

# Planning for the “empty chair”

Revisions to notice and accounting requirements when the settlor of a revocable trust loses capacity

Ventura County Bar Association  
Probate & Estate Planning Section  
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# The law before AB 1079:

**15800.** Except to the extent that the trust instrument otherwise provides or where the joint action of the settlor and all beneficiaries is required, during the time that a trust is revocable and the person holding the power to revoke the trust is competent:

- (a) The person holding the power to revoke, and not the beneficiary, has the rights afforded beneficiaries under this division.
- (b) The duties of the trustee are owed to the person holding the power to revoke.

**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.

## Evolution of case law:

- *Evangelho v. Presoto* (1998) 67 Cal.App.4th 615
- *Estate of Giralдин* (2012) 55 Cal.4th 1058
- *Drake v. Pinkham* (2013) 217 Cal.App.4th 400

# Law after AB 1079 (effective January 1, 2022):

## 15800.

(a) Except to the extent that the trust instrument otherwise provides or where the joint action of the settlor and all beneficiaries is required, 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*:

(1) The person holding the power to revoke, and not the beneficiary, has the rights afforded beneficiaries under this division.

(2) The duties of the trustee are owed to the person holding the power to revoke.

(b) *Except to the extent that the trust instrument otherwise provides or where the joint action of the settlor and all beneficiaries is required, if, during the time that a trust is revocable, no person holding the power to revoke the trust, in whole or in part, is competent, the following shall apply*:

(1) *Within 60 days of the obtaining of information establishing the incompetency of the last person holding the power to revoke the trust, the trustee shall provide notice of the application of this subdivision and 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 as of the date of receipt of the information. If the trust has been completely restated, the trustee need not include the trust instrument or amendments superseded by the last restatement.*

(2) *The duties of the trustee to account at least annually or provide information requested under Section 16061 shall be owed to each beneficiary to whom the trustee would be required or authorized to distribute income or principal if the settlor had died during the account period or the period relating to the administration of the trust relevant to the report, as applicable.*

(3) *A beneficiary whose interest is conditional on some factor not yet in existence or not yet determinable shall not be considered a beneficiary for purposes of this section, unless the trustee, in the trustee's discretion, believes it is likely that the condition or conditions will be satisfied at the time of the settlor's death.*

(4) *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 duties in paragraphs (1) and (2) shall 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, as amended and restated.*

(c) *To establish incompetency for the purposes of subdivision (b), the trustee may rely on either of the following*:

(1) *The method for determining incompetency specified by the trust instrument, as amended or restated.*

(2) *A judicial determination of incompetency.*

# Law after AB 1079:

## **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.*

## **SEC. 3.**

The changes made by this act do not do either of the following:

- (a) Diminish the right of a beneficiary to bring an action during the settlor's incompetency or after the trust becomes irrevocable, including an action related to the conduct of a trustee or a change to the terms of a trust.
- (b) Affect any legal standard for establishing incompetency.

# Notice and accounting requirements under 15800(b):

## 15800.

(a) Except to the extent that the trust instrument otherwise provides or where the joint action of the settlor and all beneficiaries is required, during the time that a trust is revocable and [1] *at least one person holding the power to revoke the trust, in whole or in part*, is competent, *the following shall apply*:

(1) The person holding the power to revoke, and not the beneficiary, has the rights afforded beneficiaries under this division.

(2) The duties of the trustee are owed to the person holding the power to revoke.

(b) [2] *Except to the extent that the trust instrument otherwise provides or where the joint action of the settlor and all beneficiaries is required, if, during the time that a trust is revocable, no person holding the power to revoke the trust, in whole or in part, is competent, the following shall apply*:

(1) [3] *Within 60 days of the obtaining of information establishing the [4] incompetency of the last person holding the power to revoke the trust, the trustee shall provide notice of [5] the application of this subdivision and [6] a true and complete copy of the trust instrument and any amendments to [7] each beneficiary to whom the trustee would be required or authorized to distribute income or principal if the settlor had died as of the date of receipt of the information. If the trust has been completely restated, the trustee need not include the trust instrument or amendments superseded by the last restatement.*

(2) [8] *The duties of the trustee to account at least annually or provide information requested under Section 16061 shall be owed to each beneficiary to whom the trustee would be required or authorized to distribute income or principal if the settlor had died during the account period or the period relating to the administration of the trust relevant to the report, as applicable.*

(3) [9] *A beneficiary whose interest is conditional on some factor not yet in existence or not yet determinable shall not be considered a beneficiary for purposes of this section, unless the trustee, in the trustee's discretion, believes it is likely that the condition or conditions will be satisfied at the time of the settlor's death.*

(4) *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 duties in paragraphs (1) and (2) shall 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, as amended and restated.*

(c) *To establish incompetency for the purposes of subdivision (b), the trustee [10] may rely on either of the following*:

(1) *The method for determining incompetency specified by the trust instrument, as amended or restated.*

(2) *A judicial determination of incompetency.*

# Sample Notice:

**NOTICE BY TRUSTEE**  
*Notice of Incapacity of Settlor*  
**California Probate Code § 15800(b)**

PLEASE TAKE NOTICE OF THE FOLLOWING:

1. \_\_\_\_\_ (“Settlor”) established the \_\_\_\_\_ *Trust* on \_\_\_\_\_  
“Trust”). The currently-operative governing instrument of the Trust [is/consists of the  
following documents]: \_\_\_\_\_ (“Trust  
Instrument”).
2. The Trust is revocable by Settlor.
3. The currently-acting [Trustee/co-Trustees] of the Trust [is/are]  
\_\_\_\_\_ (“Trustee[s]”). The mailing address[es] and telephone  
number[s] of the Trustee[s] are as follows:
4. The address of the physical location of the principal place of administration for the Trust  
is as follows:
5. On or about \_\_\_\_\_, the Trustee[s] obtained the following information  
establishing Settlor’s incapacity: [e.g., *letter from Settlor’s physician, Dr.*  
\_\_\_\_\_].
6. You are hereby notified of the application of subdivision (b) of California Probate Code  
section 15800 [OPTION: , which provides as follows: \_\_\_\_\_].
7. A copy of the Trust Instrument is enclosed with this notice.

Dated: \_\_\_\_\_  
\_\_\_\_\_, Trustee

# Drafting options:

- Grant someone else (e.g., agent under POA) power to revoke the Trust in the event of Settlor's incapacity. See Probate Code section 15401(b)(2):

“(2) Notwithstanding paragraph (1), a settlor may grant to another person, including, but not limited to, his or her spouse, a power to revoke all or part of that portion of the trust contributed by that settlor, regardless of whether that portion was separate property or community property of that settlor, and regardless of whether that power to revoke is exercisable during the lifetime of that settlor or continues after the death of that settlor, or both.”
- Specify person(s) to whom Trustee must account in lieu of accounting to remainder beneficiaries pursuant to 15800(b).
- Specify that 15800(b) shall not apply. Period.
- Specify that all of the Trustee's duties are owed to Settlor for life, regardless of capacity; i.e., eliminate the competency component of 15800(a).



# Open questions:

- Can the Trustee defer application of Section 15800(b) by avoiding obtaining formal, written evidence of Settlor's incapacity?
- If the Trustee determines that a condition to a remainder beneficiary's interest will not be satisfied before Settlor's death, must the Trustee notify that beneficiary of the Trustee's determination?
- Does the person holding the power to revoke the Trust (if other than Settlor) owe duties to the Settlor or remainder beneficiaries?
- If the Trust specifies person(s) to whom Trustee must account in the event of Settlor's incapacity, does that limit rights of remainder beneficiaries to demand accountings under common law?

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- If the Trustee determines that a condition to a remainder beneficiary's interest will not be satisfied before Settlor's death, must the Trustee notify that beneficiary of the Trustee's determination?
- Does the person holding the power to revoke the Trust (if other than Settlor) owe duties to the Settlor or remainder beneficiaries?
- If the Trust specifies person(s) to whom Trustee must account in the event of Settlor's incapacity, does that override rights of remainder beneficiaries to demand accountings under common law?

# Presenter:

John M. Andersen is the chair of the Trusts & Estates Practice Group at Ferguson Case Orr Paterson LLP. John guides families, individuals, entrepreneurs, business owners, and public figures in all aspects of estate planning, trusts and probate. John has extensive experience with complex wealth transfer tax and business succession planning. John is a member of the Executive Committee of the Trusts and Estates Section of the California Lawyers Association and has been a Certified Specialist in Estate Planning, Trust and Probate Law by the California State Bar since 2008. John has been a top-rated lawyer by “Super Lawyers” for the past five years.



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