

CALIFORNIA LAW REVISION COMMISSION

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.

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739
650-494-1335 FAX: 650-494-1827

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

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

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

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

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

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 treats a revocable living trust as an irrevocable trust by giving
3 a remainder beneficiary the same rights as if the trust had been irrevocable
4 from its inception. These rights are greater than the beneficiary would have
5 had if the settlor had left a will instead of a revocable living trust, and are
6 not needed to provide relief in a case where there has been fraud or undue
7 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 postmortem accounting and objections to the
11 accounting, with the settlor's descendants delving 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 account-
16 ing for a period when the successor had no responsibility to maintain
17 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 trustee⁷ or from a successor trustee for the period before the succes-
23 sor became a trustee.⁸ This would not preclude a beneficiary of a revocable trust
24 from obtaining relief on behalf of the settlor or the trust under common law reme-
25 dies for fraud or undue influence exercised against the settlor during the period of
26 the trust's revocability.⁹

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
14 account. A waiver of rights under this subdivision may be withdrawn in writing at
15 any time as to the most recent account and future accounts. A waiver has no effect
16 on the beneficiary's right to petition for a report or account pursuant to Section
17 17200.

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

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

21 **Comment.** Section 16064 is amended to make clear that a beneficiary does not have the right
22 to compel an accounting covering the period a trust is revocable, whether or not the trust is
23 currently revocable. See also Section 15800. This amendment effectuates the original intent of
24 this section and rejects the contrary rule of *Evangelho v. Presoto*, 67 Cal. App. 4th 615, 79 Cal.
25 Rptr. 2d 146 (1998). Thus, in circumstances such as those described in *Evangelho*, a beneficiary
26 may not later require an accounting under the Trust Law for the period that the trust was
27 revocable. However, common law remedies may be available for fraud or undue influence on the
28 settlor during that period, whether by a trustee, beneficiary, or other person. See also Sections
29 15002, 15003.