



SOUTH BAY ESTATE PLANNING COUNCIL

THE TUMULTUOUS TERRAIN OF THE TRUSTEE

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A Presentation By:



Willow A. Mc Jilton
1801 Century Park East, Suite 2400
Los Angeles, California 90067
LA: 310.684.3688
SF: 415.889.6899
FAX: 310.684.5800
willow@willowlaw.com
www.willowlaw.com



ADAM L. STRELTZER, Attorney at Law
Telephone: (424) 652-8010
Fax: (424) 652-2296
300 Corporate Pointe, Suite 320
Culver City, CA 90230
1801 Century Park East, Suite 2400
Los Angeles, CA 90067
adam@steltzer.com
www.steltzer.com

THE TUMULTUOUS TERRAIN OF THE TRUSTEE

Who actually is a Trustee, what it means to be a Trustee (including who should/should not be a Trustee), and drafting trust provisions regarding Trustees and their ilk.

A. Background

1. Roles in a Trust

- (a) A "trust" not usually deemed to be a legal entity. *Powers v. Ashton* (1975) 45 Cal.App.3d 783, 787. Rather, a trust is simply a legally-enforceable fiduciary relationship with respect to existing and ascertainable property. *Ziegler v. Nickel* (1998) 64 Cal.App.4th 545, 548.
- (b) Being a fiduciary relationship, a trust requires a certain number of parties to exist, although the parties need not actually be separate and distinct persons.
 - (i) The person who causes the creation of a trust is the "trustor" (also known as "settlor" or "grantor"). It is common for married couples, and sometimes other persons, to jointly create a trust, and, in such context they would be known as the "trustors," "settlors," or "grantors." The use of joint trusts for married couples is particularly prominent in community property jurisdictions.
 - (ii) The person or persons who hold the property are the "trustee" (or "trustees" if there is more than one, also known as "co-trustees"). The trustee has the duty and obligation to administer the trust pursuant to its terms and in accordance with law.
 - (iii) The recipients of the income or principal managed by the trustees are the "beneficiary" or "beneficiaries." The beneficiaries might receive money or property periodically during the existence of the trust relationship, or the beneficiaries may be entitled to receive a distribution of money or property only after the death of the settlors or of any lifetime beneficiaries.

2. Creating a Trust

- (a) A trust may come into existence quite informally, notwithstanding the rigid and formal requirements that may have existed in the common law. Pursuant to Cal. Prob. Code §15200, and except as may be established by a court order or as a remedy entered in a lawsuit or other judicial proceeding (for example, pursuant to the doctrines of resulting trust, constructive trust, etc.), a trust is created by one of the methods described below.
 - (i) A person's declaration that he or she holds certain property as trustee for the benefit of some beneficiary (which may be required to be in writing, not oral, pursuant to an applicable Statute of Frauds, etc.);
 - (ii) The conveyance or transfer of certain property to another person as trustee on behalf of some beneficiary, such as by deed, etc.;

- (iii) The transfer of certain property by valid testamentary instrument to another person as trustee (or the exercise of power of appointment), such as a trust established in a will; or
 - (iv) An enforceable promise to create a trust.
- (b) The most common modern method of creating a trust is by the first method described above, an express written declaration signed by the trustor. Such a written document creating a trust is known as a declaration of trust or a trust instrument, but is often (confusingly) referred to by most lay persons simply as "the trust."
- (c) The property held in the trust is described as being the trust "corpus" (derived from the Latin word for "body"). The trustee holds legal title to the corpus. *Galdjie v. Darwish* (2003) 113 Cal.App.4th 1331, 1343-1344.
- (d) Generally a purported trust without existing and ascertainable property is a not a trust at all. See, for example, Cal. Prob. Code §15202 ("A trust is created only if there is trust property.").
- (e) Note that, in comparison to a will, there is little ceremonial function in creating a trust, and it is the implications of the fiduciary relationship which the law primarily respects and enforces. Thus, depending upon the jurisdiction, a court may choose to enforce the fiduciary relationship despite the lack of an existing trust corpus so as to preserve the intention to create a trust while the intended trust property is marshaled or brought to the control of the trustee.
- (f) One often overlooked concept is the legality of trust creation. In most jurisdictions, a trust is created and will be enforced by a court only if the trustor properly manifests an intention to create a trust, and that the purpose of the trust is not illegal or against public policy. See Cal. Prob. Code §§15021 & 15203. Thus, each of the above-described methods for the creation of a trust either expressly or impliedly requires the trustor's proper manifestation of an intention to create a trust. See Cal. Prob. Code §15200.

3. Revocable Versus Irrevocable Trusts

- (a) There are generally two categories of trusts:
- (i) A trust is "revocable" if the trustor or trustors retain the power to change, alter, modify or terminate the trust. Such revocable trusts are common in modern estate planning, and generally serve as a testamentary substitute for a will with the goal of avoiding the need for formal estate administration (hence, revocable trusts are sometimes known as "will substitutes").
 - (ii) A trust is "irrevocable" (or not revocable) if the trustor or trustors do not have the power to change, alter, modify or terminate the trust.
- (b) The power to change, alter, modify or terminate is generally defined by the trust instrument itself, or, if not, then it may be found in the default trust law applicable in each jurisdiction. For example, California presumes a trust is revocable unless it

is expressly made irrevocable by the terms of the trust instrument, but other jurisdictions differ. Cal. Prob. Code §15400.

B. What is a Trustee?

1. As mentioned above, the trustee or trustees are the person or persons who hold the property of the trust, and whom have the duty and obligation to administer the trust pursuant to its terms and in accordance with law.
2. Black's Law Dictionary (7th Ed. 1990) p. 1519: "One who, having legal title to property, holds it in trust for the benefit of another and owes a fiduciary duty to that beneficiary."

C. What it means to be a Trustee?

1. Authority

A person (or entity) serving as a trustee of a trust is a fiduciary and is responsible for performing legal duties as prescribed by law.

2. Fiduciary Duties

- (a) Relevant Fiduciary Duties. The below is an overview of the fiduciary duties of a trustee of a California trust (which may be found in Cal. Prob. Code §§16000 et seq. and is summarized in a handy chart as part of these materials):
 - (i) Duty to Administer Trust. (Cal. Prob. Code §16000) The trustee has a duty to follow the terms of the trust and the law governing the administration of trusts.
 - (ii) Duty of Loyalty. (Cal. Prob. Code §16002) The trustee has a duty to administer the trust exclusively for the benefit of trust beneficiaries.
 - (iii) Duty of Impartiality. (Cal. Prob. Code §16003) The trustee has a duty to not favor the interests of one beneficiary over another, except if the trust provides otherwise.
 - (iv) Duty to Avoid Conflict of Interest. (Cal. Prob. Code §16004) The trustee has a duty to avoid transactions that benefit the trustee personally.
 - (v) Duty Not to Require Beneficiary to Relieve the Trustee of Liability. (Cal. Prob. Code §16004.5) The trustee cannot require a beneficiary to waive their rights as a condition of distribution.
 - (vi) Duty to Not Undertake Adverse Trust. (Cal. Prob. Code §16005) The trustee may not act as trustee of any other trust that has a competing interest with this trust.
 - (vii) Duty to Take Control of and Preserve Trust Property. (Cal. Prob. Code §16006) The trustee must gather trust assets and take reasonable steps to preserve them.

- (viii) Duty to Make Trust Property Productive. (Cal. Prob. Code §16007) The trustee has a duty, subject to certain qualifications, to make the trust assets profitable.
- (ix) Duty to Keep Trust Property Separate and Identified. (Cal. Prob. Code §16009) The trustee has a duty to keep the assets and debts of the trust separate from the trustee's own. In other words, the trustee should not commingle funds.
- (x) Duty to Enforce Claims. (Cal. Prob. Code §16010) The trustee must take reasonable actions to pursue assets that may be owed to the trust.
- (xi) Duty to Defend Actions. (Cal. Prob. Code §16011) The trustee has the duty to take actions to prevent a loss to the trust, such as by defending a lawsuit.
- (xii) Duty Not to Delegate. (Cal. Prob. Code §16012) Subject to certain exceptions, the trustee must perform actions on behalf of the trust rather than having others act on behalf of the trust.
- (xiii) Co-trustee Duties. (Cal. Prob. Code §16013) If the trustee serves along with a co-trustee, then each trustee has a duty to participate in the administration and prevent the other from committing a breach of the trust.
 - a. Unanimous Action. Unless otherwise provided in the trust instrument, a power vested in two or more trustees may only be exercised by their unanimous action. (Cal. Prob. Code §15620)
 - b. This is analogous to the rule for multiple agents designated under powers of attorney (Cal. Prob. Code §4202(a))
 - c. But it differs from the rules applicable to personal representatives of decedent's estates, where, if there are 2 such personal representatives, then they must act unanimously, and if there are more than 2 personal representatives, then they act by way majority decision (Cal. Prob. Code §§8425 & 9630).
- (xiv) Duty to Use Special Skills. (Cal. Prob. Code §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 a higher standard of care. {See below}
- (xv) Duty to Provide Information to Beneficiaries. (Cal. Prob. Code §§16060-16064) The trustee has a number of duties related to reporting and providing financial and other information to beneficiaries.
 - a. The nature and types of information a beneficiary is ordinarily entitled to receive are enumerated in Cal. Prob. Code §§16061 & 16063.
 - b. Cal. Prob. Code §§16060 and 16061, which require a trustee to keep beneficiaries reasonably informed (§16060) and to provide a

report of information (§ 16061), codify trustees' common law duty to report to beneficiaries. See *Wells Fargo Bank v. Superior Court* (2000) 22 Cal.4th 201, 207-208 & n.1; *Strauss v. Superior Court* (1950) 36 Cal.2d 396, 401-402.

- c. Keeping a beneficiary reasonably informed pursuant to Cal. Prob. Code §§16060 is different from the duty to render an account (see below).
 - d. Regarding the trustee's obligation to keep beneficiaries reasonably informed (§16060), the trustee does so by giving the beneficiaries complete and accurate information when requested and at reasonable times, and telling the beneficiaries what is reasonably necessary in order to enable the beneficiaries to enforce any rights under the trust or to prevent or redress a breach of trust. Cal. Prob. Code §16060. See Restatement Third of Trusts, §82, pp. 180-181. The beneficiary is always entitled to such information as is reasonably necessary to enable the beneficiary to enforce the beneficiary's rights under the trust or to prevent or redress a breach of trust. See Restatement Third of Trusts, §82, Reporter's Comment a(2).
 - e. There is a separate duty to provide copies of the terms of the trust to beneficiaries, upon request. (Cal. Prob. Code §16061.5)
 - f. Any waiver of this duty in the trust instrument is generally unenforceable as against public policy. (Cal. Prob. Code §§16068)
 - g. Trustee is NOT required to provide reasonable information to a beneficiary, or to provide terms of the trust upon a beneficiary request, if a trust is revocable and may still be revoked or if beneficiary or the trustee are the same person. (Cal. Prob. Code §16069) (BUT SEE IMPORTANT NEW DEVELOPMENTS BELOW)
- (xvi) Duty to Render Accounts to Beneficiaries (Cal. Prob. Code §§16062-16064). Regarding the trustee's obligation to render accounts, 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. (Cal. Prob. Code §16062(a)).
- a. This must contain required income, expense, asset, and liability information and disclosures, including compensation, and must contain notifications and disclosures to beneficiaries regarding the statute of limitations (3 years from receipt) and the fact that they are entitled to petition to seek court review of the account and acts of the trustee. (Cal. Prob. Code §16063).
 - b. Any limitation or waiver of this duty in the trust instrument is generally unenforceable as against public policy. (Cal. Prob. Code §16062(c))

- c. Trustee is NOT required to render an account to the beneficiary when, in the case of a revocable trust, if a trust is revocable and may still be revoked or if beneficiary or the trustee are the same person. (Cal. Prob. Code §§16062(e) & 16069) (BUT SEE IMPORTANT NEW DEVELOPMENTS BELOW)
- (xvii) IMPORTANT NEW DEVELOPMENTS: Recent legislative change (AB 1079) to Cal. Prob. Code §15800(b)(2) (effective Jan. 1, 2022).
- a. If the trust is revocable, and at least one person holding the power to revoke is competent, then the trustee's duties and obligations are owed to the person holding the power to revoke. (Cal. Prob. Code §15800(a). Thus, all notices given to the person holding the power, not the beneficiary(ies) and the trustee is, essentially, obligated to follow the instructions of the holder of the power to revoke when such a person exists (that is, for example, the trustor when the trust is revocable and the trustor remains competent).
 - (1) Except to the extent the trust instrument provides otherwise; and
 - (2) Except where the joint action of the settlor and all beneficiaries would be required.
 - b. But if the trust is revocable and there is no person holding the power to revoke the trust in whole or in part, then what?
 - (1) Prior to legislative change, many argued that all beneficiaries then stepped up and became entitled to the duties of the trustee. See, for example, *Estate of Giralдин* (2012) 55 Cal.4th 1058; *Babbitt v. Superior Court* (2016) 246 Cal.App.4th 1135. That led to problems such as large classes of persons claiming entitlement to information and the right to enforce performance of trustee duties, simply upon the suggestion of incompetency. See, for example, *Drake v. Pinkham* (2013) 217 Cal.App.4th 400.
 - (2) We have a new law that substantially revises Cal. Prob. Code §15800 (as well as a parallel change to §16069) to specify that:
 - 1) The traditional rule only applies when there is someone competent with the power to revoke. (Cal. Prob. Code §15800(a) (effective Jan. 1, 2022))
 - 2) If there is not, then the trustee must now provide notice within 60 days to the beneficiaries and a complete copy of the terms of the trust to each beneficiary who may be entitled to a distribution of

income or principal if the trustor had died, to provide annual accountings to the same beneficiaries, to respond to requests for reasonable information, etc. (Cal. Prob. Code §15800(b) (effective Jan. 1, 2022))

(3) This was designed to address the scenario where a trustor, presumed to hold the power to revoke, is no longer competent and has no ability to direct the trustee, whom otherwise would not be compelled to provide information, copies of the terms of the trust, or render accounts to beneficiaries (see above) - which left the trustor potentially subject to trustee misconduct, neglect, or abuse.

(4) However, there is uncertainty:

1) Who would qualify as a person holding the power to revoke, in whole or in part, if the trustor is not competent? Court-appointed conservators are an easy example. But, for instance, what about agents under power of attorney? Trust protectors? Trust advisors?

2) What constitutes the facts necessary to establish incompetency? (see Cal. Prob. Code §15800(c) (effective Jan. 1, 2022))

(b) *Discretionary Powers to Be Used Reasonably.* (Cal. Prob. Code §§16080-16081) Even if the trust provides that a particular action is entirely within the trustee's discretion, the trustee has a duty to act reasonably in exercising that discretion.

(i) COROLLARY: Under California's Trust Law, there can be no absolute discretion vested in a trustee. Consequently, a discretionary power conferred upon a trustee may be controlled by the judicial action if not reasonably exercised.

3. Standard of Care and Liabilities

(a) The trustee must maintain a minimum standard of care in discharging his or her duties, including the following:

(i) The trustee must administer the trust using reasonable care, skill, and caution under the circumstances and acting as a prudent person would in a similar capacity. Cal. Prob. Code §16040.

(ii) In exercising investment powers, the trustee must comply with the requirements set forth in the Uniform Prudent Investor Act (UPIA) (Cal. Prob. Code §§16045 et seq.) unless the instrument otherwise provides. Cal. Prob. Code §16046(b). In general, the trustee must invest and manage

trust assets as a "prudent investor" would do, and, in so doing, exercise "reasonable care, skill, and caution." Probate Code §16047(a).

- (iii) However, if the trustee has special skills, then the trustee will be held to a higher standard of care. Cal. Prob. Code §§16014.
- (b) The standard of care to which the trustee is held will determine whether the trustee has properly performed his or her duties. A trustee's violation of any duty owed to the beneficiaries is a breach of trust. Cal. Prob. Code §16400.
- (c) A breach of trust may lead to potential remedies for the aggrieved beneficiaries and liability for the trustee, including but not limited to removal, replacement, reduction or denial of compensation, and other remedies. See Cal. Prob. Code §§16420 et seq.

D. Who is a Trustee?

1. Becoming a Trustee

- (a) A person becomes a trustee and is burdened with the obligations and duties of a trustee simply upon "acceptance of the trust." Cal. Prob. Code §16000. See Restatement Second of Trusts, §169.
- (b) A person named as a trustee may accept the trust by the act of signing either the trust instrument or a separate written acceptance, or, alternatively, by "knowingly exercising powers or performing duties under the trust instrument or the trust instrument as modified." Cal. Prob. Code §15600(a).
- (c) The Uniform Trust Code ("UTC") is similar, in that the trustee becomes burdened with the obligations and duties of a trustee upon acceptance of the trust. UTC §801. The person designated as trustee accepts the trusteeship by substantially complying with a method of acceptance provided in the terms of the trust, if the terms of the trust are silent or not exclusive, by accepting delivery of the trust property, exercising powers or performing duties as trustee, or otherwise indicating acceptance of the trusteeship. UTC §701. The comments to the UTC indicate that only substantial, not literal or technical compliance, is required. Official Comment to UTC §701.
- (d) Both the Cal. Prob. Code and the UTC provide that persons named as trustee are permitted to act in an emergency without being considered to have accepted the trust and become a trustee. See Cal. Prob. Code §15600(b); UTC §701(c).

2. Trust Protector

A person appointed in the trust to direct or restrain the trustees in relation to their administration of the trust, and/or exercise certain defined powers under the trust instrument. {See further discussion below}

3. Trustee De Son Tort

A person not designated or named as a trustee in a trust instrument may become a trustee by intermeddling with and assuming the management of trust property, without

authority, who is then deemed to be a trustee *de son tort* ('of his/her own wrong'). {See further discussion below}

4. Constructive Trustee

A constructive trustee is one who has obtained title to property but has an equitable duty to transfer it to the rightful owner, because the constructive trustee's acquisition or retention of the property is wrongful and would unjustly enrich him or her if allowed to retain it. The doctrine of constructive trust is generally applied as a judicial remedy.

E. Trust Protectors – Concerns?

- (a) A trust protector is a person appointed in the trust to direct or restrain the trustees in relation to their administration of the trust, and/or exercise certain defined powers under the trust instrument.
- (b) A trust protector is a relatively new concept in California, but has been established elsewhere.
 - (i) The concept of a trust protector began in offshore trusts, as grantors were concerned about appointing a trust company in a foreign country as sole trustee controlling an irrevocable trust's assets.
 - (ii) However, protectors are now part of mainstream trust planning. See, for example, UTC §808, the text and commentary of which is included in these materials.
 - (iii) The role of a trust protector is to give flexibility to the trust, so as to minimize need for judicial involvement and/or litigation, and, in some instances, to permit continued trustor involvement in the administration.
- (c) Reasons for a trust protector:
 - (i) Protectors allow a great degree of flexibility when dealing with changes in circumstances, including both factual circumstances (death, divorce, previously unknown children) and changes in the law that could affect the trust, including its taxability.
 - (ii) To ensure that the trustee will carry out the trustor's wishes.
 - (iii) The trustor may prefer that certain powers be withheld from the trustees.
 - (iv) The trustor would like a third party to act as a main point of contact between the beneficiaries and the trustees.
 - (v) The trustor would like a third party to have the power to change or alter an irrevocable trust without a fiduciary duty to the beneficiaries.
- (d) The powers of the protector may include the ability to:
 - (i) Remove and appoint trustees;
 - (ii) Approve a change to adapt to new laws;
 - (iii) Approve the addition or removal of beneficiaries;

- (iv) Approve proposed trust distributions;
 - (v) Approve the appointment of an agent or advisor (either generally or in relation to specific matters);
 - (vi) Approve investment recommendations;
 - (vii) Amend a special needs trust as the beneficiary's needs change, or as public benefits law changes;
 - (viii) Appoint replacement protectors;
 - (ix) Terminate the trust or approve the termination of the trust; and
 - (x) Reimburse the trustor for income taxes paid on trust income (for Intentionally Defective Grantor Trusts).
- (e) Concerns with using protectors:
- (i) The protectors' fiduciary duties and liabilities are unclear under California law.
 - (ii) Protectors may have too much power.
 - (iii) "Pre-arranged" agreements with the trustor are likely to cause inclusion for estate tax purposes.
 - (iv) In advising trustors and trust protectors, it is strongly recommended that attorneys disclose and explain the unknown fiduciary status to such client(s) in writing.
- (f) State of Affairs in California:
- (i) There are some states with statutes governing trust protectors, but California has not yet enacted a trust protector statute.
 - (ii) **California law is unclear on a protector's duty of care (personal or fiduciary).**
 - a. Restatement Third of Trusts, §75 suggests that such persons are not fiduciaries but not permitting powers to be exercised if doing so would violate the terms of the trust or violate a fiduciary duty owed to beneficiaries.
 - b. UTC §808 suggests that such persons are presumably fiduciaries, required to act in good faith and with regard to the purposes of the trust and the interests of the beneficiaries.
 - c. See *Crocker-Citizens National Bank v. Younger* (1971) 4 Cal.3d 202, 212 & 220 (suggesting that trust advisors with powers of direction must be considered fiduciaries, but not pronouncing general rule).
 - (iii) Attorneys who wish to add a trust protector to their trusts should be careful to identify the protector's standard of care.

F. The Doctrine of Trustee De Son Tort

1. Definition and History of the Doctrine

- (a) As discussed above, a person designated as trustee accepts the position of trustee by expressly accepting the trust in writing, or, alternatively, by accepting delivery of the trust property or exercising powers or performing duties as trustee. Cal. Prob. Code §15600; UTC §701. Upon acceptance the trustee becomes bound by his or her fiduciary duties to properly administer the trust. Cal. Prob. Code §16000; UTC §801.
- (b) Consider a person not designated or named as trustee in a trust instrument. What if such a person exercises powers or performs duties as trustee, or otherwise takes action as the trustee? Can such a person be held or determined to be a trustee?
- (c) The "trustee *de son tort*" doctrine recently reappeared in California jurisprudence, after a long absence, by way of the Court of Appeal's ruling in *King v. Johnston* (2009) 178 Cal.App.4th 1488.
- (d) A person not designated or named as a trustee in a trust instrument may become a trustee by intermeddling with and assuming the management of trust property, without authority, who is then deemed to be a trustee *de son tort* ('of his/her own wrong'). 90 Corpus Juris Secundum (C.J.S.) Trusts §2, p. 132 (2010); 1 Perry on Trusts (7th ed. Little Brown & Co. 1929) §245, p. 434; *King v. Johnston*, supra, 178 Cal.App.4th at 1505-1506.
- (e) The doctrine is also known by the phrase "trustee *ex maleficio*." See 90 Corpus Juris Secundum (C.J.S.) Trusts §2, p. 132, and §322, pp. 444-445 (2010).
- (f) The doctrine of trustee *de son tort* is not a recent invention. Prior to the opinion in *King v. Johnston* in 2009, the doctrine was last discussed in California published case authorities in *England v. Winslow* (1925) 196 Cal. 260. But the doctrine is not restricted to California. Other states and other common-law jurisdictions also historically applied the trustee *de son tort* doctrine. See, e.g., *Easterly v. Barber* (1875) 65 N.Y. 252, 259 (stating that it is a "well-settled rule of trusts" that if a person actually being the trustee "acts as such by mistake or intentionally, he thereby becomes a trustee de son tort"); *Soar v. Ashwell* (1893) 2 Q.B. 390 (Lord Esher MR) ("Where a person has assumed, either with or without consent, to act as a trustee of money or other property...a Court of Equity will impose upon him all the liabilities of an express trustee").
- (g) Although it first arose in the common law and predates the California Probate Code, the trustee *de son tort* doctrine remains viable and is good law. The Court of Appeals in *King v. Johnston* commented that "the equitable principles on which the notion of a trustee *de son tort* is based remain relevant today." *King v. Johnston*, supra, 178 Cal.App.4th at 1506. See Cal. Prob. Code §15002 (the common law remains the law of the State of California except as specifically preempted by statute); UTC §106 (similar).

2. Reason for the Doctrine of Trustee De Son Tort

- (a) The trustee *de son tort* doctrine arises from the principle that a person who assumes a fiduciary office, by mistake or otherwise, ought to be held accountable as if the person were such a fiduciary or properly had the authority which has been assumed. See *England v. Winslow*, supra, 196 Cal. at 260, 267.
- (b) Hence, a person should not be permitted to assume the character of a trustee, and wrongfully benefit from doing so, without also having to assume all of the responsibilities and liabilities of being a trustee. *King v. Johnston*, supra, 178 Cal.App.4th at 1506.
- (c) Unlike a situation involving an appointed trustee who necessarily has a relationship to all of the trust property, a court imposes trustee *de son tort* liability with respect to an individual's conduct in relation to some particular item(s) or property(ies), which might not be coextensive with the trust property as a whole. *King v. Johnston*, supra, 178 Cal.App.4th at 1506 n.18; 90 Corpus Juris Secundum (C.J.S.) Trusts §322, p. 445 (2010). Accord 24 Cal.Jur.3d Decedent's Estates §455 (Supp.) (a trustee *de son tort* is a person treated as trustee "because of wrongdoing with respect to property over which the person exercised authority which the person lacked").

3. Implications of Becoming Trustee De Son Tort

A trustee *de son tort* is subject to the same rules and liability as any other trustee. A trustee *de son tort* is not allowed to escape the responsibilities and liabilities which are coincident with being a trustee, and, therefore, may not be heard to say that he or she was not actually the trustee of the trust. *King v. Johnston*, supra, 178 Cal.App.4th at 1504-1506; 1 Perry on Trusts (7th ed. Little Brown & Co. 1929) §245, p. 434.

4. Distinguishing Trustee De Son Tort from Constructive Trustee

- (a) The trustee *de son tort* doctrine is often confused with the concept of constructive trust.
- (b) A constructive trustee one who has obtained title to property but has an equitable duty to transfer it to the rightful owner, because the constructive trustee's acquisition or retention of the property is wrongful and would unjustly enrich him or her if allowed to retain it. A trustee *de son tort* is distinguished from a constructive trustee precisely because the trustee *de son tort* does not deny the trust, the rights of the beneficiaries, or even the authority of those who are appointed to manage it. 1 Perry on Trusts (7th ed. Little Brown & Co. 1929) §245, pp. 433-434.

5. Basis for Doctrine; Related Concept of Executor De Son Tort

- (a) The trustee *de son tort* doctrine arose from the similar common-law doctrine of the "executor *de son tort*."
- (b) An executor *de son tort* is one who, without authority, intermeddles with a decedent's estate and performs acts that should be performed by a duly-appointed and qualified executor or administrator. 24 Cal.Jur.3d Decedent's Estates §455; *Lamkin v. Vierra* (1961) 198 Cal.App.2d 123, 126.

- (c) Although recognized at common law, the executor *de son tort* doctrine has now been repudiated in California and other jurisdictions because modern probate practice has adopted a comprehensive, statutorily-based and judicially-supervised approach to handling probate (i.e., decedent's estate) administration. See *Lamkin v. Vierra*, supra, 198 Cal.App.2d at 126.
- (d) However, the executor *de son tort* doctrine has not been completely repudiated, in that such a person is still "recognized as a quasi-executor or administrator solely for the purposes of being sued or made liable for the estate assets with which he or she has interfered." 24 Cal.Jur.3d Decedent's Estates §455.

6. Predicate to Applying the Doctrine of Trustee De Son Tort

- (a) Adverse possession of trust assets is not a predicate to apply the trustee *de son tort* doctrine, rather it is acts of intermeddling or wrongdoing occurring with respect to property over which the person exercised authority which the person lacked. See, e.g., 90 Corpus Juris Secundum (C.J.S.) Trusts §322, p. 445 (2010); 24 Cal.Jur.3d Decedent's Estates §455 (Supp.). Thus, a person's conduct in intermeddling with and assuming the management of trust property is the prerequisite to declaring the person to be a trustee *de son tort*, not possession (adverse or otherwise) of trust assets.
- (b) The now-repudiated executor *de son tort* doctrine is in accord in focusing upon the conduct of the intermeddling person in performing acts properly undertaken only by an executor or administrator, rather than upon adversely possessing estate assets. See 24 Cal.Jur.3d Decedent's Estates §455; *Lamkin v. Vierra*, supra, 198 Cal.App.2d at 126.

7. Application of the Doctrine of Trustee De Son Tort

- (a) A person not designated or named as a trustee in a trust instrument may become a trustee by intermeddling with and assuming the management of trust property without authority. Presumably this excludes agents and others whom, with authorization from a trustee or court, have exercised management or control of trust assets or affairs. But those whom intermeddle or interfere in trust affairs, without such authorization, without denying the existence of the trust or the rights of the beneficiaries and other interested parties, should not be allowed to escape the responsibilities of being a trustee.
- (b) Typical examples of applying the doctrine would include the following:
 - (i) A trustor whom has ostensibly departed with his or her money or property to make a completed gift to an irrevocable trust, but whom still wrongfully exercises control over the management of those assets, may be held to be a trustee *de son tort* and suffer the same liability to the beneficiaries as the designated or named trustee.
 - (ii) The designated or named trustee abandons their trusteeship and fails to act, and a third party takes over the administration of the trust, who should be held accountable to the beneficiaries as if he or she had been named as successor and accepted the office of the trustee.

G. Advising Clients on Selecting a Trustee

1. Generally

- (a) The business of being a trustee and/or administering a trust is a regulated profession within California. Trust business means the business of acting as trustee, either with or without court appointment. Cal. Fin. Code §115.
- (b) Generally family members are exempt from the requirement to be licensed, as are members of the State Bar of California, certain nonprofit corporations, and licensed professional fiduciaries. Cal. Fin. Code §1553.
- (c) In addition, national banking associations may act as a trustee and conduct business as a trustee. Cal. Fin. Code 1554.

2. Individual/Family Member: Many clients will elect to designate an individual family member or friend as a successor Trustee. It is important to discuss the various options and skill-set required in the management and administration of a trust. In addition, it is vital to explore issues that may lead to or exacerbate conflict between the Trustee(s) and beneficiaries, such as:

- (a) self-interest;
- (b) existing relationships (positive, negative, alliances among siblings, etc.);
- (c) communication issues;
- (d) financial understanding/management capabilities; and
- (e) reliability.

For clients with family/friends outside the United States, it is important to note that a foreign acting trustee may trigger foreign trust issues, including a host of income taxation complexities. If a client wishes to designate a foreign trustee, it may be advisable to have a further successor designated who is a resident or give the foreign trustee the ability to designate a successor trustee in the event the foreign trust issues become too great.

3. Corporate Trustee (Bank/Trust Company)

- (a) This discussion provides a broad overview of corporate trustees. These generalizations are based upon experience and direct feedback from several corporate trustees in preparation for this presentation. **However, the most important "take-away" from this discussion is that each corporate trustee has its own policies, guidelines and requirements (in addition, many of these policies, guidelines and requirements change with staff, statutes, legal decisions, regulation and compliance requirements, etc.) – therefore you should ALWAYS contact a designated corporate trustee to confirm that particular trustee's then-existing policies, guidelines and requirements.**
- (b) In California, only a nationally or state chartered bank or a trust company licensed to do business in California can act as a corporate trustee. A trust company is a corporation or a commercial or industrial bank that is authorized to engage in trust business. Cal. Fin. Code §117. However, a corporation may not be a trust

company or otherwise engage in trust business within the State of California unless its articles of incorporation comply with all statutory requirements for being a trust company, it has received a certificate of authority to engage in the trust business from the Commissioner of Financial Institutions, and it has made the required deposit with the California State Treasurer. Cal. Prob. Code §83; Cal. Fin. Code §1550. The Commissioner of Financial Institutions is now the Commissioner of Business Oversight, which is part of the Trust Services Division of the Department of Business Oversight, Division of Financial Institutions. Cal. Fin. Code §321. Current licensed trust companies in California are:

- (i) Enterprise Trust & Investment Company;
- (ii) Farmers & Merchants Trust Company of Long Beach;
- (iii) Fiduciary Trust International of California;
- (iv) Northern Trust Company of California;
- (v) Peninsula Bay Trust Company;
- (vi) San Pasqual Fiduciary Trust Company;
- (vii) Sunstone Trust Company; and
- (viii) Whittier Trust Company.

For more information visit:

<https://dfpi.ca.gov/trust-services-division/directory-of-trust-companies/>

- (c) Financial institutions and trust companies offer many similar fiduciary services. Here are a few circumstances where financial institutions may differ from trust companies:
 - (i) Most financial institutions will require that all investable assets be managed at that particular institution. Some trust companies (and very few financial institutions) will permit investable asset management to occur at another institution or through an existing advisor. A point of discussion should be whether asset management with a particular advisor or at a particular institution (or institutions, as some clients prefer to keep investments at a range of institutions) is a priority.
 - (ii) Some financial institutions will not welcome acting as trustee where the trust is invested predominately or entirely in real estate or other illiquid, non-investable assets.
 - (iii) Most financial institutions and trust companies have a minimum trust value for which they will act as Trustee. (Note: at various times, when the economy has slowed, some corporate trustees have suspended the minimum trust value and instead instituted a minimum trustee's fee.) Generally, trust companies have a higher minimum trust value requirement than financial institutions. Usually corporate trustees will include the total value of all subtrusts in determining whether the trust meets the minimum trust value requirement.

- (d) Fees
 - (i) Corporate trustees charge fees annually based upon a percentage of the net trust asset value.
 - (ii) Corporate trustees have a published fee schedule (always subject to change) which they will happily provide to any prospective client.
 - (iii) On fee schedules, some corporate trustees combine the fees for trust administration and investable asset management, while others itemize the fees separately. In addition, some corporate trustees will discount fees as a "package deal" for trust administration and investable asset management (usually the management fees are discounted). Finally, it is important to ascertain whether ancillary fees (e.g., preparation of tax returns, real property management fees) are included or excluded from the published fee.
 - (iv) Fees can vary dramatically between corporate trustees, generally ranging from .75% to 3.5%, depending upon the value of the trust estate.
- (e) Considerations
 - (i) A corporate trustee can be a wonderful option for clients, especially in the following circumstances:
 - a. the trust estate contains complex assets and/or is extremely high value.
 - b. a neutral, third party perspective is desired. Ideally, the corporate trustee has no self interest in beneficiary disputes or in making or refraining from making distributions.
 - c. understanding of trust administration ensures proper and efficient administration.
 - d. longevity is desired – for trusts that continue for generations, an individual trustee may not outlive the trust. However, a corporate trustee will likely continue to exist (whether in its original form or folded into another financial entity) and will provide continuity.
 - (ii) Corporate trustees are generally more conservative in investment and distribution decisions than individual/family member trustees. Because corporate trustees do not have the family history and emotional dynamics, they can often administer with a more detached view based considerably upon financial projections and historical and projected needs of the beneficiaries (using a very fact-based analysis).
 - (iii) Most corporate trustees are willing to act as a co-trustee together with an individual/family member Trustee.
 - (iv) Many clients want to "meet the person who will be handling my trust." In a corporate trustee environment, it is unlikely that a particular trust officer will actually be assigned a particular trust matter, especially if the corporate trustee is designated as a successor trustee. In addition, trust

officers may come and go and the trust officer the client speaks with may not still be with the same institution.

- (v) Because corporate trustees do not have the personal connection, family history or emotional dynamics of a friend or family member, they may not have the same sensitivity, understanding of the beneficiaries' personalities and family dynamics and/or understanding of what the Trustor "would have wanted."
 - (vi) Corporate trustees will generally not become involved in direct care decisions (e.g., select an assisted living facility, interviewing and hiring caretakers, etc.) or act as Agent or Attorney-in-Fact pursuant to a financial power of attorney. Corporate trustees will handle the financial aspects of care decisions (e.g., pay bills from the trust for the care facility) and often make recommendations, but always prefer (and often require) someone else to make the final care determinations.
- (f) Many clients may simply refuse to utilize a corporate trustee because of the cost considerations. However, it is important to bring to the client's attention that the use of a corporate trustee (or professional fiduciary, discussion below) often reduces costs in other areas, such as accounting costs, legal representation, bookkeeping, etc. Because of the increased efficiency in using the services of a professional, the ancillary costs are often reduced. In addition, the use of a corporate trustee or professional fiduciary often reduces allegations of self-dealing, favoritism, etc., and may avoid litigation costs.

4. Professional Fiduciary

- (a) A professional fiduciary is another alternative to an individual trustee and/or a corporate trustee.
- (b) A "licensed" or "registered" professional fiduciary is an individual who is licensed and bonded as a professional fiduciary in California.
- (c) The Professional Fiduciaries Bureau was created by legislation that passed and was enacted into law in 2007 to regulate non-family member professional fiduciaries, including conservators, guardians, trustees, and agents under durable power of attorney as defined by the Professional Fiduciaries Act, enacted as Cal. Bus. & Prof. Code §§6500-6592. See Cal. Code of Reg. §§4400-4622.
- (d) Beginning on January 1, 2009, any fiduciary appointed by court order or hired by individuals or families in California must hold a valid license as a professional fiduciary, unless that person is otherwise exempt under applicable California law. The Professional Fiduciaries Bureau (<http://www.fiduciary.ca.gov>) is a state agency created in 2006 under the California Department of Consumer Affairs to license and regulate professional fiduciaries in California.
- (e) For licensing purposes, a professional fiduciary is defined to be a person who acts as a conservator or guardian for two or more individuals at the same time who are not related to the professional fiduciary or to each other, or a person who acts as trustee, agent under a durable power of attorney for health care, or agent under a

durable power of attorney for finances, for more than three individuals, at the same time. See. Cal. Bus. & Prof. Code §6501; Cal. Fin. Code §1553(e).

- (f) Trust companies, public agencies, certain nonprofit organizations, and FDIC-insured institutions are exempt, as are other licensed professionals such as attorneys, CPA's, enrolled agents, and certain investment advisors. See Cal. Bus. & Prof. Code §6501(f)(4).
- (g) With respect to fees, most professional fiduciaries have published fee schedules and will work on an hourly basis or based upon a percentage of the value of the trust assets, depending upon the needs and circumstances. Often a professional fiduciary's hourly rates may differ depending upon the task – e.g., administration at \$X per hour, bookkeeping at \$Y per hour.
- (h) Considerations:
 - (i) Similar to a corporate trustee, a professional fiduciary can be a wonderful option where a third party is desired to act as trustee (and/or as conservator, agent under a power of attorney, guardian of the estate, etc.). Generally professional fiduciaries do not have minimum trust value requirements (unlike a corporate trustee), and the real question is whether the trust can support the fees.
 - (ii) Professional fiduciaries are generally willing to become involved in direct care decisions (e.g., select an assisted living facility, interviewing and hiring caretakers, etc.) and/or act as agent or attorney-in-fact pursuant to a financial power of attorney.
 - (iii) Most professional fiduciaries will not act as a co-trustee together with an individual/family member trustee.
 - (iv) In those situations where a client wants to "meet the person who will be handling my trust," a professional fiduciary may fit the bill, as the trustor can meet and interview the actual person who will be working on the client's trust matter. However, because the professional fiduciary is an individual, it is possible that the professional fiduciary may retire or pass away during the administration process, thereby leaving a vacancy in the office of trustee. Therefore, longevity of the trust administration should always be considered.

H. Drafting Provisions to Consider Regarding Fiduciaries

1. HIPAA Waivers

Some practitioners favor provisions which require any acting individual trustee or professional fiduciary to submit HIPAA waivers as a condition to acting. The idea behind this requirement is that a challenging party (e.g., a beneficiary or successor trustee) can access such trustee's medical records in the event of a capacity challenge. The concern with this type of provision is the scope of the records. Query whether a disgruntled beneficiary could utilize this waiver in an attempt to harass a trustee and whether this requirement would discourage a trustee from acting. These types of provisions should be drafted very carefully to minimize harassment of a trustee.

2. Remove/Replace Trustee

- (a) In estate planning for married couples, some clients wish to include a provision permitting the Survivor to remove/replace successor trustees to provide greater flexibility to adapt to changing circumstances. However, these provisions often do not extend to the situation wherein one spouse becomes incapacitated. You may wish to revisit these provisions to permit one trustor to unilaterally remove, replace and designate successor trustees in the event of a trustor's incapacity.
- (b) There are many trusts which only provide one level of trustee succession, e.g., if the trustor is unable to act the Friend Fred is designated as successor trustee. Ideally there should be several levels of succession to avoid a vacancy in office should a designated trustee decline to act or become unable to act due to death or incapacity.
- (c) When designating individual trustees, it may be desirable to give the last acting trustee the ability to designate successor trustees.
- (d) If multiple parties have the power to remove, replace and designate trustees, then an order of priority should be established to avoid conflicting designations.
- (e) Corporate trustee
 - (i) Many practitioners include a provision which permits a majority of the trust beneficiaries to remove and replace a currently acting corporate trustee with an alternate corporate trustee. Some provisions limit the exercise of this power by the beneficiaries to once every 3 or 5 years to limit "trustee shopping."
 - (ii) Provisions should be included which establish a process in the event the corporate trustee declines to act or resigns as Trustee. You may wish to consider a provision permitting a professional fiduciary to be designated in the event the trust corpus is too modest for a corporate trustee. Note that some corporate trustees will not appoint or nominate a successor.

3. "Tie-Breaker" Provision

Many Corporate Trustees request/may require a "tie-breaker" provision when acting as a Co-Trustee.

4. Compensation

- (a) It is a well-known principle of trust law that, if the trust provides for the trustee to be compensated for work performed as trustee, then the trustee is entitled only to the compensation set forth in the trust instrument. See Cal. Prob. Code §15680. The Court of Appeal in *Thorpe v. Reed* ruled that compensation was not payable to a successor trustee of a special needs trust where the trust instrument provided that no compensation was payable to any trustee. Somehow the successor trustee accepted the job as trustee knowing the trust instrument prohibited the payment of compensation, incurred over \$100,000 in trustee's fees, and, ultimately, the Court of Appeal said the successor trustee should get nothing. *Thorpe v. Reed* (2012) 211 Cal.App.4th 1381. If a client wishes to prohibit or extremely limit compensation, the client should understand that there may be an issue finding a trustee to act.
- (b) Corporate trustees prefer provisions that permit the corporate trustee to charge fees in accordance with the institution's fee schedule in effect at the date services are rendered. In the event that a corporate trustee is acting as a co-trustee together with an individual trustee, the corporate trusts often prefer (and some may require) that the trust provisions permit a separate fee for the co-trustee which would not reduce the compensation of the corporate trustee.

5. Personal Property

- (a) To avoid/reduce conflict with and among beneficiaries, the trust instrument should address the allocation of expenses related to storage, maintenance and delivery of personal property.
- (b) The trust instrument should also provide a process for beneficiaries to select disputed items of personal property (e.g., round-robin, drawing lots, forced sale etc.) and representation of minor beneficiaries in selecting items.
- (c) Retaining personal property in trust can be administratively burdensome for the trustee as a practical matter, as the trustee is vested with the responsibility without having physical possession of the personal property.

6. Small Trust Provision

- (a) California Probate Code §15408 provides that the Trustee has the ability to terminate a trust if the trust principal is less than \$40,000.
- (b) Many corporate trustees recommend a clause that permits wider discretion to terminate the trust when the trustee determines, in the trustee's discretion, that the trust is no longer economical to administer.
- (c) As an alternative, a provision can be added to the trust that permits the trustee to terminate the trust if the principal drops below \$X amount (e.g., \$150,000), and this amount can be subject to a cost of living adjustment for inflation so that as trusts continue on for generations, the small trust component can keep pace.

7. Investments

- (a) The UPIA and the trustee's duty to diversify may limit a trustee's investment capabilities.
- (b) If the trustor intends for the trust to acquire or retain a concentrated investment position, then the trust should specifically direct the trustee with respect to such concentrated investment position. In addition, many corporate trustees have specific language they may require with respect to holding concentrated positions.
- (c) Similarly, if a trustor intends for the trust to invest funds in certain alternative investment offerings, then the trust instrument should specifically authorize such investments.

8. Trustee Discretion/Supervision

- (a) Many clients want to add restrictions, limitations or supervision for beneficiaries – it is one of the primary reasons to designate a non-beneficiary as trustee. However, care should be taken to understand the administrative implications of provisions.
- (b) With respect to drug and alcohol provisions, it is important to keep in mind that there are many viewpoints on the use versus abuse of drugs and alcohol. For instance, if a beneficiary has a prescription for medicinal marijuana or resides in a state where marijuana use is legal (or decriminalized), does use of marijuana justify withholding distributions? From the trustee perspective, what steps are the trustee required to take prior to making distributions? Is the trustee required to have the beneficiary submit to testing, which may create additional problems due to HIPAA privacy issues?
- (c) Corporate trustees may shy away from provisions which require information to be verified by or via a beneficiary (e.g., drug testing, distributions requiring a beneficiary's tax information). If the corporate trustee is willing to make such determinations, then it will often request (or may require) some type of exoneration or indemnity from liability to any beneficiary for making or refraining from making a discretionary distribution.

9. Verifying provisions with designated Corporate Trustee

- (a) Certain "no go" provisions
 - (i) Certain corporate trustees will not act as trustee of a special needs trust (SNT), while other corporate trustees have trust officers who are specialized in SNT administration.
 - (ii) There are several corporate trustees who will not administer a trust where distributions are "grossed-up" to include account for the income tax consequences of such distribution to the beneficiary.
 - (iii) Many professional fiduciaries will not act as a Co-Trustee together with another party, or may do so under very limited circumstances (e.g., where the acting Co-Trustee is the adult sole income beneficiary of such trust).

(b) Correctly identifying Corporate Trustee

Clearly identify the Corporate Trust. E.g., "Wells Fargo Bank, N.A." or "Wells Fargo Delaware Trust Company, N.A."; "BNY Mellon, N.A."; "First Republic Trust Company, a division of First Republic Bank" .."