MCLE SELF-STUDY ARTICLE

SETTLOR INCAPACITY AND FILLING A TRUST'S "EMPTY CHAIRS"

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I. SYNOPSIS

Recent amendments to Probate Code sections 15800 and 16069, adopting Assembly Bill No. 1079 (Stats. 2021, ch. 749) effective January 1, 2022, change the duties of trustees to disclose information to beneficiaries upon the incompetence of a trust's settlor. These are some of the most significant recent changes to California trust law. These reforms address the so-called "empty chair problem," where the settlor, who typically holds the power of trust revocation, is incompetent and, thus, leaves empty the "chair" of the person to whom the trustee's duties flow. The new provisions aim to limit the class of beneficiaries who fill this "chair" and are thus entitled to certain trust information under the Probate Code, including a copy of the terms of the trust upon request,[01] information related to the administration upon reasonable request,[02] and annual and other trust accountings.[03]

This article analyzes these modifications to the Probate Code, and the interpretation and determination of competence or incompetence under these Code sections, focusing on how these sections require certain Trustee disclosures in the event of a settlor's incompetence, without mandating assessment of competence (or incompetence) or reliance on any particular type of proof of incompetence. Part II provides background on the legal status of the settlor's "empty chair" prior to 2022. Part III is an overview of amended Probate Code sections 15800 and 16069. Part IV analyzes the sometimes underappreciated distinction between "competence" (or "legal capacity") and "capacity." Part V analyzes interpretive and practical challenges raised by combining mandatory disclosure in the event of settlor incompetency, without mandating competence assessments or reliance on any particular type or degree of proof of incompetence. Part VI discusses possible "authorized revokers" besides the trust's settlor. Part VII discusses the related issue of the "empty chair" of the trusteeship, when the settlor/initial trustee is incompetent. Part VIII discusses possible reforms to Probate Code section 15800 to address some of the challenges it poses. Part IX considers related trust drafting considerations.

II. BACKGROUND: THE SETTLOR'S "EMPTY CHAIR" PRE-2022

The most common trust arrangements are self-settled, revocable living trusts, established by an individual or a couple, where one and the same persons initially fill the four key trust roles: (1) settlors, (2) "authorized revokers," (3) trustees, and (4) current beneficiaries. In that common arrangement, when no settlor is competent, all chairs are empty. Prior law left the situation unclear when a trust had more than one person with the power to revoke, as in the common situation of a married couple's joint trust.[04] For such "two-seater" trusts, was the "person holding the power" incompetent if one settlor was incompetent—or only if both settlors were incompetent?

Setting aside that situation, once it is determined that all settlor(s) vacated the trust "chair," it seemed to become potentially *overly filled*, because "[u]nder [pre-2022] law, unless the trust instrument provides otherwise, most commentators conclude that the 'chair' 'is filled by all nonvested contingent reminder beneficiaries."[05]

Proponents of Assembly Bill No. 1079[06] sought to limit the implications of *Drake v. Pinkham* (2013),[07] fearing it entitled an overly broad class of beneficiaries to receive information about an incompetent settlor's trust.[08] Given that Probate Code section 24 defines a trust "beneficiary" as anyone with a present or future trust interest, regardless of any contingency,[09] the class of persons entitled to information could be quite large, including those with interests so

speculative—due to a contingency other than the settlor's death—as to be highly improbable or nearly impossible.

III. OVERVIEW OF AMENDED PROBATE CODE SECTIONS 15800 AND 16069

Probate Code section 15800, subdivision (a), as amended by Statutes 2021, chapter 749, resolves the two-seater issue by specifying that trustee duties are owed to the person holding the power to revoke, and that person, and not any other beneficiaries, holds the rights of a beneficiary under Probate Code, Division 9, provided that at least one person holding the power of revocation over the trust, in whole or in part, is competent.[10] This new provision clarifies that as long as one person with the power to revoke, in whole or part, is still competent, that person holds the rights of a beneficiary.

The other amendments address the overly filled issue. Those changes are described here, and the implications are discussed later in the article.

Amended Probate Code section 15800, subdivision (b), imposes the following new trustee duties when no competent person holds the power to revoke.[11] Subdivision (b)(1) requires that the trustee provide notice and a complete copy of the trust instrument to each beneficiary who would be entitled to receive a mandatory or discretionary distribution of trust income or principal if the settlor had died. Notice must be provided within 60 days of the trustee "obtaining information establishing the incompetency of the last person" holding the power of revocation.[12] This subdivision also specifies that if the current trust instrument is a complete restatement of the trust, the trustee need not provide any superseded trust instrument or amendment.[13]

Subdivision (b)(2) requires the trustee to account to those same beneficiaries at least annually, and to respond to a beneficiary's request for information under Probate Code section 16061.[14]

Subdivision (b)(3) does not require the trustee to provide such disclosure to beneficiaries whose interests are conditioned on a factor not yet in existence or not yet determinable, except for the condition of the settlor's death, "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."[15]

Subdivision (b)(4) extends the specified trustee duties to successor beneficiaries, where the interest of the predecessor 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."[16]

Amended Probate Code section 15800, subdivision (c), provides that, "to establish incompetency for the purposes of subdivision (b), the trustee *may* rely on either" (1) the trust instrument's specified method for determining incompetency, or (2) a judicial determination of incompetency.[17]

Stats. 2021, ch. 749, also amended Probate Code section 16069, which limits beneficiary rights to information, to conform to amended section 15800.[18]

IV. "COMPETENCE" (OR "LEGAL CAPACITY") VS. "CAPACITY"

Interpretation and application of Probate Code sections 15800 and 16069 requires defining the related terms "competence" and "incompetency." Many jurisdictions and authorities stress a distinction between "competence" (or "legal capacity") and other types of "capacity" (e.g., medical, mental, or physical). A psychiatrist framed the issue this way:

> *Competency* is a legal term referring to individuals 'having sufficient ability... possessing the requisite natural or legal qualifications to engage in a given endeavor.... The term *capacity* is frequently mistaken for competency. Capacity is determined by a physician, often (although not exclusively) by a psychiatrist, and not the judiciary. Capacity refers to an assessment of the individual's psychological abilities to form rational decisions, specifically the individual's ability to understand, appreciate, and manipulate information and form rational decisions. The patient evaluated by a physician to lack capacity to make reasoned medical decisions is referred to as *de facto incompetent*, i.e., incompetent in fact, but not determined to be so by legal procedures.[19]

California law, including amended Probate Code section 15800, does not always sharply draw such distinctions. California's Due Process in Competence Determination Act ("DPCDA")[20] does make clear that the fact that a person suffers from some "mental or physical disorder" does not, by itself, entail that the person is incapable of performing certain legally significant acts or making certain decisions. Probate Code section 810(a) provides "a rebuttable presumption affecting the burden of proof that all persons have the capacity to make decisions and to be responsible for their acts or decisions."[21] Probate Code section 811(a) requires that a determination of legal incapacity "to make a decision or do a certain act ... shall be supported by

evidence of a deficit" in certain "mental functions" along with "evidence of a correlation between the deficit or deficits and the decision or act in question."[22] These DPCDA provisions address the requisite degree of evidence of some "deficit(s)" in "mental functions," plus a correlation between the deficit(s) and the "capacity" to make some decision(s) or be "responsible" for some "acts or decisions," needed for due process in judicial determinations of competence or incompetence.[23]

Absent a judicial determination of incompetence, however, the legal status of a settlor or trustee who is incapacitated, especially in borderline cases, is murky. Often a trust instrument provides that a settlor or trustee is deemed incapacitated for trust purposes if one or two physicians certify in writing that the person in question is incapacitated, variously defined or described. Sometimes trust instruments provide for a "capacity committee" (which may include relatives or friends, but not physicians) that can collectively determine the incapacity of a settlor or trustee. But any such determination is still distinct from—and alone does not entail—a judicial determination of incompetence.

V. MANDATORY DISCLOSURE, BUT OPTIONAL INCOMPETENCY DETERMINATION

Amended Probate Code section 15800 raises some difficult questions of interpretation because its mandatory disclosure requirements under subdivision (b), and its precatory provision for determining incompetency under subdivision (c), eschew both a *duty of inquiry* on—and a standard of *constructive notice* for—both trustees and designated successor trustees, concerning the competence of the authorized revokers. Recall that subdivision (b) *requires* a trustee to provide the specified notice and information within 60 days of the trustee "obtaining information establishing the incompetency of the last person" holding the power of revocation.[24] Subdivision (c), however, provides that, "to establish incompetency for the purposes of subdivision (b), the trustee *may* rely on either" the trust's specified method or a judicial determination of incompetency.[25]

Although subdivision (b) mandates the specified disclosure upon obtaining information establishing incompetency, it does not require obtaining any such information, i.e., it imposes no such duty of inquiry. This is so regardless of any warning signs or clues that may have put the trustee on notice of likely diminished capacity. It could be argued that an acting trustee's various other fiduciary duties, including duties of care, etc., imply such a duty of inquiry in certain circumstances. Similarly, an acting trustee's duties might justify imputing constructive notice of incompetency, absent actual subjective belief in such incompetency, given knowledge of certain factual circumstances that the law will deem objectively require imputing such notice on the part of a reasonable trustee. Whatever such duties an active trustee may have, there is no apparent basis under current law for imposing a duty of inquiry or imputing constructive notice as to someone who is *merely designated* successor trustee who has not yet assumed the trusteeship or any of the trustee's duties.

Subdivision (b) requires the trustee—presumably the successor trustee when a settlor/trustee becomes incompetent—to provide the requisite notice upon receipt of information establishing incompetency.[26] It is not clear, however, what degree or character of such information (if any) necessitates notice. Subdivision (c) says what the trustee "may" rely on, but not what they "must" rely on.[27] In a situation where a successor takes over the trusteeship because of the apparent incompetence of the settlor/trustee, it seems the successor needs "information establishing incompetency" as a precondition to taking over. But one can envision scenarios where the successor trustee could nonetheless exclude a duty to disclose under section 15800. How should the mandatory language of (b) and the precatory language of (c) be reconciled?

First, the successor could draw a semantic or legalistic distinction—especially where the trust instrument uses the terms "capacity" or "incapacity" as opposed to the statutory term "incompetency"—claiming in effect they took over because their predecessor was sufficiently incapacitated per the trust instrument, but denying they had obtained "information establishing *incompetency*." How much weight, if any, should be placed on the term "incompetency," as a legal concept, as used in the phrase "information establishing ... incompetency"?

Second, where the trust instrument method of determination is a "capacity committee", and no physician determination was made, the successor could—with perhaps even more justification—question whether they really had sufficient "information establishing incompetency."

Third, a successor trustee may prefer (or even induce) the settlor/trustee to elect to "voluntarily resign" in favor of the successor, thus obviating the need to use the trust's specific method for establishing incompetency, and providing plausible deniability that the section 15800 disclosure duty had arose. This approach allows the successor trustee and the settlor to avoid the unpleasant matter of having the settlor declared incompetent. Like other legally significant acts, a settlor can only validly resign if they are legally competent to do so. This raises similar questions about the applicable standard of competence. Setting those questions aside, voluntary resignation (in lieu of succession due to

incompetence) will seem more clearly valid insofar as the impairment of the settlor/trustee is unclear.

Probate Code section 15800 leaves unclear whether there is any limit to the type of evidence a successor trustee can disregard in refusing to provide the notice it requires. At one extreme, it is hard to believe that a successor trustee could disregard a valid and final express judicial determination of incompetence, which is valid and final, such as one issued in a conservatorship case. The trustee clearly can rely on that, but apparently is not obligated to do so under subdivision (c). Similarly, where the trust instrument provides incompetence is established by a physician certification of incapacity, it again seems the trustee may or may not rely on such a determination. Absent the two statutory methods a trustee may rely on under subdivision (c), it seems even more clear the trustee could under section 15800 decline to provide the requisite notice/information, after receiving various other types of otherwise compelling evidence of incapacity, such as clear evidence that the settlor is gravely mentally impaired or is comatose. Insofar as a trustee can disregard various levels of putative proof of the settlor's incompetence, the mandate of disclosure under (b) seems also in a sense precatory, absent a legal reform clarifying the type or level of proof of incompetence the trustee *shall* or *must* rely on.

VI. "AUTHORIZED REVOKERS" BESIDES THE SETTLOR

Probate Code section 15800 focuses on the authorized revoker(s), in particular, to identify to whom the trustee owes their trust administration duties by default, absent contrary trust provisions. Again, in the typical revocable trust, that "chair" is typically initially filled by the settlor(s).

Persons other than the settlor(s) can, however, be authorized revokers under a trust's terms, which may delegate that authority to someone designated in place of the settlor(s). Such designated, authorized revokers most commonly include an authorized agent under a durable power of attorney, a court-appointed conservator, or a trust-nominated "trust protector." But a trust instrument presumably could provide that some other person holds the power to revoke, such as a trusted relative, friend, or professional advisor, who need not hold any such other official representative capacity.

When a trust instrument authorizes someone other than the settlor to revoke the trust, it usually conditions acquiring this authority on establishment of the incapacity of the settlor. But there does not appear to be any legal requirement to so limit the class of authorized revokers. Thus, a settlor could nominate various types of persons as authorized revokers, perhaps even conferring that authority on someone other than the settlor at the same time as the settlor holds that authority.

Given that California Trust Law places the authorized revoker(s) in the "chair," it enables a settlor to select another person—or perhaps multiple persons—to whom the trustee must answer, even if the settlor can no longer provide such accountability due to their loss of competence. The rationale seems to be that the trustee "serves at the pleasure" of the settlor (or other authorized revoker), given the power to revoke the trust (and thus the trustee's authority), and that the person(s) with the power of revocation can and will hold the trustee accountable. This structure also implements a policy to first give the information rights, which generally belong to beneficiaries under trust law, to the authorized revoker(s), while at least one of the authorized revokers is competent—before conferring those rights on any other beneficiaries, to avoid infringing on the settlor's privacy, by accelerating the various information rights of the other beneficiaries, who can be a large group.

VII. TRUSTEE INCAPACITY: A SECOND "EMPTY CHAIR"

When no settlor of a revocable trust is de facto competent, but no successor trustee has taken over, the "chair" of the trusteeship is also in a similar sense de facto "empty."

Amended section 15800 addresses the risks of financial elder abuse and undue influence that arise when a trustee takes over for an impaired settlor by providing other beneficiaries with rights to information that will empower them to enforce the rights and to protect the interests of the vulnerable settlor. But if that protection leaves the designated successor trustee wide discretion in various situations to deny that the succession of trusteeship has de facto happened or that it should officially happen, that greatly undermines the intended protection.

Such ambiguous situations, where a settlor/trustee seems incapacitated, but no successor trustee has officially taken over in their place, were a common challenge before Probate Code section 15800 was amended, and continue to be a challenge. An impaired settlor/trustee was and continues to be vulnerable, when a predator in their midst prefers that the impaired settlor continue to be trustee, perhaps to more easily unduly influence or financially abuse the settlor, compared to the situation where a competent successor trustee steps in and imposes sound management. Sometimes the designated successor trustee is the predator in the settlor's orbit, who prefers avoiding assuming the trusteeship, to maintain the facade that questionable financial transactions, orchestrated by the predator, are the choice of the trustee/settlor, and to conceal the "puppet

master" role the predator is really playing. Moreover, the predator may prefer to defer or avoid assuming the trusteeship so as to defer or avoid assuming the many strict fiduciary duties of a trustee.

Amended Probate Code section 15800 in no way created these situations, but it could conceivably aggravate them, by adding to the incentives of a corrupt designated successor trustee to avoid officially taking over as trustee. Before, the various information rights of a beneficiary generally had to be exercised by the beneficiary by requesting the information (an exception is the annual accounting requirement).[28] Now, a successor trustee is required to give the information specified in amended section 15800, regardless of whether any beneficiary wanted it or requested it. This mandatory transparency, though laudable, may encourage predators to try to maintain a status quo where an incapacitated settlor is nominally the trustee of their trust, although in reality the trustee "chair" is de facto empty.

The new notice requirement in section 15800, subdivision (b),[29]— which resembles the current notice requirement upon a trust becoming irrevocable in whole or part on the death of a settlor under section 16061.7,[30]—is thus a major expansion of the duties of successor trustees. Although a major impetus for the amendment was to narrow the class of beneficiaries entitled to receive such information, in the context of doing that, it imposed substantial new affirmative duties of notice and disclosure not dependent on express beneficiary request. In effect, partly in response to trust information being potentially owed upon request to a very a wide class of beneficiaries, the new statute requires that such information must be provided, absent beneficiary request—albeit to a narrower class of those beneficiaries.

VIII. POSSIBLE REFORMS TO PROBATE CODE SECTION 15800

To the extent amended section 15800 allows a successor trustee to turn a blind eye to the settlor's evident incapacity, this suggests that amended section 15800, subdivision (b), may be improved by being legislatively modified or judicially interpreted to impose some sort of duty of reasonable inquiry on the successor trustee to ascertain the settlor's capacity and to be positively required to rely on certain information establishing incapacity. This seems especially appropriate when a beneficiary or other concerned person has taken affirmative steps to clearly put the successor trustee on notice about the condition of the settlor.

Such a reform as to acting successor trustees may be less suitable for a merely *designated* successor trustee, who has yet to assume the trusteeship or the duties that come with it. But to avoid the problem of the de facto empty trustee chair, consideration could be given to a mechanism to put the designated trustee to a prompt decision on whether to accept or renounce the trusteeship, even if it is not fair to impose any further trustee-like duties on a person who has yet to become trustee. One possibility is to authorize a person who is designated as the next alternate successor trustee to provide the prior designated successor trustee notice of the incapacity of the settlor, and that they have a certain period of time in which to expressly accept or reject the trusteeship in writing. If they do not do so within that time, they will be presumed to have declined the trusteeship in favor of the next designated successor trustee (such a notice/decision mechanism could similarly be authorized to be used by certain beneficiaries or some nominees of the settlor). Some such mechanism could help protect settlors who have de facto vacated the trusteeship, but have a designated successor trustee intent on exploiting that *de facto vacancy.*[31]

This is a fraught situation, however, especially where an impaired settlor lacks insight into or denies his/her impairment, resents questioning of his/her capacity, or may even retaliate by trying to amend his/her trust to remove or disinherit a designated successor. Disputes over such questions seem to be a likely topic of litigation between beneficiaries (seeking to impose such duties) and successor trustees (seeking to avoid them).

IX. TRUST DRAFTING CONSIDERATIONS

The changes to section 15800 suggest some drafting considerations for estate planning attorneys. First, because the notice requirement does not apply to trust instruments superseded by a full trust restatement, settlors intent on keeping earlier trust iterations private will have further reason—similar to that provided by a similar provision of section 16061.7[32] (in combination with section 16060.5 (terms of the trust)[33])—to opt for full restatements over partial amendments.

Second, because section 15800, subdivisions (a) and (b), continue to expressly provide that they apply "[e]xcept to the extent that the trust instrument otherwise provides," settlors wary of the new trustee notice and disclosure duties will continue to have various opportunities, with carefully drafted provisions referencing the statute, to opt out of or limit the application of the statute's new duties.[34] This could be done with provisions generally waiving or limiting notice or disclosure duties. It could also be done by modifying or limiting the class of beneficiaries entitled to certain information—perhaps granting more or less rights to information to some beneficiaries than others.

Third, such considerations may even lead settlors to limit the number and type of persons or organizations they

designate as beneficiaries. Recall that the duties of notice and disclosure under section 15800, subdivision (b), flow to each beneficiary who would be entitled to receive a mandatory or discretionary distribution of trust income or principal if the settlor had died.[35] This applies regardless of the amount or degree of a beneficiary's interest in income or principal. If expecting a small sum of money or small item of tangible property could open the door to a "downstream beneficiary" having the full complement of beneficiary rights to notice and information, some settlors may be so put off by the very prospect that they may deem the modest gift they intended not worth the broad rights conferred—with associated perceived threat to the settlor's privacy.

Fourth, settlors desiring to postpone or avoid conferring information rights on beneficiaries may opt to add other "authorized revokers" who can, if willing and able, continue to fill the settlor's "chair" upon the settlor's incompetence.

Amended Probate Code section 15800 thus suggests further areas for client discussion in the estate planning process.

X. CONCLUSION

Amended Probate Code sections 15800 and 16069 aim to limit the class of beneficiaries who fill the "chair" of the person(s) to whom the trustee owes its duties—and are thus entitled to certain trust information under the Probate Code in situations where the settlor is incompetent, while imposing new disclosure duties on the trustee. In doing so, they raise interpretive questions and practical challenges, by requiring certain trustee disclosures upon the settlor's incompetence, without mandating assessment of competence (or incompetence) or reliance on any particular type of proof of incompetence. These concerns are especially pronounced when the successor trustee refuses to acknowledge seemingly clear evidence of the settlor's incompetence and when the designated successor trustee refuses to take over despite such evidence of the settlor's incompetence. These concerns suggest that amended section 15800, subdivision (b), may be improved by being legislatively modified or judicially interpreted to impose some sort of duty of reasonable inquiry on the successor trustee to ascertain the settlor's capacity and to be positively required to rely on certain information establishing incapacity. To address the problem of the de facto empty trustee "chair," where the initial trustee/settlor is de facto incompetent, but no designated successor has taken over, the Legislature could consider reforms to put the designated trustee to a prompt decision—on whether to accept or renounce the trusteeship—without imposing any further trustee-like duties on a person who has yet to become trustee. Finally, these issues suggest trust drafting considerations for estate planning counsel to discuss with clients concerned about preserving their privacy, given the new disclosure requirements in Probate Code section 15800.

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01 Prob. Code, section 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.").

02 Prob. Code, section 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.").

03 Prob. Code, section 16062, subd. (a) ("Except as otherwise provided in this section and in section 16064, the trustee shall account at least annually, at the termination of the trust, and upon a change of trustee, to each beneficiary to whom income or principal is required or authorized in the trustee's discretion to be currently distributed.").

04 Last, *Incapacitated Settlor? Trustee May Owe New Duties to Some Successor Beneficiaries*, Daily News (Cal. CEB October 18, 2021). There are, of course, other types of trusts which lack this unity of trust roles. For instance, a settlor might establish an irrevocable dynasty trust for the benefit of their descendants with a corporate trustee, in which case there is no overlap in the persons filling any role. The settlor grants the initial corpus per a trust agreement to a distinct corporate trustee, but no one has the power to revoke (the irrevocable trust) and the initial current beneficiaries are the settlor's descendants, not the settlor.

05 *Ibid.* (quoting the bill's sponsor, TEXCOM).

06 Assem. Com. on Judiciary, Rep. on Assem. Bill No. 1079 (2021-2022 Reg. Sess.) Apr. 3, 2021, p. 6. See Kohlmann, *The 'Empty Chair': How to Account for the Rights of Contingent Remainder Beneficiaries in the Event of Incapacity* (2018) 24 Cal Tr. & Est.Q. No 4, 19.

07 *Drake v. Pinkham* (2013) 217 Cal.App.4th 400.

08 Last, *supra.* at n. 5.

09 Prob. Code, section 24 ("'Beneficiary' means a person to whom a donative transfer of property is made or that person's successor in interest, and ... (c) As it relates to a trust, means a person who has any present or future interest, vested or contingent.")

10 Prob. Code, section 15800, subd. (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.").

11 Prob. Code, section 15800, subd. (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 receiving 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.").

12 Prob. Code, section 15800, subd. (b)(1).

13 *Ibid.*

14 Prob. Code, section 15800, subd. (b)(2).

15 Prob. Code, section 15800, subd. (b)(3).

16 Prob. Code, section 15800, subd. (b)(4).

17 Prob. Code, section 15800, subd. (c) ("Incompetency, for the purposes of subdivision (b), *may* be established by 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.") (Italics added.)

18 Prob. Code, section 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.").

19 Raphael J. Leo, M.D., *Competency and the Capacity to Make Treatment Decisions: A Primer for Primary Care Physicians*, 1 Primary Care Journal of Clinical Psychiatry 5 131-41 (Oct. 1999) (italics in original).

20 Prob. Code, section 810, et seq.

21 Prob. Code, section 810, subd. (a) ("For purposes of this part, there shall exist a rebuttable presumption affecting the burden of proof that all persons have the capacity to make decisions and to be responsible for their acts or decisions.")

22 Prob. Code, section 811, subd. (a) ("A determination that a person is of unsound mind or lacks the capacity to make a decision or do a certain act, including, but not limited to, the incapacity to contract, to make a conveyance, to marry, to make medical decisions, to execute wills, or to execute trusts, shall be supported by evidence of a deficit in at least one of the following mental functions, subject to subd. (b), and evidence of a correlation between the deficit or deficits and the decision or acts in question:

(1) Alertness and attention, including, but not limited to, the following:

(A) Level of arousal or consciousness.

(B) Orientation to time, place, person, and situation.

(C) Ability to attend and concentrate.

(2) Information processing, including, but not limited to, the following:

(A) Short- and long-term memory, including immediate recall.

(B) Ability to understand or communicate with others, either verbally or otherwise.

(C) Recognition of familiar objects and familiar persons.

(D) Ability to understand and appreciate quantities.

(E) Ability to reason using abstract concepts.

(F) Ability to plan, organize, and carry out actions in one's own rational self-interest.

(G) Ability to reason logically.

(3) Thought processes. Deficits in these functions may be demonstrated by the presence of the following:

(A) Severely disorganized thinking.

(B) Hallucinations.

(C) Delusions.

(D) Uncontrollable, repetitive, or intrusive thoughts.

(4) Ability to modulate mood and affect. Deficits in this ability may be demonstrated by the presence of a pervasive and persistent or recurrent state of euphoria, anger, anxiety, fear, panic, depression, hopelessness or despair, helplessness, apathy or indifference, that is inappropriate in degree to the individual's circumstances.")

23 *Ibid.*

24 Prob. Code, section 15800, subd. (b).

25 Prob. Code, section 15800, subd. (c).

26 Prob. Code, section 15800, subd. (b).

27 Prob. Code, section 15800, subd. (c).

28 Prob. Code, section 16062.

29 Prob. Code, section 15800, subd. (b).

30 Prob. Code, section 16061.7.

31 Prob. Code, section 15643 provides: "There is a vacancy in the office of trustee in any of the following circumstances:

(a) The person named as trustee rejects the trust.

(b) The person named as trustee cannot be identified or does not exist.

(c) The trustee resigns or is removed.

(d) The trustee dies.

(e) A conservator or guardian of the person or estate of an individual trustee is appointed.

(f) The trustee is the subject of an order for relief in bankruptcy.

(g) A trust company's charter is revoked or powers are suspended, if the revocation or suspension is to be in effect for a period of 30 days or more.

(h) A receiver is appointed for a trust company if the appointment is not vacated within a period of 30 days."

Note this provision, apart from subdivision (e) where a conservator or guardian is appointed for an individual trustee, does not otherwise address trustee incapacity.

Prob. Code, section 15642, by contrast, dealing with removal of a trustee, provides in pertinent part in subdivision (a) that a "trustee may be removed in accordance with the trust instrument" (among other ways), and in subdivision (b) that the "grounds for removal of a trustee by the court include the following" nine listed (non-exclusive) grounds, which include the grounds in pertinent parts in sub (1) ("otherwise unfit to administer the trust"), sub (4) ("[w]here the trustee fails or declines to act"), sub (7) ("If, as determined under Part 17 (commencing with Section 810) of Division 2, the trustee is substantially unable to manage the trust's financial resources or is otherwise substantially unable to execute properly the duties of the office. When the trustee holds the power to revoke the trust, substantial inability to manage the trust's financial resources or otherwise execute properly the duties of the office may not be proved solely by isolated incidents of negligence or improvidence."), sub (8) ("If the trustee is substantially unable to resist fraud or undue influence. When the trustee holds the power to revoke the trust, substantial inability to resist fraud or undue influence may not be proved solely by isolated incidents of negligence or improvidence."), and sub (9) ("other good cause").

32 Prob. Code, section 16061.7.

33 Prob. Code, section 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.").

34 Prob. Code, section 15800.

35 *Ibid.*