

Memorandum 88-45

Subject: Study L-3010 - Fees of Corporate Trustees

At the May meeting, the Commission discussed fees of corporate trustees in general terms and heard the views of a variety of bank trust officers and of the California Bankers Association. Time did not permit the Commission to review the possible approaches to the problem in detail. Accordingly, this memorandum again presents an analysis of various legislative approaches to dealing with the problem. We are not redistributing the background studies that accompanied Memorandum 88-36.

ANALYSIS OF POSSIBLE APPROACHES

The following discussion considers eight legislative schemes that were the subject of the questionnaire distributed to probate attorneys in the summer of 1987. These approaches are in the same order in which they appeared in the questionnaire. Two other detailed statutory proposals have been submitted to the Commission, one by the California Bankers Association, included in Exhibit 2, and another by Ken Klug, included in Exhibit 3. These proposals are also considered below in paragraphs (i) and (j).

We have also received two letters on this subject since the May meeting. A letter from Natalie Montgomery relating her experience in changing trustees is attached as Exhibit 10. A letter from Luther J. Avery relating to the earlier version of this memorandum is attached as Exhibit 11. Mr. Avery comments in some detail on each of the legislative schemes discussed below.

(a) Permit transfer to another corporate trustee with court approval where it is shown to be to the advantage of the trust in light of the fees charged by the existing corporate trustee.

This approach would use a modified form of the existing mechanisms for removing a trustee and appointing a new trustee to fill the

vacancy. See Prob. Code §§ 15642, 15660 (included in Exhibit 1 attached to this memorandum).

Advantages. This is an incremental change that preserves the traditional approach of using court procedures to deal with such issues. By providing a standard for replacement of a trust company, the procedure avoids the potential tax problems of giving an unrestricted power to the beneficiaries.

Disadvantages. Requiring a cotrustee or beneficiary to petition the court involves the expense of attorney's fees and court costs as well as some delay and the risk of failure. The remarks of Assembly Member Harris at the Commission's March 1987 meeting support the conclusion that the problem will not be solved by employing an impedimentary procedure.

Staff conclusion. This procedure can be useful and should be incorporated in a legislative proposal, but it should not be the only remedy.

(b) Permit transfer to another corporate trustee if the corporate trustee to be replaced and all trust beneficiaries agree.

This approach would rely on the consent of the affected persons. It is consistent with the procedure in existing law permitting a trustee to resign with the consent of all adult beneficiaries who are receiving or are entitled to receive income under the trust or to receive a distribution of principal if the trust were terminated at the time consent is sought. See Prob. Code § 15640 (included in Exhibit 1).

Advantages. By requiring the consent of the trust company that is sought to be replaced, this procedure avoids the adversarial nature of some other procedures. This procedure should be readily acceptable to corporate trustees.

Disadvantages. The presumed acceptability of this procedure to trust companies points up its defect. The trust company is in control of both the fees and the consensual replacement procedure.

Staff conclusion. This is not an adequate procedure standing by itself, but it is useful to make clear that the trustee and beneficiaries can agree to replace the trustee without the need to seek court approval.

(c) Permit transfer to another corporate trustee if all trust beneficiaries agree on the transfer (consent of existing corporate trustee not required).

Replacement of a trust company by agreement of all beneficiaries takes the view that in most cases the trust company is not providing a unique service and thus may be replaced by action of the consumers involved, just as in the case of a broker, financial advisor, or attorney. This scheme requires that the beneficiaries find a successor trust company who is ready to take over administration of the trust before the existing trust company is removed. This procedure is akin to the power of all beneficiaries to compel modification of a trust as provided in Probate Code Section 15403, except that no court petition is required. (See Section 15403 in Exhibit 1.)

Advantages. This approach is simple and avoids the expense and impediment of hiring an attorney and petitioning the court. Its simplicity might also have the effect of restraining fee increases. This procedure would facilitate the operation of the competitive market.

Disadvantages. There is a potential tax problem arising from the IRS view that the power to replace is equivalent to the power to control the trustee. (This point was discussed more fully in Memorandum 87-54.) Trust companies are concerned that services may suffer where fees are the sole basis for selecting or replacing a trustee. It is also argued that a potential successor trustee would not want to get involved unless the existing trust company is willing to step aside. (See letter from Ken Klug attached as Exhibit 3.)

Staff conclusion. The tax problem will need to be dealt with in some fashion before this scheme can be proposed. If the action of the beneficiaries can only be taken if some standard is met, the revenue ruling should not apply. The problem is to draft a standard that can be fairly applied without the need in most cases to seek court review.

(d) Permit transfer to another corporate trustee upon the direction of all cotrustees other than the one to be replaced (consent of beneficiaries not required).

This scheme is primarily aimed at the situation where a trustee has one or more individuals selected as trustee by the settlor,

presumably because of a relationship with or confidence placed in that person. As in the approach outlined in paragraph (c) above, this scheme treats the trust company cotrustee as a provider of services that can be provided equally well by some other trust company. The individual cotrustee may be in a better position than the beneficiaries to judge the fees and services of the trust company and to seek a replacement trust company.

Advantages. This procedure is even simpler than requiring the consent of all beneficiaries.

Disadvantages. As in the case of replacement by beneficiaries, there may be tax problems, particularly if the cotrustee is also a beneficiary. There may be a problem of the individual cotrustee "shopping" for a more compliant trust company. (See letter from Sandra Kass attached as Exhibit 6.) It may also be improper for a cotrustee to be able to exercise such a power without the consent or knowledge of the beneficiaries or approval by a court.

Staff conclusion. The staff is persuaded that this scheme, as first proposed in Memorandum 87-54, is too broad. If the Commission is interested in this approach, the cotrustee's power should be limited to individual trustees acting pursuant to a standard and with notice to the beneficiaries.

(e) Require prior court approval of any increase in the fees charged by a trustee.

Requiring prior court approval of fee increases would have the effect of returning this aspect of trust administration to the earlier statutory scheme where trust administration was viewed more paternalistically. It should be remembered, however, that prior law did not *require* court approval of fees in testamentary trusts, nor did continuing jurisdiction apply to living trusts.

Advantages. This would put a substantial brake on fee increases since the burden would be on the trustee to seek and obtain court approval.

Disadvantages. This scheme seems too restrictive since it might prevent justifiable fee increases to which no interested person objects. It is also a stricter scheme than that prevailing under the

former statute providing continuing court jurisdiction which did not explicitly require prior court approval.

Staff conclusion. There is no problem with a trust company voluntarily seeking approval of a fee increase, but to require prior court approval seems too burdensome. Perhaps if a standard could be derived so that minor increases would not be subject to the requirement, this scheme could be made workable.

(f) Permit the trustee to increase fees if no objection is received after giving notice to all trust beneficiaries.

This scheme is analogous to the notice of proposed action procedure under the Independent Administration of Estates Act. If there is an objection under this scheme, then the trustee would have to decide whether to petition the court for an increase in fees or seek to resign as trustee. The beneficiaries would also be able to seek the removal and replacement of the trust company.

Advantages. This scheme uses a familiar probate mechanism to attempt to strain out acceptable fee increases without having to go to court. It also could impel trust companies to seek an acceptable fee level so that objections will not be encountered. The notice with power to object allows the beneficiaries to prevent the fee increase in the first instance without any need to go to court or hire an attorney.

Disadvantages. This procedure would not work as intended if beneficiaries routinely object to proposed fee increases, thereby rendering the procedure essentially the same as requiring court approval of fee increases. However, even if this is the likely result, this approach seems less onerous than the approaches outlined in paragraphs (a) and (e) above.

Staff conclusion. This appears to be a desirable procedure that balances the interests of the beneficiary and the trust company even though it is not known whether beneficiaries would routinely object.

(g) Provide specifically by statute for court review of the reasonableness of a trustee's fees on petition by any interested person.

This is a clarification of existing law which permits a beneficiary or trustee to petition the court concerning the internal

affairs of a trust. See Prob. Code § 17200; see also Prob. Code §§ 15680 (increase or decrease of fees specified in trust instrument), 15681 (trustee entitled to reasonable compensation where trust silent), 15682 (determination of prospective compensation), 17200(b)(9) (petition fixing or allowing payment of trustee's compensation). (Copies of these provisions are included in Exhibit 1.)

Advantages. This would merely make crystal clear what is already the law.

Disadvantages. This is not a very creative response and is not likely to satisfy those desiring reform.

Staff conclusion. Legislation of this sort should not be necessary, but past experience reveals that lawyers and courts can find limitations and technicalities where none are apparent or intended.

(h) Establish a statutory fee schedule for trustees based on the value of the trust estate and permit charging additional fees for extraordinary services only with court approval.

A statutory fee schedule would presumably be patterned after the statutory fee applicable in probate. However, as discussed below, there are other types of statutory fees schemes in other states.

Advantages. This approach would adopt a familiar scheme and regularize fees. Based on information received from corporate trustees, the major corporate trustees seem to have arrived at approximately the same minimum percentage fees, although where percentages are the same, the actual fee on a smaller trust may vary because of the bracket to which the minimum fee is applied. Statutory control of the amount of the fees would restrain future increases because of the difficulty of amending the statute. (Of course, from the viewpoint of the trustee, this is a distinct disadvantage.)

Disadvantages. If it is assumed that there is competition under the current state of affairs, a statutory fee schedule would probably restrict or eliminate it. There is a perception in some quarters that fee schedules are unfair or excessive. Since statutory fees have been the subject of much discussion at recent Commission meetings, there is nothing that needs to be added here.

Staff conclusion. In light of current controversies concerning probate fees, a statutory fee schedule does not seem to be an ideal

scheme for dealing with fees in trust administration. To the extent that trust companies can avoid the statutory fee schedule by overriding provisions in the trust instrument, other solutions would still be required. The percentage fees typically charged by trust companies, which are subject to some negotiation and court review, represent a better scheme than the more rigid statutory fee schedule. In other words, nothing would seem to be gained by adopting this scheme in place of some of the other proposals.

Law in Other States. At the May meeting, the Commission requested information concerning statutory fees in other states, particularly New York. The following states have (or have recently had) statutory fees: Delaware, Georgia, Hawaii (also has UPC scheme), Kentucky (UPC scheme except for court appointed trustee), Maryland, New Jersey, New York, North Carolina, South Carolina, and Tennessee. See G. Bogert, *The Law of Trusts and Trustees* § 975 (2d rev. ed. 1983 & Supp. 1986). Most, if not all, of these states provide that the fee schedule is subject to fees provided in the trust instrument. In the last few years, several states have replaced their statutory fees with the Uniform Probate Code scheme which permits the trustee to collect compensation from the trust subject to court review. There has been a trend at least since 1970 of replacing statutory fee schedules with the reasonable fee scheme. See Daly, *How Fiduciary Fees Are Determined: A Nationwide Survey*, 116 Tr. & Est. 348 (1977).

Several states have schedules based on either a percentage of principal or a percentage of income. E.g., Delaware, Hawaii, Maryland, New Jersey, and North Carolina. Georgia bases its fee only on income plus additional fees for extraordinary services.

Several states apply the same fee schedule to both personal representatives, or some other fiduciary, and trustees. E.g., Delaware, South Carolina, Tennessee.

New York statute. The fees of a corporate trustee are governed by the trust instrument if it provides a fee. If the trust instrument does not provide a specific fee and the principal value of the trust is over \$400,000, the trustee is entitled to a reasonable fee which is subject to court review. If the trust has a value under \$400,000, the trustee is entitled to a fee of 1% of the principal value per year, and

this amount is deemed reasonable unless the trust instrument or an agreement between the trustor and corporate trustee provides otherwise. N.Y. Surr. Ct. Proc. Act § 2312 (McKinney Supp. 1988). The practice commentary following Section 2312 states that the 1% figure in effect places a ceiling on commissions for trusts under \$400,000 principal value.

In any event, unless the trust instrument provides otherwise, a corporate trustee is entitled to receive at least the compensation provided for an individual trustee. For post-1956 trusts, this amount is 0.85% on the first \$400,000, 0.45% on the next \$600,000, and 0.3% on amounts over \$1,000,000. See N.Y. Surr. Ct. Proc. Act §§ 2309, 2312 (McKinney 1967 & Supp. 1988). The practice commentary following Section 2312 states that this provision "effectively sets forth a floor for the commissions of a corporate trustee as not less than the commissions to which an individual would be entitled."

On petition of an interested person, the court may order a corporate trustee that has received "excessive compensation" from a trust to make refunds. N.Y. Surr. Ct. Proc. Act § 2114 (McKinney Supp. 1988).

(i) CBA Draft (See Exhibit 2).

The draft submitted by the California Bankers Association would require the trustee to give notice to beneficiaries 60 days before increasing its percentage rate of compensation. If all beneficiaries object in writing, the trustee must seek a compromise, postpone the increase so that a petition can be filed by a beneficiary to review the fee, or resign as trustee. In any event, one or more beneficiaries could petition for court review of the fee increase.

A proposed fee increase may not be implemented until it is confirmed by the court if a petition is filed before the stated effective date. Petitions for review of the fee after its effective date relate only to prospective fees. The court would have discretion to charge fees, costs, and expenses of proceedings under Section 17200 against the trust, although no standard is provided.

If the trustee resigns, the trustee is not liable to beneficiaries for resigning. In general, the beneficiaries who are given the power

to consent under this scheme are those currently required or authorized in the trustee's discretion to distribution of income or principal.

The CBA draft combines aspects of the schemes outlined in paragraphs (a), (b), and (f) discussed above, with several added wrinkles. For additional details, you should consult the draft itself.

Mr. Avery reacts favorably to the CBA draft. See Exhibit 11, at 4.

(j) Klug Draft (see Exhibit 3).

This draft would set a percentage fee standard which, if it is exceeded during a 12-month period, triggers a duty by the trustee to notify the beneficiaries of the right to replace the trustee. For the sake of discussion, the draft sets a standard of 1% of average fair market value during any 12-month period. ("Average fair market value" is defined in two ways, although the median definition does not seem to work as drafted.)

Court proceedings are not required if the trustee and all beneficiaries agree to the replacement. If all beneficiaries agree but the trustee does not consent, the beneficiaries must petition the court and the trustee is liable for attorney's fees and costs if the trustee unreasonably refused to resign. If all the beneficiaries do not agree, an interested person may petition for replacement. In court proceedings, the court must find that the 1% standard is exceeded, that a replacement trustee has consented in writing, and that the compensation that would be paid to a replacement trustee (including the cost of any bond) is sufficiently lower than the compensation paid to the current trustee to justify replacement. The court must also find that replacement is in the best interests of all the trust beneficiaries.

The new trustee is determined by the trust instrument, or if no successor or means of selection is provided, by the unanimous consent of the beneficiaries or on petition to the court if necessary. The draft explicitly provides that the trustee may charge a reasonable termination fee.

This draft combines aspects of the schemes discussed in paragraphs (a) and (b), subject to the percentage fee trigger. For additional details, you should consult the draft itself.

Mr. Avery believes that the Klug draft is "as faulty as a statutory fee schedule." See Exhibit 11, at 4.

OTHER FACTORS

Standard for Removal

Some of the approaches discussed above can be adjusted by employing a different standard for action by the beneficiaries, cotrustees, or the court. The standard suggested in connection with the scheme for permitting replacement of the trustee with court approval is where it is shown to be to the advantage of the trust in light of the fees charged by the trustee. This is a typical standard in estate administration. A more mechanical standard could be applied, such as some percentage increase in fees that would trigger the opportunity to seek replacement of a trust company.

Beneficiaries Whose Consent is Required or Who Must be Given Notice

The above schemes that involve consent of or notice to beneficiaries are based on the assumption that unanimous action is required, as is the case for modification or termination of a trust. It would also be possible to provide for action by a majority of beneficiaries.

There is also an important question as to which beneficiaries must give consent or receive notice. A provision like the following could be adopted:

(1) Each adult beneficiary who receives or is entitled to receive income under the trust or would be entitled to receive a distribution of principal if the trust were terminated at the time the directive is executed or, if a conservator has been appointed for the adult beneficiary, the conservator.

(2) A parent of each minor beneficiary who receives or is entitled to receive income under the trust or would be entitled to receive a distribution of principal if the trust were terminated at the time the directive is executed or, if that minor beneficiary has a guardian of the estate, the guardian of the estate.

Replacement might also be appropriate by action of the same persons who may consent to the resignation of a trustee, described in Probate Code

Section 15640(a)(3) as follows: "[A]ll adult beneficiaries who are receiving or entitled to receive income under the trust or to receive a distribution of principal if the trust were terminated at the time consent is sought."

Replacement of Trust Company by Individual Trustee

The suggestion has been made that a corporate trustee should be able to be removed and replaced with an individual trustee. See letter from Ken Klug in Exhibit 7. Comments received in response to the questionnaire on attorney's fees suggest that competition would be improved and the problem with the small trust solved if an individual could be substituted for a corporate trustee.

Application to Individual Trustees

Some bank representatives and others have suggested that any new procedures or standards for review of trustees' fees should apply to both individual and corporate trustees. See, e.g., California Bankers Association letter attached as Exhibit 2. The staff has no objection to applying the same rules concerning review of fees to individual trustees, but there is a problem with permitting easy removal of individuals under traditional trust doctrines. As a general rule, it is believed that an individual known to the settlor is chosen in part because of a personal confidence placed in that person. A trust company is not clothed with this personality, and thus we have proceeded on the assumption that most trust companies may be treated as essentially interchangeable. In any event, depending on the nature of any scheme recommended by the Commission, it may be appropriate to apply it to individual trustees. This question will necessarily arise when the nature of any proposal is determined.

Costs and Attorney's Fees

Once a desirable set of remedies is selected, the real issue may be the liability for costs and attorney's fees. Both the CBA draft and the Klug draft deal with this liability. (See Exhibits 2 and 3.) Although many of the possible remedies may be widely acceptable, controversy will certainly arise at the point where liability for

costs, and especially attorney's fees, becomes involved in the statute. We suspect that the banks would be much more likely to find a statute to their liking if costs are borne by the petitioner or by the trust.

Termination Fees

The ability to take advantage of a competitive market is, to some extent, inhibited by the standard charges for winding up the trust with the old trustee and setting up the trust with the new trustee. Our survey of corporate trustees last year found that minimum charges ranged from around \$200 to \$500 and that some charged 1% of the value of trust assets. In addition, most corporate trustees will charge expenses for transferring assets or a set fee such as \$20-\$25 per securities issue and \$75-\$100 for real estate. In this connection, Delaware law is interesting. Delaware regulates termination and transfer fees depending on how long the trust has been administered by the trustee. The standard fee is reduced by 30% after 3 years and ranges up to a 100% reduction after 9 years.

Mr. Avery also suggests imposing some restraint on termination fees. See Exhibit 11, at 4.

Historical Note

In early English and American law, the trustee was not allowed payment, since otherwise the trust estate "might be loaded, and rendered of little value." *Robinson v. Pett*, 3 P. Wms. 249, 251 (Ch. 1734). It was thought that the trustee would be tempted to operate the trust so as to magnify the importance of his work and pile up charges instead of administering the trust solely for the benefit of the beneficiaries. See, e.g., *Gilbert v. Sutliff*, 3 Ohio St. 129 (1853).

Respectfully submitted,

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05/31/88

EXHIBIT 1
PROBATE CODE SECTIONS
relating to
TRUSTEES' FEES AND REMOVAL OF TRUSTEES

§ 15403. Modification or termination of irrevocable trust by all beneficiaries

15403. (a) Except as provided in subdivision (b), if all beneficiaries of an irrevocable trust consent, they may compel modification or termination of the trust upon petition to the court.

(b) If the continuance of the trust is necessary to carry out a material purpose of the trust, the trust cannot be modified or terminated unless the court, in its discretion, determines that the reason for doing so under the circumstances outweighs the interest in accomplishing a material purpose of the trust. Under this section the court does not have discretion to permit termination of a trust that is subject to a valid restraint on transfer of the beneficiary's interest as provided in Chapter 2 (commencing with Section 15300).

Comment. Section 15403 is drawn from Section 337 of the Restatement (Second) of Trusts (1957). Unlike the Restatement, however, subdivision (b) gives the court some discretion in applying the material purposes doctrine except in situations where transfer of the beneficiary's interest is restrained, such as by a spendthrift provision. See Section 15300 (restraint on transfer of beneficiary's interest). Section 15403 permits termination of an irrevocable trust with the consent of all beneficiaries where the trust provides for successive beneficiaries or postpones enjoyment of a beneficiary's interest. The discretionary power provided in subdivision (b) also represents a change in the California case-law rule. See, e.g., *Moxley v. Title Ins. & Trust Co.*, 27 Cal. 2d 457, 462, 165 P.2d 15 (1946). Section 15403 is intended to provide some degree of flexibility in applying the material purposes doctrine in situations where transfer of the beneficiary's interest is not restrained. For provisions governing judicial proceedings, see Section 17200 *et seq.* For provisions relating to obtaining consent of persons under an incapacity, see e.g., Civil Code §§ 2450, 2467 (statutory form of durable power of attorney); Prob. Code §§ 2580 (conservator), 15405 & 17208 (appointment of guardian ad litem). See also Section 15406 (no conclusive presumption of fertility). For provisions governing modification and termination of trusts where the consent of all beneficiaries cannot be obtained, see Sections 15408 (trust with uneconomically low

principal) and 15409 (modification or termination by court order in changed circumstances). Subdivision (a) limits the application of this section to irrevocable trusts since if the trust is revocable by the settlor, the method of revocation is governed by Section 15401. Compare Section 15404 (modification or termination by settlor and all beneficiaries).

Article 3. Resignation and Removal of Trustees

§ 15640. Resignation of trustee

15640. (a) A trustee who has accepted the trust may resign only by one of the following methods:

- (1) As provided in the trust instrument.
- (2) In the case of a revocable trust, with the consent of the person holding the power to revoke the trust.
- (3) In the case of a trust that is not revocable, with the consent of all adult beneficiaries who are receiving or are entitled to receive income under the trust or to receive a distribution of principal if the trust were terminated at the time consent is sought.

(4) Pursuant to a court order obtained as provided in subdivision (b).

(b) On petition by the trustee, the court shall accept the trustee's resignation. The court may also make any orders necessary for the preservation of the trust property, including the appointment of a receiver or a temporary trustee.

Comment. Subdivisions (a) (1), (a) (3), and (a) (4) of Section 15640 are similar to Section 106 of the Restatement (Second) of Trusts (1957), except that the class of persons whose consent is needed under subdivision (a) (3) is more restricted. For a provision governing acceptance of the trust, see Section 15600. Subdivision (a) (1) continues part of the second sentence of former Probate Code Section 1138.8 without substantive change. Subdivision (a) (2) is a new provision that recognizes that the person holding the power to revoke a revocable trust has control over the trust rather than the beneficiaries. See Section 15800. Subdivision (a) (3) supersedes former Civil Code Section 2282(d) which permitted discharge from the trust with the consent of "the beneficiary, if the beneficiary has capacity to contract." For provisions relating to consent by beneficiaries under an incapacity, see, e.g., Civil Code §§ 2450, 2467 (statutory form of durable power of attorney); Prob. Code §§ 2580 (conservator), 17208 (guardian ad litem). Subdivision (a) (4) restates the authority of the court under former law. See former Civil Code §§ 2282(e), 2283; former Prob. Code §§ 1125.1, 1138.1(a) (9), 1138.8. Under subdivision (a) (4) the court has authority to accept a resignation regardless of whether the trust provides a manner of resignation. Former Probate Code Section 1138.8 permitted the court to act where the trust was silent.

The provision that the trustee's resignation shall be accepted by the court in subdivision (b) restates part of the last sentence of the first paragraph of former Probate Code Section 1125.1 and part of the third sentence of former Probate Code Section 1138.8. The authority for protective orders in subdivision (b) restates part of the last sentence of the first paragraph of former Probate Code Section 1125.1 and part of the third sentence of former Probate Code Section 1138.8. See also Section 17206 (general authority to make necessary orders). For the procedure applicable to proceedings under subdivision (b), see Section 17200 *et seq.* See also Section 17200(b)(11) (petition to accept resignation of trustee).

§ 15642. Removal of trustee

15642. (a) A trustee may be removed in accordance with the trust instrument or by the court on its own motion or on petition of a cotrustee or beneficiary.

(b) The grounds for removal of a trustee by the court include the following:

(1) Where the trustee has committed a breach of the trust.

(2) Where the trustee is insolvent or otherwise unfit to administer the trust.

(3) Where hostility or lack of cooperation among cotrustees impairs the administration of the trust.

(4) Where the trustee fails or declines to act.

(5) For other good cause.

(c) If it appears to the court that trust property or the interests of a beneficiary may suffer loss or injury pending a decision on a petition for removal of a trustee and any appellate review, the court may, on its own motion or on petition of a cotrustee or beneficiary, compel the trustee whose removal is sought to surrender trust property to a cotrustee or to a receiver or temporary trustee. The court may also suspend the powers of the trustee to the extent the court deems necessary.

Comment. Subdivision (a) of Section 15642 is the same in substance as Section 107 of the Restatement (Second) of Trusts (1957). The authority of the court to remove trustees continues authority found in former law. See former Civil Code §§ 2233, 2283; former Prob. Code §§ 1123.5, 1138.1(a)(10). The recognition that the trustee may be removed as provided in the trust instrument is new. See Restatement (Second) of Trusts § 107 comment h (1957). The authority for removal on the court's own motion is drawn from the third sentence of former Probate Code Section 1123.5. For the procedure applicable to judicial removal proceedings, see Section 17200 *et seq.* See also Section 17200(b)(10) (petition to remove trustee).

The statement of grounds for removal of the trustee by the court is drawn from the Texas Trust Code and the Restatement. See Tex. Prop. Code Ann. § 113.082(a) (Vernon 1984); Restatement (Second) of Trusts § 107 comments b-d (1957). Paragraphs (1) and (2) of subdivision (b) supersede parts of former Civil Code Sections 2233 and 2283 and part of the first sentence of former Probate Code Section 1123.5. The general language relating to a trustee being otherwise unfit to administer the trust subsumes the reference in former Section 1126 to a trustee who is incapable of acting. Paragraph (3) of subdivision (b) continues part of the second sentence of former Probate Code Section 1123.5 without substantive change, except that the reference to "ill feeling" is omitted as redundant with "hostility," and the word "continued" has been omitted since the test is whether the administration of the trust is impaired. Paragraph (4) of subdivision (b) continues part of the first sentence of former Probate Code Section 1126 and part of the first sentence of former Probate Code Section 1138.9 without substantive change. Paragraph (5) of subdivision (b) continues authority found in former Probate Code Sections 1126 and 1138.9.

Subdivision (c) continues former Probate Code Section 1138.2 without substantive change and restates former Probate Code Section 1123.6 without substantive change. See also Section 17206 (general authority to make necessary orders).

Article 4. Appointment of Trustees

§ 15660. Appointment of trustee to fill vacancy

15660. (a) If the trust has no trustee or if the trust instrument requires a vacancy in the office of a cotrustee to be filled, the vacancy shall be filled as provided in this section.

(b) If the trust instrument provides a practical method of appointing a trustee or names the person to fill the vacancy, the vacancy shall be filled as provided in the trust instrument.

(c) If the vacancy in the office of trustee is not filled as provided in subdivision (b), on petition of a cotrustee or beneficiary, the court may, in its discretion, appoint a trustee to fill the vacancy. If the trust provides for more than one trustee, the court may, in its discretion, appoint the original number or any lesser number of trustees. In selecting a trustee, the court shall give consideration to the wishes of the beneficiaries who are 14 years of age or older.

Comment. Section 15660 supersedes former Civil Code Sections 2287 and 2289 and former Probate Code Sections 1125, 1126, and 1138.9. For a provision governing the occurrence of vacancies in the office of trustee, see Section 15643. Subdivision (a) makes clear that the vacancy in the office of a cotrustee must be filled only if the trust so requires. If the vacancy in the office of cotrustee is not filled, the remaining cotrustees may continue

to administer the trust under Section 15621, unless the trust instrument provides otherwise. The provision in subdivision (b) relating to a "practical" method of appointing a trustee continues language found in former Civil Code Section 2287 and supersedes part of former Probate Code Section 1138.9.

The authority of the court to appoint the same or a lesser number of trustees in subdivision (c) continues the second sentence of former Civil Code Section 2289 without substantive change. The provision requiring the court to give consideration to the wishes of the beneficiaries in subdivision (c) supersedes the second sentence of former Civil Code Section 2287. See Restatement (Second) of Trusts § 108 comment i (1957). Subdivision (c) gives the court discretion to fill a vacancy in a case where the trust does not name a successor who is willing to accept the trust, where the trust does not provide a practical method of appointment, or where the trust does not require the vacancy to be filled. For a limitation on the rights of certain beneficiaries of revocable trusts, see Section 15800. For the procedure applicable to judicial proceedings, see Section 17200 *et seq.* See also Section 17200(b)(10) (petition to appoint trustee).

Article 5. Compensation and Indemnification of Trustees

§ 15680. Trustee's compensation as provided in trust instrument; different compensation

15680. (a) Subject to subdivision (b), if the trust instrument provides for the trustee's compensation, the trustee is entitled to be compensated in accordance with the trust instrument.

(b) Upon proper showing, the court may fix or allow greater or lesser compensation than could be allowed under the terms of the trust in any of the following circumstances:

(1) Where the duties of the trustee are substantially different from those contemplated when the trust was created.

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

(3) In extraordinary circumstances calling for equitable relief.

(c) An order fixing or allowing greater or lesser compensation under subdivision (b) applies only prospectively to actions taken in administration of the trust after the order is made.

Comment. Subdivision (a) of Section 15680 continues the first sentence of former Civil Code Section 2274 without substantive change and restates the first sentence of former Probate Code Section 1122 without substantive change. Subdivision (b) restates the second sentence of former Civil Code Section 2274 and the second sentence of former Probate Code Section 1122 without substantive change, except that subdivision (b) makes clear that the court can reduce the trustee's compensation when appropriate. Subdivision (c) makes clear that an order changing the amount of compensation cannot be applied retroactively to actions already taken. See also Sections 15682 (court determination of prospective compensation), 17200(b) (9) (petition to fix compensation).

§ 15681. Trustee's compensation where trust silent

15681. If the trust instrument does not specify the trustee's compensation, the trustee is entitled to reasonable compensation under the circumstances.

Comment. Section 15681 continues the third sentence of former Civil Code Section 2274 without substantive change and restates part of the third sentence of former Probate Code Section 1122 without substantive change. The trustee has authority to fix and pay its compensation without the necessity of prior court review. See Section 16243 (power to pay compensation and other expenses). See also Sections 15682 (court determination of prospective compensation), 17200(b) (9) (petition to fix compensation).

§ 15682. Court determination of prospective compensation

15682. The court may fix an amount of periodic compensation under Sections 15680 and 15681 to continue for as long as the court determines is proper.

Comment. Section 15682 is a new provision that makes clear that the court may fix compensation prospectively. This section supersedes the last part of the third sentence of former Probate Code Section 1122. See also Section 17200(b) (9) (petition to fix compensation).

CHAPTER 3. PROCEEDINGS CONCERNING TRUSTS

§ 17200. Petitioners; grounds for petition

17200. (a) Except as provided in Section 15800, a trustee or beneficiary of a trust may petition the court under this chapter concerning the internal affairs of the trust or to determine the existence of the trust.

(b) Proceedings concerning the internal affairs of a trust include, but are not limited to, proceedings for any of the following purposes:

(1) Determining questions of construction of a trust instrument.

(2) Determining the existence or nonexistence of any immunity, power, privilege, duty, or right.

(3) Determining the validity of a trust provision.

(4) Ascertaining beneficiaries and determining to whom property shall pass or be delivered upon final or partial termination of the trust, to the extent the determination is not made by the trust instrument.

(5) Settling the accounts and passing upon the acts of the trustee, including the exercise of discretionary powers.

(6) Instructing the trustee.

(7) Compelling the trustee to report information about the trust or account to the beneficiary, if (A) the trustee has failed to submit a requested report or account within 60 days after written request of the beneficiary and (B) no report or account has been made within six months preceding the request.

(8) Granting powers to the trustee.

(9) Fixing or allowing payment of the trustee's compensation.

(10) Appointing or removing a trustee.

(11) Accepting the resignation of a trustee.

(12) Compelling redress of a breach of the trust by any available remedy.

(13) Approving or directing the modification or termination of the trust.

(14) Approving or directing the combination or division of trusts.

(15) Amending or conforming the trust instrument in the manner required to qualify a decedent's estate for the charitable estate tax deduction under federal law, including the addition of mandatory governing instrument requirements for a charitable remainder trust as required by final regulations and rulings of the United States Internal Revenue Service, in any case in which all parties interested in the trust have submitted written agreement to the proposed changes or written disclaimer of interest.

(16) Authorizing or directing transfer of a trust or trust property to or from another jurisdiction.

(17) Directing transfer of a testamentary trust subject to continuing court jurisdiction from one county to another.

(18) Approving removal of a testamentary trust from continuing court jurisdiction.

(19) Reforming or excusing compliance with the governing instrument of an organization pursuant to Section 16105.

Comment. Section 17200 restates the substance of subdivision (a) of former Probate Code Section 1138.1 and supersedes parts of former Probate Code Section 1120. The reference to determining the existence of a trust in subdivision (a) is new. Subdivision (a) also restates without substantive change part of former Probate Code Section 1139.1 and the first sentence of former Probate Code Section 1139.2 (petition for transfer of trust to another jurisdiction) and part of former Probate Code Section 1139.12 (petition for transfer to California). The introductory clause of subdivision (a) is a new provision that has the effect of giving the right to petition concerning the internal affairs of a revocable living trust to the settlor (or other person holding the power to revoke) instead of the beneficiaries during the time that the settlor (or other person holding the power to revoke) is competent. See Section 15800 and the Comment thereto.

The list of grounds for a petition concerning the internal affairs of a trust under subdivision (b) is not exclusive and is not intended to preclude a petition for any other purpose that can be characterized as an internal affair of the trust. Paragraphs (1) and (2) of subdivision (b) are new and are drawn from Section 7-201(a) of the Uniform Probate Code (1977). Paragraph (3) is new. Paragraph (5) restates parts of subdivisions (b) and (d) of former Civil Code Section 2269 (review of exercise of discretionary powers) without substantive change. See Sections 16080-16081 (duties with regard to discretionary powers). Paragraph (9) supersedes the last sentence of former Civil Code Section 2274.

Various provisions elsewhere in this division relate to proceedings under this article. For limitations on the right of a beneficiary to compel the trustee to account or report under paragraph (7), see Sections 15800 and 16060-16064. As to granting powers to the trustee under paragraph (8), see Section 16201. As to the trustee's compensation under paragraph (9), see Sections 15680-15683. As to breaches of trust involved in paragraph (12), see Sections 16400-16462. As to modification and termination of trusts under paragraph (13), see Sections 15400-15410. As to combining or dividing trusts under paragraph (14), see Sections 15411 and 15412. As to transfers of trusts under paragraph (16), see Sections 17400-17405 and 17450-17457. As to transfers of certain testamentary trusts within California under paragraph (17), see Section 17304. As to removal of certain testamentary trusts from continuing court jurisdiction under paragraph (18), see Section 17352.

The procedure provided in this chapter is available to determine matters concerning the administration of trusts notwithstanding a purported limitation or exclusion in the trust instrument. The provision of former Probate Code Section 1138.1(b) to the effect that the trust could restrict the availability of remedies is not continued.

See also Sections 24 ("beneficiary" defined), 82 ("trust" defined), 17005 (venue).

EXHIBIT 2

California Bankers Association
Established 1891

March 7, 1988

Mr. John H. DeMouilly
Executive Secretary
California Law Revision Commission
Suite D-2
4000 Middlefield Road
Palo Alto, California 94303-4739

Re: Trustee Fees

Dear Mr. DeMouilly:

The Trust State Governmental Affairs Committee of the California Bankers Association has received a copy of a letter from Assemblyman Elihu Harris to the Commission transmitting concerns that the Assemblyman apparently still has regarding trust industry practices.

We disagree with the factual premises of several of the assertions made by Mr. Harris. The following is a roughly sequential response to certain of the statements in Mr. Harris' letter.

1. The subject matter of the San Diego Union article (which we note is at this point over a year old), attached to Mr. Harris' letter does not illustrate any problem reasonably related to the reason behind the 1982 legislation (AB 3612) referenced in the first paragraph of his letter. Mrs. Hinman resolved her fee dispute with her then current trustee by asking that trustee to resign in favor of another corporate trustee, which in fact occurred. The solution to Mrs. Hinman's concern illustrates the method by which beneficiary disputes are frequently handled by corporate trustees: Voluntary agreement.

2. If a request is to be made to the California Law Revision Commission to explore the relationships between trustees and beneficiaries, then it is appropriate to have the scope of the inquiry reach all trustees and not merely "bank trustee departments". It strikes us as inherently unfair that corporate trustees be discriminated against by being the target of a vague and unstructured investigation. For instance, while the terms "consumer" may have some meaning when used in connection with the individual initially establishing the trust relationship, under the California

Trust Law, the term "beneficiary" is clearly defined in Probate Code Section 24, and nowhere is the term "consumer" used. What class of individuals is intended to be included by use of the term consumer? We also question the significance of the comment that some beneficiaries have chosen not to be represented by legal counsel. Such beneficiaries are neither compelled to retain counsel nor are they prohibited from retaining counsel. In addition, the Bankers are gravely concerned about the characterization of trust estates of under \$1,000,000 as being "small". The experience of the California Bankers Association with its member trust banks is that there is no consensus of what constitutes "small" trust estates. Indeed, at least one major corporate trustee markets trust services for accounts of \$50,000 in size. We also question use of the term "disproportionate" with respect to fees, regardless of the size of a trust estate. An appropriate fee for any trust is of necessity a function of the trustee's responsibilities and risks incurred under the governing agreement, the nature and complexities of the trust assets, and the needs of the beneficiaries.

3. We would like to respond to what amounts to an accusation that corporate trustees refuse to act as trustees of smaller trust estates. In examining what trust business should be accepted, corporate trustees should not accept accounts believed at the outset to be unprofitable. To do otherwise is to violate the trust and confidence imposed on the management of trust institutions by their boards of directors, and ultimately, their shareholders. Moreover, because it is widely known that the profitability of corporate trustees has been marginal at best, operating any unprofitable business (whether the account is, relatively speaking, small or large), is simply irresponsible.

4. Most trusts provide a mechanism for the removal of a trustee and the appointment of a successor, which may or may not call for court intervention. In the absence of such mandatory guidance, the trustee is frequently compelled to seek court assistance as a part of the process of having an account transferred from one trustee to another. To illustrate the point we offer the following hypothetical fact situation. An individual creates a trust and does not provide for the qualifications or identity of a successor trustee. Beneficiary/spouse of a subsequent marriage wants "X" to serve. Beneficiary/children of a prior marriage want "Y" to serve. The trustee is obligated under Probate Code

Section 16003 to deal impartially with the beneficiaries. Consequently, what choice other than seeking court intervention would satisfy that duty? Indeed, in general the intervention of the court has long been intended to provide continuity and order to the administration of trusts for the purpose of protecting the interests of all trust beneficiaries.

5. We take exception the statement that "a substantial number of trust beneficiaries" are "unaware of fee increases which would give them cause to complain". Most, if not all, corporate trustees provide prior written notice of fee increases. In addition, trust beneficiaries receive regular statements which disclose fees charged. Concerning Mr. Harris' comments as to the reasons for which a beneficiary does not seek the advice of an attorney, we do not feel it is appropriate for the California Bankers Association to address the issues of the costs of legal services or the factor of the intimidation of beneficiaries by attorneys. It is said that banks have made fee increases which they represented to the Legislature would not be made. While it is true that fee increases may have been initiated in response to inflation and increased operating costs, the competitive pressures of the marketplace have kept these increases to reasonable levels and there has been no immediate explosion in fees as charged by the opponents of AB 3612. This fact is the essence of what was represented to the Legislature and the California Bankers Association has remained true to its word.

6. We do not understand why Mr. Harris has chosen to raise the issue of executor and administrator fees in the context of the discussion of trustee fees. For an objective analysis of the issues, we refer to the Law Revision Commission Staff memoranda considering the subject. Memorandum 88-12 dated 1/22/88 (Attorney fees in Probate), and Memorandum 88-13, dated 2/1/88 (Fees of Personal Representatives).

7. The "problem" referenced in the second full paragraph of the second page of Mr. Harris' letter focuses on the refusal of corporate trustees to accept appointment as executor or administrator unless an estate is a "sizable one". We are unclear as to the intended meaning of this statement. Corporate trustees evaluate each estate on its own merits in terms of size, complexity, and risk. Take a hypothetical example: A corporate fiduciary is nominated in a will to serve as an executor. While the estimated fair market value of the estate, which consists primarily of real estate, is

\$8,000,000, the institution might decline to act upon being advised that one of the properties of the estate was an abandoned dump site selected by the Environmental Protection Agency for hazardous waste clean up. The risks and complexities of administering this type of asset could well outweigh any fee considerations based on the size of the estate, and would bear careful analysis as a condition precedent to accepting the business or turning it down.

8. The California Bankers Association has been advised by Wells Fargo Bank that the example used in Mr. Harris' letter regarding Wells' probate practices is not accurate. The CBA is further advised that Wells Fargo Bank has addressed this subject in a separate letter to Mr. Harris.

9. The characterization of corporate fiduciaries' policies of determining what estates they can act in profitably as "skimming the cream" is highly inflammatory and unjustified. No negative connotation should be attached to the business decision to accept estates which are considered to be profitable and for which no unreasonable risks of liability are likely to be assumed. We do not understand the reference to the so called "Robin Hood theory". Whatever is intended by the reference to the "Robin Hood theory", we cannot accept a "compensation scheme" that adopts as its philosophical foundation the inequitable charging of larger probate estates to offset the uncompensated or undercompensated costs of administering smaller estates. Every probate estate must stand on its own and adequately compensate the personal representative for the services being performed.

10. Beneficiaries are not unprotected and have recourse to the courts on trust fees. If by "automatic protection" it is meant that statutory trustee fees would be appropriate, the California Bankers Association would oppose vigorously any such proposal.

11. With respect to the request that questionnaires be sent to bar associations for the ostensible purpose of surveying the "appropriate consumer population," it would appear that such an inquiry is unfocused and unnecessary in view of both the previous questionnaire directed to those attorneys most directly involved in, and most familiar with, the issues of trustee services and fees, as well as the questionnaire directed to corporate fiduciaries who voluntarily completed and submitted responses in good faith to the Law Revision Commission. We question the public benefit of additional

Mr. John DeMouilly
March 4, 1988
Page 5

surveys of a broad population which, more than likely, has little interest or familiarity with the issues.

We have formally advised Assemblyman Harris that the California Bankers Association believes that there is no problem regarding trust administration issues which require a legislative solution. The CBA has not changed its very strong belief in this regard. Nevertheless, we recognize that there is a perception that such a problem exists, as evidenced by Mr. Harris' subject January 26, 1988 letter. Accordingly, in the spirit of further promoting the interests of trust beneficiaries, the CBA has drafted a legislative proposal, a copy of which is enclosed.

Thank you for your consideration of our views on this most important area of the law. If we can supply additional information, we welcome the opportunity to meet with you.

David W. Lauer
L. Bruce Norman
Co-chairmen, Trust State
Governmental Affairs Committee

David W. Lauer

cc: The Honorable Elihu Harris
Stan Wieg

March 7, 1988

Existing: Increase in Compensation

15681 (a) existing

15681 (b) The trustee may increase its rate of percentage compensation or its stated minimum fee (hereinafter "compensation") only after compliance with the requirements of this Section.

(1) The trustee shall provide notice in the form specified in this Section in writing at least sixty days prior to the stated effective date of the increase to all beneficiaries, as defined in Section 15681(b)(4), of trusts affected by the increase.

(2) The notice shall contain the following information:

(a) The effective date of the increase.

(b) The current and the proposed compensation.

(c) The name, address and telephone number of the person or persons representing the trustee to whom questions may be addressed.

(d) A statement that if all of the beneficiaries as defined in Section 15681(b)(4) advise the trustee in writing prior to the effective date of the increase specified in the notice of their objection to the increase, no increase will be implemented until the trustee complies with Section 15681(b)(3).

(e) A statement that any beneficiary may petition the court pursuant to Section 17200 to review the increase to the trustee's compensation, and that if the petition is filed and notice is given to the trustee prior to the effective date of the increase, such increase shall not be implemented until confirmed by order of the court.

(3) If all of the beneficiaries as defined in Section 15681(b)(4) object to the proposed increase, and advise the trustee in writing prior to the effective date of the increase, the trustee shall do one of the following:

(a) Withdraw or compromise the proposed increase to compensation; or

(b) Postpone the proposed increase for a period not to exceed 30 days subsequent to the effective date of the increase to enable the beneficiaries to file a petition under Section 17200 to review the proposed increase and to serve notice on the trustee; or

- (c) Resign as trustee pursuant to Section 15640. The trustee shall incur no liability to the beneficiaries by reason of the exercise of this power to resign.
- (4) For purposes of this Section, the term beneficiary shall include those beneficiaries specified in Section 16062(a), subject to the limitations in Section 15800. If such beneficiary is a ward or conservatee, the notice required by Section 15681(b)(1) shall be sent to the guardian or conservator, as the case may be, of such beneficiary. If such beneficiary is a minor for whom no guardian has been appointed, notice shall be sent to the parent having legal custody of the minor. The guardian, conservator or parent of such a beneficiary shall represent the interests of the beneficiary for all purposes under this Section.
- (5) If any beneficiary petitions the court under Section 17200 to review the increase prior to the effective date of the increase, such increase shall not be implemented until confirmed by order of the court.
- (6) If any beneficiary petitions the court under Section 17200 subsequent to the effective date of the increase to review the increase, any determination of the court shall relate only to the prospective application of the increase to compensation.

- (7) The court, in its discretion, may charge fees, costs and expenses of a proceeding under Section 17200 to review the increase in the trustee's compensation against the trust estate.
- (8) This Section shall be applicable only to those trusts as defined in Section 82(a).

05/31/88

EXHIBIT 3

**ESTATE PLANNING, TRUST AND
PROBATE LAW SECTION
THE STATE BAR OF CALIFORNIA**

*Chair*D. KEITH BILTER, *San Francisco**Vice-Chair*IRWIN D. GOLDRING, *Los Angeles**Advisors*KATHRYN A. BALLSUN, *Los Angeles*HERMIONE K. BROWN, *Los Angeles*THEODORE J. CRANSTON, *La Jolla*LLOYD W. HOMER, *Campbell*KENNETH M. KLUG, *Fresno*JAMES C. OPEL, *Los Angeles*LEONARD W. POLLARD, II, *San Diego*JAMES V. QUILLINAN, *Mountain View*WILLIAM V. SCHMIDT, *Costa Mesa*HUGH NEAL WELLS, III, *Irvine*JAMES A. WILLETT, *Sacramento**Section Administrator*PRES ZABLAN-SOBERON, *San Francisco*

555 FRANKLIN STREET
SAN FRANCISCO, CA 94102-4498
(415) 561-8200

*Executive Committee*D. KEITH BILTER, *San Francisco*OWEN G. FIORE, *San Jose*IRWIN D. GOLDRING, *Los Angeles*JOHN A. GROMALA, *Eureka*LYNN P. HART, *San Francisco*ANNE K. HILKER, *Los Angeles*WILLIAM L. HOISINGTON, *San Francisco*BEATRICE LAIDLEY LAWSON, *Los Angeles*JAY ROSS MacMAHON, *San Rafael*VALERIE J. MERRITT, *Los Angeles*BARBARA J. MULLER, *Oakland*BRUCE S. ROSS, *Los Angeles*STERLING L. ROSS, JR., *Mill Valley*ANN E. STODDEN, *Los Angeles*JANET L. WRIGHT, *Fresno*

Reply to: P.O. Box 1461
Fresno, CA 93716
(209) 442-0600

February 8, 1988

Mr. John H. DeMouilly
Executive Secretary
California Law Revision Commission
Suite D-2
4000 Middlefield Road
Palo Alto, California 94303-4739

Re: Memo 88-19

Dear John:

The Executive Committee of the Estate Planning, Trust and Probate Law Section has considered the issue of whether or not the size of corporate trustees' fees poses a problem to trust beneficiaries. It is the consensus of the members of the Executive Committee that any abuse which may exist is not of sufficient gravity to warrant corrective legislation. Generally, it has been our experience that where beneficiaries have a reasonable complaint about the size of the corporate trustees' fees, corporate trustees have willingly stepped aside in favor of either another corporate trustee whose fee schedule is lower, or in favor of an individual trustee. That informal practice has eliminated a great many of the fee problems.

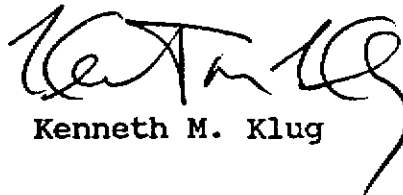
Nonetheless, our Executive Committee recognizes that our experience may not be the universal experience. Indeed, Assemblyman Harris indicates in his February 1, 1988, letter to you that "arguably a greater number [of trust beneficiaries] who do not contact counsel have been adversely affected by increases in fees. . . ." In the event that the Commission perceives a problem needing a legislative solution, our Executive Committee is willing to work with you to draft a solution.

Mr. John H. DeMouilly
February 8, 1988
Page 2

I am enclosing for your review a rough draft of tentative legislation which takes one approach towards a legislative solution. This legislation could be added as Article 6 of Chapter 1 of Part 3 of Division 9 of the Probate Code. This approach would formalize the established informal practice, and provide an economical method of replacing an existing trustee in the event the existing trustee's fees exceed a certain threshold. (For our draft purposes, the threshold is tentatively set at 1 percent of the fair market value of the trust.) The enclosed draft goes somewhat further than merely addressing the problem raised by Assemblyman Harris: it provides an inexpensive means of appointing a successor trustee in those cases where the existing trustee agrees to resign. The enclosed draft is the product of three members of the Executive Committee, and has not yet been reviewed or approved by the entire Executive Committee. Accordingly, it does not represent the views of the Executive Committee.

Furthermore, this draft is not yet intended to be offered as legislation in its present form. There are still a number of practical problems with this approach which will need to be resolved by further refinements. Before working further to refine this draft, we would like the Commission's views as to whether the approach taken by this draft provides an appropriate solution. If so, we will be happy to undertake the work necessary to further refine this draft into workable legislation. If the Commission endorses this approach, we could have our final product to you by the end of April.

Very truly yours,



Kenneth M. Klug

Enclosure

cc: The Honorable Elihu M. Harris
L. Bruce Norman
David W. Lauer
John L. McDonnell, Jr.

To be Added to Probate Code, Division 9, Part 3, Chapter 1

ARTICLE 6

Replacement of Trustees

§15690. Right to Replace Trustee. If the reasonable compensation to which the trustee is entitled pursuant to §15681 during any 12-month period exceeds one percent (1%) of the average fair market value of the trust estate during such 12-month period, the trustee may be replaced as provided in this Article.

§15691. Notice of Excess Compensation. If the compensation received or to be charged by the trustee during any 12-month period exceeds 1% of the average fair market value of the trust estate during such period, then the trustee shall notify all beneficiaries of their right to replace the trustee as provided in this Article. The notice required by this Section shall be given not later than the earlier of (a) 30 days after the receipt by the trustee of such excess compensation or (b) 30 days after the trustee knows its compensation will exceed such 1%.

§15692. Form of Notice. [To be drafted.]

§15693. Procedure for Replacement. (a) If the trustee and all beneficiaries consent to replacement of the trustee, the

Draft, 12/11/87

trustee to be replaced may resign as provided in Article 3 and deliver the assets to the successor trustee, if any, named in the trust instrument. If there is no successor trustee named in the instrument, a successor trustee shall be selected as provided in §15694. A trustee who resigns pursuant to this subsection (a) shall be entitled to a reasonable termination fee.

(b) If all beneficiaries consent to a replacement trustee pursuant to this Article, and the trustee refuses to resign, the beneficiaries may petition the court for replacement of trustee as provided in §15695. If the court determines that the trustee unreasonably refused to resign, it shall award attorneys' fees and costs against the trustee.

(c) If some but not all beneficiaries consent to a replacement trustee, any person interested in the estate may petition the court for replacement of trustee as provided in §15695.

§15694. Selection of Replacement Trustee. A replacement trustee shall be selected as follows:

(a) If the trust instrument names a successor trustee who consents to act, the successor trustee shall be the replacement trustee.

(b) If the trust instrument does not name a successor trustee but provides a practical method of appointing a trustee, the replacement trustee shall be appointed as

Draft, 12/11/87

provided in the trust instrument.

(c) If neither subsection (a) nor subsection (b) is applicable, a replacement trustee shall be selected by the unanimous consent of all beneficiaries.

(d) If unanimous consent of all beneficiaries cannot be obtained, a replacement trustee may be appointed by the court on petition by any person interested in the trust.

(e) If the replacement trustee is not a corporate trustee, the court may require bond unless waived by the trust instrument or unless all beneficiaries consent to waiver of bond.

§15695. Court Findings. Upon petition by any beneficiary, the court shall replace a trustee if it finds all of the following:

(a) The compensation received or to be charged by the trustee for any 12-month period exceeds 1% of the average fair market value of the trust estate during such period.

(b) There is a replacement trustee qualified to administer the trust who has consented in writing to appointment as trustee.

(c) The compensation to be paid to the replacement trustee plus the premium to be charged to the trust estate for any bond required by the court are reasonably expected to be sufficiently lower than the compensation paid or to be paid the existing trustee to justify replacement.

Draft, 12/11/87

(d) Replacement of the existing trustee is to the best interest of all beneficiaries.

§15696. Definitions.

(a) "Average fair market value" means the greater of (i) the median of the fair market value on the first day of any 12-month period and the fair market value on the last day of the 12-month period; or (ii) the mean of the fair market values determined on a regular cycle.

(b) "All beneficiaries" means the person, if any, holding the power to revoke the trust; or, if none, the holder of a presently exercisable general power of appointment or power to withdraw property from the trust, to the extent of the holder's power over the trust property; or, if none, all adult beneficiaries who are receiving or are presently entitled to receive income under the trust or to receive a distribution of principal if the trust were terminated at the time consent is sought.

EXHIBIT 4**ABBITT & BENNETT**

A PROFESSIONAL CORPORATION

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KENNETH G. PETRULIS

*CERTIFIED FAMILY LAW SPECIALIST

October 8, 1987

California Law Revision Commission
4000 Middlefield Road, No. D2
Palo Alto, CA 94303-4739Re: Memorandum 87-70
Corporate Trustee's Fees

Commissioners:

The Beverly Hills Bar Association Probate and Estate Planning Legislative Committee has reviewed the above Memorandum and submits the following comments.

We have discussed the subject memorandum and feel that all of the following should be permitted methods of changing trustees:

1. Permit transfer to another corporate trustee with court approval where it is shown to be to the advantage of the trust in light of the fees charged by the existing trustee.

2. Permit transfer to another corporate trustee if the corporate trustee to be replaced and all trust beneficiaries (parent, guardian, conservator or other fiduciary responsible for a minor or incompetent person) agree.

3. Permit transfer to another corporate trustee if all trust beneficiaries agree on the transfer and that good cause exists for the transfer, including increase in trustee's fees and neglect or negligence by the trustee in the conduct of its duties (consent of existing corporate trustee not required).

Discussion: We recommend that a standard similar to the above language be used.

4. Permit the trustee to increase fees received after giving notice to all trust beneficiaries. Trust beneficiaries would then have the right to object to any fee increase in court.

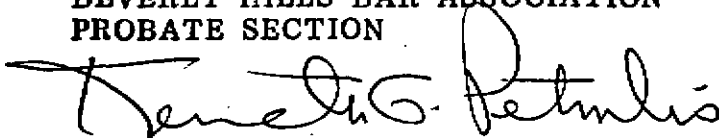
5. Provide specifically by statute for court review of the reasonableness of trustees fees upon petition by any interested person.

Conclusion: The other alternatives raised by the staff were rejected. We feel that the problem of corporate trustee's fees does merit some examination and clarification in the code. We would also suggest that the code define or authorize the Rules Committee to define the normal duties of trustees to be included within the fee schedule and guidelines on when extraordinary fees should be allowed.

In any case, where consents are required, all adult beneficiaries would be necessary, but interests of minors or incompetents would not require the appointment of guardian ad litem, etc. If there was a parent guardian of the estate or person, conservator or other fiduciary already present and identifiable, that person's consent would also have to be obtained.

Yours very truly,

LEGISLATIVE COMMITTEE
BEVERLY HILLS BAR ASSOCIATION
PROBATE SECTION



KENNETH G. PETRULIS, Chairman

KGP/ar

cc: James J. Stewart
Melinda J. Tooch
Marc B. Hankins
Jeffrey A. Altman
David Gutman
Ralph Palmieri
Phyllis Cardoza

05/31/88

C. J. L. COMM'N

SEP 23 1987

RECEIVED

733 Kline Street #304
La Jolla, CA 92037-4307
September 21, 1987

Re: Memorandum 87-54
Study L-3010 - Replacement of Corporate Trustees

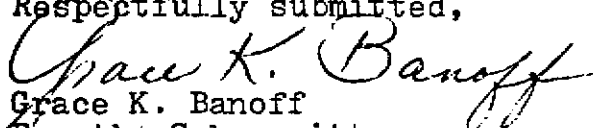
Stan G. Ulrich, Esq.
Staff Counsel
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Dear Mr. Ulrich:

This letter is submitted on behalf of the Legislative Subcommittee on Estate Planning, Trusts and Probate of the San Diego County Bar Association.

The Subcommittee endorses the proposed simple procedure for replacement of a corporate trustee but urges the addition of a proviso that a corporate trustee which is removed because of a fee increase may not receive a termination fee nor any other compensation related to the termination of fiduciary responsibility.

Respectfully submitted,


Grace K. Banoff
For the Subcommittee

cc: Daniel B. Crabtree, Esq.
Subcommittee Chair

05/31/88

EXHIBIT 6**SHEA & GOULD**

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July 28, 1987

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TELEX 269488

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

Re: Memorandum 87-54; Replacement
of Corporate Trustees

Dear Stan:

I just received the staff draft of a Tentative Recommendation relating to the replacement of corporate trustees. I have absolutely no problem with the concept of permitting the beneficiaries of a trust to substitute the trust company of their choice for the trust company selected by the settlor. However, I have significantly more problem with the idea of permitting the co-trustees to substitute trust companies.

Since the trust is intended to benefit the beneficiaries, the law should have sufficient flexibility to permit their wishes to override the strict language of the trust instrument, at least on matters which would not defeat the underlying purpose of the trust. I would not permit the beneficiaries to terminate the trust since that would clearly defeat the settlor's purpose unless they can demonstrate sufficiently changed circumstances. I would, however, permit the beneficiaries, acting together, to override less essential provisions of the trust instrument. While I would be extremely reluctant to permit them to substitute an individual trustee for the corporate trustee named by the settlor, I would not oppose permitting them to select another corporate trustee. The definition of "trust company" in Section 83, as amplified by the Comment, is sufficiently specific to offer adequate protection.

Permitting co-trustees, without the consent or even the knowledge of the beneficiaries, to change trust companies is another matter. Based upon my experience with co-trustees, I can readily see them "shopping" trust companies until they find one which will not be as quick to object to discretionary distributions with no evidence of need (frequently to the co-trustee's side of the family), questionable investments, sizeable fees to the co-trustee, etc.

Even where the motives of the co-trustee are proper and pure, a co-trustee occupies a position entirely different from that of a beneficiary. With a beneficiary, it is basically his money; a co-trustee, on the other hand, is an employee retained by the settlor to work for the beneficiary. Permitting a co-trustee to change any of the terms of the trust instrument without the consent of either the beneficiaries or the court is an unnecessary and indeed radical expansion of the role of a trustee. If the co-trustee has a valid reason for desiring to change corporate trustees, he should either seek the consent of the beneficiaries or the approval of the court.

I would therefore delete subsection (d) of Section 15691, and the introductory portion of subsection (e), and change the reference to subsections (d) and (e) in subsection (c). Otherwise, I think the procedure described in Sections 15691 and 15692 is workable and could be very useful.

Please note that the above comments express only my personal views and not those of either of the organizations which I have previously represented before the Commission.

Very truly yours,

Sandra

SANDRA S. KASS

SSK/mb

05/31/88

EXHIBIT 7

**ESTATE PLANNING, TRUST AND
PROBATE LAW SECTION
THE STATE BAR OF CALIFORNIA**



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July 21, 1987

Mr. Irwin D. Goldring
Attorney at Law
1888 Century Park East
Suite 350
Los Angeles, California 90067

Re: LRC Memo 87-54 - Replacement of Trustee

Dear Irv:

These are my personal comments on the above memo. The memo was received in my office too late to schedule a conference call with the other members of Team 2.

As you know, I had some preliminary discussions with Michael Harrington of Wells Fargo Bank. During those preliminary discussions, he and I exchanged some ideas which he indicated he would run past the California Bankers' Association. Basically, Memo 87-54 follows the general approach of the ideas that Mr. Harrington and I discussed. The approach of Memo 87-54 goes somewhat further, because it would allow the beneficiaries to replace a trustee without any triggering mechanism. The approach that Mr. Harrington and I discussed would allow for a replacement only where there is a fee increase exceeding a certain threshold. He and I did not discuss what that threshold ought to be.

From my viewpoint, I favor a statutory procedure which would allow for a transfer to a successor corporate trustee without the involvement of the Court if everyone is in agreement. Mechanically, my approach would be as follows. If the trustee proposes a substantial fee increase, the trustee will advise the beneficiaries (similar to an advice

Mr. Irwin D. Goldring
July 21, 1987
Page Two

of proposed action). If the beneficiaries consent to the increase, nothing further need be done. If a beneficiary objects, then the fees cannot be increased without court approval. Alternatively, the trustee and the beneficiaries may agree to replace the trustee. If the trustee refuses to step aside, then a court proceeding may be utilized to replace the trustee. If the court determines either that the proposed fee increase is unreasonable, or if the court determines that the trustee has acted unreasonably in refusing to step aside, then the court shall award attorneys' fees against the trustee (not to be paid by the trust). I believe in most cases the trustee and the beneficiaries would agree.

The procedure proposed by Memo 87-54 would allow the trustee to be replaced at the beneficiaries' discretion. It also allows for the beneficiary to obtain a commitment from a successor trustee without first dealing with the existing trustee. As a practical matter, a successor trustee is not likely to want to get involved unless the replaced trustee has indicated a willingness to step aside. If the trustees and the beneficiaries all consent to replacing the existing trustee, the beneficiaries can then locate a successor trustee.

If there is not unanimous consent by the beneficiaries and the trustee, then I believe the Court ought to be involved. The Court ought to be authorized to award attorneys' fees against a trustee if the trustee unreasonably withheld its consent. On the other hand, if there is a dispute among the beneficiaries concerning replacement of the existing trustee, then the Court should resolve the dispute, and not have the burden placed on the trustee.

Again, I believe there should be some triggering mechanism (e.g., a substantial increase in fees) before the beneficiaries have the right to replace the trustee. A right to replace the trustee which arises only with a proposed fee increase should go a long way to minimizing the tax risk raised in Revenue Ruling 79-353 cited in the note following Section 15691.

Finally, I believe there should be some mechanism for replacement of a corporate trustee with an individual

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trustee. Perhaps this mechanism ought to require approval of the Court and the setting of a bond. Memo 87-54 does not allow for replacement of a corporate trustee by an individual trustee, but such should not be precluded. In many small trusts, a family member can serve as responsibly as a corporate trustee, at a lesser cost.

I believe that Memo 87-54 is a start in the right direction. There are many other issues which need to be addressed. My recommendation is that the Law Revision Commission defer further action on this memo until its September meeting. Hopefully, by that time Mike Harrington will have obtained the bankers' suggestions, and we will be in a position to provide a more complete study to the Law Revision Commission.

Very truly yours,



Kenneth M. Klug

cc: Michael Harrington
James F. Rogers
Owen G. Fiore
James R. Goodwin
Jay R. MacMahon
William H. Plageman, Jr.
Charles A. Collier, Jr.
D. Keith Bilter
James C. Opel
James D. Devine
Lloyd W. Homer
Theodore J. Cranston
James V. Quillinan

05/31/88

EXHIBIT 8

ROBERT H. CORNELL
J. KENNETH LYNCH
ANDREW G. LANGE
ROGER C. PETERS
FREDERICK A. PATTERSON
JAMES F. HALLEY

LAW OFFICES OF
HALLEY, CORNELL & LYNCH
A PROFESSIONAL CORPORATION
25TH FLOOR
50 CALIFORNIA STREET
SAN FRANCISCO, CALIFORNIA 94111-4787

JAMES W. HALLEY
(1921-1976)
(415) 981-7700

13 August 1987

John H. DeMouilly
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Dear John:

Enclosed please find a copy of the Court opinion in Pam's case.

In investigating the matter I discovered that Crocker Bank had automatically increased its rate schedule, after the elimination of Court supervision of accountings, to include in its fee the amount that had ordinarily been allowed to both the trustee and the trustee's attorneys. Accordingly, the trustee fees being charged in the unsupervised cases were universally higher than the maximum allowed under Court Rules of the various county Superior Courts. I understand a number of other banks also raised their fees at this time. In the case of Crocker, the increased fees were also accompanied by a substantial reduction in service in an apparent attempt of the bank to maximize profitability. We were tempted to bring a class action but Pam's sister, who is confined to a wheelchair, was suffering bad health at the time and was not up to a more extensive litigation.

Among the proposed solutions, a statutory maximum fee that would work automatically would probably help the most number of people. Requirements regarding all beneficiaries are difficult because of the usual provisions for a broad class of remaindermen, including minors and unborn heirs.

I hope this is of some help.

Best regards,


Robert H. Cornell

ncc.001
enc.

THIS IS A MEMORANDUM DECISION AND
DOES NOT CONSTITUTE A JUDGMENT

FILED

SEP 3 1986

Office of the County Clerk
San Mateo County

MARVIN CHURCH, County Clerk

By Christal Davis
DEPUTY CLERK

Hon. Clarence B. Knight, Judge of the Superior Court

Redwood City, California Sept. 3, 1986

No. 29246 G. Bates and P. Cornell v Crocker National Bank

On the court trial

heretofor

submitted in the above-entitled action, the Court has this day rendered the following decision:

The Court finds that Respondent bank breached its fiduciary duty to Petitioners by charging exorbitant and unjustified amounts for its trustee fees for the years 1983, 1984, 1985 and 1986. The Respondent will be surcharged in regard to the trustee's fees for all amounts in excess of \$4,800. per year for each trust (the highest amount of the last fee approved by the Court).

It is further ordered that the Petition for removal as trustee is granted. Respondent will be removed as trustee upon the appointment

I declare under penalty of perjury that on the following date I deposited in the United States Post Office mail box at Redwood City, California, a true copy of the foregoing decision, enclosed in an envelope, with the proper and necessary postage prepaid thereon, and addressed to:

Roger Peters
Attorney at Law
50 California St., 25th Floor
San Francisco, Calif.
94111

George Malloch
Attorney at Law
580 California St., Ste. 1600
San Francisco, California
94104

Executed on September 3, 1986 at Redwood City, California.

MARVIN CHURCH, Clerk

ENTERED

by

By Christal Davis
Deputy Clerk

of a new trustee or trustees herein. Petitioners are requested to determine if all of the beneficiaries and contingent beneficiaries of the said trusts can agree upon a new trustee or trustees for the said trusts and to provide the names of proposed trustee or trustees for consideration by the court within 21 days of the signing of the judgment herein. If the said beneficiaries and contingent beneficiaries are unable to agree upon a trustee or trustees the court requests a list of suggested trustees for its consideration.

Attorney for the petitioners are to prepare the judgment herein.

EXHIBIT 9

University National Bank & Trust Company
250 LYTTON AVENUE PALO ALTO

HALL PALMER
EXECUTIVE VICE PRESIDENT
AND SENIOR TRUST OFFICER

MAILING ADDRESS: P.O. BOX 89
PALO ALTO, CA 94302
TELEPHONE (415) 327-0210

April 27, 1988

Mr. Stan G. Ulrich
Staff Counsel
California Law Revision Commission
Suite D-2
4000 Middlefield Road
Palo Alto, CA 94303

Dear Mr. Ulrich:

I am writing to pass along our Bank's observations on the subject of fees of corporate trustees and the resolution of any problems in this regard.

It is our belief that there currently exists a relatively efficient and competitive marketplace for fiduciary services and that the prospective trust customer who shops this market today will find a fairly priced service available for any economically viable trust account.

The market is significantly less efficient, however, over the duration of a trust relationship. Many trust accounts have a duration of several decades during which the costs of doing business, values of assets, nature of services being rendered, and fees charged by trustees may all change profoundly. The price competition between prospective trustees is generally a factor present only at the time of the trust's inception and it ceases to operate as a price control mechanism at the individual account level when a trust becomes irrevocable by its terms; especially where the beneficiaries lack the power to make a substitution of trustees.

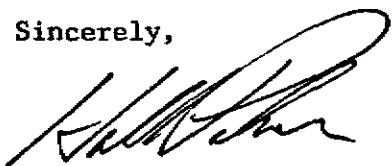
We observe that significant relative overpricing of trust services probably does exist affecting large numbers of irrevocable trusts. This is most evident concerning accounts formerly subject to continuing court supervision. Many of these may have appeared to have been economically viable and attractive arrangements to both customers and trustees at the time of their creation and funding, but have since diminished in size or at least have not appreciated in value in proportion to the minimum fees now charged them by their current trustees. In many cases the minimum fee now charged may well be a multiple of that the customer anticipated or the

court would have allowed under continuing court jurisdiction.

We suggest that there is no easy solution to this problem. The question of what amount constitutes reasonable compensation for a trustee's services is quite complex, varies from case to case, and not well suited to a statutory fee mechanism. Changing corporate trustees is a relatively costly and burdensome process which one tends to see as a last resort.

We do strongly endorse the proposal for a statutory mechanism to enable the beneficiaries of a trust to return to the market to take advantage of price competition. There are considerable differences in minimum fees charged by corporate trustees as well as differences in other aspects of their services, and we believe there is less potential for any abusive fee practices when the beneficiaries have some measure of choice in the selection of the provider and the related leverage in negotiation of the fees to be charged.

Sincerely,

A handwritten signature in dark ink, appearing to read 'Elihu Harris', written in a cursive style.

cc: The Honorable Elihu Harris

EXHIBIT 10

May 18, 1988

Mr. Stan Ulrich
Staff Council
California Law Revision Commission
4000 Middlefield Rd. Suite 2-D
Palo Alto, CA 94303-4739

Dear Mr. Ulrich:

Mr. Hall Palmer, of University National Bank, has informed me that you are currently working on legislation that would allow Trust Beneficiaries to substitute Corporate Trustees. I would like to express my enthusiasm for any new regulations in this regard. As the Beneficiary of a small trust, I know from sad experience that trust arrangements can end up as financial traps.

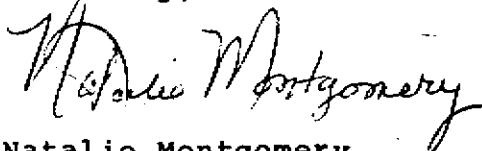
My mother's 1963 will established a trust for me at her death. The Co-Trustee was Security Pacific Bank. Since 1977, I have been receiving income from this trust -- and watching the administrative fees eat away more and more of my "nestegg." When it reached the point where the bank was charging about 28% of what the trust earned each year, I looked into changing Trustees.

Substituting Trustees as turned out to be a long and fairly expensive process. In fact, it has taken over a year to: locate an attorney who would help me; find a reliable financial institution with reasonable fees; get Security Pacific to agree to release the trust; and receive the final accounting.

Having worked for a large bank (Wells Fargo), I am well aware that big banks consider anything under a million to be chicken feed. Generally, small trust assets are placed in pooled funds, where they are cheerfully ignored. During my relationship with Security Pacific, several obvious oversights on the part of the bank confirmed that "no one was watching the store."

If there are others struggling with the impersonal, computerized management of a big bank -- and I'm sure there are many -- I'm sure they'll be delighted to know that they may soon be able to seek out the most advantageous Trustee arrangements.

Sincerely,



Natalie Montgomery
80 Eucalyptus Knoll
Mill Valley, CA 94941

cc: Hall Palmer

EXHIBIT 11

BANCROFT
AVERY
&
MCALISTER

CA LAW REV. COMM'N

MAY 19 1988

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FORREST E. FANG

May 17, 1988

Mr. John H. DeMouilly
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

STUDY L-3010--FEES OF CORPORATE TRUSTEES

Dear Mr. DeMouilly:

This comments on Memo 88-36. Why should fees of corporate trustees be different from fees of individuals? Every fiduciary should be held to the same high standards. Every fiduciary should be compensated the same way and should perform similarly. The individual fiduciary should receive the same compensation as the corporate fiduciary; if the inexperienced fiduciary wishes to engage the professional fiduciary to do the individual's work, the individual can do so.

In addition, it is a basic error to write a law in terms of a corporate fiduciary as a favored class. There are many professional fiduciaries who are individuals or partnerships. Those professional fiduciaries should be entitled to the same fees as a "corporate fiduciary". Being incorporated is no assurance of competence or honesty. Moreover, all of the provisions related to change of fiduciaries should include a change from one fiduciary to another regardless of whether one is a corporate trustee.

I agree with those who claim there is a problem with corporate fiduciary fees. The problem is that those fees may on occasion reward a corporate fiduciary for sloppy work and the corporate fiduciary can collect its fee under the present system because the beneficiaries cannot afford to fight the corporate trustee.

The Summary and Analysis of Information From Corporate Trustees showing the fees increased between 1982 and 1987 should be no surprise. All costs of doing

Mr. John H. DeMouilly
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business have increased in that period while the value of the dollar dropped 50%.

In my opinion, it is inappropriate to try to solve the problem of fiduciary fees by regulation seeking to help or harm corporate fiduciaries. The correct approach is to let market forces prevail. Require of all fiduciaries what you require of lawyers, a written fee agreement spelling out the fees. Abolish the statutory fee schedule and encourage professional fiduciaries to publish competitive fees (unlike the present system which encourages a conspiracy among the banks to have identical fees under the umbrella of a statutory probate fee system).

My comments regarding possible approaches are as follows:

(a) Permit transfer to another corporate trustee with court approval where it is shown to be to the advantage of the trust in light of the fees charged by the existing corporate trustee.

Why should the trustee fees be at issue? If the beneficiaries are dissatisfied with the corporate trustee, why not permit them to change trustees under P.C. §15,403 regardless of P.C. §15,403(b) and regardless of whether the fees are in dispute? If necessary, I would amend P.C. §15642 to add that if all the beneficiaries agree on a substitute trustee, an original trustee can be replaced unless the trustor expressly prohibited a change of trustees or specified procedures for a change of trustees. This approach seems to agree with (b) below.

(b) Permit transfer to another corporate trustee if the corporate trustee to be replaced and all trust beneficiaries agree.

I disagree that the consent of the corporate trustee is desirable. The consent of the court is all that should be required. If the court agrees, upon petition of all of the beneficiaries, a new trustee desired by the beneficiaries should be possible regardless of whether the substitute trustee is a corporation. Seeking court approval, although involving the expense of a court procedure, avoids the argument that

Mr. John H. DeMouilly
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the beneficiaries have an unrestricted power that could result in a tax problem.

(c) Permit transfer to another corporate trustee if all trust beneficiaries agree on the transfer (consent of existing corporate trustee not required).

This solution is unacceptable. If there is to be change of fiduciaries, it should not be too easy; hence any suggestion that at a minimum there be court approval. A fiduciary may often have to make decisions the fiduciary believes are in the best interest of the beneficiary. An unlimited power to change trustees will lead to an undesirable forum shopping and may also lead to interstate competition for fiduciary assignments, not unlike the interstate competition presently flourishing among banks seeking deposits.

(d) Permit transfer to another corporate trustee upon the direction of all cotrustees other than the one to be replaced (consent of beneficiary not required).

I support this proposal since it obviously permits the trustor to designate an individual co-trustee (such as a surviving spouse) with the power to choose what corporate trustee is desired. My only dissent is that a professional trustee should be able to act and that professional trustee need not be incorporated.

I have no difficulty with the requirement that the beneficiaries be notified. As long as the standard for change can be, but need not be, in the instrument, then a standard for change may be workable if the statute spells out the standard.

(f) Permit the trustee to increase fees if no objection is received after giving notice to all trust beneficiaries.

I agree that (f) is a desirable procedure. I do not believe the "disadvantage" discussed on page 7 of Memo 88-36 will occur.

(g) Provide specifically by statute for court review of the reasonableness of a trustee's fees on petition by any interested person.

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I disagree with a provision that takes the determination of fees out of the control of the beneficiaries or of the individual trustees selected by the trustor. Too often the public feels the court and the corporate trustees are in collusion. Nothing should obstruct the power of the persons paying the fee to rely on market forces to determine the level of fees for a professional fiduciary.

(h) Establish a statutory fee schedule for trustees based on the value of the trust estate and permit charging additional fees for extraordinary services only with court approval.

This proposal is patterned after a probate system that is unfair and insufficient and requires unnecessary court supervision. This proposal should be avoided at all costs.

The California Bankers Association ("CBA") draft proposal is a workable plan. Subject to my comments above, I can see that the CBA plan would be an improvement over existing law.

The Klug draft is as faulty as a statutory fee schedule. The proposal can result in exorbitant fees as well as inadequate fees. Moreover, the proposal does not let market forces determine fees and inadequately deals with the replacement of trustees.

Other Factors

As a general proposition, one regulation that may be worthy of consideration is a restraint on termination fees. Too often a corporate trustee coerces beneficiaries into staying with an unsatisfactory relationship because the corporate trustee has the power to impose extra fees at the time of termination. While there may be some merit in reasonable compensation to cover fees at the time of termination, control of these costs is needed.

Another aspect of corporate trustee fees that needs attention is who pays the attorney fees of the corporate trustee who is removed or seeks a fee increase. The law should be clear that the trustee that is removed or who seeks increased fees cannot

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charge the costs of resisting removal or seeking more fees against the trust it administers.

I strongly support the idea that an individual can replace a corporate trustee with the consent of the court. I also agree with the proposal that the changes in the law should apply to everyone serving as a fiduciary.

Yours sincerely,



Luther J. Avery

LJA:bal
841.1.trustee