

WOODLAND HILLS TAX AND ESTATE PLANNING COUNCIL, INC.

**PRUDENT INVESTING IN PROBATE,
CONSERVATORSHIP, GUARDIANSHIP,
AND TRUST PROCEEDINGS:**

STATUTORY GUIDELINES AND PRACTICAL APPLICATIONS

February 13, 2025

**Hon. Jonathan Rosenbloom
Los Angeles Superior Court**

PRESENTER'S BIOGRAPHY

JONATHAN ROSENBLOOM was appointed as a Judge of the Los Angeles Superior Court in May, 2018. After serving in the Court's Family Law Division, he joined the Court's Probate Division in February, 2021. In addition to his assignment, he serves on the Probate Curriculum Committee of the California Judicial Council, which is responsible for training California Probate judicial officers.

Prior to his appointment, he was in private practice, primarily in the areas of estate planning, administration and litigation, and all aspects of conservatorship proceedings from serving as court-appointed counsel to representation of private professional fiduciaries. He served for eight years on the Probate and Mental Health Advisory Committee of the California Judicial Council. He was a contributing author to the California Decedent Estate Practice treatise (CEB). He held several leadership roles in the Los Angeles County Bar Association's Trusts and Estates section and organized and moderated training programs for court-appointed counsel in probate and conservatorship matters for many years. He is a graduate of UC Berkeley and Northwestern University School of Law.

PRUDENT INVESTING IN PROBATE, CONSERVATORSHIP, GUARDIANSHIP AND TRUST PROCEEDINGS

Background: are we giving enough consideration to the suitability of investments, fees charged, internal expenses, risk, performance and complexity (and resulting additional administrative expense)?

Each litigation area has different rules, because each presents different circumstances and investment needs.

For each of the four areas, we will give an overview of the governing statutes and case law. We will then ask Jeff how he would structure a portfolio to comply with those requirements and what considerations he would employ to serve the interests of the party/parties to whom a duty is owed.

Finally, we will present a sample portfolio and excerpts from a modest-sized special needs trust accounting and ask Jeff to analyze and comment on each.

Estates:

Term is one year, possibly more if estate tax return is needed.

Prudent Investor Rule for trusts does NOT apply. Personal representative is not a trustee and has different powers and duties.

Duty to liquidate decedent's assets in favor of CDs, treasuries, etc? Probably not, because primary duty is to preserve and distribute. However, personal representatives can and should request instructions to liquidate if asset mix at date of death seems inappropriate and/or unduly risky.

Finally, a decedent's last will may contain instructions regarding management of assets; this language can serve to shield the personal representative from liability for decisions in conformity with these instructions.

Some highlights:

Prob. C. 9650(b): duty to preserve is of the *entire estate*, not individual assets. Sometimes liquidation is needed to raise cash or to avoid loss.

Prob C. 9652: keep cash invested in interest-bearing accounts or other instruments authorized by law.

OK: direct obligations of US or California, one year or less; money market accounts; US bonds of five years or less; repurchase agreements fully collateralized by US government obligations; common trust fund units.

Estate of Beach (1975) Cal.3d 623: personal representative not liable for decreases in value of estate assets due to decisions made in good faith and without negligence.

Standard of care: ordinary care and diligence (Prob. C. 9600). Depends on specific circumstances. General test: would ordinary person handling his/her own affairs make the same decision? PPF held to a higher standard.



KeyCite Yellow Flag - Negative Treatment

Distinguished by Rudnick v. Rudnick, Cal.App. 5 Dist., December 2, 2009

15 Cal.3d 623

Supreme Court of California

ESTATE of Seth G. BEACH, Deceased.

BANK OF CALIFORNIA, as Executor,

etc., Petitioner and Respondent,

v.

Joette Beach CARTER et al., Objectors and Appellants.

S.F. 23224.

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Dec. 1, 1975.

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Rehearing Denied Jan. 14, 1976.

Synopsis

Contest of executor bank's account was brought seeking to surcharge executor for damages sustained through executor's alleged negligence in not selling oil stock while market price was above stock's appraised value at date of testator's death. The Superior Court, El Dorado County, William E. Byrne, J., rejected exceptions to account and awarded executor's attorneys extraordinary fees, and contestants appealed. The Supreme Court, Wright, C.J., held that evidence supported finding that executor exercised ordinary care in applying skills and knowledge ordinarily possessed by banks engaged in trust business under similar circumstances, that contestants were not entitled to jury trial, and that executor was entitled to extraordinary compensation and attorney fees, but that such awards should have been charged against entire estate instead of against only contestants' shares, and that executor should not have been allowed interest based on some of its compensation, payment of which had been deferred pending resolution of contests.

Affirmed as modified.

Opinion, 41 Cal.App.3d 774, 116 Cal.Rptr. 418, vacated.

Procedural Posture(s): On Appeal.

West Headnotes (27)

- [1] **Executors and Administrators** ⇔ Custody and Management of Estate
Executor is not liable for losses suffered by estate without his fault but may be required to reimburse estate for losses proximately resulting from his failure to exercise requisite duty of care in estate's administration. West's Ann.Prob.Code, § 920.

1 Case that cites this headnote
- [2] **Executors and Administrators** ⇔ Custody and Management of Estate
Standard of care generally applicable to executors is that degree of prudence and diligence which a man of ordinary judgment would be expected to bestow upon his own affairs of a like nature. West's Ann.Prob.Code, § 920.

4 Cases that cite this headnote
- [3] **Executors and Administrators** ⇔ Custody and Management of Estate
As a bank engaged in business of acting as fiduciary for estates and trusts, executor could be held liable for negligence if it failed to exercise skill and knowledge ordinarily possessed by professional fiduciaries. West's Ann.Financial Code, §§ 106, 107, 1502.

4 Cases that cite this headnote
- [4] **Executors and Administrators** ⇔ Presumptions
In determining whether judgment for executor in proceeding contesting executor's account was supported by the evidence, Supreme Court reviewed the facts, viewing evidence in light most favorable to executor and indulging in all reasonable intendments and inferences that tended to sustain judgment.

2 Cases that cite this headnote

[5] Executors and Administrators ⇌ Investments

Mere absence from will of express restrictions on executor's powers of investment was not sufficient to permit executor to invest cash of estate other than in savings accounts or certain government securities under statute allowing probate court to authorize personal representative to invest and reinvest surplus monies in any manner provided by will. West's Ann.Prob.Code, §§ 584, 584.1, 584.5, 584.6, 585.

1 Case that cites this headnote

[6] Executors and Administrators ⇌ Loss or Depreciation

As a professional fiduciary, executor's liability for alleged negligence in not selling certain stock had to be determined by more stringent standards than would liability of lay executor since those undertaking to render expert services in practice of profession or trade are required to have and apply skill, knowledge and competence ordinarily possessed by their fellow practitioners under similar circumstances, or suffer liability for their negligence failure to do so.

11 Cases that cite this headnote

[7] Negligence ⇌ Trades, Special Skills and Professions

Proof of liability for failure to possess or exercise professional attributes required by those undertaking to render expert services in practice of profession or trade requires testimony of a qualified expert where claimed injury and its causes are beyond common knowledge.

5 Cases that cite this headnote

[8] Executors and Administrators ⇌ Loss or Depreciation

In proceeding seeking to surcharge executor for damages suffered through executor's alleged

negligence in not selling certain stock while market price was above stock's appraised value at date of death, trial court, which referred to one of executor's experts as having excellent qualifications and as the most persuasive witness produced, properly judged conduct of executor, which was a professional fiduciary, by professional rather than lay standards.

2 Cases that cite this headnote

[9] Executors and Administrators ⇌ Acting in Different Capacities

Powers and duties of bank as executor were just as distinct from its powers and duties as testamentary trustee as if will had named another bank as trustee.

3 Cases that cite this headnote

[10] Executors and Administrators ⇌ Acting in Different Capacities

Anticipation that bulk of estate would be transferred to bank as testamentary trustee did not require bank, in its capacity as executor, to manage estate assets as if they were already being held under terms of trust.

2 Cases that cite this headnote

[11] Executors and Administrators ⇌ Loss of Assets

Primary duty of executor is to take reasonable steps to preserve assets of estate and such duty may require executor to take affirmative steps to prevent deterioration in value; however, executor or administrator is not liable for any decreases in value of estate assets on account of acts or omissions done in good faith without negligence. West's Ann.Prob.Code, §§ 770, 920.

5 Cases that cite this headnote

[12] Executors and Administrators ⇌ Investments

Executor is normally not held to account for failure to anticipate fluctuations in price of a publicly traded stock arising from general market

conditions, as distinct from conditions peculiar to company in which stock is held.

of beneficiary, to avoid unreasonable delay in distribution of estate assets.

3 Cases that cite this headnote

[13] Executors and Administrators ⇌ Weight and Sufficiency

Evidence, in proceeding seeking to surcharge executor for damages suffered through executor's alleged negligence in not selling oil stock while market price was above stock's appraised value at date of testator's death, supported finding that executor bank, in accordance with its duties to preserve estate assets, used skill or knowledge ordinarily possessed by professional fiduciaries in similar circumstances in determining not to sell oil stock even though such stock was not paying dividends.

4 Cases that cite this headnote

[14] Executors and Administrators ⇌ Loss or Depreciation

Where, inter alia, maturity dates of bonds sold to raise cash made it probable that some or perhaps all would have been converted to cash before administration of estate was completed, and there was evidence that executor in deciding not to obtain cash from selling additional oil stock took into account suitability of stock for inclusion in trust, executor exercised due care in deciding to retain oil stock for distribution to trust and thus was not liable for damages suffered through executor's alleged negligence in not selling stock while market price was above stock's appraised value at date of testator's death.

2 Cases that cite this headnote

[15] Executors and Administrators ⇌ Time for Making Distribution

Where there was no evidence that earlier distribution of oil stock to trust would have resulted in its being sold by trustee at price higher than its market value at time when it was distributed, executor did not breach its duty, which was not dependent on initiative

[16] Jury ⇌ Probate Courts

There is no right to jury in probate proceedings unless that right is granted by statute. West's Ann.Prob.Code, §§ 371, 382, 928, 1081, 1471, 1755.

7 Cases that cite this headnote

[17] Executors and Administrators ⇌ Submission of Issues to Jury

Since claims for mismanagement of a probate estate, unlike ordinary claims for negligence or malpractice, are necessarily based on conduct that is subject to independent control and supervision of very court before which claims must be asserted, jury resolution of such claims is inappropriate.

4 Cases that cite this headnote

[18] Executors and Administrators ⇌ Submission of Issues to Jury

Probate Code provision expressly granting right to jury for exceptions to allowed claims indicates exclusion of right to jury trial for other exceptions to accounts. West's Ann.Prob.Code, §§ 927, 928.

11 Cases that cite this headnote

[19] Executors and Administrators ⇌ Submission of Issues to Jury

Executors and Administrators ⇌ Scope of Review in General

In proceeding contesting executor's account and seeking to surcharge executor for damages suffered through executor's alleged negligence in not selling oil stock while market price was above stock's appraised value at date of

testator's death, trial court had discretion to impanel jury to render advisory verdict on issues raised by contestants' exceptions to account; however, court's absolute power to disregard any verdict that jury might have returned rendered pointless any examination on appeal of denial of contestants' request for advisory jury.

3 Cases that cite this headnote

[20] Executors and Administrators ⇌ Expenditures

Expenditures which were for purpose of protecting executor from unjust surcharge for conduct in administration of estate and which were subsequently determined to have been proper were chargeable against estate.

6 Cases that cite this headnote

[21] Executors and Administrators ⇌ Extra Allowances

Executors and Administrators ⇌ Amount

In fixing amount of extraordinary compensation for executor and its attorneys following successful defense in suit contesting executor's account and seeking to surcharge executor, probate court could properly consider not only time spent but also such factors as value of estate, skills exercised, amount in dispute and results obtained.

5 Cases that cite this headnote

[22] Executors and Administrators ⇌ Extra Allowances

Executors and Administrators ⇌ Questions of Fact, and Findings

Extraordinary compensation awarded executor and its attorneys following successful defense of proceeding contesting executor's account in which contestants sought to surcharge executor had to be upheld unless they appeared so clearly out of proportion to services performed as to be abuse of discretion.

5 Cases that cite this headnote

[23] Executors and Administrators ⇌ Extra Allowances

Executors and Administrators ⇌ Amount

Awards of extraordinary compensation to executor of \$2,500 for, inter alia, answering interrogatories, attending depositions of five witnesses, and conferring with attorneys in preparation for contest of executor's account, and \$14,500 extraordinary fees to executor's attorneys, who submitted records showing that they were entitled to compensation of over \$24,000 for their successful defense of contest, were not abuse of discretion.

5 Cases that cite this headnote

[24] Wills ⇌ Debts and Expenses

Wills ⇌ Nature and Grounds of Liability of Devisees and Legatees

Where no property of estate passed by intestacy, expenses of administration, including extraordinary compensation awarded to executor and its attorneys following successful defense to contest of executor's account brought by three of four beneficiaries were chargeable generally against all property otherwise distributable to residuary trust without differentiation as to burden to be borne by any beneficiary's particular interest.

9 Cases that cite this headnote

[25] Executors and Administrators ⇌ Allowance to or Against Contestants

Trial court's discretion to charge contestants with costs of proceeding which contested executor's account and sought to surcharge executor did not include power to impose on contestants entire burden of extraordinary compensation of executor and its attorneys following executor's successful defense against contest. West's Ann.Prob.Code, § 1232; West's Ann.Code Civ.Proc. § 1021.

4 Cases that cite this headnote

[26] **Interest** ⇌ Time from Which Interest Runs in General

Noncontractual interest on a creditor's claim against estate does not begin to run when claim is allowed but only when it is ordered paid.

[27] **Interest** ⇌ Rests in Computation

Executor was not entitled to award of interest on allowances of executor's compensation for period during which payment had been expressly ordered deferred pending conclusion of contests of executor's account.

Attorneys and Law Firms

*629 ***573 **997 George M. McClarrinon, Sacramento, for objectors and appellants.

Cushing, Cullinan, Hancock & Rothert, Vincent Cullinan and Lawrence W. Thorpe, San Francisco, for petitioner and respondent.

McCutchen, Doyle, Brown & Enersen, Brent M. Abel, Robert A. Mills and James C. Fowler, San Francisco, as amici curiae on behalf of petitioner and respondent.

Opinion

WRIGHT, Chief Justice.

Seth G. Beach died on August 4, 1968, leaving an estate valued at over \$2.4 million. His will, after making a number of smaller dispositions, placed the bulk of his estate in a testamentary trust for the benefit of his four children and named the Bank of California as both executor and trustee. The estate included 27,700 shares of Reserve Oil and Gas Company (Reserve) common stock appraised at \$391,262.50, or \$14.125 per share. In June 1969 the executor sold 3,000 shares of the stock for approximately \$16 per share to raise funds toward the payment of claims, taxes and expenses of administration. By the time the remaining 24,700 shares were distributed to the testamentary trustee in September 1970, their value had declined to little more than \$6 per share.

Three of the four residuary trust beneficiaries filed a contest of the executor's first account (Prob.Code, s 927)¹ claiming

the estate was entitled to damages from the executor for the latter's alleged negligence in not selling the stock while its market price was above its appraised value at the date of death. After discovery proceedings and a six-day nonjury trial, the trial court found that the executor had exercised due care in retaining the stock and accordingly rendered judgment rejecting *630 the exceptions to the account and declaring the account settled.² Appealing from the judgment,³ objectors (hereafter contestants) assert that the trial court applied an incorrect standard of care in exonerating the executor from negligence and that in ***574 **998 any event the finding of no negligence is unsupported by the evidence. We conclude that the executor was not negligent if it exercised ordinary care in applying the skills and knowledge ordinarily possessed by banks engaged in the trust business under similar circumstances to the administration of the present estate, and that the evidence sufficiently shows that the executor met this standard. We reject the contestants' contention that the bank can be called to account for performance of its duties as Trustee in the present proceeding for settlement of its account as Executor even though it might have to give due consideration to the existence and terms of the trust and the circumstances of the beneficiaries of the trust in order to properly carry out its duties as executor in the probate administration of the estate.

With regard to other contentions on appeal, we conclude that the trial court committed no error in denying contestants' demand for a jury trial, in allowing the executor extraordinary compensation for defendant against the contest, and in making an order subsequent to the judgment (separately appealed from) allowing the executor's attorneys extraordinary fees for such defense. However, such compensation and fees should have been charged against the entire estate instead of against only the contestants' shares, and the executor should not have been allowed interest based on deferral of some of its compensation. With modifications to eliminate these errors, we affirm the judgment and the order.

*Bank's Alleged Liability as Executor
for Retention of Stock in Estate*

[1] [2] [3] An executor is not liable for losses suffered by the estate without his fault (s 920) but may be required to reimburse the estate for losses proximately resulting from his failure to exercise the requisite duty of care in its administration (*631 Estate of Guiol (1972) 28 Cal.App.3d 818, 105 Cal.Rptr. 35). The standard of care

generally applicable to executors is 'that degree of prudence and diligence which a man of ordinary judgment would be expected to bestow upon his own affairs of a like nature.' (Estate of Moore (1892) 96 Cal. 522, 525, 31 P. 584. Estate of Barbikas (1959) 171 Cal.App.2d 452, 457—458, 341 P.2d 32, 37.) However, as a bank engaged in the business of acting as a fiduciary for estates and trusts (see Fin.Code, ss 106—107, 1502), the executor could be held liable for negligence if it failed to exercise the skill and knowledge ordinarily possessed by such professional fiduciaries. (Gagne v. Bertran (1954) 43 Cal.2d 481, 489, 275 P.2d 15; Rest.2d Torts, s 299A.)

[4] Contestants claim that the judgment is not supported by the evidence. To consider this contention, we review the facts, viewing the evidence in the light most favorable to the executor and indulging in all reasonable inferences and inferences that tend to sustain the judgment. (McCarthy v. Tally (1956) 46 Cal.2d 577, 581, 297 P.2d 981; Berniker v. Berniker (1947) 30 Cal.2d 439, 444, 182 P.2d 557; Estate of Bristol (1943) 23 Cal.2d 221, 223, 143 P.2d 689.)

Under the decedent's will the residue of the estate left in trust was to be divided into four shares, one for each of the testator's children. One third of each child's share was to be distributed to him or her at age 25, one third at age 30, and the remaining third at age 35, with periodic distributions of income from the part of the share held in trust. The decedent's four children were: Marianne Beach Edwards, born June 1, 1939; Joette Beach Carter, born January 1, 1942, and twins named Scott Gregory Beach and Schuyler Jean Beach, born November 19, 1952. Thus, upon the decedent's death both Mrs. Edwards and Mrs. Carter were eligible to receive one third of their trust shares, and Mrs. Edwards became eligible for an additional third nine months thereafter. Only Mrs. Carter and the twins are contestants in the present proceeding.

The principal assets of the estate and their appraised values as of the date of ***575 **999 death were 27,700 shares of Reserve common stock (\$391,262.50); Reserve convertible debentures (\$117,625); Mother Lode Bank common stock (\$300,600); government and public utility bonds (\$691,238); real estate (\$387,000); a lumber business which was liquidated during administration (\$299,389); and cash, notes, insurance and miscellaneous items (\$235,680).

The Reserve stock was listed on the American Stock Exchange. The company's main activity was the exploration for and production of oil. *632 The stock paid no

dividend, and the company's earnings were 'flat,' lacking any significant increase or decrease. The principal attraction of the stock was the prospect of capital growth through oil exploration activities.

Donald T. Dooling, the bank's trust officer immediately in charge of the estate, testified that when administration commenced in August 1968 he was concerned about the size of the Reserve holding and discussed the matter with Roger Newell, head of the bank's portfolio management section, who replied within a week or two that no immediate steps were necessary. Newell testified that on receiving Dooling's inquiry he went to the securities research section to read available information concerning Reserve and discuss the stock with the section's security analysts, whose function was to analyze individual securities and industries as well as general economic conditions. Newell concluded there was no reason to recommend immediate sale of the stock because he found no apparent 'deterioration' in the company's balance sheet, management, or other 'fundamentals.'

The following December, the bank's trust investment committee (T.I.C.), responsible for portfolio management decisions, made an 'initial review' of the estate's assets and decided to retain the stock because of the absence of deterioration in the company. In January 1969 the same committee considered what assets should be sold to raise cash needed for administration and decided 'to continue with the program to sell the real estate assets and to defer sale of Reserve.' The reasons for this decision were (1) that the real estate required current expenditures from the estate and was not as readily marketable as a listed stock, which could be sold later if and as needed, and (2) the absence of any evidence of deterioration in Reserve.⁴

In February 1969 the bank's trust Securities committee (T.S.C.) recommended that holdings of Reserve stock be sold. However, the T.S.C.'s recommendation was based on information furnished by the securities research section concerning the stock itself, without regard to the nature of the trust or estate in which the stock might be held. Despite the T.S.C.'s recommendation, the T.I.C. decided to retain the Beach estate's holding of the stock because of the continued absence of any sign of deterioration in the company.

*633 In May 1969, Dooling reported to John Pierson of the portfolio management section that the estate required \$390,000 of additional cash to conclude administration and suggested consideration of a sale of part of the Reserve holding for this purpose.⁵ About this time it was learned

that the Reserve convertible debentures held by the estate would be called for redemption on July 16th at a price below the current market price. To avoid a loss through redemption the estate would have either to sell the debentures or to convert them into some 7,600 shares of common stock thereby increasing its stock holding ***576 **1000 to some 35,300 shares. Under these circumstances the T.I.C., on advice from the portfolio management section, decided to raise the needed cash by selling the debentures, 3,000 shares of the stock, and certain short-term government bonds. Based on court authorization received on June 24, 1969, the executor sold the debentures for \$119,500 and the 3,000 shares of stock for \$47,607, reducing the estate's holding of the stock to 24,700 shares. Newell testified that in recommending this sale the portfolio management section felt that 'some reduction of Reserve was in order,' that the 'one-third reduction' (35,300 to 24,700 shares) was 'appropriate,' and that the remaining Reserve stock was acceptable for distribution into the trust because the company remained fundamentally sound and the stock had 'some long-term potential for increase in value.'

In July and August of 1969 the stock's market price commenced a gradual decline which continued into the following May and was followed by a moderate rise until distribution to the trustee in the fall.⁶ The bank's security analysts interpreted this decline as a reflection of a downward trend in stocks generally which was particularly pronounced *634 in oil stocks and not as indicating any deterioration in Reserve's operations or prospects.⁷

In determining that the Reserve stock was suitable for inclusion in the trust, the bank's portfolio management section considered the circumstances and resources of the trust beneficiaries and determined that the tentative objectives of the trust should include not only the production of income but also long-term capital growth as a protection against inflation. None of the beneficiaries or their families had any special problems of ill health or disability which would require unusual amounts of income. The twins in addition to having interests under the trust were the beneficiaries of a settlement agreement between their mother and the decedent under which the estate was paying \$500 per month for their benefit in child support and was obligated to pay the expenses of their college educations. Assets distributable to the trust other than the Reserve stock were producing substantial amounts of income.⁸ Under these circumstances the growth potential of Reserve was deemed to make it a desirable trust asset despite the fact that it paid no dividends.

[5] On the other hand, the portfolio management section did not base its decision ***577 **1001 to retain the 24,700 shares of Reserve stock on any standard of diversification.⁹ Its practice was not to attempt to diversify particular investment holdings during probate because of the restrictions on the executor's power to reinvest.¹⁰ Thus the retention of *635 the stock in the estate was based on the executor's determination that Reserve was not in a deteriorating condition, that no further cash was needed to complete administration of the estate, and that the stock was a suitable asset for inclusion in the trust.

[6] [7] The bank concedes that as a professional fiduciary its liability must be determined by more stringent standards than would the liability of a lay executor. Those undertaking to render expert services in the practice of a profession or trade are required to have and apply the skill, knowledge and competence ordinarily possessed by their fellow practitioners under similar circumstances, and failure to do so subjects them to liability for negligence. (Lucas v. Hamm (1961) 56 Cal.2d 583, 591, 15 Cal.Rptr. 821, 364 P.2d 685 (attorney); Gagne v. Bertran, supra, 43 Cal.2d 481, 489, 275 P.2d 15 (professional soil tester); Huffman v. Lindquist (1951) 37 Cal.2d 465, 473, 234 P.2d 34 (physician); Rest.2d Torts s 299A; cf. Coberly v. Superior Court (1965) 231 Cal.App.2d 685, 689, 42 Cal.Rptr. 64 (bank's liability as trustee despite exculpatory provisions of trust).) Proof of liability for failure to possess or exercise these professional attributes requires the testimony of a qualified expert where the claimed injury and its causes are beyond common knowledge. (Brown v. Colm (1974) 11 Cal.3d 639, 643, 114 Cal.Rptr. 128, 522 P.2d 688; Cobbs v. Grant (1972) 8 Cal.3d 229, 236, 104 Cal.Rptr. 505, 502 P.2d 1; Lysick v. Walcom (1968) 258 Cal.App.2d 136, 156, 65 Cal.Rptr. 406 (liability of attorney).)

The bank contends we should accept the findings of its freedom from negligence simply for lack of testimony by qualified experts sufficient to prove its noncompliance with the relevant professional standards. Plaintiff called three expert witnesses who gave reasoned opinions that the bank should have sold more or all of the Reserve stock during the administration of the probate estate. One of these witnesses was president of an investment management firm; another had been in charge of the trust department of a title company¹¹ from 1952 to 1966; and a third was director of research for a stock brokerage firm. It is unnecessary for us to consider the sufficiency of these witnesses' expert qualifications or testimony because the findings are fully supported by the

testimony of the Bank's expert witnesses, who included not only those *636 of its employees already mentioned but also an independent securities analyst and a senior trust officer of a competing bank with 38 years of banking experience. The latter witness testified in answer to a hypothetical question that in his opinion and based on his professional experience, ***578 **1002 the executor's retention of the 24,700 shares of Reserve stock in the estate was prudent and did not deviate from any investment standard in California known to the witness.

[8] It is suggested that the trial court's findings and memorandum decision show that it failed to give proper weight to the requirement that the bank use the skills and knowledge ordinarily possessed by professional fiduciaries in similar circumstances. However, the memorandum decision refers to the last mentioned expert as '(t)he most persuasive witness produced . . . who had excellent qualifications, vast experience, vast knowledge and who impressed the Court as being totally impartial' and further commends the bank's 'committee set-up of checks and balances and review within (its) trust department' as 'excellent.' The findings uphold the bank's exercise of due care 'in the manner in which it utilized all of its available relevant internal banking services and procedures' in making the decisions for which contestants seek to impose liability. (See fn. 12, Post.) Under these circumstances we are satisfied that the trial court properly judged the bank's conduct by professional rather than lay standards.

Contestants claim that the trial court erred in determining the bank's liability according to its exercise of care as an executor rather than as a testamentary trustee.¹² They contend that because the bank received title to the trust assets upon the decedent's death by operation of his will, subject only to probate administration (ss 28, 300; Estate of Lefranc (1952) 38 Cal.2d 289, 297, 239 P.2d 617; Estate of Muhammad (1971) 16 Cal.App.3d 726, 733, 94 Cal.Rptr. 856), the bank acted during probate *637 administration in a dual capacity as executor and trustee, and that its supposed capacity as trustee subjected the bank's decisions concerning the retention or disposition of the Reserve stock in the probate estate to the 'prudent investor' rule of Civil Code section 2261.¹³ Contestants are particularly concerned with the requirement ***579 **1003 implicit in the rule that investments be diversified (Mandel v. Cemetery Board, supra, 185 Cal.App.2d 583, 587, 8 Cal.Rptr. 342) and argue that by judging the bank solely on its performance as executor the trial court erroneously failed to consider

whether the retention of the unsold shares of Reserve stock in the estate violated this diversification requirement. Although contestants recognize that apart from sections 584.5—584.6 (see fn. 10, Ante) the executor could not have invested the proceeds from any sale of Reserve stock in anything but savings accounts or government securities (ss 584, 584.1, 585), they argue that even those forms of interest-bearing investments would have been preferable to retention in the estate of a disproportionately large holding of a 'speculative' stock yielding no dividends.

[9] In making this argument contestants overlook or misconceive basic distinctions between the bank's duties as executor and its duties as trustee. In the first place, the fact that the same bank was named as both executor and trustee in the will is immaterial. Even though the executor in handling estate assets may sometimes be required to take into account the fact that all or part of the net estate will be distributed to a testamentary trust with particular terms and beneficiaries, the executor's duty in this regard does not vary according to whether the executor and trustee are the same or different entities. The present bank's powers and *638 duties as executor were just as distinct from its powers and duties as trustee as if the will had named another bank as trustee. (Goad v. Montgomery (1898) 119 Cal. 552, 561, 51 P. 681 (powers of executor and trustee are distinct); Estate of de Laveaga (1958) 50 Cal.2d 480, 486, 326 P.2d 129 (beneficiaries' rights in trust not before court on decree of distribution to trustee); Estate of Freman (1960) 185 Cal.App.2d 527, 530, 8 Cal.Rptr. 311 (same).)

[10] Moreover, the anticipation that the bulk of the estate would be transferred to a testamentary trustee, which in this case happened to be the same bank, did not require the executor to manage the estate assets as if they were already being held under the terms of the trust. The executor has numerous functions and obligations not normally imposed upon a testamentary trustee, such as presenting the will for probate (ss 320, 323, 324), locating assets (ss 571, 581), locating beneficiaries (s 326, subd. 3), handling creditors' claims (ss 700—719, 730—738), providing for any immediate needs of the decedent's family through a family allowance (s 680), preparing returns for and paying estate and inheritance taxes (Int.Rev.Code, s 2002 (26 U.S.C. s 2002); Rev. & Tax Code, s 14101) as well as income taxes of the decedent and the estate (Int.Rev.Code, ss 641(b), 6012(b) (26 U.S.C. ss 641(b), 6012(b)); Rev. & Tax Code, s 18405) and distributing the remaining assets to the beneficiaries (ss 1000—1003, 1020—1029). The executor holds and manages the estate assets incidentally to performance of the

various duties of administering the estate, in contrast to the testamentary trustee, whose primary mission is to serve the trust beneficiaries under the terms of the trust. Usually, as in the instant case, such management by the executor concerns the interests of the trust beneficiaries only through its effect on the nature and value of the property distributed to the trustee and the timing of such distribution or distributions. (See Estate of de Laveaga, supra, 50 Cal.2d 480, 486, 326 P.2d 129; Estate of Marre (1941) 18 Cal.2d 184, 190, 114 P.2d 586.)

The present record reveals that in handling the Reserve stock in the probate estate the executor made three kinds of decision affecting the contestants' interests as trust beneficiaries and supports the trial court's conclusion that in all three areas the executor applied the requisite skills and knowledge and exercised the requisite degree of care. These decisions related to (1) preservation of the estate assets, (2) selection of assets to sell for needed cash ***580 **1004 and (3) timing of distributions to the trust. Each area of decision will be considered in turn.

*639 [11] A primary duty of the executor is to take reasonable steps to preserve the assets of the estate. (Estate of King (1942) 19 Cal.2d 354, 358, 121 P.2d 716; Estate of McSweeney (1954) 123 Cal.App.2d 787, 793, 268 P.2d 107; Estate of Smith (1931) 112 Cal.App. 680, 685, 297 P. 927. ¹⁴) The duty of preservation may require the executor to take affirmative steps to prevent deterioration in value. (Estate of Porter (1900) 129 Cal. 86, 61 P. 659 (sale of vineyard-orchard to avoid maintenance expenses pending escheat proceeding); Estate of Fernandez (1898) 119 Cal. 579, 585, 51 P. 851 (care of livestock until sold); Estate of Smith (1897) 118 Cal. 462, 50 P. 701 (maintenance of vineyard); cf. s 770, authorizing executor's sale without notice of '(p)erishable property and other personal property which will depreciate in value if not disposed of promptly.') However, an executor or administrator is not liable for any decreases in the value of estate assets on account of his acts or omissions done in good faith and without negligence. (s 920 ('He shall not . . . suffer loss by the decrease or destruction without his fault, of any part of the estate'); Estate of Armstrong (1899) 125 Cal. 603, 604—606, 58 P. 183; cf. Estate of Fraysher (1956) 47 Cal.2d 131, 138—139, 301 P.2d 848.)

[12] [13] Contestants argue that the executor's duty of preservation required it in the exercise of due care to sell the Reserve stock before it depreciated in market value, but the authorities upon which they rely indicate that such liability

has rarely been imposed. ¹⁵ The executor *640 normally is not held to account for failure to anticipate fluctuations in the price of a publicly traded stock arising from general market conditions, as distinct from conditions peculiar to the company in which the stock is held. (Estate of Kent (1936) 6 Cal.2d 154, 164—165, 57 P.2d 901; cf. Day v. First Trust & Sav. Bank (1941) 47 Cal.App.2d 470, 479, 118 P.2d 51.) There was evidence that the decline in the value of the Reserve stock reflected a decline in the market price of oil stocks generally (see fn. 7, Ante) and that the executor used reasonable care to ***581 **1005 become informed about any special circumstances that might affect the value of the stock. Thus, the evidence showed that during the initial two weeks of probate administration and periodically thereafter until distribution the executor ascertained through the research facilities of its investment department, staffed by security analysts and other experts, that there was no deterioration in the financial condition or management of Reserve which would indicate the existence or prospect of a substantial loss of intrinsic value. This evidence supported the trial court's finding that 'Reserve Oil & Gas Company was not in a deteriorating condition at any time during the probate of this estate and the (executor) so determined in the course of considering whether to retain any shares of the common stock of said corporation in the estate.'

[14] In addition to the executor's duty to preserve the estate assets, a second area of its responsibility necessarily affecting the contestants' interests in the trust was its selection of which assets to sell to raise the cash needed by the estate and which to retain for distribution into the trust. Contestants attack the executor's sales of short term government bonds authorized by the probate court in June 1969 along with the sale of part of the Reserve holdings. They argue that the executor was negligent in not obtaining the needed cash entirely from a larger disposition of Reserve instead of partly from Reserve and partly from the bonds. ¹⁶ To have retained the bonds for distribution to the trust would have been nearly equivalent to retaining cash for this purpose as the *641 maturity dates of the bonds made it probable that some and perhaps all would be converted to cash before administration of the estate was completed. ¹⁷ As previously stated, there was evidence that the executor in deciding not to obtain cash from selling additional shares of Reserve took into account the suitability of that stock for inclusion in the trust, based on the trust's terms, the circumstances and resources of the beneficiaries, the income produced by trust assets other than Reserve, the propriety of capital growth as one of the trust objectives, and a judgment that Reserve stock had longterm

potential for increase in value. This evidence supports the trial court's finding set forth in footnote 12, Ante, that the executor exercised due care in deciding to retain the stock for distribution to the trust.

[15] A third area of the executor's responsibilities having at least a potential effect on the contestants' interests as trust beneficiaries was the timing of the distribution of particular assets from the probate estate into the trust. Upon such distribution the management of the Reserve stock was freed from the restrictions imposed by the executor's multifarious duties and limited powers and became subject to the broad powers conferred upon the trustee by the terms of the trust.¹⁸ 'It is the established policy of this state, implemented by sections 1000 and 1001 of the Probate Code, to encourage the distribution of property to legatees as soon as can be done without jeopardizing the rights of others interested in the estate. (Citations.)' (***582 **1006 Estate of Toler (1957) 49 Cal.2d 460, 467, 319 P.2d 337, 341; accord, Estate of Hogemann (1965) 63 Cal.2d 131, 136, 45 Cal.Rptr. 149, 403 P.2d 405.) Although contestants as trust beneficiaries had standing to petition for preliminary distribution to the trustee (Estate of Mackay (1895) 107 Cal. 303, 307, 40 P. 558; Estate of McGirl (1932) 125 Cal.App. 310, 313, 13 P.2d 746), the executor's duty to avoid unreasonable delay in distribution was not dependent on the initiative of a beneficiary. (Estate of Taylor (1967) 66 Cal.2d 855, 858—859, 59 Cal.Rptr. 437, 428 P.2d 301.) The record shows that the executor in fact obtained authorization for preliminary distribution of the Mother Lode Bank stock from the estate to the trust in April 1969 (see fn. 8, Ante) and indicates no obstacle to preliminary distribution of the Reserve stock if its earlier subjection to trust management had been deemed advantageous.¹⁹ *642 However, there was no evidence that earlier distribution of the Reserve stock would have resulted in its being sold by the trustee at any price higher than its market value at the time it was in fact distributed.

Right to Jury Trial

Contestants claim the trial court erred in not ordering a jury trial of the factual issues raised by the contest. The executor asserts contestants waived any right to a jury trial by failure to make timely demand therefor. We need not pass on the waiver issue in view of our conclusion that even if the jury trial claim was effectively asserted it was properly denied on its merits.

[16] There is no right to a jury in probate proceedings unless that right is granted by statute. (Estate of Van Deusen

(1947) 30 Cal.2d 285, 291, 182 P.2d 565; Estate of England (1931) 214 Cal. 298, 300, 5 P.2d 428.) Thus there are express statutory provisions for the right in will contests before probate (s 371) and after probate (s 382), contests of allowed claims (s 928), determinations of rights to distribution (s 1081), and hearings on restoration of 'incompetent' persons to capacity (s 1471) and termination of conservatorships (s 1755).

Urging a broader right to a jury, contestants refer us to a line of cases construing the Probate Code and predecessor sections of the Code of Civil Procedure as granting a right to a jury trial in certain other probate proceedings in which the code expressly authorizes the formation of issues of fact to be tried. (See, e.g., Estate of Perkins (1943) 21 Cal.2d 561, 566—567, 134 P.2d 231 (final distribution).) However, no California appellate decision has declared or recognized any right to a jury trial in the kind of proceeding now before us—the resolution of exceptions to an executor's or administrator's account. To the contrary this court has consistently rejected any such right. (Estate of Smead (1938) 12 Cal.2d 20, 25, 82 P.2d 182; Estate of England, supra, 214 Cal. 298, 5 P.2d 428; Estate of Franklin (1901) 133 Cal. 584, 65 P. 1081; Estate of Sanderson (1887) 74 Cal. 199, 204—210, 15 P. 753; Estate of Moore (1887) 72 Cal. 335, 338—340, 13 P. 880.)

*643 [17] Contestants point out that the early Moore decision was based in part upon the impracticability of requiring 'a jury to wade through, comprehend, and disentangle a long account, or to express an intelligent judgment upon each item' (72 Cal. at p. 338, 13 P. at p. 882) and argue that the issues in the instant case of whether the executor was negligent in retaining the Reserve stock and if so the amount of resultant damages to the estate were relatively clearcut and as fully appropriate for jury ***583 **1007 consideration as the fact issues in regular civil actions for negligence or professional malpractice. However, there is another characteristic of claims for mismanagement of a probate estate which makes jury resolution inappropriate. Such claims, unlike ordinary claims for negligence or malpractice, are necessarily based on conduct that is subject to the independent control and supervision of the very court before which the claim must be asserted. As we said in Estate of Sanderson, supra, 74 Cal. 199, 208, 15 P. 753, 757: 'There may be a manifest propriety in requiring, at the request of a party, issues of fact such as ordinarily arise in the contest of the probate of a will, (was the testator of unsound mind? was he subjected to undue influence?) to be tried by a jury.'

But the proceeding in probate for the settlement of an account is *Sui generis*, bearing but a distant and incomplete analogy to the procedure for an accounting in equity. The executor or administrator derives his power to act as such from the will, or order of the court, but in his conduct of the affairs of the estate he is subjected largely to the discretion and control of the court. The court is bound to protect the estate, and, as far as may be, the rights of all concerned. Publication is had that all interested may have an opportunity, by written exceptions, to call the attention of the court to alleged errors or defects; but, in the absence of exceptions, the court may and should inquire into any matter which may seem to the court objectionable, and pass judgment thereon, and, in the presence of specific objections, the court is not limited to the specific objections.' (See also *Estate of Randall* (1922) 188 Cal. 329, 335, 205 P. 118.) In short, to subject the court's determination of the propriety of an executor's acts in the course of administering the estate to contradiction by a jury verdict would tend to dilute and undermine the court's ongoing responsibility for detecting and correcting executorial mismanagement.

[18] Finally, a legislative intent to disallow any right to jury trial in the present proceeding is implied by section 928, which expressly grants a right to a jury for exceptions to allowed claims, thus indicating exclusion of the right for other exceptions to an account under section 927, as in the present proceeding. (*Estate of England*, supra, 214 Cal. 298, 300, 5 P.2d 428.)

*644 [19] The trial court had discretion to impanel a jury to render an advisory verdict on issues raised by contestants' exceptions to the account. (*Estate of Moore*, supra, 72 Cal. 335, 339, 13 P. 880.) However, the court's absolute power to disregard any verdict that a jury might have returned renders pointless any examination on appeal of the denial of contestants' request for an advisory jury. (*Stearns v. Los Angeles City School Dist.* (1966) 244 Cal.App.2d 696, 725—726, 53 Cal.Rptr. 482.)

*Extraordinary Compensation of Executor and
Executor's Attorneys for Defense Against Contests*

The principal judgment rejecting contestants' exceptions to the executor's account included provisions (1) reserving jurisdiction to determine the value of the extraordinary services of the executor's attorneys in defending against the contests, (2) awarding the executor \$2,500 for extraordinary

services in such defense, and (3) ordering that all extraordinary compensation awarded the executor and its attorneys for such defense be charged against contestants' shares of the testamentary trust. Subsequently a petition of the executor's attorneys for extraordinary compensation of \$23,665 was filed and heard by the court, which thereupon awarded them \$14,500 for their defense of the contests. Contestants have appealed from this order as well as from the principal judgment.

[20] Contestants' initial objection to these awards is that the costs of defense should have been borne by the executor itself without reimbursement from the estate ***584 **1008 on the theory that such defense benefitted the executor and not the estate. The expenditures were for the purpose of protecting the executor from unjust surcharge for conduct in the administration of the estate which the present proceeding has determined to have been perfectly proper. Such expenditures for an executor's or administrator's successful defense against exceptions to his account are chargeable against the estate. (*Estate of Beirach* (1966) 240 Cal.App.2d 864, 866—868, 50 Cal.Rptr. 5; *Estate of Raphael* (1954) 128 Cal.App.2d 92, 97, 274 P.2d 880.)

[21] [22] [23] Contestants question the amounts of the extraordinary compensation awards. The trial court's findings state that the award of \$2,500 to the executor was for answering interrogatories, attending depositions of five witnesses (three of whom were bank employees), conferring with attorneys in preparation for depositions, interrogatories, and trial, and attending the six-day trial. The executor's attorneys were a partner and *645 an associate of a law firm. The award to them of \$14,500 was based not only on the trial court's observation of the contest proceedings but also upon an evidentiary hearing at which the attorneys submitted time records itemizing the services of their firm in the matter and showing that they would be entitled to compensation of over \$24,000 based on hourly rates of \$70 for the partner, \$40 for the associate, and \$15 for law student research clerks. In fixing the amount of extraordinary compensation for the executor and its attorneys the court could properly consider not only the time spent but also such factors as the value of the estate, the skills exercised, the amount in dispute, and the results obtained. (*Estate of Lanza* (1964) 229 Cal.App.2d 720, 726—727, 40 Cal.Rptr. 528; *Estate of Walker* (1963) 221 Cal.App.2d 792, 795, 34 Cal.Rptr. 832; *Estate of Merritt* (1950) 98 Cal.App.2d 70, 76, 219 P.2d 40.) The awards must be upheld unless they appear so clearly out of proportion to the services performed as to be an abuse of discretion. (*Estate of Taylor*, supra, 66 Cal.2d 855, 860, 59 Cal.Rptr. 437,

428 P.2d 301; Estate of Turino (1970) 8 Cal.App.3d 642, 649, 87 Cal.Rptr. 581.) The amounts of the present awards were within the court's discretion.

*Chargeability of Defense Expenditures
Against Contestants' Shares of Trust*

[24] The trial court exceeded its authority in ordering that the extraordinary compensation of the executor and its attorneys for defending the contests be charged against contestants' shares of the trust. The residue of the estate was distributed in trust for four beneficiaries of whom only three filed the present contests. Probate Code section 750 provides in effect that in the absence of contrary provision in the will debts and expenses of administration must be paid from the estate in the following order: (1) 'that portion of the estate not disposed of by the will,' (2) 'property given to residuary legatees and devisees,' (3) 'all other property devised and bequeathed' other than by specific devise or legacy, and (4) 'specific devises and legacies.' There being no property of the estate passing by intestacy, the expenses of administration, including the extraordinary compensation in question, were chargeable generally against all the property otherwise distributable to the residuary trust without differentiation as to the burden to be borne by any beneficiary's particular interest. (See Estate of Stauffer (1959) 53 Cal.2d 124, 129—131, 346 P.2d 748.)

[25] The executor seeks to sustain the charging of extraordinary compensation against contestants' trust shares by arguing that '(i)t would have *646 been manifestly unfair for a noncontesting beneficiary to participate in the burden of that expense incurred by the contesting beneficiaries,' and that '(t)he allocation of fees and costs is fully supported by the broad equitable discretion of the trial Court in assessing such fees and costs to the respective parties.' The trial court had discretion to charge contestants with costs of suit (s 1232) and ***585 **1009 acted within this authority in awarding such costs against contestants in the amount of \$774.47. However, the court's authority to award costs did not include power to impose upon contestants the entire burden of the extraordinary compensation of the executor and its attorneys for conducting the executor's defense against the contests. (Code Civ.Proc., s 1021; Estate of Marre , supra, 18 Cal.2d at p. 191, 114 P.2d 586; Estate of Harvey (1964) 224 Cal.App.2d 555, 561, 36 Cal.Rptr. 788; Estate of Bevelle (1947) 81 Cal.App.2d 720, 185 P.2d 90.) A contrary rule would unduly deter contestants such as these from

questioning the stewardship of executors and administrators through proceedings brought in good faith.

Interest on Deferred Payment of Executor's Compensation

In its order of September 28, 1970, settling the executor's account except as to issues raised by the contests, the probate court approved \$8,210.50 as the remaining balance of the executor's statutory compensation (s 901) and \$7,750 as extraordinary compensation to the executor for services rendered on or before September 4, 1970, but provided that payment of these amounts should not be made until the contests were concluded. The judgment on the contests entered August 1, 1972, now before us, provides 'that interest in the sum of \$1,955.17 computed at the rate of 7% Per annum on the withheld balance of statutory compensation and extraordinary services for (the executor) pursuant to this court's order of September 28, 1970, which interest is computed from said date to the date hereof is allowed (the executor).'

[26] [27] This allowance of interest was error. It is settled that noncontractual interest on a creditor's claim against an estate does not begin to run when the claim is allowed but only when it is ordered paid. (Palmer v. Gregg (1967) 65 Cal.2d 657, 661, 56 Cal.Rptr. 97, 422 P.2d 985; Hilton v. McNitt (1957) 49 Cal.2d 79, 83, 315 P.2d 1.) An analogous principle precluded any award of interest on allowances of executor's compensation for a period during which payment had been expressly ordered deferred pending occurrence of a future event.

*647 The judgment of August 1, 1972, is modified by striking therefrom the provisions for (1) charging extraordinary compensation of the executor and its attorneys 'against the principal share of the Contestants' trusts' and (2) allowing interest on the withheld amounts of executor's statutory and extraordinary compensation allowed in the order of September 28, 1970. As so modified, the judgment is affirmed. The order for payment of attorney's fees for extraordinary services, dated and filed on November 17, 1972, is affirmed. Each party shall bear its own costs on appeal.

McCOMB, TOBRINER, MOSK, SULLIVAN and CLARK, JJ., and TAYLOR, * J., Assigned, concur.

Rehearing denied; RICHARDSON, J., did not participate.

All Citations

15 Cal.3d 623, 542 P.2d 994, 125 Cal.Rptr. 570

Footnotes

- 1 All section references hereinafter are to the Probate Code unless otherwise indicated.
- 2 The probate court properly incorporated the settlement of the account into the judgment resolving the contested issues (s 1230) rather than making a separate order for settlement. (Estate of Jamison (1951) 107 Cal.App.2d 483, 485—486, 237 P.2d 546.)
- 3 Section 1240, authorizing appeals from an 'order . . . settling an account of an executor,' was enacted as a continuation of former Code of Civil Procedure section 963, subdivision 3, which authorized appeals from a 'judgment or order' settling an executor's account, and therefore authorized the present appeal from the judgment. (Estate of Jamison, supra, 107 Cal.App.2d at pp. 484—485, 237 P.2d 546.)
- 4 The estate received \$26,000 from the sale of real estate in November 1968, \$54,000 from the sale of the decedent's residence in December 1968 and January 1969, and approximately \$44,000 from the sale of real estate in July and August of 1969.
- 5 The estate's cash needs included \$200,000 for California inheritance taxes and \$611,000 for federal estate taxes. Cash was available to the estate not only from the cash assets but also from the maturing of some of the bonds and the sales described in footnote 4, Ante, of about one-third of the estate's real property.
- 6 An exhibit showing monthly price ranges on the American Stock Exchange indicates that the stock reached its high point for the period of probate administration in June 1969, when the price per share ranged between 14 # and 20 #. There was then a gradual decline to a range of 7 ¼ to 10 ¼ in December 1969 and thence to the low point of May 1970, when the price ranged between 4 # and 7 #. Distribution of the stock from the executor to the trustee was ordered on September 28, 1970, and acknowledged by the trustee's receipts dated October 6, 1970. The stock's price range for September was 7 ¼ to 10 and for October was 8 to 10 #.

The trial court's findings and memorandum decision state that at the conclusion of probate the stock was worth 'approximately \$6.00 per share.' Contestants' pleadings, filed August 7, 1970, and amended August 26, 1970, claimed damages based on an alleged current value of \$6 per share. This allegation was apparently based on the information reflected in the foregoing exhibit, which showed a price range of 5 # to 7 # for July 1970 and of 6 # to 8 for August 1970.
- 7 A security analyst employed in the bank's securities research section testified that between June 1969 and September 1970, while the monthly low price of Reserve stock was dropping by about 45 percent, there were corresponding percentage drops in the prices of the following oil stocks: Atlantic-Richfield, 47 percent; Union, 45 percent; Continental, 35 percent; Standard of California, 33 percent; Marathon, 50 percent.
- 8 Approximately \$72,000 in accumulated income was distributed from the probate estate to the trust: \$20,000 by preliminary distribution in April 1969, \$12,000 by preliminary distribution in September 1969, and \$40,000 by final distribution in September 1970. Moreover, the preliminary distribution of April 1969 included the 16,700 shares of Mother Lode Bank stock, which yielded annual dividend income of \$13,360.

- 9 To comply with the standard of the prudent investor laid down by section 2261 of the Civil Code, a trustee is ordinarily required to diversify the trust investments. (Mandel v. Cemetery Board (1960) 185 Cal.App.2d 583, 587, 8 Cal.Rptr. 342.)
- 10 The executor could invest cash of the estate only in savings accounts (s 585) or certain government securities (ss 585, 584.1). Contestants suggest that the executor had broader investment powers under section 584.5, which allows the probate court to 'authorize a personal representative to invest and reinvest any surplus moneys in his hands in any manner provided by the will.' (See also, s 584.6.) However, the section did not take effect until November 13, 1968, over three months after the decedent's death, and in any event there was no provision in the will for any such additional forms of investment. Contrary to contestants' argument, the mere absence from the will of expressed restrictions on the executor's powers of investment was not a provision permitting additional forms of investment within the meaning of section 584.5.
- 11 Title insurance companies have legal authority comparable to that of banks to maintain trust departments for carrying on the business of acting as executor or trustee or in other fiduciary capacities. (Fin.Code, ss 106, 107, 1501.)
- 12 The trial court found: '(The bank) demonstrated its exercise of care and prudence According to the standard of care and prudence prevailing in the State of California for executors of probate estates in the manner in which it utilized all of its available relevant internal banking services and procedures in determining the cash needs of the estate, in determining which assets would be used for payment of administration expenses, and in arriving at and executing its decision to sell 3,000 shares of Reserve Oil & Gas Company common stock during probate and its decision to retain the balance of said share (sic) for distribution to the trusts created under decedent's will.' (Italics supplied.) In another finding the trial court declared: 'At all times referred to in the contests, the (bank) acted in the capacity as an executor of a probate estate, and not as a trustee.' Similarly, the trial court's memorandum opinion stated, 'An executor is not a trustee; his duty is to conserve, not to invest.' It also said, 'It must be kept in mind that here we are dealing with a probate estate, not a trust problem.'
- 13 The prudent investor rule is embodied in subdivisions (1) and (2) of section 2261 of the Civil Code, which provide as follows:
- '(1) In investing, reinvesting, purchasing, acquiring, exchanging, selling and managing property for the benefit of another, a trustee shall exercise the judgment and care, under the circumstances then prevailing, which men of prudence, discretion and intelligence exercise in the management of their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income, as well as the probable safety of their capital. Within the limitations of the foregoing standard, and subject to any express provisions or limitations contained in any particular trust instrument, a trustee is authorized to acquire every kind of property, real, personal or mixed, and every kind of investment, specifically including, but not by way of limitation, corporate obligations of every kind, and stocks, preferred or common, which men of prudence, discretion and intelligence acquire for their own account.
- '(2) In the absence of express provisions to the contrary in the trust instrument, a trustee may continue to hold property received into a trust at its inception or subsequently added to it or acquired pursuant to proper authority if and as long as the trustee, in the exercise of good faith and of reasonable prudence, discretion and intelligence, may consider that retention is in the best interests of the trust. Such property may include stock in the trustee, if a corporation, and stock in any corporation controlling, controlled by, or under common control with such trustee.'
- 14 The last two cited cases hold that the executor's primary duty of preservation gives rise to his authority to deposit estate cash in a savings account but that because his duty to protect rather than invest estate assets,

such deposits are not mandatory. The duty to invest became mandatory by the enactment in 1971 of section 920.3, which requires an executor or administrator to show that he has kept cash not required for the estate's orderly administration invested in interest-bearing accounts or other investments authorized by law. The bulk of the present estate, including the Reserve stock, was distributed prior to this enactment. (See fn. 6, Ante.)

- 15 The cases relied upon by contestants are collected in an annotation in 92 A.L.R. 436, *Liability of executor or administrator for Loss by Depreciation in Value of Securities, through Retaining or Deferring Sale Thereof*. The few cases where liability was imposed are distinguishable. Thus, in *Mathews v. Sheehan* (1904) 76 Conn. 654, 57 A. 694, the administrators were held liable for not effecting a reasonably prompt settlement of the decedent's margin accounts with stockbrokers on the ground that maintaining a 'speculative account' in stocks and bonds was equivalent to carrying on a trade or business, which an executor may not do without special authorization except at his own risk. Although the same consequences attach to a personal representative's operation of a business in a California decedent's estate without specific authorization (*Estate of Burke* (1926) 198 Cal. 163, 166, 244 P. 340; *California Emp. etc. Com. v. Hansen* (1945) 69 Cal.App.2d 767, 770, 160 P.2d 173), the executor's mere retention of the Reserve shares in the instant estate did not amount to carrying on a trade or business. In *Mellier's Estate* (1933) 312 Pa. 157, 167 A. 358, the administrators were surcharged for refusing to close out securities margin accounts upon the demand of a putative widow whose claim against the estate had been settled by an agreement to pay her a cash amount and who demanded that in a falling stock market the accounts be liquidated at a point at which the remaining value would suffice to satisfy her claim. (Cf. s 754 (authorizing sale of estate property when 'necessary' to pay debts, legacies, family allowance or expenses), s 758 (any person interested may petition for order requiring executor or administrator to make a necessary sale).)
 - 16 Contestants do not contend that sales of additional Reserve should have been substituted for the sales of the decedent's residence and other real estate by which the estate was relieved from expenditures for taxes and insurance. (See fn. 4, Ante.) The residence was not needed or wanted by surviving family members and until sold was occupied by caretakers compensated from the estate.
 - 17 About half of the proceeds from the bond sales was produced by bonds maturing no later than February 1, 1970, and the remaining half came from bonds maturing no later than September 1, 1970. The petition for final distribution was filed July 22, 1970, and distribution of substantially all remaining assets was ordered on September 28, 1970.
 - 18 Four pages of the decedent's will were devoted to the listing of powers conferred upon the trustee 'in addition to those now or hereafter conferred by law.'
 - 19 There was nothing apparent in the record to prevent distribution of the retained Reserve stock to the trustee as soon as the estate's cash needs had been satisfied by the sale of government bonds, Reserve debentures, and 3,000 shares of Reserve stock authorized in June 1969. The petition for final distribution filed July 22, 1970, showed that property appraised at \$1,111,765.38 (including 24,700 shares of Reserve appraised at \$348,887.50) was then on hand in the estate for distribution to the trust, subject only to minor obligations for remaining executor's and attorneys' fees and closing costs.
- * Assigned by the Chairman of the Judicial Council.



PROBATE CODE - PROB

DIVISION 7. ADMINISTRATION OF ESTATES OF DECEDENTS [7000 - 12591] (Division 7 enacted by Stats. 1990, Ch. 79.)

PART 5. ESTATE MANAGEMENT [9600 - 10382] (Part 5 enacted by Stats. 1990, Ch. 79.)

CHAPTER 2. Estate Management Generally [9650 - 9657] (Chapter 2 enacted by Stats. 1990, Ch. 79.)

(a) Except as provided by statute and subject to subdivision (c):

9650. (1) The personal representative has the right to, and shall take possession or control of, all the property of the decedent to be administered in the decedent's estate and shall collect all debts due to the decedent or the estate. The personal representative is not accountable for any debts that remain uncollected without his or her fault.

(2) The personal representative is entitled to receive the rents, issues, and profits from the real and personal property in the estate until the estate is distributed.

(b) The personal representative shall pay taxes on, and take all steps reasonably necessary for the management, protection, and preservation of, the estate in his or her possession.

(c) Real property or tangible personal property may be left with or surrendered to the person presumptively entitled to it unless or until, in the judgment of the personal representative, possession of the property by the personal representative will be necessary for purposes of administration. The person holding the property shall surrender it to the personal representative on request by the personal representative.

(Enacted by Stats. 1990, Ch. 79.)



PROBATE CODE - PROB

DIVISION 7. ADMINISTRATION OF ESTATES OF DECEDENTS [7000 - 12591] (*Division 7 enacted by Stats. 1990, Ch. 79.)*

PART 5. ESTATE MANAGEMENT [9600 - 10382] (*Part 5 enacted by Stats. 1990, Ch. 79.)*

CHAPTER 2. Estate Management Generally [9650 - 9657] (*Chapter 2 enacted by Stats. 1990, Ch. 79.)*

(a) Except as provided in subdivisions (b) and (c), the personal representative shall keep all cash in his or her possession
9652. invested in interest-bearing accounts or other investments authorized by law.

(b) The requirement of subdivision (a) does not apply to the amount of cash that is reasonably necessary for orderly administration of the estate.

(c) The requirement of subdivision (a) does not apply to the extent that the testator's will otherwise provides.

(Enacted by Stats. 1990, Ch. 79.)



PROBATE CODE - PROB

DIVISION 7. ADMINISTRATION OF ESTATES OF DECEDENTS [7000 - 12591] (*Division 7 enacted by Stats. 1990, Ch. 79.*)

PART 5. ESTATE MANAGEMENT [9600 - 10382] (*Part 5 enacted by Stats. 1990, Ch. 79.*)

CHAPTER 1. General Provisions [9600 - 9645] (*Chapter 1 enacted by Stats. 1990, Ch. 79.*)

ARTICLE 1. Duties and Liabilities of Personal Representative [9600 - 9606] (*Article 1 enacted by Stats. 1990, Ch. 79.*)

9600. (a) The personal representative has the management and control of the estate and, in managing and controlling the estate, shall use ordinary care and diligence. What constitutes ordinary care and diligence is determined by all the circumstances of the particular estate.

(b) The personal representative:

- (1) Shall exercise a power to the extent that ordinary care and diligence require that the power be exercised.
- (2) Shall not exercise a power to the extent that ordinary care and diligence require that the power not be exercised.

(Enacted by Stats. 1990, Ch. 79.)



PROBATE CODE - PROB

DIVISION 7. ADMINISTRATION OF ESTATES OF DECEDENTS [7000 - 12591] (*Division 7 enacted by Stats. 1990, Ch. 79.*)

PART 5. ESTATE MANAGEMENT [9600 - 10382] (*Part 5 enacted by Stats. 1990, Ch. 79.*)

CHAPTER 1. General Provisions [9600 - 9645] (*Chapter 1 enacted by Stats. 1990, Ch. 79.*)

ARTICLE 1. Duties and Liabilities of Personal Representative [9600 - 9606] (*Article 1 enacted by Stats. 1990, Ch. 79.*)

(a) If a personal representative breaches a fiduciary duty, the personal representative is chargeable with any of the following that is appropriate under the circumstances:

9601.

(1) Any loss or depreciation in value of the decedent's estate resulting from the breach of duty, with interest.

(2) Any profit made by the personal representative through the breach of duty, with interest.

(3) Any profit that would have accrued to the decedent's estate if the loss of profit is the result of the breach of duty.

(b) If the personal representative has acted reasonably and in good faith under the circumstances as known to the personal representative, the court, in its discretion, may excuse the personal representative in whole or in part from liability under subdivision (a) if it would be equitable to do so.

(Enacted by Stats. 1990, Ch. 79.)



PROBATE CODE - PROB

DIVISION 7. ADMINISTRATION OF ESTATES OF DECEDENTS [7000 - 12591] (*Division 7 enacted by Stats. 1990, Ch. 79.*)

PART 5. ESTATE MANAGEMENT [9600 - 10382] (*Part 5 enacted by Stats. 1990, Ch. 79.*)

CHAPTER 4. Investments and Purchase of Property [9730 - 9737] (*Chapter 4 enacted by Stats. 1990, Ch. 79.*)

Pending distribution of the estate, the personal representative may invest money of the estate in possession of the personal representative in any one or more of the following:

9730.

- (a) Direct obligations of the United States, or of the State of California, maturing not later than one year from the date of making the investment.
- (b) 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 and to repurchase agreements fully collateralized by United States government obligations.
- (c) Units of a common trust fund described in Section 1585 of the Financial Code. The common trust fund shall have as its objective investment primarily in short term fixed income obligations and shall be permitted to value investments at cost pursuant to regulations of the appropriate regulatory authority.

(Amended by Stats. 2014, Ch. 71, Sec. 140. (SB 1304) Effective January 1, 2015.)



PROBATE CODE - PROB

DIVISION 7. ADMINISTRATION OF ESTATES OF DECEDENTS [7000 - 12591] (*Division 7 enacted by Stats. 1990, Ch. 79.*)

PART 5. ESTATE MANAGEMENT [9600 - 10382] (*Part 5 enacted by Stats. 1990, Ch. 79.*)

CHAPTER 4. Investments and Purchase of Property [9730 - 9737] (*Chapter 4 enacted by Stats. 1990, Ch. 79.*)

- 9731.** (a) Pending distribution of the estate, upon a showing that it is to the advantage of the estate, the court may order that money of the estate in possession of the personal representative be invested in securities of the United States or of this state.
- (b) To obtain an order under this section, the personal representative or any interested person shall file a petition stating the types of securities that are proposed to be purchased and the advantage to the estate of the purchase.
- (c) Notice of the hearing on the petition shall be given as provided in Section 1220.

(Enacted by Stats. 1990, Ch. 79.)



PROBATE CODE - PROB

DIVISION 7. ADMINISTRATION OF ESTATES OF DECEDENTS [7000 - 12591] (*Division 7 enacted by Stats. 1990, Ch. 79.*)

PART 5. ESTATE MANAGEMENT [9600 - 10382] (*Part 5 enacted by Stats. 1990, Ch. 79.*)

CHAPTER 4. Investments and Purchase of Property [9730 - 9737] (*Chapter 4 enacted by Stats. 1990, Ch. 79.*)

9732. (a) The court may order that money of the estate in possession of the personal representative be invested in any manner provided by the will if all of the following conditions are satisfied:

(1) The time for filing claims has expired.

(2) All debts, as defined in Section 11401, have been paid or are sufficiently secured by mortgage or otherwise, or there is sufficient cash in the estate aside from the money to be invested to pay all the debts, or the court is otherwise satisfied that all the debts will be paid.

(3) The estate is not in a condition to be finally distributed.

(b) To obtain an order under this section, the personal representative or any interested person shall file a petition showing the general condition of the estate and the types of investments that are proposed to be made.

(c) Notice of the hearing on the petition shall be delivered as provided in Section 1220. In addition, the petitioner shall cause notice of the hearing and a copy of the petition to be delivered pursuant to Section 1215 to all known devisees of property which is proposed to be invested. Where the property proposed to be invested is devised to a trust or trustee, notice of the hearing and a copy of the petition shall be delivered pursuant to Section 1215 to the trustee or, if the trustee has not yet accepted the trust, to the person named in the will as trustee. Delivery pursuant to this subdivision shall be to the person's last known address as provided in Section 1220.

(d) If no objection has been filed by an interested person, the court may make an order authorizing or directing the personal representative to invest such portion of the money of the estate as the court deems advisable in the types of investments proposed in the petition and authorized by the will. If there is no objection by an interested person and no substantial reason why some or all of the investment powers given by the will should not be exercised, the court shall make the order. The order may be for a limited period or until the administration of the estate is completed. Upon petition of the personal representative or any interested person, the order may be renewed, modified, or terminated at any time.

(Amended by Stats. 2017, Ch. 319, Sec. 76. (AB 976) Effective January 1, 2018.)

Conservatorships and Guardianships:

Standard is ordinary care and diligence as determined by all the circumstances of the particular estate (Prob. C. 2401). Prudent person standard found in Prob. C. 16040-42 applies but is tempered by the recognition that ordinary care and diligence varies with each case.

Standard is somewhere between executor/administrator and trustee. No need (as with trustee) to protect remainder interest.

Also see CRC 7.1009 and CRC 7.1059: competent management; refrain from unreasonably risky investments; refrain from loans of property; manage estate for benefit of the ward or the conservatee.

Depends on age of the ward or conservatee, other sources of income (public benefits, structured settlement, etc.), needs of ward or conservatee (purchase of vehicle, remodel house, costs of care), lifetime and estate tax considerations. For guardianships, consider the interplay with a parent's legal duty to provide support (if a surviving parent is around). What can legitimately be spent from the guardianship estate?



California Rules of Court

(Revised January 1, 2024)

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Rule 7.1009. Standards of conduct for the guardian of the estate

Except as otherwise required by statute, in the exercise of ordinary care and diligence in managing and controlling the estates of the ward, the guardian of the estate is to be guided by the following principles:

(a) Avoidance of actual and apparent conflicts of interest with the ward

The guardian must avoid actual conflicts of interest and, consistent with his or her fiduciary duty to the ward, the appearance of conflicts of interest. The guardian must avoid any personal, business, or professional interest or relationship that is or reasonably could be perceived as being self-serving or adverse to the best interest of the ward. In particular:

- (1) Except as appropriate for guardians who are not professional fiduciaries with full disclosure to the court, the guardian should not personally provide medical or legal services to the ward;
- (2) The guardian must be independent from all service providers, except when (a) no other guardian or service providers are reasonably available, (b) the exception is in the best interest of the ward, (c) the circumstances are fully disclosed to the court, and (d) prior court approval has been obtained;
- (3) The guardian must neither solicit nor accept incentives from service providers; and
- (4) The guardian must not engage his or her family members to provide services to the ward for a profit or fee when other alternatives are reasonably available. Where family members do provide such services, their relationship to the guardian must be fully disclosed to the court, the terms of engagement must be in the best interest of the ward compared to the terms available from independent service providers, the services must be competently performed, and the guardian must be able to exercise appropriate control and supervision.

A guardian's employees, including family members, are not service providers and are not providing services to the ward for a profit or fee within the meaning of this rule if their compensation is paid by the guardian and their services are either included in the guardian's petition for allowance of the guardian's compensation or are not paid from the ward's estate.

(b) Guardianship estate management

In addition to complying with applicable standards of estate management specified in rule 7.1059(b), the guardian of the estate must:

- (1) Manage the estate primarily for the ward's long-term benefit if the ward has a parent available who can provide sufficient support;
- (2) If it would be in the best interest of the ward and the estate, consider requesting court authority to support the ward from the estate if the ward does not have a parent available who can provide sufficient support.

Rule 7.1009 adopted effective January 1, 2008.

Advisory Committee Comment

The Probate and Mental Health Advisory Committee consulted with several organizations in the development of rule 7.1009, including the National Guardianship Association, a nationwide voluntary association of professional and family fiduciaries, guardians, and allied professionals. In developing this rule, the Probate and Mental Health Advisory Committee considered the National Guardianship Association's Standards of Practice. Some of these standards have been incorporated into the rule.



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Rule 7.1059. Standards of conduct for the conservator of the estate

Except as otherwise required by statute, in the exercise of ordinary care and diligence in managing and controlling the estate of the conservatee, the conservator of the estate is to be guided by the following principles:

(a) Avoidance of actual and apparent conflicts of interest with the conservatee

The conservator must avoid actual conflicts of interest and, consistent with his or her fiduciary duty to the conservatee, the appearance of conflicts of interest. The conservator must avoid any personal, business, or professional interest or relationship that is or reasonably could be perceived as being self-serving or adverse to the best interest of the conservatee. In particular:

- (1) Except as appropriate for conservators who are not professional fiduciaries with full disclosure to the court, the conservator should not personally provide housing, medical, or legal services to the conservatee;
- (2) The conservator must be independent from all service providers, except when (a) no other conservator or service providers are reasonably available, (b) the exception is in the best interest of the conservatee, (c) the circumstances are fully disclosed to the court, and (d) prior court approval has been obtained;
- (3) The conservator must neither solicit nor accept incentives from service providers; and
- (4) The conservator must not engage his or her family members to provide services to the conservatee for a profit or fee when other alternatives are reasonably available. Where family members do provide such services, their relationship to the conservator must be fully disclosed to the court, the terms of engagement must be in the best interest of the conservatee compared to the terms available from independent service providers, the services must be competently performed, and the conservator must be able to exercise appropriate control and supervision.

A conservator's employees, including family members, are not service providers and are not providing services to the conservatee for a profit or fee within the meaning of this rule if their compensation is paid by the conservator and their services are either included in the conservator's petition for allowance of the conservator's compensation or are not paid from the conservatee's estate.

(b) Conservatorship estate management

The conservator of the estate must:

- (1) Provide competent management of the conservatee's property, with the care of a prudent person dealing with someone else's property;
- (2) Refrain from unreasonably risky investments;
- (3) Refrain from making loans or gifts of estate property, except as authorized by the court after full disclosure;
- (4) Manage the estate for the benefit of the conservatee;
- (5) Subject to the duty of full disclosure to the court and persons entitled under law to receive it, closely guard against unnecessary or inappropriate disclosure of the conservatee's financial information;

- (6) Keep the money and property of the estate separate from the conservator's or any other person's money or property, except as may be permitted under statutes authorizing public guardians or public conservators and certain regulated private fiduciaries to maintain common trust funds or similar common investments;
- (7) Hold title reflecting the conservatorship in individual securities, mutual funds, securities broker accounts, and accounts with financial institutions;
- (8) Keep accurate records of all transactions. Professional fiduciaries must maintain prudent accounting systems and procedures designed to protect against embezzlement and other cash-asset mismanagement;
- (9) Undertake as soon as possible after appointment and qualification to locate and safeguard the conservatee's estate planning documents, including wills, living trusts, powers of attorney for health care and finances, life insurance policies, and pension records;
- (10) Undertake as soon as possible after appointment and qualification to secure the real and personal property of the estate, insuring it at appropriate levels, and protecting it against damage, destruction, or loss;
- (11) Make reasonable efforts to preserve property identified in the conservatee's estate planning documents;
- (12) Communicate as necessary and appropriate with the conservator of the person of the conservatee, if any, and with the trustee of any trust of which the conservatee is a beneficiary;
- (13) Pursue claims against others on behalf of the estate when it would be in the best interest of the conservatee or the estate to do so. Consider requesting prior court authority to pursue or compromise large or complex claims, particularly those that might require litigation and the assistance of counsel and those that might result in an award of attorneys' fees for the other party against the estate if unsuccessful, and request such approval before entering into a contingent fee agreement with counsel;
- (14) Defend against actions or claims against the estate when it would be in the best interest of the conservatee or the estate to do so. Consider requesting court approval or instructions concerning the defense or compromise of litigation against the estate;
- (15) Collect all public and insurance benefits for which the conservatee is eligible;
- (16) Evaluate the conservatee's ability to manage cash or other assets and take appropriate action, including obtaining prior court approval when necessary or appropriate, to enable the conservatee to do so to the level of his or her ability;
- (17) When disposing of the conservatee's tangible personal property, inform the conservatee's family members in advance and give them an opportunity to acquire the property, with approval or confirmation of the court; and
- (18) In deciding whether it is in the best interest of the conservatee to dispose of property of the estate, consider the following factors, among others, as appropriate in the circumstances:
 - (A) The likely benefit or improvement of the conservatee's life that disposing of the property would bring;
 - (B) The likelihood that the conservatee would need or benefit from the property in the future;
 - (C) Subject to the factors specified in Probate Code section 2113, the previously expressed or current desires of the conservatee concerning the property;
 - (D) The provisions of the conservatee's estate plan concerning the property;
 - (E) The tax consequences of the disposition transaction;
 - (F) The impact of the disposition transaction on the conservatee's entitlement to public benefits;
 - (G) The condition of the entire estate;

(H) Alternatives to disposition of the property;

(I) The likelihood that the property will deteriorate or be subject to waste if retained in the estate; and

(J) The benefit versus the cost or liability of maintaining the property in the estate.

Rule 7.1059 adopted effective January 1, 2008.

Advisory Committee Comment

The Probate and Mental Health Advisory Committee consulted with several organizations in the development of rule 7.1059, including the National Guardianship Association, a nationwide voluntary association of professional and family fiduciaries, guardians, and allied professionals. In developing this rule, the Probate and Mental Health Advisory Committee considered the National Guardianship Association's Standards of Practice. Some of these standards have been incorporated into the rules.



PROBATE CODE - PROB

DIVISION 4. GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE PROCEEDINGS [1400 - 3925] (Division 4 enacted by Stats. 1990, Ch. 79.)

PART 4. PROVISIONS COMMON TO GUARDIANSHIP AND CONSERVATORSHIP [2100 - 2893] (Part 4 enacted by Stats. 1990, Ch. 79.)

CHAPTER 6. Powers and Duties of Guardian or Conservator of the Estate [2400 - 2595] (Chapter 6 enacted by Stats. 1990, Ch. 79.)

ARTICLE 1. Definitions and General Provisions [2400 - 2410] (Article 1 enacted by Stats. 1990, Ch. 79.)

2401. (a) The guardian or conservator, or limited conservator to the extent specifically and expressly provided in the appointing court's order, has the management and control of the estate and, in managing and controlling the estate, shall use ordinary care and diligence. What constitutes use of ordinary care and diligence is determined by all the circumstances of the particular estate.

(b) The guardian or conservator:

(1) Shall exercise a power to the extent that ordinary care and diligence requires that the power be exercised.

(2) Shall not exercise a power to the extent that ordinary care and diligence requires that the power not be exercised.

(c) Notwithstanding any other law, a guardian or conservator who is not a trust company, or an employee of that guardian or conservator, in exercising their powers, may not hire or refer any business to an entity in which the guardian or conservator or an employee has a financial interest. For the purposes of this subdivision, "financial interest" shall mean (1) an ownership interest in a sole proprietorship, a partnership, or a closely held corporation, or (2) an ownership interest of greater than 1 percent of the outstanding shares in a publicly held corporation, or (3) being an officer or a director of a corporation.

(d) Subdivision (c) does not prohibit a professional fiduciary appointed as a guardian or conservator from hiring and compensating individuals as employees, with court approval.

(e) (1) Notwithstanding any other law, a guardian or conservator who is a trust company, in exercising its powers may not, except upon authorization of the court, invest in securities of the trust company or an affiliate or subsidiary, or other securities from which the trust company or affiliate or subsidiary receives a financial benefit or in a mutual fund, other than a mutual fund authorized in paragraph (5) of subdivision (a) of Section 2574, registered under the Investment Company Act of 1940 (Subchapter 1 (commencing with Sec. 80a-1) of Chapter 2D of Title 15 of the United States Code), to which the trust company or its affiliate provides services, including, but not limited to, services as an investment adviser, sponsor, distributor, custodian, agent, registrar, administrator, servicer, or manager, and for which the trust company or its affiliate receives compensation.

(2) Before authorization from the court, the guardian or conservator shall disclose to the court in writing the trust company's financial interest.

(Amended by Stats. 2021, Ch. 417, Sec. 21. (AB 1194) Effective January 1, 2022.)



PROBATE CODE - PROB

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ARTICLE 1. Definitions and General Provisions [2400 - 2410] (Article 1 enacted by Stats. 1990, Ch. 79.)

(a) If the guardian or conservator breaches a fiduciary duty, the guardian or conservator is chargeable with any of the following that is appropriate under the circumstances:

2401.3.

- (1) Any loss or depreciation in value of the estate resulting from the breach of duty, with interest.
 - (2) Any profit made by the guardian or conservator through the breach of duty, with interest.
 - (3) Any profit that would have accrued to the estate if the loss of profit is the result of the breach of duty.
- (b) If the guardian or conservator has acted reasonably and in good faith under the circumstances as known to the guardian or conservator, the court, in its discretion, may excuse the guardian or conservator in whole or in part from liability under subdivision (a) if it would be equitable to do so.

(Enacted by Stats. 1990, Ch. 79.)



PROBATE CODE - PROB

DIVISION 4. GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE PROCEEDINGS [1400 - 3925] (Division 4 enacted by Stats. 1990, Ch. 79.)

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CHAPTER 6. Powers and Duties of Guardian or Conservator of the Estate [2400 - 2595] (Chapter 6 enacted by Stats. 1990, Ch. 79.)

ARTICLE 1. Definitions and General Provisions [2400 - 2410] (Article 1 enacted by Stats. 1990, Ch. 79.)

(a) If the guardian or conservator is liable for interest pursuant to Section 2401.3, the guardian or conservator is liable for the greater of the following amounts:

2401.5.

(1) The amount of interest that accrues at the legal rate on judgments.

(2) The amount of interest actually received.

(b) If the guardian or conservator has acted reasonably and in good faith under the circumstances as known to the guardian or conservator, the court, in its discretion, may excuse the guardian or conservator in whole or in part from liability under subdivision (a) if it would be equitable to do so.

(Amended by Stats. 1998, Ch. 77, Sec. 2. Effective January 1, 1999.)



PROBATE CODE - PROB

DIVISION 4. GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE PROCEEDINGS [1400 - 3925] (*Division 4 enacted by Stats. 1990, Ch. 79.*)

PART 4. PROVISIONS COMMON TO GUARDIANSHIP AND CONSERVATORSHIP [2100 - 2893] (*Part 4 enacted by Stats. 1990, Ch. 79.*)

CHAPTER 6. Powers and Duties of Guardian or Conservator of the Estate [2400 - 2595] (*Chapter 6 enacted by Stats. 1990, Ch. 79.*)

ARTICLE 9. Investments and Purchase of Property [2570 - 2574] (*Article 9 enacted by Stats. 1990, Ch. 79.*)

(a) The guardian or conservator, after authorization by order of the court, may invest the proceeds of sales and any other money of the estate as provided in the order.

2570.

(b) To obtain an order of the court authorizing a transaction under subdivision (a) of this section, the guardian or conservator, the ward or conservatee, or any other interested person may file a petition with the court.

(c) Notice of the hearing on the petition shall be given for the period and in the manner provided in Chapter 3 (commencing with Section 1460) of Part 1. The court may order that the notice be dispensed with.

(d) The court may require such proof of the fairness and feasibility of the transaction as the court determines is necessary.

(e) If the required showing is made, the court may make an order authorizing the transaction and may prescribe in the order the terms and conditions upon which the transaction shall be made.

(Enacted by Stats. 1990, Ch. 79.)



PROBATE CODE - PROB

DIVISION 4. GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE PROCEEDINGS [1400 - 3925] (Division 4 enacted by Stats. 1990, Ch. 79.)

PART 4. PROVISIONS COMMON TO GUARDIANSHIP AND CONSERVATORSHIP [2100 - 2893] (Part 4 enacted by Stats. 1990, Ch. 79.)

CHAPTER 6. Powers and Duties of Guardian or Conservator of the Estate [2400 - 2595] (Chapter 6 enacted by Stats. 1990, Ch. 79.)

ARTICLE 9. Investments and Purchase of Property [2570 - 2574] (Article 9 enacted by Stats. 1990, Ch. 79.)

When authorized by order of the court under Section 2570, the guardian or conservator may purchase:

2571. (a) Real property in this state as a home for the ward or conservatee if such purchase is for the advantage, benefit, and best interest of the ward or conservatee.

(b) Real property as a home for those legally entitled to support and maintenance from the ward or conservatee if such purchase is for the advantage, benefit, and best interest of the ward or conservatee and of those legally entitled to support and maintenance from the ward or conservatee.

(Enacted by Stats. 1990, Ch. 79.)



PROBATE CODE - PROB

DIVISION 4. GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE PROCEEDINGS [1400 - 3925] (*Division 4 enacted by Stats. 1990, Ch. 79.*)

PART 4. PROVISIONS COMMON TO GUARDIANSHIP AND CONSERVATORSHIP [2100 - 2893] (*Part 4 enacted by Stats. 1990, Ch. 79.*)

CHAPTER 6. Powers and Duties of Guardian or Conservator of the Estate [2400 - 2595] (*Chapter 6 enacted by Stats. 1990, Ch. 79.*)

ARTICLE 9. Investments and Purchase of Property [2570 - 2574] (*Article 9 enacted by Stats. 1990, Ch. 79.*)

2572. An order authorizing the guardian or conservator to purchase real property may authorize the guardian or conservator to join with the spouse of the ward or the spouse or domestic partner of the conservatee or with any other person or persons in the purchase of the real property, or an interest, equity, or estate therein, in severalty, in common, in community, or in joint tenancy, for cash or upon a credit or for part cash and part credit. When the court authorizes the purchase of real property, the court may order the guardian or conservator to execute all necessary instruments and commitments to complete the transaction.

(Amended by Stats. 2001, Ch. 893, Sec. 37. Effective January 1, 2002.)



PROBATE CODE - PROB

DIVISION 4. GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE PROCEEDINGS [1400 - 3925] (Division 4 enacted by Stats. 1990, Ch. 79.)

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CHAPTER 6. Powers and Duties of Guardian or Conservator of the Estate [2400 - 2595] (Chapter 6 enacted by Stats. 1990, Ch. 79.)

ARTICLE 9. Investments and Purchase of Property [2570 - 2574] (Article 9 enacted by Stats. 1990, Ch. 79.)

2573. An order authorizing investment in bonds issued by any state or of any city, county, city and county, political subdivision, public corporation, district, or special district of any state may authorize the guardian or conservator to select from among bonds issued by any such issuer, without specifying any particular issuer or issue of bonds, if the type of issuer is designated in general terms and the order specifies as to such bonds a minimum quality rating as shown in a recognized investment service, a minimum interest coupon rate, a minimum yield to maturity, and the date of maturity within a five-year range.

(Enacted by Stats. 1990, Ch. 79.)



PROBATE CODE - PROB

DIVISION 4. GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE PROCEEDINGS [1400 - 3925] (Division 4 enacted by Stats. 1990, Ch. 79.)

PART 4. PROVISIONS COMMON TO GUARDIANSHIP AND CONSERVATORSHIP [2100 - 2893] (Part 4 enacted by Stats. 1990, Ch. 79.)

CHAPTER 6. Powers and Duties of Guardian or Conservator of the Estate [2400 - 2595] (Chapter 6 enacted by Stats. 1990, Ch. 79.)

ARTICLE 9. Investments and Purchase of Property [2570 - 2574] (Article 9 enacted by Stats. 1990, Ch. 79.)

(a) Subject to subdivision (b), the guardian or conservator, without authorization of the court, may invest funds of the estate pursuant to this section in:

2574.

- (1) Direct obligations of the United States, or of the State of California, maturing not later than five years from the date of making the investment.
 - (2) United States Treasury bonds redeemable at par value on the death of the holder for payment of federal estate taxes, regardless of maturity date.
 - (3) Securities listed on an established stock or bond exchange in the United States which are purchased on such exchange.
 - (4) Eligible securities for the investment of surplus state moneys as provided for in Section 16430 of the Government Code.
 - (5) 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 and to repurchase agreements fully collateralized by United States government obligations.
 - (6) Units of a common trust fund described in Section 1585 of the Financial Code. The common trust fund shall have as its objective investment primarily in short-term fixed income obligations and shall be permitted to value investments at cost pursuant to regulations of the appropriate regulatory authority.
- (b) In making and retaining investments made under this section, the guardian or conservator shall take into consideration the circumstances of the estate, indicated cash needs, and, if reasonably ascertainable, the date of the prospective termination of the guardianship or conservatorship.
- (c) This section shall not limit the authority of the guardian or conservator to seek court authorization for any investment, or to make other investments with court authorization, as provided in this division.

(Amended by Stats. 2014, Ch. 71, Sec. 136. (SB 1304) Effective January 1, 2015.)

Trusts:

1. Prudent Investor Rule of UPIA

In exercising its investment powers, the trustee must comply with the requirements set forth in the Uniform Prudent Investor Act (UPIA) (Prob C §§16045–16054), which sets forth the standard of care a trustee must use in investing:

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

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

The UPIA specifically recognizes the importance of analyzing both risk and return consistent with modern investment theory.

Although it is anticipated that an individual of ordinary intelligence and without special skills may serve as trustee, trustees have a duty to apply the full extent of their skills. Prob C §16014. Further, a professional trustee is typically held to a higher standard of care than the average individual. *Estate of Beach* (1975) 15 C3d 623; *Estate of Collins* (1977) 72 CA3d 663.

2. Duty to Invest and Make Property Productive

The trustee ordinarily has a duty to invest trust property, preserve it, and make it productive. Prob C §§16006–16007. Consider duties with regard to real property. The duty to invest extends to accumulated but undistributed income as well as principal. *Lynch v John M. Redfield Found.* (1970) 9 CA3d 293. However, the settlor may negate this duty to invest through express language in the trust instrument. Prob C §§16000, 16046(b).

3. Duty to Diversify

Probate Code §16048 requires that, "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." Case law also places a duty on trustees to diversify investments. See Estate of Beach (1975) 15 C3d 623, 634 n9; Estate of Collins (1977) 72 CA3d 663.

Unless the trust instrument provides otherwise or it is imprudent to do so, the trustee must diversify the portfolio by investing in more than one asset and type of assets.

4. Considerations Regarding Diversification

a. Risk Management

Diversification is fundamental to risk management and is therefore an integral factor in prudent investment management.

The trustee should understand and evaluate the various risks that apply to portfolio management:

- Market, or systemic, risk (the risk that a diversified portfolio will not produce the expected return).
- Unique, or unsystemic, risk (the risk associated with a specific issue in the portfolio, such as a company's decision to file for bankruptcy).
- Interest rate risk (the risk that interest rates will change, which can affect the current market value of fixed-income instruments, as well as valuations for stocks).
- Risk of inflation (the risk that the purchasing power of the portfolio, or the income distributed from the portfolio, will not keep pace with price changes).

b. Factors Relevant in Assessing Adequacy of Diversification

Among others, the trustee should consider the following factors in deciding whether the trust assets are properly diversified:

- Size, terms, and purpose of the trust.
- Representation of different asset classes.
- Correlation of returns between the different asset classes.
- Needs of the beneficiaries and the type of return produced by each investment.

- General economic conditions.
- Volatility of each asset and the percentage of trust corpus that the asset represents.
- Percentage of the total company that the trust holds.
- Market for the asset.
- Tax planning implications.



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DIVISION 9. TRUST LAW [15000 - 19530] (*Division 9 enacted by Stats. 1990, Ch. 79.*)

PART 4. TRUST ADMINISTRATION [16000 - 16632] (*Part 4 enacted by Stats. 1990, Ch. 79.*)

CHAPTER 1. Duties of Trustees [16000 - 16110] (*Chapter 1 enacted by Stats. 1990, Ch. 79.*)

ARTICLE 2. Trustee's Standard of Care [16040 - 16042] (*Article 2 enacted by Stats. 1990, Ch. 79.*)

16040. (a) The trustee shall administer the trust with 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.

(b) The settlor may expand or restrict the standard provided in subdivision (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.

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

(Amended by Stats. 1995, Ch. 63, Sec. 4. Effective January 1, 1996.)



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ARTICLE 2.5. Uniform Prudent Investor Act [16045 - 16054] (*Article 2.5 added by Stats. 1995, Ch. 63, Sec. 6.)*

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

16045.

(*Added by Stats. 1995, Ch. 63, Sec. 6. Effective January 1, 1996.*)



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ARTICLE 2.5. Uniform Prudent Investor Act [16045 - 16054] (*Article 2.5 added by Stats. 1995, Ch. 63, Sec. 6.*)

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

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

(Added by Stats. 1995, Ch. 63, Sec. 6. Effective January 1, 1996.)



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ARTICLE 2.5. Uniform Prudent Investor Act [16045 - 16054] (*Article 2.5 added by Stats. 1995, Ch. 63, Sec. 6.*)

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

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

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

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

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

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

(Added by Stats. 1995, Ch. 63, Sec. 6. Effective January 1, 1996.)



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ARTICLE 2.5. Uniform Prudent Investor Act [16045 - 16054] (*Article 2.5 added by Stats. 1995, Ch. 63, Sec. 6.)*

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

(Added by Stats. 1995, Ch. 63, Sec. 6. Effective January 1, 1996.)



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ARTICLE 2.5. Uniform Prudent Investor Act [16045 - 16054] (*Article 2.5 added by Stats. 1995, Ch. 63, Sec. 6.)*

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

(Added by Stats. 1995, Ch. 63, Sec. 6. Effective January 1, 1996.)



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ARTICLE 2.5. Uniform Prudent Investor Act [16045 - 16054] (*Article 2.5 added by Stats. 1995, Ch. 63, Sec. 6.)*

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

(Added by Stats. 1995, Ch. 63, Sec. 6. Effective January 1, 1996.)



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ARTICLE 2.5. Uniform Prudent Investor Act [16045 - 16054] (*Article 2.5 added by Stats. 1995, Ch. 63, Sec. 6.)*

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

(*Added by Stats. 1995, Ch. 63, Sec. 6. Effective January 1, 1996.*)



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ARTICLE 2.5. Uniform Prudent Investor Act [16045 - 16054] (*Article 2.5 added by Stats. 1995, Ch. 63, Sec. 6.*)

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

16052.

(1) Selecting an agent.

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

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

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

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

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

(Added by Stats. 1995, Ch. 63, Sec. 6. Effective January 1, 1996.)



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ARTICLE 2.5. Uniform Prudent Investor Act [16045 - 16054] (*Article 2.5 added by Stats. 1995, Ch. 63, Sec. 6.)*

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

(Added by Stats. 1995, Ch. 63, Sec. 6. Effective January 1, 1996.)



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ARTICLE 2.5. Uniform Prudent Investor Act [16045 - 16054] (*Article 2.5 added by Stats. 1995, Ch. 63, Sec. 6.)*

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

16054.

(*Added by Stats. 1995, Ch. 63, Sec. 6. Effective January 1, 1996.*)