



Trustee Notice Pursuant to P.C. Section 16061.7; *Don't Overlook the Mundane*

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What is this about?

What do you mean by telling us
“Do not overlook the mundane!”

What is the policy behind all of this?



Background – *The Law*

California law:

- Governs the creation, validation, modification, termination and administration of trusts;
- Provides for the rights and responsibilities of all persons with an actual or potential interest in and to a trust, i.e., the trustor (settlor), trustee, beneficiary, heir, and third party (creditor);
- Provides for the adjudication of disputes relating to trusts.



Background – *The Law*

California Trust Law enacted as Probate Code §§15000 et seq.
(Prob. Code §15000)

Except to the extent that the common law rules governing trusts are modified by statute, the Common Law as to trusts is the law of the State of California.
(Prob. Code §15002)



Background – *But What About Trusts???*

- But what about assets held in trust?
 - In a trust relationship, we have a person (“trustor” a.k.a. settlor) who places money or property (corpus) in the hands of a “trustee” controlled by fiduciary duties, for the benefit of others (beneficiary/ies).
 - Such a trust may be either **revocable**, meaning that the person or persons creating the trust (trustor/settlor) has the right to revoke the trust or withdraw the property of the trust, or not revocable (**irrevocable**).
 - The right to revoke includes the right to amend, alter, or modify.
- **Should the same generally accepted principles discussed above also apply as if the assets were NOT held in trust?**



Background – *But What About Trusts???*

- **Before a trust becomes irrevocable**, legal title to the trust corpus belongs to the trustee, but the equitable title remains vested in the trustor.
 - For most all intents and purposes, the corpus still belongs to the trustor. Although there are exceptions and limitations, the law generally treats the trustor as the owner of the assets held in a revocable trust, not the trustee.
- **So, heirs generally have no legal rights in and to the assets held in a revocable trust, i.e., a mere expectancy.**
 - **Hence, it is considered inappropriate in the eyes of the law to force a competent person to notify heirs if they wish to give away their wealth held that is held in trust, if that trust remains *revocable*.**

(For purposes of this discussion, we are again excluding voluntary transfers or gifts of money or property due to fraud, undue influence, lack of capacity, etc.)



Background – *But What About Trusts???*

- **But what about after a trust comes irrevocable?** Generally, the cessation or termination of the right to revoke creates an important legal distinction.
 - Once a trust becomes **irrevocable**, the powers afforded to the trustor are limited and restricted such that:
 - The corpus can no longer be freely taken back by the trustor; and
 - The rights of the beneficiaries (and other parties with an interest in the trust or the trust assets) may be, effectively, vested.
- In such circumstance, unlike how we treat non-trust assets, the law generally does not presume that the trustor is completely free to dispose of without providing notice. **Instead, under both statutory and common law, notice to heirs is or may be required under the circumstances.**



Background – *Policies*

- **If irrevocability of a trust results from the trustor's death**, then the law generally treats the event similar to the passage of ownership through the probate administration context of a decedent's assets to devisee(s).
 - In the probate administration context, once a testator is dead, heirs and other interested persons are given a certain mandatory notice with required formalities, disclosures, and deadlines.
 - Required even if those particular persons are not provided for in a will or other testamentary instrument.
 - **Similarly, the law generally requires that heirs be notified when a trustor's death causes a revocable trust to become irrevocable.**
(Prob. Code §16061.7)



Background – *Policies*

- California has taken these general legal principals compelling the provision of notice to heirs and extended them in a manner that:
 - Tends to effectuate trustor intentions,
but, at the same time,
 - Balances the rights of heirs, devisees, beneficiaries, and other persons with an interest in and to the trust and the trust corpus.
- With the rise of the trust administration being the predominate method of estate and financial planning, the provision of notice under California law to heirs now happens on a regular basis, and often in a perfunctory, mechanical manner that belies a lack of forethought and planning.

Do not overlook the mundane!





The Statutes

Do I really need to read and know this?
Why is this statute so long and boring?



Statutes – *The Big Picture*

Prob. Code §16060: The trustee has a duty to keep the beneficiaries of the trust reasonably informed of the trust and its administration.

Prob. Code § 16060.5: As used in this article, “terms of the trust” means the written trust instrument of an irrevocable trust or those provisions of a written trust instrument in effect at the settlor’s death that describe or affect that portion of a trust that has become irrevocable at the death of the settlor. In addition, “terms of the trust” includes, but is not limited to, signatures, amendments, disclaimers, and any directions or instructions to the trustee that affect the disposition of the trust. “Terms of the trust” does not include documents which were intended to affect disposition only while the trust was revocable. If a trust has been completely restated, “terms of the trust” does not include trust instruments or amendments which are superseded by the last restatement before the settlor’s death, but it does include amendments executed after the restatement. “Terms of the trust” also includes any document irrevocably exercising a power of appointment over the trust or over any portion of the trust which has become irrevocable.

Prob. Code §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.

Prob. Code §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.



Statutes – *The Big Picture*

Prob. Code §16069:

(a) 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:

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

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

(b) Notwithstanding subdivision (a), in the case of a revocable trust, if no person holding the power to revoke the trust, in whole or in part, is competent, the trustee's duties to account shall be owed to those beneficiaries specified in paragraph (2) of subdivision (b) of **Section 15800**.

(Amended by Stats. 2021, Ch. 749, Sec. 2. (AB 1079) **Effective January 1, 2022.**)



Statutes – *The Specific Requirements*

Prob. Code §16061.7



Statutes – *The Specific Requirements*

Prob. Code §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.



Statutes – *The Specific Requirements*

Prob. Code §16061.7 (con't):

(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*.

(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.

**subject to the limitations of Prob. Code §15804 regarding class gifts, future interests, etc., which is beyond the scope of this discussion.*



Statutes – *The Specific Requirements*

Prob. Code §16061.7 (*con't*):

(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.



Statutes – *The Specific Requirements*

Prob. Code §16061.7 (*con't*):

- (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, 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.**



Statutes – *The Specific Requirements*

Prob. Code §16061.7 (con't):

(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 delivered to you during that 120-day period, whichever is later.”

(NOTE: the above text is Arial font, boldface, 12-point)



Statutes – *The Specific Requirements*

Prob. Code §16061.7 (con't):

(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.



Statutes – *The Specific Requirements*

Prob. Code §16069



Statutes – *The Specific Requirements*

Prob. Code §16069:

(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.





Why do we care?

What do we gain by doing this?

What can we lose by not doing this?



Why do we care? *Statute of Limitations!*

Prob. Code §16061.8

A person upon whom the notification by the trustee is served pursuant to paragraph (1) of subdivision (a) of Section 16061.7, whether the notice is served on the person within or after the time period set forth in subdivision (f) of Section 16061.7, **shall not bring an action to contest the trust more than 120 days from the date the notification by the trustee is served upon the person, or 60 days from the date on which a copy of the terms of the trust is delivered pursuant to Section 1215 to the person during that 120-day period, whichever is later.**

(Amended by Stats. 2022, Ch. 30, Sec. 1. (AB 1745) **Effective January 1, 2023***.)

**excludes application of the 60/120 day deadline to proceedings instituted after the change of a trustee of an irrevocable trust or the lapse/ineffectiveness of a power of appointment retained by settlor.*



Why do we care? \$\$\$\$\$

Prob. Code §16061.9

- (a) A trustee who fails to serve the notification by trustee as required by Section 16061.7 on a beneficiary **shall be responsible for all damages, attorney's fees, and costs caused by the failure** unless the trustee makes a reasonably diligent effort to comply with that section.
- (b) A trustee who fails to serve the notification by trustee as required by Section 16061.7 on an heir who is not a beneficiary and whose identity is known to the trustee **shall be responsible for all damages caused to the heir** by the failure unless the trustee shows that the trustee made a reasonably diligent effort to comply with that section. For purposes of this subdivision, “reasonably diligent effort” means that the trustee has delivered notice pursuant to Section 1215 to the heir at the heir’s last address actually known to the trustee.
- (c) A trustee, *in exercising discretion with respect to the timing and nature of distributions of trust assets*, **may consider** the fact that the period in which a beneficiary or heir could bring an action to contest the trust has not expired.



Why do we care?

The statute of limitations provided in Prob. Code §16061.8 **begins to run only once the trustee serves a notice that is compliant with Prob. Code §16061.7.**

(Harustak v. Wilkins (2000) 84 Cal.App.4th 208, 215)





Problems

Things to contemplate...



Don't overlook the mundane!

*(1) Did the **trustee** correctly
serve the notice?*



(1) Did the trustee correctly serve the notice?

- Prob. Code §16061.7 says that a “trustee shall serve a notification by the trustee as described in this section...”
 - **Over the past decade I have seen more and more situations where a lawyer serves the trustee notifications required by Prob. Code §16061.7, rather the lawyer’s client (the trustee) serving the notice.**
 - As a general proposition, a trustee is authorized to hire attorneys. (Prob. Code §16247)
 - Lawyers may take such action on behalf of the client as is impliedly authorized to carry out the representation. (CRPC Rule 1.2(a))
 - **So, does a lawyer serving the Prob. Code §16061.7 notice comply with the requirements of California’s Trust Law?**
 - **Is doing so “compliant” pursuant to the *Harustak* ruling?**



(1) Did the trustee correctly serve the notice?

- As a general proposition, the attorney-client relationship is governed by the principles of **agency**. (*Blanton v. Womancare, Inc.* (1985) 38 Cal.3d 396)
 - Civ. Code §2295: An agent is one who represents another, called the principal, in dealings with third persons. Such representation is called agency.
 - Civ. Code §2305: Every act which, according to this Code, may be done by or to any person, may be done by or to the agent of such person for that purpose, unless a contrary intention clearly appears.
 - Civ. Code §2304: An agent may be authorized to do any acts which his principal might do, **except those to which the latter is bound to give his personal attention.**
- **HOWEVER:** The “trustee has a duty **not to delegate to others the performance of acts that the trustee can reasonably be required to perform** and may not transfer the office of trustee to another person nor delegate the entire administration of the trust to a cotrustee or other person.” (Prob. Code §16012)
 - A trustee is authorized to hire attorneys “to advise or assist the trustee in the performance of administrative duties.” (Prob. Code §16247)



(1) Did the trustee correctly serve the notice?

- So, if the trustee does not serve the Prob. Code §16061.7 notice, then do we have a statutorily deficient service of notice?
 - Remember that the bar of the statute of limitations provided in Prob. Code §16061.8 begins to run only once the trustee serves a notice that is compliant with Prob. Code §16061.7 pursuant to *Harustak v. Wilkins* (2000) 84 Cal.App.4th 208.
 - **The Prob. Code requires:**
 - **the “trustee”**
 - **to “serve”**
 - **the required notice.**
 - But the Probate Code also:
 - Permits delegation and hiring of agents, advisors, attorneys, etc.
 - **Prohibits** delegation of services that may be reasonably performed by the trustee.



(1) Did the trustee correctly serve the notice?

- ❖ Is service the same as preparing? What about signing?
- ❖ Is serving a written notice that is not filed in a court proceeding a legal service that requires a California bar license, and for which it would be appropriate for a non-lawyer trustee to delegate to an attorney?

But the policies underlying the reason for notice are, among others, to effectuate trustor intent while balancing the rights of others. So...

PRO: *We should permit presumably expeditious and cost-effective activity by lawyers in this context as a way to properly and efficiently effectuate trustor intent?*

CON: *Why risk having the Prob. Code §16061.7 notice later be deemed improper and ineffective to start the running of the statute of limitations, exposing trustee to liability, etc.?*



Don't overlook the mundane!

*(2) Did the trustee's notice
contain the correct
disclosures?*



(2) Did the trustee's notice contain the correct disclosures?

What happens if the trustee's notice does not contain all the information and disclosures required by Prob. Code §16061.7? *Does the Prob. Code §16061.8 statute of limitations begin to run under such circumstances?*

- **No - Invalid for failure to include all terms of the trust, including those that the trustee may not believe are true and correct.**

Andersen v. Andersen (Cal.App. 2016) D068716, 2016 Cal.App.Unpub.LEXIS 7677, 2016 WL 6122781 (noting that the *only* appropriate course of action for a trustee is to include *all* properly executed trust documents and amendments in the Prob. Code §16061.7 notice, and, if the trustee questions the validity of any such instrument(s), to initiate trust proceedings to determine the validity thereof)

NOTE: Again, the policy is to effectuate trustor intention and balance the rights of others, so how could we effectuate the trustor's intentions if we allow a trustee to pick and chose unilaterally which items to be considered the "terms of the trust"? (See *Andersen v. Andersen*, at n. 5)



(2) Did the trustee's notice contain the correct disclosures?

What happens if the trustee's notice does not contain all the information and disclosures required by Prob. Code §16061.7? *Does the Prob. Code §16061.8 statute of limitations begin to run under such circumstances?*

- **No - Invalid for failure to include the warning set forth in Prob. Code §16061.7(g)(5)? But maybe...**

See *Germino v. Hillyer* (2003) 107 Cal.App.4th 951 (The trustee failed to include the statutory warning language of Prob. Code §16061.7(g)(5) specifying that the recipient was entitled to a copy of the terms of the trust upon reasonable request to the trustee. But the trustee included an actual and complete copy of the terms of the trust along with the written notice. The failure to include the (g)(5) warning was inconsequential because the recipient actually received the entire terms of the trust. Since the recipients were not prejudiced by the deviation from the statutory requirements, the trustee's notice was valid and effective to trigger the running of the statute of limitations notwithstanding that the notice was facially deficient and did not contain the warning language mandated by the statute.)



Don't overlook the mundane!

*(3) Did the trustee's notice
comply with the required
form and format?*



(3) Did the trustee's notice comply with the required form and format?

What happens if the trustee's notice does not comply with the form and format required by Prob. Code §16061.7? *Does the Prob. Code §16061.8 statute of limitations begin to run under such circumstances?*

- **No - Invalid for failure to comply with statutory requirements by not providing a conspicuous warning within the trustee's notice.**

REMINDER: 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, then 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**, of the 60/120 day statute of limitations. (Prob. Code §16061.7(h))

See *Harustak v. Wilkins* (2000) 84 Cal.App.4th 208 (the trustee's notice contained the warning in 10-point type, but not in boldface, and it was also not italicized, underlined, printed in all caps, or differentiated at all from the remainder of the text of the trustee's notice. The Court of Appeal found the notice deficient, *not the reasonable equivalent thereof*, and consequently ineffective to start the running of the statute of limitations.)



Fun thought experiment?

- The only common rationale underlying the opinions in *Harustak*, *Germino*, and *Andersen (unpublished)* appears to be the policy to effectuate trustor intent while at the same time balancing the rights of others.
- But can all 3 of these decisions really be completely harmonized?



THANK YOU.



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