court for approval. It does not constitute an admission of a violation for any purpose. The assurance may stipulate to a voluntary payment of the cost of investigation or to an amount to be held in escrow pending the outcome of an action or as restitution to aggrieved parties. (*Govt.C. 12591.2.*)

(3) *Ten-Year Statute of Limitations.* In *Mosk v. Summerland Spiritualist Assn. (1964) 225 C.A.2d 376, 380, 37 C.R. 366*, it was held that lapse of time was not a bar to an action by the Attorney General. The 1965 Legislature then added *Govt.C. 12596*, establishing a 10-year statute of limitations for an action by the Attorney General against trustees, a charitable corporation, or a director or officer, to (a) enforce the trust, (b) impress property with a trust for charitable purposes, or (c) recover property or its proceeds for a charitable trust or corporation.

(4) *Standing of Others To Sue.* The Attorney General's power is not exclusive. Minority trustees may sue other trustees for breach of trust (*Holt v. College of Osteopathic Physicians & Surgeons (1964) 61 C.2d 750, 754, 757, 40 C.R. 244, 394 P.2d 932*), and, in a proper case, strangers may sue to enforce the trust (*San Diego County Council, Boy*

Scouts of America v. Escondido (1971) 14 C.A.3d 189, 196, 92 C.R. 186). (See 9 U.S.F. L. Rev. 1 [standing to enforce fiduciary duties of college trustees]; 94 A.L.R.3d 1204 [standing of minister or member of religious society to seek enforcement, termination, or proper administration of charitable trust]; 4 Cal. Proc. (4th), *Pleading*, §120.) However, taxpayers and members of the public with no special interest in a charitable trust lack standing to bring an action to enjoin alleged mismanagement of the trust, even though the trustees are public officials. (*Hardman v. Feinstein* (1987) 195 C.A.3d 157, 162, 240 C.R. 483 [trust to maintain public art museum administered pursuant to municipal charter].)

(5) *Disallowance of Tax Exemption for Noncompliance*. A charitable corporation that fails to file its registration or periodic report after written notice loses its tax exemption. (Rev.C. 23703.)

(6) *Recovery of Expenses and Costs*. In a proceeding to secure compliance with the Act, a judgment in favor of the state must provide that the person with the duty to comply pay the "reasonable expenses necessarily incurred" in investigation and prosecution of the action. (Govt.C. 12597.) In addition, the Attorney General is entitled to "reasonable attorney's fees" and "actual costs incurred" in an enforcement action, including the costs of auditors, consultants, and experts. (Govt.C. 12598(b).) The attorneys' fees and costs to be paid by "the charitable organization and the individuals named as defendants in or otherwise subject to the action" must be awarded pursuant to a court order and "in a manner that the court finds to be equitable and fair." (Govt.C. 12598(c).) On a finding that an action by the Attorney General was frivolous or brought in bad faith, costs may be awarded to the defendant charity. (Govt.C. 12598(d).)

(7) *Revocation, Suspension, or Denial of Registration*. If the Attorney General finds that a charitable corporation or trustee, commercial fundraiser, fundraising counsel, or coventurer has violated or is violating any provision of Govt.C. 12580 et seq., the Attorney General may revoke or suspend registration or refuse to register the offending party. (Govt.C. 12598(e).)

(8) *Civil Penalties*. Violations of the Act are subject to civil penalties of \$ 1,000 for the first offense, \$ 2,500 for subsequent offenses, and \$ 10,000 for a violation with intent to deceive or defraud. Civil penalties may not be imposed for designated filing errors without reasonable notice of the violation and a reasonable opportunity to correct it. (Govt.C. 12591.1.) (On imposition of late fees, see Govt.C. 12586.1.)

SUPPLEMENT: [This section is current through the latest supplement]

(4) *Standing of Others To Sue*. See *L.B. Research & Education Foundation v. UCLA Foundation* (2005) 130 C.A.4th 171, 180, 29 C.R.3d 710 [dicta; Attorney General's power to enforce charitable trust is not exclusive; trustee or another with sufficient special interest (e.g., settlor) may bring enforcement action]. *Enforcement by stranger:*

Cross-Reference: 4 Cal. Proc. (5th), *Pleading*, §139.



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IX. CHARITABLE TRUSTS

E. Enforcement and Supervision.

2. Supervision of Trustees and Fundraisers for Charitable Purposes Act.

d. Scope of Attorney General's Supervision.

13 Witkin Sum. Cal. Law Trusts § 309

[§ 309] Scope of Attorney General's Supervision.

The Attorney General, although a necessary party to proceedings affecting disposition of assets (see *supra*, §308), is not "a super administrator of charities with control over, or right to participate in, the contractual undertakings of the charities." (*Estate of Horton (1970) 11 C.A.3d 680, 685, 90 C.R. 66.*) In *Horton*, a trust provided for payment of \$ 40,000 a year to B, an individual beneficiary, with remainder to charities. There was no provision for disposition of yearly income in excess of \$ 40,000, and in 10 years, excess income of \$ 722,566.80 had accumulated. In protracted negotiations between B and the charities, a compromise agreement was made, giving B income equal to the purchasing power of \$ 40,000 at the date of the testator's death, and giving the rest to the charities. On the trustees' petition, the probate court approved the agreement and modified the trust under the *cy pres* doctrine. The Attorney General appealed, contending that he should have been a party to the negotiations and objecting to the increased payments to B. *Held*, order affirmed; the compromise was beneficial to the charities, avoided litigation, and was not subject to the Attorney General's veto power. (*11 C.A.3d 685.*)

West's Key Number Digest, Charities k.42, 43

SUPPLEMENT: [This section is current through the latest supplement]



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3. Compliance With Internal Revenue Code.

13 Witkin Sum. Cal. Law Trusts § 310

[§ 310] Compliance With Internal Revenue Code.

The Internal Revenue Code imposes taxes on private foundations for designated activities, including self-dealing, retaining excess business holdings, making investments that jeopardize charitable purposes, and failing to distribute income. (See 26 U.S.C., §4940 et seq.)

Prob.C. 16100 et seq. require the trustees of charitable trusts, split-interest trusts, and private foundations to distribute income and to refrain from other activity (e.g., retaining excess business holdings, self-dealing) in a manner consistent with the provisions of the Internal Revenue Code so as to avoid taxation. (*Prob.C. 16101, 16102*; for definitions, see *Prob.C. 16100*.) These restrictions are deemed to be contained in instruments creating the trusts to which *Prob.C. 16000* et seq. apply, and any inconsistent provision is "without effect." (*Prob.C. 16104*; on exceptions, see *Prob.C. 16103*; on proceeding to reform governing instrument, see *Prob.C. 16105*.) (See *Estate of Mabury* (1976) 54 C.A.3d 969, 981, 127 C.R. 233 [action to compel distribution under predecessor statute].)

The Internal Revenue Code provides charitable deductions against the gift and estate tax for property held in charitable remainder unitrusts, charitable remainder annuity trusts, and charitable lead trusts. (See 26 U.S.C., §§2055, 2522.) Under *Prob.C. 21540, 21541*, instruments that evidence an intention to comply with these provisions are to be construed to comply, and the trustee may not take any action or exercise any power that impairs the charitable deduction.

SUPPLEMENT: [This section is current through the latest supplement]



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 X. RESULTING TRUSTS
 A. Nature and Distinctions.

13 Witkin Sum. Cal. Law Trusts § 311

[§ 311] Nature and Distinctions.

(1) *In General.* A resulting trust arises from a transfer of property under circumstances showing that the transferee was not intended to take the beneficial interest. (See *Rest.3d, Trusts* §7; 5 Scott §404; Bogert §451 et seq.; 76 *Am.Jur.2d* (2005 ed.), *Trusts* §135 et seq.) (On practice in actions to establish and enforce resulting trusts, see Cal. Civil Practice, 3 Probate and Trust Proceedings, §24:8.; 24 *Am.Jur. P.P. Forms* (1999 ed.), *Trusts*, Form 41 et seq.; see also 17A *Am.Jur. Legal Forms 2d* (1995 ed.), §251:41 [declaration of trust by trustee of resulting trust].)

(2) *Constructive Trust Distinguished.* It has been termed an "intention-enforcing" trust, to distinguish it from the other type of implied trust, the constructive or "fraud-rectifying" trust. The resulting trust carries out the inferred intent of the parties; the constructive trust defeats or prevents the wrongful act of one of them. (See *Lezinsky v. Mason Malt Whiskey Distilling Co.* (1921) 185 C. 240, 243, 196 P. 884; *Johnson v. Clark* (1936) 7 C.2d 529, 533, 61 P.2d 767; *Bainbridge v. Stoner* (1940) 16 C.2d 423, 428, 106 P.2d 423; *American Motorists Ins. Co. v. Cowan* (1982) 127 C.A.3d 875, 884, 885, 179 C.R. 747, citing the text [no trust established]; *Rest.3d, Trusts*, §7, Comment a; *Rest., Restitution* §160; 5 Scott §404.2; Bogert §451; 12 *Cal. L. Rev.* 244; 19 *Cal. L. Rev.* 70; 21 *Cal. L. Rev.* 165; 1 *So. Cal. L. Rev.* 99; 76 *Am.Jur.2d* (2005 ed.), *Trusts* §132; on the difference in accrual of the statute of limitations, see *supra*, §137.)

(3) *Express Trust Distinguished.* A resulting trust differs from an express trust chiefly in that (1) it arises by operation of law, without an expressed intent, and (2) the resulting trustee ordinarily has no duty other than to transfer the property to the person entitled. (See *Rest.3d, Trusts*, §7, Comment e; *Rest., Restitution* §160; *Richman v. Green* (1956) 143 C.A.2d 470, 473, 299 P.2d 890; 5 Scott §404.1.) The statute of frauds is not a bar to the use of parol evidence to establish a resulting trust. (*Nishi v. Downing* (1937) 21 C.A.2d 1, 3, 67 P.2d 1057; see *Rest.3d, Trusts* §7, Comment g; 5 Scott §406; Bogert §452.)

(4) *Termination.* A resulting trust may terminate by merger, as where the trustee transfers property to the beneficiary. (*Zakaessian v. Zakaessian* (1945) 70 C.A.2d 721, 724, 161 P.2d 677; see *Rest.3d, Trusts* §7, Comment h; 5 Scott §410; Bogert §466.) An oral surrender will also terminate it. (See *infra*, §314.)

West's Key Number Digest, Trusts k.62

SUPPLEMENT: [This section is current through the latest supplement](1) *In General.* See 85 Proof of Facts 3d 221 [circumstances establishing purchase-money resulting trust].



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B. Failure of Express Trust.
1. In General.

13 Witkin Sum. Cal. Law Trusts § 312

[§ 312] In General.

Where property is given in trust, but the trust fails for lack of a valid purpose, beneficiary, or other reason, a resulting trust arises in favor of the settlor or the settlor's successors, unless the instrument provides otherwise. (See *Rest.3d, Trusts* §8; *Hansen v. Bear Film Co.* (1946) 28 C.2d 154, 173, 168 P.2d 946 [transfer of stock on express trust to retransfer; transferor died without demanding transfer]; *Davenport v. Davenport Foundation* (1950) 36 C.2d 67, 75, 222 P.2d 11 [express trust; invalid restraint on alienation under former law]; *Estate of Maloney* (1938) 27 C.A.2d 332, 333, 80 P.2d 998 [precatory language]; *Booge v. Reinicke* (1941) 45 C.A.2d 260, 265, 114 P.2d 427 [illegality of express trust]; 5 Scott §411; Bogert §468; 76 Am.Jur.2d (2005 ed.), *Trusts* §142 et seq.; 65 Harv. L. Rev. 598; cf. 30 A.L.R.3d 1318 [termination on death of settlor who left will without disposition of trust property]; on *cy pres* doctrine protecting charitable trust, see *Rest.3d, Trusts* §67, and *supra*, §302.)

The principal situations involve *uncertainty* in the trust instrument, and the following distinction should be noted:

(1) *Uncertainty About Trust Intent*. Where it is uncertain whether any trust was intended, the purported trustee may take the property as an absolute gift to him or her personally. This is the usual effect of precatory language. (See *Estate of McGivern* (1947) 80 C.A.2d 508, 510, 180 P.2d 32 [residuary estate to priest, "to be disposed of by him in accordance with my said wishes heretofore expressed to him," but "[i]t is not my desire to create a trust in Father Byrne"; held absolute gift]; *supra*, §33.)

(2) *Uncertainty About Trust Purpose*. Where a trust intent is clearly indicated, but no valid purpose is stated, the purported trustee has no claim on the property and holds it subject to a resulting trust for the heirs. (See *Estate of Ralston* (1934) 1 C.2d 724, 726, 37 P.2d 76 [no valid purpose; K appointed executor, and "I give and bequeath in trust" to K to dispose of "as he may see fit"]; *Sears v. Rule* (1941) 45 C.A.2d 374, 381, 114 P.2d 57 [precatory language, no trust], and later appeal, *Sears v. Rule* (1945) 27 C.2d 131, 140, 163 P.2d 443.) This result, of course, can be avoided by a residuary clause in a will; on failure of the trust the residuary legatees take. (*Estate of Feldman* (1947) 78 C.A.2d 778, 790, 178 P.2d 498; *Estate of Reed* (1947) 82 C.A.2d 448, 450, 186 P.2d 147; see 14 Summary (10th), *Wills and Probate*, §243.)

A similar basis for a resulting trust exists where an express trust is fully performed, leaving a surplus of property. (*Rest.3d, Trusts* §8; see 5 Scott §430 et seq.; Bogert §469.)

West's Key Number Digest, Trusts k.65 et seq.

SUPPLEMENT: [This section is current through the latest supplement]



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 2. Gift by Implication.

13 Witkin Sum. Cal. Law Trusts § 313

[§ 313] Gift by Implication.

The doctrine of gift by implication normally invoked in the construction of wills (see 14 *Summary* (10th), *Wills and Probate*, §207) was applied to an inter vivos trust against the living settlor in *Brock v. Hall* (1949) 33 C.2d 885, 206 P.2d 360. Defendant settlor created a trust to pay income to his daughters M and C. The corpus was to be divided between them at age 35, or, if either died before 35 under certain circumstances, the corpus was to go to her surviving husband, or issue, or to the other daughter. Some contingencies were unprovided for; one of them--death of daughter C, a widow without issue--occurred, and defendant settlor claimed C's share of the property on a resulting trust. *Held*, plaintiff, daughter M, was entitled. (a) The reasons justifying gifts by implication in wills are equally applicable to inter vivos trusts. (b) Whether a gift should be implied must be determined by considering the general scheme of the trustor as it appears in the particular instrument. (c) The document here showed a general intention to have the property go to the surviving daughter if other specified beneficiaries were not in existence. (33 C.2d 888.)

This startling decision was challenged in the dissenting opinion on two grounds: (a) The fundamental reason for the doctrine is the strong policy against intestacy, and no basis for implication of a gift exists where the settlor is alive and can direct the disposition of the property. (b) The court's theory of interpretation is unsound. "To lift the document 'by its four corners' and construe it according to its 'general scheme,' allows a court to reach any desired result by reciting generalities and stating a positive, if unexplained, conclusion therefrom. Such a rule of construction leads to the disposition of property in such manner as a majority of the judges may determine most fully accords with their views as to whom the corpus of a trust should be distributed." (33 C.2d 894.) (See 37 Cal. L. Rev. 701; 23 So. Cal. L. Rev. 425; 2 Stanf. L. Rev. 226.)

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C. Payment of Consideration for Transfer.
1. In General.

13 Witkin Sum. Cal. Law Trusts § 314

[§ 314] In General.

(1) *General Principles*. When a transfer of property is made to one person, and the purchase price is paid by or for another, a trust is presumed to result in favor of the person by or for whom the purchase price is paid. (*Rest.3d, Trusts* §9; *McNeil v. Dow* (1948) 89 C.A.2d 370, 372, 200 P.2d 859; *Emden v. Verdi* (1954) 124 C.A.2d 555, 558, 269 P.2d 47; *Casa Colina Convalescent Home for Crippled Children v. Wiest* (1963) 214 C.A.2d 161, 165, 29 C.R. 407 [life estate as subject]; *Johnson v. Johnson* (1987) 192 C.A.3d 551, 556, 557, 237 C.R. 644, citing the text [following *Norwood v. Judd* (1949) 93 C.A.2d 276, 209 P.2d 24, 1 Summary (10th), *Contracts*, §444; purchase money resulting trust enforceable despite illegality of underlying loan]; see 5 Scott §§440, 441; Bogert §455; 76 *Am.Jur.2d* (2005 ed.), *Trusts* §§143, 148 et seq.; 5 *Cal. Proc.* (4th), *Pleading*, §793.)

The trust may arise even though the property is not taken in the grantee's name alone. (*Rowland v. Clark* (1949) 91 C.A.2d 880, 882, 206 P.2d 59 [grandmother paid consideration but took title in name of herself and granddaughter as joint tenants, intending to retain life estate; granddaughter's title was subject to resulting trust for grandmother's life].)

(2) *Form of Consideration*. The consideration need not be money, but may consist of property or services. (See *Stewart v. Douglass* (1906) 148 C. 511, 514, 83 P. 699; *Rest.3d, Trusts* §9, Comment a; 5 Scott §455.)

(3) *Application of Doctrine to Personal Property*. Although the typical cases involve purchase of land, the same principle applies to purchase of personal property. (*Kirk White & Co. v. Bleg-Hoffine Co.* (1935) 6 C.A.2d 188, 191, 44 P.2d 439; *Norman v. Burks* (1949) 93 C.A.2d 687, 691, 209 P.2d 815; *McKinnon v. McKinnon* (1960) 181 C.A.2d 97, 104, 5 C.R. 43; see *Rest.3d, Trusts* §9, Comment a; 5 Scott §440.)

(4) *Effect of Partial Payment*. Partial payment gives rise to a trust to the extent of the payment. (*Moultrie v. Wright* (1908) 154 C. 520, 523, 98 P. 257; *Juranek v. Juranek* (1938) 29 C.A.2d 276, 281, 84 P.2d 195; *Neusted v. Skernswell* (1945) 69 C.A.2d 361, 367, 159 P.2d 49; *Martin v. Kehl* (1983) 145 C.A.3d 228, 238, 239, 193 C.R. 312 [resulting trust arising from one purchaser's partial downpayment on real property with title taken in name of other purchaser only]; see *Rest.3d, Trusts* §9, Comment d; 5 Scott §454; Bogert §457; 76 *Am.Jur.2d* (2005 ed.), *Trusts* §§163, 164; 5 *Cal. Proc.* (4th), *Pleading*, §794.) However, the burden is on the party who asserts a *pro tanto* trust to establish definitely the proportional amount contributed. (*Socol v. King* (1950) 36 C.2d 342, 348, 223 P.2d 627 [burden not met]; *Lloyds Bank Calif. v. Wells Fargo Bank* (1986) 187 C.A.3d 1038, 1044, 232 C.R. 339, citing the text [insufficient proof of amount of

proportional contribution].) And part payment of the consideration at the time of the conveyance must be distinguished from mere subsequent contribution of funds by the claimant to enable the grantee to complete installment payments or to make improvements on property after the grantee has already acquired title; in the latter situation no resulting trust arises. (See *Keene v. Keene* (1962) 57 C.2d 657, 667, 21 C.R. 593, 371 P.2d 329, 11 Summary (10th), *Community Property*, §270 [no resulting trust where woman in meretricious relationship furnished services to improve land previously conveyed to husband by grantor]; *McQuin v. Rice* (1948) 88 C.A.2d 914, 917, 199 P.2d 742; *infra*, §317.)

In re Marriage of Becker (1984) 161 C.A.3d 65, 207 C.R. 392, 11 Summary (10th), *Community Property*, §69, involved the application of the part payment rule to retirement benefits. Plaintiff, the first wife of a deceased member of the Public Employees' Retirement System, sought to recover her community property interest in her former husband's retirement benefits. The second wife, as authorized by statute, elected to receive the benefits as an annuity. *Held*, the first wife was entitled to reimbursement of her community share of retirement contributions, and that right could not be defeated by the second wife's election of a payment option. Thus, the second wife held a pro tanto portion of each monthly payment on a resulting trust for the first wife. (161 C.A.3d 75, citing the text.)

(5) *Termination*. Because the trust is created without a writing, on principle it may be extinguished by oral surrender of the beneficiary's interest to the trustee. (*Rest.3d, Trusts* §9, Comment f; see *Nicolds v. Storch* (1944) 67 C.A.2d 8, 15, 153 P.2d 561 [discussing Restatement rule, but leaving question open, and holding that oral surrender, followed by *change of position* by trustee in reliance, results in estoppel to set up statute of frauds]; *Johnson v. Altman* (1950) 96 C.A.2d 467, 469, 215 P.2d 768 [similar discussion but also decided on estoppel theory]; 5 Scott §460; Bogert §466; on termination by merger, see *supra*, §311.)

West's Key Number Digest, Trusts k.72

SUPPLEMENT: [This section is current through the latest supplement]

(1) *General Principles*.

Cross-Reference: 5 Cal. Proc. (5th), *Pleading*, §837.

(4) *Effect of Partial Payment*.

Cross-Reference: 5 Cal. Proc. (5th), *Pleading*, §838.



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2. Payment Directly by Claimant.

13 Witkin Sum. Cal. Law Trusts § 315

[§ 315] Payment Directly by Claimant.

The usual resulting trust situation occurs where the claimant (the person claiming the benefit of the trust) actually *pays* the consideration as part of the original transaction of purchase. (See *Neusted v. Skernswell* (1945) 69 C.A.2d 361, 364, 159 P.2d 49; *Elliott v. Wood* (1949) 95 C.A.2d 314, 317, 212 P.2d 906; *Stone v. Lobsien* (1952) 112 C.A.2d 750, 756, 247 P.2d 357, *infra*, §317; but see *infra*, §317, on payment after conveyance.)

Of course, if the claimant *lends* the money to the grantee, the claimant does not pay the consideration directly or indirectly, and there is no trust. (*Rest.3d, Trusts* §9, Comment e; see 5 Scott §445; Bogert §455; 76 *Am.Jur.2d* (2005 *ed.*), *Trusts* §§157, 158.)

West's Key Number Digest, Trusts k.75

SUPPLEMENT: [This section is current through the latest supplement]



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3. Payment by Grantee on Behalf of Claimant.

13 Witkin Sum. Cal. Law Trusts § 316

[§ 316] Payment by Grantee on Behalf of Claimant.

It is not essential that the claimant pay *directly* and with his or her *own money*. The payment may actually be made by the *grantee*, on behalf of the claimant, pursuant to a promise by the grantee to *lend* the money or credit to the claimant. In this kind of situation, it is the claimant's own money that is subject to the obligation to repay, and the trust will arise. (*Viner v. Untrecht* (1945) 26 C.2d 261, 269, 158 P.2d 3; see *Brown v. Spencer* (1912) 163 C. 589, 593, 126 P. 493; *Watson v. Poore* (1941) 18 C.2d 302, 318, 115 P.2d 478; *Rest.3d, Trusts* §9, Comment a; 5 Scott §§448, 456; Bogert §455.)

In *Viner*, defendant (grantee) agreed to lend money to plaintiff (claimant) for the purchase of land, but in acquiring it defendant paid the money directly to the vendor and defendant himself assumed the obligation of payment of the balance of the price. *Held*, a resulting trust arose, for plaintiff was impliedly obligated to reimburse defendant, and the price was therefore paid on plaintiff's behalf. (26 C.2d 269.) (See 33 Cal. L. Rev. 335.)

The result is the same where the grantee, instead of lending the money, makes a prior *gift* of the purchase money to the claimant; a resulting trust arises in favor of the claimant. (*Helmer v. Helmer* (1948) 87 C.A.2d 682, 689, 197 P.2d 558.)

Cases like *Viner* make it possible to argue, and to allow the trial court to draw the "inference," that a loan was made by the grantee to the claimant in nearly all cases in which the grantee purchases property in his or her own name and refuses to perform an oral promise to buy it for the claimant. The claimant cannot have a *constructive trust* imposed where there is no fraud or violation of a confidential relationship, but it may be possible to show a *resulting trust* if the claimant can convince the trial court that the money paid by the grantee to the grantor was in whole or part a loan by the grantee to the claimant. In *Mazzera v. Wolf* (1947) 30 C.2d 531, 537, 183 P.2d 649, *infra*, §325, this contention was rejected because the trial court found that there was no loan; but *Viner* might have compelled a contrary result if the trial court had found otherwise.

SUPPLEMENT: [This section is current through the latest supplement]



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 4. Payment After Conveyance.

13 Witkin Sum. Cal. Law Trusts § 317

[§ 317] Payment After Conveyance.

A few California cases, mostly by dictum, set forth a requirement of *prior or contemporaneous payment*: No resulting trust arises unless the claimant pays the consideration before or at the time of execution of the conveyance to the grantee, as a part of the original transaction of purchase. (See *Lincoln v. Chamberlain* (1923) 61 C.A. 399, 401, 214 P. 1013; *Bradley v. Duty* (1946) 73 C.A.2d 522, 526, 166 P.2d 914; *McQuin v. Rice* (1948) 88 C.A.2d 914, 917, 199 P.2d 742.) This view has now been repudiated. (See *Viner v. Untrecht* (1945) 26 C.2d 261, 270, 158 P.2d 3, supra, §316; 5 Scott §457; Bogert §456.)

In *Stone v. Lobsien* (1952) 112 C.A.2d 750, 755, 247 P.2d 357, a husband and wife, who were receiving public assistance, had an opportunity to buy a small house for \$ 1,955 for payments similar to rent, but the vendor wanted additional security. Defendant, a close friend, went on the secured note, was named as grantee, and received the deed. But defendant paid nothing; the spouses made the downpayment, and paid all charges and installments on the price. After the husband's death, defendant claimed title. *Held*, judgment establishing a resulting trust for plaintiff wife affirmed. The court disposed of the two main issues as follows:

(a) Defendant grantee contended that there could be no resulting trust for the claimants because they neither paid nor agreed to pay the consideration at the time of the conveyance. *Held*, the circumstances clearly showed an implied promise to make the installment payments, and that is enough. (112 C.A.2d 755.)

(b) Defendant grantee contended that she lent her credit to make the purchase, and therefore that the claimants did not pay the consideration. *Held*, however, the note was secured by a purchase money deed of trust which imposes no personal liability on the purchaser (i.e., no deficiency judgment; see 4 Summary (10th), *Security Transactions in Real Property*, §182); hence, there was no detriment to defendant and no loan of her credit.

West's Key Number Digest, Trusts k.77

SUPPLEMENT: [This section is current through the latest supplement]

See *In re Marriage of Ruelas* (2007) 154 C.A.4th 339, 342, 64 C.R.3d 600, citing the text [recognizing resulting trust in favor of parents where daughter took title to condominium to secure loan for which parents were not qualified and evidence showed that parents' monthly payments were for mortgage, not rent; following *Stone v. Lobsien* (1952) 112

C.A.2d 750, 247 P.2d 357, text, p. 891].



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5. Presumption of Gift or Advancement.

13 Witkin Sum. Cal. Law Trusts § 318

[§ 318] Presumption of Gift or Advancement.

Where the grantee is the spouse, child, or other natural object of the affections of the claimant, a contrary presumption arises of a gift or advancement. (See *Rest.3d, Trusts §9*; *Altramano v. Swan* (1942) 20 C.2d 622, 628, 128 P.2d 353; *Lloyds Bank Calif. v. Wells Fargo Bank* (1986) 187 C.A.3d 1038, 1043, 232 C.R. 339, citing the text [deed of family home to two of six children was presumed to be gift; no resulting trust in favor of other children]; 5 Scott §442; Bogert §§459, 460; 76 *Am.Jur.2d* (2005 ed.), *Trusts §152 et seq.*) This presumption, like the other, is rebuttable. (*Faylor v. Faylor* (1902) 136 C. 92, 96, 68 P. 482; *Quinn v. Reilly* (1926) 198 C. 465, 468, 245 P. 1091; *Gomez v. Cecena* (1940) 15 C.2d 363, 367, 101 P.2d 477; see *Rest.3d, Trusts §9*, Comment c; 5 Scott §443; Bogert §459; 15 *Cal. L. Rev.* 160; 5 *Cal. Proc.* (4th), *Pleading*, §795.)

SUPPLEMENT: [This section is current through the latest supplement]
Cross-Reference: 5 *Cal. Proc.* (5th), *Pleading*, §839.



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XI. CONSTRUCTIVE TRUSTS
A. Nature of Constructive Trust.

13 Witkin Sum. Cal. Law Trusts § 319

[§ 319] Nature of Constructive Trust.

(1) *Remedy Only*. A constructive trust is a *remedy* used by a court of equity to compel a person who has property to which he or she is not justly entitled to transfer it to the person entitled to it. The trust is passive, the only duty being to convey the property. (See *Rest., Restitution* §160; 5 Scott §462; Bogert §471; *Haskel Engineering & Supply Co. v. Hartford Acc. & Indem. Co.* (1978) 78 C.A.3d 371, 375, 378, 144 C.R. 189, citing the text; *Pacific Lumber Co. v. Superior Court* (1990) 226 C.A.3d 371, 378, 276 C.R. 425, citing the text; *Communist Party v. 522 Valencia* (1995) 35 C.A.4th 980, 990, 41 C.R.2d 618, citing the text [improper to use alter ego theory to impute ownership of corporate property to political party, in absence of evidence that party actually owned or was rightfully entitled to possession of property, despite alleged agreement to have corporation manage property for benefit of party]; *Burlesci v. Petersen* (1998) 68 C.A.4th 1062, 1069, 80 C.R.2d 704 [constructive trust may be imposed as remedy for conversion]; 76 *Am.Jur.2d* (2005 ed.), *Trusts* §168 et seq.) (On practice in actions to establish and enforce constructive trusts, see 24 *Am.Jur.* P.P. Forms (1999 ed.), *Trusts*, Form 60 et seq.; 5 *Cal. Proc.* (4th), *Pleading*, §796 et seq.; on distinction between constructive and resulting trusts, see *supra*, §311.)

(2) *Statutory Basis*. The principal constructive trust situations are covered by statute. C.C. 2223 provides: "One who wrongfully detains a thing is an involuntary trustee thereof, for the benefit of the owner." C.C. 2224 provides: "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." (See *Burns v. Ross* (1923) 190 C. 269, 273, 212 P. 17; *Blair v. Mahon* (1951) 104 C.A.2d 44, 50, 230 P.2d 832; *Santa Clarita Water Co. v. Lyons* (1984) 161 C.A.3d 450, 461, 207 C.R. 698 [C.C. 2224 applied to public utility's acquisition of water from adjacent landowner by negligent trespass]; *GHK Associates v. Mayer Group* (1990) 224 C.A.3d 856, 878, 274 C.R. 168.)

(3) *Unjust Enrichment*. "[T]he wrongful act giving rise to a constructive trust need not amount to fraud or intentional misrepresentation. All that must be shown is that the acquisition of the property was wrongful and that the keeping of the property by the defendant would constitute unjust enrichment." (*Calistoga Civic Club v. Calistoga* (1983) 143 C.A.3d 111, 116, 191 C.R. 571, citing the text.) (See *Martin v. Kehl* (1983) 145 C.A.3d 228, 237, 193 C.R. 312; *Chang v. Redding Bank of Commerce* (1994) 29 C.A.4th 673, 682, 35 C.R.2d 64, 4 *Summary* (10th), *Negotiable Instruments*, §83 [progress payments received by general contractor for sole purpose of paying subcontractors were held in trust for benefit of subcontractors and could not be seized by bank to offset general contractor's debts]; *Cal. Civil Practice*, 3 Probate and Trust Proceedings, §24:9.)

In *Calistoga Civic Club*, a private club had solicited and used money from the general public to acquire and retain legal title to a building used mainly for a public free library. The evidence showed that the club would be unjustly enriched if it were allowed to retain both legal and beneficial ownership; but the usual remedies in constructive trust cases--conveyance to the person entitled, or granting that person an equitable lien--were inappropriate. Accordingly the trial judge's decision accomplishing the desired result by *imposing a charitable trust* on the property was upheld. (143 C.A.3d 117.) The court also held that the evidence of solicitation of funds on the representation that they would be used to provide a permanent home for the library was sufficient to support the judgment on the theory of a resulting trust. (143 C.A.3d 118.)

(4) *Action Not Dependent on Absence of Adequate Legal Remedy.* In *Heckmann v. Ahmanson* (1985) 168 C.A.3d 119, 214 C.R. 177, corporate directors averted a takeover attempt by purchasing shares from the takeover shareholders at a premium. Other shareholders sought to recover the profit on the sale, alleging a breach of fiduciary duty by both the corporate directors and the takeover shareholders. The trial judge granted a preliminary injunction that imposed a constructive trust on the profits. *Held*, affirmed.

(a) California follows the majority view that "an action in equity to establish a constructive trust does not depend on the absence of an adequate legal remedy," and many cases have recognized a plaintiff's right to a constructive trust regardless of the defendant's solvency. (168 C.A.3d 134.)

(b) Where there is a preexisting fiduciary relationship between the parties, a plaintiff whose property has been taken is entitled to "greater solicitude" than a mere creditor of the defendant; the plaintiff has the right to restoration of the property itself. (168 C.A.3d 135.)

(c) Money damages in the form of a judgment for the value of the property plus interest at the legal rate are inadequate. To prevent unjust enrichment, the plaintiff is entitled to trace the fund to its ultimate product. "By the time plaintiff obtains a final judgment, the original fund may have grown far greater than the legal rate of interest would recognize. To allow the defendant to pocket the difference would reward the defendant for his wrongdoing." (168 C.A.3d 135.) (See 5 Scott §462.3; Bogert §472.)

West's Key Number Digest, Trusts k.91

SUPPLEMENT: [This section is current through the latest supplement]
(1) *Remedy Only.*

Action to establish constructive trust:

Cross-Reference: 5 Cal. Proc. (5th), *Pleading*, §840 et seq.(3) *Unjust Enrichment.* See *Cabral v. Soares* (2007) 157 C.A.4th 1234, 1240, 1242, 69 C.R.3d 242 [brother's former wife, attempting to collect delinquent support, should have been granted leave to amend complaint to plead constructive trust, based on allegations that brother and sister induced their mother to alter her will to replace devise to brother with devise to sister (later to be transferred to brother) in order to prevent wife from enforcing support; brother's right to constructive trust could be enforced in creditor's suit].



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Witkin Summary of California Law
XI. CONSTRUCTIVE TRUSTS
B. Fraud or Mistake.

13 Witkin Sum. Cal. Law Trusts § 320

[§ 320] Fraud or Mistake.

(1) *Fraud*. A constructive trust will be imposed where a person obtains property by *fraudulent representations* or concealment (actual fraud). (*Crosby v. Clark* (1901) 132 C. 1, 5, 63 P. 1022; *Crabtree v. Potter* (1907) 150 C. 710, 713, 89 P. 971; *Kallmeyer v. Poore* (1942) 52 C.A.2d 142, 147, 125 P.2d 924; *Strausburg v. Connor* (1950) 96 C.A.2d 398, 399, 215 P.2d 509; *Walter H. Leimert Co. v. Woodson* (1954) 125 C.A.2d 186, 190, 270 P.2d 95; *Rest., Restitution* §§166, 167, 169, 184, 185; see 5 Scott §§468 et seq., 489, 490; Bogert §§473, 475; 76 Am.Jur.2d (2005 ed.), *Trusts* §§179, 188, 203; 5 Cal. Proc. (4th), *Pleading*, §798.)

In *Brazil v. Silva* (1919) 181 C. 490, 185 P. 174, a wife fraudulently prevented her husband from revoking his will, which made her the sole distributee. *Held*, she was a constructive trustee for his heirs. (181 C. 495.) (See 63 Harv. L. Rev. 108.)

In *Norman v. Burks* (1949) 93 C.A.2d 687, 209 P.2d 815, plaintiff, estranged from his wife, became enamored of defendant, and they contemplated an eventual marriage. He then made expensive gifts of personal property to her and placed title to a dwelling house and furnishings in her name. Later she informed him of her intention to marry another, and he brought this action to recover the house, furnishings, and a valuable engagement ring. The theory of his action was a *false promise*, and the court observed that a constructive trust could properly have been imposed. But the trial judge gave judgment for plaintiff on the theory that a *resulting trust* was established, and this finding was upheld. It would seem, however, that the constructive trust theory was the only tenable one, for plaintiff undoubtedly intended a gift and not a resulting trust. (93 C.A.2d 690.)

Hall v. Hall (1950) 98 C.A.2d 209, 219 P.2d 808, is similar. Plaintiff was living with defendant, a married woman, in a meretricious relationship. Plaintiff was on parole from state prison, and could not legally contract to buy property. He made an agreement with defendant to buy land, in her name, and made the payments. Later she claimed the property as her own. With permission of the Adult Authority he brought this action to quiet title, and judgment in his favor was affirmed. (98 C.A.2d 212.)

(2) *Mistake*. A constructive trust will be imposed where property is taken by mistake. (*First Nat. Bank of Modesto v. Wakefield* (1906) 148 C. 558, 561, 83 P. 1076; *Kraus v. Willow Park Public Golf Course* (1977) 73 C.A.3d 354, 373, 140 C.R. 744, citing the text [trust arising from mistaken belief that partnership possessed unrestricted right to convey lease]; *Rest., Restitution* §§163, 164, 165; see 5 Scott §465 et seq.; Bogert §474.)

West's Key Number Digest, Trusts k.94.5

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Fraud*.

Cross-Reference: 5 *Cal. Proc.* (5th), *Pleading*, §842.



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C. Crime.

13 Witkin Sum. Cal. Law Trusts § 321

[§ 321] Crime.

(1) *Forgery or Theft*. A constructive trust may arise where property or money is obtained by forgery or theft. (*Burns v. Ross* (1923) 190 C. 269, 273, 212 P. 17, 5 Cal. Proc. (4th), *Pleading*, §§798, 804 [forged assignment of contract of sale]; *Church v. Bailey* (1949) 90 C.A.2d 501, 504, 203 P.2d 547 [employee embezzled funds and bought land]; Bogert §§476, 477; 38 A.L.R.3d 1354 [property bought with stolen or embezzled funds].)

(2) *Homicide*. A constructive trust may arise where an heir or legatee kills a testator or intestate, a beneficiary of a life insurance policy unlawfully kills the insured, or one joint tenant kills the other. (See *Abbey v. Lord* (1959) 168 C.A.2d 499, 506, 336 P.2d 226; *Whitfield v. Flaherty* (1964) 228 C.A.2d 753, 762, 39 C.R. 857; *Saltares v. Kristovich* (1970) 6 C.A.3d 504, 516, 85 C.R. 866; *Rest.*, *Restitution* §§187, 188, 189; 5 Scott §492 et seq.; Bogert §478; 12 *Summary* (10th), *Real Property*, §34; 14 *Summary* (10th), *Wills and Probate*, §293 et seq.)

Under *Prob.C.* 250 et seq. (see 14 *Summary* (10th), *Wills and Probate*, §295), a person who feloniously and intentionally kills a decedent is not entitled to share in the decedent's estate, insurance, or similar benefits on the decedent's life, property owned with the decedent in joint tenancy, or any other acquisition of "property, interest, or benefit" as a result of the killing. The prohibition also applies to any property, interest, or benefit under a trust created by or for the benefit of the decedent or in which the decedent had an interest. Entitlement to the property or other interest is determined as if the killer predeceased the decedent.

(3) *Murder-Suicide*. The problem becomes complicated where a murder-suicide takes place. In *Johansen v. Pelton* (1970) 8 C.A.3d 625, 628, 87 C.R. 784, the husband and wife owned property as joint tenants. The husband murdered the wife and immediately committed suicide. Plaintiff, the wife's administrator, sued defendant, the husband's administrator, to impose a constructive trust on all the property. *Held*, a trust was proper, but only for half the property. (a) To deprive the slayer's heirs of all interest would tend to work a forfeiture, attainder, or corruption of blood. (8 C.A.3d 632.) (b) The analogy of simultaneous death, under which joint tenancy property is divided between the estates of the two joint tenants, is close. (8 C.A.3d 632.) (c) Restitution is an equitable remedy and should be as consistent with reality as possible. (8 C.A.3d 633.)

The court observed: "[T]he result to be obtained may vary depending on whether the problem is approached from the viewpoint of what the slayer had, or what the victim lost. The now generally repudiated rule that the survivor take all disregards the general principles of unjust enrichment first set forth in this opinion, and fails to consider at all what

the malefactor gained. The New York rule and that recommended in the comment in the Restatement appears to unduly weigh what the victim lost. It does so to the derogation of what the slayer had before, equitably if not legally. The seeming anomaly that the part gained and the part lost cannot be reconciled is due to the fact that the inchoate rights--with survivorship--of the two joint tenants are in reality greater than the whole while the tenancy exists. Any solution must, therefore, at best be a compromise." (8 C.A.3d 635.)

In *Estate of Hart* (1982) 135 C.A.3d 684, 185 C.R. 544, the joint tenant husband killed his cotenant wife and then killed himself. The opinion reviews the decisions, quotes *Johansen* at length (135 C.A.3d 689, 690, 691), and approves the trial judge's adoption of the *Johansen* "compromise" or "equitable" view, recognizing "the slayer's preslaying inchoate right to one-half the property." (135 C.A.3d 691.) Hence, the joint tenancy property was divided equally between the wife's and the husband's estates.

(4) *Distinction: Felon's Sale of Story*. The proceeds accruing to a convicted felon from the sale of rights and materials arising from the story of the felony for which the felon was convicted are subject to an *involuntary trust for beneficiaries who were victims of the crime* and entitled to recover damages from the felon for injury or loss resulting from the crime. (C.C. 2225(b).) Income from anything sold or transferred, including any right the value of which is enhanced by notoriety concerning the crime, is also subject to an involuntary trust. (C.C. 2225(a)(10), (b)(2).) Any designated beneficiary may bring an action against the felon, the felon's representative, or a "profiteer of a felony" (defined in C.C. 2225(a)(3)(B)) to recover his or her interest in the trust, and the Attorney General may bring an action to require the proceeds to be held in an express trust. (C.C. 2225(c), (e).) An injunction to prevent waste of the trust assets is also authorized. (C.C. 2225(f).) First Amendment and media exceptions are applicable. (See C.C. 2225(a)(3)(B).) (See 27 *Pacific L. J.* 643.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Forgery or Theft*.

Burns case:

Cross-Reference: 5 *Cal. Proc.* (5th), *Pleading*, §§842, 848.



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D. Breach of Fiduciary Duty.
1. In General.

13 Witkin Sum. Cal. Law Trusts § 322

[§ 322] In General.

A constructive trust will arise from violation of a fiduciary duty, in situations such as the following:

(1) Where the property is obtained by constructive fraud or undue influence arising from violation of some fiduciary or confidential relationship, such as husband and wife, partnership, etc. (*Broder v. Conklin* (1898) 121 C. 282, 285, 53 P. 699; *Koyer v. Willmon* (1907) 150 C. 785, 787, 90 P. 135; *Johnson v. Clark* (1936) 7 C.2d 529, 533, 61 P.2d 767; *Forman v. Goldberg* (1941) 42 C.A.2d 308, 315, 108 P.2d 983; *Blair v. Mahon* (1951) 104 C.A.2d 44, 49, 230 P.2d 832 [executor and absent legatee]; *Cardozo v. Bank of America* (1953) 116 C.A.2d 833, 837, 254 P.2d 949 [executor and absent remainderman]; *Rest., Restitution* §§166, 167, 169, 184, 185; see 5 Scott §§468 et seq., 489, 490; Bogert §482; 79 Proof of Facts 3d 269 [abuse of confidential relationship between transferor and transferee of property]; 5 Cal. Proc. (4th), *Pleading*, §797.)

(2) Where a fiduciary acquires property or makes a profit for himself or herself, when this should have been done for the benefit of the beneficiary. (See *Rest., Restitution* §§190-200; *Air Purification v. Carle* (1950) 99 C.A.2d 258, 264, 221 P.2d 700 [defendant joint venturer, engaged with others in developing an air cleaner, secretly obtained a patent on his own process]; *Gerhardt v. Weiss* (1966) 247 C.A.2d 114, 116, 55 C.R. 425; 5 Scott §495 et seq.; Bogert §481 et seq.; 44 A.L.R.2d 519 [constructive trust for partnership where partner purchases property with own funds]; 76 Am.Jur.2d (2005 ed.), *Trusts* §181 et seq.; *infra*, §324.)

(3) Where a trustee or other fiduciary transfers property in breach of trust, the transferee who takes with notice or not for value (i.e., not as a bona fide purchaser) holds as constructive trustee for the beneficiary. (*Cohn v. Goodday* (1923) 191 C. 615, 623, 217 P. 756; see *Estate of Lyon* (1912) 163 C. 803, 805, 127 P. 75; *Lucas v. Associacao Protectora Uniao Madeirense Do Estado Da California* (1943) 61 C.A.2d 344, 351, 143 P.2d 53; *Rest., Restitution* §§168, 201; 5 Scott §§470, 506; Bogert §484.)

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Constructive fraud or undue influence:*

Cross-Reference: 5 Cal. Proc. (5th), *Pleading*, §841.



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2. Where No Benefit Is Obtained.

13 Witkin Sum. Cal. Law Trusts § 323

[§ 323] Where No Benefit Is Obtained.

In *Elliott v. Elliott* (1964) 231 C.A.2d 205, 41 C.R. 686, plaintiff wife and defendant husband were divorced. The trial judge found that a promissory note from defendant's brother-in-law and business partner, payable to defendant, was community property, and a half-interest was awarded to plaintiff. This note was due and enforceable at the time of the interlocutory decree. But the husband appealed, and, when the remittitur was finally entered affirming the decree, the statute of limitations had run on the note. Plaintiff then brought this action to declare defendant a constructive trustee of her half-interest, and the judge awarded her a judgment for one-half the principal with interest. *Held*, the declaration was legally sound.

(a) Defendant's contention that his refusal to recognize the wife's half-interest did not become wrongful until the final decision on his appeal was untenable. By appealing and automatically staying proceedings under *C.C.P. 916(a)*, he prevented plaintiff from enforcing payment until after the statute ran, and this was a wrongful detention of her property within the meaning of C.C. 2223 and 2224. "In short, defendant, by exercising exclusive control over the note during his appeal, became a constructive trustee, which position carried with it the duty of preserving the property." (231 C.A.2d 209.)

(b) His contention that there was no "thing" within the meaning of the code sections was equally untenable. A note evidencing an indebtedness is a sufficient "res" for a constructive trust. (231 C.A.2d 209.)

(c) His contention that both sections refer to a person who "gains a thing," and that this requires a benefit to the constructive trustee (absent here because he too suffered a loss), was more difficult but also untenable. On this new point in California, the Restatement of Restitution was followed: A person is accountable where he would unjustly benefit "or the other would unjustly suffer loss." (231 C.A.2d 210.) And this is both logical and reasonable. "As a practical matter, we see no distinction between a constructive trustee being charged with the value of trust property he has destroyed ... , or being made accountable for the value of property sold to an innocent purchaser ... , and being chargeable with the value of a promissory note that he prevents the beneficiary from enforcing before the statute of limitations has run. To charge a constructive trustee with an unconscionable loss he has caused the beneficiary is simply the converse of charging him with profits rightly belonging to the beneficiary ... ; the loss is equally real to the beneficiary in either case and in each case it results from wrongful acts of the trustee. To apply the constructive trust doctrine in both instances lends congruity to the law." (231 C.A.2d 211.)

(d) The relationship of the parties was significant. Ordinarily the interests of the husband and wife would be identical in enforcing a community property note; here, they were hostile, while the husband was in a close relationship with the maker. Plaintiff, an estranged wife, had no way to discover whether the payee-husband deliberately failed to force collection of the note to spite her, or whether he had a secret agreement with his brother-in-law partner for payment of his half, or whether the note was collectible at all. "Perhaps the greatest justification for applying the doctrine of constructive trust here is the difficulty of learning the truth surrounding the actions of the constructive trustee and his brother-in-law, the maker of the note." (231 C.A.2d 212.) (See 19 Hastings L. J. 1268.)

West's Key Number Digest, Trusts k.102(1)

SUPPLEMENT: [This section is current through the latest supplement]



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1. Promise To Buy Property for Plaintiff.
a. In General.

13 Witkin Sum. Cal. Law Trusts § 324

[§ 324] In General.

If a defendant's promise lacks consideration, or is oral and within the statute of frauds, equity will not, in the ordinary case, give indirect enforcement to the unenforceable contract. So where a person orally or without consideration promises to buy land for another, and thereafter buys it for himself or herself, without using the other's money, there is no basis for a constructive trust. (*Bauman v. Wuest* (1916) 32 C.A. 217, 219, 162 P. 434; *Lincoln v. Chamberlain* (1923) 61 C.A. 399, 403, 214 P. 1013; *Elliott v. Wood* (1949) 95 C.A.2d 314, 317, 212 P.2d 906; but see *Rest., Restitution §194(2)*; 5 Scott §499; Bogert §487; 76 *Am.Jur.2d* (2005 ed.), *Trusts* §190 et seq.; *Neet v. Holmes* (1944) 25 C.2d 447, 464, 154 P.2d 854 [pointing out difference between California rule and *Rest., Restitution §194(2)*].)

Mere failure to perform is not, therefore, enough; there must be some other circumstances, such as fraud, breach of a confidential relation, or unjust enrichment, before equity will use the remedy of constructive trust to compel performance of the unenforceable promise. (See *Mazzera v. Wolf* (1947) 30 C.2d 531, 535, 183 P.2d 649, *infra*, §325; *Bradley v. Duty* (1946) 73 C.A.2d 522, 525, 166 P.2d 914; *Helfrich v. Kerley* (1961) 192 C.A.2d 726, 728, 13 C.R. 753; *Spector v. Miller* (1962) 199 C.A.2d 87, 93, 18 C.R. 426; *Crowder v. Lyle* (1964) 225 C.A.2d 439, 447, 37 C.R. 343 [applied to patented land, rejecting contention that U.S. Bureau of Land Management had exclusive jurisdiction to determine ownership]; *Quezada v. Hart* (1977) 67 C.A.3d 754, 760, 136 C.R. 815 [constructive trust arising from mother's entrustment to son of money and authority to purchase property to share with siblings]; 36 *Cal. L. Rev.* 494; 5 *Cal. Proc.* (4th), *Pleading*, §799.)

An oral trust in derogation of title may be shown only by clear and convincing evidence. In *Toney v. Nolder* (1985) 173 C.A.3d 791, 796, 219 C.R. 497, plaintiff and defendant lived together for 7 years. Plaintiff gave defendant \$ 10,000 to help finance the purchase of a condominium, title to which was taken in defendant's name. Plaintiff alleged an oral agreement to purchase the property as equal partners, and claimed that title was taken in defendant's name to prevent plaintiff's former spouse from executing against the property to collect delinquent child support payments. Defendant contended that the transaction was a loan, which was repaid in full. In awarding a one-half interest in the property to plaintiff, the trial court found clear and convincing evidence of a confidential and fiduciary relationship between the parties, but concluded that plaintiff had failed to prove an oral partnership by clear and convincing evidence. *Held*, reversed.

(a) At common law, the presumption that the owner of legal title to property is the owner of full beneficial title could be rebutted only by clear and convincing proof, and this presumption was codified in *Ev.C. 662* (see *1 Cal. Evidence (4th), Burden of Proof and Presumptions, §87*). (*173 C.A.3d 794*.) There was no confidential relationship exception to this rule at common law, and there is no exception under the unambiguous language of *Ev.C. 662*. (*173 C.A.3d 796*.)

(b) Plaintiff's contention that, because of their confidential relationship defendant assumed the status of a trustee, assumes the fact in issue. After showing the confidential relationship, plaintiff still has the burden of proving by clear and convincing evidence either (1) that he entrusted management of his funds to defendant, or (2) that the parties had an oral partnership agreement to purchase the property. (*173 C.A.3d 796*, citing the text.)

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SUPPLEMENT: [This section is current through the latest supplement]

Circumstances justifying constructive trust: Cross-Reference: 5 Cal. Proc. (5th), Pleading, §843.



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b. Illustrations.

13 Witkin Sum. Cal. Law Trusts § 325

[§ 325] Illustrations.

(1) *Breach of Fiduciary Duty*. A trust will be imposed if an agent or other fiduciary agrees to buy property for a principal, and instead takes title in his or her own name; the breach of fiduciary duty is sufficient to raise the constructive trust. (*Stromerson v. Averill* (1943) 22 C.2d 808, 815, 141 P.2d 732; *Edwards v. Edwards* (1949) 90 C.A.2d 33, 39, 202 P.2d 589 [grantee son held a constructive trustee for his father, after violation of agreement to buy and hold land for himself and parents]; *Walter H. Leimert Co. v. Woodson* (1954) 125 C.A.2d 186, 189, 270 P.2d 95; *South v. Wishard* (1956) 146 C.A.2d 276, 285, 303 P.2d 805; *Rest.*, *Restitution* §194; 5 Scott §499; Bogert §487; 20 A.L.R.2d 1140 [rights and remedies where broker or agent buys property for himself or herself]; 76 Am.Jur.2d (2005 ed.), *Trusts* §191.)

In *Kinert v. Wright* (1947) 81 C.A.2d 919, 185 P.2d 364, plaintiff principal entrusted defendant agent with money to purchase a piece of land. Defendant bought a larger tract, which included the selected piece. *Held*, he took the larger tract as a trustee for plaintiff, regardless of whether he used plaintiff's money or his own. From the point of view of classification, it would seem that if he used plaintiff's money he became a *resulting* trustee; if he used his own, his attempt to make a secret profit would be defeated by making him a *constructive* trustee. (81 C.A.2d 926.)

An attempt to establish the essential confidential relationship by inferences drawn from the mere making of the oral agreement was defeated in *Mazzera v. Wolf* (1947) 30 C.2d 531, 183 P.2d 649. Plaintiff and defendants, having had no previous business activities or relationship, casually discussed the purchase by defendants of a vacant lot between their respective properties for \$ 2,500, on a "fifty-fifty" basis. Defendants assented, but did nothing until some months later, when they eventually bought the lot with their own money for \$ 4,500. Plaintiff's theory was that the oral agreement created a partnership or joint enterprise for the purpose of buying and holding the lot, and that, in consequence, the violation of the agreement was a breach of the fiduciary relationship. *Held*, the facts did not support the inference that the parties contemplated a profit sharing business in the land; their object was to buy and physically divide it. Hence there was no breach of a fiduciary relationship and no constructive trust could be imposed. (30 C.2d 535.)

(2) *Reliance on Promise To Avoid Execution or Foreclosure*. Where the property of a debtor is about to be sold at an execution or foreclosure sale, and the defendant, orally or without consideration, promises the debtor to buy it and hold it for the debtor's redemption, and the debtor, relying on the promise, refrains from taking any other action to

protect his or her interests, a constructive trust will be imposed. In such a case, a defendant who subsequently refused to convey would be unjustly enriching himself or herself. (See *Rest., Restitution* §181; 5 Scott §484; Bogert §§486, 494.) In *Webb v. Vercoe* (1927) 201 C. 754, 759, 258 P. 1099, defendant mortgagee promised plaintiff mortgagor that, if the latter would consent to foreclosure, defendant would purchase and hold it until plaintiff could redeem. Later defendant repudiated the promise. The court declared that a *resulting* trust arose from his fraud, although it would seem that the trust was constructive. (See *Lucas v. Associacao Protectora Uniao Madeirense Do Estado Da California* (1943) 61 C.A.2d 344, 350, 143 P.2d 53; 36 Cal. L. Rev. 496; 1 So. Cal. L. Rev. 99.)

(3) *Enforceable Promise*. Although there is no fiduciary relationship, a constructive trust will be imposed where the defendant's promise is actually *enforceable*. In *Neet v. Holmes* (1944) 25 C.2d 447, 154 P.2d 854, defendants orally agreed for consideration to locate mining claims for plaintiffs, and instead located them for themselves. *Held*, the breach of promise made them constructive trustees of the claims, for mining rights are *not real property*, and the statute of frauds was therefore not a defense. (25 C.2d 464.) (See also 40 Cal. L. Rev. 622.)

In *Adams v. Talbott* (1943) 61 C.A.2d 315, 320, 142 P.2d 775, this theory was again applied where a woman was the intimate friend and business advisor of an 81-year-old man, and induced him to convey, for management purposes, on a promise to reconvey.

SUPPLEMENT: [This section is current through the latest supplement]

(1) *Breach of Fiduciary Duty*. See *Warren v. Merrill* (2006) 143 C.A.4th 96, 111, 49 C.R.3d 122 [constructive trust was proper remedy against real estate broker who breached fiduciary duty to purchasing client by fraudulently procuring title to condominium in name of broker's daughter].



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E. Violation of Unenforceable Contract.
2. Promise To Reconvey to Transferor.

13 Witkin Sum. Cal. Law Trusts § 326

[§ 326] Promise To Reconvey to Transferor.

If the owner of real property makes an inter vivos transfer to another on an oral trust for the transferor, or in reliance on the transferee's oral promise to reconvey, the trust or promise is unenforceable because of the statute of frauds, and, on repudiation or refusal to perform, the transferor's only remedy is a constructive trust.

Some authorities refuse to impose the trust on the ground that this would defeat the policy of the statute of frauds. (See 40 Cal. L. Rev. 621; 76 Am.Jur.2d (2005 ed.), *Trusts* §189.)

The other view, favored by expressions in a number of California cases, is that the statute of frauds cannot be used to perpetrate a fraud, and that, on proof of the oral agreement and repudiation, the trust will be imposed. (See *Steinberger v. Steinberger* (1943) 60 C.A.2d 116, 119, 140 P.2d 31; *Lyttle v. Fickling* (1945) 72 C.A.2d 383, 388, 164 P.2d 842 [after divorce former husband and wife maintained friendly relations; he conveyed their joint tenancy real property to her as her separate property on oral understanding that she would reconvey his one-half interest on request; constructive trust imposed on her administrator]; *Svistunoff v. Svistunoff* (1949) 94 C.A.2d 651, 652, 211 P.2d 352; *Briggs v. Nilson* (1964) 226 C.A.2d 342, 346, 38 C.R. 68; *Marshall v. Marshall* (1965) 232 C.A.2d 232, 250, 42 C.R. 686; 40 Cal. L. Rev. 622.)

Rest.3d, Trusts §24 and *Rest., Restitution* §182 approve the imposition of a constructive trust where the transfer was procured by fraud, etc., or was made as security for an indebtedness of the transferor, or where the transferee was in a confidential relation to the transferor. (See 1 Scott §44; 5 Scott §485; Bogert §495 et seq.) It has been pointed out that this "confidential relations" exception, widely followed, gives relief in nearly all cases, for the term may be so broadly interpreted as to cover almost any situation in which a person would convey property to another under an oral agreement.

In *O'Melia v. Adkins* (1946) 73 C.A.2d 143, 150, 166 P.2d 298, there was a conveyance by a former wife to her ex-husband after her divorce and remarriage to another. *Held*, no confidential relation existed between her and her former husband, and no constructive trust arose. (Cf. *Orella v. Johnson* (1952) 38 C.2d 693, 698, 242 P.2d 5 [suggesting that where no confidential relationship is involved, remedy may be specific restitution rather than constructive trust]; see 40 Cal. L. Rev. 622, 623.)

In *Steinberger, supra*, plaintiff and his uncle owned undivided interests in property. Plaintiff, before leaving on a trip of indefinite duration, at his uncle's request deeded his interest to the uncle for convenience of management, the uncle orally promising to reconvey on request. The uncle died without being requested to reconvey. *Held*, his administrator took the title subject to a constructive trust. The court declared that the test of confidential relationship is a *factual one*, and covers not only family relationships but also any others in which intimate friendship and reliance are present. (60 C.A.2d 122.)

In *Toney v. Nolder* (1985) 173 C.A.3d 791, 219 C.R. 497, the question was whether the statutory presumption that the owner of legal title to property is the owner of the full beneficial title (Ev.C. 662; see 1 Cal. Evidence (4th), *Burden of Proof and Presumptions*, §87) can be overcome by less than clear and convincing evidence where the parties are in a confidential relationship. On a review of *Steinberger*, the court declared that there was no common law "confidential relationship" exception to the rule that an oral trust in derogation of title may be shown only by clear and convincing evidence; hence no exception could be read into the unambiguous language of Ev.C. 662. (173 C.A.3d 795, 796, citing the text.)

SUPPLEMENT: [This section is current through the latest supplement]



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3. Gift at Death on Unenforceable Trust.

13 Witkin Sum. Cal. Law Trusts § 327

[§ 327] Gift at Death on Unenforceable Trust.

Sometimes a testator leaves property by an absolute devise, in reliance upon a promise of the devisee to hold it in trust for another, and thereafter the devisee refuses to perform. The *promise* is unenforceable, because the statute of wills prevents modification of the will by an extrinsic writing; but a nonperforming devisee who was permitted to keep the property absolutely would be unjustly enriched. Hence, a constructive trust will be imposed.

This does not, however, wholly solve the problem; the question remains whether the trust should be imposed in favor of the intended beneficiary or the successors of the testator. The majority view, followed in California, raises the trust for the intended beneficiary. (See *Weinstein v. Moers* (1929) 207 C. 534, 542, 279 P. 444; *Prior v. Andrews* (1927) 83 C.A. 782, 789, 257 P. 560; *Rest.3d, Trusts §18; Rest., Restitution, §186(1)*; 1A Scott §55; 5 Scott §491; Bogert §498; 76 *Am.Jur.2d* (2005 ed.), *Trusts §201*; 5 *Cal. Proc.* (4th), *Pleading*, §800.)

The same result is reached where the decedent dies *intestate*, failing to make a will in reliance on a promise by the heir to hold the property in trust for another. (*Rest.3d, Trusts §18; Rest., Restitution §186(2)*; see *Aho v. Kusnert* (1939) 12 C.2d 687, 690, 87 P.2d 358; 1A Scott §55.3; 5 Scott §491; Bogert §498; 76 *Am.Jur.2d* (2005 ed.), *Trusts §202*; 5 *Cal. Proc.* (4th), *Pleading*, §800.)

There are several distinctions and qualifications to keep in mind:

(1) It is essential that there be a *promise*, express or implied; a mere expectation by the testator that a devisee would devote the gift to certain purposes is not sufficient. (*O'Donnell v. Murphy* (1911) 17 C.A. 625, 629, 120 P. 1076; see *Estate of Holt* (1923) 61 C.A. 464, 469, 215 P. 124.)

(2) If the devisee voluntarily performs the secret trust, the heirs of the testator have no right to complain, although it is not clear whether the party who thus acts in good faith is properly called a *constructive* trustee. (See *Curdy v. Berton* (1889) 79 C. 420, 423, 21 P. 858; 16 *Cal. L. Rev.* 19.)

(3) Where the secret trust was *illegal*, as where the attempt was made to evade former statutory limitations by a secret trust for charity, a constructive trust was imposed to prevent unjust enrichment, but it is in favor of the *heirs* of the testator and not the charity. (See *Garner v. Purcell* (1916) 173 C. 495, 499, 160 P. 682; 2 *Cal. L. Rev.* 257.)

(4) There can be no trust for unknown beneficiaries. In *Sears v. Rule* (1945) 27 C.2d 131, 163 P.2d 443, the testator left her property to her brother, stating that she placed her "trust" in him and was "confident" that he would distribute it in accordance with her "wishes" discussed between them. *Held*: (a) Because there was a clear trust *intent*, but no declared trust *purpose*, the purported express trust failed (*supra*, §312); (b) the brother would be unjustly enriched if allowed to take absolutely; (c) the ordinary rule, imposing a constructive trust for the intended beneficiaries, could not be applied, because their identities were not disclosed by the brother and were unknown; (d) hence, the proper solution was to impose the constructive trust for the benefit of the heirs of the testator. (27 C.2d 139.)

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SUPPLEMENT: [This section is current through the latest supplement]

Trust for intended beneficiary:

Cross-Reference: 5 Cal. Proc. (5th), *Pleading*, §844.



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4. Conveyance During Life on Unenforceable Trust.

13 Witkin Sum. Cal. Law Trusts § 328

[§ 328] Conveyance During Life on Unenforceable Trust.

Similar to the problem of gift by will on an unenforceable trust (*supra*, §327) is that arising where a grantor conveys land to a grantee in reliance upon the grantee's oral promise to hold it for the benefit of another, and the grantee refuses to perform. The same unjust enrichment is present, and a constructive trust will be imposed, but for whom? In the case of a *decedent*, the whole scheme fails unless the trust is in favor of the intended beneficiary; but in the case of a living grantor, it is possible to raise the trust in favor of the grantor, who may then make a new valid trust or any other disposition he or she desires. (See Bogert §495.)

Many authorities, including the Restatement of Restitution, take the view that a constructive trust is raised in favor of the *intended beneficiary*, but only where (1) the transfer was induced by fraud, duress, or undue influence, (2) a confidential relation was violated, or (3) the transfer was made by the transferor in contemplation of death. The theory is that otherwise there is no wrong to the intended beneficiary. (*Rest., Restitution §183*; see *Rest.3d, Trusts §24*, Comment d; 1 Scott §45; 5 Scott §486.) This appears to be the rule in California. (See *Lauricella v. Lauricella* (1911) 161 C. 61, 67, 118 P. 430; *Allen v. Meyers* (1936) 5 C.2d 311, 314, 54 P.2d 450; *Orella v. Johnson* (1952) 38 C.2d 693, 697, 242 P.2d 5; *Adams v. Young* (1967) 255 C.A.2d 145, 154, 62 C.R. 877; 1 Cal. L. Rev. 333; 13 Cal. L. Rev. 174, 365; 24 Cal. L. Rev. 609; 36 Cal. L. Rev. 495, note 13.)

In those cases where no trust is raised for the beneficiary, a constructive trust might well be raised for the *grantor*. (See *Rest.3d, Trusts §24*, Comment d; 1 Scott §45; cf. *Rest., Restitution §183* [no position taken on this point].)

SUPPLEMENT: [This section is current through the latest supplement]