

Memorandum 88-77

Subject: Study L-3010 - Trustees' Fees Tentative Recommendation
(Limitation on Exemplary Damages)

At the September meeting, the Commission, acting as a subcommittee, approved the draft Tentative Recommendation Relating to Trustees' Fees for distribution for comment, subject to prior review by commissioners. (A copy of the draft tentative recommendation that implements decisions made at the September meeting is attached to this memorandum.) The ground rules were that if any commissioner objected to the tentative recommendation, it would not be distributed, but would be put on the agenda for consideration by the full Commission. Commissioner Walker has raised questions about the provision in the tentative recommendation that would set a maximum exemplary damages liability at three times compensatory damages for breach of trust. (See letter in Exhibit 1.)

The draft tentative recommendation contains the following material concerning exemplary damages for breach of trust:

EXEMPLARY DAMAGES

The proposed legislation would also limit exemplary damages for breach of trust to no more than three times compensatory damages.¹³ Although the right to exemplary damages against trustees is not well-established, the traditional reluctance to award such damages is dissipating. Recent cases have indicated a willingness to award exemplary damages against fiduciaries.¹⁴ The potential for large punitive damages awards may act as an incentive for trust companies to raise fees across the board, to the detriment particularly of smaller trusts. Thus it is in the interest of trust beneficiaries as a group to limit the potential liability for exemplary damages.

Consequently, the Commission renews its recommendation that exemplary damages for breach of trust involving the trustee's willful misconduct, fraud, or gross negligence may not exceed three times the amount of compensatory damages.

13. The Commission originally recommended this provision as part of the comprehensive trust bill. See Recommendation

Proposing the Trust Law, 18 Cal. L. Revision Comm'n Reports 501, 560, 713 (1986).

14. See *Vale v. Union Bank*, 88 Cal. App. 3d 330, 339-40, 151 Cal. Rptr. 784 (1979); *Werschkull v. United California Bank*, 85 Cal. App. 3d 981, 1000-04, 149 Cal. Rptr. 829 (1978); see also *Schoenholtz v. Doniger*, 657 F. Supp. 899, 913-16 (S.D.N.Y. 1987).

The statutory language, which is the same as that originally recommended by the Commission when the Trust Law was submitted in 1986, reads as follows:

Probate Code § 16443 (new). Liability for exemplary damages

SEC. 4. Section 16443 is added to the Probate Code, to read:
16443. If a breach of trust results from the trustee's willful misconduct, fraud, or gross negligence, the court may find the trustee liable for an amount of exemplary damages not exceeding three times the amount of liability determined under Section 16440.

Comment. Section 16443 is new and is intended to clarify the right to exemplary damages for breach of trust. This section codifies the right to exemplary damages found in some appellate cases. See *Vale v. Union Bank*, 88 Cal. App. 3d 330, 339-40, 151 Cal. Rptr. 784 (1979); *Werschkull v. United California Bank*, 85 Cal. App. 3d 981, 1000-04, 149 Cal. Rptr. 829 (1978); see also *Schoenholtz v. Doniger*, 657 F. Supp. 899, 913-16 (S.D.N.Y. 1987).

Commission Walker objects to the piecemeal nature of the proposal, suggesting that if the treble damages limitation is appropriate for breach of trust, it may be appropriate generally, and that no reason has been given in Commission meetings for distinguishing these situations. He also recognizes that the issue of punitive damages generally is not before the Commission. The staff would add that it would be a futile undertaking if it were.

Commissioner Marshall has written suggesting that a good idea should not be refused in this area of the law simply because it has not yet percolated into other areas of the law. (See the letter attached as Exhibit 2.)

Piecemeal Legislation

If this proposal is truly piecemeal legislation and the Commission concludes that a piecemeal approach is unacceptable, the issue is

resolved. It should be considered whether this type of limitation in the Trust Law is really piecemeal. Trust law in general, and the rules governing the measure of liability in particular, differ historically and theoretically from the measures of damages in tort law. Thus, historically there was no right to punitive damages against a trustee. One method of determining the amount a trustee should be surcharged can be more drastic, or perhaps punitive, than another, but there is no doctrine of open-ended liability for punitive damages in this area of the law. For example, much ink has been spilled over the question of appreciation damages, i.e., whether a trustee who sells property such as stock in breach of trust is liable for the value of the stock at the time of trial. The sense that appreciation damages may be punitive has led courts to reserve application of this measure of damages to particularly culpable fiduciaries and apply a lesser measure of damages where the trustee is merely negligent or has made a good faith mistake. See, e.g., Estate of Rothko, 84 Misc. 2d 830, 379 N.Y.S.2d 923 (1975); Estate of Talbot, 141 Cal. App. 2d 309, 296 P.2d 848 (1956).

The old Field Code provisions that governed the determination of liability of trustees (and other fiduciaries) provided only the mildest form of punishment for one kind of willful breach. Former Civil Code Section 2262 assessed compound interest for a willful failure to invest trust property, instead of simple interest. Even then, a California case characterized this provision as intended to prevent the trustee from profiting from wrongdoing, rather than as a punishment of the trustee. Miller v. Lux, 100 Cal. 609, 616, 35 P. 345 (1893).

The point is that the law governing the liability of fiduciaries for breach of their duties is not of a piece with the law of torts where punitive damages are well-known.

Limitations on Punitive Damages in Other Statutes

There are many statutes that provide limitations on punitive damages or set a penalty at a set amount, subject to a ceiling, or a multiple of actual damages:

Business & Professions Code:

§ 17536 (up to \$2500 -- false and misleading advertising)

Civil Code:

- § 52 (\$250 penalty -- violation of Unruh Civil Rights Act)
- § 536 (treble damages -- injury to property of cable television corporation)
- § 1710.1 (\$500 penalty plus treble damages -- sale of mechanical and electrical appliances with removed or damaged manufacturer's mark or serial number)
- § 1716 (treble damages -- solicitation of money for goods not ordered or services not performed)
- § 1719 (treble damages -- dishonored check)
- § 1721 (treble damages -- malicious destruction of materials at construction site)
- § 1739.4 (treble damages -- misrepresentation concerning political campaign items)
- § 1748.1 (treble damages -- imposition of surcharge on use of credit card)
- § 1812.123 (treble damages -- discount buying services contracts)
- § 1882.2 (treble damages -- diversion of utility services)
- § 3346 (treble damages -- injury or removal of timber)
- § 3370.1 (up to \$2500 -- unfair competition)

Code of Civil Procedure:

- § 732 (treble damages -- waste)
- § 733 (treble damages -- injury or removal of timber)
- § 735 (treble damages -- forcible or unlawful entry)
- § 1029.8 (treble damages -- provision of goods or services by unlicensed persons)
- § 1174(b) (treble damages -- forcible entry or unlawful detainer with malice)

Food & Agricultural Code:

- § 21855 (penalty of four times value plus punitive damages -- taking or killing cattle without owner's consent)

Labor Code:

- § 1054 (treble damages -- preventing employment of former employee, etc.)

Penal Code:

- § 496 (treble damages plus costs and fees -- receiving or concealing stolen property)
- § 637.2 (\$3000 or treble damages -- invasion of privacy)

Probate Code:

- § 13110 (three times property value -- fraudulently securing payment, delivery, or transfer of personal property under affidavit procedure)
- § 13205 (three times property value -- execution or filing fraudulent affidavit for disposition of real property of small value)

While this list may be viewed as a patchwork, we assume that for the most part these provisions are responses to particular problems.

Of course, a number of them are the result of compromise. The provision limiting exemplary damages against trustees was also based on a compromise. The bank representatives, in the face of an apparent trend toward awarding punitive damages, urged the Commission to recommend a statute barring punitive damages for breach of trust in proceedings by beneficiaries. Others objected to this suggestion, and there was a sense that it would be doomed to failure in the Legislature. Double and triple limitations were discussed, and the result was the language like that in draft Section 16443 above. The banks were particularly concerned with a recent case (Pitzer-Burton) in which a jury awarded \$3,000,000 in punitive damages and decided on \$25,000 compensatory damages. Of course, the new Trust Law makes clear that there is no right to a jury trial in a proceeding for breach of trust.

Policy Factors

Commissioner Walker doubts that limiting punitive damages would have any effect of trustees fees. He also suggests that no justification has been given for encouraging creation of trusts and allocation of financial resources to this type of arrangement.

As to the relationship of potential liabilities to fees, the staff has no independent information, but the Commission has received written and oral statements from representatives of many corporate trustees making this point. The argument that has been made that trust departments are required to be profitable, whereas in the past this was not necessarily expected, and that banks are victims of a deep-pocket litigiousness. Presumably, if a trust department becomes seriously unprofitable, a bank may choose to phase out the trust department or not to accept any but the most profitable trusts. We doubt that the limitation on exemplary damages would induce any trustee to lower fees, but it would eliminate a source of upward pressure.

As to the allocation of financial resources, the trust arrangement appears to be increasingly desirable as an estate planning tool. The law would not seem to have any effect on allocating investment resources. The trust option would remain available no matter what is done on this recommendation. The concern with fees, however, relates

to the availability of professional trustees for those having smaller estates.

Including the limitation provision in this recommendation directed toward controlling fee increases is also aimed at creating a balanced legislative package.

Respectfully submitted,

Stan G. Ulrich
Staff Counsel

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CLAW REV. COMM
SEP 21 1988
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September 20, 1988

Nathaniel Sterling, Esq.
Assistant Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Dear Nat:

My understanding (or, at least, recollection) is that the Commission requested staff drafts or tentative recommendations relating to Trustees' Fees and the Notice to Creditors provisions of the Probate Law and Procedures, but I did not understand that we approved any particular proposal. I raise the point because I am troubled by certain provisions of both tentative recommendations.

I have sent a copy of this letter to Chairman Plant and would appreciate it if you could send a copy of this letter to the other commissioners.

1. Trustees' Fees.

The fundamental policy of the draft is sound in allowing the parties to the trust to determine trustees' fees rather than imposing fees by statute or requiring court approval for fees. Less sound, in my view, is the limitation on liability for exemplary damages in the new proposed section 16443. The punitive damages remedy is, of course, subject to abuse. No reason has been advanced in our meetings that the threat of such abuse is greater in cases for breaches of duty by trustees than in cases involving breaches by others. Personally, I might be persuaded that punitive damages in all types of cases should be limited to treble damages to prevent exposure to unwarranted levels of liability. But that issue is not before the Commission. And, even though I might be persuaded that a ceiling in all types of cases is sound, that policy conclusion does not justify piecemeal enactment of punitive damages ceilings.

The proposed section clearly seeks to enact a special rule for trustees. No cogent reasons have been advanced at our meetings to suggest that trustees are deserving of special protections not afforded to others who assume or have imposed upon them legal duties. The argument that in the absence of a punitive damages ceiling trust companies may raise their fees goes much more to the wisdom of allowing punitive damages in the first place than it does to the trebling limitation. But existing law apparently allows for recovery of punitive damages against trustees. Under that circumstance, I believe trustees should be entitled to no more or less protection as regards punitive damages than others and, in any event, special rules for trustees should not be enacted without a compelling showing of need. Moreover, if limiting punitive damages would have any effect on trustee fees (which personally I doubt), the result would be to foster use of the trust device by encouraging people and firms to take up trustees' duties. No one has made the case why the laws of this state should encourage allocation of resources to this activity as opposed to the myriad other forms of available economic activity. I perceive no such justification.

Accordingly, I would urge deletion of "not exceeding three times the amount of liability determined under Section 16440" from new Section 16443.

2. Notice to Creditors.

Generally, the changes proposed in the Tentative Recommendation seem sound. Again in the vein of my reservations above, I am troubled by those provisions intending to insulate attorneys and personal representatives from liability in subsections (b) and (c) of Section 9053. While subsection (a) seems sensible because it fosters or encourages the giving of notice, the other subsections have the opposite effect. I fail to appreciate the public policy served by providing that the personal representative and attorney have no duty to search for creditors and, even more startling, the requirement that the omitted creditor must show bad faith to recover. Such provisions seem destined to encourage that legitimate creditors will be overlooked.

Accordingly, I would urge deletion of subsections (b) and (c) of Section 9053.

Very truly yours,


Vaughn R. Walker

cc: Forrest A. Plant, Esq., Chairman

EXHIBIT 2

ARTHUR K. MARSHALL
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CA LAW REV. COMM'N
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September 28, 1988

Nathaniel Sterling, Esq.
Assistant Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739


Re: Letter of Mr. Walker Dated 9-20-88

Dear Nat:

In response to Vaughn Walker's letter of 9-20-88 re punitive damages, may I say this: while limiting punitive damages (for trustees) is a new concept applying only to one field of law, why refuse a good idea simply because it has not as yet percolated into other areas of law? How else would a good idea get started?

As to notice to creditors, I am inclined to agree that the attorney should at least make a reasonable search. Anything less would cause the public to be cynical about the good intentions of the representative.

Sincerely,


Arthur K. Marshall

AKM:nvl

STATE OF CALIFORNIA
California Law Revision Commission

Staff Draft

TENTATIVE RECOMMENDATION

relating to

TRUSTEES' FEES

September 1988

This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be a part of the public record and will be considered at a public meeting when the Commission determines the provisions it will include in legislation the Commission plans to recommend to the Legislature in 1989. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you believe revisions should be made in the tentative recommendation.

COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN OCTOBER 31, 1988.

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

09/14/88

TRUSTEES' FEES

Background

As compensation for administering the trust, a trustee is entitled to a fee as provided in the trust instrument.¹ The amount specified in the trust is subject to court review and may be reduced where, for example, the amount provided in the trust is inequitable or unreasonably high.² If the trust instrument does not set the trustee's compensation, the trustee is entitled to a reasonable fee under the circumstances.³

In the past, when testamentary trusts were more closely controlled by the courts,⁴ the trustee's fees were subject to review in the annual approval of accounts. Under this scheme, the first bracket percentage fee was typically $\frac{1}{2}$ of 1% of the principal value of trust property.⁵

1. Prob. Code § 15680(a).

2. Prob. Code § 15680(b). This remedy also applies where the amount of compensation is inadequate and the trustee seeks a higher amount. An order changing compensation acts only prospectively.

3. Prob. Code § 15681.

4. Trusts created after 1977 were not subject to continuing jurisdiction, but were made subject to the statute covering living trusts. See Prob. Code § 1120(c), as added by 1976 Cal Stat. ch. 860, § 3. Beginning in 1983, trusts created before July 1, 1977, were required to be removed from continuing jurisdiction, if the trust had a corporate trustee, or permitted to be removed, if the trust did not have a corporate trustee. See Prob. Code § 1120.1a, as added by 1982 Cal. Stat. ch. 1199, § 2. The Trust Law, operative on July 1, 1987, reconfirmed the preference for intermittent court jurisdiction over both testamentary and living trusts at the instigation of an interested person. See Prob. Code § 17209.

5. See, e.g., Cohan & Fink, *Trustees and Administrative Provisions*, in *California Will Drafting* § 17.23, at 608 (Cal. Cont. Ed. Bar 1965); *California Will Drafting Supplement* § 17.23, at 259-260 (Cal. Cont. Ed. Bar 1981).

Since 1982, many trust companies have increased their first bracket rates to 1% or more.⁶ In addition, several trust companies have raised the size of the first bracket so that the highest percentage fee is charged over a greater value of trust property.⁷ In most cases, the minimum fee has also been increased.⁸

The Commission has made no judgment on the propriety of the fees charged by California trustees. It has been suggested that the fee increases have resulted from a number of factors, such as inflation, the increased cost of doing business, the additional burden of regulation and reporting imposed on the banking industry, and a greater exposure to liability.⁹ It has also been suggested that the fees in the past may have been artificially low, but that trust departments are now expected to produce a higher level of return.¹⁰

Recommendations

The appropriate level of fees for services should continue to be determined by the parties to the trust and not by statute or by requiring court approval of fees. This approach is consistent with modern trust administration under which the interested parties are

6. This conclusion is based on information gathered from 24 California trust companies comparing fee schedules in effect in 1982 and 1987. Ten out of 18 respondents had increased percentage rates during this 5-year period. See Corporate Trustees' Fees: Summary and Analysis of Information from Corporate Trustees 2-4 (October 1987) (on file at Commission office).

7. Five of the respondents raised the ceiling of the first bracket to which the highest percentage rate is applied. See Corporate Trustees' Fees: Summary and Analysis of Information from Corporate Trustees 2-6 & supporting data (October 1987) (on file at Commission office).

8. Fifteen of 18 respondents increased minimum fees between 1982 and 1987. One bank lowered its minimum fee. See Corporate Trustees' Fees: Summary and Analysis of Information from Corporate Trustees 4-6 (October 1987) (on file at Commission office).

9. See statements of bank trust officers quoted in the appendix to Corporate Trustees' Fees: Summary and Analysis of Information from Corporate Trustees 16-18 (October 1987) (on file at Commission office).

10. *Id.*

expected to take the initiative in protecting their rights. The settlor presumably may take the trustee's fee schedule into account in selecting the trustee.¹¹ In addition, the trust instrument may provide a mechanism for determining fees or replacing a trustee if the fees become excessive without the need to petition the court. After a trust is established, the persons having the power to modify or terminate the trust clearly should have the power to accept or reject fee increases.

The Commission recommends (1) making existing judicial remedies more explicit and (2) adding a nonjudicial procedure providing for notice of and an opportunity to object to proposed fee increases.

To implement the first recommendation, the Trust Law should be revised to provide explicitly that the court, on petition of a beneficiary or cotrustee, may review the reasonableness of the trustee's compensation and order a different amount. The grounds for removal of a trustee should also include situations where the trustee's fee is excessive under the circumstances.

The second recommendation would be implemented by requiring trustees to give at least 60 days' written notice of a proposed fee increase to the trust beneficiaries.¹² The trustee would not be permitted to increase its periodic base fee, rate of percentage compensation, minimum fee, or hourly rate, or to increase transaction charges by 10% or more per year, without following this procedure or petitioning for court approval. If no beneficiary objects in writing to the proposed fee increase within the 60-day period (or longer period

11. This recommendation is mainly concerned with irrevocable trusts, whether living or testamentary, since the settlor under a revocable trust may replace the trustee at will in response to an unreasonable fee increase.

12. For this purpose, "beneficiaries" would include all beneficiaries to whom income or principal is required or authorized in the trustee's discretion to be currently distributed under the trust and to those who would receive a distribution of principal if the trust were terminated at the time notice is given. This class of beneficiaries is drawn from Probate Code Section 16062 governing consent to a trustee's resignation. In the case of a minor for whom a guardian has not been appointed, notice would go to the custodial parent, who would then have the right to object under the proposed procedure.

afforded by the trustee), the proposed fee increase would become effective. If all beneficiaries object to the proposed fee increase and are unable to work out a compromise with the trustee, the beneficiaries could replace the trustee without the need to petition the court. In addition, if all beneficiaries object, the trustee would be permitted to resign without court approval and would not be liable for the resignation or for the selection of, or acts or omissions of, the successor trustee. If one or more, but not all, of the beneficiaries object and the proposed increase is not compromised, the trustee would have to petition the court for an increased fee, or could petition to resign the trust. If the trustee petitions for approval of the fee increase, the court would have discretion to award costs and attorney's fees to be paid by the trustee, the trust, or the objecting beneficiary, as justice requires.

EXEMPLARY DAMAGES

The proposed legislation would also limit exemplary damages for breach of trust to no more than three times compensatory damages.¹³ Although the right to exemplary damages against trustees is not well-established, the traditional reluctance to award such damages is dissipating. Recent cases have indicated a willingness to award exemplary damages against fiduciaries.¹⁴ The potential for large punitive damages awards may act as an incentive for trust companies to raise fees across the board, to the detriment particularly of smaller trusts. Thus it is in the interest of trust beneficiaries as a group to limit the potential liability for exemplary damages.

Consequently, the Commission renews its recommendation that exemplary damages for breach of trust involving the trustee's willful

13. The Commission originally recommended this provision as part of the comprehensive trust bill. See Recommendation Proposing the Trust Law, 18 Cal. L. Revision Comm'n Reports 501, 560, 713 (1986).

14. See *Vale v. Union Bank*, 88 Cal. App. 3d 330, 339-40, 151 Cal. Rptr. 784 (1979); *Werschull v. United California Bank*, 85 Cal. App. 3d 981, 1000-04, 149 Cal. Rptr. 829 (1978); see also *Schoenholtz v. Doniger*, 657 F. Supp. 899, 913-16 (S.D.N.Y. 1987).

misconduct, fraud, or gross negligence may not exceed three times the amount of compensatory damages.

SETTLOR'S PETITION FOR REMOVAL OF TRUSTEE

Traditionally, the settlor of an irrevocable living trust has not been considered to have a sufficient interest in the trust to petition for removal of a trustee, unless such a power is reserved in the trust instrument.¹⁵ If the settlor had or retained an unrestricted power to replace the trustee, the trust would be taxable in the settlor's estate.¹⁶

The Commission recommends that the settlor of an irrevocable living trust be given the limited power to petition the court for removal of a trustee, on the same footing as a beneficiary or cotrustee.¹⁷ The settlor may be in a good position to assess whether the trustee is failing to administer the trust appropriately. The power to petition for removal would be particularly useful in a case where the settlor has created the trust for minor children, and thus would avoid the need to seek appointment of a guardian ad litem to represent their interests. A statutory right to petition for removal would not have adverse tax consequences because the power to remove the trustee remains in the court's discretion subject to a set of standards.

15. See, e.g., G. Bogert & G. Bogert, *Handbook of the Law of Trusts* § 160, at 575 (5th ed. 1973).

16. See E. Depper & A. Bernstein, *California Trust Administration* § 13.11, at 554 (Cal. Cont. Ed. Bar 1986); *Treas. Reg.* § 20.2041-1(b)(1) (19).

17. See Prob. Code § 15642.

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

An act to amend Sections 15642 and 17200 of, to add Section 16443 to, and to add Article 6 (commencing with Section 15690) to Chapter 1 of Part 3 of Division 9 of, the Probate Code, relating to trusts and trustees.

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

Probate Code § 15642 (amended). Removal of trustee

SECTION 1. Section 15642 of the Probate Code is amended to read:

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 settlor, 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) Where the trustee's compensation is excessive under the circumstances.

(6) 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) is amended to provide the settlor of an irrevocable living trust the right to petition under this section for removal of a trustee. As to the rights of a settlor of a revocable trust, see Sections 15401 (revocation by settlor), 15402 (modification

by settlor of revocable trust), 15800 (rights of person holding power of revocation). The right to petition under this section does not give the settlor any other rights, such as the right to an account or to receive information concerning administration of the trust.

Paragraph (5) is added to subdivision (b) to make clear that a trustee may be removed in the court's discretion where the trustee's compensation is excessive under the circumstances. This is a clarification of the law, rather than a new principle. If a trustee is removed, another trustee may be appointed to fill the vacancy as provided in Section 15660. See also Section 15681 (trustee entitled to reasonable compensation under the circumstances).

* * * * *

Probate Code §§ 15690-15698 (added). Notice and Review of Fee Increases

SEC. 2. Article 6 (commencing with Section 15690) is added to Chapter 1 of Part 3 of Division 9 of the Probate Code, to read:

Article 6. Notice and Review of Fee Increases

§ 15690. "Trustee's fee" defined

15690. As used in this article, "trustee's fee" means the trustee's periodic base fee, rate of percentage compensation, minimum fee, hourly rate, or transaction charge.

Comment. Section 15690 defines "trustee's fee" for the purposes procedure in this article governing increases in trustees' fees. This limited definition does not apply to provisions not in this article. The reference to "transaction charge" includes charges for deed preparation, stock sales, check writing, tax return preparation, and the like.

§ 15691. Application of article

15691. (a) Notwithstanding any provision in the trust and subject to subdivision (b), the trustee may increase the trustee's fee only after compliance with this article or pursuant to a court order.

(b) The requirement of subdivision (a) does not apply to an increase in a transaction charge that is less than 10 percent per year.

Comment. Subdivision (a) of Section 15691 makes clear that the procedure applicable to increases in trustees' fees under this article governs even where the trust instrument contains a contrary provision concerning the trustee's fees. See Section 15690 ("trustee's fee" defined). It should be noted, however, selection of a successor trustee is subject to trust provisions. See Section 15698.

The last clause of subdivision (a) recognizes that this article does not govern fee increases that are approved by the court. See Sections 15680, 17200(b)(9).

Subdivision (b) makes clear that *de minimis* transaction charge increases are not subject to the procedure of this article or to court approval.

§ 15692. Notice of proposed fee increase

15692. (a) Except as provided in Section 15691, if a trustee proposes to increase the trustee's fee, as to each trust that would be affected by the proposed fee increase, the trustee shall give at least 60 days' written notice of the proposed fee increase to each beneficiary to whom income or principal is required or authorized in the trustee's discretion to be currently distributed or to receive a distribution of principal if the trust were terminated when notice is given. If a beneficiary is a minor for whom no guardian has been appointed, notice of the proposed fee increase shall be given to the parent having legal custody of the minor beneficiary and the parent may thereafter represent the interests of the minor beneficiary under this article.

(b) The effective date of the proposed fee increase may be different from the date by which the trustee is to receive an objection, but at least 60 days shall be allowed for making an objection.

Comment. Section 15692 requires the trustee to give notice to certain beneficiaries of a proposed fee increase. The class of beneficiaries entitled to notice under subdivision (a) is drawn in part from Section 15640 (acceptance of trustee's resignation), with the addition of special rules concerning certain minor beneficiaries. Where the trust is revocable, the settlor has the rights of the beneficiaries. See Section 15800. See also Sections 1003 (guardian ad litem), 15802 (notice to person holding power to revoke), 15803 (rights of holder of power of appointment or withdrawal).

§ 15693. Contents of notice of proposed fee increase

15693. Notice of the proposed increase of the trustee's fee shall include the following information:

(a) A statement that the trustee proposes to increase the trustee's fee.

(b) The effective date of the proposed fee increase.

(c) The trustee's fee currently charged that would be affected by the proposed fee increase and the amount or rate of the proposed fee increase.

(d) The name, address, and telephone number of the trustee or the trustee's representative to whom questions may be addressed and to whom any objections shall be directed.

(e) A statement that the proposed fee increase will become effective on the stated date unless a beneficiary's written objection is received by the designated trustee or trustee's representative within the time allowed for making an objection.

(f) The date by which any objections to the proposed fee increase must be received by the designated trustee or the trustee's representative.

(g) A statement that if an objection is made within the time allowed, the trustee may withdraw the proposed fee increase or seek to compromise the proposed fee increase, may petition the court for approval of the trustee's resignation, or may petition the court for approval of all or part of the proposed fee increase.

(h) A statement that if the trustee successfully petitions for court approval, the objecting beneficiary or the trust may be held liable for the trustee's costs and attorney's fees, and that if the trustee's petition is unsuccessful, the trustee may be held liable for the objecting beneficiary's costs and attorney's fees.

(i) A statement that if all the beneficiaries who are entitled to notice of the proposed fee increase agree in writing, the trustee may resign pursuant to Section 15697 or the beneficiaries may replace the trustee with a successor trustee pursuant to Section 15698.

Comment. Section 15693 sets out the required contents of a notice of proposed fee increase given under Section 15692. As to the liability for costs and attorney's fees, see Section 15696.

§ 15694. Increased fee allowed if no objection

15694. The trustee may increase the trustee's fee as stated in the notice unless, within the time allowed for making an objection stated in the notice, either of the following occurs:

(a) The trustee receives an objection to the proposed fee increase from any person entitled to notice under Section 15692.

(b) The trustee receives notice of a petition under Section 17200 relating to the proposed fee increase.

Comment. Section 15694 describes two actions that prevent a proposed fee increase from taking effect according to its terms. An

objection, as provided in subdivision (a), is part of the procedure provided by this article. A petition under Section 17200 relating to the trustee's fee takes the matter out of this article and the court has jurisdiction over the fee issue. See Section 17200(b)(9).

§ 15695. Procedure if beneficiary objects

15695. If any person entitled to notice under Section 15692 objects to the proposed fee increase by delivering a written notice of the objection to the trustee within the time allowed for making an objection, the proposed fee increase does not become effective and the trustee may do any of the following:

(a) Withdraw the proposed fee increase as to that trust.

(b) Revise the proposed fee increase and give notice of a different proposed fee increase under the procedure provided by this article.

(c) Petition the court for approval of the proposed fee increase or a modified fee increase.

(d) Petition the court to accept the trustee's resignation.

Comment. Section 15695 provides for the trustee's options following a timely objection to the proposed fee increase. See Section 15697 (right to resign if all beneficiaries object). See also Section 15696 (liability for costs and attorney's fees).

§ 15696. Liability for costs and attorney's fees

15696. If the trustee petitions for approval of all or part of the proposed fee increase under Section 15695, the court may, in its discretion, order costs and attorney's fees to be paid by the trustee, the trust, or the beneficiary who objected to the proposed fee increase, as justice may require. If the objecting beneficiary is made liable for costs or attorney's fees, the amount may be charged against the beneficiary's interest in the trust, as ordered by the court.

Comment. Section 15696 gives the court authority to award costs and attorney's fees in the interests of justice in proceedings for approval of a proposed fee increase following receipt of a beneficiary's objection under this article. This section does not apply where the trustee seeks court approval of a fee increase initially by petition under Section 17200(b)(9).

§ 15697. Resignation or removal if all beneficiaries object

15697. (a) If all persons entitled to notice under Section 15692 object to the proposed fee increase in a writing delivered to the

trustee within the time allowed, within 60 days after expiration of the time allowed for making an objection:

(1) The persons entitled to notice under Section 15692 may, acting together and without the need to obtain court approval, remove the existing trustee and select a successor trustee as provided in Section 15698. The trustee may not be removed under this paragraph if, before the expiration of the time allowed for making an objection, the trustee petitions the court for approval of the fee increase or withdraws the proposed fee increase by giving written notice of the withdrawal to the persons entitled to notice under Section 15692.

(2) The trustee may resign as trustee without the need to obtain court approval. The trustee's resignation under this paragraph is not effective until a successor trustee is selected.

(b) A trustee who resigns or is removed pursuant to this section is not liable for any consequences of the resignation and is not liable for the selection of, or the acts or omissions of, the successor trustee.

Comment. Section 15697 provides for the resignation or removal of the trustee if all the persons entitled to notice of a proposed fee increase object in writing within the time allowed. If fewer than all such persons object, the trustee would have to petition the court to permit the resignation or the objecting beneficiaries would have to petition for removal of the trustee. See Section 15695 (procedure if not all beneficiaries object). Where a parent of a minor beneficiary is given notice pursuant to Section 15692, the parent may exercise the power to remove the trustee provided by this section. See Section 15692(a).

§ 15698. Selection of successor trustee

15698. If a trustee resigns or is removed pursuant to Section 15697, a successor trustee shall be selected as follows:

(a) If the trust instrument provides a practical method of appointing a successor trustee or names a successor trustee, the successor shall be selected as provided in the trust instrument.

(b) If subdivision (a) is not applicable, a trust company may be selected as successor trustee by agreement of all beneficiaries entitled to notice under Section 15692 without the need for court approval.

(c) If the successor trustee is not selected pursuant to subdivision (a) or (b), the court may appoint a successor trustee on petition.

Comment. Section 15698 governs selection of a successor trustee to fill the vacancy created by resignation or removal of a trustee pursuant to Section 15697 following a failed attempt to gain approval of a proposed fee increase. Subdivisions (a) and (c) are comparable to subdivisions (b) and (c) of Section 15660.

Subdivision (b) permits the beneficiaries who are entitled to notice under Section 15692 to select the successor trustee without going to court if the trust does not provide a special procedure or name a successor. Subdivision (b) applies only where the successor trustee agreed on by all beneficiaries is a trust company. If the beneficiaries wish to select an individual trustee, court approval must be sought. See Section 17200(b)(10) (petition for appointment of trustee). If the successor trustee is an individual, the bond requirements of Section 15602 may apply.

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Probate Code § 16443 (new). Liability for exemplary damages

SEC. 4. Section 16443 is added to the Probate Code, to read:

16443. If a breach of trust results from the trustee's willful misconduct, fraud, or gross negligence, the court may find the trustee liable for an amount of exemplary damages not exceeding three times the amount of liability determined under Section 16440.

Comment. Section 16443 is new and is intended to clarify the right to exemplary damages for breach of trust. This section codifies the right to exemplary damages found in some appellate cases. See *Vale v. Union Bank*, 88 Cal. App. 3d 330, 339-40, 151 Cal. Rptr. 784 (1979); *Werschull v. United California Bank*, 85 Cal. App. 3d 981, 1000-04, 149 Cal. Rptr. 829 (1978); see also *Schoenholtz v. Doniger*, 657 F. Supp. 899, 913-16 (S.D.N.Y. 1987).

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Probate Code § 17200 (amended). Petitions; grounds for petition

SEC. 5. Section 17200 of the Probate Code is amended to read:

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 or reviewing the reasonableness 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. Subdivision (b)(9) of Section 17200 is amended to make clear that the reasonableness of the trustee's compensation is subject to review on petition under this section. This revision is a clarification of prior law and not a substantive change.