



TRUSTS & ESTATES SECTION

THE STATE BAR OF CALIFORNIA

TRUSTEE'S DUTY TO INFORM BENEFICIARIES: CLARIFICATION AND EXPANSION

LEGISLATIVE PROPOSAL (T&E-2009-09)

TO: Saul Bercovitch, Legislative Counsel

FROM: Peter S. Stern, Chair, Trusts & Estates Section Executive Committee
Richard Burger, Chair, Subcommittee on Administration of Trusts and Estates,
Trusts & Estates Section Executive Committee
Catherine A. Lawson, Advisor, Trusts & Estates Section Executive Committee

DATE: June 14, 2008

RE: An act to amend Sections 16061, 16064, and 17200 of, and to add Sections 16060.7,
16065, 16068 and 16069 to, the Probate Code, relating to trusts.

SECTION ACTION AND CONTACTS:

Date of Approval by Trusts & Estates Section Executive Committee: June 14, 2008

Approval vote: 22 ayes; 2 nays

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SUMMARY OF PROPOSAL:

This proposal would clarify a trustee's obligation to provide trust beneficiaries with information and documents.

The purpose of the proposal is to reduce disputes by bringing clarity and certainty to the law describing the parties' rights and obligations in the area of trustee accountability. The proposal is intended to reduce the expense of trust administration by encouraging informal, targeted and responsive replies to requests from beneficiaries rather than superfluous or burdensome formal reporting requirements. At the same time, the proposal requires greater accountability from trustees, thereby instilling greater confidence in beneficiaries, discouraging actual breaches of trust by trustees, and reducing needless litigation engendered by the unnecessary fear and suspicion of beneficiaries that can result from a lack of communication and information.

Specifically, it would:

- Clarify that a beneficiary may request a copy of the "terms of the trust" at any time (§16060.7);
- Clarify that a trustee can and should provide a beneficiary with specific information the beneficiary has reasonably requested concerning a trust, rather than being compelled to provide a standard report containing statutorily specified information that may be neither relevant nor of interest to the requesting beneficiary (§16061);
- Clearly distinguish those situations in which a trustee is obligated to provide a formal accounting from those where the trustee is required to report only information requested by a beneficiary (§16064);
- Specifically require a trustee to provide a beneficiary an opportunity to review and copy trust records relevant to the beneficiary's interest in the trust upon a reasonable request (§16065);
- Clarify that the rights of a beneficiary to receive information relevant to his or her interest in the trust upon reasonable request, to obtain a copy of the terms of the trust, and to review and copy trust records relevant to the beneficiary's interest in the trust may not be waived by the settlor in the trust instrument (§§16064 and 16068);
- Make other clarifying and conforming changes.

ISSUES AND PURPOSE:

Revocable trusts are increasingly replacing wills as the primary vehicle to transfer property at death, and California trust law continues to evolve in response to this shift.

Division 9, Part 4, Article 3, of the California Probate Code, comprising §§16060 – 16064, sets forth the trustee's duty to report information and account to beneficiaries. As

experience with trust administration increases over time, the need to change and clarify some of these statutes becomes apparent. This proposal seeks to address some of the problems that practitioners have reported experiencing in recent years. It makes amendments and changes to these sections of the Probate Code and to §17200 as follows:

§16060.7 (new)

Most revocable inter vivos trusts (“living trusts”) remain revocable until the death of the settlor of the trust. When the settlor dies, existing law requires the trustee to notify both the settlor’s heirs and the trust beneficiaries of their right to obtain a copy of the “terms of the trust.” The “terms of the trust” are clearly defined in §16060.5, and include the trust and all amendments to the trust. If the trust has been “restated,” the trustee need only provide a copy of the restated trust and any subsequent amendments.

The law is clear as to what the trustee must provide when the beneficiary requests the terms of the trust in response to the trustee’s post-death notification. But the settlor’s death is not the only time a beneficiary may request a copy of the trust.

Section 16061 sets forth a beneficiary’s general right to request information from the trustee, and such information ought to include a copy of the “terms of the trust” as defined in §16060.5. However, the current language of §16061 is unclear because a beneficiary’s right to request the “terms of the trust” could be read as being unduly restricted by the phrase that limits the trustee’s duty to provide information which is “relevant to the beneficiary’s interest.” Is a beneficiary who requests a copy of the trust under §16061 entitled to the entire “terms of the trust,” or only those portions of the terms of the trust which are “relevant to the beneficiary’s interest”?

This proposal moves the beneficiary’s right to request a copy of the trust to a new section, making it clear that a beneficiary may request a copy of the “terms of the trust” at any time and without special limitations. This will make it clear that the trustee must provide the same portions of the trust upon a beneficiary’s request whether that request is in response to the trustee’s notification under §16061.7 (such as after a death or change of trustee) or is at another time on the beneficiary’s own initiative under Section 16060.7.

§16061 (amendment)

There is a general expectation among the public that trust administration should be less rigid and less expensive than probate administration. This proposal furthers that expectation by encouraging and facilitating informal, inexpensive communications between a trustee and beneficiary.

Section 16061 currently requires a trustee, on reasonable request by a beneficiary, to provide a “report of information about the assets, liabilities, receipts, and disbursements of the trust, the acts of the trustee, and the particulars relating to the administration of the trust relevant to the beneficiary’s interest, including the terms of the trust.” This language implies that the trustee must provide a specific document with particular information, much like a formal “Report

of Administration” that a personal representative must file in a formal probate proceeding, even though the required report may not be responsive to the beneficiary’s specific request. There is a tendency toward such reports in current practice, although they may include far more information than the beneficiary needs or wants, while still not answering his or her specific questions regarding the administration of the trust. The proposal provides that a trustee’s obligation to “report to the beneficiary” means that the trustee shall respond to the beneficiary’s actual questions, as opposed to providing “a report,” a phrase which implies a specific type of document. Allowing a trustee to provide the beneficiary with the specific information relevant to the beneficiary’s interests that the beneficiary himself reasonably requests (which may include any or all of the specific information currently listed) will have the positive effect of creating an atmosphere of trust and confidence in administration, without the expense of the preparation of a report in a specified format or the provision of unrequested and unwanted information. Instead, the trustee’s obligation is satisfied by a responsive communication that answers the questions posed, which may take any form which is adequate under the circumstances to provide the information that the beneficiary requested

The proposal will also minimize any potential confusion created by the majority opinion in *Esslinger v. Cummins* (2006) 144 Cal.App.4th 517. Although Probate Code § 16062 requires a trustee to account only to those beneficiaries who may currently receive income or principal, the *Esslinger* court upheld a probate court’s order that the trustee provide accountings to a remainder beneficiary, based upon on the remainder beneficiary’s right to request information under § 16061. While the *Esslinger* court may achieved a just result under the particular facts of that case, there is concern among practitioners that certain language in the opinion, in which the terminology “a particular account” is used to refer to “a report” may cause unnecessary confusion by blurring the distinction between the right of any trust beneficiary to request information under § 16061 with the separate right to receive accountings under § 16062, which is granted only to current beneficiaries.

The proposal retains the “reasonable request” and “relevance” standards of the present statute. A trustee must provide requested information only if it is “relevant to the beneficiary’s interest,” and the beneficiary’s requests for information must be “reasonable.”

§16064 (amendment)

Section 16064 includes provisions governing both a formal trust “account” and “a report” of information upon request. Including both of these terms in the same section contributes to the confusion whether a trustee must report information with a particular style and content.

Consistent with the distinction made by the amendments to §16061 above, the proposed amendments to §16064 remove the current reference to “reporting” and “a report,” thereby clarifying that a trustee may be relieved of the duty to provide an accounting under certain specified circumstances (specified under current law), but may not be relieved of the duty to respond to reasonable beneficiary requests for relevant information. This change will prevent beneficiaries from having their right to receive answers to their questions “waived” by either the trust instrument or their own inadvertence. Such waivers make it too easy for wrongful acts to go undiscovered until it is too late to repair the damage. Moreover, clauses in trust instruments

waiving accounts and reports are not always the product of thoughtful consideration by the trust's settlor. They often appear as boilerplate in forms and receive little if any scrutiny prior to signing.

Further, while current law permits a court to order that a waived account or report be provided "upon a showing that it is reasonably likely that a material breach of the trust has occurred," making the required showing of reasonable likelihood of a breach of trust may be impossible if the beneficiaries cannot obtain any information from the trustee due to an ostensible waiving of their right to obtain information from the trustee (i.e., waiver of "a report."). This leads to a Catch-22 situation: The beneficiary cannot obtain information unless he can show there may have been a breach of trust, but he cannot show there may have been a breach of trust because he cannot obtain information. This proposal addresses this issue by clearly distinguishing the formal process of "accounting" from the less formal "reporting," permitting only the waiver of the former. This recognizes the inherent fiduciary nature of the trustee-beneficiary relationship and better harmonizes with §16060, which states the fundamental precept that a trustee "has a duty to keep the beneficiary reasonably informed of the trust and its administration."

The proposal continues to permit waivers of formal annual accountings by the settlor or by a beneficiary because such waivers serve an acceptable purpose: The preparation of a formal accounting involves a significant amount of time and expense which is not always necessary to keep the beneficiaries adequately informed, particularly if the estate is modest in value. The proposal also tightens up the provision of existing law which permits a beneficiary – without any reason – to compel an account that he previously waived (§16064(c), renumbered (b) in the proposal). This power makes the beneficiary's previous waiver meaningless. The proposal therefore requires the beneficiary to show that it is reasonably likely that a material breach of the trust has occurred in order to compel an account that he has previously waived.

§16065 (new)

The only guidance in current law regarding a beneficiary's right to review trust records is found in the California Supreme Court case of *Strauss v. Superior Court* (1950) 36 Cal.2d 396. Most practitioners expect important aspects of the law of trusts and estates to be contained in the Probate Code. Parties and their counsel would benefit from codification of this critical aspect of the trustee-beneficiary relationship. There is also a need to refine the basic rule so that it responds to modern concerns. Among these are (1) the resources of the trust and of the courts that are sometimes consumed by vexatious litigants whose own interests in the trust are limited, or whose interests in the trust are distant in time or not yet vested because they are subject to conditions that might not occur; (2) protection of the financial and personal privacy of other beneficiaries of the same trust; and (3) a lack of guidance from *Strauss* whether the beneficiary may copy the records, and at whose expense.

The law should strike a fair balance between the rights of a beneficiary to see records that affect him or her, and the burdens on the trust and on the other beneficiaries that result from providing all trust records. The proposal achieves this balance by requiring the trustee to provide trust records upon a reasonable request, but limiting disclosure to documents which are relevant

to the beneficiary's interest in the trust. This limitation is in accord with the similar existing limitation regarding requests for information that is found in current §16061.

Extending this limitation to beneficiaries' requests to review documents is necessary because without it, persons who would be entitled to review all trust books and records would include "beneficiaries" whose interests are minor or too remote. Probate Code §24 defines a trust "beneficiary" very broadly as "a person who has any present or future interest, vested or contingent." This definition includes people who may never actually have any interest in the trust because they may not survive the primary beneficiaries or fulfill some other condition. For example, if a trust provides that the settlor's "heirs" or "next of kin" will be entitled to distribution if all of the settlor's children, grandchildren and other lineal descendants predecease the settlor, distant relatives who would likely never receive anything could review all of the books and records of the trust unless such a right were limited. Also, some beneficiaries may be limited to modest cash bequests, or may be entitled to one specific item of property. A minor beneficiary who is entitled to receive only some personal property or a nominal sum of money should not be able to copy all of the records relating to the majority of the trust property that is distributable to other beneficiaries. These situations are especially sensitive if the trust records reveal private financial information pertinent to those other beneficiaries but having no relevance to the requesting beneficiary.

§16068 (new)

Current law provides that the trustee's obligation to send the beneficiaries a notification of their entitlement to receive a copy of the terms of the trust may not be waived by the settlor (§ 16061.7(i)). Because the right to receive a copy of the terms of the trust is fundamental to the beneficiary's ability to protect his or her interests, the proposal provides that a beneficiary's right to request the terms of the trust at other times also may not be waived by the settlor in the trust instrument. Similarly, the proposal prohibits the settlor from waiving a beneficiary's right to inspect the trust's books and records.

§16069 (new)

Existing Section 16064 provides that a beneficiary is not entitled to either reporting of information or to accountings under the following circumstances: while the trust is revocable by the settlor or another person, where the settlor has waived the trustee's duty in the trust instrument, and where the trustee and the beneficiary are the same person.

Although, as noted above, proposed new Section 16068 would prohibit a settlor from waiving some of the trustee's duties in the trust instrument, the proposal continues the existing rule in the latter two circumstances, so that if the trust is revocable a beneficiary is not entitled to obtain a copy of the terms of the trust or to inspect and copy the trust's books and records. Although it may be thought unnecessary to continue to provide that a trustee's obligations do not exist if the trustee and the beneficiary are "the same person," the continued inclusion of existing Section 16064(d) in the form of proposed Section 16069(b) is meant to avoid any unintentional implication that some substantive change was intended by its deletion.

§17200(b)(7) (amended)

Existing law provides that a beneficiary may bring a petition to obtain a court order concerning the internal affairs of the trust. Section 17200, while expressly not all-inclusive, references nearly all of the usual circumstances under which a beneficiary might file such a petition. Among the expressly described uses for a petition under Section 17200 is as a means to compel the trustee to provide an accounting and to report information (§ 17200(b)(7)). To coordinate the provisions of Section 17200(b)(7) with the proposed statutes, the proposal adds references to the right to compel the trustee to provide a copy of the terms of the trust and the right to compel the trustee to provide books, documents and records for inspection and copying.

HISTORY: No similar bill has been introduced either this session or during a previous legislative session.

IMPACT ON PENDING LITIGATION: The proposal will not have any impact on litigation currently pending.

LIKELY SUPPORT & OPPOSITION:

<p><u>Anticipated Support</u></p> <p>The Section believes that the proposal will find support by professional, corporate and individual trustees and by counsel representing both trustees and beneficiaries.</p>	<p><u>Why?</u></p> <p>The proposal brings greater clarity to the law describing the parties' rights and obligations, which reduces disputes.</p> <p>The proposal clarifies the question that reporting information need not involve formal presentation requirements and may consist of informal replies or correspondence, which will reduce the expense of trust administration.</p> <p>The proposal promotes the positive social policy of requiring greater accountability from fiduciaries and instilling greater confidence in beneficiaries. Such policy discourages both actual breaches of trust and litigation due to unnecessary fear and suspicion based upon lack of communication.</p> <p>The proposal modifies the overbroad impact of case law which is widely, if not universally, perceived as becoming outmoded due to its burden on administration and impact on privacy concerns.</p>
<p><u>Potential Opposition</u></p> <p>The California Judges Association</p>	<p><u>Why? Include possible arguments in opposition</u></p> <p>There has not yet been formal review of this proposal by the CJA. Some initial response from individual bench officers has expressed concern regarding one portion of the proposal: the portion discussing books and records of the trust. The concern expressed was that a beneficiary's right to inspect "relevant" books and records may encourage some trustees to aggressively deny beneficiaries' requests to review books and records under proposed §16065 by asserting a lack of relevance to the beneficiary's interest, thereby wasting judicial resources on <i>in camera</i> inspections and decisions regarding disclosure in a non-litigation or pre-litigation setting.</p>

FISCAL IMPACT: There is no anticipated fiscal impact.

GERMANENESS: The matter requires the special knowledge, training, experience and technical expertise of the Trusts & Estates Section, whose members have both an expert understanding of the details of the law governing the administration of trusts and also extensive experience with the effect of the application of that law on the relationships and interactions between trustees and beneficiaries in daily practice.

TEXT OF PROPOSAL

SECTION 1. Section 16060.7 is added to the Probate Code, to read:

16060.7 On request by a beneficiary, the trustee shall provide the terms of the trust to the beneficiary, provided that the trustee is not required to provide the terms of the trust to the beneficiary in any of the circumstances described in Section 16069.

SEC. 2. Section 16061 of the Probate Code is amended to read:

16061. Except as provided in Section ~~16064~~ 16069, on reasonable request by a beneficiary, the trustee shall ~~provide report to the beneficiary with a report of~~ *by providing requested information about the assets, liabilities, receipts and disbursements of the trust, the acts of the trustee, and the particulars relating to the administration of the trust relevant to the beneficiary's interest, including the terms of the trust.*

SEC. 3. Section 16064 of the Probate Code is amended to read:

16064. The trustee is not required to ~~report information or to~~ account to a beneficiary *described in subdivision (a) of Section 16062*, in any of the following circumstances:

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

(b) ~~In the case of a beneficiary of a revocable trust, as provided in Section 15800, for the period when the trust may be revoked.~~

~~(c) As to a beneficiary who has waived in writing the right to a report or an account. A waiver of rights under this subdivision may be withdrawn in writing at any time as to the most recent account and future accounts. A waiver has no effect on the beneficiary's right to petition for a report or an account pursuant to Section 17200. Regardless of a waiver of accounting by a beneficiary, upon a showing that it is reasonably likely that a material breach of the trust has occurred, the court may compel the trustee to account.~~

~~(c) In any of the circumstances set forth in Section 16069.~~

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

SEC. 4. Section 16065 is added to the Probate Code, to read:

16065. Except as provided in Section 16069, on reasonable request by a beneficiary, the trustee shall make available to the beneficiary for inspection, at a reasonable time and place, requested books, documents and records pertaining to the administration of the trust which

contain information relevant to the beneficiary's interest. The beneficiary's right of inspection includes the right to make copies at the expense of the beneficiary.

SEC. 5. Section 16068 is added to the Probate Code, to read:

16068. Any waiver by a settlor of the obligation of the trustee to provide the terms of the trust to the beneficiary as required by Section 16060.7, to report requested information to the beneficiary as required by Section 16061, or to make available books, documents and records to the beneficiary as required by Section 16065 is against public policy and shall be void.

SEC. 6. Section 16069 is added to the Probate Code, to read:

16069. The trustee is not required to account to a beneficiary, provide the terms of the trust to a beneficiary, provide requested information to a beneficiary pursuant to Section 16061, or make books, documents and records available to the beneficiary pursuant to Section 16065, in any of the following circumstances:

(a) In the case of a beneficiary of a revocable trust, as provided in Section 15800, for the period when the trust may be revoked.

(b) Where the beneficiary and the trustee are the same person.

SEC. 7. 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 *do any of the following:*

(A) Provide a copy of the terms of the trust;

(B) Report ~~report~~ information about the trust under Section 16061 if the trustee has failed to report the requested information within 60 days after written request of the beneficiary, and the beneficiary has not received the requested information from the trustee within the six months preceding the request;

*(C) Account ~~or account~~ to the beneficiary, subject to the provisions of Section 16064, 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: *or**

(D) Make available to the beneficiary books, documents, and records under Section 16065.

- (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.
 - (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.
 - (20) Determining the liability of the trust for any debts of a deceased settlor. However, nothing in this paragraph shall provide standing to bring an action concerning the internal affairs of the trust to a person whose only claim to the assets of the decedent is as a creditor.
 - (21) Determining petitions filed pursuant to Section 15687 and reviewing the reasonableness of compensation for legal services authorized under that section. In determining the reasonableness of compensation under this paragraph, the court may consider, together with all other relevant circumstances, whether prior approval was obtained pursuant to Section 15687.
 - (22) If a member of the State Bar of California has transferred the economic interest of his or her practice to a trustee and if the member is a deceased member under Section 9764, a petition may be brought to appoint a practice administrator. The procedures, including, but not limited to, notice requirements, that apply to the appointment of a practice administrator for a deceased member shall apply to the petition brought under this section.
 - (23) If a member of the State Bar of California has transferred the economic interest of his or her practice to a trustee and if the member is a disabled member under Section 2468, a petition may be brought to appoint a practice administrator. The procedures, including, but not limited to, notice requirements, that apply to the appointment of a practice administrator for a disabled member shall apply to the petition brought under this section.
- (c) The court may, on its own motion, set and give notice of an order to show cause why a trustee should not be removed for failing to register in the Statewide Registry under Section 2850.