

A Summary of California Trustee Responsibilities, Beneficiary Rights, and Elder Law Issues

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The following discussion is a summary of the trustee responsibilities, beneficiary rights and related elder law issues in California. Many of these discussions also apply to Wills.

The following topics are covered in this paper:

1. Overview of trust interpretation, responsibilities and rights.
2. Investments and management.
3. Accountings and information.
4. Uncertainties and disputes.
5. Additional trust and elder law issues: conservatorships, elder abuse, transfers to prohibited people, and when a trustor dies.

First, a few words of caution. These materials do not provide legal, accounting or other professional advice or services, or apply to any particular person, entity or circumstance, and are not a solicitation for or engagement of services inside or outside of California. These materials are a summary of complicated topics. They do not cover all of the information that might apply in a particular circumstance. Additionally, these materials do not relate to any situation where any of the relevant facts are outside the California jurisdiction. The law changes all the time. You cannot rely on the information in these materials for your particular situation. You should consult with an appropriate professional if you have questions about a specific situation.

1. Overview of trust interpretation, responsibilities and rights.

Trust terms and interpretation.

When dealing with trust issues always look at the written terms of the trust, Court orders, if any, pertaining to your particular case, applicable statutes, and relevant Court opinions from other cases. At times in this paper I will be citing relevant California Probate Code sections. You may find it useful to obtain a copy of the Probate Code. At times in this paper I will also use the term “trustor” which refers to the person who signed the trust. The “trustee” is the person who manages the trust. While the trustor is alive or able to manage his or her financial affairs, the

trustor and the trustee will typically be the same person.

The trustee primarily administers the trust by its written terms, which express the trustor's intent (Cal. Probate Code §§16000, 21101 and 21102). This can be a complicated issue. The rule most often stated is that the trustor's intent is to be followed, as expressed in the trust, and that, generally, evidence outside the plain meaning of the words used in the trust cannot be used to determine the trustor's intent, unless the words used in the trust are ambiguous and susceptible to more than one interpretation. However, more and more the Courts are allowing people to present outside evidence of the trustor's intent even if the language used in the trust is clear and cannot be interpreted more than one way. So the bottom line is that you should consider whether the trust expresses what the trustor would have wanted, and, if it does not, is there sufficient other evidence to prove what the trustor's intended? I am not suggesting that in these circumstances the trustee decide what he or she believes the trustor intended. To resolve issues of this sort you petition the Court for instructions and an order. Do not determine issues of this type on your own.

Trustee standard of care.

Trustee standard of care also is a constantly evolving area of law. Generally, Courts construe the trustee's standard to be very high. Initially, the beneficiary does have the right, in most, but not necessarily all circumstances, to demand that the trustee disclose trust-related information. At that point, if the beneficiary believes that an impropriety has occurred, the beneficiary must, to the extent possible, expressly state the nature of the dispute or impropriety. The Courts are not uniform in determining the extent to which the beneficiary must initially present, if at all, evidence of the trustee's alleged wrongdoing. Assuming that the beneficiary has stated a potentially valid claim, it is then the burden of the trustee to refute that claim with sufficient evidence. Assuming that the trustee can present sufficient evidence tending to refute the claimed impropriety, the beneficiary will want to present evidence establishing trustee wrongdoing.

The general standard of trustee care is stated in Cal. Probate Code §16040. The trustee should administer the trust with the reasonable care, skill, and caution that a prudent person would under the current circumstances to accomplish the purposes of the trust as determined from the trust wording.

A trustee who has special skills is required to use those skills. Cal. Probate Code §16014.

Generally, the trustee should not delegate responsibilities that the trustee can reasonably be expected to perform. However, in practice it is not uncommon for trustees to delegate certain responsibilities, and, by statute, in appropriate circumstances a trustee can delegate specific duties. You can refer to Probate Code §§16001(a), 16012, 16052, and 16247. Some of the responsibilities that might be delegated are investment, tax, legal and accounting in nature. The trustee must prudently select which agents to use, and must oversee those agents.

In some circumstances the trustee will have a duty to provide trust accounting and other information to the beneficiaries. This topic is discussed in more detail later in this paper. You can refer to Probate Code §16060-61.5 (relating to trust information), §16061.7 (relating to certain required trust notifications), §16062 (relating to accountings), and §16064 (relating to exceptions to accounting requirements).

Confidentiality, self interest, and impartiality.

A trustee has a duty of confidentiality. The trustee has a general duty, but not in all circumstances, not to disclose to a third person information about the trust and the beneficiaries. However, the trustee might need to disclose certain information to properly administer the trust.

More important, a trustee must not put his or her interests above those of the trust or the beneficiaries, and should avoid conflicts of interest with the trust and the beneficiaries. This can be a difficult area because it is absolutely permissible and common for a trustee also to be one of several beneficiaries. Although not a legal requirement, it has been my experience that a trustee should try to avoid even the appearance of self-dealing, or that he or she has placed his or her interests above those of the trust or beneficiaries. If potential conflicts exist, often disputes can be avoided by obtaining prior beneficiary or Court approval of the action to be taken.

The trustee should act impartially between the competing interests of the various beneficiaries. Unless the trust specifies otherwise, the trustee should not favor a particular beneficiary or class of beneficiaries.

Discretionary powers.

A trust will typically contain provisions that give the trustee discretionary powers, that is, the power to use his or her own judgment in specific circumstances. The amount of discretion is strictly construed from the language in the trust document and the intent of the trustor. Be cautious, however—even if the trust provides sole, absolute or uncontrolled discretion, Courts still require the trustee to act within the fiduciary standards and not in bad faith or in disregard of the purposes of the trust. You can refer to Probate Code §§16080-81. In other words, if the issue of a trustee's discretion is presented to the Court, the Judge will make a determination based on his or her own evaluation.

Unless limited by the terms of the trust, the trustee also has other statutory powers. You should review the powers and limitations specified in the trust document, and also the powers listed at Probate Code §§16200-16249.

One area in which a trustee might be required to use discretion relates to determining the appropriate amount of income or principal to distribute to a beneficiary. For example, should a trustee give consideration to the beneficiary's outside financial resources when the trust is silent on that issue? There are differing opinions. However, some Courts have suggested that, if the trust does not state otherwise, the trustee should consider the beneficiary's outside resources.

Co-trustees.

A few words about trusts that have co-trustees, that is, a trust that has two or more people acting as trustees at the same time. Unless the trust provides otherwise, co-trustees must act unanimously. Refer to Probate Code §§16013 and 15620. However, the trust can allocate powers unequally between co-trustees. And, in limited circumstances if a co-trustee is unavailable, the remaining co-trustees may act. Refer to Probate Code §15622. If the co-trustees are stalemated on a decision, one or more of the co-trustees can file a Court petition for instructions. Refer to Probate Code §17200(b)(6).

A co-trustee can be liable for a breach of duty by a co-trustee. Refer to Probate Code §§16402(a)-(b). Thus, if a co-trustee takes an action that the other co-trustee believes is a breach of duty, the non-breaching co-trustee should consider filing a Court petition under Probate Code §16420.

Hostility between co-trustees can be a ground for removal of a trustee. Refer to Probate Code §15642(b)(3). In some circumstances, a co-trustee might be allowed to resign if there are disputes with the other co-trustee; however, if the resignation allows the other co-trustee to commit an anticipated breach, the resignation itself could be considered a breach of duty to protect the trust. You can refer to Probate Code §§16013(b) and 16402(b)(4).

2. Investments and management.

The trustee has the duty to invest trust property for the benefit of the beneficiaries, subject to restrictions or limitations stated in the trust. The trustee's investment powers are provided by the terms of the trust. If not derived from the trust, the investment powers are also derived by statute, case law and the factual circumstances. You can refer

to Probate Code §§16200(a) and (b) and 16047. Generally, the trustee has the duty to make trust assets economically productive.

The trustee is subject to the Uniform Prudent Investor Act, unless the trust provides for a greater or lesser standard of care. You can refer to Probate Code §§16045 through 16054. The trustee should carefully read the trust terms and the Uniform Prudent Investor Act.

A trustee must invest and manage the trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust. The trustee must exercise reasonable care, skill, and caution.

A trustee's investment and management decisions relating to individual assets and courses of action are evaluated in the context of the trust's portfolio as a whole and as a part of an overall investment strategy reasonably suited to the trust's risk and return objectives.

Probate Code §16047 requires the trustee to consider such matters as economic conditions, inflation or deflation, tax consequences, the role of each investment or action within the overall trust portfolio, the expected rate of return from income and appreciation, other financial resources of the beneficiaries known to the trustee, needs for liquidity, regularity of income, preservation and appreciation of principal, and asset special value or relationship to the purpose of the trust or the beneficiaries.

The trustee has a duty to locate and take possession of the trust assets, and develop an investment strategy suited to the purpose of the trust. You can refer to Probate Code §§16006 and 16049.

Unless the trust states otherwise, the trustee has a duty to invest trust property, preserve it, and make it productive. You can refer to Probate Code §§1600, 16006-16007 and 16046(b).

Unless the trust states otherwise, the trustee has a duty to diversify the trust investments unless, under the circumstances, it is prudent not to do so. You can refer to Probate Code §§16046(b) and 16048.

The trustee must consider the interests and needs of all beneficiaries, income and remainder, when making investment decisions. You can refer to Probate Code §16003. The beneficiaries may have conflicting interests. When two or more income beneficiaries have different personal income tax brackets, generally the trustee should strike a balance between them when determining how much to invest in certain assets. However, the trustee might be allowed to prefer one class of beneficiaries over another if the trust terms direct—this can be a difficult area and cause litigation concerns. You can refer to Probate Code §16000.

Subject to the terms and intent of the trust, the trustee has a duty to make the trust property as productive as possible under the circumstances. You can refer to Probate Code §§16007 and 16046(b). Under the Uniform Prudent Investor Act, an asset may be productive either by producing income, or by appreciating in value.

A trustee has the authority to make investment decisions as provided by the intent of the trust, as provided by statute, and as required by the trustee's legal standards of care, the interests of the beneficiaries, and the Prudent Investor Rule. You can refer to Probate Code §§16200, 16202, 16220-16244, 16040 and 16047.

3. Accountings and information.

The general rule is that the trustee is required to keep the beneficiaries reasonably informed about the trust and its administration. You can refer to Probate Code §16060. However, there are important exceptions.

Upon reasonable request by a beneficiary, the trustee must provide the beneficiary with a report of the information relating to the assets, liabilities, receipts, and disbursements of the trust,

the acts of the trustee, and the particular terms of the trust that are relevant to the beneficiary's interest. You can refer to Probate Code §16061.

Probate Code §16062 requires the trustee to provide an accounting at least annually, at termination of the trust, and upon a change of trustee to each beneficiary to whom current distribution of income or principal is authorized. However, the accounting or information might not be required if waived by the terms of the trust or the beneficiary, or the trust in question is revocable. You can refer to Probate Code §16064.

The trustee must maintain proper accounts. Accounting requirements are beyond the scope of this discussion—for example, generally, the records might be required to differentiate between potentially confusing accounting aspects such as income and principal allocations. You can refer to the Uniform Principal and Income Act at §§16320-375. Accountings can be complicated. However, I can assure you that maintaining proper accounting and backup documentation records is extremely important. Probate Code §§16061.5 and 16061.7 also require the trustee to provide specific notices and information to the beneficiaries when a portion of a revocable trust becomes irrevocable, or there is a change of trustee of an irrevocable trust. You should consult an attorney about these notices.

4. Uncertainties and disputes.

The following are some of the typical trust issues and disputes that arise:

Distributions to and allocations between beneficiaries.

Investment decisions.

What assets are in trust, and the nature of those assets (such as separate property, or community property).

Entitlement to information, accountings and reports.

Asset valuation.

Allocation of income, expenses and taxes between income and principal.

Trustee self-dealing.

Right to compensation.

Trust provision and trustor intent interpretation.

Trust modification and revocation to conform to trustor intent.

Trust validity due to alleged undue influence or lack of mental capacity.

The following are typical ways to avoid or resolve dispute:

Informal resolution without Court involvement.

Court petition for instructions.

Court petition to compel accounting or disclosure of information.

Court petition to remove and surcharge trustee.

Court petition to determine validity of trust.

Court petition to interpret the trust and the trustor intent.

California Probate Code §§16500-16504 permit a trustee to serve a Notice of proposed action or proposed inaction to required people (beneficiaries and possible beneficiaries), to obtain clearance for a proposed action or inaction. In some circumstances a trustee may want to consider this process when a proposed action might be disputed.

A few words about no-contest clauses. It is typical for a trust to contain what is called a no-contest clause. In essence, a no-contest clause states that if a beneficiary initiates a certain type of Court proceeding, and if the beneficiary loses that proceeding, the beneficiary will be deleted or removed as a beneficiary of the trust.

No-contest clauses are favored because they help to reduce litigation. However, some Courts also narrowly construe no-contest clauses so that a beneficiary is not prevented from bringing a legitimate legal proceeding.

Not all legal proceedings will trigger a no-contest clause. This is a complicated subject. It is important to carefully analyze the wording of any no-contest clause and the risk to the prospective beneficiary. It is also still possible at this time to first file a petition to obtain a prior Court ruling regarding whether the filing of the specific legal proceeding will trigger the no-contest clause. However, this is a rapidly changing area of law, and new legislation enacted in June 2008 (SB 1264) will revise portions of this area of law beginning January 1, 2010 for trust and Will documents that became irrevocable on or after January 1, 2001. Obviously, you should consult an attorney regarding these issues. Generally, at this time you can refer to Probate Code §§21300-21322.

5. Additional trust and elder law issues.

The following is a discussion about four additional important topics.

First, conservatorships. A conservatorship is when a petition is filed with the Court, and the Court appoints a person to handle and be responsible for another person's financial and/or daily living affairs and needs. A conservatorship may be necessary when a person in need cannot handle his or her affairs and has not nominated another person to help through a trust or power of attorney document, when the person nominated is not suitable, or in the case of physical or financial abuse.

Second, a few comments about elder abuse. Elder abuse takes many forms: physical, financial, neglect, isolation, emotional, and influential, persuasive or coercive. California has enacted statutes to help provide specific remedies, beginning at Welfare & Institutions Code §15600. I have worked on elder abuse cases involving trusts and Wills; theft; neglect; nursing homes and elder care; and undue influence. These cases present challenging issues of evidence and proof. Seek assistance if you become aware of a possible situation of elder abuse.

Third, you should also be aware of Probate Code §§21350-56, which state that certain transfers in trusts and Wills may be unlawful, such as certain transfers of assets to attorneys, caregivers fiduciaries and other non-family members.

Fourth and finally, a few comments about what to do when a trustor dies. As a general matter, when a trustor dies, you should consult with a trust administration attorney to carry out the necessary legal and administration tasks. For example, if the trustors are husband and wife, upon the death of the first to die it is typical that the assets are valued, and then allocated or transferred into two, three or more trusts. However, due to the increased federal estate tax exclusion, sometimes a decision is made not to divide the trust. Although the use of a trust may avoid a need for probate, most likely there probably will be tax, accounting, distribution, asset title, and legal issues to address. Following the second to die, similar issues will also need to be addressed.

I hope the information is helpful, and I wish you success with all of your trust matters. Obviously, the above discussion is a summary, and does not apply to your particular situation. You should consult an attorney or other appropriate professional about your particular situation.

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