TRUSTS & ESTATES SECTION

THE STATE BAR OF CALIFORNIA

DIRECTED TRUSTS

LEGISLATIVE PROPOSAL (T&E-2011-08)

TO: Saul Bercovitch, Legislative Counsel
State Bar Office of Governmental Affairs

FROM: Philip J. Hayes, Executive Committee, Trusts and Estates Section, State Bar of California, Vice-Chair, Trust Administration Subcommittee

DATE: June 30, 2010

RE: Directed Trusts
A proposal to add a new Section 85 to the Probate Code, add a new Section 16065 to the Probate Code, add a new Chapter 6 to Part 4 of Division 9 (Sections 16600 et seq.) to the Probate Code, and amend Sections 300, 1304, 17200, 17202, 17203 and 17205 of the Probate Code

SECTION ACTION AND CONTACTS:
Date of Approval by Section Executive Committee: March 6, 2010
Approval vote: For: 27 Against: 0 Abstain: 1

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SUMMARY OF PROPOSAL:

This is a proposal to add a chapter to the Probate Code explicitly authorizing the use of directed trusts.

Given the increasing complexity and sophistication of trust investment and administration, persons establishing irrevocable trusts (referred to as "settlors") often wish to divide traditional trustee duties (and liabilities) into discrete, specialized functions; e.g., trust administration or compliance, discretionary distributions, and investments. Estate planning practitioners have increasingly used "directed trusts" to satisfy this client-driven need. With a directed trust, *the settlor* instructs the trustee to follow the direction of, or seek consent from, a third party (referred to in the proposed statute as a "Statutory Trust Advisor," which includes a trust protector, trust director, trust committee, or the like) with respect to such a discrete function.

The use of directed trusts is limited only by the imagination of the settlor and his or her attorney. Directed trusts are useful, appropriate, and sometimes a necessity in several common circumstances, among them when:

- The client does not want to use a corporate trustee to invest, but want its administrative capability;
- The corporate trustee balks at running a family business, hedge fund or LLC, or maintaining a concentrated position; or
- The client wishes to separate responsibility for asset management, on the one hand, from the power to determine discretionary distributions, on the other.

Twenty-nine states have enacted directed trust legislation in one form or another. These statutes provide varying degrees of protection from liability to a directed trustee for following the settlor's instruction to carry out the direction of the third-party trust advisor. The modern trend, as exemplified by the statutes of Delaware, South Dakota, New Hampshire and others, is to completely exonerate the trustee from any liability associated with the actions or decisions of the trust advisor, except for the administrative duties to carry out the advisor's direction.

California practitioners commonly draft trusts providing for a trust advisor, protector or committee to direct the trustee. They do so, however, without the benefit of a statute explicitly protecting the directed trustee from liability for following such direction. While a creative attorney could *infer* protection for a directed trustee by combining several provisions of the Probate Code, and the structure is not contrary to California policy as expressed in common or statutory law, the concept is not explicitly authorized by California law; the respective duties and liabilities of the directed trustee and the trust advisor are not directly or comprehensively addressed. Therefore, in the absence of enabling legislation, the directed trustee is arguably exposed to liability for the actions and omissions of the trust advisor when they need protection most, i.e., in hindsight after the trust advisor has made poor choices -- or no choice at all. The

proposed directed trust chapter allows the settlor to fully protect the directed trustee in those circumstances.

While practitioners often provide that a third party advisor is *not* a fiduciary (probably in order to entice the advisor to act), this is inconsistent with common law and at least one California Supreme Court case:[1] an advisor *must* have a fiduciary duty before a directed trustee can be absolved of liability for the advisor's actions. The proposed statute clarifies that it is wishful thinking for a practitioner to presume that a directed trustee can be protected from acts performed by a non-fiduciary.

With the relatively modern advent of multi-state trust companies, trust situs has become portable, and an increasing number of corporate and professional fiduciaries are unwilling to act as a directed trustee in states lacking a statute explicitly authorizing full exculpation of a trustee who follows the direction of a trust advisor. In particular, there is no reason for a corporate directed trustee to act in California (and risk exposure to liability) when trust situs can easily be moved to a state with directed trust-enabling legislation. Thus, California attorneys face a difficult choice: take the chance that a California court, faced with a breach of trust of the trust advisor, will uphold a California-administered directed trust arrangement and protect the directed trustee under current law; or move trust administration to another state, perhaps drafting under that state's laws, or hiring an attorney to provide counsel in the directed trust state. Settlors and their attorneys increasingly choose the latter option under these circumstances.

Without a directed trustee statute, many California clients will continue to be directed out of state for trust administration, unnecessarily depriving California banks, trustees and attorneys of trust-related business. California needs a dedicated statute authorizing - and clarifying – the use of directed trusts. Current California law does not provide adequate protection for the widespread practice of California attorneys who draft directed trusts, placing California in a competitive disadvantage for trust business. A directed trust statute does not require a policy shift: a directed trust arrangement can be inferred from existing law. However, clarifying legislation would provide the necessary foundation for in-state directed trusts and also bring California current in this facet of the highly competitive business and legal sectors.

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[1] Only one California case, to our knowledge, has addressed the use of trust advisors. In *Crocker-Citizens National Bank v. Younger* (1971) 4 Cal.3d 202, a divided California Supreme Court held, based on rather flimsy authority, that trust advisors were generally to be treated as co-trustees, with the same rights, responsibilities and fiduciary duties to the beneficiaries. Although the opinion cited authority authorizing a trustor to divide rights and responsibilities between trustees and advisors, it did not address the liability of an advisor or trustee for the acts or omissions of the other.

ISSUES AND PURPOSE:

I. Introduction: What is a Directed Trust Statute?

A directed trust statute authorizes a settlor to appoint a third party advisor or director to direct the trustee in carrying out certain duties of trusteeship, and to exonerate the trustee from liability for following the directions of the advisor. A power to direct involves action initiated by and within the control of a third party advisor or director; the trustee usually has no responsibility other than to competently carry out the direction when made.

A "trust protector" is subsumed within the trust advisor or trust director concept, sharing many aspects of a trust advisor but usually with a more limited mandate: to remove and replace the trustee, to amend the trust to comply with changes in the law, to move situs or change governing law, etc. The proposed statute covers the trust protector situation also, and clarifies that the trust protector acts as a fiduciary.

Settlors also commonly grant a third party veto power over proposals presented by the trustee. In this situation the trustee is responsible for initiating the action, and the relationship is more analogous to co-trustees. Consequently, under the statutory proposal, where a trust advisor accepts the trustee's proposal, the trustee is treated as a conventional trustee for exculpatory purposes unless the settlor specifically provides that the trustee is to be provided the protections of directed trustee status in this circumstance. In the proposed statute, a trustee whose proposal is rejected by the trust advisor or who receives no response from the trust advisor is a fully protected directed trustee if it does not carry out the proposed action.

The situations above (true directed trust, trust protector and veto power) should be distinguished from a delegation power. With a delegation power, the trustee on its own initiative selects an advisor to manage one aspect of trust administration. The trustee, however, has a duty to competently screen the delegee and ongoing duty to supervise the delegee's actions. California's delegation statute (Prob. Code section 16052) is not affected by this proposal.

II. Prevailing Approaches

The extent to which the designation of an advisor exonerates the directed trustee for following the advisor's directions varies between the twenty-nine states have enacted directed trustee enabling legislation. Three approaches can be grouped: the Restatements[2]

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[2] Under the Restatements (Section 185 of the Restatement (Second) and Section 75 of the Restatement (Third)) the directed trustee must verify that the directions of the advisor do not violate a fiduciary duty that the advisor has to the beneficiaries. This does not provide the directed trustee with much (or, arguably, any) protection. It is often more difficult to follow and control the actions of a co-trustee or advisor than it is to make the decisions themselves. Under the Restatements, a trustee can be liable if the direction does not comply with the terms of the trust, even if the inconsistency is not "manifestly contrary to the terms of the trust," as required under the UTC (discussed in footnote 3 below). This begs the question of how serious the advisor's breach of a fiduciary duty needs to be before the trustee will

approach, the Uniform Trust Code (UTC)[3] approach, and the "more protective" approach, which reflects the modern trend.

The Restatements and UTC approaches are less effective than modern statutes, almost to the point of irrelevance, because they impose on the directed trustee, notwithstanding the terms of the trust, a duty to monitor and judge the actions of the trust advisor. Given this crack in the door of liability, corporate fiduciaries, under their own mandate to minimize risk, do not trust these statutes to provide protection to the directed trustee, and do not establish directed trusts in these jurisdictions, given the option.

Several states, including Delaware, New Hampshire and South Dakota, provide more reliable protection for the directed trustee, reflecting the modern trend of recently enacted statutes. These states' statutes generally relieve the trustee from any duty to review the actions of the advisor or director, and exculpate the trustee from liability for anything less than willful misconduct or bad faith in carrying out the instructions of the trust advisor. The proposed statute follows these states in not only clearly absolving a directed trustee from liability for the trust advisor's actions, but also relieving the directed trustee from the duties to report to the trust advisor and, except to the extent information is provided to the trustee by the trust advisor, to the beneficiaries.

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be liable for following a direction that constitutes a breach. As a result of these issues, *only one state*, Iowa, follows a Restatements (Second) approach.

[3] The UTC, adopted by NCCUSL in 2003, includes a more modern directed trust provision, a variety of which has been adopted in about 14 jurisdictions:

> §808. Powers to Direct.
>
> (a) [N/A. re: revocable trusts]
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> (b) If the terms of a trust confer upon a person other than the settlor of a revocable trust power to direct certain actions of the trustee, the trustee shall act in accordance with an exercise of the power *unless the attempted exercise is manifestly contrary to the terms of the trust or the trustee knows the attempted exercise would constitute a serious breach of a fiduciary duty that the person holding the power owes to the beneficiaries of the trust.*
>
> (c) The terms of a trust may confer upon a trustee or other person a power to direct the modification or termination of the trust.
>
> (d) A person, other than a beneficiary, who holds a power to direct is *presumptively a fiduciary* who, as such, is required to act in good faith with regard to the purposes of the trust and the interests of the beneficiaries. The holder of a power to direct is liable for any loss that results from breach of a fiduciary duty.
>
> (emphasis added.)

The Comment confirms that a trustee has overall responsibility for ensuring that the trust terms are followed, and thus must refuse to act if the trustee knows the attempted exercise is manifestly contrary to the terms of the trust or that the attempted exercise would constitute a serious breach of a fiduciary duty owed by the holder of the power to the trust beneficiaries.

Specifically, the proposal builds on the excellent directed trustee statute very recently enacted in New Hampshire, which clarifies the respective duties of the directed trustee and the Statutory Trust Advisor, and the flow of information among the directed trustee, the trust advisor, and trust beneficiaries. The statute provides the settlor with maximum flexibility to divide responsibilities between or among fiduciaries, while ensuring that no duty or function is delegated to a non-fiduciary.

III. Current California Law

California statutes do not explicitly empower a settlor to assign discrete duties to third parties and absolve the directed trustees with respect to those discrete duties. As described below, if pressed (e.g., in litigation), a creative attorney could *infer* such authority from the statutes. Despite the absence of clear authorization, many California practitioners accommodate clients by drafting trusts whereby a trust advisor or trust protector directs the trustee on one or more aspects of trust administration. These practitioners tempt fate to a degree; the implied directed trust scheme is not an adequate substitute for an explicit statute, and attorneys (and their clients) relying on California's existing law are unnecessarily exposed.

A. Trustee Standard of Care and Exculpation

Probate Code section 16040 sets forth a trustee's basic standard of care (except with investment and management functions under the Uniform Prudent Investor Act, which are contained in Probate Code section 16046). Subdivision (b) of both sections provides that "The settlor may expand or restrict the standard provided in [this section] by express provisions in the trust instrument. A trustee is not liable to a beneficiary for the trustee's good faith reliance on these express provisions."

Thus, for instance, in theory a settlor in California may relieve the trustee of the duty to diversify. Case law consistently illustrates, however, that when investment performance is bad, a court of equity will lay blame with the trustee for violating some duty to the beneficiaries, notwithstanding the ostensible insulation from liability for failure to diversify.[4] So, in practice, corporate fiduciaries refuse to accept the risks of holding a concentrated position. Moreover, in California, the settlor cannot in any event exculpate a trustee from liability for breach of trust committed *with gross negligence*.[5] Because the concept of gross negligence is so broad, an exculpation clause in California, even when coupled with a waiver of the duty to diversify, provides fig leaf protection for trustees.

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[4] The most notorious case, *Rollins v. Branch Banking and Trust Company of Virginia*, 56 Va. Cir. 147 (2001), while not a California decision, has had a chilling effect on trustee willingness to act as a directed trustee anywhere but in a "fully protected" directed trust state.

[5] Cal. Prob. Code, §16461(b). The UTC, in contrast, provides in Section 1008 that a trustee may be exculpated for breach of trust, but not for breaches committed in *bad faith* or with *reckless indifference* to the purposes of the trust or the interests of the beneficiaries. Thus, a trustee may be exculpated for gross negligence.

B. Liability for Co-Trustees

California's current protection for a directed trustee is further eroded by implication under Section 16402,[6] which broadly holds a co-trustee (analogous to a directed trustee) liable for a breach of trust committed by its cotrustee (direction advisor) where the trustee negligently enables the cotrustee to commit a breach of trust or neglects to take reasonable steps to compel the cotrustee to redress a breach of trust in a case where the trustee knows or has information from which the trustee *reasonably should have known* of the breach.[7] Thus, even if a trust advisor is elevated to the status of cotrustee, and has total responsibility for certain trust functions, its cotrustee may be liable for failure to prevent a breach, much like the UTC directed trust statue. Again, the settlor could attempt to reduce the standard of care to supervise a cotrustee, but if the cotrustee violates its duty, the other trustee (especially if a deep pocket) will almost always be brought to account for some breach of trust, albeit under a different name than the duty to supervise.

IV. Proposed Legislation

As a threshold matter, one should note that the proposed directed trust statute does NOT apply unless the trust instrument explicitly invokes the statute. Thus, existing trusts are not affected, and directed trusts may continue to be drafted under the law as it stands today. For example, a practitioner may draft a trust whereby a trust protector is appointed, with the limited power to remove and replace trustees, and state that such trust protector shall not be held to a fiduciary standard. It is debatable whether this provision would act to insulate the trustee from fiduciary liability (someone must have fiduciary responsibility over the duties of the trust protector); nonetheless practitioners will continue to have the flexibility to draft trust advisor/director provisions outside the statute if they feel the provisions of the chapter are too restrictive or onerous for the trust advisor. To emphasize this distinction and clearly differentiate a statutory directed trust from a pre-existing directed trust arrangement or directed trust arrangement otherwise outside the chapter, the trust advisor acting under the chapter is labeled "Statutory Trust Advisor."

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[6] Cal. Prob. Code, § 16402 provides, in pertinent part: "Trustee's liability to beneficiary for acts of cotrustee.
(a) Except as provided in subdivision (b), a trustee is not liable to the beneficiary for a breach of trust committed by a cotrustee.
(b) A trustee is liable to the beneficiary for a breach committed by a cotrustee under any of the following circumstances:
(1) Where the trustee participates in a breach of trust committed by the cotrustee.
(2) Where the trustee improperly delegates the administration of the trust to the cotrustee.
(3) Where the trustee approves, knowingly acquiesces in, or conceals a breach of trust committed by the cotrustee.
(4) Where the trustee negligently enables the cotrustee to commit a breach of trust.
(5) Where the trustee neglects to take reasonable steps to compel the cotrustee to redress a breach of trust in a case where the trustee knows or has information from which the trustee reasonably should have known of the breach…"

[7] Prob. Code, § 16402(b)(5) (*infra*, footnote 6).

The proposal follows the modern trend providing maximum protection for a directed trustee, and ensuring that the Statutory Trust Advisor has fiduciary duties, and is subject to the jurisdiction of California courts. Under the proposed chapter, the settlor explicitly cannot assign a duty to a third party who does not have a fiduciary duty to carry out its functions.

With respect to a purely directed trust arrangement, where the Statutory Trust Advisor affirmatively directs the trustee, the directed trustee is completely absolved of liability for following the direction.[8] The Statutory Trust Advisor is explicitly held to fundamental fiduciary duties,[9] so that duties assigned to the trust advisor do not "fall through the cracks." Essentially the statute allows the settlor to divide responsibilities and duties between fiduciaries who are not responsible for the others' activities: neither fiduciary has a duty to monitor the other's activities, to warn the beneficiaries if the other fiduciary carries out its duties in a manner different than the fiduciary would have, or to commence a proceeding against the other fiduciary.[10]

The statute also addresses the common situation where the trust advisor's role is to veto or consent to proposals by the directed trustee. In this situation the default is to exculpate the directed trustee for actions taken in accordance with the Statutory Trust Advisor's consent only where the governing instrument explicitly so provides, under the theory that the trustee making a proposal is more like a co-trustee.[11] If the Statutory Trust Advisor does not respond, or responds by vetoing the proposal, the trustee presenting the proposal is treated as a protected directed trustee.[12]

Exceeding the notice requirements contained in any other directed trust statute, the proposed statute clarifies the duties of the Statutory Trust Advisor to notify the trustee and trust beneficiaries (and respond to their requests for information), the trustee's duty to pass on information received from the Statutory Trust Advisor to the beneficiaries, and provides warning language to be used whenever a trustee includes information provided by a Statutory Trust Advisor in its report to beneficiaries.[13] As the Statutory Trust Advisor has a fiduciary duty to carry out a function for which the trustee is not responsible, these provisions are meant to clarify the trustee's limited duties to notify the

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[8] Unless in carrying out the direction – an administrative duty – the directed trustee is held by clear and convincing evidence to have acted with gross negligence. See proposed Prob. Code, § 16608(c).

[9] Under proposed Prob. Code § 16602(d), the Statutory Trust Advisor "shall have a fiduciary duty to with respect to each power to act in accordance with the terms and purposes of the governing instrument and solely in the interests of the beneficiaries." These duties track Probate Code sections XXX and XXX

[10] Proposed Prob. Code, §§ 16608(d) and 16602(f).

[11] Proposed Prob. Code, § 16608(a)(4).

[12] Proposed Prob. Code, § 16608(a)(3).

[13] Proposed Prob. Code, § 16606.

beneficiaries as to the acts of the Statutory Trust Advisor in the absence of trust provisions to the contrary.

Explanation of Specific Provisions:

SECTION 1. New Chapter 6, Part 4 of Division 9, sections 16600 – 16609.

Sections 16600 and 16601

Section 16600 provides that the directed trustee chapter will not apply to any trusts unless the "governing instrument" explicitly invokes the chapter. Section 16601 defines "governing instrument."

Settlors may override designated provisions of the statute that apply "[u]nless otherwise provided in the governing instrument."

Section 16602

Subdivision 16602(a) defines "Statutory Trust Advisor" and gives examples of powers commonly provided to trust advisors in trust instruments. The term "Statutory Trust Advisor" encompasses the traditional trust protector, trust director, trust advisor, or committee comprising such advisor. The list of powers and duties is intended only to provide attorneys with common, real world examples illustrating the concept of a Statutory Trust Advisor. The list is illustrative only, and not exclusive.

Subdivision 16602(b) provides that, unless and to the extent overridden by the governing instrument, the Statutory Trust Advisor has absolute discretion and that the exercise of the Statutory Trust Advisor's powers shall be binding on all persons.

Subdivision 16602(c) provides that a governing instrument may incorporate the powers enumerated in subdivision 16602(a) by clear reference.

Subdivision 16602(d) ensures that, regardless of whether the Statutory Trust Advisor is an individual or a committee, the Statutory Trust Advisor, or at least one of the committee comprising the Statutory Trust Advisor, has the fundamental fiduciary duties, with respect to the Statutory Trust Advisor's specific powers, to act in accordance with the terms and purposes of the trust (as in Probate Code section 16000) and solely in the interests of the beneficiaries (as in Probate Code subdivision 16002(a)).[14]

Most of the remaining duties addressed in Probate Code section 16000 et seq. are not applicable to Statutory Trust Advisors or are generally contrary to the intent of a

[14] This also tracks the proposed Uniform Trust Code, which states: A person, other than a beneficiary, who holds a power to direct is presumptively a fiduciary who, as such, is required to act in good faith with regard to the purposes of the trust and the interests of the beneficiaries." Uniform Trust Code section 808(d) (2001).

settlor appointing a Statutory Trust Advisor. For example, a settlor appointing an advisor to direct the trustee on investments generally expects the Statutory Trust Advisor to have the power to self-deal, either by investing in an investment advisor/Statutory Trust Advisor's proprietary investment vehicles, or by directing the trustee with regard to a business that the Statutory Trust Advisor is interested in either as an employee or owner. The settlor, of course, is free to impose additional specific fiduciary duties from the Probate Code.

Note that while the Statutory Trust Advisory has *fiduciary duties*, the Statutory Trust Advisor is not labeled a *"Fiduciary"* in the statute – the Executive Committee of the Trusts and Estates Section (TEXCOM) consciously avoided that label so as not to invoke Probate Code section 39,[15] which would expose the Statutory Trust Advisor to all provisions of the Probate Code that apply to "fiduciaries."[16] The intent is for the directed trust chapter to be self-contained to the extent possible, without invoking hundreds of extraneous provisions not relevant to Statutory Trust Advisors.[17]

Subdivision 16602(e) provides that a Statutory Trust Advisor committee shall act unanimously unless the governing instrument provides otherwise.

Subdivision 16602(f) provides that, as a directed trustee with respect to duties not to be performed by the Statutory Trust Advisor, the Statutory Trust Advisor is not responsible for the actions of the directed trustee or other advisors.

Sections 16603 and 16604

These sections adapt and apply beneficiary remedies and measure of damages provisions regarding trustees from Probate Code sections 16420, 16421, 16440, 16441

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[15] Probate Code, § 39 provides: "Fiduciary" means personal representative, trustee, guardian, conservator, attorney-in-fact under a power of attorney, custodian under the California Uniform Transfers to Minors Act (Part 9 (commencing with Section 3900) of Division 4), *or other legal representative subject to this code.* (Emphasis added.)

With respect to the italicized catch-all provision, the Statutory Trust Advisor is an advisor, *not* a legal representative of the trust; the directed trustee remains the legal representative, holding legal title to assets, coordinating the flow of information between and among the directed trustee, the beneficiaries and the Statutory Trust Advisor(s), and carrying out the directions of the Statutory Trust Advisor.

[16] By the author's count, the defined term "fiduciary" is used 239 times throughout the Probate Code.

[17] Likewise, rather than treating the Statutory Trust Advisory as a "trustee" across the board for all purposes in the Probate Code, the committee reviewed each section of the Probate Code that applies to trustees, selected the sections that were relevant to Statutory Trust Advisors, and applied them by specific reference under proposed Section 16609.

and 16442 to Statutory Trust Advisors. In addition, Section 16603 provides that a trustee may also bring an action against the Statutory Trust Advisor.

Section 16605

This section sets forth default provisions addressing the duties of the directed trustee when a vacancy occurs in the office of the Statutory Trust Advisor, if the settlor has not otherwise provided in the governing instrument.

Section 16606

Subdivision 16606(a) addresses reports and information to be provided by the Statutory Trust Advisor, which parallel a trustee's duties to report to the beneficiaries under Probate Code sections 16060, 16061 and 16064.

Paragraph 16606(a)(1), analogous to Probate Code section 16060, generally requires the Statutory Trust Advisor to keep the trustee informed as to its particular duties. Paragraphs (a)(2) and (a)(3) parallel Probate Code section 16061 in that the directed trustee ((a)(2)) and beneficiary ((a)(3)) may request information from the Statutory Trust Advisor relevant to its specific duties and functions. The introductory phrase in paragraph (a)(3) recognizes that the settlor may waive the beneficiary's right to a report.

Because the directed trustee may have no affirmative duty to warn the beneficiaries of potential breaches of trust by the Statutory Trust (see proposed Probate Code subdivision 16608(d)), subdivision 16606(b) of the proposed statute requires a trustee providing a report to a beneficiary to include language warning the beneficiary of the role of the Statutory Trust Advisor and providing the Statutory Trust Advisor's information.

Subdivision 16606(c) reinforces that the directed trustee is not liable for the Statutory Trust Advisor's failure to provide the information required in this subdivision.

Section 16607

Section 16607 ensures that a Statutory Trust Advisor cannot by contract sidestep the jurisdiction of California courts.

Section 16608

Subdivision 16608(a) defines a directed trustee to include only:

- Affirmatively directed trustees;

- Trustees who must seek the consent of the Statutory Trust Advisor with respect to a particular duty, but only if:

  1) the trustee timely seeks but fails to obtain consent to a proposed action, either through the Statutory Trust Advisor's explicit veto or through the Statutory Trust Advisor's failure to respond, or

  2) the trustee timely seeks and obtains the Statutory Trust Advisor's consent and acts in accordance with it AND the instrument clearly indicates that the settlor intends the trustee to be a fully protected "directed trustee" under those circumstances. If the settlor does not so indicate, the trustee obtaining the Statutory Trust Advisor's consent to a proposed action is not entitled to the protections set forth in subdivision 16608(b) for directed trustees.

Subdivision 16608(b) sets forth the protection from liability for a trustee qualifying as a directed trustee. A directed trustee is not liable for: 1) actions taken at the direction or with the prior consent of the Statutory Trust Advisor, 2) actions or inaction of the Statutory Trust Advisor with respect to a particular duty or function, and 3) actions not taken after the trustee proposed such action to the Statutory Trust Advisor but did not receive consent.

Under subdivision 16608(c), the directed trustee's duties in carrying out the Statutory Trust Advisor's direction and reporting on those actions are *merely administrative*, and absent clear and convincing evidence to the contrary, the performance of these duties is not an undertaking by the directed trustee to monitor the Statutory Trust Advisor or engage in activities within the scope of the Statutory Trust Advisor's authority. In other words, no fiduciary liability or implied duties shall attach to the directed trustee in carrying out the Statutory Trust Advisor's directions.

Subdivision 16608(d) states that, unless the trust agreement provides otherwise, the directed trustee has no duty to monitor, consult with or provide advice to the Statutory Trust Advisor with respect to its duties, or to warn the beneficiaries that the excluded trustee would have acted in a manner different from the Statutory Trust Advisor.

Section 16609

This section surveys the Probate Code for provisions that will or may apply to a Statutory Trust Advisor in the same manner as if the Statutory Trust Advisor was acting as a trustee with respect to its specific powers and duties.

Subdivision (a) applies Division 9, Part 4, Chapter 1, Article 4 "Duties With Regard to Discretionary Powers," (Probate Code sections 16080-16082) to Statutory Trust Advisors as if the Statutory Trust Advisor was acting as a trustee. These sections generally provide that a discretionary power shall be exercised by a Statutory Trust Advisor reasonably, not arbitrarily (Probate Code section 16080), and also provide an individual Statutory Trust Advisor protection from inadvertent estate tax inclusion if he

or she holding the power to make trust distributions (Probate Code sections 16081 and 16082).

Subdivision 16609(b) lists statutes that will apply to a Statutory Trust Advisor in the same manner as if the Statutory Trust Advisor was acting as a trustee, unless the governing instrument otherwise provides.

These provisions are:

1) Part 2, Chapter 2 (Sections 15300 – 15309), regarding restrictions on voluntary and involuntary transfers. These statutes are applicable to a Statutory Trust Advisor who has the power to make distributions.

2) Sections 15640-15642, addressing methods of resigning, continuing liability, and removal of a Statutory Trust Advisor. (Vacancy in the office of the Statutory Trust Advisor is directly addressed in the proposed legislation.)

3) Part 3, Chapter 1, Article 5 (Sections 15680 – 15688), regarding Statutory Trust Advisor compensation.

4) Part 4, Chapter 4, Article 4 (Sections 16460-16465), regarding limitations on proceedings against, and exculpation of, a Statutory Trust Advisor, and the effect of a beneficiary's affirmation of a transaction initiated by the Statutory Trust Advisor.

5) Part 4, Chapter 5 (Sections 16500-16504), allows a Statutory Trust Advisor to use the notice of proposed action procedure directly, without having to compel the directed trustee to do so on its behalf.

SECTION 2 of the proposal adds Probate Code section 16065 to Article 3, Chapter 1, Part 4 of Division 9, "Trustee's Duty to Report Information and Account to the Beneficiaries," to point directed trustees and Statutory Trust Advisors to the directed trustee statute with respect to reports and accountings.

SECTION 3 amends Probate Code sections 17200, 17202, 17203 and 17205 of Chapter 3, Part 5 of Division 9, "Proceedings Concerning Trusts" to add appropriate references to a Statutory Trust Advisor where the context requires.

SECTION 4 adds Probate Code section 85 to Part 2 of Division 1, "Definitions," defining Statutory Trust Advisor by reference to the directed trustee statute.

SECTION 5 amends Probate Code section 300 of Part 9 of Division 2, "Trust Company as Fiduciary," to provide that a trust company may act as a Statutory Trust Advisor.

SECTION 6 amends Probate Code subdivision 1304(a) of Chapter 1, Part 3 of Division 3, "Appeals – General," to provide that Statutory Trust Advisors are to be treated as trustees with respect to an order compelling a Statutory Trust Advisor to report and with

respect to an order accepting a Statutory Trust Advisor's resignation, in that neither order shall be appealable.

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

IMPACT ON PENDING LITIGATION: Will the proposal have any impact on litigation currently pending? No.

LIKELY SUPPORT & OPPOSITION:

Support Trusts and Estates Attorneys	Why? Provides clarity for California attorneys drafting directed trusts. Permits California attorneys to use California law to carry out the wishes of the settlor. Keeps directed trust situs and administration in California.
Support California Banks and Trust Companies	Why? Would result in more directed trust administration to stay in California. Would provide certainty and clear protection for California directed trustees.
Oppose No organized opposition expected	

FISCAL IMPACT: No negative fiscal impact is anticipated. The retention of trust business in California could result in more business for California banks, trust companies and professional fiduciaries, potentially expanding the tax base.

GERMANENESS: This proposal requires the special knowledge, training, experience or technical expertise of the members of the Trusts and Estates Section because it proposes additions to the trust law which is the special purview of the Committee.

TEXT OF PROPOSAL:

SECTION 1. A new Chapter 6, Part 4 of Division 9, Sections 16600 to 16609, is added to the Probate Code, to read:

16600. Applicability of Chapter

This chapter shall not apply unless expressly invoked in a governing instrument (as defined in Section 16601).

16601. Governing Instrument

As used in this chapter, "governing instrument" means the will, trust instrument, court order or exercise of power of appointment appointing, designating or providing for a method for appointing a Statutory Trust Advisor under this chapter.

16602. Statutory Trust Advisor

(a) As used in this chapter, "Statutory Trust Advisor" means one or more persons (as the context requires), including, without limitation, a trust advisor, special trustee, trust protector or committee, who, under the terms of the governing instrument, is expressly made subject to the provisions of this chapter, and who has a power or duty to direct, consent to, or disapprove an action, or has a power or duty that would normally be required of a trustee. Such powers and duties may include but shall not be limited to:

(1) the power to modify or amend the governing instrument to achieve favorable tax status or respond to changes in any applicable federal, state, or other tax law affecting the trust, including, without limitation, any rulings, regulations, or other guidance implementing or interpreting such laws;

(2) the power to modify or amend the governing instrument to take advantage of changes in (A) the rule against perpetuities, (B) laws governing restraints on alienation, or (C) other state laws restricting the terms of the trust, the distribution of trust property, or the administration of the trust;

(3) the power to appoint a successor trustee, trust advisor or Statutory Trust Advisor;

(4) the power to change the governing law or principal place of administration of the trust;

(5) the power to remove a trustee, trust advisor or Statutory Trust Advisor for the reasons stated in the governing instrument;

(6) the power to consent to a trustee's action or inaction in making distributions to beneficiaries;

(7) the power to direct a trustee to make or withhold distributions to beneficiaries;

(8) the power to increase or decrease any interest of any beneficiary in the trust, to grant a power of appointment to one or more trust beneficiaries, or to terminate or amend any power of appointment granted in the trust; provided, however, that a modification, amendment or grant of a power of appointment may not:

(A) grant a beneficial interest in a charitable trust with only charitable beneficiaries to any non-charitable interest or purpose; or

(B) unless the governing instrument provides otherwise by specific reference to this paragraph 16602(a)(8)(B), expressly or impliedly grant any power that would cause all or any portion of the trust estate to be includible in the gross estate of the settlor or any trust beneficiary for estate tax purposes;

(9) the power to consent to a trustee's action or inaction relating to investments of trust assets; and

(10) the power to direct the acquisition, management, disposition, or retention of any trust investment.

(b) Unless provided otherwise in the governing instrument, the exercise of a power by a Statutory Trust Advisor shall be exercised in the sole and absolute discretion of the Statutory Trust Advisor and shall be binding on all other persons.

(c) Any of the powers enumerated in subdivision (a), as they exist at the time of the signing of the governing instrument, may, by appropriate reference made thereto, be incorporated in whole or in part in such instrument, by a clearly expressed intention in the governing instrument.

(d) In exercising any power or refraining from exercising any power granted to such Statutory Trust Advisor in the governing instrument, a Statutory Trust Advisor shall have a fiduciary duty with respect to each power to act in accordance with the terms and purposes of the trust and solely in the interests of the beneficiaries. Notwithstanding the foregoing, where there is more than one Statutory Trust Advisor with respect to a particular power or powers, the governing instrument may provide that one or more Statutory Trust Advisors is not subject to a fiduciary duty to the beneficiaries, provided that there is at least one Statutory Trust Advisor who is subject to a fiduciary duty to the beneficiaries with respect to each power granted to a Statutory Trust Advisor.

(e) Unless otherwise provided in the governing instrument, a power vested in two or more Statutory Trust Advisors may only be exercised by their unanimous action.

(f) A Statutory Trust Advisor shall be entitled to the protection from liability provided to a directed trustee under subdivision 16608(b) with respect to each power granted or reserved exclusively to the trustee or any one or more other Statutory Trust Advisors.

16603. Remedies for Breach of Duty

(a) If a Statutory Trust Advisor breaches a fiduciary duty with respect to a power granted to the Statutory Trust Advisor in the governing instrument, or threatens to commit such a breach, a trustee or beneficiary of the trust may commence a proceeding for any of the following purposes that is appropriate:

(1) to compel the Statutory Trust Advisor to perform the Statutory Trust Advisor's duties;

(2) to enjoin the Statutory Trust Advisor from committing a breach of fiduciary duty;

(3) to compel the Statutory Trust Advisor to redress a breach of fiduciary duty by payment of money or otherwise;

(4) to require the trustee to assume responsibility for a power or duty given to a Statutory Trust Advisor in the governing instrument;

(5) to remove the Statutory Trust Advisor;

(6) subject to Section 18100, to set aside acts of the Statutory Trust Advisor;

(7) to reduce or deny compensation of the Statutory Trust Advisor;

(8) subject to Section 18100, to impose an equitable lien or a constructive trust on trust property;

(9) subject to Section 18100, to trace trust property that has been wrongfully disposed of and recover the property or its proceeds.

(b) The provision of remedies for breach of fiduciary duty in subdivision (a) does not prevent resort to any other appropriate remedy provided by statute or the common law.

(c) The remedies set forth in this section against a Statutory Trust Advisor are exclusively in equity.

16604. Measure of Liability for Breach of Duty; Measure of liability for interest; Excuse from liability

(a) If the Statutory Trust Advisor commits a breach of fiduciary duty, the Statutory Trust Advisor is chargeable with any of the following that is appropriate under the circumstances:

(1) any loss or depreciation in value of the trust estate resulting from the breach, with interest;

(2) any profit made by the Statutory Trust Advisor through the breach, with interest;

(3) any profit that would have accrued to the trust estate if the loss of profit is the result of the breach.

(b) If the Statutory Trust Advisor is liable for interest pursuant to subdivision 16604(a), the Statutory Trust Advisor is liable for the greater of the following amounts:

(1) the amount of interest that accrues at the legal rate on judgments in effect during the period when the interest accrued;

(2) the amount of interest actually received.

(c) If the Statutory Trust Advisor has acted reasonably and in good faith under the circumstances as known to the Statutory Trust Advisor, the court, in its discretion, may

excuse the Statutory Trust Advisor in whole or in part from liability under subdivisions (a) or (b) if it would be equitable to do so.

(d) The provisions in this article for liability of a Statutory Trust Advisor for breach of fiduciary duty do not prevent resort to any other remedy available under the statutory or common law.

16605. Vacancy; Directed Trusts

(a) Except as otherwise provided by the terms of the governing instrument, upon learning of a vacancy in the office of Statutory Trust Advisor,

(1) the trustee shall be vested with any fiduciary power or duty that otherwise would be vested in the trustee but that by the terms of the governing instrument was vested in the Statutory Trust Advisor, until such time that a Statutory Trust Advisor is appointed pursuant to the terms of the governing instrument or by a court upon the petition of any interested person; and

(2) if the trustee determines that the terms of the governing instrument require the vacancy to be filled, the trustee shall petition the court to fill the vacancy.

(b) Notwithstanding the provisions of paragraph (a)(1), a trustee shall not be liable for failing to exercise or assume any power or duty held by a Statutory Trust Advisor and conferred upon the trustee by paragraph (a)(1) for the 60 day period immediately following the date the trustee learns of such vacancy.

16606. Statutory Trust Advisor's Duty to Inform and Report; Notice to Beneficiary

(a) A Statutory Trust Advisor shall:

(1) keep the trustee reasonably informed of the administration of the trust with respect to the specific duties or functions being performed by the Statutory Trust Advisor, and

(2) upon request by the trustee, provide the trustee with requested information regarding the administration of the trust with respect to the specific duties or functions being performed by the Statutory Trust Advisor; and

(3) except as otherwise provided by the terms of the governing instrument, upon request by a beneficiary, provide the requesting beneficiary with the information required to be provided under Probate Code section 16061 regarding the administration of the trust with respect to the specific duties or functions being performed by the Statutory Trust Advisor. Solely for purposes of the application of Probate Code section 16061 under this subdivision (3), the Statutory Trust Advisor shall be deemed to be the trustee with respect to the specific duties or functions being performed by the Statutory Trust Advisor.

(b) Any report provided to a beneficiary by a directed trustee shall also include a warning, set out in a paragraph of not less than 10-point boldface type, or a reasonable equivalent thereof, stating as follows:

"The trustee is providing information as required by statute and the governing instrument, but certain actions undertaken by the trustee are administrative actions directed to be taken or consented to by the Statutory Trust Advisor(s) pursuant to the terms of the governing instrument, or reports of actions taken directly by the Statutory Trust Advisor(s) and reported to the trustee by the Statutory Trust Advisor(s). If the beneficiary has any questions concerning the actions taken by the Statutory Trust Advisor(s), or taken by the trustee at the direction of the Statutory Trust Advisor(s), the beneficiary should contact the Statutory Trust Advisor at [address, phone, email] or seek the assistance of an independent advisor."

(c) Neither the performance nor the failure to perform of a Statutory Trust Advisor designated by the terms of the trust as provided in this subdivision shall affect the limitation on the liability of the directed trustee provided in subdivision 16608(b).

16607. Statutory Trust Advisor Subject to Court Jurisdiction

By accepting appointment to serve as a Statutory Trust Advisor, the Statutory Trust Advisor submits personally to the jurisdiction of the courts of this state even if investment advisory agreements or other related agreements provide otherwise, and the Statutory Trust Advisor may be made a party to any action or proceeding relating to a decision, action, or inaction of the Statutory Trust Advisor.

16608. Directed Trustee; Directed Trustee's Liability for Action or Inaction of Statutory Trust Advisor; No Duty to Review Actions of Statutory Trust Advisor

(a) As used in this chapter, "directed trustee" means a trustee that, under the terms of the governing instrument:

(1) must follow the direction of a Statutory Trust Advisor as to a particular duty or function, to the extent such trustee follows any such direction; or

(2) may not undertake a particular duty or function without direction from a Statutory Trust Advisor, to the extent such trustee fails to undertake such duty or function due to the absence of such direction; or

(3) must obtain the consent or authorization of a Statutory Trust Advisor with respect to a particular duty or function, to the extent such trustee timely seeks but fails to obtain such consent or authorization.

(4) must obtain the consent or authorization of a Statutory Trust Advisor with respect to a particular duty or function, to the extent such trustee obtains such consent or authorization and acts in accordance therewith, but only if and to the extent that the governing instrument clearly indicates that the protections of directed trustee status are intended by the testator, settlor or power-holder.

(b) A directed trustee is not liable, either individually or as trustee, for the following:

(1) any loss that results from compliance with the Statutory Trust Advisor's direction or from actions taken with the prior consent or authorization of the Statutory Trust Advisor;

(2) any loss that results from any action or inaction of a Statutory Trust Advisor with respect to any power granted to the Statutory Trust Advisor under the governing instrument; or

(3) any loss that results from a failure to take any action proposed by a directed trustee that requires the prior consent of a Statutory Trust Advisor, provided that the directed trustee who had a duty to propose such action timely sought but failed to obtain that consent.

(c) Absent clear and convincing evidence to the contrary, the actions of the directed trustee pertaining to matters within the scope of the Statutory Trust Advisor's authority (such as confirming that the Statutory Trust Advisor's directions have been carried out and recording and reporting actions taken at the Statutory Trust Advisor's direction or other information pursuant to Section 16606), shall be presumed to be administrative actions taken by the directed trustee solely to allow the directed trustee to perform those duties assigned to the directed trustee under the terms of the governing instrument, and such administrative actions shall not be deemed to constitute an undertaking by the directed trustee to monitor the Statutory Trust Advisor or otherwise participate in actions within the scope of the Statutory Trust Advisor's authority.

(d) Whenever a directed trustee is to follow the direction of a Statutory Trust Advisor, then, except to the extent that the terms of the governing instrument provide otherwise, the directed trustee shall have no duty to:

(1) monitor the conduct of the Statutory Trust Advisor, or provide advice to the Statutory Trust Advisor or consult with the Statutory Trust Advisor, including, without limitation, any duty to perform investment or suitability reviews, inquiries, or investigations or to make recommendations or evaluations with respect to any investments to the extent the Statutory Trust Advisor has authority to direct the acquisition, disposition, or retention of any such investment; or

(2) communicate with or warn or apprise any beneficiary or third party concerning instances in which the directed trustee would or might have exercised the directed trustee's own discretion in a manner different from the manner directed by the Statutory Trust Advisor; or

(3) commence a proceeding against the Statutory Trust Advisor.

16609. Applicability of Other Provisions of Division 9

(a) Part 4, Chapter 1, Article 4 (Sections 16080 – 16082) of the Probate Code shall apply to a Statutory Trust Advisor with respect to such powers or duties given to a Statutory Trust Advisor in the governing instrument in the same manner as if the Statutory Trust Advisor was acting as trustee with respect to such powers or duties.

(b) Except as otherwise provided in this chapter or in the governing instrument, or to the extent inconsistent with this chapter, the following provisions of Division 9 of the

Probate Code shall apply to a Statutory Trust Advisor with respect to such powers or duties given to a Statutory Trust Advisor in the governing instrument in the same manner as if the Statutory Trust Advisor was acting as trustee with respect to such powers or duties:

1) Part 2, Chapter 2 (Sections 15300 – 15309);

2) Sections 15640 – 15642;

3) Part 3, Chapter 1, Article 5 (Sections 15680 – 15688);

4) Part 4, Chapter 4, Article 4 (Sections 16460 – 16465);

5) Part 4, Chapter 5 (Sections 16500 – 16504).

Otherwise, the balance of Division 9 shall not apply to this chapter unless so provided in the governing instrument.

SECTION 2. Section 16065 of Article 3, Chapter 1, Part 4 of Division 9 of the Probate Code is added, to read:

§ 16065. Statutory Trust Advisor's duty to report to trustees and beneficiaries; Directed trustee's report to beneficiaries

(a) The duty of a Statutory Trust Advisor to report to trustees and beneficiaries is as set forth in subdivision 16606(a).

(b) Any report provided to a beneficiary by a directed trustee under Chapter Six of this Part shall include the notice prescribed in subdivision 16606(b).

SECTION 3. Sections 17200, 17202, 17203 and 17205 of Chapter 3, Part 5 of Division 9 of the Probate Code *are amended* to read (*italics indicate added language*):

§ 17200. Petitioners; Grounds for petition

(a) Except as provided in Section 15800, a trustee, *Statutory Trust Advisor* 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 of the trustee and passing upon the acts of the trustee or *Statutory Trust Advisor*, including the exercise of discretionary powers.
(6) Instructing the trustee *or Statutory Trust Advisor*.
(7) Compelling the trustee *or Statutory Trust Advisor* to report information about the trust *or to compel the trustee to* account to the beneficiary, if (A) the trustee *or Statutory Trust Advisor* has failed to submit a requested report or *the trustee has failed to* submit a requested 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 *or Statutory Trust Advisor's* compensation or reviewing the reasonableness of the trustee *or Statutory Trust Advisor's* compensation.
(10) Appointing or removing a trustee *or Statutory Trust Advisor.*
(11) Accepting the resignation of a trustee *or Statutory Trust Advisor*.
(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) …[*no further revisions*].

§ 17202. Dismissal of petition

The court may dismiss a petition if it appears that the proceeding is not reasonably necessary for the protection of the interests of the trustee, *Statutory Trust Advisor* or beneficiary.

§ 17203. Notice

(a) At least 30 days before the time set for the hearing on the petition, the petitioner shall cause notice of hearing to be mailed to all of the following persons:
(1) All trustees *and Statutory Trust Advisors*.
(2) All beneficiaries, subject to Chapter 2 (commencing with Section 15800) of Part 3.
(3) The Attorney General, if the petition relates to a charitable trust subject to the jurisdiction of the Attorney General.

(b) At least 30 days before the time set for hearing on the petition, the petitioner shall cause notice of the hearing and a copy of the petition to be served in the manner provided in Chapter 4 (commencing with Section 413.10) of Title 5 of Part 2 of the Code of Civil Procedure on any person, other than a trustee, *Statutory Trust Advisor* or beneficiary, whose right, title, or interest would be affected by the petition and who does not receive notice pursuant to subdivision (a). The court may not shorten the time for giving notice under this subdivision.

(c) If a person to whom notice otherwise would be given has been deceased for at least 40 days, and no personal representative has been appointed for the estate of that person, and

the deceased person's right, title, or interest has not passed to any other person pursuant to Division 8 (commencing with Section 13000) or otherwise, notice may instead be given to the following persons:

(1) Each heir and devisee of the decedent, and all persons named as executors of the will of the decedent, so far as known to the petitioner.

(2) Each person serving as guardian or conservator of the decedent at the time of the decedent's death, so far as known to the petitioner.

§ 17205. Request for copy of petition

If a trustee, *Statutory Trust Advisor* or beneficiary has served and filed either a notice of appearance, in person or by counsel, directed to the petitioner or the petitioner's counsel in connection with a particular petition and proceeding or a written request for a copy of the petition, and has given an address to which notice or a copy of the petition may be mailed or delivered, the petitioner shall cause a copy of the petition to be mailed to that person within five days after service of the notice of appearance or receipt of the request.

SECTION 4. Section 85 of Part 2 of Division 1 of the Probate Code is added, to read:

§ 85. "Statutory Trust Advisor" Defined

"Statutory Trust Advisor" means one or more persons (as the context requires), including, without limitation, a trust advisor, special trustee, trust protector or committee, who, under the terms of the will, trust instrument, or court order appointing, designating or providing for a method for appointing a Statutory Trust Advisor, is expressly made subject to the provisions of Chapter 6, Part 4, Division 9 of this code.

SECTION 5. Section 300 of Part 9 of Division 2 of the Probate Code is *amended* to read (*italics indicate added language*):

§ 300. Appointment of trust company

A trust company may be appointed to act as a personal representative, guardian or conservator of an estate, *Statutory Trust Advisor*, or trustee, in the same manner as an individual. A trust company may not be appointed guardian or conservator of the person of a ward or conservatee.

SECTION 6. Section 1304 of Chapter 1, Part 3 of Division 3 of the Probate Code is *amended* to read (*italics indicate added language*):

§ 1304. Appealable orders relating to trust

With respect to a trust, the grant or denial of the following orders is appealable:

(a) Any final order under Chapter 3 (commencing with Section 17200) of Part 5 of Division 9, except the following:

(1) Compelling the trustee to submit an account or report acts as trustee.
(2) *Compelling a Statutory Trust advisor to report acts as Statutory Trust Advisor*.
(3) Accepting the resignation of the trustee *or of a Statutory Trust Advisor*.
(b) Any final order under Chapter 2 (commencing with Section 19020) of Part 8 of Division 9.
(c) Any final order under Part 1 (commencing with Section 20100) and Part 2 (commencing with Section 20200) of Division 10.
(d) Determining whether an action constitutes a contest under former Chapter 2 (commencing with Section 21320) of Part 3 of Division 11, as that chapter read prior to its repeal by Chapter 174 of the Statutes of 2008.