

## Memorandum 88-62

Subject: Study L-3017 - Petition for Removal of Trustee by Settlor

At the July meeting, the Commission opened consideration of a proposal to revise the Trust Law to permit the settlor of an irrevocable living trust to petition the court for removal of a trustee. This matter was postponed until the September meeting so that the banks and bar associations would have additional time to consider any potential problems, particularly tax issues. The remainder of this memorandum repeats material in Memorandum 88-51 on the agenda for July. Comments from interested persons will follow in a later supplement.

Probate Code Section 15642 governs removal of trustees in the following terms:

§ 15642. Removal of trustee

15642. (a) A trustee may be removed in accordance with the trust instrument or by the court on its own motion or on petition of a cotrustee or beneficiary.

(b) The grounds for removal of a trustee by the court include the following:

(1) Where the trustee has committed a breach of the trust.

(2) Where the trustee is insolvent or otherwise unfit to administer the trust.

(3) Where hostility or lack of cooperation among cotrustees impairs the administration of the trust.

(4) Where the trustee fails or declines to act.

(5) For other good cause.

(c) If it appears to the court that trust property or the interests of a beneficiary may suffer loss or injury pending a decision on a petition for removal of a trustee and any appellate review, the court may, on its own motion or on petition of a cotrustee or beneficiary, compel the trustee whose removal is sought to surrender trust property to a cotrustee or to a receiver or temporary trustee. The court may also suspend the powers of the trustee to the extent the court deems necessary.

This section recognizes the inherent power of the court to remove a trustee that existed under the common law and under prior statutory law. Beneficiaries and cotrustees have the power to petition for removal because they are interested in the trust. In fact, a cotrustee may have a duty to seek removal of another trustee in certain cases. In these respects Section 15642 continues the substance of former law. See former

Civil Code §§ 2233, 2283; former Prob. Code §§ 1123.5, 1138.1(a)(10). The settlor may draft the trust instrument to provide a mechanism for removal, as recognized in the section. Of course, the settlor must take care that a power in the trust instrument is not so broad that it creates unpleasant tax consequences. If the settlor has the power to remove the trustee at will, the trust may be taxed in the settlor's estate. See E. Depper & A. Bernstein, California Trust Administration § 13.11, at 554 (Cal. Cont. Ed. Bar 1986).

Traditionally, the settlor is not considered to have sufficient interest in an irrevocable trust to petition for removal of a trustee, unless such a power is reserved in the trust instrument. See, e.g., G. Bogert & G. Bogert, Handbook of the Law of Trusts § 160, at 575 (5th ed. 1973). We are not aware of any other state that permits the settlor to petition for removal of a trustee of an irrevocable trust. In general, like other remedies for breach of an irrevocable trust, the right to petition for removal is held by the beneficiaries.

However, it may make sense to permit the settlor to petition to remove a trustee, particularly where the beneficiaries are minors or the children of the settlor. Otherwise it might be necessary to appoint a guardian ad litem. It would also appear that since the court can remove a trustee on its own motion, a settlor could under the existing statute petition the court in effect by invoking the court's inherent power. This being the case, it might be better to provide specifically for a petition for removal in Section 15642.

A statutory right to petition for removal of a trustee would not defeat the tax advantages of an irrevocable trust since the trustee may be removed only by the court for cause as provided in Section 15642.

Accordingly, Section 15642(a) might be amended as follows:

15642. (a) A trustee may be removed in accordance with the trust instrument, or by the court on its own motion, or on petition of a settlor, cotrustee, or beneficiary.

Respectfully submitted,

Stan G. Ulrich  
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