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**TRUST ADMINISTRATION
FOR PARALEGALS**
CHALLENGES AND BEST PRACTICES

March 16, 2016

What is a Trust?

Overview of Basic Trust Concepts

A trust is a fiduciary relationship in which one or more trustees are called to manage, protect, and invest certain property for the benefit of one or more named beneficiaries.

A trust creates a beneficial interest in property to which another person holds the legal title.

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Trust Parties

- Trustor: the creator of the trust; also referred to as settlor or grantor.
- Trustee: party to whom the trustor transfers the property; holds legal title to the trust property; has specific duties to perform.
- Beneficiary: party who holds the beneficial interest in the trust property; party to whom the trustee owes a fiduciary duty.

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Basic Types of Trusts

- Living Trust: trust created during the lifetime of the trustor; often revocable or amendable. (Also known as *inter vivos trust*.)
- Testamentary Trust: trust created upon the death of the trustor; the terms of the trust are generally located in the trustor's will.

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Common Types of Trusts, cont.

- Revocable Trust: trust which can be fully amended, altered, or revoked by the trustor.
- Irrevocable Trust: trust which cannot be revoked by the trustor, and usually cannot be amended or altered.
- Under California Probate Code § 15400, unless a trust is expressly made irrevocable by the trust instrument, the trust is presumed to be revocable by the trustor.

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What is Trust Administration?

Trust administration is the process of administering a trust. It is typically thought of in the context of death. However, a trust administration does not require there first be a death. A trust could be administered as a result of a death, incapacity of a trustor, or the creation of an irrevocable trust during the lifetime of a beneficiary.

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Paralegal Role in Trust Administration

- Organization – keep everyone organized!
- Calendaring
- Recordkeeping
- Keeping the client informed (some handholding)
- Keeping professionals (e.g., tax advisors, financial advisors, and attorneys) informed

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Trust Administration: Initial Steps

1. Identify the client (trustee, beneficiary, co-trustees?)
2. Identify scope of work
3. Services agreement
4. Conflict waiver required?
5. Identify any issues that need immediate attention

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Trust Administration: Next Steps

- Read the trust and prepare a working memo
- Gather documents and records:
 - Authorization for release of records and information needed?
 - Source documents are critical
 - Deposit Agreement required for certain original documents
- Create checklists:
 - For trustees, create master list of beneficiaries
 - Create master spreadsheet/list of assets
 - Checklist of action required and deadlines
- Calendar important dates:
 - Statutory deadlines
 - Deadlines created by trust instrument
 - Tax deadlines

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Trust Administration: Next Steps, cont.

- Letter or memo to trustee providing overview of trust and outlining general duties and powers:
 - What does the trust say?
 - What does the trustee need to know to administer the trust, especially in the early stages of administration?
 - What are things the trustee should refrain from doing until he or she has consulted with an attorney?
- Marshalling assets and protecting the trust estate:
 - Retitle assets in the name of the new trustee
 - Claim assets
 - Obtain insurance information and work with trustee to insure assets
- Subtrust funding and distributions

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Identifying the Client

- Who is the Client?
- The attorney does not “represent the trust” because the trust is not a separate legal entity.
- Ideally, the attorney will represent only a single trustee or a single beneficiary. If this is not practical, the attorney should prepare appropriate conflict waivers.
- If representing the trustee, the attorney should represent the trustee only in his or her capacity as a trustee, and not as a beneficiary.
- Communications between the attorney and the trustee may not be privileged.

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Scope of Work

- Will the work be limited to one task or a particular set of tasks, or will the representation span the entire duration of the trust?
- Are tax filings (e.g., estate tax return or fiduciary income tax returns) included in the scope of work?

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Services Agreement

- A written services agreement is required by law.
- Who will sign the services agreement and ultimately be responsible for attorneys' fees?
- With whom is the attorney authorized to communicate, and what impact does this have on the attorney-client privilege?
- If the attorney is representing the trustee, is there any litigation contemplated? If so, consider necessary precautions in structuring representation and remember that the attorney-client privilege belongs to the office of trustee, not the person(s) holding the office. *Moeller v. Superior Court* (1997) 16 C4th 1124.

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Conflict Waiver Required

- Is a conflict waiver required?
- If attorney is representing a trustee in both its individual and fiduciary capacities, what disclosure is being made regarding the risks inherent in such representation?
- If attorney is representing co-trustees, what disclosure is being made regarding potential conflicts of interest and is a waiver of those conflicts being obtained?
- Are there any business organizations (e.g., corporations or partnerships) held by the trust? If so, does the attorney represent one or more of such business organizations or any of the owners? If yes, disclosures and conflict waivers may be required.

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Read the Trust

- Read the trust, read the trust, read the trust!!!
 - Do not rely on other peoples' summaries of the trust
 - Ensure you are working with the correct and complete trust document(s)
 - Any missing pages?
 - Look at the dates of execution by the parties and the notary
 - Any amendments or exercises of power of appointment?
 - Any handwritten changes to the trust document?

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Read the Trust, cont.

- Prepare a working memo:
 - Parties (trustor, trustee, beneficiaries, attorneys)
 - Timeline (trust and other testamentary document dates, date of death, and other important dates)
 - Trust structure and dispositive provisions
 - Trustee succession, distribution, and termination provisions
 - Trustee powers and duties, with citations to paragraph, article, and/or page numbers
 - Any special deadlines set by the trust?
 - Any issues?
 - For easy reference, include citations to paragraph, article, and/or page numbers

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Gather Documents and Records

- Create inventory of documents received from client.
- Identify missing documents and information.
- Authorization for release of records and information needed?
- Source documents are critical (e.g., actual deed versus client statement as to title).
- Deposit agreement required for any original documents?

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Create Checklists & Other Organizational Tools

- For trustees, create master list of beneficiaries
 - Full name
 - Address and other contact information
 - Date of birth
 - Social Security Number
 - Relationship to trustor
- Create master spreadsheet/list of assets
 - Consider organizing by asset type (easy to sort in Excel)
 - Title of asset (joint tenancy, individual name, trust)
 - Character of asset (separate property versus community property)
 - Values (start with estimates and determine whether date of death and/or date of distribution appraisals will be required)
 - Action to be taken
 - Notes

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Create Checklists & Other Organizational Tools, cont.

- Checklist of action required and deadlines
 - Consider use of master checklist which outlines statutory, trust, tax, and other deadlines
 - Generally, the checklist should be customized
- Calendar important dates and deadlines

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Statutory Deadlines

A few statutory which apply when a person has died include:

Lodge Will	Within 30 days
Send 16061.7 Notification	Within 60 days
Notice to Dept. of Health Services	Within 90 days
Change of Ownership Statement	Form BOE-502-D
Affidavit of Death of Trustee	Within 150 days
Trust Accounting	At least annually (some exceptions apply)

**This is not an exhaustive list.

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Deadlines Created By Trust Instrument

- Duty to account
 - Trust may provide for more frequent accounting
- Duty to fund subtrusts or make distributions
- Timeframe for objections to accounting
- Are there any pecuniary gifts which may bear interest?

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Tax Deadlines

File SS-4 to obtain taxpayer identification number for trust	If necessary, prepare and file immediately
Prepare and send W-9 Form to beneficiaries	Once beneficiaries are determined
Estate tax return	Within 9 months of decedent's death (may apply for 6 month extension)
Fiduciary income tax returns	April 15
Decedent's final personal returns	April 15 of the year following death
645 Election	no later than due date of the first Form 1041 for the estate, including extensions
Form 56	As soon as possible

**This is not an exhaustive list.

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Lodging The Will

- Decedent's will must be lodged with the superior court in the Decedent's county of residence, within 30 days of death.
- Always confirm the requirements for lodging the will and any fees with the probate clerk. Some courts require the will to be on Blueback, some courts require a death certificate to accompany the will.
- Send via trackable delivery.
- Calendar a follow up for receipt of the lodged will, and keep the lodgment receipt with a copy of the will.

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16061.7 Notification By Trustee When Must Notification Be Served

Under California Probate Code § 16061.7, a trustee must send a notification to current beneficiaries and heirs at law when:

- A revocable trust or any portion of it becomes irrevocable either: (1) because of the death of one or more of the settlors, or (2) by the express terms of the trust and within 1 year of a settlor's death; or
- There is a change of trustee of an irrevocable trust.

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16061.7 Notification By Trustee Deadline to Serve

Notification must be served personally or by mail on each beneficiary or heir entitled to receive it at the last known address within 60 days of:

- The occurrence of the event requiring service of the notification (*e.g.*, the settlor's death); or
- The trustee becoming aware of the existence of a previously unknown person entitled to notice.

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16061.7 Notification By Trustee Information to Include

The Notification must include:

- The identity of the trustor and the date of execution of the trust instrument.
- The name, mailing address, and telephone number of each trustee.
- The address of the physical location of the principal place of trust administration.
- A statement that the recipient is entitled, on reasonable request to the trustee, to receive from the trustee a true and complete copy of the terms of the trust.
- If the notification is served because a revocable trust or a portion of it has become irrevocable, a boldfaced warning set out in a separate paragraph that the recipient has a specified limited amount of time in which to bring an action to contest the trust.
- Any additional information which may be expressly required by the terms of the trust.

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16061.7 Notification By Trustee Deadline To Contest

A person on whom notification is served must bring any action to contest the trust by the later of:

- 120 days from the date of service; or
- 60 days from the day on which a copy of the trust terms is mailed or personally delivered to him or her during the 120-day period.

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16061.7 Notification Best Practices

- Always refer to the statute for specific language and requirements for persons to whom notification must be given.
- List the date of trust and the dates of all amendments.
- Common practice is to use the law firm address if the trustee lives outside of CA. If trustee resides in CA, use his or her address.
- Always send via Certified Mail or some other trackable delivery.
- Calendar the statutory deadline to contest the trust.

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Affidavit of Death of Trustee

- If the trust held real property, notice must be provided to the recorder of the county in which the real property was located.
- This establishes the record that the previous trustee has passed away, and the new trustee is the party authorized to deal with the real property.
- Some counties provide forms on website.

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Affidavit of Death of Trustee Best Practices

- Prepare within 150 days of date of death or change of trustee
- Always confirm with the county recorder the recording fees and mailing address
- Always send via Certified Mail or some other trackable delivery
- Always confirm whether recorder requires a copy to conform and a self-addressed stamped envelope for returning the affidavit
- The name of decedent and/or trust must be listed exactly as it is on the original deed showing ownership of the property
- Verify if the trust is referred to in any other documents in any way other than how it is listed on the deed (e.g., “u/d/t”, “as amended”, etc.)
- Include Notary Jurat – NOT a Notary Acknowledgment
- Calendar a follow up for receipt of recorded affidavit
- File with a Preliminary Change of Ownership Report

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Marshalling Assets and Protecting the Trust Estate

- Ensure assets are secure
- Obtain insurance information and work with trustee to insure assets
- Retitle assets in the name of the new trustee:
 - Real property – Affidavit of Death of Trustee
- Claim assets:
 - Unclaimed property – check all states to which the decedent had a connection or owned assets
 - Life insurance
 - Retirement plans
- 13100 Declaration

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California Probate Code §13100

The decedent's successor in interest may use an affidavit or declaration procedure to collect money due the decedent, receive tangible personal property, and transfer property of the decedent, if:

1. The gross fair market value of the decedent's personal and real property in California, excluding vehicles, does not exceed \$150,000;
AND
2. 40 days have elapsed since the death of the decedent.

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Affidavit or Declaration Pursuant to §13101 – Best Practices

- Refer to the actual statute, and do not deviate from the specific language listed.
- Include a good description of the property owned by the Decedent at death of death (e.g., Bank of America checking account number 1234567890).
- If using an Affidavit, insert Notary Jurat; if using a Declaration, insert Notary Acknowledgment.
- When sending to a third party, include a copy of California Probate Code Sections 13100 and 13101 and a copy of the death certificate.
- Always send via certified mail or some other trackable delivery.
- Note: This procedure should not be used on an estate exceeding \$150,000.00.

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Conclusion of Trust Administration: Distribution of Assets and Trust Termination

- A trustee has a duty to distribute trust assets and terminate the trust within a reasonable time.
 - There are several factors to consider when determining what is a “reasonable time”, such as the type of assets, whether the assets must be sold, the difficulty of ascertaining the beneficiaries, and whether there is any ongoing litigation.
- Once all trust assets have been distributed, the trust has “terminated.”

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Trust Termination Event

- Trusts usually specify a particular event which triggers distribution of trust assets and the termination of the trust.
- The event is typically the death of an individual, or the attainment of a specific age by one or all of the beneficiaries. Before acting, the trustee must be satisfied that the event has occurred.
- If death is the triggering event, the trustee should obtain a certified copy of the death certificate.
- If the trust terminates on the beneficiary's attainment of a certain age, the trustee should obtain certified birth certificates for the beneficiaries unless the trust instrument states the date of birth for purposes of determining dates of termination.

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Trust Termination Event: Small Trust Termination

- Most trusts contain a small trust termination provision.
- This permits the trustee to use his or her discretion and terminate the trust, before the occurrence of the specified termination event, if the value of the trust drops below a specific amount and the trustee feels that continued operation of the trust is uneconomical.

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Distribution of Trust Assets

- After confirming the termination event, and that trust assets must be distributed, create a plan of distribution.
 - Obtain updated values of all assets
 - Determine if there will be any on-going trusts, or if all assets are being distributed free of trust to beneficiaries
 - If there are ongoing trusts, obtain TINs and prepare certifications of trust
 - Determine if any particular assets must be distributed to specific beneficiaries
 - Determine if non pro rata distributions are authorized
- Obtain delivery instructions and make final distributions.
- Send final accounting, receipts, and release documents to beneficiaries.

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Supplemental Information

- Parent Child Exclusion on Real property
- 645 Election

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Real Property Reappraisal: Parent-Child Exclusion

- In California, real property may be reassessed any time there is a change of ownership.
- The transfer of property to a revocable trust is generally not a change in ownership for property tax purposes.
- A change in ownership occurs at the death of the trustor and the property will be subject to reassessment, unless an exclusion applies.
 - Parent-child exclusion applies to outright distributions to children of the trustor or to a continuing trust, if the children of the trustor are the sole present beneficiaries of the trust.
 - Grandparent-grandchild exclusion may be available when all of those who qualify as children of the grandparent are deceased as of the date of the transfer.

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Parent-Child Exclusion Limitations

- Amount of Exclusion
 - The parent-child exclusion applies to the trustor's "principal residence" plus the first \$1 million of other property (assessed value, not fair market value).
 - "Principal residence" includes only the portion of the underlying land that consists of an area of reasonable size used as a site for the residence.
- The exclusion is not automatic; a claim must be filed.
- A claim for exclusion is timely if it is filed:
 - Within 3 years after the date of transfer or before the property is transferred to a third party, whichever is earlier; or
 - Within 6 months after the mailing of the notice of supplemental or escape assessment.

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Parent-Child Exclusion Best Practices

- Refer to the county recorder's website for the exact form to use – every county is a little different.
- A separate claim for reassessment exclusion must be filed for each parcel of real property.

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645 Election

- A qualified revocable trust (“QRT”) may elect to be treated as part of an estate for income tax purposes.
 - A QRT is a trust for which the decedent held the power to revoke the trust as of the decedent's death.

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Benefits of Making 645 Election

- Making a 645 election may allow a trust to receive favorable income tax treatment that would otherwise only be available to an estate
- Potential benefits include:
 - Electing to use fiscal year instead of calendar year
 - Using favorable rules regarding passive losses
 - Qualifying as eligible S-corporation shareholder
 - Deducting income set aside for charity (§642(c))
 - Recognizing losses from distributing depreciated assets in kind to satisfy pecuniary gifts

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645 Election

Making the Election

- A 645 Election is made by filing Form 8855 by the due date of the first income tax return for the estate, including any extension
 - This deadline applies even if the estate does not have enough income to require filing a return
- A 645 Election is irrevocable, but will expire
 - After two years, if no estate tax return is due
 - Six months after a final determination of estate tax, if an estate tax return is due

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645 Election Online EIN Application

- The online EIN application process for a trust asks whether the trust is filing as an estate under 645
- Checking this box does not make the 645 Election and does not appear to be required
 - The box may have other effects, (e.g., telling the system that the trust may use a fiscal year end)
 - It is a good practice to leave the box unchecked unless it is certain that a 645 Election will be made

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645 Election Who Makes the Election

- If there is an executor, both the executor and the trustee must join in the election
- If there is no executor, the trustee makes the election alone
 - If an executor is later appointed, the executor has 90 days to affirm the 645 Election by filing a revised 8855, or the election will terminate

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645 Election Filing Tax Returns During Election

- If a 645 Election is made, a single 1041 is filed for the electing trust and the related estate
 - If there is an executor, the 1041 is filed under the TIN for the related estate
 - If there is no executor, the 1041 is filed under the TIN for the electing trust

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645 Election After the Election Ends

- After the 645 Election ends:
 - If there is an executor and returns were filed under the TIN for the estate, the related estate will continue to use the TIN assigned to it
 - If there is no executor and returns were filed under the TIN for the trust, the trust must obtain a new TIN to use for all future returns
 - The estate continues to use the same tax year
 - The trust uses a calendar year for future returns

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