

Memorandum 87-32

Subject: Study L-640 - Amendments to Assembly Bill 362 (Trusts)
(Change in Circumstances Justifying Change in Trustee)

At the last meeting, Commissioner Harris expressed concern that corporate trustees are increasing fees. He stated that he was warned that this would happen when the legislation to remove testamentary trusts from court supervision was considered, but he did not believe that it would happen. He asked the Commission, in cooperation with the State Bar Section and local probate and trust law committees, to develop legislation to deal with the problem.

The staff has prepared a draft of legislation to deal with this problem. Commissioner Harris indicated that he did not desire to involve the courts in the solution to the problem. He mentioned the possibility of a statutory fee schedule. The staff favors a statutory scheme that will permit a trust to be transferred from one corporate trustee to another corporate trustee if there has been a significant increase in the fees of the corporate trustee. This scheme will allow the competitive forces in the market to keep fee increases under control.

The attached draft should be considered with a view possibly to drafting provisions that could be added by amendment to Assembly Bill 362 (1987 urgency trust bill). It should be recognized that inclusion of provisions dealing with this matter in Assembly Bill 362 might jeopardize the enactment of the bill. Nevertheless, this problem is one that appears to need immediate attention. The Commission should weigh that need against the possibly controversial nature of these provisions.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

SEC. . Article 6 (commencing with Section 15690) is added to Chapter 1 of Part 3 of Division 9, to read:

Article 6. Replacement of Corporate Trustee

§ 15690. "Significant increase in trustee's compensation" defined

15690. For the purposes of this article, there is a "significant increase in the trustee's compensation" if the amount of compensation the trustee received during the trust year which ended during the immediately preceding calendar year was either (a) more than five percent greater than the amount of the compensation the trustee received during the previous trust year or (b) more than twice the amount of compensation the trustee received during any one of the previous five trust years.

Comment. Section 15690 specifies the two circumstances when a trust can be transferred under this article from one corporate trustee to another corporate trustee. See Sections 15691 and 15696. The compensation received during the previous trust year or years need not have been received by the same trustee; Section 15690 applies not only where the same corporate trustee received the compensation during the relevant periods, but also where there has been a change in trustees during the relevant periods.

Clause (a) permits the trust to be transferred under this article if the compensation of the trustee is five percent more than that received during the previous year. For example, the trust can be transferred in 1988 if the trustee's compensation for the trust year ending in 1986 was \$10,000 and the trustee's compensation for the trust year ending in 1987 was more than \$10,500.

Clause (b) permits a transfer of the trust under this article based on an increase in compensation over a five year period. For example, the trust can be transferred in 1988 if the trustee's compensation for the trust year ending in 1984 was \$3,000 and the trustee's compensation exceeded \$6,000 in the trust year ending in 1987.

Note. What standard should be used to determine whether the increase in the amount of compensation is sufficient to disregard the designation of the trustee in the trust instrument? Section 15690 is provided as a starting point for a discussion of this issue.

§ 15691. Right to replace corporate trustee

15691. Notwithstanding any provision in the trust instrument, where there has been a significant increase in the trustee's

compensation, the procedure provided in this article may be used to remove a trust company as a trustee and to designate another trust company as a trustee.

Comment. Section 15691 permits the administration of the trust to be transferred from one trust company to another if there has been a significant increase in the trustee's compensation. See Section 15690 (defining "significant increase in the trustee's compensation"). The procedure provided in this article may be used notwithstanding any provision in the trust instrument. The procedure may be used only where an existing trustee is a trust company and the new trustee is another trust company. See Section 83 (defining "trust company"). The procedure may be used where the trust company is the sole trustee or where the trust company is a cotrustee.

Note. The procedure provided in this article is applicable notwithstanding any provision of the trust instrument. Otherwise, a trust company could require the inclusion of a provision in the trust instrument making this procedure unavailable.

§ 15692. Replacement of trustee directive

15692. (a) To initiate the replacement of a trustee under this article, a directive entitled "Replacement of Trustee Pursuant to Sections 15690-15695 of the California Probate Code" shall be presented to the trust company that is to be designated as the new trustee.

(b) The replacement of trustee directive shall include all of the following:

- (1) A reasonably sufficient description of the trust.
- (2) The name and address of the existing trustee (the trust company being removed as trustee).
- (3) A statement that there has been a significant increase in the trustee's compensation within the meaning of Section 15690 of the California Probate Code.
- (4) A statement that the existing trustee is removed and a new trustee designated pursuant to Sections 15690-15695 of the California Probate Code.
- (5) The name and address of the trust company designated as the new trustee.
- (6) A statement that administration of the trust is transferred to the new trustee.
- (7) A statement that the directive is executed and acknowledged by all of the persons required by Section 15692 of the California Probate Code to execute and acknowledge the directive.

(8) A statement that each person executing the directive affirms or declares under penalty of perjury under the laws of the State of California that the statements in the directive are true and correct.

(c) The directive shall be signed and acknowledged by either the persons designated in subdivision (d) or by the persons designated in subdivision (e).

(d) If there are cotrustees, the directive may be signed and acknowledged by all of the cotrustees (other than the trust company being removed as a trustee).

(e) Whether or not there are cotrustees, the directive may be signed and acknowledged by all of the following:

(1) All of the adult beneficiaries who have legal capacity and receive or are entitled to receive income under the trust or to receive a distribution of principal if the trust were terminated at the time the directive is executed.

(2) A parent of each minor beneficiary who receives or is entitled to receive income under the trust or to receive a distribution of principal if the trust were terminated at the time the directive is executed or, if that minor beneficiary has a guardian of the estate, the guardian of the estate.

(f) If the beneficiary or the parent or guardian of the minor beneficiary is a resident of this state, the directive shall be acknowledged before a notary public within this state. If the beneficiary or the parent or guardian of the minor beneficiary is not a resident of this state, the directive shall be acknowledged either before a notary public within this state or before a comparable official within the other jurisdiction where the beneficiary or the parent or guardian is a resident.

Comment Section 15692 specifies the contents of the replacement of trustee directive and the persons who must execute and acknowledge the directive. Execution of the directive by the beneficiaries is not necessary if all of the cotrustees (other than the trust company being removed as a trustee) execute the directive. However, even where there are cotrustees, execution of the directive by the cotrustees is not required if the directive is executed by or on behalf of all of the beneficiaries described in subdivision (e). If a minor beneficiary has a guardian of the estate, the directive must be executed by the guardian rather than by a parent. The directive is sufficient without the joinder of an adult beneficiary who lacks the legal capacity to execute the directive.

§ 15693. Acceptance of trust by new trustee and request for delivery of trust property

15693. The trust company designated as the new trustee in the replacement of trustee directive may accept the trust if the trust company in good faith believes that the directive satisfies the requirements of Section 15692. The trust company may accept the trust by signing the directive or by signing a separate written acceptance.

(b) Upon acceptance of the trust, the trust company shall deliver the directive to the trust company being removed by the directive and request that the trust property be delivered to the new trustee designated in the directive.

(c) Within a reasonable time after receipt of the request for transfer, the trustee holding the trust property shall do one of the following:

(1) Deliver the trust property it holds to the new trustee.

(2) Advise the new trustee that the trust property will not be delivered because the trustee holding the property has reasonable cause to believe that the directive does not satisfy the requirements of Section 15692, specifying precisely in what respect the directive fails to satisfy those requirements.

(d) A trustee who delivers the trust property to the new trustee designated in the directive is subject to all the provisions of law that govern the duties and liabilities of a trustee who has been removed.

Comment Section 15693 provides a simple method of transferring the trust property from the trust company that has been removed to new trustee designated in the replacement of trustee directive. If the trustee refuses to deliver the trust property, a court order may be sought under Section 15694.

§ 15694. Court order that existing trustee comply with directive; award of attorney fees; punitive damages

15694. (a) If a request for delivery of the trust property is made pursuant to Section 15693 and the trust company holding the trust property does not deliver the trust property to the new trustee designated in the replacement of trustee directive, a petition for an order under this section may be filed by the new trustee designated in

the directive, by a cotrustee, or by any beneficiary. If a petition is filed under this section and the court determines that the directive satisfies the requirements of Section 15692, the court shall order that the trust property held by the removed trustee be transferred to the new trustee.

(b) If the court determines that the removed trustee without reasonable cause failed or refused to deliver the trust property to the new trustee within a reasonable time after receipt of the request made pursuant to Section 15693, the court shall award the petitioner the reasonable costs of the proceeding under this section, including reasonable attorney fees. In its discretion, the court may also award the trust punitive damages not exceeding ten thousand dollars (\$10,000).

Comment Section 15694 provides for a court proceeding to enforce the transfer of the trust under this article.

§ 15695. Immunities where property delivered pursuant this article

15695. A trust company that delivers trust property to the trust company designated as the new trustee in a replacement of trustee directive in good faith reliance upon the directive is not subject to any liability for making the delivery.

Comment Section 15695 protects a trust company than delivers trust property in good faith reliance upon a replacement of trustee directive. The section is necessary to encourage a trust company to deliver the trust property without the need for a court order.

§ 15696. Beneficiary's petition for replacement of corporate trustee

15696. If a trustee is a trust company and there has been a "significant increase in the trustee's compensation" within the meaning of Section 15690, any beneficiary may file a petition requesting that the court make an order removing the trust company as trustee and appointing another trust company as trustee. Notwithstanding any provision in the trust instrument, the court shall grant the requested order unless good cause is shown why it should not be granted.

Comment. Section 15696 permits a beneficiary to petition for transfer of the trust where there has been a significant increase in the trustee's compensation (see Section 15690) and requires the court to grant the order unless good cause is shown why it should not be granted. A petition under this section might be used where it is not possible to satisfy the requirements of Section 15692 because a

beneficiary refuses to join in the execution of a replacement of trustee directive.

**ADDITION TO ARTICLE 3—TRUSTEE'S DUTY TO REPORT
INFORMATION AND ACCOUNT TO BENEFICIARIES**

§ 16065. Disclosure statement concerning right to replace trustee

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

16065. Notwithstanding Section 16064, if a trustee is a trust company and there is a "significant increase in the trustee's compensation" within the meaning of Section 15690:

(a) If an account is furnished pursuant to Section 16062 on and after July 1, 1988, it shall include a statement that the beneficiaries of the trust have the right to transfer the trust to another trust company pursuant to Sections 15690 to 15696, inclusive, of the Probate Code.

(b) If the beneficiary is not being furnished with accounts pursuant to Section 16062, not later than 60 days after the end of each trust year that ends on or after July 1, 1988, the trustee shall furnish each beneficiary to whom income or principal is required or authorized in the trustee's discretion to be currently distributed a statement that the beneficiaries of the trust have the right to transfer the trust to another trust company pursuant to Sections 15690 to 15696, inclusive, of the Probate Code.

Comment. The disclosure statement required by Section 16065 is designed to alert the beneficiaries of a trust having a corporate trustee of their right to replace the trustee with another corporate trustee where there has been an increase in the trustee's compensation that permits the replacement under Sections 15690-15696.