

Senate Bill No. 202

Passed the Senate August 26, 2010

Secretary of the Senate

Passed the Assembly August 16, 2010

Chief Clerk of the Assembly

This bill was received by the Governor this _____ day
of _____, 2010, at _____ o'clock ____M.

Private Secretary of the Governor

CHAPTER _____

An act to amend Sections 15408, 16061, 16061.5, 16061.7, 16061.8, 16064, 16336.4, and 17200 of, and to add Sections 16060.7, 16068, and 16069 to, the Probate Code, relating to probate.

LEGISLATIVE COUNSEL'S DIGEST

SB 202, Harman. Trustees: duties.

(1) Existing law regulates the administration of trusts by trustees on behalf of beneficiaries. Existing law provides that, if the principal of a trust does not exceed \$20,000 in value, the trustee has the power to terminate the trust.

This bill would provide, instead, that a trustee has the power to terminate a trust if the principal does not exceed \$40,000 in value.

(2) Existing law provides that the trustee shall provide the beneficiary, upon reasonable request, information about the assets, liabilities, receipts and disbursements of the trust, acts of the trustee, and the administration of the trust relevant to the beneficiary's interest. Existing law also allows the trust instrument to waive the report, as provided.

This bill would instead provide that on reasonable request the trustee shall report to the beneficiary information relating to the administration of the trust, and on request of the beneficiary the trustee shall provide the terms of the trust, unless it is during the period when a revocable trust can be revoked, as provided, or if the beneficiary and the trustee are the same person. This bill would allow a beneficiary or trustee to petition the court to determine the existence of a trust if a trustee has failed to report the requested information within 60 days after written request. This bill would also require a court to compel the trustee to account, regardless of waiver by a beneficiary, upon a showing that it is reasonably likely that a material breach of the trust has occurred and would provide when a waiver is void as against public policy. The bill would permit the court, on its own motion, to set and give notice of an order to show cause why a trustee who is a professional fiduciary, as provided, should not be removed for failing to hold a valid, unexpired, unsuspended license.

(3) Existing law requires, when a revocable trust or any portion of a revocable trust becomes irrevocable, as provided, the trustee to provide a copy of the trust to any beneficiary who requests it and to any heir of a deceased settlor who requests it. Existing law also requires a trustee to serve a notification, as provided, to specified persons including each beneficiary of an irrevocable trust, each heir of the deceased settlor, and to the Attorney General if the trust is a charitable trust.

This bill would revise and recast these provisions to require the trustee to provide a true and complete copy of the terms of an irrevocable trust, or the irrevocable portion of the trust, to any beneficiary or heir of a deceased settlor who requests it, as provided, including when the power of appointment is effective or lapses upon the death of a settlor, except as provided, to any beneficiary whenever there is a change of trustee of an irrevocable trust, and if the trust is a charitable trust subject to the supervision of the Attorney General, to the Attorney General, as provided. This bill would also specify that the duty to serve the notification by the trustee is the duty of the continuing or successor trustee.

The people of the State of California do enact as follows:

SECTION 1. Section 15408 of the Probate Code is amended to read:

15408. (a) On petition by a trustee or beneficiary, if the court determines that the fair market value of the principal of a trust has become so low in relation to the cost of administration that continuation of the trust under its existing terms will defeat or substantially impair the accomplishment of its purposes, the court may, in its discretion and in a manner that conforms as nearly as possible to the intention of the settlor, order any of the following:

- (1) Termination of the trust.
- (2) Modification of the trust.
- (3) Appointment of a new trustee.

(b) Notwithstanding subdivision (a), if the trust principal does not exceed forty thousand dollars (\$40,000) in value, the trustee has the power to terminate the trust.

(c) The existence of a trust provision restraining transfer of the beneficiary's interest does not prevent application of this section.

SEC. 2. Section 16060.7 is added to the Probate Code, to read:

16060.7. On the request of a beneficiary, the trustee shall provide the terms of the trust to the beneficiary unless the trustee is not required to provide the terms of the trust to the beneficiary in accordance with Section 16069.

SEC. 3. Section 16061 of the Probate Code is amended to read:

16061. Except as provided in Section 16069, on reasonable request by a beneficiary, the trustee shall report to the beneficiary by providing requested information to the beneficiary relating to the administration of the trust relevant to the beneficiary's interest.

SEC. 4. Section 16061.5 of the Probate Code is amended to read:

16061.5. (a) A trustee shall provide a true and complete copy of the terms of the irrevocable trust, or irrevocable portion of the trust, to each of the following:

(1) Any beneficiary of the trust who requests it, and to any heir of a deceased settlor who requests it, when a revocable trust or any portion of a revocable trust becomes irrevocable because of the death of one or more of the settlors of the trust, when a power of appointment is effective or lapses upon the death of a settlor under the circumstances described in paragraph (3) of subdivision (a) of Section 16061.7, or because, by the express terms of the trust, the trust becomes irrevocable within one year of the death of a settlor because of a contingency related to the death of one or more of the settlors of the trust.

(2) Any beneficiary of the trust who requests it, whenever there is a change of trustee of an irrevocable trust.

(3) If the trust is a charitable trust subject to the supervision of the Attorney General, to the Attorney General, if requested, when a revocable trust or any portion of a revocable trust becomes irrevocable because of the death of one or more of the settlors of the trust, when a power of appointment is effective or lapses upon the death of a settlor under the circumstances described in paragraph (3) of subdivision (a) of Section 16061.7, or because, by the express terms of the trust, the trust becomes irrevocable within one year of the death of a settlor because of a contingency related to the death of one or more of the settlors of the trust, and whenever there is a change of trustee of an irrevocable trust.

(b) The trustee shall, for purposes of this section, rely upon any final judicial determination of heirship. However, the trustee shall have discretion to make a good faith determination by any

reasonable means of the heirs of a deceased settlor in the absence of a final judicial determination of heirship known to the trustee.

SEC. 5. Section 16061.7 of the Probate Code is amended to read:

16061.7. (a) A trustee shall serve a notification by the trustee as described in this section in the following events:

(1) When a revocable trust or any portion thereof becomes irrevocable because of the death of one or more of the settlors of the trust, or because, by the express terms of the trust, the trust becomes irrevocable within one year of the death of a settlor because of a contingency related to the death of one or more of the settlors of the trust.

(2) Whenever there is a change of trustee of an irrevocable trust.

(3) Whenever a power of appointment retained by a settlor is effective or lapses upon death of the settlor with respect to an inter vivos trust which was, or was purported to be, irrevocable upon its creation. This paragraph shall not apply to a charitable remainder trust. For purposes of this paragraph, “charitable remainder trust” means a charitable remainder annuity trust or charitable remainder unitrust as defined in Section 664(d) of the Internal Revenue Code.

(4) The duty to serve the notification by the trustee pursuant to this subdivision is the duty of the continuing or successor trustee, and any one cotrustee may serve the notification.

(b) The notification by the trustee required by subdivision (a) shall be served on each of the following:

(1) Each beneficiary of the irrevocable trust or irrevocable portion of the trust, subject to the limitations of Section 15804.

(2) Each heir of the deceased settlor, if the event that requires notification is the death of a settlor or irrevocability within one year of the death of the settlor of the trust by the express terms of the trust because of a contingency related to the death of a settlor.

(3) If the trust is a charitable trust subject to the supervision of the Attorney General, to the Attorney General.

(c) A trustee shall, for purposes of this section, rely upon any final judicial determination of heirship, known to the trustee, but the trustee shall have discretion to make a good faith determination by any reasonable means of the heirs of a deceased settlor in the absence of a final judicial determination of heirship known to the trustee.

(d) The trustee need not provide a copy of the notification by trustee to any beneficiary or heir (1) known to the trustee but who cannot be located by the trustee after reasonable diligence or (2) unknown to the trustee.

(e) The notification by trustee shall be served by mail to the last known address, pursuant to Section 1215, or by personal delivery.

(f) The notification by trustee shall be served not later than 60 days following the occurrence of the event requiring service of the notification by trustee, or 60 days after the trustee became aware of the existence of a person entitled to receive notification by trustee, if that person was not known to the trustee on the occurrence of the event requiring service of the notification. If there is a vacancy in the office of the trustee on the date of the occurrence of the event requiring service of the notification by trustee, or if that event causes a vacancy, then the 60-day period for service of the notification by trustee commences on the date the new trustee commences to serve as trustee.

(g) The notification by trustee shall contain the following information:

(1) The identity of the settlor or settlors of the trust and the date of execution of the trust instrument.

(2) The name, mailing address and telephone number of each trustee of the trust.

(3) The address of the physical location where the principal place of administration of the trust is located, pursuant to Section 17002.

(4) Any additional information that may be expressly required by the terms of the trust instrument.

(5) A notification that the recipient is entitled, upon reasonable request to the trustee, to receive from the trustee a true and complete copy of the terms of the trust.

(h) If the notification by the trustee is served because a revocable trust or any portion of it has become irrevocable because of the death of one or more settlors of the trust, or because, by the express terms of the trust, the trust becomes irrevocable within one year of the death of a settlor because of a contingency related to the death of one or more of the settlors of the trust, the notification by the trustee shall also include a warning, set out in a separate paragraph in not less than 10-point boldface type, or a reasonable equivalent thereof, that states as follows:

“You may not bring an action to contest the trust more than 120 days from the date this notification by the trustee is served upon you or 60 days from the date on which a copy of the terms of the trust is mailed or personally delivered to you during that 120-day period, whichever is later.”

(i) Any waiver by a settlor of the requirement of serving the notification by trustee required by this section is against public policy and shall be void.

(j) A trustee may serve a notification by trustee in the form required by this section on any person in addition to those on whom the notification by trustee is required to be served. A trustee is not liable to any person for serving or for not serving the notice on any person in addition to those on whom the notice is required to be served. A trustee is not required to serve a notification by trustee if the event that otherwise requires service of the notification by trustee occurs before January 1, 1998.

SEC. 6. Section 16061.8 of the Probate Code is amended to read:

16061.8. No person upon whom the notification by the trustee is served pursuant to this chapter, whether the notice is served on him or her within or after the time period set forth in subdivision (f) of Section 16061.7, may bring an action to contest the trust more than 120 days from the date the notification by the trustee is served upon him or her, or 60 days from the day on which a copy of the terms of the trust is mailed or personally delivered to him or her during that 120-day period, whichever is later.

SEC. 7. Section 16064 of the Probate Code is amended to read:

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

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

(b) As to a beneficiary who has waived in writing the right to an account. A waiver of rights under this subdivision may be withdrawn in writing at any time as to accounts for transactions occurring after the date of the written withdrawal. Regardless of

a waiver of accounting by a beneficiary, upon a showing that is reasonably likely that a material breach of the trust has occurred, the court may compel the trustee to account.

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

SEC. 8. Section 16068 is added to the Probate Code, to read:

16068. Any waiver by a settlor of the obligation of the trustee of either of the following is against public policy and shall be void:

(a) To provide the terms of the trust to the beneficiary as required by Sections 16060.7 and 16061.5.

(b) To provide requested information to the beneficiary as required by Section 16061.

SEC. 9. Section 16069 is added to the Probate Code, to read:

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

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

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

SEC. 10. Section 16336.4 of the Probate Code is amended to read:

16336.4. (a) Unless expressly prohibited by the governing instrument, a trustee may convert a trust into a unitrust, as described in this section. A trust that limits the power of the trustee to make an adjustment between principal and income or modify the trust does not affect the application of this section unless it is clear from the governing instrument that it is intended to deny the trustee the power to convert into a unitrust.

(b) The trustee may convert a trust into a unitrust without a court order if all of the following apply:

(1) The conditions set forth in subdivision (a) of Section 16336 are satisfied.

(2) The unitrust proposed by the trustee conforms to the provisions of paragraphs (1) to (8), inclusive, of subdivision (e).

(3) The trustee gives written notice of the trustee's intention to convert the trust into a unitrust and furnishes the information required by subdivision (c). The notice shall comply with the requirements of Chapter 5 (commencing with Section 16500), including notice to a beneficiary who is a minor and to the minor's guardian, if any.

(4) No beneficiary objects to the proposed action in a writing delivered to the trustee within the period prescribed by subdivision (d) of Section 16502 or a longer period as is specified in the notice described in subdivision (c).

(c) The notice described in paragraph (3) of subdivision (b) shall include a copy of Sections 16336.4 to 16336.7, inclusive, and all of the following additional information:

(1) A statement that the trust shall be administered in accordance with the provisions of subdivision (e) and the effective date of the conversion.

(2) A description of the method to be used for determining the fair market value of trust assets.

(3) The amount actually distributed to the income beneficiary during the previous accounting year of the trust.

(4) The amount that would have been distributed to the income beneficiary during the previous accounting year of the trust had the trustee's proposed changes been in effect during that entire year.

(5) The discretionary decisions the trustee proposes to make as of the conversion date pursuant to subdivision (f).

(d) In deciding whether to exercise the power conferred by this section, a trustee may consider, among other things, the factors set forth in subdivision (g) of Section 16336.

(e) Except to the extent that the court orders otherwise or the parties agree otherwise pursuant to Section 16336.5 after a trust is converted to a unitrust, all of the following shall apply:

(1) The trustee shall make regular distributions in accordance with the governing instrument construed in accordance with the provisions of this section.

(2) The term "income" in the governing instrument shall mean an annual distribution, the unitrust amount, equal to 4 percent, which is the payout percentage, of the net fair market value of the trust's assets, whether those assets would be considered income or principal under other provisions of this chapter, averaged over the lesser of the following:

(A) The three preceding years.

(B) The period during which the trust has been in existence.

(3) During each accounting year of the trust following its conversion into a unitrust, the trustee shall, as early in the year as is practicable, furnish each income beneficiary with a statement

describing the computation of the unitrust amount for that accounting year.

(4) The trustee shall determine the net fair market value of each asset held in the trust no less often than annually. However, the following property shall not be included in determining the unitrust amount:

(A) Any residential property or any tangible personal property that, as of the first business day of the current accounting year, one or more current beneficiaries of the trust have or have had the right to occupy, or have or have had the right to possess or control, other than in his or her capacity as trustee of the trust, which property shall be administered according to other provisions of this chapter as though no conversion to a unitrust had occurred.

(B) Any asset specifically devised to a beneficiary to the extent necessary, in the trustee's reasonable judgment, to avoid a material risk of exhausting other trust assets prior to termination of the trust. All net income generated by a specifically devised asset excluded from the unitrust computation pursuant to this subdivision shall be accumulated or distributed by the trustee according to the rules otherwise applicable to that net income pursuant to other provisions of this chapter.

(C) Any asset while held in a testator's estate or a terminating trust.

(5) The unitrust amount, as otherwise computed pursuant to this subdivision, shall be reduced proportionately for any material distribution made to accomplish a partial termination of the trust required by the governing instrument or made as a result of the exercise of a power of appointment or withdrawal, other than distributions of the unitrust amount, and shall be increased proportionately for the receipt of any material addition to the trust, other than a receipt that represents a return on investment, during the period considered in paragraph (2) in computing the unitrust amount. For the purpose of this paragraph, a distribution or an addition shall be "material" if the net value of the distribution or addition, when combined with all prior distributions made or additions received during the same accounting year, exceeds 10 percent of the value of the assets used to compute the unitrust amount as of the most recent prior valuation date. The trustee may, in the reasonable exercise of his or her discretion, adjust the unitrust amount pursuant to this subdivision even if the distributions or

additions are not sufficient to meet the definition of materiality set forth in the preceding sentence.

(6) In the case of a short year in which a beneficiary's right to payments commences or ceases, the trustee shall prorate the unitrust amount on a daily basis.

(7) Unless otherwise provided by the governing instrument or determined by the trustee, the unitrust amount shall be considered paid in the following order from the following sources:

(A) From the net taxable income, other than capital gains, determined as if the trust were other than a unitrust.

(B) From net realized short-term capital gains.

(C) From net realized long-term capital gains.

(D) From tax-exempt and other income.

(E) From principal of the trust.

(8) Expenses that would be deducted from income if the trust were not a unitrust may not be deducted from the unitrust amount.

(f) The trustee shall determine, in the trustee's discretion, all of the following matters relating to administration of a unitrust created pursuant to this section:

(1) The effective date of a conversion to a unitrust.

(2) The frequency of payments in satisfaction of the unitrust amount.

(3) Whether to value the trust's assets annually or more frequently.

(4) What valuation dates to use.

(5) How to value nonliquid assets.

(6) The characterization of the unitrust payout for income tax reporting purposes. However, the trustee's characterization shall be consistent.

(7) Any other matters that the trustee deems appropriate for the proper functioning of the unitrust.

(g) A conversion into a unitrust does not affect a provision in the governing instrument directing or authorizing the trustee to distribute principal or authorizing the exercise of a power of appointment over or withdrawal of all or a portion of the principal.

(h) A trustee may not convert a trust into a unitrust in any of the following circumstances:

(1) If payment of the unitrust amount would change the amount payable to a beneficiary as a fixed annuity or a fixed fraction of the value of the trust assets.

(2) If the unitrust distribution would be made from any amount that is permanently set aside for charitable purposes under the governing instrument and for which a federal estate or gift tax deduction has been taken, unless both income and principal are set aside.

(3) If possessing or exercising the power to convert would cause an individual to be treated as the owner of all or part of the trust for federal income tax purposes, and the individual would not be treated as the owner if the trustee did not possess the power to convert.

(4) If possessing or exercising the power to convert would cause all or part of the trust assets to be subject to federal estate or gift tax with respect to an individual, and the assets would not be subject to federal estate or gift tax with respect to the individual if the trustee did not possess the power to convert.

(5) If the conversion would result in the disallowance of a federal estate tax or gift tax marital deduction that would be allowed if the trustee did not have the power to convert.

(i) If paragraph (3) or (4) of subdivision (h) applies to a trustee and there is more than one trustee, a cotrustee to whom the provision does not apply may convert the trust unless the exercise of the power by the remaining trustee or trustees is prohibited by the governing instrument. If paragraph (3) or (4) of subdivision (h) applies to all of the trustees, the court may order the conversion as provided in subdivision (b) of Section 16336.5.

(j) (1) A trustee may release the power conferred by this section to convert to a unitrust if either of the following circumstances exist:

(A) The trustee is uncertain about whether possessing or experiencing the power will cause a result described in paragraph (3), (4), or (5) of subdivision (h).

(B) The trustee determines that possessing or exercising the power will or may deprive the trust of a tax benefit or impose a tax burden not described in subdivision (h).

(2) A release pursuant to paragraph (1) may be permanent or for a specified period, including a period measured by the life of an individual.

SEC. 11. Section 17200 of the Probate Code is amended to read:

17200. (a) Except as provided in Section 15800, a trustee or beneficiary of a trust may petition the court under this chapter concerning the internal affairs of the trust or to determine the existence of the trust.

(b) Proceedings concerning the internal affairs of a trust include, but are not limited to, proceedings for any of the following purposes:

- (1) Determining questions of construction of a trust instrument.
- (2) Determining the existence or nonexistence of any immunity, power, privilege, duty, or right.
- (3) Determining the validity of a trust provision.
- (4) Ascertaining beneficiaries and determining to whom property shall pass or be delivered upon final or partial termination of the trust, to the extent the determination is not made by the trust instrument.
- (5) Settling the accounts and passing upon the acts of the trustee, including the exercise of discretionary powers.
- (6) Instructing the trustee.
- (7) Compelling the trustee to do any of the following:
 - (A) Provide a copy of the terms of the trust.
 - (B) Provide information about the trust under Section 16061 if the trustee has failed to provide the requested information within 60 days after the beneficiary's reasonable written request, and the beneficiary has not received the requested information from the trustee within the six months preceding the request.
 - (C) Account to the beneficiary, subject to the provisions of Section 16064, if the trustee has failed to submit a requested account within 60 days after written request of the beneficiary and no account has been made within six months preceding the request.
- (8) Granting powers to the trustee.
- (9) Fixing or allowing payment of the trustee's compensation or reviewing the reasonableness of the trustee's compensation.
- (10) Appointing or removing a trustee.
- (11) Accepting the resignation of a trustee.
- (12) Compelling redress of a breach of the trust by any available remedy.
- (13) Approving or directing the modification or termination of the trust.
- (14) Approving or directing the combination or division of trusts.

(15) Amending or conforming the trust instrument in the manner required to qualify a decedent's estate for the charitable estate tax deduction under federal law, including the addition of mandatory governing instrument requirements for a charitable remainder trust as required by final regulations and rulings of the United States Internal Revenue Service.

(16) Authorizing or directing transfer of a trust or trust property to or from another jurisdiction.

(17) Directing transfer of a testamentary trust subject to continuing court jurisdiction from one county to another.

(18) Approving removal of a testamentary trust from continuing court jurisdiction.

(19) Reforming or excusing compliance with the governing instrument of an organization pursuant to Section 16105.

(20) Determining the liability of the trust for any debts of a deceased settlor. However, nothing in this paragraph shall provide standing to bring an action concerning the internal affairs of the trust to a person whose only claim to the assets of the decedent is as a creditor.

(21) Determining petitions filed pursuant to Section 15687 and reviewing the reasonableness of compensation for legal services authorized under that section. In determining the reasonableness of compensation under this paragraph, the court may consider, together with all other relevant circumstances, whether prior approval was obtained pursuant to Section 15687.

(22) If a member of the State Bar of California has transferred the economic interest of his or her practice to a trustee and if the member is a deceased member under Section 9764, a petition may be brought to appoint a practice administrator. The procedures, including, but not limited to, notice requirements, that apply to the appointment of a practice administrator for a deceased member shall apply to the petition brought under this section.

(23) If a member of the State Bar of California has transferred the economic interest of his or her practice to a trustee and if the member is a disabled member under Section 2468, a petition may be brought to appoint a practice administrator. The procedures, including, but not limited to, notice requirements, that apply to the appointment of a practice administrator for a disabled member shall apply to the petition brought under this section.

(c) The court may, on its own motion, set and give notice of an order to show cause why a trustee who is a professional fiduciary, and who is required to be licensed under Chapter 6 (commencing with Section 6500) of Division 3 of the Business and Professions Code, should not be removed for failing to hold a valid, unexpired, unsuspended license.

Approved _____, 2010

Governor