

PICKING YOUR TRUSTEE IN CALIFORNIA

A Guide for High Net Worth Individuals

Estate planning is about peace of mind, knowing that you have set up a way to smoothly transition your assets to the next generation. With the right trustee, your estate plan has a much better chance of coming off without a hitch. Here are tips on picking someone who will do a good job... from someone who's just about seen it all.

PICKING YOUR TRUSTEE IN CALIFORNIA



About this guide

I've focused exclusively on California estate, gift-planning, and probate law since 1991 and I've just about seen it all: Trustees who can't manage money; trustees who can't meet deadlines; and trustees whose commitment peters out too soon. I've also seen trustees who embezzle funds (and, wouldn't you know it, rationalize the stealing). Whatever the cause, the effects can be dire. Family members become resentful and estranged. Savings built up over a lifetime are poured into avoidable expenses and the estate plan is not realized.


The good news

With the right trustee, your estate plan has a much better chance of coming off without a hitch. In the next few pages I'll outline the "job description" of a trustee in California, and common mistakes to avoid. And at the end is a worksheet to help you with picking someone who will do a good job.

JANET L. BREWER

I've focused exclusively on California estate planning and probate law since 1991. And, for better or worse, I've just about seen it all (see page 6 for some examples).

Janet



WHAT IS A TRUSTEE, *exactly?*

When you have a trust, you need a trustee. That's the person who will make sure that everything stipulated in the trust document actually happens.

A trust doesn't have arms or legs. It can't walk or talk or think. And it certainly can't sign its own forms or write its own letters or pay its own bills.

So while we like to think of a trust as taking care of all your estate planning concerns, it's actually the trustee who has to carry out the orders.

The takeaway: A trustee makes sure that everything stipulated in the trust document actually happens.

HIRING FOR A SPECIFIC JOB

Usually, you are the initial trustee. However, if you become incapacitated or die, someone will need to replace you, even if it's only for a few weeks, while your affairs are being tidied up.

In other words, when you are picking a trustee you are giving that person a job. You want to make sure (s)he understands that there will be work to do, and that (s)he's capable of doing it.

ROLES AND RESPONSIBILITIES

So in this guide we first look at what the trustee has to do. Then we'll get into some options regarding who should do it.

THE JOB: CONFIDENTLY CARRYING OUT YOUR WISHES

Special duty of trust

A trustee is a “fiduciary” of the estate and the beneficiaries of the trust. That means they have a special duty of trust and responsibility. The trustee must always act with the best interests of the estate and beneficiaries in mind, and must not intentionally do anything or make any decisions that could harm them.

The trustee also has to follow the probate code and must communicate honestly and openly with the beneficiaries, gather all property of the estate, and prepare an accounting of all property that passes through the estate.

It's all in the details

Your trustee may need to gather information, sell some assets, or pay some bills. The trustee needs to know where to find the information (s)he will need to get the job done. We're talking about details here: where to find the checkbook, where to find your previous years' tax returns for comparison and so forth.

Further, if your estate is taxable – that is, if it's worth more than \$3.5 million (or whatever the “estate tax exemption amount” is when the time comes) – (s)he'll need to prepare an estate tax return, file it, and pay the taxes owed.

The takeaway: The trustee needs to know where to find the information she will need to get the job done. We're talking about details here... like where to find the checkbook!

Real time commitment

Gradual disbursement and other considerations

If you have young heirs, or heirs who may not handle money well, you may want your trust to disburse the money gradually. In that case, you will need a trustee who is willing to stay in it for the long haul. Even in a fairly well organized estate, the trustee usually needs to spend a few hours with a lawyer getting details squared away. Otherwise, they'll spend even more hours with a lawyer straightening out the messes they've created by being "penny wise and pound foolish."

It's also important to think about successor trustees. That's someone who can take over in the event that the original trustee dies or resigns.

What could go wrong?

The first five letters in the word "trustee" are T-R-U-S-T. That's the most important characteristic. Most people assume that the person they have named as their trustee is honest and would never take advantage of the position of trust they've been placed in. Unfortunately, in some cases it isn't true. Trustees don't always grasp the idea that they have a legal responsibility to act honestly and impartially on behalf of the estate's beneficiaries. Or worse, they sometimes don't care.

A bad trustee might embezzle, delay asset distribution, fail to account for assets, or otherwise mismanage the estate. A local probate court judge recently stated that many of the cases he's hearing these days deal with dishonest executors and trustees.

The takeaway: A bad trustee might embezzle, unnecessarily delay asset distribution, fail to account for assets, or otherwise mismanage the estate.

REAL WORLD EXAMPLES

The takeaway: A trustee's standard of conduct needs to be higher than "who would know?"

EXAMPLE 1

Recently, the trustee of a California trust – a trust that was large enough to cover all of the estate's expenses and have a lot left over – asked me a question. This trustee was also one of the two trust beneficiaries. He wanted to get some money fast. Could he just take some, maybe as a loan? "Who would know?" he asked.

Is that the kind of person you want as trustee, someone who's standard of conduct is "who would know"?

EXAMPLE 2

I know of one case where "Dad" had three children and left one son as trustee of the trust. Sonny was supposed to manage the trust on behalf of himself, his brother and his sister. The siblings soon realized that the trustee was not revealing many relevant facts to them in a timely fashion. The siblings never saw a copy of their father's trust.

They knew he had a home, bank accounts, mutual funds, and brokerage accounts, but the only funds they received were from the sale of their father's home and the sale did not bring in much money because their brother – the trustee – had failed to pay the mortgage for months.

THE BURDEN OF CHOICE

The only legal requirement in California for a person to be a trustee is that she or he is at least 18 years old and “of sound mind.” The Trustee must also be a U.S. citizen to avoid adverse tax consequences.

Common mistakes

Sometimes people feel obligated to name their oldest child as trustee, regardless of the child’s ability to perform the task. I’ve actually had people tell me they don’t really trust the person they’re thinking of naming because (s)he has had serious drug or mental problems in the past, or because the person is “terrible at managing money.” Still other people take drastic actions like naming all of their children as trustees so no one feels left out.

Those are not good approaches. Picking a trustee isn’t about making people feel good. It’s about finding the best person for the job. Now, it might be that your eldest child would be great at doing the job. If not, however, you have other options.

Naming a beneficiary as Trustee

The trustee can even be one of the beneficiaries. On that score, however, there’s a technical issue to consider: If the trustee has the ability to exercise what the IRS considers unfettered discretion in spending trust funds (including the right to spend them on himself for his own “comfort and welfare”, or to use the funds to discharge his own legal obligations), then the beneficiary should not act as trustee. That is something you should discuss with the attorney who is drafting the trust.

The takeaway: If “trust” is the foundation for picking a trustee, “cooperation” is the watchword when picking co-trustees.

Multiple trustees

Occasionally, it makes some sense to name multiple trustees.

For example, naming co-trustees may be the right route when assets will go to a young adult. The young heir could be one trustee, and an older, wiser, adult could be the co-trustee. If “trust” is the foundation for picking a trustee, “cooperation” is the watchword when picking co-trustees.

The local probate judge I mentioned earlier says that one “hotbed” of estate litigation deals with co-trustees who cannot get along and cannot agree on anything.

Professional trustees know the job

Sometimes a professional trustee is best. A lot of people don’t like that idea because it costs money. But so does fire insurance.

Hiring a professional also reduces the likelihood of drama and chaos if family relationships break down after the client’s death. After all, it’s better for the family to be united against the professional trustee than to be at odds with one another.

Bank trust departments are more than happy to help. There are also trust companies which specialize in acting as executor or trustee. Or you name a licensed “private professional fiduciary” – a person licensed by the California Department of Consumer Affairs.

The takeaway: Hiring a professional reduces the likelihood of chaos if family relationships break down after the client’s death.

California requires “non-family member” trustees who manage five or more trusts to take a test and to be licensed and bonded. For long-term administration, having an independent trustee also provides some protection for beneficiaries against being duped by hustlers and con artists. I am recommending to more and more of my clients that they “bite the bullet” and hire professional trustees to administer their trusts when they are unable to manage it themselves.



Time to think

Whatever choice you make, take time to think it through. That's where an estate planning attorney can be a big help.

CREATING A "JOB DESCRIPTION"

As you discuss your goals and concerns with your attorney, make sure to talk about the personalities of heirs, friends, and others who might serve as successor trustees. Your attorney can explain in detail the kind of job you are creating for the trustee, and the skills that will be needed to get the job done properly.

THE GOAL: PEACE OF MIND

Estate planning is about more than just money. It's about peace of mind, knowing that you have set up a way to smoothly transition your assets to the next generation. With the right trustee, your estate plan has a much better chance of coming off without a hitch.

The takeaway: Estate planning is about peace of mind, knowing that you have set up a way to smoothly transition your assets to the next generation.

ABOUT THE PROBATE PROCESS IN CALIFORNIA

**You may have heard probate horror stories.
You don't have to be one of them, if you
take the time to plan your estate.**

How an estate is probated

Even if you've planned your estate, let's look at how an estate is probated in California, in case you're faced with a relative who hasn't done his/her planning.

In California the probate process begins in the Probate Court of each county. California law requires that the decedent's Will be filed with the Probate Court Clerk in the county where the decedent resided. The Will must be filed within 30 days after death even if there won't be a probate (for example, because all of the assets were transferred to a living trust or because there were insufficient assets to require a probate).

The takeaway: You may have heard probate horror stories. You don't have to be one of them, if you take the time to plan your estate.

Filing a *Petition to Probate the estate*

If there are no assets to probate (for example, because all of the assets were held in a living trust or because the entire estate is worth less than about \$160,000 adjusted for inflation), there's no need for a formal court process. But if there are assets worth more than \$160,000 that are subject to probate, then the next step is to file a "Petition to Probate Decedent's Estate". The Petition is filed on a Court-mandated form and the Petitioner (the person who is filing the Petition) is required to fill in certain specific information.

For example, the Petitioner must indicate if (s)he is asking to be appointed as the Personal Representative or nominating the person to be appointed (and if so, the name of that person). The Petition asks for a rough "guesstimate" of the value of the assets being probated. It asks for the names and addresses of all of the individuals who are named in the Decedent's Will (if (s)he had one) and also the names and addresses of all people who are legally entitled to inherit from the Decedent under the laws of intestate succession (whether they are named in the will or not).

Filing a Notice of Petition with the court

At the same time that the Petition is filed with the County Probate Court, a Notice of Petition is prepared and sent to each person whose name and address was listed in the Petition. A copy of the Notice is also published in a local newspaper. The Court schedules a hearing date for the Petition and collects a Filing Fee (in 2010 the filing fee is \$355).

Getting a hearing date

The Probate Code states that the Petition for Probate is to be heard not less than 30 days nor more than 45 days after the date on which the Petition is filed. As a practical matter in the larger California counties it is not unusual to have a hearing date scheduled 60 or 75 days after the filing date.

Completing all the steps requires endurance

The steps described in this section are just the beginning of the probate process. There are many more steps, such as:

- Notifying creditors
- Dealing with creditors' claims
- Preparing an inventory of the decedent's assets, and
- Getting those assets appraised... and much more.

Again, these are just some of the things required to get started with the probate process.

Please call us at (650) 325-8276 if you need help with probating an estate.

REFLECTING ON GOALS & PRIORITIES

Getting started

I invite you to bring this worksheet in and visit at my office at 4 Main St, Suite 20, in Los Altos.

In most cases, a \$75 fee is charged for the initial consultation. Call us at (650) 325-8276 to talk with our intake specialist about whether our law office is a good fit for your needs.

Thinking through these questions will help you prepare for effective estate planning. I invite you to bring this worksheet in and visit at my Los Altos office.

What is truly important to me?

Who should care for my minor children? Does that person share my “family values”? How well can (s)he handle my children’s money?

How much money is “enough” to leave to my family?

Am I concerned about maximizing the amount my heirs will receive?

How do I pass my values along to my family?

What do I want my life to stand for with respect to my financial legacy?

Do I want to leave a charitable legacy?

Do my children have the ability to manage inherited wealth?

Would I prefer paying estate taxes or contributing that same amount to charitable causes I believe in?

Anything else?

ABOUT JANET BREWER



Focused on estate planning, gift planning and probate law since 1991

Janet Brewer has practiced California estate, gift planning, and probate law exclusively since 1991. She is a California certified estate planning and probate specialist – one of fewer than 200 practicing in Santa Clara County and fewer than 2,000 practicing in California (out of almost 200,000 lawyers statewide).

Advanced tax strategies for high net worth estates

Ms. Brewer specializes in preparing wills and revocable living trusts, administering estates and trusts, probating estates, forming family limited partnerships and limited liability companies, and establishing a wide variety of tax-sensitive trusts – including children's trusts, charitable trusts, and irrevocable life insurance trusts. She also prepares estate tax returns for decedents whose estates have more than \$5,000,000 of assets.

CREDENTIALS

Certified Specialist in Estate Planning and Probate Law

California State Bar Board of
Legal Specialization

LLM – Tax

Masters of Laws in Taxation,
Golden Gate University

MBA

MBA, Golden Gate University

JD

JD, University of Denver Law

California State Bar

Member, State Bar of California

Colorado Bar

Member, Colorado Bar Association

ABOUT JANET BREWER



Experience

Janet has served as an Instructor in the CFP (certified financial planner) program at UC – Santa Cruz and has taught estate planning for the UCSC Certified Financial Planner certificate program.

In September 2009, the California State Bar Board of Governors selected her to serve a 3-year term as a member of the Executive Committee of the Solo and Small Firms Section of the State Bar. She was also elected to serve as a member of the Board of Trustees from 2014 - 2017.

Janet is also a member of STEP (the Society of Trust and Estate Practitioners), an invitation-only group of estate planning professionals who have special expertise in the area of international estate planning. She frequently prepares estate plans for foreign nationals who own property or live in the United States and for US citizens who own property abroad.

Prior to founding her estate-planning practice, Janet worked as a corporate attorney for a number of firms, including Corvus Systems, Hewlett-Packard, Hills Bros. Coffee, and Telebit Corporation.

She received her law degree from the University of Denver Law School and was admitted to the California Bar. She earned her MBA degree from Golden Gate University and received her Masters of Laws degree in Taxation (LLM - Tax) at GGU Law School in the summer of 2010.

HONORS & AWARDS

Avvo Rating: 10.0/10 - Superb

California State Bar Executive Committee, Solo and Small Firm Section

Society of Trust and Estate Practitioners

Northern California SuperLawyers since 2007

Founding Member, Wealth Counsel

Getting started

We can set up documentation, write any complex agreements, and take other steps to help protect you. But you need to take the first step: contacting us.

Protect your assets and your loved ones by examining your options now. Call (650) 325-8276 or [get started at our website](#).



CONTACT US

Law Office of Janet L. Brewer

4 Main Street, Suite 20, Los Altos, CA 94306-1606

Call (650) 325-8276 | www.calprobate.com

Specializing in serving clients with assets in Palo Alto, Atherton, Portola Valley, Woodside, Los Altos, Mountain View, Sunnyvale, Menlo Park, Redwood City, Belmont, San Carlos, San Mateo, Burlingame, Santa Clara, Cupertino, Saratoga, Los Gatos, Campbell, San Jose, Santa Clara County, San Mateo County, Alameda County, San Francisco County, Santa Cruz County, or Silicon Valley.

Circular 230 Disclosure: Unless otherwise expressly indicated, any federal tax advice contained in this communication, including attachments and disclosures, is not intended or written to be used, and may not be used for the purpose of (i) avoiding tax-related penalties under the Internal Revenue Code or (ii) promoting, marketing, or recommending to another party any tax-related matters addressed herein.