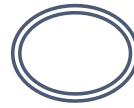


# Estate Planning & Fiduciary Responsibilities



**Presented on April 28, 2023**

*by*

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*for*

**The Sacramento County Law Library**

# About Brian and Teri

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- **Brian D. Wyatt**

- B.A., Economics, *summa cum laude*, UCLA, 1995
- J.D., UC Berkeley School of Law (Boalt Hall), 1999
- Joined California Bar, 1999
- Law Clerk to Hon. Joseph T. Sneed, III (Ninth Circuit), 1999
- Associated at Covington & Burling, LLP (San Francisco), 2000
- Founded Law Office of Brian D. Wyatt, P.C., 2006
- Husband to Jennifer; father to Lily (10); Sophie (8); and Ben (8)

- **Teri L. Jones**

- AA, Paralegal Studies, MTI in 2013
- Joined Brian D. Wyatt, A Professional Corporation in 2013
- BS, Business Management, Global Colorado University, 2015
- Mother to Stacy (24) and Tony (15)

# About Our Office

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- Our focus:
  - Estate Planning (wills and trusts)
  - Probate
  - Trust Administration
  - Special Needs Planning (for people with disabilities)
  - Conservatorships
- Our objective is to help people make a *lifetime* of good decisions for themselves, their loved ones, and their assets.

~~SOME DAY~~ ~~TOMORROW~~ ~~LATER~~  
**NOW** ~~NEXT YEAR~~  
~~NEXT WEEK~~



# What We Will Cover Today

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- The basics.
- What has changed since many did their original planning.
- How a living trust can be properly built.
- The fiduciary duties of a trustee.



# Our “Ground Rules”

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- There will be a question-and-answer period just before we conclude.
  - You can send questions using the Q&A feature.
- We will provide our contact information at the end.

# What is a Living Trust?

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- A legal document similar to a Will.
  - A contract between the person who sets it up (the **grantor**) and the person who manages it (the **trustee**).
  - For the benefit of at least one person (the **beneficiary**).
- A bucket with a set of instructions.



# An Additional Step after Signing...

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- We've got to fill the bucket with the right assets.

- Real estate.



- Bank accounts.



- Investments.



# During the Grantor's Lifetime...

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- It's business as usual.
  - The grantor is in control.
  - The trust is **revocable** and **amendable**.
    - ✦ The grantor doesn't need to make an appointment with his/her lawyer when they buy or sell assets, or open or close accounts.
    - ✦ If the grantor wants to amend the trust, they (and their spouse) need legal capacity.
  - The trust is simply a “standby” device just in case:
    - ✦ The grantor-beneficiary becomes too sick to manage affairs.
    - ✦ The grantor-beneficiary dies.

# When One Grantor Dies with a Trust

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- A grantor-surviving spouse continues to be the trustee and the beneficiary after their spouse's death.
- No worries about probate or conservatorship for the surviving spouse.
- Note: Older Living Trusts should be reviewed.
  - Laws and planning techniques have changed in the past 15 years.
  - Families have also changed.
  - Goal: to ensure things are as simple as possible for the surviving spouse and his/her other loved ones.

# A Will Does Not Protect Like a Trust

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- With only a will, a person's estate may be headed for probate court.
  - Probate is a legal action that an estate files, using the decedent's assets, for the benefit of his/her creditors (whether there are any or not).
    - ✦ It takes more than 16 months in our area.
    - ✦ It costs approximately 5% of the decedent's gross estate. PC §§ 10800 & 10810.
    - ✦ It's public.
    - ✦ It happens whenever a person dies with more than \$184,500 (PC § 13151) in "probatable" assets (gross value). Where there's a Will, there's a probate.
- They may also need a conservatorship.
  - ✦ If a person becomes incapacitated, someone may need to go to court to get control over his/her financial decisions and/or personal welfare.

# What about Joint Tenancy?

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- Joint Tenancy is adding someone to an account or putting them on title to real estate to avoid probate.
- A person takes some risk relying on joint tenancy. It works if the person and their joint tenants die “in the right order.” Otherwise....
  - It can disinherit family members (e.g., grandchildren).
  - It can expose property to claims by a joint tenant’s creditors.
  - It doesn’t allow planning, so people inherit in the right way at the right time.
  - It doesn’t create a legal obligation to use the property for the person or spouse.
  - It can create management problems for future co-owners.
- Transfer on Death deeds can work in some cases, but there are issues with property management, disinheritance, etc.

# When A Trust May Not Make Sense

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- When a person has less than \$188,500 in “probatable” assets (gross value).
- When person expects so much fighting among heirs that they would prefer to have a judge supervise wealth transition.

Note: Even with a living trust, it’s okay to have a small account that the grantor co-owns with a child for convenience.

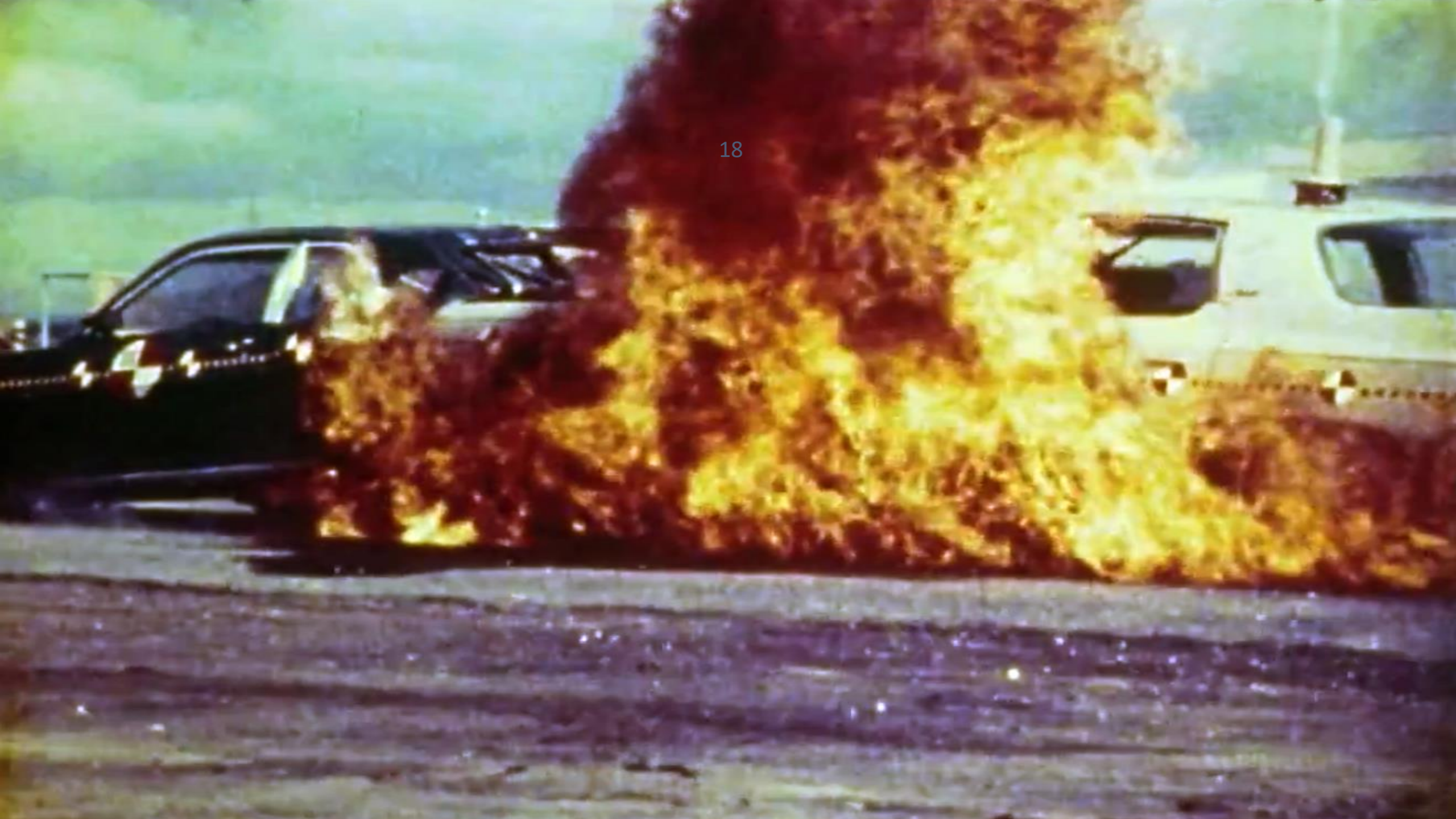
LIVING TRUSTS  
ARE NOT  
ALL THE SAME!

# Think about it...

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- Are all cars the same – the only difference being price?
- Are they all built and maintained in the same way?





# The problem is...

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- When does a person learn whether their plan fits their needs?



# You might be thinking...

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- What could possibly go wrong with a living trust?



# What If the Grantor is Ill or Has Disabilities?

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- Will their trust work properly?
- What are the odds of an issue?



# What the Grantor is Ill or Has Disabilities?

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- While we are in our working years, we are significantly less likely to die than to become disabled. <https://www.lifeinsure.com/disability-facts-and-statistics/>
- Seventy percent (70%) of adults who survive to age 65 develop severe long-term service/support needs. Forty-eight percent (48%) receive some kind of paid care. <https://aspe.hhs.gov/reports/what-lifetime-risk-needing-receiving-long-term-services-supports-0>
- Can the grantor's chosen person(s) immediately step in?
  - The trust should have a clear incapacity standard – e.g., two doctors' letters.
  - Will privacy laws prevent the doctors from writing the letters, which contain individually identifiable health information? 42 U.S. Code § 1320d–6
  - Why won't a simple HIPAA release work?
  - What about California's Confidentiality of Medical Information Act (CMIA) (Cal. Civ. Code § 56 *et seq.*), Cal. Civ. Code § 1798.145(c)(1)(A)?



# What If the Grantor is Ill or Has Disabilities?

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- Does their trust protect the grantor if he/she needs skilled nursing home care someday?
- Can gifts be made to family to qualify for Medi-Cal if necessary? [http://www.canhr.org/factsheets/medi-cal\\_fs/html/fs\\_medcal\\_limits.htm](http://www.canhr.org/factsheets/medi-cal_fs/html/fs_medcal_limits.htm).
- This planning cannot typically be done in an emergency.



# What If the Grantor is Ill or has Disabilities?

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- Sign an Advance Health Care Directive.





# Will a Person's Trust Really Avoid Court?

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- Were *all* probatable assets placed in trust?
- What about assets acquired after signing the trust?
- A “pour-over” will is advisable.
  - The only beneficiary of the will is typically the trust.
  - Assets left out “pour-over” to the trust.
  - But relying on the will stinks.
  - Where there's a will, there's a probate.



# Will a Person's Trust Really Avoid Court?

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- An attorney should transfer all real estate, personal property, and business property to the trust.
- The attorney should also provide instructions for bank and investment accounts.
- If the trust isn't "funded" correctly, one may question whether it was worth the cost.



# Will a Person's Trust Really Avoid Court?

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- What if the terms of the trust are confusing, inconsistent, contradictory, or poorly drafted?
- The trustee may have to ask a judge for instructions. See PC § 17200 et seq.
  - That's expensive.
  - It can lead to fighting over wishes.





# “A-B Planning:” How We Used To Do Things

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After First Death

Survivor's 1/2

Deceased's 1/2

“A” is included  
in survivor's  
estate.

Surviving  
Spouse **can**  
change  
beneficiaries.

“A”

Revocable

“B” uses an  
exemption to  
save death  
taxes.

Surviving  
Spouse **can't**  
change  
beneficiaries.

“B”

Irrevocable

# “A-B Planning:” How We Used To Do Things

31

- Until 2001, the tax exemption was in the hundreds of thousands of dollars. Most trusts divided into an “A” and a “B” trust after one spouse died.
- After 2001, a compromise in Congress steadily increased the tax exemption into the millions of dollars. Fewer people used this “A-B Planning.”
- Under current law, the estate-tax exemption is now **\$12.92 million**. (Subject to change.)
  - The number is indexed for inflation.
  - Most don’t need “A-B Planning” because a person can file an IRS form and “check a box” to keep deceased spouse’s unused exemption. “Portability.”

# “A-B Planning:” How We Used To Do Things

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- In fact, if a trust still includes “A-B Planning,” a surviving spouse may have the following issues:
  - Extra state and federal income-tax returns.
  - Difficulty refinancing a home in the “B” trust.
  - Frustration because they cannot amend the “B” trust for changed circumstances with heirs.
  - Having to hold open accounts in both trusts.
- If property is put in a “B” trust, and if it appreciates before the survivor dies, there may be capital gains taxes when the heirs sell the property after the survivor’s death.

# “A-B Planning:” How We Used To Do Things

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- Is there ever a reason to do “A-B Planning?”
- Yes
  - It can be useful if someone has an estate greater than the exemption (currently \$12.92 million).
  - It can protect part of the estate against the “evil caregiver” and “wicked stepmother” scenarios.
- Often, however, the burdens outweigh the benefits.
- If a person has a trust that hasn’t been reviewed in the last 10 years, now might be a good time.
- Otherwise, a surviving spouse or children could be in for extra taxes and fees, etc.



# The “Flexible A-B” Trust

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After First Death

Everything

“A” is included  
in survivor’s  
estate.

Surviving  
Spouse **can**  
change  
beneficiaries.



Revocable

SP + Up to 1/2 of  
Marital Estate



Irrevocable

“B” uses an  
exemption to  
save death  
taxes.

Surviving  
Spouse **can’t**  
change  
beneficiaries.

# The “Flexible A-B” Trust

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- If the exemption drops, the “A-B Planning” can be used.
- If the law stays the same, there are no extra tax returns, accounting costs, or capital gains taxes.
  - Surviving spouse doesn’t have any additional stress.
  - Things are kept simple.
- Technically, this flexible A-B approach is known as “disclaimer planning.” 26 U.S.C. § 2518; PC § 275, et seq.

# An Important Principle of Estate Planning

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- We leave a lot more cash to our loved ones when we die than we have when we are alive.
- That's because what we own is usually liquidated.

# Will the Grantor's Trust Protect Heirs?

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- The traditional way of distributing property under a trust (or a will) is “outright.”
- The property comes right out of the estate and goes into the hands of the heirs.
- But an “outright” distribution can be less preferable if a beneficiary is:
  - Too young
  - Elderly, ill, or disabled
  - Drug or alcohol addicted
  - Not good at handling money
  - Receiving government assistance

# Will the Grantor's Trust Protect Heirs?

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- What if the grantor has those things covered? An outright distribution can still be less preferable because:
  - A beneficiary's spouse may take in a divorce. But see Fam C. § 770.
  - Creditors (or bankruptcy) can grab it.
  - The government can force it to be spent or paid over to it.
  - A fortune hunter's lawsuit can take it.
  - The government might tax it (again) when children die.
  - It also leaves grandchildren unprotected from these things.

# OUTRIGHT DISTRIBUTIONS

- No matter what: outright distributions may be a missed opportunity even if the beneficiaries can handle everything on their own.

# Instead, Consider an “Inheritance Trust”

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- Each beneficiary controls investment, use, and (often) distribution. PC § 15303
- But doesn't legally “own” the assets.
- This creates legal “walls” for protection.
- For even greater security, the trust may require co-trustee/ distribution trustee or use a Trust Protector.





# Case Study: Outright vs. Inheritance Trust

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# Case Study: Outright vs. Inheritance Trust

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## KYLE'S TRUST



- Greedy Spouse/Divorce
- Business Lawsuits
- Estate Tax Minimized

**BETTER PROTECTED!**

## MARY'S TRUST



- Poor Financial Decisions
- Bully Spouse/Divorce
- Kids' Inheritance Secure

**BETTER PROTECTED!**

## LARRY'S TRUST



- Keeps Gov't Benefits
- Creditors Foiled
- Assets Sheltered

**BETTER PROTECTED!**

# Inheritance Trusts...

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- “Optional Equipment.”
- Might be useful for larger inheritances.
- Or when there are known challenges like Kyle’s, Mary’s, or Larry’s.
- Remember to consider grandchildren’s challenges as well.





# Can A Trust Adapt after Grantor's Death?

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- What happens if the laws affecting trusts change when the grantor is incapacitated or deceased?
- What if there is a beneficiary who is born with (or later develops) a disability? Will what is left cut off their access to medical and other benefits?
- When trusts have issues like this, someone usually has to go to court and convince the judge to make a change. This often requires the consent of all beneficiaries, including unborn heirs. See PC §§ 15400 – 15414.
- It is possible to avoid these problems, but not all trusts do.

# Can A Trust Adapt after Grantor's Death?

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- One strategy is to have a “Trust Protector.”
- A “Trust Protector” is...
  - A neutral third party who can update a trust for changes in the law or to create a special needs trust.
  - Someone who can postpone distributions when there is a crisis.
  - How a trust may adapt.
- The grantor can name one in advance or a court can do it upon petition.





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# Will Your Trust Be Operated Correctly?

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- Grantors may develop an “owner’s manual” with their lawyer including things like...
  - Diagram showing how everything works.
  - Instructions for transferring assets (i.e., fueling the trust).
  - Checklist of things to be done upon death.
  - List of people to contact, important property, and key advisors.
  - Place to store passwords.
- A knowledgeable attorney may also help.
  - Do they have experience with trust administration?
  - Are they focused on trusts/estates?
  - Do they design plans or merely sell documents?



# Choosing An Attorney

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**WARRANT OUT  
FOR YOUR ARREST?**

**I KNOW A GUY  
WHO KNOWS A GUY  
WHO WILL TAKE CARE OF IT.**



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**Saul Goodman**  
ATTORNEY AT LAW

# Recap

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- THE BASICS: A TRUST IS THE PREFERRED VEHICLE FOR MOST PEOPLE.
- LIVING TRUSTS ARE NOT ALL THE SAME.
  - Will the trust work if the grantor is ill or disabled?
  - Will the trust really avoid court?
  - Will the trust be easy for a surviving spouse to live with?
  - Will the trust really protect heirs?
  - Will the trust adapt when the grantor is deceased?
  - Will the trust be properly operated/managed?
  - Will the successor trustee have a place to go for legal help?

# Which comes with a better “driving experience?”

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# Fiduciary Duties: Choosing A Trustee

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- For many people, the biggest obstacle to having a plan that works (after procrastination and lack of knowledge) is choosing a trustee.
- A trustee is a “fiduciary,” meaning they must put their own interests aside and act in the best interests of the beneficiaries. See PC §§ 16000-16015, 16060-16062, 16064, 16068-16069, 16080, & 16200.
  - Must avoid conflicts-of-interest.
  - Must communicate with the beneficiaries.
  - Must protect confidentiality.
  - Must act in “good faith.”



# Fiduciary Duties: Choosing A Trustee

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- What does a trustee do?
  - Uses property for the grantor during life.
  - Distributes property to heirs as required on death.
  - Pays expenses, including taxes.
  - Hires advisors, including CPA, attorney, and investment advisor.
  - Prepares formal accountings for the beneficiaries.
  - Follows the terms of the trust.
    - ✦ Invests per the trust's terms or
    - ✦ As required in the Prudent Investor Act. PC §§ 16045-16054
  - Defends the trust.
  - Can arrange for or even serve as an advocate for a beneficiary with disabilities.



# Fiduciary Duties: Choosing A Trustee

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- Who can serve as trustee?
  - A loved one (with assistance).
  - A friend (with assistance).
  - A bank.
  - A licensed professional fiduciary.
- Should there be co-trustees?
- Most important quality of a trustee: commitment to diligently following the rules of trust administration and the terms of the trust.
- Trustees may be sued for breach. Liability may be limited under PC § 16461.



# All things considered....

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- This planning is a way for the grantor to say “I love you” to the most important people in his/her life for the last time.

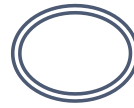
# Contact Information

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# Q&A

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