

## Memorandum 99-63

### Revocable Trust Accounting (Draft of Tentative Recommendation)

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The Commission at its August meeting discussed issues surrounding the case of *Evangelho v. Presoto*, 67 Cal. App. 4th 615, 79 Cal. Rptr. 2d 146 (1998), which allows beneficiaries of a revocable trust to demand a retroactive accounting covering the period when the trust was revocable. This is contrary to the intent of the Trust Law.

Attached is a staff draft tentative recommendation making clear that there is no duty to account to beneficiaries for periods when the trust is revocable, and stating the conclusion that this is existing law, not new law. If the Commission approves the draft, we will circulate it for comment.

This is a limited recommendation that is intended to repair the main harm caused by *Evangelho*, without addressing other related issues that were raised in letters before the Commission and discussed at the August meeting. The Commission felt that an accounting should not be required for the period when the settlor acted as sole trustee of a revocable trust (which is covered by the rule excluding the duty to account for a period when the person was not a trustee). Nor should an accounting be required of a successor trustee for the period before the successor trustee became a trustee. The draft recommendation accomplishes these goals, but does not create any exceptions, such as may be appropriate in cases where the third-person trustee under the revocable trust didn't account to the settlor (or other person holding the power to revoke) or where the settlor is incompetent. Several Commissioners expressed concerns at the August meeting that there should be a ready remedy to pursue the "faithless fiduciary" in some situations, notwithstanding the technical revocability of the trust. Other commentators have focused on the will-substitute nature of revocable trusts and prefer a bright-line rule preventing any relation back of the rights of beneficiaries to a time before the trust became irrevocable. These are interesting and worthy issues, but are difficult to accommodate quickly in a recommendation that is focused on clarifying the existing rules, without adding to them or carving out new, special exceptions.

A related matter discussed at the August meeting is whether the language of Probate Code Section 15800 is adequate. That section may be read to suggest that when the settlor of a revocable trust becomes incompetent, beneficiaries (rather than the settlor's fiduciaries) have rights in the revocable trust. We will schedule this matter for review at a subsequent Commission meeting, when Charles Collier (who raised the issue and has a strong interest in it) is able to be in attendance.

Respectfully submitted,

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STATE OF CALIFORNIA

# CALIFORNIA LAW REVISION COMMISSION

*Staff Draft*

TENTATIVE RECOMMENDATION

## Revocable Trust Accounting

October 1999

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. 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 **January 31, 2000.****

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.

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## SUMMARY OF TENTATIVE RECOMMENDATION

1 This recommendation rejects the rule of *Evangelho v. Presoto*, 67 Cal. App. 4th  
2 615, 79 Cal. Rptr. 2d 146 (1998). That case misinterprets existing law, giving ben-  
3 eficiaries of a revocable trust the right, after the death of the settlor, to require an  
4 accounting covering the period when the trust was revocable. Trust beneficiaries  
5 do not have rights under the Trust Law while the trust is revocable. Consequently,  
6 they cannot require a trust accounting covering the period when the trust was  
7 revocable. The recommended legislation would make a clear statement of this  
8 existing principle.

9 This recommendation was prepared pursuant to Resolution Chapter 81 of the  
10 Statutes of 1999.

## REVOCABLE TRUST ACCOUNTING

1 Under the Trust Law,<sup>1</sup> a revocable trust, so long as it remains revocable, is  
2 considered to be for the benefit of the settlor of the trust, not for the benefit of the  
3 named beneficiaries. The settlor may do as the settlor wishes with the trust assets,  
4 including withdrawing them from the trust or revoking the trust in its entirety; the  
5 settlor is accountable to no one but himself or herself.<sup>2</sup> Unless the trust instrument  
6 otherwise provides, the named beneficiaries of a revocable trust have no  
7 enforceable interest — only an expectancy — until the trust becomes irrevocable,  
8 ordinarily at the death of the settlor.<sup>3</sup>

9 Notwithstanding these principles, the 1998 court of appeal case of *Evangelho v.*  
10 *Presoto*<sup>4</sup> holds that, after the settlor of a revocable living trust dies and the trust  
11 becomes irrevocable, the beneficiaries may compel an accounting by the successor  
12 trustee retroactively for the period during which the trust was revocable by the  
13 settlor, even though the settlor was the sole trustee.

14 The court recognized that the Trust Law provides that there is no right to compel  
15 an account “during the time” the trust is revocable,<sup>5</sup> but the court erroneously  
16 interprets this language to mean, in effect, that the right to compel an accounting  
17 only slumbers during the period of revocability and springs to life in favor of the  
18 beneficiaries when the settlor dies and the trust becomes irrevocable.

19 The correct interpretation, however, is that there is no duty to account to a  
20 beneficiary concerning acts of the trustee during the period of revocability,  
21 regardless of whether the trust has become irrevocable. As the court notes, the  
22 statutory duty is owed only to the person holding the right of revocation, typically  
23 the settlor. There is no authority in the Trust Law for transferring an accounting  
24 duty exclusively owed to the settlor before death, so as to create a right to a  
25 retrospective trust account in beneficiaries after the settlor’s death.<sup>6</sup>

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1. Prob. Code § 15000 *et seq.* The Trust Law was enacted on Commission recommendation in 1986 and re-enacted in slightly revised form in the new Probate Code in 1990. See 1986 Cal. Stat. ch. 820; 1990 Cal. Stat. ch. 79; see also *Recommendation Proposing the Trust Law*, 18 Cal. L. Revision Comm’n Reports 501 (1986); *Selected 1986 Trust and Probate Legislation*, 18 Cal. L. Revision Comm’n Reports 1201, 1207 (1986); *Recommendation Proposing New Probate Code*, 20 Cal. L. Revision Comm’n Reports 1001 (1990).

2. Prob. Code §§ 15800, 16064 & Comments.

3. This scheme is analogous to that applicable under a will — a will is ambulatory and may be changed or revoked or property disposed of by the testator up until the time of death. A beneficiary has a mere expectancy that does not become enforceable until the will becomes irrevocable on the testator’s death.

4. 67 Cal. App. 4th 615, 79 Cal. Rptr. 2d 146 (1998).

5. 67 Cal. App. 4th at 623-24, 79 Cal. Rptr. 2d at 150-51.

6. The case presents an additional difficulty., since it appears that the defendant daughter was being ordered to account on the basis of the Trust Law for a time when she was not the trustee. It is fundamental that a *trust accounting under the Trust Law* cannot be required from a person who is not a trustee, or from a trustee for a period when the person was not acting as a trustee.

1 This misinterpretation of existing law creates a number of problems:

- 2 • It effectively converts a revocable living trust into an irrevocable trust by  
3 giving a remainder beneficiary the same rights as if the trust had been  
4 irrevocable from its inception. These rights are greater than the beneficiary  
5 would have had if the settlor had left a will instead of a revocable living  
6 trust, and are not needed to provide relief in a case where there has been  
7 fraud or undue influence on the settlor.
- 8 • It impairs the usefulness of the revocable living trust as a probate-avoiding  
9 will substitute — it burdens the settlor with lifetime record-keeping and  
10 heralds the prospect of post mortem accounting and objections to the  
11 accounting as the settlor's descendants delve into the settlor's lifetime  
12 transfers.
- 13 • It promotes intrafamily litigation over the personal choices of a settlor  
14 making donative transfers — during life or at death.
- 15 • It imposes on a successor trustee the responsibility to construct an  
16 accounting for a period when the successor had no responsibility to  
17 maintain records.

18 The Law Revision Commission recommends amending the Trust Law to reject  
19 the statutory interpretation in *Evangelho v. Presoto*. A beneficiary of a revocable  
20 trust, whether before or after the settlor's death, should not be able to require a  
21 trust accounting covering the period the trust was revocable, either from the settlor  
22 acting as sole trustee<sup>7</sup> or from a successor trustee for the period before the  
23 successor became a trustee.<sup>8</sup> This would not preclude a beneficiary of a revocable  
24 trust from obtaining relief on behalf of the settlor or the trust under common law  
25 remedies for fraud or undue influence exercised against the settlor during the  
26 period of the trust's revocability.<sup>9</sup>

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7. Even though a settlor acting as cotrustee may be competent, it cannot be conclusively presumed that the settlor has approved all the actions of the cotrustee in circumstances where there may have been fraud or undue influence.

8. This rule is subject to the specifics set out in Probate Code Section 16403 (liability of successor trustee for acts and omissions of predecessor).

9. *Cf.* Prob. Code §§ 15002, 15003.

## PROPOSED LEGISLATION

1 **Prob. Code § 16064 (amended). Exceptions to duty to report information and account**

2 SECTION 1. Section 16064 of the Probate Code is amended to read:

3 16064. The trustee is not required to report information or account to a  
4 beneficiary in any of the following circumstances:

5 (a) To the extent the trust instrument waives the report or account, except that no  
6 waiver described in subdivision (e) of Section 16062 shall be valid or enforceable.  
7 Regardless of a waiver of accounting in the trust instrument, upon a showing that  
8 it is reasonably likely that a material breach of the trust has occurred, the court  
9 may compel the trustee to report information about the trust and to account.

10 (b) In the case of a beneficiary of a revocable trust, as provided in Section  
11 15800, for the period when the trust may be revoked, regardless of whether the  
12 trust has become irrevocable.

13 (c) As to a beneficiary who has waived in writing the right to a report or account.  
14 A waiver of rights under this subdivision may be withdrawn in writing at any time  
15 as to the most recent account and future accounts. A waiver has no effect on the  
16 beneficiary's right to petition for a report or account pursuant to Section 17200.

17 (d) Where the beneficiary and the trustee are the same person.

18 (e) Subject to Section 16403, where the report or account would cover a period  
19 during which the person was not a trustee.

20 **Comment.** Section 16064 is amended to make clear that a beneficiary does not have the right  
21 to compel an accounting covering the period a trust is revocable, whether or not the trust is  
22 currently revocable. See also Section 15800. This amendment effectuates the original intent of  
23 this section and rejects the contrary rule of *Evangelho v. Presoto*, 67 Cal. App. 4th 615, 79 Cal.  
24 Rptr. 2d 146 (1998). Thus, in circumstances such as those described in *Evangelho*, a beneficiary  
25 may not later require an accounting under the Trust Law for the period that the trust was  
26 revocable. However, common law remedies may be available for fraud or undue influence on the  
27 settlor during that period, whether by a trustee, beneficiary, or other person. See also Sections  
28 15002, 15003.