

## **Trustee Duties When Trustor Is Incompetent**

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So, you've found yourself in the position of trustee and are managing your loved one's estate while they are still alive. What are your duties to account to the eventual beneficiaries of your loved one's estate? And what if your loved one is incompetent, thus the reason you are now overseeing their estate?

### **Beneficiaries Left In The Dark**

Until last year, the statutory duties of such a trustee were fairly clear; a trustee only owed a duty to the original settlor (i.e. the trustor, the person who originally created the estate and has the power to revoke the trust). In other words, the trustee managing the estate had no duty to give a copy of the trust or provide an accounting to any beneficiary during the trustor's/settlor's lifetime. But when a trustor/settlor becomes incompetent, the laws recently changed to protect the them/trustor, their estate and eventually, the beneficiaries.

The limited statutory duties of a trustee under California Probate Code 15800 often left beneficiaries in the dark. Previously, when beneficiaries would ask the trustee for more information regarding the trust, the trustee would decline to give out such information. Often children of heirs would grow concerned that the trustee was taking advantage of mom or dad. In turn, this frustration led to courts establishing rules for this area of concern. Three cases have helped develop this new area of law.



### **Cases That Shaped The Law**

First, in *Evanghelo v. Presoto*, the California court of appeal held that after an incompetent settlor died, the remainder beneficiaries could force the trustee to account for the period of time that the settlor was incompetent. In other words, the court created a "look back" that the trustee could be held to account. The court's findings in *Evanghelo* created a complicated area of law, as often trustees may not be certain as to the exact point in time when the settlor became incompetent. Many commentators disagreed with the court's decision because it effectively allowed remainder beneficiaries to "Monday morning quarterback" decisions by a trustee while the settlor was alive.

Fourteen years later, the California Supreme Court went a step further in the case *Estate of Giralдин*, another case where beneficiaries waited until after a settlor's death to take action. In *Giralдин*, the settlor's son (Timothy) took over as trustee while his father (William) was arguably incompetent. Timothy used trust funds to invest in a business owned by Timothy. A lot of evidence was introduced that William was aware of and approved of this investment. However, there was conflicting evidence over whether William was incompetent.

Unfortunately, Timothy's business essentially went bankrupt, losing \$4 million of trust money invested in the business. After William's death, Timothy's siblings brought suit against Timothy, claiming he had breached fiduciary duties. At issue was whether the remainder beneficiaries had standing to bring such an action since the investments had been made during the period that the trust was revocable. Ultimately, Court allowed the beneficiaries to bring their claim.

Most recently, in the California court of appeal case *Drake v. Pinkham*, settlor Josephine entered into two amendments to her revocable trust, a fourth amendment in 2001 and a fifth amendment in 2004. Both amendments resulted in the appointment of Josephine's daughter Janice as a co-trustee and sole successor trustee while disinheriting the settlor's other daughter Gina. Thereafter, in 2005, Gina filed a petition asking the court to appoint her as a co-trustee (as provided under the documents prior to the fourth amendment). Gina entered into a settlement agreement acknowledging Josephine as the sole trustee (with commitments by Josephine not to sell or encumber any property). After Josephine's death, Gina filed suit challenging the fourth and fifth amendments. The court of appeals confirmed the summary judgment against Gina, basically on the grounds that Gina should have challenged the amendments while Josephine was alive. The court held that Gina could bring a cause of action while Josephine was alive (and the trustee's duties were only owed by Josephine).



## **New Law Protects Trustor/Settlor and Beneficiaries**

In summary, roughly fourteen years of the case law has created a confusing set of rules governing the duties of a trustee while a settlor is incompetent.

In late 2021, California enacted AB1079, which revised probate code section 15800. Effective January 1, 2022, when a trustee receives notice that the settlor is incompetent, the trustee must provide a copy of the trust to any beneficiary entitled to a share of the trust estate upon the settlor's death. Special rules apply if a beneficiary's entitlement to their share of the trust is subject to conditions. In this situation, the trustee must determine if the preconditions to distribution of that beneficiary's share would likely be satisfied at the time of the settlor's death.

Newly revised Probate Code section 15800(b)(2) further provides that a trustee shall be required to account at least annually to beneficiaries. In other words, the new Probate Code 15800(b)(2) establishes a new duty to account to remainder beneficiaries during the settlor's lifetime.

These new rules might encourage families to consider professional trust companies to serve as trustee during a parent's lifetime (but possibly during incapacity). Often, having a neutral trustee reduces the potential fear of other family members that one of their siblings may be taking advantage of mom or dad.

It is hopeful that these statutory changes will encourage settlors to talk about trust and estate planning with their families during their lifetime, anticipating that upon their potential incompetency, the family will be informed about what is happening with the trust estate.

If a family member has any issue about the level of incompetency of the settlor, it is best to establish trust guidelines and accountings while the settlor is alive. While under prior law, a beneficiary would often have to wait until their settlor's death and then go through the complicated process of proving incapacity for a particular period of time prior to death.



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