

Memorandum 91-45

Subject: Study L-3010 - Trustees' Fees (Notice of Fee Increase)

Attached to this memorandum is a staff draft of a recommendation to clarify which trust beneficiaries are required to be given notice of a proposed increase in trustees' fees.

At the June meeting, the Commission discussed a different draft proposal for dealing with the concerns raised by the California Bankers Association. This proposal was opposed by the Executive Committee of the State Bar Estate Planning, Trust and Probate Law Section, and by others. The Commission directed the staff to continue working on the statute in an attempt to find some middle ground that both the bar and the banks could accept.

The draft recommendation provides for notice of a fee increase to beneficiaries who get accounts and, in addition, to any beneficiary who requests notice. This offers a practical solution to the banks' administrative burden while also protecting the rights of interested remainder beneficiaries. It should also be noted that the requirement that notice be sent to all beneficiaries who were given the most recent account of the administration of the trust will also pick up some beneficiaries who are not strictly entitled to an account under the statutory accounting standard in Probate Code Section 16062.

The new staff draft will not give as broad a notice as the "affected interest" standard in existing Section 15686. But considering all the factors, the staff concludes that the abstract interest in giving notice to all potentially affected beneficiaries does not justify the administrative cost.

Respectfully submitted,

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#L-3010

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07/01/91

RECOMMENDATION

relating to

NOTICE OF TRUSTEES' FEES

Before a trustee may implement an increase in the trustee's fees, the trustee must give notice of the proposed fee increase to each beneficiary of the trust whose interest may be affected by the fee increase.¹ Beneficiaries who are sufficiently concerned may attempt to negotiate the matter with the trustee, petition the court for review of the increased fee,² or seek to transfer the trust to another trustee.³

Standard for Determining Which Beneficiaries Should Receive Notice

The "affected interest" standard for giving notice has been criticized as being vague and difficult to apply. This standard may impose a significant administrative burden on trust companies in order to determine which beneficiaries' interests would be affected under each trust administered by the trustee. The trustee would need to review and interpret the terms of each trust and then identify and locate beneficiaries of future interests in any situation where the fees are charged in part to the principal account of the trust. It has also been suggested that it is inconsistent as a matter of policy to require notice of an increase in a trustee's fee to be given to

1. Prob. Code § 15686 (operative July 1, 1991). For background, see *Recommendation Relating to Trustees' Fees*, 20 Cal. L. Revision Comm'n Reports 279 (1990).

2. See Prob. Code §§ 15686(c), 17200(b)(9).

3. See Prob. Code §§ 15640(c) (resignation of trustee with consent of adult beneficiaries), 15642(b)(5) (petition for removal of trustee for excessive compensation), 15645 (costs and attorney's fees in proceedings for transfer of trust to successor trust company), 15660(c) (filling vacancy by agreement of adult beneficiaries).

beneficiaries who are not receiving trust accounts. As a general rule, income beneficiaries receive trust accounts, but not remainder beneficiaries.⁴

The "affected interest" standard does, however, embody an important principle: trust beneficiaries whose interests are chargeable with the payment of the trustee's fees should have a right to be informed of an increase in fees and an opportunity to take appropriate action. This right should not depend on whether the person is an income beneficiary or remainder beneficiary.

Balancing these competing considerations, the Commission recommends that the "affected interest" standard be replaced by a more specific description of the beneficiaries entitled to notice. The notice of an increase in the trustee's fee should be given to all beneficiaries (1) who are entitled to accounts under the statute, (2) who were given the last preceding account (whether or not required), or (3) who have made a written request to the trustee for notice of an increased trustee's fee and supplied an address for mailing notice.

By requiring notice to beneficiaries who are entitled to an account or actually receiving accounts, the recommended standard recognizes that proposed fee increases are an important matter of interest to beneficiaries who follow the administration of the trust. The opportunity to request notice of an increased fee is provided to recognize the interest of other beneficiaries in being informed of

4. Probate Code Section 16062, with certain exceptions, requires the trustee to account "to each beneficiary to whom income or principal is required or authorized in the trustee's discretion to be currently distributed." The accounting requirement of Section 16062 does not apply in the following circumstances: (1) under living trusts created before July 1, 1987, (2) under 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 the Commission is informed that corporate trustees give accounts to a broad class of adult beneficiaries even though not strictly required to do so by statute. There is an incentive to account in order to start the running of the statute of limitations under Section 16460.

changes in the expense of administration of the trust. The "notice on written request" standard avoids the administrative burden of existing law and makes it easy for trustees to determine who is entitled to notice of a proposed fee increase. While this standard imposes a greater burden on remainder beneficiaries, those who are interested in the matter can be expected to take the simple step of making a written request to the trustee.

Notice Involving Future Interests

A useful but perhaps overlooked general notice provision in the Trust Law excuses the duty to give notice to certain beneficiaries of future interests.⁵ For example, this provision permits notice to be given only to the holder of an interest, without the need to give notice to contingent beneficiaries, such as the holder's spouse, distributees, heirs, issue, or other kindred.⁶ The assumption is that the present interest holder can be expected to protect the interest and that requiring notice to be given to those whose interests are contingent would be burdensome and needless duplication. The present interest holder is viewed as representing the entire class of potential holders of the interest.

However, in two respects, this "virtual representation" section is unnecessarily restricted. The statute should be revised to make clear that it also applies to service of papers, such as accounts and reports. In addition, the rule for determining membership in a class of beneficiaries by applying the terms of the governing instrument at the time of "commencement of the proceedings"⁷ should be expanded to take account of situations that do not involve judicial proceedings. This would avoid any argument that notices in non-hearing matters need to be given to minors or unborns by appointment of guardians ad litem.⁸

5. Prob. Code § 15804.

6. Prob. Code § 15804(a)(2).

7. Prob. Code § 15804(a)(1).

8. See Prob. Code § 1003.

RECOMMENDED LEGISLATION

The Commission's recommendation would be effectuated by enactment of the following measure:

An act to amend Sections 15686 and 15804 of the Probate Code, relating to trusts and trustees.

The people of the State of California do enact as follows:

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

SECTION 1. Section 15686 of the Probate Code is amended to read:

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~~ all of the following persons:

(1) Each beneficiary who is entitled to an account under Section 16062.

(2) Each beneficiary who was given the last preceding account.

(3) Each beneficiary who has made a written request to the trustee for notice of an increased trustee's fee and has given an address for receiving notice by mail.

(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 specify the beneficiaries who are to be given notice of a proposed fee increase. The list of beneficiaries entitled to notice replaces the former standard requiring notice to beneficiaries whose interest may be affected by the fee increase. Under the new standard for giving notice

of a fee increase, if a beneficiary is not receiving accounts under the trust (whether required by Section 16062 or given as a matter of practice), the beneficiary will need to give the trustee a written request for notice of a fee increase. Under subdivision (b)(3), it is the responsibility of the person requesting notice to provide an address. The trustee's duty to give notice is satisfied by sending notice to the address supplied by the person requesting the notice.

Subdivision (b) requires notice to be given only to "beneficiaries." Thus, if a person is no longer a beneficiary (as in a case where the person's interest has terminated), subdivision (b) does not require notice of an increased fee to be given the person, even if the person had given the trustee a written request for notice. See also Sections 15802 (notice to person holding power to revoke trust), 15804 (notice in case of future interest).

Prob. Code § 15804 (amended). Notice to beneficiaries of future interests

SEC. 2. Section 15804 of the Probate Code is amended to read:

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

(1) Where an interest has been limited on any future contingency to persons who will compose a certain class upon the happening of a certain event without further limitation, notice shall be given to the persons in being who would constitute the class if the event had happened immediately before the commencement of the proceedings 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.

(d) As used in this section, "notice" includes other papers.

Comment. Subdivision (a)(1) of Section 15804 is amended to clarify its application to notices given under this division outside of judicial proceedings. See, e.g., Section 15686 (notice of trustee's fee).

Subdivision (d) has been added to make clear that other papers, such as accounts to beneficiaries under Section 16062, are covered by the rules governing notice in this section.