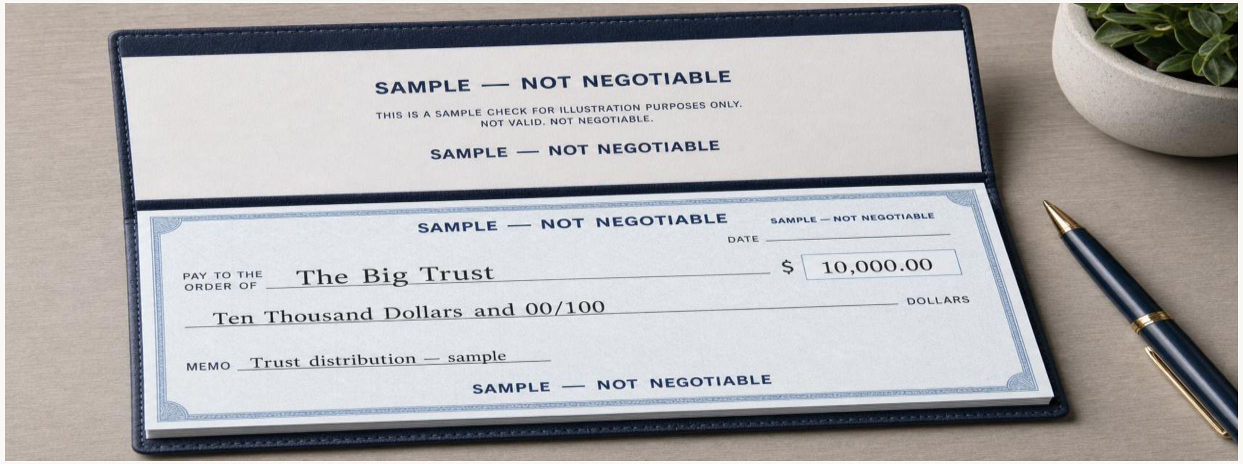
South Bay Estate Planning Council

Utilizing the Trust Checkbook & Creating a Clean Exit



Hon. Clifford Klein (Ret.) & David Kim, Esq.

Thursday September 10, 2026

HON. CLIFFORD L. KLEIN (RET.)

SIGNATURE RESOLUTION- MEDIATOR ARBITRATOR

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HON. CLIFFORD L. KLEIN (RET.) JOINED SIGNATURE RESOLUTION AFTER A DISTINGUISHED CAREER AS A SUPERIOR COURT JUDGE AND AS A PROSECUTOR IN THE LOS ANGELES COUNTY DISTRICT ATTORNEY'S OFFICE. AT SIGNATURE RESOLUTION, HE FOCUSES ON MATTERS INVOLVING PROBATE AND TRUSTS AND ESTATES, TAKING A CALM AND REASONED APPROACH TO HELP PARTIES SOLVE THEIR MOST DIFFICULT DISPUTES.

JUDGE KLEIN BEGAN HIS CAREER AS A DEPUTY DISTRICT ATTORNEY IN LOS ANGELES COUNTY, WHERE HE PROSECUTED A VARIETY OF CRIMINAL CASES. HE SPECIALIZED IN THE PROSECUTION OF COMPLEX BUSINESS FRAUD CASES INCLUDING EMBEZZLEMENT, INSURANCE, AND REAL ESTATE FRAUD, ALSO SUPERVISING THESE UNITS. AFTER BECOMING A SUPERIOR COURT JUDGE, HE PRESIDED OVER THE IMPLEMENTATION OF THE NATION'S FIRST FULL-TIME JUVENILE MENTAL HEALTH COURT, WHICH ADDRESSED CASES INVOLVING CHILDREN WITH SERIOUS MENTAL HEALTH ISSUES.

AFTER TRANSITIONING TO CRIMINAL COURT FOR MANY YEARS, JUDGE KLEIN WAS THEN ASSIGNED TO THE PROBATE COURT, WHERE HE PRESIDED OVER CASES INVOLVING ESTATES AND TRUSTS, GUARDIANSHIPS, AND PROBATE CONSERVATORSHIPS. HE HAS OVERSEEN THE PROBATE CASES OF NUMEROUS PUBLIC FIGURES, ENTERTAINERS, AND BUSINESS LEADERS.

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DAVID KIM, MANAGING PARTNER AT WRIGHT KIM DOUGLAS, ALC IS AN EXPERIENCED LITIGATOR WITH AN EXTENSIVE BUSINESS AND REAL ESTATE BACKGROUND, AND HANDLES EXCLUSIVELY PROBATE AND TRUST MATTERS, BOTH LITIGATED AND NON-LITIGATED.

MR. KIM HAS SUCCESSFULLY CONDUCTED SEVERAL NOTABLE TRIALS INVOLVING PROBATE AND TRUST DISPUTES ON BEHALF OF PRIVATE PROFESSIONAL FIDUCIARIES AND INDIVIDUALS. HE ALSO COUNSELS CLIENTS IN ALL PHASES OF TRUST ADMINISTRATION, CONSERVATORSHIPS AND PROBATE MATTERS.

ADDITIONALLY, MR. KIM SERVES FROM TIME TO TIME, ON HIGHLY CONTESTED CONSERVATORSHIP MATTERS AS COURT APPOINTED COUNSEL AND GUARDIAN AD LITEM FOR TRUST MATTERS.

Trust Assets, Litigation & Trustee Resignation

California Authority and Practical Strategy

Two Questions Presented

1. Funding litigation from the trust

- When, and to what extent, may a trustee use trust assets to prosecute or defend litigation?

  Cal. Prob. Code §§ 16249, 16243, 16247, 15684

2. Resigning with minimum exposure

- How may a trustee resign — paying the costs from trust resources — while limiting personal liability?

  Cal. Prob. Code §§ 15640–15644, 17200; § 15641 on continuing liability

Why they travel together

- Both turn on the same test: did the trustee act for the trust, or for herself?

The Bottom Line

Litigation funding

- Trust assets are available where the litigation protects trust property or the trustee's proper performance of duties.
- Test: was the suit a "benefit and a service to the trust" — not to the trustee personally
- The trustee must act as a neutral fiduciary, never as an advocate for one beneficiary faction.
- Defending one's own mismanagement risks denial of reimbursement, or surcharge.

§§ 16249, 16243, 16247, 15684

Resignation

- Four statutory methods — the court-approved § 17200 petition is the safest route.
- Fees, accounting, and transition costs are ordinary administration expenses payable from the trust.
- Resignation does not release liability for prior acts or omissions — § 15641.
- Protection comes from a court-approved final accounting, prompt delivery to the successor, and a beneficiary release where obtainable.

§§ 15640, 15641, 16243, 15684

PART I

Using Trust Assets to Prosecute or Defend Litigation

Statutory authority — the controlling standard — interim funding — reasonableness — fee-shifting

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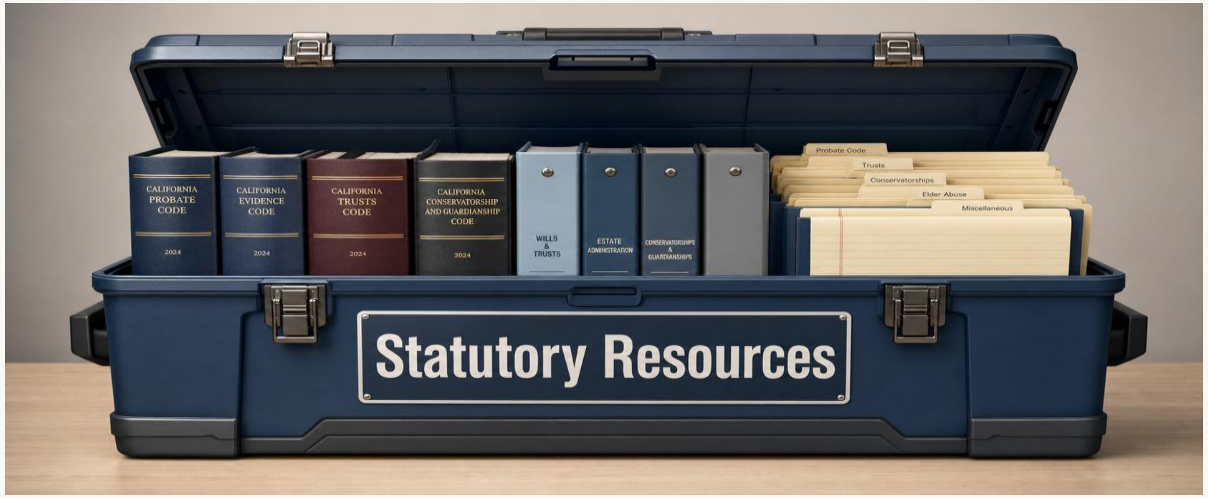
A. Your Statutory Toolkit

- **§ 16249 —** power to prosecute or defend actions for the protection of trust property and of the trustee in performing his duties.
- **§ 16243 —** authority to pay expenses of collection, care, administration, and protection of the trust.
- **§ 16247 —** authority to hire attorneys and other professionals to assist in administration.
- **§ 15684 —** reimbursement for (a) expenditures properly incurred, and (b) improper expenditures to the extent they benefited the trust.

Confirmed by the courts

Wells Fargo Bank v. Superior Court, 22 Cal.4th 201 — trust funds may pay for legal advice on administration; Kasperbauer v. Fairfield, 171 Cal.App.4th 229, 235 — the Code is "studded with provisions" authorizing payment of attorneys



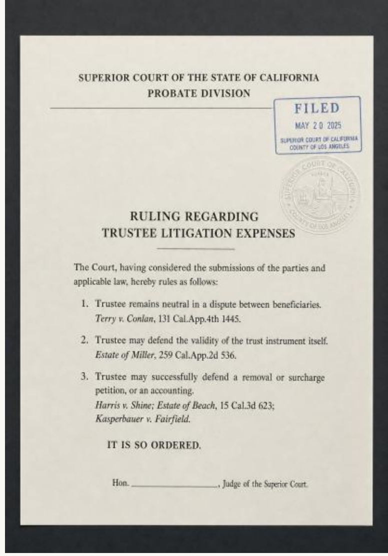
B. Controlling Standard: Benefit & Neutrality

- Entitlement does not turn on who wins the underlying dispute.

  "Such litigation is a benefit and a service to the trust" — not to the trustee personally

  People ex rel. Harris v. Shine, 16 Cal.App.5th 524, quoting Whittlesey v. Aiello, 104 Cal.App.4th 1221, 1230
- Ask two questions: did the litigation benefit the trust as an entity, and did the trustee act as a neutral fiduciary rather than a partisan for one side?
- If the defense is unsuccessful, reimbursement is not automatic — the trustee must also show a subjectively and objectively reasonable belief that the expense was necessary or appropriate to the trust's purposes.

How the Courts Have Actually Ruled



SUPERIOR COURT OF THE STATE OF CALIFORNIA
PROBATE DIVISION

FILED
MAY 20 2025
SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES

RULING REGARDING
TRUSTEE LITIGATION EXPENSES

The Court, having considered the submissions of the parties and applicable law, hereby rules as follows:

1. Trustee remains neutral in a dispute between beneficiaries. *Terry v. Conlan*, 131 Cal.App.4th 1445.
2. Trustee may defend the validity of the trust instrument itself. *Estate of Miller*, 259 Cal.App.2d 536.
3. Trustee may successfully defend a removal or surcharge petition, or an accounting. *Harris v. Shine; Estate of Beach*, 15 Cal.3d 623; *Kasperbauer v. Fairfield*.

IT IS SO ORDERED.

Hon. ____________________, Judge of the Superior Court.

Chargeable to the trust

- Trustee defends the validity of the trust instrument itself.
  Estate of Miller, 259 Cal.App.2d 536
- Trustee successfully defends a removal or surcharge petition, or an accounting.
  Harris v. Shine, 16 Cal.App.5th 524; Estate of Beach, 15 Cal.3d 623; Kasperbauer v. Fairfield

Not chargeable — or surcharged

- No Trustee neutrality in a dispute between beneficiaries.
  Terry v. Conlan, 131 Cal.App.4th 1445
- Trustee takes one side among competing beneficiaries, e.g. defending a contested amendment.
  Whittlesey v. Aiello, 104 Cal.App.4th 1221; Zahnleuter v. Mueller, 88 Cal.App.5th 1294 (surcharge affirmed)
- Trustee defends removal or surcharge arising from his own mismanagement.
  Butler v. LeBouef, 248 Cal.App.4th 198 — roughly $503,000 of trust funds spent on self-defense; reimbursement denied in full

C. Interim & Advance Payment of Defense Costs

- The trustee need not wait for a final ruling — §§ 15684, 16243, and 16247 together authorize advance payment of properly incurred litigation costs as the case proceeds.
  Kasperbauer v. Fairfield, 171 Cal.App.4th 229 — beneficiaries ordered to return distributed funds so the trustee could be reimbursed on an ongoing basis, with no predicate § 17211 bad-faith finding
- Interim draws are not immune from later review: fees found unreasonable, disproportionate, or self-serving can be disallowed or surcharged at the final accounting.
  Butler v. LeBouef, 248 Cal.App.4th 198; Donahue v. Donahue, 182 Cal.App.4th 259
- If a beneficiary moves to cut off funding, the court weighs the trustee's probability of ultimate entitlement against the harm to the beneficiaries and the trust — and a mere resource imbalance between the parties is not itself a reason to deny interim funding.
  People ex rel. Harris v. Shine, 16 Cal.App.5th 524

The Trust Is NOT a War Chest

Trustee Neutrality & the “Explicit Defense Directive”

Whittlesey · Terry · Doolittle · Zahnleuter

The Rule in One Sentence

A trustee may not finance one beneficiary's victory over another out of the trust — unless the settlor said so, explicitly, in the document.

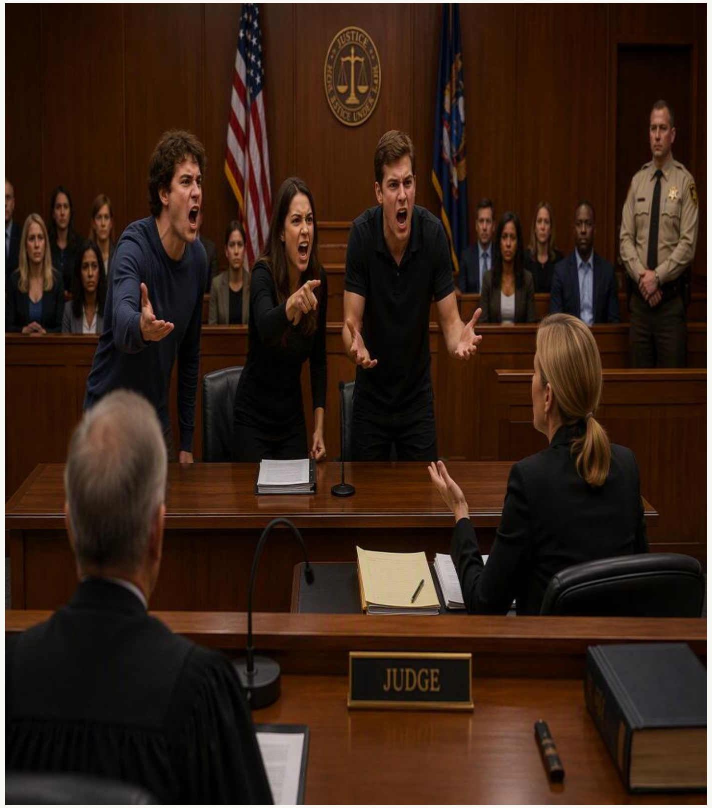
Whittlesey v. Aiello (2002) 104 Cal.App.4th 1221 · Terry v. Conlan (2005) 131 Cal.App.4th 1445 · Doolittle v. Exchange Bank (2015) 241 Cal.App.4th 529 · Zahnleuter v. Mueller (2023) 88 Cal.App.5th 1294.

Whittlesey v. Aiello (2002) 104 Cal.App.4th 1221

- Facts — The decedent’s niece challenged an amendment and prevailed on undue influence against the second wife, who was also trustee. After the wife died, the successor trustee kept defending the amendment, then sought fees from the trust.
- Holding — Fees denied. The heart of the action “was not a challenge to the existence of the trust; instead it was a dispute over who would control and benefit from it.” (Id. at 1228.)
- Neutrality — “There was no basis for the trustee to have taken other than a neutral position in the contest.” (Id. at 1230–1231.)
- Equity — There is “no equity” in making the successful contestant finance her opponent’s litigation. (Id. at 1230.)
- Takeaway — Defending an amendment means representing one side, “not representing the interests of the trust or the trustee.”

Terry v. Conlan (2005) 131 Cal.App.4th 1445

- Facts — A fight between the decedent’s adult children and his second wife; one of the children served as trustee and litigated on her family’s side.
- Holding — The court saw “very little difference” from Whittlesey: “The dispute was, and continues to be, over who will enjoy the benefits and who will control the trust.” (Id. at 1461–1462, 1464.)
- No benefit to the trust — A contest of this kind is not necessary to preserve the trust or protect its property, so it is not administration.
- Result — The trustee “has not participated in this litigation as a neutral trustee… rather, she has consistently pursued her own interests and those of her siblings.” She bore her own costs. (Id. at 1464.)
- Takeaway — Family alignment is not trust benefit. A trustee-beneficiary who litigates for her own branch pays her own way.



Doolittle v. Exchange Bank (2015) 241 Cal.App.4th 529

- The general rule restated — Where the dispute is over who is the rightful beneficiary, “involving no attack upon the validity or assets of the trust itself, the trustee ordinarily must remain impartial, and may not use trust assets to defend the claim of one party against the other.” (Id. at 537–538.)
- The exception — “Unless the language of a trust provides otherwise.” In Doolittle, it did: the trustee was “directed to defend, at the expense of any trust estate… any contest or other attack of any nature on this Agreement, on any of its provisions and any amendments hereto.” (Id. at 534.)
- What makes a directive explicit — Whittlesey and Terry did not contain “an explicit directive to the trustee to defend claims challenging the validity of the instrument at the trust’s expense.” (Id. at 538.)
- Form-book safe harbor — Doolittle points to CEB’s Drafting California Revocable Trusts language, and calls its own clause “more expansive,” leaving “no doubt” of intent.
- Takeaway — Doolittle is the only escape hatch, and it is a drafting escape hatch.

Zahnleuter v. Mueller (2023) 88 Cal.App.5th 1294

- Facts — The successor trustee, the decedent's brother, spent trust funds fighting his niece over the validity of a third amendment. He was surcharged. (Id. at 1297.)
- The governing principle — Fees come out of the trust only where "such litigation is a benefit and a service to the trust"; where the trust "did not stand to be benefited," there is no basis for recovery. (Id. at 1305.)
- The clause that was not enough — The trust authorized the trustee "to initiate or defend, at the expense of the trust estate, any litigation the trustee considered advisable related to the trust or any property of the trust." (Id. at 1298.) That is the boilerplate in countless trusts.
- Holding — His "duty to deal impartially with beneficiaries required him to stay neutral… as there was no language in the trust document or in any of the amendments… directing or authorizing him to favor one beneficiary over another." (Id. at 1309.)
- Takeaway — Surcharge, not merely denial of fees. Getting this wrong is personal.

Bottom Line the Cases Draw

Case	Defense language in the trust	Court's answer	Consequence
Whittlesey (2002)	None	Trustee must stay neutral	Fees denied
Terry (2005)	None	Dispute over control and benefit	Trustee bears own costs
Doolittle (2015)	Express directive to defend “any contest or other attack of any nature”	Directive controls	Trust-funded defense allowed
Zahnleuter (2023)	General power to “initiate or defend… any litigation… related to the trust”	Not enough — no directive	Trustee surcharged

The dividing line is not how broad the clause is. It is whether the settlor named the fight.

What the Non-Neutral Trustee Risks

1

Fees denied

No reimbursement for defense costs already advanced — the trustee eats them.

2

Surcharge

Zahnleuter affirmed a personal surcharge for trust funds spent on a contest.

3

Breach of duty

Loyalty and impartiality claims under §§ 16002 and 16003, with removal exposure.

4

Injunction

A beneficiary can seek an order freezing further trust-funded litigation spending.

Zahnleuter v. Mueller (2023) 88 Cal.App.5th 1294, 1297, 1307–1309 · Prob. Code §§ 16002, 16003, 15684

D & E. Two Further Limits — and a Sword

Donahue's "double-barreled" test

- Fees must be reasonable in amount and reasonably necessary to the litigation.
- And, separately, reasonable and appropriate as a benefit to the trust.
- The trustee has an affirmative duty to be cost-conscious — he may not fund an excessive strategy at the trust's expense merely because some expenditure was justified.

Donahue v. Donahue, 182 Cal.App.4th 259

§ 17211 & § 15642(d) fee-shifting

- § 17211(a) — a beneficiary who contests the account without reasonable cause and in bad faith may be charged the trustee's fees against his trust interest, with personal liability for any shortfall.
- § 17211(b) — a trustee whose opposition is itself in bad faith may be charged the beneficiary's fees; reasonable cause defeats an award even if the trustee loses.
- § 15642(d) — a bad-faith removal petition can be turned back on the petitioning beneficiary, potentially beyond his trust interest.

Leader v. Cords, 182 Cal.App.4th 1588; Uzyel v. Kadisha, 188 Cal.App.4th 866; Chatard v. Oveross, 179 Cal.App.4th 1098; Bruno v. Hopkins, 79 Cal.App.5th 801

PART II

Resigning With Trust Resources & Minimum Liability

Four statutory exits — the court petition — handover duties — paying the costs — limiting what follows you out the door

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A. Four Statutory Methods — § 15640

(a) Under the trust instrument — many instruments specify the mechanism, e.g. written notice to the beneficiaries and the successor.

(b) Revocable trusts — with the consent of the person holding the power to revoke.

(c) Irrevocable trusts — with the consent of all adult beneficiaries currently receiving, or entitled to, income or principal; a conservator or an attorney-in-fact with sufficient authority may consent for a beneficiary.

(d) Court order — by petition under § 17200; the court shall accept the resignation and may make any orders necessary to preserve trust property, including appointing a receiver or temporary trustee.

Route (d) is the method of choice where minimizing liability is the priority — it packages the resignation together with an accounting and, where needed, transition instructions

B–D. The Petition- the Handover & Who Pays

The court petition

- § 17200 covers the trust's internal affairs — accepting a resignation, § 17200(b)(11), and settling the trustee's accounts, § 17200(b)(5).
- A combined petition for settlement of account and approval of fees is properly brought under §§ 1061–1064 with § 17200.
  Manson v. Shepherd, 188 Cal.App.4th 1244

Paying the costs from the trust

- Petition, final accounting, and transition fees are ordinary administration expenses under §§ 16243 and 15684 — payable even after discharge, and on appeal.
  Kasperbauer v. Fairfield; Hollister v. Hollister, 194 Cal.App.2d 750
- But where a breach of trust is found, the court may reduce or deny both compensation and fees.
  Estate of Gump, 1 Cal.App.4th 582 (§ 16420(a)(7))

Duties that survive the resignation

- § 15644 — the former trustee must deliver trust property to the successor and remains responsible for it until delivery is complete.
- During the transition he retains only the powers reasonably necessary to preserve property and finish pending administration.
- No right to withhold original trust documents from a successor.
  Schwartz v. Labow, 164 Cal.App.4th 417
- Duty to protect the estate until the account is settled and the corpus is delivered.
  Bixby v. Hotchkis, 58 Cal.App.2d 445
- Exposure during this window may be uninsured and unbonded — do not treat resignation as the finish line.

E. Resignation Is Not a Release — § 15641

"The liability for acts or omissions of a resigning trustee … is not released or affected in any manner by the trustee's resignation."

§ 16440 separately governs breach liability — loss, depreciation, and profits — subject to the court's discretion to excuse a trustee who acted reasonably and in good faith

1. File a comprehensive final accounting and seek court approval under § 17200(b)(5) — Moeller v. Superior Court, 16 Cal.4th 1124.
2. Seek a voluntary release from the beneficiaries under § 16004.5(b)(2) — never conditioning a required distribution on it.
3. Deliver trust property to the successor promptly and completely — § 15644.
4. Document good faith and reasonableness contemporaneously, preserving the § 16440(b) equitable-excuse argument.
5. Resign through the court-supervised § 17200 / § 15640(d) route whenever there is friction or uncertainty in the record.

Practice Pointers — Monday Morning

- Document contemporaneously why the specific litigation protects trust property or the trustee's proper performance — that record matters most if the trustee does not prevail.
- Where the real dispute is between beneficiaries, consider neutrality rather than funding one faction's position.
- Track and periodically true up interim fee draws — Donahue's double-barreled test will be applied at the final accounting.
- If a contest or removal petition looks bad-faith, move early under § 17211(a) or § 15642(d) instead of absorbing the cost against the trust.
- Pair the resignation petition with the final accounting so the court passes on the trustee's conduct and his exit at the same time.
- Treat the resignation as effective for liability purposes only once trust property is delivered — and negotiate a § 16004.5 release where feasible.

Act for the trust, price it reasonably, and paper it as you go.

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Best Practices: Before You Spend the Dollar

- Read the instrument for the directive, not for comfort. Search for “contest,” “attack,” “challenge,” “validity.” A general power “to commence or defend… litigation” is not a defense directive.
- Characterize the lawsuit honestly. Ask whether the trust survives no matter who wins. If it does, the fight is between beneficiaries and the trust does not benefit.
- Declare neutrality early and in writing. Notify all beneficiaries that you will not take a side on validity, and say what you will and will not fund.
- Separate your two hats. If you are also a beneficiary, defend your own inheritance with your own counsel and your own money.
- Do the administrative job anyway. Preserve assets, keep the accountings current, respond to discovery, and produce records to every beneficiary equally.

Best Practices: You Are Already In It, what do you do?

- Petition for instructions before spending, not after. A petition can be denied with prejudice — better to learn that at $20,000 than at $500,000.
- Segregate and track defense fees separately. If reimbursement is later disallowed, you want a clean number to repay rather than a commingled mess.
- Consider a reserve or an escrow rather than payment. Holding funds pending court approval preserves the estate and blunts a surcharge argument.
- Take the demand letter seriously. A demand to withdraw objections and repay is the usual precursor to an injunction request.
- Consider resigning or seeking a neutral fiduciary. Where you cannot be impartial, stepping aside for a professional trustee is often the cheapest outcome.
- Never treat an off-hand judicial remark as a ruling. Courts routinely disclaim preliminary comments about trust language.

Best Practices for Drafters

TO AUTHORIZE A FUNDED DEFENSE

- Use the CEB / Doolittle formulation verbatim: authorize the trustee "to defend, at the expense of the trust estate, any contest or other attack of any nature on this trust or any of its provisions."
- Say "and any amendments or restatements hereto" — Zahnleuter turned on a clause that excluded later amendments.
- Put it in its own article and have the settlor initial it.
- Document the settlor's reasons in a contemporaneous memo.

ALSO CONSIDER

- Name an independent successor trustee to serve if a contest is filed, so the fiduciary is not also a stakeholder.
- Add a funding cap or a court-approval condition so a directive does not become a blank check.
- Audit legacy documents — a "general powers" litigation clause gives your client nothing.
- Tell trustee-beneficiary clients plainly: two hats, two lawyers, two checkbooks.

Trusteeship is a Voluntary Position

McCarthy v. Poulsen, 173 Cal. App. 3d 1212, 219 Cal. Rptr. 375 (Ct. App. 1985)

A person named as a successor trustee-including the trustor of a charitable trust-cannot be compelled to serve as trustee against their will. (McCarthy v. Poulsen 173 Cal. App 3d 1212, 219 Cal. Rptr. 375 (Ct. App. 1985).

MAY THE FORCE BE WITH YOU

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