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# **Summary of California Trustee and Beneficiary Responsibilities and Rights, and Handling Contentious Trust Administrations and Other Family Situations**



See also the disclaimer and limitation on the following page.

Slide 1 of 26 07212025

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## Presentation Overview

1. Overview of Trust Interpretation, Responsibilities, and Rights
2. Investments and Management
3. Accountings and Information
4. Uncertainties and Disputes
5. Additional Select Trust, Estate, Elder, and Planning Issues – conservatorships, elder abuse, powers of attorney, mental capacity, transfers to prohibited people, when a trustor dies, planning, etc.

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# Overview of Trust Interpretation, Responsibilities, and Rights



Slide 4 of 26 07212025

## Trust Terms and Interpretation

Slide 5 of 26 07212025

- When dealing with trust issues always look at the written terms of the trust, Court orders, if any, pertaining to your particular case, applicable statutes, and relevant Court opinions from other cases.
- The trustee primarily administers the trust by its written terms, which express the trustor's intent. This can be a complicated issue. The rule most often stated is that the trustor's intent is to be followed, as expressed in the trust, and that, generally, evidence outside the plain meaning of the words used in the trust cannot be used to determine the trustor's intent, unless the words used in the trust are ambiguous or susceptible to more than one interpretation. However, to a certain extent each probate Judge has her or his own legal propensities, leanings, and interpretations or understandings of the law – some Courts are more often allowing outside evidence of the trustor's intent to be admitted even if the trust is clear or cannot be interpreted more than one way.

## Trustee Standard of Care

- Generally, Courts construe the trustee's fiduciary duty standard of care to be very high, one of the highest required by law.
- The trustee should administer the trust with the reasonable care, skill, and caution that a prudent person would under the current circumstances to accomplish the purposes of the trust as determined from the trust wording.
- A trustee who has special skills is required to use those skills.
- Generally, the trustee should not delegate responsibilities that the trustee can reasonably be expected to perform. However, in practice it is not uncommon for trustees to delegate certain responsibilities, and, by statute, in appropriate circumstances a trustee can delegate specific duties. Some of the responsibilities that might be delegated are investment, tax, legal and accounting in nature. The trustee must prudently select which agents to use, and must oversee those agents.

Slide 6 of 26 07212025

## **Trustee Confidentiality, Self-Interest, and Impartiality**

- A trustee has a duty of confidentiality. The trustee has a general duty, but not in all circumstances, not to disclose to a third person information about the trust and the beneficiaries. However, the trustee might need to disclose certain information to properly administer the trust.
- More important, a trustee must not put her or his interests above those of the trust or the beneficiaries, and should avoid conflicts of interest with the trust and the beneficiaries.
- The trustee should act impartially between the competing interests of the various beneficiaries. Unless the trust specifies otherwise, the trustee should not favor a particular beneficiary or class of beneficiaries.



Slide 7 of 26 07212025

## Trustee Discretionary Powers

- A trust will typically contain provisions that give the trustee discretionary powers, that is, the power to use her or his own judgment in specific circumstances. The amount of discretion is strictly construed from the language in the trust document and the intent of the trustor. Be cautious, however—even if the trust provides sole, absolute or uncontrolled discretion, Courts still require the trustee to act within the fiduciary standards and not in bad faith or in disregard of the purposes of the trust.
- Unless limited by the terms of the trust, the trustee also has other statutory powers. You should review the powers and limitations specified in the trust document, and also the powers listed in the Probate Code.
- One area in which a trustee might be required to use discretion relates to determining the appropriate amount of income or principal to distribute to a beneficiary.



## Co-Trustees

- A few words about trusts that have co-trustees, that is, a trust that has two or more people acting as trustees at the same time. Unless the trust provides otherwise, co-trustees must act unanimously.
- A co-trustee can be liable for a breach of duty by a co-trustee. Thus, if a co-trustee takes an action that the other co-trustee believes is a breach of duty, the non-breaching co-trustee could consider filing a Court petition under Probate Code §16420.
- Hostility between co-trustees can be a ground for removal of a trustee. In some circumstances, a co-trustee might be allowed to resign if there are disputes with the other co-trustee; however, if the resignation allows the other co-trustee to commit an anticipated breach, the resignation itself could be considered a breach of duty to protect the trust.

## **Beneficiary Responsibilities and Conduct**

A lot is written about trustee and fiduciary duties, and many cases hold that a trustee has almost an absolute responsibility to a beneficiary. However, there is a growing body of case and statutory law holding that a beneficiary must act reasonably, or at least not unreasonably, must take action and cannot delay taking action to protect her or his interests, and in limited situations could also be charged with attorneys' fees and costs if the beneficiary breaches her or his standard of conduct.





## Investments and Management

## Trustee Investment Duties

- The trustee has the duty to invest trust property for the benefit of the beneficiaries, subject to restrictions or limitations stated in the trust. The trustee's investment powers are provided by the terms of the trust. If not derived from the trust, the investment powers are also derived by statute, case law and the factual circumstances.
- Generally, the trustee has the duty to make trust assets economically productive.
- A trustee must invest and manage the trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust. The trustee must exercise reasonable care, skill, and caution.



Slide 12 of 26 07212025

## **Trustee Investment Duties (continued)**

- Unless (perhaps) the trust provides otherwise, for several important reasons including possible liability exposure reduction in the case of asset value decline, a trustee's investment and management decisions are best made and evaluated in the context of the trust's portfolio as a whole and as a part of an overall investment strategy reasonably suited to the trust's risk and return objectives.
- Probate Code §16047 requires the trustee to variously consider such matters as economic conditions, inflation or deflation, tax consequences, the role of each investment or action within the overall trust portfolio, the expected rate of return from income and appreciation, other financial resources of the beneficiaries known to the trustee, needs for liquidity, regularity of income, preservation and appreciation of principal, and asset special value or relationship to the purpose of the trust or the beneficiaries.

## Trustee Investment Duties (continued)

- Unless the trust states otherwise, the trustee has a duty to diversify the trust investments unless, under the circumstances, it is prudent not to do so.
- The trustee must consider the interests and needs of all beneficiaries, income and remainder, when making investment decisions. The beneficiaries may have conflicting interests. When two or more income beneficiaries have different personal income tax brackets, generally the trustee could strike a balance between them when determining how much to invest in certain assets. However, the trustee might be allowed to prefer one class of beneficiaries over another if the trust terms direct—this can be a difficult area and cause litigation concerns.



Slide 14 of 26 07212025



## Accountings and Information

## Overview of Accountings and Information

Slide 16 of 26 07212025

- The general rule is that upon reasonable request by a beneficiary the trustee must provide a report of the information relating to the assets, liabilities, receipts, and disbursements of the trust, the acts of the trustee, and the particular terms of the trust relevant to the beneficiary's interest. Probate Code §§16060 and 16061.
- Probate Code §16062 requires the trustee to provide an accounting at least annually, at termination of the trust, and upon a change of trustee, to each beneficiary to whom current distribution of income or principal is authorized.
- However, the above information or accounting might not be required if waived by the terms of the trust or the beneficiary, or if the trust is revocable (Probate Code §16069).
- Probate Code §§16061.5 and 16061.7 also require the trustee to provide specific notices and information to the beneficiaries when a portion of a revocable trust becomes irrevocable, or when there is a change of trustee of an irrevocable trust.





## Uncertainties and Disputes

## Overview of Uncertainties and Disputes

- At the presentation discuss typical trust issues and disputes that may arise.
- At the presentation discuss typical ways to avoid or resolve disputes.
- California Probate Code §§16500-16504 permit a trustee to serve a Notice of proposed action or proposed inaction to required people (beneficiaries and possible beneficiaries), to obtain consent for a proposed action or inaction.
- A few words about no-contest clauses. It is typical that a trust may contain a no-contest clause. In essence, a no-contest clause states that if a beneficiary initiates a certain type of Court proceeding, and if the beneficiary loses that proceeding, the beneficiary will be deleted or removed as a beneficiary of the trust. A will can also contain a no-contest clause. On the one hand, no-contest clauses are favored because they help to reduce litigation. On the other hand, some Courts narrowly construe no-contest clauses so that a beneficiary is not prevented from bringing a legitimate legal proceeding.

Slide 18 of 26 07212025

## Additional Select Trust, Estate, Elder, and Planning Issues



## Conservatorships

A conservatorship involves a petition filed with the Court requesting the Court to appoint a person (a conservator) to handle and be responsible for another person's (the conservatee) financial and/or daily living needs and decision making. A conservatorship may be necessary when a person in need cannot handle her or his affairs, decision making or protection, and that person has not nominated or appointed another person to help and make those decisions through a trust or power of attorney document, or when the person nominated is not suitable for that position.



## Elder Abuse

Elder abuse takes many forms: physical, financial, neglect, isolation, emotional, mental, and undue influence, persuasive or coercive. California has enacted statutes to help provide specific remedies, beginning at Welfare & Institutions Code §§15600, et seq. I have worked on elder abuse cases involving trusts and wills, theft, neglect, financial abuse, nursing homes, elder care, fraud, and undue influence. These cases present challenging issues of evidence and proof. See, for example, the California Welfare and Institutions Code §15610.70 statutory definition of undue influence. Seek assistance if you become aware of possible elder abuse, and also if you are a mandated reporter. See also my separate eBook: **How Undue Influence Can Disrupt an Estate Plan: Was it Free Will or Foul Play?**



Slide 21 of 26 07212025

## Powers of Attorney

Slide 22 of 26 07212025

- A person who signs a power of attorney (called a principal) appoints someone else to make decisions for them (called an agent or attorney in fact) at some point in time either immediately or after a defined event occurs such as one or more doctors opining that the person is no longer capable of making their own decisions.
- Power of attorney documents typically variously cover finances, or daily living or healthcare decision making, and sometimes can cover decisions about where the principal will live. The attorney in fact has fiduciary duties to prudently and diligently act in the best interests of the principal without conflict of interest or self-dealing.
- Powers of attorney can present very complicated legal issues, such as when does the attorney in fact actually start making decisions and on what matters, amendment or possible termination of the power of attorney, communicating with the principal, and taking the principal's wishes into consideration. Powers of attorney are governed by the power of attorney document, case law, and the Probate Code.

## Mental Capacity

Some cases involve the issue whether the trustor had the mental capacity to understand, and to execute or sign the trust. Mental capacity depends on the type of document that is being signed, e.g., a will, or a trust, or a power of attorney, or a deed, or some other document, how complicated the document is, and the different, detailed facts of each different situation. Different standards apply in different situations and for different documents, including different statutes and different case law. See generally, for example, Probate Code §6100.5 for wills, and Probate Code §§810-813 for trusts – however, you will note that even these code sections each contain multiple different provisions and criteria, and case law interpretation also is very important, in addition to which party has the burden of proof. See also my separate eBook: **How Undue Influence Can Disrupt an Estate Plan: Was it Free Will or Foul Play?**

## Prohibited Transfers

You should be aware of Probate Code §§21360-21392, which state that certain transfers in trusts and wills may be unlawful, such as certain transfers of assets to attorneys or other people who drafted or transcribed the estate planning, trust, will or transfer instrument, caregivers or care custodians, fiduciaries and other non-family members.





## When a Trustor Dies

As a general matter, when a trustor dies, you should consult with a trust administration attorney to accomplish the necessary legal and administration tasks. Trusts are complicated as are also estates when there is a will. Most likely some or all of the following trust administration issues and difficulties could exist including collecting the assets, taxes, accountings, distributions, asset titles and conveyances, and other legal issues. And if you throw in multiple marriages, divided families, contentious relationships, and outright disputes and litigation, as a general matter retaining a trust administration attorney is beneficial.



Slide 25 of 26 07212025

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## Questions

