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YOUR JOB AS A TRUSTEE

Steps to Administer a Trust after a Death

The California Probate Code governs your job as a Trustee. You must act reasonably and in good faith to adhere to the requirements of the Probate Code. The Trustee is a "fiduciary" who has "fiduciary duties." If the Trustee "breaches" a fiduciary duty, a beneficiary could sue the Trustee personally.

Let's review the major portions of the Probate Code and discuss examples of things that could go wrong. Just like a driver's education course, we need to learn to see the road ahead, anticipate common problems, and have a strategy to deal with challenges.

1. **Duty to Administer the Trust (Probate Code Section 16000):** The Trustee has a duty to follow the terms of the trust and the law governing the administration of trusts.

   <u>To Do #1</u>: Review Estate Planning Documents – Will and Codicils, and Trust and Amendments

   Caution: Do I have the final documents?

   Be sure you are working from the final documents. Find the Last Will and Codicils (changes to the Will). Who is the Executor? Does the Will contain the distribution plan or is it under the Trust?

   Locate the final Trust and Amendments/Restatements (changes to the Trust). Who is the Trustee? What is the distribution plan?

To Do #2: Consult with Trust/Estate Attorney

Caution: You don't know what you don't know.

It is important to have an advisor who can inform you about the road ahead. Enter into an Engagement Agreement, discuss the Fee Arrangements (Hourly, Flat, Statutory Probate Fee) and the Costs (ex. Death Certificates, Postage, County Recorder, Will Filing Fee)

To Do #3: Determine if a Probate or other Court proceeding is necessary.

Caution: Were assets left in Decedent's own name.

Many times, there are assets outside of the trust. If these assets were titled in the Decedent's name alone, there are several ways to transfer these assets:

Small Estate Affidavit:	$150,000 personal property
Real Property Affidavit:	$50,000 real property
Petition Succession Real Property:	$150,000 real property
Spousal Property Petition:	All assets pass to spouse
Heggstad 850 Petition:	Asset "intended" to be a trust asset
Probate:	If none of the above applies

2. **Duty of Loyalty (Probate Code Section 16002):** The Trustee has a duty to administer the trust solely for the benefit of the beneficiaries of the trust.

To Do #1: Consider whether the Trustee's actions could constitute a breach in the duty of loyalty, even if it is unintended.

Caution: Let's assume the Trustee wants to use a friend to act as a real estate agent to sell the real property. Maybe this friend is not the best choice for a realtor, charges an excessive fee, or lacks the experience to sell the property. This could constitute a breach of the "duty of loyalty" since the Trustee's interest in hiring a friend is to the detriment to the beneficiaries.

3. **Duty of Impartiality (Probate Code Section 16003):** The Trustee has a duty to not favor the interests of one beneficiary over another, except to the extent that the trust provides to the contrary.

<u>To Do #1:</u>	Consider whether a Trustee's actions benefit only one beneficiary.
Caution:	Ex. Preliminary distributions. If one beneficiary is in need of immediate cash, consider equal preliminary distributions to other trust beneficiaries so that you do not favor one beneficiary. Ex. Ongoing Trusts – Favoring current income beneficiaries over future remainder beneficiaries.

4. **Duty to Avoid Conflict of Interest (Probate Code Section 16004):** The Trustee has a duty not to use or deal with trust property for the Trustee's own profit.

<u>To Do #1</u>:	Recognizing actual or potential conflicts of interest
Caution:	Will the Trustee receive a benefit from the trust other than Trustee compensation. The Trustee has a duty not to deal with or use trust property for the Trustee's own profit, including: occupying the beautiful Coronado condo during trust administration to "keep it safe", borrowing from the trust even if paying a fair interest rate, or acting as the broker for the sale of trust real estate. Another example: If a child is the successor Trustee and his parents loaned him money, he cannot make this loan disappear after death.

5. **Duty not to Require Release of Liability for Condition for Distributions (Probate Code Section 16004.5):** The Trustee cannot require a beneficiary to relieve the Trustee of liability as a condition for making a distribution to or for the benefit of the beneficiary.

<u>To Do #1</u>:	Seek a voluntary Release/Discharge Agreement from beneficiaries
Caution:	What should the Trustee do if a beneficiary will not sign a Release/Discharge Agreement? Maintain a reserve for reasonably anticipated expenses, including taxes, debts, Trustee and accounting fees, and costs and expenses of administration. Decide whether to seek court or beneficiary approval of an accounting of trust activities.

6. **Duty not to serve as Trustee of an Adverse Trust (Probate Code Section 16005):** The Trustee may not become a Trustee of any other trust adverse in its nature to the interest of the beneficiary of the first trust.

To Do #1: Identify the beneficiaries of the trust.

Caution: Are you already the Trustee of another trust that might require you to take a position adverse to the beneficiaries of the other trust?

In a second marriage, the husband's trust may be passing to his own children, and the wife's trust may be passing to her own children (often called an "A-B Trust"). Suppose these two trusts own property together, such as a family home. What if the husband's children want to sell as quickly as possible, but the wife's children want to hold out for the highest price? What if the Wife's children want to buyout the interest in the Husband's trust? Should you be Trustee of both trusts? What if you get the written consent of all the beneficiaries?

7. **Duty to take Control of and Preserve Trust Property (Probate Code Section 16006):** The Trustee has a duty to take reasonable steps to take and keep control of and to preserve the trust property.

To Do #1: Determine the trust assets and liabilities

Caution: Are there assets that do not belong to the trust?

Review title and beneficiary designations. Certain assets may pass outside of the trust to designated beneficiaries such as: traditional IRA and Roth IRA, 401k plan, pension plan, life insurance, annuities, accounts "payable upon death" (POD), and accounts "in trust for" (ITF) a beneficiary.

Find out about all of the Decedent's debts and determine if the trust is liable.

To Do #2: Obtain valuations of the trust assets

Caution: Can I print out the "Zillow" value for the real estate?

It is important to obtain a realtor's valuation letter of a residential property or a certified appraisal of a commercial property. This document will establish the new "income tax basis" of the property. The new basis will be used to calculation capital gain/loss and depreciation for rental property. Additionally, if you are distributing the real estate in-kind, it's important to have a value that can stand up to scrutiny.

A Notice of Proposed Action can be sent to the beneficiaries to inform them of pending sale and sales price. If a beneficiary signs the Consent or fails to object, then the Trustee is protected in taking the action. .

To Do #3: Keep assets insured

Caution: Can anyone drive the trust car?

No. Even if the car is insured, the trust, as owner, can be liable for all damage caused by driving the car. This risk of loss is immeasurable. Just rent a car.

To Do #4: Prepare Income Tax Returns

Caution: You don't know what you don't know.

Consult with a CPA to prepare Income Tax returns. The CPA has the knowledge to minimize trust income taxes and preserve the trust.

The Decedent's last individual returns (Form 1040 and 540) must be prepared and file. Estimated income tax payments must be made.

The Trust is now a separate taxpayer. It must have a Trust taxpayer ID Number (EIN). IF there is a Probate Estate, that entity is another separate taxpayer. The CPA will assist with the special election to be on a fiscal or calendar year end.

The CPA will also help to plan for estimated payments and the distribution of net income to minimize the income tax. Income which is distributed to the beneficiary is taxed to the beneficiary; but income that is accumulated in the trust is taxed to the trust.

The lowest income tax may be achieved by distributing the income to the beneficiary by the end of the tax year.

To Do #5: Prepare Federal Estate (Form 706) and/or Gift Tax Returns (Form 709), state estate tax return, if any

Caution: Do I have to think about this if the trust is less than $11.2 million? California does not have an estate tax; why do I need to consider a *state* estate tax?

The current Federal Estate Exemption is $11.2 million for deaths in 2018, however, ask your Trust/Estate attorney whether you should file an Estate Tax Return (Form 706) for a lesser estate in order to: make a Portability election, QTIP election, or Generation-Skipping Transfer tax election/allocation.

Were there lifetime gifts which now need to be reported on a late Federal Gift Tax return? Is the "gross estate" with gifts $11.2 million or more? Was there a predeceased spouse whose assets (QTIP trust) are now included in this estate?

Is there property in another state (such as Washington), which has a state estate tax and a return will be due?

To Do #6: Property tax planning – Consider whether any Exclusions from property tax reassessment apply or whether the real estate will be reassessed and a supplemental property tax bill paid in the future.

Caution: You must file a Preliminary Change of Ownership Report for each parcel of California real estate within 150 days of the death.

If you report that the property transfer is "exempt" from reassessment, the assessed value of the property will not change under Proposition 13. If you report that the property transfer is not exempt from reassessment, the assessed value of the property will become the actual current fair market value of the property, and the property tax bill could increase substantially.

What is "exempt"? All transfers to a spouse or a trust for a spouse are exempt. Also, transfers of a residence plus $1 million of assessed value between a parent and child are exempt. Certain transfers to a grandchild whose parent has died are exempt. If there have been lifetime gifts, part of the exemption may have been used.

Don't wait for the assessor to contact you! You need to get these forms filed before the assessor decides to reassess, at which point, you must pay the tax and "appeal" the decision.

What if one of the children wants to inherit the family home, but the home is more than the value of the child's share? If properly structured, the trust can obtain a loan from a third party, distribute the home to one child and cash to the others. The "parent-child exclusion" can be claimed. This transaction must be done at the trust level before the home is distributed to the children. If siblings transfer a home to each other, the exemption is lost.

To Do #7: Liquidity Planning

Caution: The cash flow after a death may change.

It is important to estimate the cash flow during the period of trust administration. How much money is there? How much money will come in as revenue? Social Security and pensions will end. What will the expenses be? Does the home need improvement before it can be sold? Is there an operating business? Does the Trustee have the authority to operate the business? In any event, should the business be sold as soon as possible?

8. **Duty to Make Trust Property Productive (Probate Code 16007)**: The Trustee has a duty to make the trust property productive.

To Do #1: Identify the income beneficiaries and the remainder beneficiaries

Caution: The surviving spouse wants more income now and the children want more growth for the future.

The income beneficiary receives trust distributions during her lifetime; and the remainder beneficiaries get what is left after the income beneficiary dies.

Read the trust for guidance. Does the trust provide that the needs of the income beneficiary take precedence over the interests of the remainder beneficiaries? Is this a "QTIP" trust in which the spouse/income beneficiary has a right to demand that the Trustee make the trust produce income?

If there is no trust guidance, the Trustee must balance the interests of the income and the remainder beneficiaries. For example, it would be a breach of trust to hold all the trust assets in certificates of deposit to produce interest income, since there would be no growth for the remainder beneficiaries. On the other hand, if the trust owns a parcel of raw land that produces no income, the remainder beneficiaries may be very happy that the land will grow substantially in value in the future, but there is no income for the income beneficiary. Consider the needs of all the beneficiaries.

9. **Duty to Keep Trust Property Separate (Probate Code Section 16009):** The Trustee has a duty to keep the trust property separate from other property not subject to the trust, including the Trustee's own assets.

To Do #1: Marshall the assets

Caution: Do not ever put an asset in your name individually or under your own Social Security Number. This is called "commingling assets" and will cause steam to come out of the judge's ears, if you should ever heaven-forbid have to appear in court.

Transfer the trust assets into the name of the Trustee under the trust Federal ID number. For example, the bank account will be: Joan Honest, Trustee of the Mary Johnson Trust dated Sept. 1, 1987 (Federal ID: 93-xxxxxx).

You may be very annoyed that every institution (bank, brokerage firm, life/annuity company) has a different set of paperwork to complete. Have available a copy of the trust, the certificate of trust, and the new Federal ID number. Your signature may need to be notarized or a Medallion guarantee may be required.

10. **Duty to Enforce Claims (Probate Code Section 16010):** The Trustee must take reasonable actions to pursue amounts that may be owed to the trust.

To Do #1: Identify money owing to the trust.

Caution: Sonny owes his Dad $200,000

Dad has three sons, and his trust passes equally to the boys. However, one of the boys, Sonny, still owe his dad's trust $200,000. What should you do?

As soon as you become aware of the debt, talk to Sonny and all the boys, if possible. It is easier to prevent conflict before individuals take a position. It is also helpful if all the beneficiaries are part of the plan. If Sonny's share of the trust is more than $200,000, it is possible to "assign" this "$200,000 trust asset" to Sonny as part of his share. Maybe Sonny is willing to pay all or part of the money back to the trust. Maybe the brothers are willing to accept a Note payable to them from Sonny.

11. **Duty to Defend Actions (Probate Code Section 16011):** The Trustee has the duty to take actions to prevent a loss to the trust, such as defending a lawsuit.

<u>To Do #1</u>:	Are there any current or possible lawsuits against the trust/decedent?
Caution:	Was the decedent involved in an accident or a divorce,
	Was the decedent the pilot of a small plane which crashed, carrying a passenger who died? Was the decedent involved in an auto accident on his way to the dentist? Was the decedent in the middle of a divorce at the time of death? As the Trustee, you step into the decedent's shoes. Consult with a personal injury attorney regarding liability for the plane crash or the auto accident. Work with the decedent's family law attorney to complete the divorce proceeding. A lawsuit may very likely increase the trust's need for cash/liquidity. Plan for this.
<u>To Do #2</u>:	Shorten the time for Creditors to make claims (statute of limitations) by filing a Trust Notice to Creditors
Caution:	I am not sure if the Decedent has any creditors.
	The Decedent may have lived a colorful life, and you may be unsure if he has any current or potential creditors. You can limit the time that a creditor can make claims against the trust by preparing a Notice to Creditors, which is filed with the Court and published in the newspaper. If you know of an actual creditor, you must send the Notice directly to the creditor. A creditor's claim will be barred if made after a 120 day period

12. **Duty not to Delegate; Duty to Supervise (Probate Code Section 16012):** The Trustee has the duty not to delegate acts the Trustee can be reasonably required to perform and may not delegate entire administration to a Co-Trustee or other person. When the Trustee has property delegated a matter to an agent, the Trustee has a duty to supervise the agent.

To Do #1:	Supervise all trust agents: Attorneys, CPA's, property managers, handymen, etc.
Caution:	My attorney/CPA failed to file a tax return on time? It was their responsibility. I can't be held liable, right?

There are so many cases requesting relief from interest and penalties for late filed tax returns because the attorney/CPA filed late. The Trustee takes the position that it was the attorney/CPA responsibility and asks the court to grant mercy on the trust.

You don't want to read about yourself in one of these cases. As Trustee, you can be held personally liable for the interest, penalties, and costs to appeal. Keep a calendar! Write down everyone's due dates, even if you have delegated a task to the agent. Bug everyone. Be the squeaky wheel.

13. **Duty with Respect to Co-Trustee (Probate Code Section 16013):** If a Trustee serves along with a Co-Trustee, each Trustee has a duty to participate in the administration of the trust and prevent the other Co-Trustee from committing a breach of the trust.

To Do #1: Determine if you want to serve as Co-Trustee.

Caution: I am a professional fiduciary, and I have been named as Co-Trustee to serve with the Decedent's son. The son is a really smart doctor, but he is so busy it is hard to reach him. I am worried that immediate decisions will need to be made, but I won't be able to get in touch with him.

You need to decide whether you are willing to be a Co-Trustee. While it provides some checks and balances because two people must agree on all trust transactions, it is difficult to have two chiefs. Each Co-Trustee will be responsible for all the actions and all the inactions of each Co-Trustee. Consider how you will work together. Should one Co-Trustee resign? Also, Co-Trustees generally split the Trustee compensation equally. It could be twice the work and liability for half the pay.

14. **Duty to Use Special Skills (Probate Code Section 16014):** In managing the trust property, the Trustee must use at least ordinary business ability. However, if the Trustee has special skills, the Trustee will be held to higher standard of care.

To Do #2: Attend a Trustee's Duties workshop.

Caution: I am a contract attorney and I am a Co-Trustee with my brother, that bum musician. The buyer of Mom's house is suing my both of us for failing to close escrow on time, which cost the buyer a lot of money. Can we be liable?

The judge might listen with sympathy to your brother's explanation that he never reads contracts, the escrow documents were long and confusing, and he just signed everything on his iPhone using DocuSign while he was playing Jimmy Hendrix on the guitar. But you, the attorney, will be held to the highest standard of care. After all, you are a contract attorney, and even if you don't read real estate contracts, you know that you should consult a real estate attorney. You have special skill, and you can be liable for breach of trust if you don't use it.

15. **Duty to Keep Trust Beneficiaries Reasonably Informed (Probate Code Section 16060 and following):** The Trustee has a duty to keep beneficiaries reasonably informed of the trust terms, trust assets, and trust transactions.

    a. **Notification by Trustee (Probate Code Section 16061.7):** When a trust becomes irrevocable because of a death or when there is a change of Trustee of an irrevocable trust, the Trustee must notify the beneficiaries of the trust and the heirs of the decedent (even if they are not beneficiaries) of their right to a copy of the terms of the trust and the 120 days limit to contest the trust.

<u>To Do #1</u>: Identify the Beneficiaries and the Heirs at Law, and send each of them the Notification within 60 days of the death

Caution: The Decedent was a Japanese war bride who came to the US in 1945. I only know about two nephews, so I will assume those are her only heirs at law. Have I fulfilled my duty?

If you are uncertain as to the Decedent's complete family tree and/or names and addresses of heirs, you should engage the services of an heir finding service to confirm the Decedent's heirs at law. If you fail to give all the heirs or beneficiaries the Notification, you can be sued personally in the future by the accidently omitted individuals. The trust will pay for the cost of the heir finding service. This is good and reasonable insurance to protect you.

After mailing the Notification, check the Court's Registry of Actions after 120 days, to make sure no lawsuit has been filed.

b. **Accountings (Probate Code Section 16062):** The Trustee must provide a full accounting of the trust transactions 1) at least annually, 2) on the termination of the trust, and 3) upon the change a Trustee, to each current trust beneficiary.

<u>To Do#1</u>: Maintain an annual accounting at all times in the Court required format

Caution: Even if you have your attorney/CPA prepare the annual accounting, you need to keep a detailed record of checks written and deposits made. Record the purpose of each check written and make copies of all deposits. It is difficult to remember these details over time.

The accounting *must* be sent every year to the income beneficiary of the trust, and the remainder beneficiaries *may* demand the accounting each year. Always maintain your accounting.

The Court format for an accounting is quite specific, and you may want you attorney or CPA to maintain the accounting. The accounting shows every asset at the beginning of the accounting and the end of the accounting, along with every penny that came in and went out, in detail. Needless to say, the account must balance.

When you provide the accounting to a beneficiary, you start a three year statute of limitations (sometimes shortened to 180 days by the trust) for the recipient to contest the accounting. After than period of time, it is too late for a beneficiary to sue. You can also petition the Court for approval of the accounting. The accounting is your number one protection!

<u>To Do #2</u>: Prepare the final accounting for the distribution of the trust

Caution: The final accounting is more complex than the annual accounting.

In addition to the regular annual accounting information, the final accounting for the distribution of the trust identifies the cash reserve to be retained for future expenses as well as the exact assets to be distributed to the beneficiaries.

The reserve retained needs to contain enough to pay for the final CPA fees and income taxes which will be owing *after* the distribution, final attorney fees, mailing and shipping expenses, supplemental property tax bills, Trustee fee, and reimbursement of expenses.

The final accounting will show the exact assets to be distributed to each beneficiary, which will include an itemization of personal effects, specific bequests, and the cash or assets to be distributed as the residue.

<u>To Do #3</u>: Distribution Agreement and Consents of Beneficiaries

Caution: I plan to distribute the stock to one beneficiary and the real estate to the other beneficiary, since their values are equal.

The trust may allow assets to be distributed "in kind", without liquidation, such as stock. The trust may allow assets to be distributed "pro-rata" or "non pro-rata", so that real estate can be distributed in percentages. However, you should not pick and choose which assets pass to certain beneficiaries without the consent of all the beneficiaries.

What if the value of the stock goes down and the real estate goes up? What if the IRA carries income which taxable to one beneficiary but not the other? Protect yourself and obtain the Consent of the Beneficiaries to the distribution plan. Have them all sign a Distribution Agreement.

<u>To Do #4</u>: Transferring Assets

Caution: The trust says it terminates, so my job is over, right?

Although a trust says that it "terminates" at some point, such as a death, the Trustee still has work to do to transfer the assets. Real estate is transferred by a Deed signed by the Trustee and recorded. The title to cash and investment accounts are transferred into accounts in the name of the beneficiary. Be careful on the distribution of retirement plans, which are still subject to income tax.

In most states, an inheritance is the separate property of the beneficiary, even if the beneficiary is married. It is your duty to transfer the asset to the beneficiary, alone. It is up to the beneficiary to add their spouse if desired.

16. **Duty to Exercise Discretionary Powers Reasonably (Probate Code Section 16080 – 16081):** The Trustee has a duty to exercise discretionary powers reasonably. When the trust confers "absolute", "sole" or "uncontrolled" discretion on the Trustee, the Trustee has a duty to act in accordance with fiduciary principals and cannot act in bad faith or disregard the trust purposes.

<u>To Do #1</u>: Identify your discretionary powers under the trust.

Caution: The trust says I *must* give all the income to Nancy; additionally, I *may* give her principal for her reasonable health, education, maintenance and support in *my discretion*. What do I do?

If you are the Trustee of an ongoing trust, you must read the distribution language carefully. In your accounting, you need to keep track of all the trust income as well as the expenses that reduce the income. For example, if the trust owns a rental property, then the rent is gross income, which will be reduce by certain expenses of the property to determine the *net* income. At the end of the year, your attorney/CPA will complete the annual accounting, and inform you of the exact amount of the "net income" to distribute to Nancy.

Nancy may tell you that she needs more money, which must come from trust principal. You have a duty to determine if this distribution is needed for her reasonable health, education, maintenance and support, since this is the language of the trust.

If Nancy wants the money to put a new roof on a house that she owns herself, you cannot make the distribution. If Nancy wants to buy a vacation home in Mexico or take the first SpaceX trip to Mars, you cannot make the distribution. These distributions do not serve the trust purpose.

If Nancy wants a monthly allowance of $3,000, you would have a duty to inquire as to her monthly income and expenses to determine if she needs $3,000 for the trust purpose. If Nancy wants $10,000 for plastic surgery, you need to determine if the surgery and the cost are reasonable for her health.

When you make a discretionary distribution, you should maintain a written record of the distribution and the reason the distribution falls within your discretionary powers.

If you are the Trustee of a "Special Needs Trust" for a beneficiary with a disability, you need to pay particular attention to your powers of distribution, which are quite limited in order to preserve the beneficiary's right to certain government benefits.

17. **Trustee's Standard of Care is that of a Prudent Person (Probate Code Section 16040 and following):** A Trustee shall invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust. In satisfying this standard, the Trustee shall exercise reasonable care, skill, and **Caution**.

<u>To Do #1</u>: Maintain a written investment policy

Caution: My Dad worked for ExxonMobil for his entire career. His trust is 90% ExxonMobil stock. It has been a great investment. Can I hold onto this stock for the trust?

The law requires the Trustee to "diversify" the trust assets in order to protect against inflation/deflation, as a Prudent Investor would do for his own benefit. It is advisable for the Trustee to meet with an investment advisor annually and create a written investment policy describing the diversification of assets.

Some beneficiaries are adamant about retaining a block of stock that has performed well, such as ExxonMobil or Berkshire Hathaway. In these instances, the Trust should get the written Consent of each of the beneficiaries to the retention of the block of stock.

18. **Compensation of Trustee (Probate Code Section 15680 and following)**: The Trustee is entitled to be compensated according to the terms of the trust, and if the trust does not specify, the Trustee is entitled to "reasonable compensation under the circumstances."

<u>To Do #1</u>: Determine amount of Trustee Compensation

Caution: The trust provides that I may receive "reasonable compensation" for my services as Trustee. I am an engineer. Can I pay myself my normal hourly rate?

Your hourly fee for your occupation is not used to determine what is reasonable. The fee schedule of a "professional Trustee" could be used, which is about 1% -2% of the net trust estate annually. For instance, the fee for a $1 million trust might be $10,000 to $20,000 per year.

If a Court decides what is reasonable, the Court would consider: trust income, trust appreciation/depreciation, the experience of the Trustee, routine and extraordinary services (sale of real estate, tax planning), and the number of beneficiaries.

Always maintain a diary of your time and services every day, so that your efforts can be summarized to justify your fee.

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