



## TRUSTS & ESTATES SECTION

THE STATE BAR OF CALIFORNIA

### ***NOTICE OF PROPOSED ACTION BY TRUSTEE***

#### **LEGISLATIVE PROPOSAL (T&E-2016-06)**

TO: Office of Governmental Affairs

FROM: Yvonne A. Ascher, Member of the Executive Committee, Trusts and Estates Section

DATE: June 25, 2015

RE: Proposal to Amend Probate Code Sections 16501 and 16502 (Notice of Proposed Action by Trustee)

#### **SECTION ACTION AND CONTACT(S):**

Date of Approval by Section Executive Committee: September 14, 2014

Approval vote: For 31; Against 0; Abstain 0

<b>Contact:</b>	<b>Section Legislative Co-Chair:</b>
Yvonne A. Ascher Law Office of Yvonne A. Ascher 444 Pearl Street A1 Monterey, CA 93940 Phone: (831) 641-9019 Fax: (831) 641-9018 <a href="mailto:yascher@ascherlaw.com">yascher@ascherlaw.com</a>	Gina L. Lera Lera Tiberini PC 455 Capitol Mall, Suite 350 Sacramento, CA 95814 Phone: (916) 403-5180 Fax: (916) 403-5190 <a href="mailto:glera@leratiberini.com">glera@leratiberini.com</a>

#### **SUMMARY OF PROPOSAL**

##### **INTRODUCTION**

Probate Code sections 16500 et seq. permit a trustee, in specified situations, to notify the beneficiaries of a trust of a proposed course of action and obtain their prior consent, either directly by a beneficiary's written consent or implicitly as a result of a beneficiary's failure to timely object.

Such a “Notice of Proposed Action” (NOPA) procedure is intended to promote efficient administration of trusts, encourage open communication between trustees and beneficiaries, and to provide trustees with a mechanism for obtaining the beneficiaries’ consent (directly or by implication) prior to undertaking a course of action. Utilization of the procedure allows a trustee to confidently undertake a course of action without having to incur the expense and possible delay associated with a court hearing on the matter.

The statute was originally drafted to mirror the existing probate NOPA procedure. (Probate Code section 10500). Limitations that apply in the probate area (Probate Code section 10501) are duplicated in the statute applicable to trust administrations. (Probate Code section 15501).

The current NOPA procedure for trust administrations requires a notice period of 45 days, during which a beneficiary may object to the proposed course of action. (Probate Code section 16502). Absent a formal objection during that period, the beneficiary is deemed to have consented to the proposed course of action. All that is required to object is that a box be checked and the notice returned to the trustee.

Under current law, the trust NOPA procedure may not be used to obtain approval of a proposed action that involves a distribution to the trust beneficiaries. The Executive Committee of the Trusts and Estates Section (TEXCOM) believes that an amendment to Probate Code section 16501 that removes the current prohibition pertaining to distributions would further achieve the original purpose of the statute without diminishing a beneficiary’s rights to object or diluting a trustee’s fiduciary duties.

The proposed change to the statute would dramatically increase its usefulness and enhance the ability of trustees to efficiently administer trusts in California. Under current law, unless the trustee obtains the affirmative written approval by every beneficiary prior to a proposed plan of distribution, in order to be ensured that no beneficiary can later object to a distribution, a trustee is required to file a petition with the probate court seeking approval of a proposed distribution. Presently, no other method currently exists to reliably ensure that there are no beneficiary objections prior to such a distribution absent either obtaining affirmative consent or a court order. In most cases, no objection to the petition is received. Thus, such petitions unnecessarily strain the resources of California’s over-burdened court system.

Although in many trust administrations, receiving the affirmative consent of all interested parties to a proposed distribution may be possible, there are situations in which securing such consents is not cost effective or practical, such as when the trust has numerous beneficiaries, or in situations where a beneficiary has such a minor interest that getting him or her to respond is problematic.

In addition to removing the prohibition pertaining to distributions, the reference to “discharge” should also be removed from the current statute. The “discharge” prohibition was included in the initial legislation, which, as stated above, mirrored the probate statutes. The concept of “discharging” a trustee is not applicable to trust administrations and therefore should be deleted.

Furthermore, TEXCOM believes the current notice period of 45 days has the unintended effect of making the NOPA procedure overly burdensome since current law requires only 30 days notice for a hearing on a petition pertaining to the same matters. Additionally, having inconsistent periods in which a beneficiary must respond to a proposed course of action by a trustee creates potential confusion among both fiduciaries and beneficiaries.

The following provides a detailed explanation of the proposed amendments to the statutes.

Removing the NOPA prohibition pertaining to “preliminary and final distributions and discharge”

The proposed amended statute would remove the current prohibition against using the NOPA procedure with respect to “preliminary and final distributions and discharge.” (Probate Code section 16501(d)(4)). Distributions are applicable to every trust administration and thus permitting a NOPA to be utilized with respect to such transactions will greatly enhance the usefulness of the statute and promote efficient administration of trusts in California.

The original NOPA statute was designed to mirror the statute applicable in probate administrations. However, probate administrations are inherently different from trust administrations. Most individuals create a revocable “Living Trust,” increasingly the most popular method for providing for the disposition of one’s assets on death, specifically to avoid the burdens of a probate administration. In creating such trusts, the settlor intentionally wishes to authorize the trustee to administer his or her trust estate without court involvement, absent a dispute. Primarily, the settlor wishes to avoid the cost and time delays associated with having to seek court approval for many routine administrative actions, as is required in probate matters.

Every trust administration involves making distributions. It is a routine aspect of a trust administration. Expanding the scope of the statute to allow a trustee to use a NOPA procedure in conjunction with distribution matters would increase the efficiency of a trust administration without diminishing any rights or protections currently afforded beneficiaries. Such a procedure would allow trustees to easily communicate proposed distribution plans to beneficiaries and seek their consent, whether expressed directly by written consent, or indirectly by failure to object, without having to resort to the more costly and time consuming option of seeking court approval of the proposed distribution plan.

It should be noted that no changes are proposed to the statute’s current provisions that address how a beneficiary may register an objection to the proposed action. A beneficiary can easily object to the proposed course of action. For example, the beneficiary need not state why he or she objects, but may merely check a box and return the form to the trustee.

In addition to excluding distributions from the NOPA procedure, Probate Code section 16501(d)(4) also excludes obtaining a “discharge” of the trustee from the procedure. TEXCOM proposes that this reference be removed as it has no meaningful application in the trust administration context. There is no procedure in trust administration to “discharge” a trustee similar to the discharge of a personal representative in a probate administration. In probate, the discharge of a personal representative is required under Probate Code section 12550 (or in some cases, section 12551) in order to fully terminate the personal representative’s responsibilities. In

trust administrations, a trustee is relieved of his or her duties when the trust is fully distributed and no further action is required. There is no formal procedure or consent of beneficiaries required for the cessation of the trustee's duties. The deletion of "discharge" from the NOPA procedure does not result in a trustee being able to use the NOPA procedure to obtain a release from liability. The prohibition in the statute against the use of such a procedure to approve accountings (Probate Code section 16501(d)(3)) and transactions involving "claims, actions and proceedings...against the trustee" (Probate Code section 16501(d)(9)) would continue to ensure that a trustee can not use NOPA for such purposes.

Lastly, Section 817 of the Uniform Trust Code allows for trust distributions to be made with a similar notice procedure. Thus, removing the prohibition in the California NOPA statute with respect to distributions, as proposed by this amendment, serves to align the administration of California trusts with those being administered in jurisdictions that have adopted the Uniform Trust Code.<sup>1</sup>

In summary, by expanding the scope of the statute to allow the NOPA procedure to be used for trust distribution matters, the proposed amendment to the statute would increase the efficiency of trust administrations, enhance communication between trustees and beneficiaries, and reduce the burden on our courts, without diminishing any rights or protections currently afforded beneficiaries.

#### Shortening Notice Period from 45 days to 30 days

The notice period for a trustee's petition for instructions brought under Probate Code section 17200 is 30 days. However, if a trustee uses the NOPA procedure to communicate a proposed course of action to a beneficiary, the notice period is 45 days. Nowhere else in the Probate Code pertaining to the administration of trusts is a 45 day notice period required.

It should be noted that the timeframe for a NOPA in a probate matter is only 15 days. This is the same timeframe applicable to most hearings in probate matters.

Not only may a trustee presently seek court approval of a proposed action with only a 30 day notice requirement, but in order to object the beneficiary must file a response to the petition stating his or her reasons for objecting. To object to a NOPA, all that is required is for a beneficiary to check a box and return the objection to the trustee. TEXCOM believes there is no

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<sup>1</sup> Uniform Trust Code section 817 provides as follows:

"(a) Upon termination or partial termination of a trust, the trustee may send to the beneficiaries a proposal for distribution. The right of any beneficiary to object to the proposed distribution terminates if the beneficiary does not notify the trustee of an objection within 30 days after the proposal was sent but only if the proposal informed the beneficiary of the right to object and of the time allowed for objection.

(b) Upon the occurrence of an event terminating or partially terminating a trust, the trustee shall proceed expeditiously to distribute the trust property to the persons entitled to it, subject to the right of the trustee to retain a reasonable reserve for the payment of debts, expenses, and taxes.

(c) A release by a beneficiary of a trustee from liability for breach of trust is invalid to the extent:

(1) it was induced by improper conduct of the trustee; or

(2) the beneficiary, at the time of the release, did not know of the beneficiary's rights or of the material facts relating to the breach."

rationale for granting a beneficiary a longer period of time to check a box than is required to file a formal response with a court, when the underlying proposed course of action is the same.

Having consistent time periods applicable to all trust administration matters would also serve to ensure that all parties are aware of the applicable timeframe requirements in which they must respond, thereby avoiding inadvertent mistakes. Moreover, no public interest is served by mandating the current longer notice period for the trust NOPA, especially as a shorter notice period is applicable for court matters involving trusts. To have a different and longer time period for actions not involving the courts creates inconsistency, confusion, and does not further the orderly administration of trusts.

Furthermore, the extended notice period required under the current statute prevents the trustee from utilizing this procedure in situations that are time sensitive, such as selling real estate, executing leases, or refinancing property. Thus, in such situations, a trustee might elect to file an action with the court in order to use the shorter notice period compared to the NOPA procedure. Such petitions would be unnecessary if the notice periods were consistent.

The longer notice period reduces the effectiveness of the NOPA statutes pertaining to trusts and diminishes the orderly administration of trusts in California. By increasing the usefulness and effectiveness of the statute, the burden on the courts would be reduced, thereby allowing limited judicial resources to be allocated more efficiently.

**HISTORY:**

TEXCOM is not aware of any prior legislative proposals on this topic.

**PENDING LITIGATION:**

None known.

**LIKELY SUPPORT AND OPPOSITION:**

TEXCOM supports this legislation.

There is no known opposition.

**FISCAL IMPACT:**

No anticipated fiscal impact.

**GERMANENESS:**

This proposal requires the special knowledge, training, experience and technical expertise of the members of TEXCOM because it relates to estate administration matters which are the special purview of TEXCOM.

**DISCLAIMER:**

This position is only that of the Trusts and Estates Section of the State Bar of California. This position has not been adopted by either the State Bar’s Board of Trustees or overall membership, and is not to be construed as representing the position of the State Bar of California.

Membership in the Trusts and Estates Section is voluntary and funding for section activities, including all legislative activities, is obtained entirely from voluntary sources.

**TEXT OF PROPOSAL:**

SECTION 1. Section 16501 of the Probate Code is amended to read:

**16501. Mailing notice of proposed action by trustee; consent to proposed action; copies of notice; actions in which notice prohibited**

(a) The trustee who elects to provide notice pursuant to this chapter shall mail notice of the proposed action to each of the following:

(1) A beneficiary who is receiving, or is entitled to receive, income under the trust, including a beneficiary who is entitled to receive income at the discretion of the trustee.

(2) A beneficiary who would receive a distribution of the principal if the trust were terminated at the time the notice is given.

(b) Notice of proposed action is not required to be given to a person who consents in writing to the proposed action. The consent may be executed at any time before or after the proposed action is taken.

(c) A trustee is not required to provide a copy of the notice of proposed action to a beneficiary who is known to the trustee but who cannot be located by the trustee after reasonable diligence or who is unknown to the trustee.

(d) Notwithstanding any other provision of this chapter, the trustee may not use a notice of proposed action in any of the following actions:

(1) Allowance of the trustee’s compensation.

(2) Allowance of compensation of the attorney for the trustee.

(3) Settlement of accounts.

~~(4) Preliminary and final distributions and discharge.~~

~~(5)~~(4) Sale of property of the trust to the trustee or to the attorney for the trustee.

~~(6)~~(5) Exchange of property of the trust for property of the trustee or for property of the attorney for the trustee.

~~(7)~~(6) Grant of an option to purchase property of the trust to the trustee or to the attorney for the trustee.

~~(8)~~(7) Allowance, payment, or compromise of a claim of the trustee, or the attorney for the trustee, against the trust.

~~(9)~~(8) Compromise or settlement of a claim, action, or proceeding by the trust against the trustee or against the attorney for the trust.

~~(10)~~(9) Extension, renewal, or modification of the terms of a debt or other obligation of the trustee, or the attorney for the trustee, owing to or in favor of the trust.

SEC. 2. Section 16502 of the Probate Code is amended to read:

**16502 - Contents of Notice.**

The notice of proposed action shall state that it is given pursuant to this section and shall include all of the following:

- (a) The name and mailing address of the trustee.
- (b) The name and telephone number of a person who may be contacted for additional information.
- (c) A description of the action proposed to be taken and an explanation of the reasons for the action.
- (d) The time within which objections to the proposed action can be made, which shall be at least ~~45~~30 days from the mailing of the notice of proposed action.
- (e) The date on or after which the proposed action may be taken or is effective.