

CONCURRENCE IN SENATE AMENDMENTS

AB 1079 (Gallagher)

As Amended June 14, 2021

Majority vote

SUMMARY

Clarifies which beneficiaries under a revocable trust are owed duties by the trustee in the event the settlor or other person holding the power to revoke the trust is deemed incompetent. Specifically, *this bill*:

- 1) Provides that, during the time that a trust is revocable and at least one person holding the power to revoke the trust, in whole or in part, is competent, the following shall apply:
 - a) The person holding the power to revoke, and not the beneficiary, has the rights afforded beneficiaries under trust law.
 - b) The duties of the trustee are owed to the person holding the power to revoke.
- 2) Establishes, unless the trust instrument provides otherwise, or joint action of the settlor and all beneficiaries is required, that if no person holding the power to revoke the trust is competent, then:
 - a) The trustee must, within 60 days of obtaining the information establishing the incompetency, provide a true and complete copy of the trust instrument and any amendments to each beneficiary to whom the trustee would be required or authorized to distribute income or principal if the settlor had died on the date the trustee received the incompetency information.
 - b) The trustee owes duties to account at least annually and to provide statutorily-required information on request to each beneficiary to whom the trustee would be required or authorized to distribute income or principal if the settlor had died during the relevant period.
 - c) The trustee may use its discretion as to whether to treat a beneficiary whose interest is conditional as a beneficiary owed a duty; if the trustee does not believe the condition will be satisfied at the time of the settlor's death, the trustee will owe a duty to the beneficiary or beneficiaries who would next succeed to that interest at the relevant time or period, as determined under the trust instrument.
- 3) Permits incompetency to be established either by a) the method for determining incompetency specified by the trust instrument, as amended or restated, or b) a judicial determination of incompetency. States that this does not affect any legal standard for establishing incompetency.
- 4) Clarifies that this bill does not diminish a beneficiary's right to bring an action during the settlor's incompetence or after the trust becomes irrevocable, including actions related to the trustee's conduct, or a change to the terms of the trust.

Senate Amendments

Remove the ability of the trustee to obtain a certificate of incompetency from one or more physicians who examined the settlor's condition; establish procedures specifically governing revocable trusts; and add the clarification in 4), above.

COMMENTS

In the event a settlor or other person with the power to revoke the trust in whole or in part is determined to be incompetent, the question becomes, who does the trustee owe a duty to in the absence of the settlor or other person with revocation authority? When the settlor is competent, the trustee owes their duty to the settlor. When the settlor becomes incompetent, the trustee owes their duty to beneficiaries. However, some trusts are complicated and involve different types of beneficiaries. This bill clarifies which beneficiaries are owed a duty from the trustee in the event the settlor or other person with revocation authority is deemed incompetent.

Background on Trusts. Trusts are commonly used to avoid probate and may provide certain tax advantages. There are two types of trust estate plans; a testamentary trust, which is written into a will and becomes effective upon death, and a living or inter vivos trust, which is created in a separate document. There are two types of living trusts, revocable and irrevocable trusts, although living revocable trusts generally become irrevocable trusts upon the death of the person creating the trust (in California, the settlor). Unlike a revocable trust, an irrevocable trust does not permit the settlor to revoke or change the trust without the consent of the beneficiaries of the trust and/or the court.

A settlor is the person who creates and funds the trust. The trustee is appointed by the settlor to administer the trust. The same person can perform both functions or different people can act as settlor and trustee but Californians who create a revocable living trust as part of their estate plan generally designate themselves as the initial trustee(s). So long as those individuals are alive and competent, California law protects the privacy of their trust, even in situations where someone other than the settlor has assumed the role of trustee.

Background on Beneficiaries: There are different types of beneficiaries. Some beneficiaries have a vested interest to receive trust property. Additionally, there are beneficiaries whose interest in the trust is not vested. For example, there are presumptive remainder beneficiaries who may become vested or qualified beneficiaries only if the current beneficiary's interest in the trust is terminated. There may also be contingent beneficiaries, whose rights are conditional on the occurrence of certain events.

Rights of Beneficiaries. Under current law, a trustee is required to notify the trust's beneficiaries, and the heirs of the deceased settlor, of the existence of the trust when certain events occur. That notification starts the clock ticking on when the beneficiaries or heirs may bring an action to contest the trust. Thus, according to current law, a trustee would be required to notify each beneficiary, meaning beneficiaries whose interest is vested in the trust and beneficiaries who stand to benefit from the trust only if the current beneficiary is terminated. Under this bill, when the settlor is deemed incompetent the trustee would be required to notify the beneficiaries with a vested interest in the trust and would be authorized to use discretion to determine whether to notify beneficiaries whose interest is not vested in the trust. The only exception, in either case, is if the trust instrument specifies different procedures in the event of the settlor's incompetence.

Limit the Rights of Remainder Beneficiaries When a Settlor is Deemed Incompetent. The issue addressed in this bill is to what extent beneficiaries whose interest in the trust is not vested have

rights under the trust when the settlor has been deemed incompetent and unable to express their intent for the administration and enforcement of the trust.

According to the sponsor, the California Lawyers Association, Trusts and Estates Section (TEXCOM):

Where a successor trustee takes over during the settlor's lifetime because the settlor has become incompetent, the...provisions curtailing the rights of a remainder beneficiary are lifted. Specifically, where a settlor is no longer competent, and no other competent party holds the power to revoke the trust, there is what is referred to as an "empty chair;" the trustee does not have a competent party to whom it owes duties, and thus the "chair" that had been occupied by the competent holder of the power of revocation is now "empty." Under existing law, unless the trust instrument provides otherwise, most commentators conclude that the "chair" is filled by all nonvested contingent remainder beneficiaries. This means all such beneficiaries, which is broadly defined under the Probate Code to include even remote and contingent beneficiaries, are now occupying the "chair." Such beneficiaries are thus able to enforce the duties of the trustee, receive accountings, etc."

This bill creates a process for determining which beneficiaries are owed a duty by the trustee when the last person with authority to revoke the trust (usually, the settlor) is deemed incompetent. Under the bill, a trustee will automatically be required to provide a true and complete copy of the trust instrument and any amendments, an annual account, and information upon request to each beneficiary to whom income or principal would be required to be provided if the settlor had died. The trustee will have to provide this information within 60 days of receiving information establishing the incompetency.

Next, the trustee will have discretion to determine whether the same duty listed above is owed to a beneficiary whose interest is conditional on some factor not yet in existence or not yet determinable, if the trustee believes it is likely the condition or conditions will be satisfied at the time of the settlor's death.

Finally, if the interest of a beneficiary fails because a condition to receiving that interest has not been satisfied or the trustee does not believe that the condition will be satisfied at the time of the settlor's death, the trustee's duty will be owed to the beneficiary or beneficiaries who would next succeed to that interest at the relevant time or period as determined under the trust instrument.

According to the Author

AB 1079 would amend the Probate Code to limit the scope of the remainder beneficiaries who have...rights [under *Drake v. Pinkham* (2013) 217 Cal.App.4th 400]. Delineating that a trustee has duties in such situation to clearly defined "qualified beneficiaries" only, as under the Uniform Trust Code, but not to more remote beneficiaries, will provide more reasonable guidance to trustees.

Arguments in Support

According to the sponsor, Trusts and Estates Section of the California Lawyers Association (TEXCOM):

We believe that most settlors, by virtue of creating a trust for estate planning purposes, do not intend for a trustee to have such broad duties to all nonvested contingent remainder beneficiaries if they should become incompetent. Stated otherwise, by virtue of doing basic

estate planning, TEXCOM believes most settlors do not intend for disclosure of the terms of their trust, asset information, investment decisions, expenditures for their care, etc. to be shared during their lifetime, should they become incompetent, with every beneficiary named in their trust, regardless of the interest granted to those beneficiaries....

TEXCOM believes delineating that a trustee has duties in such situation to clearly defined "qualified beneficiaries" only, as per the UTC, but not to more remote beneficiaries, will provide much need reasonable guidance to trustees and beneficiaries alike. *Trusts and Estates Section of the California Lawyers Association*

Arguments in Opposition

No opposition on file.

FISCAL COMMENTS

None

VOTES:

ASM JUDICIARY: 11-0-0

YES: Stone, Gallagher, Chau, Chiu, Davies, Lorena Gonzalez, Holden, Kalra, Kiley, Maienschein, Reyes

ASSEMBLY FLOOR: 75-0-3

YES: Arambula, Bauer-Kahan, Bennett, Berman, Bigelow, Bloom, Boerner Horvath, Bonta, Burke, Calderon, Carrillo, Cervantes, Chau, Chen, Chiu, Choi, Cooley, Cooper, Cunningham, Megan Dahle, Daly, Davies, Flora, Fong, Frazier, Friedman, Gabriel, Gallagher, Cristina Garcia, Eduardo Garcia, Gipson, Lorena Gonzalez, Gray, Grayson, Holden, Irwin, Jones-Sawyer, Kalra, Kiley, Lackey, Lee, Levine, Low, Maienschein, Mathis, Mayes, McCarty, Mullin, Muratsuchi, Nazarian, Nguyen, O'Donnell, Patterson, Petrie-Norris, Quirk, Ramos, Reyes, Luz Rivas, Robert Rivas, Rodriguez, Blanca Rubio, Salas, Santiago, Seyarto, Smith, Stone, Ting, Valladares, Villapudua, Voepel, Waldron, Ward, Wicks, Wood, Rendon

ABS, ABST OR NV: Aguiar-Curry, Medina, Quirk-Silva

UPDATED

VERSION: June 14, 2021

CONSULTANT: Jith Meganathan / JUD. / (916) 319-2334

FN: 0000966