

Memorandum 89-36

Subject: Study L-3010 - Trustees' Fees (Revised Draft Recommendation)

The Commission staff met with nine representatives of the California Bankers Association on February 28 in an effort to resolve issues concerning the draft *Recommendation Relating to Trustees' Fees*. As a result of this meeting, the staff has prepared the attached revised draft which we recommend for approval and submission to the 1989 Legislature.

The revised draft adopts a new concept. The former recommendation required a notice to all the beneficiaries if the trustee proposed a fee increase. If all the beneficiaries objected to the proposed fee increase and were unable to work out a compromise with the trustee, the beneficiaries could replace the trustee with a trust company without the need to petition the court. The effect of the latter provision was that the giving of the notice triggered a procedure that could result in the transfer of the trust without the consent of the existing trustee and without court review of the transfer. The banks sought to limit to the maximum extent possible the circumstances where the notice was required in order to limit the scope of the free right to transfer the trust.

The Commission is aware of the struggle that has taken place in an effort to prescribe the rules that govern when the notice of a proposed increase fee should be required. An exception was included in the former recommendation that avoided the need to give notice in some cases of an increase in transaction fees. The banks were unsatisfied with the way the exception was written. Various alternatives for dealing with transaction fees have been considered, but all of these alternatives were viewed by the banks as being too uncertain or involving considerable costs in computer programing and tracking of transaction expenses. These costs were not quantified, but the staff accepts the representation that the costs would be substantial initially and that the continuing costs could be significant.

The banks also were concerned about the problem of increasing hourly rates. Hourly rates tend to increase as the general wage level increases. Yet, giving a notice of an increase in hourly rates (just to keep up with the cost of living) would have permitted free transfer of the trust to another corporate trustee under the earlier proposal. Allowing a specified percentage increase in hourly rates each year without the need to give notice of the increase would probably result in an annual increase in hourly rates to the maximum extent allowed.

The staff concluded that it would not be possible to work out a statute that would meet general approval and not involve significant costs of compliance if the concept of the former recommendation were retained.

The new recommendation adopts a different approach. It requires a notice of any increase in the trustee's fees (including hourly rates and transaction charges). The notice goes to the same persons who would be entitled to receive an annual account from the trustee, thereby reducing the problem of determining the persons who are to be given the notice of increased rates. The notice must be given at least 60 days before the increase goes into effect. If any beneficiary files a petition for review of the rates before the 60-day period expires, the increase does not go into effect until the petition is decided (unless the court otherwise orders). The giving of the notice gives the beneficiaries no independent right to transfer the trust without the consent of the trustee.

How does the new recommendation deal with the problem of the beneficiaries who want to move the trust when there would be a saving in the trustee's fees if the trust were transferred to another corporate trustee? The new recommendation requires the court to award costs and attorney's fees when the beneficiaries have requested the transfer of the trust to another trust company, the existing trustee has refused to do so without substantial justification, and the court orders the transfer to the trust company selected by the beneficiaries. There are other requirements, including a requirement that a representative of the beneficiaries meet and confer with the existing trustee in an effort to reach an agreement concerning the fees the existing trustee would charge the trust.

The attorney's fees section is the key section of the draft. This section is required in order to discourage the existing trustee from refusing without substantial justification to comply with the request to transfer the trust when all the beneficiaries agree to the transfer. The denial would force the beneficiaries to go to court to obtain an order that the transfer be made. Absent this section, the draft would do nothing to solve the problem that concerned Assembly Member Harris that court proceedings be avoided. If this section were not included, the staff would recommend that the Commission go back to its previous draft and recommend that draft for enactment in 1989.

Respectfully submitted,

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STATE OF CALIFORNIA

California Law Revision Commission

Revised Staff Draft

RECOMMENDATION

relating to

TRUSTEES' FEES

March 1989

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

LETTER OF TRANSMITTAL

This recommendation proposes several revisions of the Trust Law (Prob. Code §§15000-18201) to provide some control over trustee's fees and to make clear that the court has authority to award exemplary damages in an appropriate case.

The recommended legislation requires trustees to give at least 60 days' notice to beneficiaries before increasing a fee. If a beneficiary objects by petitioning the court before the 60-day period expires, the fee increase would not go into effect until the court so orders.

The recommended legislation permits all the beneficiaries to request the trust company that has the trust to transfer it to another trust company that will charge lower fees. If the trust company refuses without substantial justification to consent to the transfer and the court orders the transfer, the costs and attorney's fees incurred in securing the transfer can be recovered from the trust company that refused to consent. This procedure should encourage transfer of trusts without the need to go to court.

The recommended legislation gives statutory recognition to the right to exemplary damages for breach of trust. However, in view of the upward pressure on fees that is caused by the potential liability for exemplary damages, this liability is limited to a maximum of three times actual damages.

The recommended legislation makes other clarifications and improvements in the Trust Law. The Trust Law was enacted upon Commission recommendation in 1986, and this recommendation is part of the Commission's ongoing effort to review and act on suggestions for improvement in legislation enacted upon Commission recommendation. It is submitted pursuant to Resolution Chapter 37 of the Statutes of 1980.

REVIEW AND CONTROL OF TRUSTEES' FEES

As compensation for administering a trust, the trustee is entitled to a fee as provided in the trust instrument.¹ The fee specified in the trust is subject to court review and may be reduced where, for example, the amount 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 3/4 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 259-60 (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. Representatives of corporate trustees have suggested that the fee increases result 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, and that trust departments are now expected to produce a higher level of return.¹⁰

The Commission has concluded that the appropriate level of fees for services should continue to be determined by the parties to the trust and not by a statutory fee schedule or by requiring court approval of fees. This approach is consistent with modern trust administration principles under which the interested parties, having the needed information, are expected to take the initiative in

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.*

protecting their rights. The settlor can 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 without the need to petition the court. However, where the trust instrument does not provide a remedy, the beneficiaries must rely on the statutes or judicial remedies. The cost of court proceedings can act as a significant inhibition to beneficiaries who are dissatisfied with an increase in fees.

The existing statutes do not deal adequately with the situation where the trust beneficiaries are dissatisfied with the trustee's fees. Accordingly, the Commission recommends that (1) existing judicial remedies be made more explicit and (2) nonjudicial procedures be provided for giving notice of and providing an incentive to work out disagreements concerning fees. These recommendations are discussed below.

Clarifying Judicial Remedies

The recommended legislation gives explicit recognition to the authority of the court, on petition of a beneficiary or cotrustee, to review the reasonableness of the trustee's compensation and to set a different amount.¹² In addition, specifically included in the grounds for removal of a trustee are situations where the trustee's fee is excessive under the circumstances.¹³

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. See Prob. Code § 17200(b)(9) (petition to fix or allow payment of the trustee's compensation). As a matter of clarification, this provision would be revised to provide that a petition may be filed to review the reasonableness of the trustee's compensation. This is consistent with Probate Code Section 15681 pursuant to which the trustee is generally entitled to reasonable compensation.

13. See Prob. Code § 15642.

Notice of Proposed Fee Increase

The recommended legislation requires the trustee to give at least 60 days' written notice of a proposed fee increase to trust beneficiaries to whom income or principal is required or authorized in the trustee's discretion to be currently distributed.¹⁴ Notice must be given of any proposed increases in the trustee's periodic base fee, rate of percentage compensation, minimum fee, hourly rate, and transaction charges, but not extraordinary fees. This requirement applies both to individual trustees and trust companies. The requirement is consistent with the trustee's duty to keep the beneficiaries reasonably informed of the administration of the trust.¹⁵

If a beneficiary objects to the proposed fee increase by filing a petition and giving notice to the trustee before the 60-day period expires, the proposed fee increase will not become effective until the court orders otherwise.¹⁶

Transfer of Trust to Trust Company

The recommended legislation clarifies the right of adult beneficiaries, with the consent of the trustee, to transfer administration of the trust from the existing trustee to a trust company that has agreed to accept the trust.¹⁷ The recommended legislation permits the adult beneficiaries who are receiving or are entitled to receive income or a distribution of principal if the trust were terminated to select a trust company to fill the vacancy created by the resignation without the need to obtain court

14. This class of beneficiaries is the same as those entitled to an accounting under Probate Code Section 16062.

15. Prob. Code § 16060.

16. See Prob. Code § 17200(b)(9) (petition to fix or allow payment of trustee's compensation). The proposed legislation would also revise this provision to explicitly provide for a petition for review of the reasonableness of the trustee's compensation. This would be a clarification, rather than new law.

17. See Prob. Code § 15640(a)(3) (resignation of trustee with 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").

approval.¹⁸ Of course, if the trust instrument provides a practical method for selecting the successor trustee or designates the successor, the instrument would govern.¹⁹

Attorney's Fees Award Where Transfer Refused Without Justification

In order to encourage out-of-court settlement of disputes over trustees' fees, the recommended legislation provides a special procedure for the transfer of the trust from one trust company to another trust company that is willing to administer the trust at a savings in fees. The procedure is initiated by a request for transfer from the adult beneficiaries authorized to select a trust company to fill a vacancy without the need for court approval. The request includes a statement from another trust company that it will accept the trust and setting forth the fees that currently would be charged by that trust company.

Within 30 days after receiving the request, the trust company administering the trust must do one of the following:

- (1) Resign and transfer trust property to the successor.
- (2) Offer to meet and confer with the representative of the beneficiaries in an effort to reach agreement on the fee dispute.
- (3) Petition the court for approval of the fee.

If the trustee complies with the request and transfers the trust or if the beneficiaries and the trust company resolve their differences concerning the fees (whether by an explanation of the fees or by an adjustment of the fees), the statute has served its purpose and court proceedings have not been necessary.

If the trust company refuses to consent to the transfer and a petition to replace the trustee is filed, the petitioners are entitled

18. This power to select a new trust company under Probate Code Section 15660 is analogous to the power to accept a trustee's resignation under Probate Code Section 15640.

19. Prob. Code § 15660(b).

to costs and reasonable attorney's fees if the petition is not opposed or if all of the following requirements are satisfied:

(1) A request for the trustee's resignation was made that satisfied the applicable requirements.

(2) The petition for removal of the trustee was filed more than 30 days after the request for the trustee's resignation was made.

(3) A representative of the persons requesting the trustee's resignation made a reasonable effort to meet and confer with the trustee's representative in an effort to reach an agreement concerning the fees.

(4) The court makes an order removing the existing trustee and appointing the trust company identified in the request as successor trustee.

(5) The court determines that the fees currently being charged by the successor trust company on the type of trust involved are lower than the fees of the removed trustee.

(6) The court determines that the existing trustee's refusal to resign and transfer the trust property to the successor trust company was without substantial justification.

This carefully limited liability for costs and attorney's fees should have the effect of encouraging the parties to settle the dispute without the need to initiate court proceedings.

EXEMPLARY DAMAGES

The recommended legislation gives the court express statutory authority to award exemplary damages for breach of trust involving the trustee's willful misconduct, fraud, or gross negligence.²⁰ Although the right to exemplary damages against trustees is not well-established, the traditional reluctance to award such damages is dissipating. A willingness to award exemplary damages against

20. 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). The provision was deleted from the bill to permit further study.

fiduciaries for breach of fiduciary duties is found in some recent cases.²¹

On the other hand, the potential for large exemplary damages awards may act as an incentive for trust companies to raise fees across the board, to the detriment particularly of smaller trusts. The exposure to exemplary damages would also make private trustees less willing to serve. Thus, it is in the interest of trust beneficiaries as a group to limit the potential liability for exemplary damages. The recommended legislation limits the liability to not more than three times the amount of compensatory damages.²²

21. 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).

22. This limitation was included in the Commission's previous recommendation. See *supra* note 20. Many statutes provide limitations on exemplary damages or set a penalty in a given amount, subject to a ceiling, or as a multiple of actual damages. See Bus. & Prof. Code § 17536 (up to \$2500 for false and misleading advertising); Civil Code §§ 52 (\$250 penalty for violation of Unruh Civil Rights Act), 536 (treble damages for injury to property of cable television corporation), 1710.1 (\$500 penalty plus treble damages for sale of mechanical and electrical appliances with removed or damaged manufacturer's mark or serial number), 1716 (treble damages for solicitation of money for goods not ordered or services not performed), 1719 (treble damages for dishonored check), 1721 (treble damages for malicious destruction of materials at construction site), 1739.4 (treble damages for misrepresentation concerning political campaign items), 1748.1 (treble damages for imposition of surcharge on use of credit card), 1812.123 (treble damages for discount buying services contracts), 1882.2 (treble damages for diversion of utility services), 3346 (treble damages for injury or removal of timber), 3370.1 (up to \$2500 for unfair competition); Code Civ. Proc. §§ 732 (treble damages for waste), 733 (treble damages for injury or removal of timber), 735 (treble damages for forcible or unlawful entry), 1029.8 (treble damages for provision of goods or services by unlicensed persons), 1174(b) (treble damages for forcible entry or unlawful detainer with malice); Food & Agric. Code § 21855 (penalty of four times value plus punitive damages for taking or killing cattle without owner's consent); Labor Code § 1054 (treble damages for preventing employment of former employee, etc.); Penal Code §§ 496 (treble damages plus costs and fees for receiving or concealing stolen property), 637.2 (\$3000 or treble damages for invasion of privacy); Prob. Code §§ 13110 (three times property value for fraudulently securing payment, delivery, or transfer of personal property under affidavit procedure), 13205 (three times property value for execution or filing fraudulent affidavit for disposition of real property of small value).

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.²³ If the settlor had or retained an unrestricted power to replace the trustee, the trust would be taxable in the settlor's estate.²⁴

The recommended legislation gives the settlor of an irrevocable living trust the limited power to petition the court for removal of a trustee, on the same footing as a beneficiary or cotrustee.²⁵ 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.

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

24. See E. Depper & A. Bernstein, California Trust Administration § 13.11, at 554 (Cal. Cont. Ed. Bar 1986); Treas. Reg. § 20.2041-1(b)(1) (1988).

25. See Prob. Code § 15642.

RECOMMENDED LEGISLATION

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

An act to amend Section 2051 of the Financial Code, to amend Sections 15640, 15642, 15660, and 17200 of, to add Sections 15686 and 16443 to, to add Article 6 (commencing with Section 15700) 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:

Financial Code § 2051 (amended). Rights of trust parties on sale of trust business

SECTION 1. Section 2051 of the Financial Code is amended to read:

2051. (a) The selling and purchasing banks shall enter into an agreement of purchase and sale which shall contain all the terms and conditions of the sale and contain proper provision for the payment of all liabilities of the selling bank, or of the business, branch, or branch business sold, and proper provision for the assumption by the purchasing bank of all fiduciary and trust obligations of the selling bank, or business, branch, or branch business sold. The agreement may provide for the transfer of all deposits of the selling bank or of the business, branch, or branch business sold to the purchasing bank, subject to the right of every depositor of the selling bank or of the business, branch, or branch business sold to withdraw his the deposit in full on demand after such transfer, irrespective of the terms under which it was deposited with the selling bank, and may provide for the transfer of all court and private trusts so sold to the purchasing bank, ~~subject to the rights of all trustors and beneficiaries under the trusts so sold after such transfer to nominate another or succeeding trustee of the trust so transferred.~~

(b) If a trust is transferred under this section, the transfer is good cause for removal of the trustee under the Trust Law, Division 9 (commencing with Section 15000) of the Probate Code.

Comment. Subdivision (b) is added to Section 2051 to clarify the rules concerning removal and replacement of trustees following the transfer of a trust business from one trustee to another. Subdivision (b) replaces the provision formerly appearing in the last clause of

this section and incorporates the general rules governing removal and replacement of trustees provided by the Trust Law. See, e.g., Prob. Code §§ 15640, 15642, 15660, 17200(b)(10).

Probate Code § 15640 (amended). Resignation of trustee

SEC. . Section 15640 of the Probate Code is amended to read:

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

~~(1)~~ (a) As provided in the trust instrument.

~~(2)~~ (b) In the case of a revocable trust, with the consent of the person holding the power to revoke the trust.

~~(3)~~ (c) 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. If a beneficiary has a conservator, the conservator may consent to the trustee's resignation on behalf of the conservatee without obtaining court approval. Without limiting the power of the beneficiary to consent to the trustee's resignation, if the beneficiary has designated an attorney in fact who has the power under the power of attorney to consent to the trustee's resignation, the attorney in fact may consent to the resignation.

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

~~(b)-On~~

(d) Pursuant to a court order obtained on petition by the trustee, the under Section 17200. The court shall accept the trustee's resignation. The court and may also make any orders necessary for the preservation of the trust property, including the appointment of a receiver or a temporary trustee.

Comment. Section 15640 is revised to make clear that court approval is not required to accomplish a resignation except under subdivision (d). This revision makes explicit what was implicit under former law. Whether court approval is required under paragraph (1) of subdivision (a) depends on the terms of the trust.

The last two sentences are added to subdivision (c) for consistency with Section 15660(c) (appointment of trustee to fill vacancy) and to make clear that a conservator may consent to the resignation without the need to obtain approval of the court in which the conservatorship proceeding is pending. If the trustee resigns pursuant to subdivision (c), the trust may be transferred to a trust

company pursuant to Section 15660(c), all without court approval. See also Sections 15700-15703 (request to transfer trust to trust company charging lower fees).

Probate Code § 15642 (amended). Removal of trustee

SEC. . 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 under Section 17200.

(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) of Section 15642 is revised to give the settlor of an irrevocable living trust the right to petition 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 for removal of a trustee 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 Sections 15681 (trustee entitled

to reasonable compensation under the circumstances), 15700-15703 (request to transfer trust to trust company charging lower fees).

Probate Code § 15660 (amended). Appointment to fill vacancy in office of trustee

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), the vacancy may be filled by a trust company that has agreed to accept the trust on agreement 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 the agreement is made. If a beneficiary has a conservator, the conservator may agree to the successor trustee on behalf of the conservatee without obtaining court approval. Without limiting the power of the beneficiary to agree to the successor trustee, if the beneficiary has designated an attorney in fact who has the power under the power of attorney to agree to the successor trustee, the attorney in fact may agree to the successor trustee.

~~(e)~~ (d) If the vacancy in the office of trustee is not filled as provided in subdivision (b) or (c), 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 of 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. Subdivision (c) is added to Section 15660 to permit a vacancy in the office of trustee to be filled, without the need for court approval, by a trust company selected by agreement of the adult beneficiaries of the trust. The persons who must agree to the new trustee are the same as those who must consent to a resignation under subdivision (c) of Section 15640. A vacancy may be filled under subdivision (c) whether or not the former trustee was a trust company.

If the trustee resigns pursuant to subdivision (c) of Section 15640, the trust may be transferred to a trust company pursuant to

subdivision (c) of Section 15660, all without court approval. See also Sections 15700-15703 (request to transfer trust to trust company charging lower fees).

Probate Code § 15686 (added). Notice of proposed fee increase

SEC. . Section 15686 is added to the Probate Code, to read:

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

(b) A trustee may not increase the trustee's fee unless the trustee first gives 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.

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

Comment. Section 15686 is new provision. See also Section 16060 (duty of the trustee under Section 16060 to keep beneficiaries of trust reasonably informed of the trust and its administration). The notice under Section 15686 is given to the same persons who would receive an account under Section 16062(a).

Probate Code §§ 15700-15703 (added)

SEC. . Article 6 (commencing with Section 15700) is added to Chapter 1 of Part 3 of Division 9, to read:

Article 6. Transfer of Trust to Trust Company Charging Lower Fees

§ 15700. Request to transfer trust

15700. (a) If the beneficiaries of a trust wish to transfer the trust from one trust company to another trust company in order to achieve savings in the trustee's fee, the beneficiaries may request that the existing trustee resign and transfer the trust property to a successor trust company.

(b) The request shall include all of the following:

(1) The consents required by subdivision (c) of Section 15640.

(2) The agreement required by subdivision (c) of Section 15660.

(3) A statement from the successor trust company that it will accept the trust.

(4) A statement of the fees that would be currently charged on the trust if it were transferred.

Comment. Section 15700 is a new provision that, along with the remaining sections in this article, is designed to encourage an out-of-court solution where the beneficiaries of a trust want to transfer the trust to a trust company in order to reduce the cost of the trustee's fees. The procedure of this article is not exclusive. See Section 15703 and the Comment thereto.

§ 15701. Response to request

15701. Within 30 days after the trust company receives a request under Section 15700, the trust company shall do one of the following:

(a) Resign and transfer the trust property to the successor trust company, in which case court approval of the transfer is not required.

(b) Offer to meet and confer with a representative of the persons making the request in an effort to reach an agreement concerning the fees the existing trustee will charge the trust.

(c) File a petition under Section 17200 for court approval of the trustee's fees currently being charged or, if a fee increase is proposed, the trustee's fee as proposed to be increased.

Comment. Section 15701 sets out the alternative courses of action for the trust company following receipt of a request to resign.

§ 15702. Award of costs and attorney's fees where request refused

15702. (a) Subject to subdivision (b), if a petition is filed under Section 17200 to replace the trustee:

(1) The petitioners are entitled to costs and reasonable attorney's fees incurred in the proceeding under Section 17200 and under this article, to be paid by the trustee and not from the trust.

(2) The trustee may not charge the trust for its costs and attorney's fees incurred in opposing the petition or under this article.

(b) This section applies only if the petition to remove the existing trustee is not opposed or, if the petition is opposed, where all of the following requirements are satisfied:

(1) A request for the trustee's resignation was made that satisfied the requirements of Section 15700.

(2) The petition under Section 17200 was filed more than 30 days after the request for the trustee's resignation was made.

(3) A representative of the persons requesting the trustee's resignation made a reasonable effort to meet and confer with a representative of the existing trustee in an effort to reach an agreement concerning the fees the trustee would charge the trust.

(4) The court makes an order removing the existing trustee and appointing the trust company identified in the request as successor trustee.

(5) The court determines that the fees currently being charged by the successor trust company on the type of trust involved are lower than the fees of the removed trustee.

(6) The court determines that the existing trustee's refusal to resign and transfer the trust property to the successor trust company was without substantial justification.

Comment. Section 15702 is a new provision that is designed to encourage an out of court solution where the beneficiaries of a trust want to transfer the trust to a trust company in order to reduce the cost of the trustee's fees.

§ 15703. Other rights not limited

15703. (a) Nothing in this article limits the rights of resignation, removal, or appointment of trustees under other provisions of this division, including the right to petition under Section 17200.

(b) Nothing in this article limits any power the court may otherwise have to award or not award costs or costs and attorney's fees.

Comment. Section 15703 makes clear that the procedure of this article is not exclusive. For example, the existing trust company may voluntarily resign pursuant to subdivision (c) of Section 15640 and the trust may be transferred to another trust company selected pursuant to subdivision (c) of Section 15660, all without court approval and without complying with the requirements of this article. Likewise, a beneficiary may petition under Section 17200 for removal of the trustee without complying with the requirements of this article. See also Sections 15640 (resignation of trustee), 15642 (removal of trustee), 15660 (appointment of trustee). As to the power of the court to award or not to award attorney's fees in other situations, see the Comment to Section 15684 (repayment of trustee for expenditures)

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

SEC. . 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).

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

SEC. . 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. See also Section 15701 (recovery of attorney's fees where request to transfer trust to trust company charging lower fees denied by existing trustee without substantial justification).