

First Supplement to Memorandum 89-36

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

We have just received a letter from David W. Lauer, on behalf of the California Bankers Association, stating the opposition of CBA to the draft statute relating to trustees' fees attached to Memorandum 89-36. (See Exhibit 1.) That draft was prepared after the staff met with representatives of CBA and various banks on February 28. The staff draft was intended to meet the CBA's concerns and preserve the policies of concern to the Commission. However, CBA apparently finds the new draft more objectionable than the prior draft.

The staff believes that the new draft does respond to concerns expressed by CBA about applying the earlier draft to increases in transaction charges and hourly rates. We have not been able to come to an agreement on standards for excluding *de minimis* increases from the coverage of the notice and removal provisions of the earlier draft. Accordingly, we have come up with a different approach that recognizes aspects of existing practice, as represented to us by CBA, and ties them together. We have been told that the banks routinely give notice of fee increases and that if there is a problem, they try to work it out. If the bank reaches an impasse with the beneficiaries, we have been told that they will resign, if there are no other complications, and turn the trust over to another trust company. In accord with these practices, the new draft requires prior notice of fee increases, provides incentives to negotiation, and encourages resignation and transfer if agreement cannot be reached. The new draft encourages the parties to work the matter out themselves without court involvement by awarding costs and attorney's fees to beneficiaries where the trustee refuses a request to resign in an appropriate case.

None of these principles should be very startling. They have been before us in one form or another for some time and are easily understood. CBA strongly objects, however, to aspects of the new procedure for transfer of a trust to a trust company charging lower fees (see Sections 15700-15703 on pages 13-15 of the draft attached to Memorandum 89-36). In order to move this project forward, the staff suggests that we drop this detailed procedure and simply provide for

liability for costs and attorney's fees in proceedings to transfer the trust to another trust company where the trustee does not have a substantial justification for refusing to consent to the transfer. We would keep the other provisions of new draft, most of which have been considered and approved in earlier drafts.

To implement this suggestion, the following provisions would replace Sections 15700-15703 in the draft attached to Memorandum 89-36:

Probate Code § 15645 (added). Costs and attorney's fees in proceedings for transfer of trust to successor trust company

15645. (a) Subject to subdivision (b), in proceedings under Section 17200 to remove a trustee and transfer administration of the trust to a trust company:

(1) The petitioners are entitled to costs and reasonable attorney's fees incurred in the proceeding, 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.

(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) The court makes an order removing the existing trustee and appointing a trust company as successor trustee.

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

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

Comment. Section 15645 is a new provision that is designed to encourage an out of court solution where the beneficiaries of a trust want to transfer administration of the trust to a successor corporate trustee.

If the Commission does not decide to adopt some form of the suggested compromise based on the new draft, we will revert to the earlier draft. Accordingly, we are redistributing the draft that was under consideration at the February meeting. Whichever course is chosen, at the April meeting, the Commission needs to approve language to be amended into Assembly Bill 831, the spot bill on trustees' fees.

Respectfully submitted,

Stan G. Ulrich
Staff Counsel



California Bankers Association
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CA LAW REV. COMM'N

APR 10 1989

R E C E I V E D

HAND DELIVERY

April 7, 1989

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

**Re: Trustee Fees
Memorandum 89-36**

Dear Mr. DeMouilly:

The California Bankers Association has been committed to working with the California Law Revision Commission and its Staff to arrive at legislation which protects trust beneficiaries in an administratively feasible manner. As you know, in furtherance of this goal, the CBA has proposed legislation which requires notice to beneficiaries of increases in trustee fees which have the greatest economic impact on beneficiaries, thus incorporating current practice into legislation.

In the spirit of working towards acceptable legislation, the CBA met with the LRC Staff on February 28, 1989, at which representatives of several California banks expressed their concerns with the previous LRC proposal. The Bankers stated many business and fiduciary reasons which made the LRC Staff proposal unacceptable. There was a lengthy discussion of several points, including, but not limited to, the following:

1. The definition of "trustee fees" under Section 15690(c), which included types of fees which make the notice provision unworkable from an administrative and practical standpoint.
2. The de minimis provision of Section 15692, "Exempt Transaction Charges", which operationally did not work. You will recall that we discussed alternative language which was preferable.

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3. "Liability for costs and attorney's fees,"
Section 15697, which could be interpreted to charge costs and fees against the trustee even if the beneficiaries do not prevail.

The new proposal of the Staff set forth in Memorandum 89-36 does not appear to reflect any of the discussion of the issues, the suggested alternatives, or the conclusions or representations of the Bankers expressed at the February 28 meeting. I have discussed your proposal with many of the other CBA representatives in attendance. They have expressed the same reaction and share the concerns which I have.

Furthermore, we would like to take specific exception to a number of points in the Memorandum. First, we recall no basis from the discussion at the meeting for the conclusion expressed in paragraph 2 at page 1 of Memorandum 89-36 that "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". To the contrary, the concept of "notice" has been contained in every CBA proposal. CBA merely desires a workable definition of "trustee fees" in order to delineate the circumstances under which notice should be given to affected persons.

Second, the concept of moving a trust to "save trustee's fees" was not discussed at our meeting. In fact, this concept is totally new. In the last two years, at the request of Assemblyman Harris, the subject of proposed legislation has been increases in trustee fees. Sections 15700, 15701, and 15702 are far beyond what is reasonable or necessary. These sections addressed different issues, creating substantial questions of statutory interpretation and cumbersome procedures, and would result in no net benefits to trust beneficiaries.

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The purpose of the February 28, 1989 meeting was to review any middle ground between the CBA and LRC proposals, or to develop alternate ideas acceptable to the LRC and CBA. Instead, Memorandum 89-36 raises new, even more complex problems, and present a more untenable position.

Neither Memorandum 88-77 nor Memorandum 89-36 is acceptable to the CBA, which will oppose such proposals if introduced in the Legislature. As an alternative, we again urge consideration of the CBA definition of "trustee fees" and incorporation of that definition in the revisions previously agreed to by the LRC in Memorandum 88-77. Acceptance of the definition would eliminate, or at least minimize, the conceptual and administrative difficulties of the LRC proposal.

Very truly yours,



David W. Lauer
Chairman,
CBA Trust State Governmental Affairs Committee

DWL/clc

RECOMMENDATION
relating to
TRUSTEES' FEES

Background

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

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 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 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 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 trust beneficiaries whose interests would be affected by the proposed fee increase.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 certain transaction

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.

charges,¹³ without following this procedure or petitioning for court approval. If half or more of the affected beneficiaries object in writing to the proposed fee increase within the 60-day period (or longer period afforded by the trustee), the proposed fee increase would not become effective without judicial approval. If half or more 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.

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. This provision would give the beneficiaries a nonjudicial remedy when they all object to the proposed fee increase.¹⁴ 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, or acts or omissions, of the successor trustee.

13. "Transaction charges" are defined as fees for routine and recurring activities, such as check writing, stock transfers, banking transactions, and the like, and to exclude fees for extraordinary services and fees determined on a time basis, such as preparation of tax returns, complex property transactions and distributions, property management, lease negotiations, and the like. The proposed procedure does not apply to transaction charges where the aggregate amount of transaction charges in the current fiscal year of the trust does not exceed 5% of the total trustee's fee charged during that time or the aggregate amount of transaction charges in the preceding fiscal year.

14. This proposal provides a limited form of trust portability when all the beneficiaries, not just those whose interests would be affected by the fee increase, can agree. Trust companies have the freedom to transfer trusts to other trust companies, without the consent of the beneficiaries or settlor, by selling the trust company's whole trust business or that of a branch. See Fin. Code § 2051. This statute recognizes the post-transfer right of settlors and beneficiaries to "nominate" a succeeding trustee. However, the court with jurisdiction over a particular trust has no part in the transfer process. *Cf. In re Estate of Barnett*, 97 Cal. App. 138, 141-43, 275 P. 453 (1929) (probate court has no jurisdiction to consider objection to change of trustee through purchase).

EXEMPLARY DAMAGES

The proposed legislation would also limit exemplary damages for breach of trust to no more than three times compensatory damages.¹⁵ 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 for breach of fiduciary duties.¹⁶ 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.

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.¹⁷

15. 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).

16. See *Vale v. Union Bank*, 88 Cal. App. 3d 330, 339-40, 151 Cal. Rptr. 784 (1979); *Werschkuhl 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).

17. 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

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.¹⁸ If the settlor had or retained an unrestricted power to replace the trustee, the trust would be taxable in the settlor's estate.¹⁹

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.²⁰ 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

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).

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

19. 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).

20. See Prob. Code § 15642.

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.

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

An act to amend Section 2051 of the Financial Code, and 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:

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. 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 or her 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 the settlors, cotrustees, and beneficiaries under the trusts so sold after such transfer to nominate another or succeeding trustee of the trust so transferred remove or replace the trustee as provided in the Trust Law, Division 9 (commencing with Section 15000) of the Probate Code.

Comment. Section 2051 is amended to conform to the provisions of the Trust Law relating to removal and replacement of trustees. See, e.g., Prob. Code §§ 15642, 15660, 17200(b)(10).

Probate Code § 15642 (amended). Removal of trustee

SEC. 2. 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. 3. 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. Definitions

15690. As used in this article:

(a) "Beneficiary" means a 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 at the time notice is given or an action is taken.

(b) "Transaction charges" include [scheduled] fees for routine and recurring activities, such as check writing, stock transfers, banking transactions, and the like. The term does not include fees for extraordinary services or fees determined on a time basis, such as preparation of tax returns, complex property transactions and distributions, property management, lease negotiations, and the like.

(c) "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 several terms for the purposes of the procedure in this article governing increases in trustees' fees. These limited definitions do not apply to provisions not in this article.

The definition of beneficiaries in subdivision (a) is drawn in part from Section 15640 (acceptance of trustee's resignation). This definition provides some limits on the beneficiaries who must be given notice under Section 15692 or who can remove a trustee under Section 15697. 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).

Subdivision (b) defines "transaction charges" for purposes of the special rules provided in Section 15691(b).

§ 15691. Application of article

15691. Notwithstanding any provision in the trust:

(a) 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 transaction charges in either of the following circumstances:

(1) Where the aggregate amount of transaction charges in the current fiscal year of the trust does not exceed five percent of the total trustee's fee charged the trust during that time.

(2) Where the aggregate amount of transaction charges in the current fiscal year of the trust does not exceed the aggregate amount of transaction charges charged the trust in the preceding fiscal year of the trust.

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

Subdivision (a) provides the general rule restricting increases in trustee fees. A trustee desiring to increase fees may proceed either under this article or by petitioning the court. See Sections 15680, 17200(b)(9). In addition, the trustee may begin with the notice procedure under this article and later abandon this procedure in favor of judicial proceedings. See Section 15695 (procedure where beneficiaries object to proposed fee increase). Similarly, any beneficiary or cotrustee may take the matter out of this article by petitioning under Section 17200(b)(9).

Subdivision (b) excuses *de minimis* transaction charge increases from the requirements of this article. Thus, the notice requirement of Section 15692 is not triggered by any increase in transaction charges affecting a particular trust until the aggregate of such charges as defined in Section 15690(b) exceeds 5% of the total fee (including the transaction charges) and exceeds the aggregate of such charges assessed the trust in the prior fiscal year of the trust.

§ 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 whose interest would be affected by the proposed fee increase. 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. See Section 15690(a) ("beneficiary" defined for purposes of this article). 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) The names, addresses, and telephone numbers of all beneficiaries to whom the notice of proposed fee increase is being sent.

(f) A statement that the proposed fee increase will become effective on the stated date unless 50 percent or more of the beneficiaries whose interests in the trust would be affected by the proposed fee increase object in writing and the objections are received by the designated trustee or trustee's representative within the time allowed for making objections.

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

(h) A statement that if objections from 50 percent or more of the beneficiaries entitled to notice are received 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.

(i) A statement that if the trustee successfully petitions for court approval, the objecting beneficiaries 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 beneficiaries' costs and attorney's fees.

(j) A statement that if the trustee receives written objections to the proposed fee increase from all beneficiaries 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 at the time the action is taken, the trustee may resign or be removed pursuant to Section 15697 without the need to obtain court approval.

Comment. Section 15693 sets out the 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 of proposed fee increase unless, within the time allowed for making objections stated in the notice, either of the following occurs:

(a) The trustee receives written objections to the proposed fee increase from 50 percent or more of the beneficiaries 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. The objection procedure, as provided in subdivision (a), is governed by this article. A petition under Section 17200 relating to the trustee's fee, referred to in subdivision (b), takes the matter out of this article and the court then has jurisdiction over the fee issue. See Section 17200(b)(9).

§ 15695. Procedure if half of affected beneficiaries object

15695. If the trustee receives written objections from 50 percent or more of the beneficiaries entitled to notice under Section 15692 within the time allowed for making objections, 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 as to that trust 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 timely receipt of objections to the proposed fee increase from 50% or more of the affected beneficiaries. See also Sections 15696 (liability for costs and attorney's fees), 15697 (right to resign if all beneficiaries object).

§ 15696. Liability for costs and attorney's fees

15696. If the trustee petitions for approval of all or part of the proposed fee increase as provided in Section 15695, the court may, in its discretion, order costs and attorney's fees to be paid by the trustee, the trust, or the beneficiaries who objected to the proposed fee increase, as justice may require. If the objecting beneficiaries are made liable for costs or attorney's fees, the amount may be charged against the beneficiaries' respective interests 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 objections from 50% or more of the affected beneficiaries as provided in 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), without using the notice procedure of this article.

§ 15697. Resignation or removal if all beneficiaries object

15697. (a) If the trustee receives written objections to the proposed fee increase from all beneficiaries within the time allowed for making objections, within 60 days after expiration of the time allowed for making an objection:

(1) All of the beneficiaries, acting together and without the need to obtain court approval, may remove the existing trustee and select a successor trustee as provided in Section 15698. The trustee may not be removed under this paragraph if, within 15 days after the expiration of the time allowed for making an objection, the trustee petitions for

court approval of the fee increase or withdraws the proposed fee increase by giving written notice to the beneficiaries.

(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 of the beneficiaries (as defined in Section 15690(a)) object in writing to the proposed fee increase within the time allowed. The standard for removal without court approval pursuant to this section is stricter than the standard for interrupting a proposed fee increase. Removal under this section requires the unanimous action of all the beneficiaries, not only those whose interests would be affected by the proposed fee increase, and not simply 50% of the beneficiaries.

If fewer than all beneficiaries object, the trustee would have to petition the court to permit the resignation or a beneficiary or other interested person would have to petition for removal of the trustee. See Section 15695 (procedure where 50% or more, but not all, of 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 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 to select the successor

trustee without going to court, if the trust does not provide a special procedure or name a successor. As in Section 15697, the agreement of all beneficiaries (as defined in Section 15690(a)) is required to select a successor trustee, not simply the beneficiaries whose interests would have been affected by the proposed fee increase. 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.

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).

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.