

Memorandum 91-37

Subject: Study L-3010 - Trustees' Fees (California Bankers Association Proposal)

At the April meeting, the Commission deferred consideration of Memorandum 91-29 concerning the issues raised by the attached letter from David Lauer on behalf of the California Bankers Association, because the memorandum had not been received by several Commissioners and others had not had time to review it. The staff also informed the Commission that the issues did not appear to be noncontroversial. Thus the proposed amendments were not suitable for inclusion in the Commission's urgency bill (SB 896), as requested by CBA, until the problems could be ironed out. A letter from Irwin Goldring, expressing his opinion and not on behalf of the State Bar, was also distributed at the April meeting. (See letter attached to April Minutes.)

The staff requested CBA to give further consideration to the requested amendments in light of the urgency issues and the need to agree on noncontroversial amendments in this legislative session. On April 22, Mr. Lauer informed the staff by telephone that CBA was most concerned with the issue of which beneficiaries are to get notice of a proposed increase in trustee's fees under Probate Code Section 15686. (The CBA position on this issue is discussed in Mr. Lauer's letter in paragraph 2 on page 2 of Exhibit 1.)

Notice of Increase in Trustee's Fee

CBA proposes to revise the standard in Section 15686(b) so that it is the same as the standard for beneficiaries entitled to receive accounts under Section 16062. That section provides for accounting to "each beneficiary to whom income or principal is required or authorized in the trustee's discretion to be currently distributed." The intent is to be able to give the notice of proposed fee increase to the same people who are getting trust accounts for each trust. The CBA proposal could be implemented by the following amendment:

Prob. Code § 15686. Notice of increased trustee's fee

15686. (a) As used in this section, "trustee's fee" includes, but is not limited to, the trustee's periodic base fee, rate of percentage compensation, minimum fee, hourly rate, and transaction charge, but does not include fees for extraordinary services.

(b) A trustee may not charge an increased trustee's fee for administration of a particular trust unless the trustee first gives at least 60 days' written notice of that increased fee to each beneficiary of the trust ~~whose interest may be affected by the increased fee~~ who is entitled to an account under Section 16062 and to each beneficiary of the trust who was given the last preceding account.

(c) If a beneficiary files a petition under Section 17200 for review of the increased trustee's fee or for removal of the trustee and serves a copy of the petition on the trustee before the expiration of the 60-day period, the increased trustee's fee does not take effect as to that trust until otherwise ordered by the court or the petition is dismissed.

Comment. Subdivision (b) of Section 15686 is amended to provide that notice of a proposed fee increase is to be given to the same beneficiaries who are receiving accounts under the trust, whether they are required to be given accounts under Section 16062 or receive accounts as a matter of practice. If a person is no longer a beneficiary (as in a case where the person's interest has terminated or the person has died), subdivision (b) does not require notice of an increased fee to such person. See also Sections 15802 (notice to person holding power to revoke trust), 15804 (notice in case of future interest).

The chief advantage of this proposal for trustees would be administrative simplicity. The accounting standard is more concrete than the "affected by the increased fee" standard and it would be easy to implement since the trustee has the system in place.

CBA also argues that it is inconsistent to require notice of an increased fee to go to beneficiaries who are not entitled to accounts. CBA makes the point that the management of the trust as reflected in the account is potentially a much more important matter than a minimal change in a transaction charge. This is a strong argument, as far as it goes. The staff notes, however, that not all fee increases are minimal -- consider, for example, the magnitude of an ad valorem fee increase from 1% to 1.25% or higher or a new \$10,000 minimum annual fee.

It should be noted that there are a number of exceptions to the duty to account that are picked up by the proposed amendment. The duty

to account under Section 16062(a) does not apply (1) to a living trust created before July 1, 1987, (2) to certain testamentary trusts created before July 1, 1987, (3) where the trust waives the account, (4) in the case of a revocable trust to the extent provided by Section 15800, (5) where the beneficiary has waived the account, or (6) where the beneficiary and trustee are the same person. In practice, it does not appear that these exceptions would impair the policy of the fee increase notice statute, since we are informed that corporate trustees give accounts to a broad class of adults, if for no other reason than to start the running of the statute of limitations under Section 16460.

Section 16062(a) provides for accounts "to each beneficiary to whom income or principal is required or authorized in the trustee's discretion to be currently distributed." In practical terms, the staff does not see anything wrong with the CBA proposal to give notice only to this class of beneficiaries, since a trust where all fees are paid out of the principal account and where none of the remainder beneficiaries is entitled to an account seems highly unlikely. We assume as a general rule that notice to present income beneficiaries is most likely to be effective. Our only reservation has to do with the concern expressed in the past over the interests of remainder beneficiaries, which played a part in developing the existing language. We do not know whether that concern is still important.

The staff recommends approval of the amendment to Section 15686 set out above, so long as it is acceptable to bar association representatives. If there is a serious objection from practitioners to relying on the trust account standard, the amendment would not be appropriate. The alternative mentioned in the earlier memorandum (the standard for approving a trustee's resignation) is not discussed here because CBA sees the same problems with that standard as with the existing standard.

Notice Involving Future Interests

An important and sometimes overlooked general notice provision in the Trust Law excuses the duty to give notice to certain beneficiaries of future interests. Section 15804(a) seems to apply to any notice

given under the Trust Law, but paragraph (1) determines membership in a class at the time of commencement of "proceedings." This is unduly limited and should be expanded to cover notices in situations that do not involve judicial proceedings. This would help clarify the duty to give a notice of proposed fee increase and the duty to give an account where a future interest is held by a class of persons and would avoid any argument that notices in non-hearing matters need to be given to unborns (by appointment of a guardian ad litem). The language of this section should also be adjusted to make clear that "notice" includes other papers so that accounts and reports are covered.

The staff recommends the following technical revision:

§ 15804. Notice to beneficiaries of future interests

15804. (a) Subject to subdivisions (b) and (c), it is sufficient compliance with a requirement in this division that a notice (including other papers) be given to a beneficiary, or to a person interested in the trust, if notice is given as follows:

(1) Where an interest has been limited on any future contingency to persons who will compose a certain class upon the happening of a certain event without further limitation, notice shall be given to the persons in being who would constitute the class if the event had happened immediately before the commencement of the proceedings proceeding or, if there is no proceeding, if the event had happened immediately before notice is given.

(2) Where an interest has been limited to a living person and the same interest, or a share therein, has been further limited upon the happening of a future event to the surviving spouse or to persons who are or may be the distributees, heirs, issue, or other kindred of the living person, notice shall be given to the living person.

(3) Where an interest has been limited upon the happening of any future event to a person, or a class of persons, or both, and the interest, or a share of the interest, has been further limited upon the happening of an additional future event to another person, or a class of persons, or both, notice shall be given to the person or persons in being who would take the interest upon the happening of the first of these events.

(b) If a conflict of interest involving the subject matter of the trust proceeding exists between a person to whom notice is required to be given and a person to whom notice is not otherwise required to be given under subdivision (a), notice shall also be given to persons not otherwise entitled to notice under subdivision (a) with respect to whom the conflict of interest exists.

(c) Nothing in this section affects any of the following:

(1) Requirements for notice to a person who has requested special notice, a person who has filed notice of

appearance, or a particular person or entity required by statute to be given notice.

(2) Availability of a guardian ad litem pursuant to Section 1003.

Comment. Subdivision (a)(1) of Section 15804 is amended to clarify its application to notices given under this division outside of judicial proceedings, such as a notice of trustee's fee under Section 15686. The introductory clause of subdivision (a) is revised to make clear that other papers, such as accounts to beneficiaries under Section 16062, are covered by this section.

Vehicle for Amendments

If the Commission approves the proposed amendments, the staff would include them in either the urgency bill (CBA's preference) or the general probate bill, assuming that the occasion arises to make the amendment. We do not want to slow down the urgency bill by making further amendments unless we have to correct something already in the bill. It is possible that CBA will find another bill.

Respectfully submitted,

Stan Ulrich
Staff Counsel



California Bankers Association
Established 1891

Memo 91-37

EXHIBIT 1

Study L-3010

April 3, 1991

Stan G. Ulrich, Esq.
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

**Re: Probate Code Section 15686 - Notice of Trustee Fee Increase
California Bankers Association
Proposed Amendment**

Dear Stan:

This letter will serve as a written follow-up to the meeting of March 19, 1991 at which you, Paulette Leahy and I were in attendance.

As we discussed at our meeting, the California Bankers Association, (the "CBA") believes that certain provisions of new Probate Code Section 15686 require important clarification which the CBA requests be made in the Commission's "clean-up" amendment to the Trust Law. The CBA is hereby requesting that the Law Revision Commission add these amendments to the urgency bill which the Commission is currently proposing for enactment effective July 1, 1991. In the interest of clarity, I am attaching a copy of the changes which the CBA strongly recommends. The specific changes are underlined on the attachment.

The changes, and the reasons for which the CBA believes these changes to be necessary, are summarized as follows:

1. Changing the provision "trustee fees include, but are not limited to" to "trustee fee means": Since the current version of the statute includes a complete list of trustee fees, it is unnecessary to leave open to interpretation whether there are any additional "charges" to be included. Trustees need certainty as to what the statute requires, and should not be put in the position of being second guessed later, when an increased expense not controlled by the Trustee arguably could be covered by the notice provision.

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2. Notice change requirement to include only persons receiving statements pursuant to Probate Code Section 16062. This change brings consistency to the Trust Law and conforms the fee increase notice to Section 16062 which states the requirement of who is to receive trust statements. It does not appear to be logical to require notices of fee increases to those persons whom the Law Revision Commission felt did not need to receive statements of a Trust's transactions as provided under Section 16062. Sales and purchases of assets and disbursements to beneficiaries are arguably more important information than a minimal change in the trustee transaction charge which may not even directly affect a beneficiary receiving the notice.

In addition, the contingent beneficiaries who may be required to receive notice under the current version of Section 15686 will often be minors who are the issue of persons already receiving statements due to their own beneficial status. The added expense of providing this type of notice under Section 15686 does not appear warranted in the overall scheme of trust administration. In addition to providing this notice, trustees would be forced to monitor the existence of newly born contingent beneficiaries who may never receive any interest in the trust at all, thereby substantially increasing a trustee's costs and expenses. In summary, this provision is not administratively meaningful or reasonable from a cost and expense perspective.

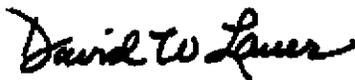
3. Notices to conservators, guardians, or attorneys in fact. It should be clearly stated that notices to conservators, guardians or attorneys in fact, if appointed, are legally sufficient. This clarification could appear in Section 15686, or could be added to the provisions governing statements of account (Section 16060 et. seq.) to make the same notice clearly applicable to all account and notice provisions throughout the Trust Law.

Thank you for your consideration of these proposed changes which the CBA is requesting. Of course, Paulette and I are available to discuss these proposed changes

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should you or the Commission require additional information or clarification. The CBA is extremely interested in enacting these important clarifications to the Trustee fee notice legislation prior to July 1, 1991, the effective date of Section 15686.

Very truly yours,



DWL:bam

cc: CBA Board Trust Executive Committee
CBA Trust State Government Affairs Committee

**CBA Trust State Governmental Affairs
Suggested Revision to Trustee Fee
Statute Effective 7/1/91**

15686. (a) As used in this section, "trustee's fee" means the trustee's periodic base fee, rate of percentage compensation, minimum fee, hourly rate and transaction charge, but does not include fees for extraordinary services.

(b) A trustee may not charge an increased trustee's fee for administration of a particular trust unless the trustee first gives at least 60 days written notice of that increased fee to each beneficiary who is entitled to statements of accounts pursuant to Section 16062. If a beneficiary has a conservator, or has designated to the trustee an attorney in fact to receive such notice, such notice shall be sent to the conservator or attorney in fact.