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# Considerations for Constructing Your Revocable Living Trust

## Trustee Considerations

### What is a Trustee?

The trustee is the “manager” of your trust. He or she will fulfill three primary roles. First, he or she will manage your finances if you become incapacitated. Second, he or she will distribute the assets you own at death according to your wishes as expressed in your trust document. Finally, he or she MAY manage assets for beneficiaries after your death. This most often occurs when a beneficiary is: (a) a minor, (b) cannot manage his or her assets due to immaturity, addictions, or disability, or (c) you desire to protect your beneficiary’s inheritance from his or her creditors, which might include an ex-spouse or child owed spousal support or child support, a bankruptcy trustee, a taxing authority like the IRS, a person your child has injured or anyone he or she owes money to.

### Who should be Trustee?

Anyone can serve as your Trustee. The key is to choose the right person for the right reasons. Sometimes this might be a child or other relative. Sometimes this might be a long-time friend or co-worker. Sometimes this might be someone at your church or a professional you work with – like your attorney or accountant. Sometimes there is no one that can be trusted. In this case, a professional private fiduciary, trust company or bank will be needed.

### Should a child be the Successor Trustee?

A child is a common choice and often is the right choice for a Successor Trustee. But often it is not. In deciding whether to have a child serve as trustee, evaluate the skills, temperament, maturity and availability of the child. You should not automatically choose the oldest male child to serve as trustee. While your son may be the CEO of a big company, he may not have the time to devote to serving as your trustee. Sometimes your daughter who lives close to you and manages her family’s finances may be the proper choice because she can devote the time to fulfill the duties of a Trustee. Each child should be evaluated and chosen in the order of those most capable of serving as trustee. While the older children may have hurt feelings they were not selected to serve as trustee, you can rest assured that the child you feel is most trustworthy and capable of handling your affairs will manage your income and assets and pay your bills if you become disabled and administer the trust according to your wishes after you pass away.

## THE REVOCABLE TRUST IS A KEY COMPONENT TO YOUR ESTATE PLAN

A revocable living trust is a key component to nearly every estate plan.

First, if properly drafted and funded, a revocable trust will avoid probate, saving your heirs thousands of dollars in fees and costs and months of dealing with court personnel.

Second, a properly drafted and funded revocable trust makes administration of your estate in the event of your disability much simpler. It will avoid the needs for a costly conservatorship proceeding if you develop Alzheimer’s disease or dementia.

A properly drafted and funded trust can simplify and speed administration of your estate after the death of an unmarried individual as well as the death of the first spouse to die and the surviving spouse.

A revocable living trust may make it easier to plan for care in a nursing home and qualifying for long term care government assistance. It can also prevent recovery of your residence by the State of California after your death should you ever receive long term care Medi-Cal benefits.

Finally, a properly drafted revocable trust can provide protections for your beneficiaries after your death.



## Are Co-Trustees a Good Idea?

While in theory it is nice to have two or more persons monitoring the other persons, this can lead to much impracticality. First, many financial institutions will require all co-trustees to be present to open trust accounts, meaning that arrangements might have to be made for an out-of-state co-trustee to fly in to handle administrative duties. Next, many documents require notarization or signature guaranties, which can turn into a nightmare when you have an escrow requiring over 100 pages to be signed and/or initialed and you have co-trustees. Finally, more and more financial institutions are declining accounts with co-trustees unless they can all act independently. This means you don't have the financial safeguards you thought you had by appointing co-trustees.

My immediate question when being told by a client they want to have some or all of their children serve as co-trustees is "do they all get along and work with each other now?" The usual response is a chuckle and a no. If children cannot get along and work with each other in a relatively non-stressful family environment, why would things change when placed in stressful business situation where dominance of their siblings and control of money is at stake?

## Who Else Can Serve as Trustee?

Often there are other family members who could serve as Successor Trustee. A parent, aunt, uncle, brother, sister, nephew or niece might be a good choice. Other times, there may be a long-time friend, neighbor or co-worker who you would trust to manage your finances both while you are alive and after you pass away. Finally, if no other choices are available, a private fiduciary is often a good choice. These are individuals who are licensed by the state of California to serve as trustees, executors, conservators and agents. Check on [www.pfac-pro.org](http://www.pfac-pro.org) for the names of private fiduciaries in your area. Trust companies and banks are also viable choices, but most have minimum account sizes of \$500,000 to \$1 million and many will not accept management of real estate or business assets. Dennis M. Sandoval serves as trustee and successor trustee for many of his clients. Ask for more information about our trustee services if you have an interest in them.

## What Protections Are Available to My Beneficiaries?

Trustees can be bonded, but the Trustee must qualify for the bond and there will be a cost for the bond. If you want your Trustees to be bonded, make sure that is stated in your Trust. Often, a Trust will waive bond for the trustee to save costs. Professional trustees should also carry insurance protection for errors and omissions. Ask a professional trustee candidate what kind of insurance he or she carries when making your trustee selection. Family members may not be able to obtain this type of insurance coverage.

## Determination of Capacity

At some time you may lose the capacity to manage your own affairs. This rarely happens quickly – what starts out as forgetfulness eventually turns into the inability to comprehend and act. Most trusts provide for determining incapacity to two physicians familiar with your situation. While the requirement of certification by two physicians assures protection from a premature determination of incapacity, it often makes it difficult for the Successor Trustee to take over management of the Trust when the time is right. Doctors are often reluctant to declare their patient incompetent or worried they will be violating federal and state privacy regulations by making this determination. One alternative might be to require only one doctor to certify that you are incapable of managing your financial affairs. Another alternative may be to designate a panel of trusted persons who will determine your ability to continue as Trustee of your Trust. The panel could consist of three to five trusted persons (they don't have to have a medical background, although some may be doctors or nurses) who would determine your capacity by majority vote. If you like the idea of an incapacity panel, remember that appointing your children and trustees to be on the panel creates a potential conflict of interest, as determining your incapacity might give them control or access to your income and assets. We always suggest that the majority of the trusted persons who serve on your incapacity panel, if you want one, not be successor Trustees or primary beneficiaries of your Trust.



## Trust Advisor Provision

A Trust Advisor or Trust Protector is a person who could correct errors or inconsistencies in your trust, remove and replace the Successor Trustee of your Trust, ask for an accounting of income and assets, resolve disputes among beneficiaries and even potentially amend the Trust terms to take into account a change in beneficiary circumstances or a change in the law. For example, if a beneficiary is scheduled to receive a distribution but receiving that distribution would cause a loss of government assistance or cause the assets to be available to be grabbed by the beneficiary's creditors, it may be possible for the Trust Advisor to amend the Trust terms so that the beneficiary does not lose his inheritance. A Trust Advisor or Trust Protector (different names for the same position) is usually an independent professional such as your attorney, your accountant, or your financial planner. While a non-professional can serve as a Trust Advisor, it is best to have someone familiar with estate planning, trust administration, and taxes serve as the Trust Advisor. The Trust Advisor cannot serve as Trustee and Trust Advisor at the same time. Dennis Sandoval usually serves as the Trust Advisor of the trusts he drafts for his clients.

## Distributions to Beneficiaries

When asked how a client wants to distribute assets to beneficiaries, the client often replies they want an outright distribution when the beneficiary reaches age 18. An outright distribution is one that the beneficiary has full control over and that is available to the beneficiary's creditors. Often an 18 year old child does not have the maturity to handle an inheritance, especially if it is large. And often, there are reasons that a beneficiary should not receive an outright distribution>

### When is an Outright Distribution Inappropriate?

Estate planning attorney Dennis Sandoval believes that almost all outright distributions are inappropriate. There are many reasons he has come to this conclusion. Here are just a few.

#### Disabled Beneficiary

If a beneficiary is disabled, he or she may be receiving government assistance referred to as "needs based." If the beneficiary receives an outright inheritance that put him over the limit of assets he or she may have (usually as low as \$2,000), then the disabled beneficiary loses his or her need based government assistance. This can mean that the disabled beneficiary loses his or her health insurance coverage in the form of Medi-Cal. In these cases some people simply disinherit the disabled beneficiary. This is not usually the best course of action, as it gives the disabled beneficiary no security blanket to pay for things not provided through the government assistance. A much better solution is a Special Needs Trust. A Special Needs Trust allows a trusted person to serve as Trustee for the special needs person's trust and to use the funds to provide assistance that is not available through the government.

#### Irresponsible Beneficiary

Often a beneficiary does not have the maturity or discipline to manage his or her inheritance. This could result from compulsiveness or lack of life experiences or maybe the beneficiary has an addiction, such as uncontrolled gambling, drug or alcohol use. In these cases it may be appropriate to appoint a Trustee to manage the inheritance for the beneficiary. The Trustee might have to pay the beneficiary an allowance or may be given authority to make distributions based on his or her discretion. An example of this would be a beneficiary asking for a Ferrari and the Trustee agreeing that the beneficiary could have a Dodge Charger or Ford Mustang instead.

#### Keeping Separate Property Separate

Under most state's laws an inheritance is separate property. However, the beneficiary can commingle the inheritance with his or her spouse and convert the inheritance to joint or community property. A better solution might be to give the inheritance to the child in an Access Trust™, a type of trust developed by Mr. Sandoval. Mr.



Sandoval named the trust an Access Trust™ because the trust assets are titled in the name of a trust, but the beneficiary has control over the assets as Trustee and therefore “access” to the assets. Titling of the inheritance in the name of the trust prevents the assets from being commingled with a spouse. For an unmarried beneficiary who later gets married it could reduce or eliminate the need for a prenuptial agreement. Because the beneficiary has control and access over the trust assets, he or she can invest the assets however he or she desires. He or she can also make withdrawals as desired. Because of the manner in which the Access Trust™ is designed, the trust income is reported on the beneficiary own 1040 income tax return. This eliminates the need for a separate trust tax return to be filed each year. The beneficiary can even terminate the trust any time he or she wishes to do so simply by withdrawing all of the assets from the trust. The Access Trust™ option is the most frequently selected trust distribution option for clients of our law firm. It gives all the benefits of an outright distribution without the negative of potentially commingling the inheritance with the beneficiary’s spouse.

## Funding the Trust

Often we have experienced the disappointment of having to tell a Successor Trustee he or she must be involved in a probate proceeding to get assets that belonged to the decedent into the decedent’s trust. The Successor Trustee is very frustrated because he or she was told by the decedent that the trust avoids the need for a probate.

A trust is like a treasure chest.



When you receive it from the attorney, the treasure chest is empty. The attorney may assist the client in transferring ownership of the client’s residence to the trust. If the attorney transfers title to the residence to the trust, now the treasure chest gets filled. But it remains the responsibility of the client to fill the treasure chest with his or her gold / treasure. The client does this by transferring ownership of his or her assets to the trust. This is a relatively easy process of changing the title to the client’s assets. For instance, a couple might own their assets as Bill and Mary Jones, joint tenants. There, the title would need to be changed to Bill and Mary Jones, Trustees of The Jones Trust dated January 5, 2018. Since the title to the assets is no longer in the name of Bill and Mary individually, there would be no need for a probate at either of their deaths (since the trust that owned the assets doesn’t die). If, however, the survivor of Bill or Mary has assets in his or her name at death, those assets may need to be probated to get them distributed to the beneficiaries that Bill and Mary have designated.

It is vitally important that your attorney provide you with instructions on how to transfer the various types of assets to your trust after you have your estate plan completed!

