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When Your Parent Or Spouse Passes Away: 10 First Steps For Successor Trustees And Executors

If you are reading this because you have just lost somebody you love, let me first tell you that I am terribly sorry for your loss. This must be an unspeakably difficult time for you.

The question I get from a lot of people in your shoes is – "now what?" This article contains critical information and immediate first steps to take.

There are several stages to administering a trust or estate. Please be aware that the very last stage is asset distribution. You may have beneficiaries or heirs demanding their share of the trust or estate right now. But, until you have worked through the administration, it is not advisable to make distributions.

Stage One: If there is a trust or will, review it. If the trust is a joint trust between spouses, and it splits upon the death of the first spouse, contact counsel. As discussed below, this is a complicated administration and requires more than simply transferring assets to the surviving spouse.

Stage Two: Gather information and documents as to assets and debts of the estate and trust. Create a list of assets and debts in a spreadsheet.

Stage Three: Transfer assets to yourself as personal representative. This may require a probate procedure. Or, you may be able to use a non-probate vehicle to transfer the assets. This depends on the value of the estate, discussed in more detail below.

Stage Four: Pay creditors. Determining which creditors should be paid is an issue in and of itself.

Accounting: It is likely advisable for you to prepare an accounting, which is a document that shows all the activities conducted on behalf of a trust or estate.

Stage Five: Only after creditors have been paid should you make distributions. You may seek waivers of liability at this stage, but you cannot condition distributions based on waiver of liability.

Tax Returns: These have different deadlines so they are not a distinct phase, but something you should be preparing for all along. Prepare tax filings for the estate/trust/individual. You will need to file a Form 1040 for the deceased person for income earned in the year of death. You also may need to file Form 706 for trust/estate; and Form 1041 for any income earned by the trust/estate. There are also corresponding California tax returns.

Schedule a free consultation. As discussed throughout this piece, as a trust or estate representative you have duties and obligations to many individuals and entities. You want to do the right thing. Navigating an administration is not easy. I have re-written this piece multiple times because there are so many steps to take in administering a trust or estate. And, they do not necessarily follow a formula. Each administration is unique. You do not need to go it alone – reach out today for a complimentary consultation.

Be aware that as a personal representative you are like the president of a company. You are now the one in charge. Be aware from the first day that the potential pain sources on this journey are: 1) trust beneficiaries; 2) heirs; 3) the IRS; and 4) account custodians. These first three are sources of potential liability, and possibly *personal* liability. The fourth category – account custodians – can be a source of frustration! Account custodians do not always know the law, but nonetheless may feel quite confident in applying what they think is the law, and creating roadblocks, preventing you from accessing the assets.

Having counsel representing you as successor trustee or executor can be extremely helpful to help you avoid liability and remove roadblocks. As discussed below, I highly encourage successor trustees and executors to hire counsel to guide them through this process.

Here are some first steps to take once you have taken on the role of successor trustee or executor.

1) **File the will**. Whether a probate petition is required or not, the executor must file an original copy of the will with the court's probate office within 30 days. Should an executor not do so, they will be liable for any resulting damages.

2) **Notify trust beneficiaries and heirs**. If the deceased person had an inter vivos trust, the successor trustee likely has an obligation under Probate Code 16061.7 to alert trust beneficiaries and heirs that the person has passed away. My successor trustee clients are often surprised that heirs need to be notified. "Heirs" are beneficiaries at law or family members who are related to the deceased person. Sometimes, that can include estranged sisters, brothers, and even wives and husbands – people whom the deceased person would never leave assets to. But, that is how the law works.

Moreover, proper notice under 1061.7 is a method to prevent the heirs and beneficiaries from later contesting the estate plan. The purpose of the notice is to alert heirs and beneficiaries that the deceased person has died, and that they are entitled to a copy of the trust upon request, or included with the notice. They then have a certain amount of time to contest the trust. If they do not, then, they miss their chance to contest it. The law wants beneficiaries *and* heirs to have the opportunity to review the trust in case questions surrounding the validity of the trust arise.

The beneficiaries and heirs have 120 days from the date the notice is served, or 60 days from the date on which a copy of the trust document is delivered, whatever is later. So, should an heir contest the trust on day 61 after being served with the trust document, they are barred from doing so.

The notice has specific requirements set forth by the Probate Code. If the representative does not follow these requirements, then notice has *not* been served under the law. There are also safeguards you can make to make your notice extra effective – to ensure that the notice is properly served.

There is also a deadline. You are required to serve this notice within 60 days of the death of the deceased person, or other event by which the trust becomes revocable. Should a representative not serve the notice they may be personally responsible for any damages.

3) **Get an Employer Identification Number (EIN) from the IRS**. No – you are not employing anyone. This is just the language that the IRS uses to

describe a trust or estate entity. You will frequently need the EIN, including for the next step – opening a bank account. The EIN establishes that the trust or estate is an entity separate from you as an individual.

4) **Create a bank account for the estate or trust administration**. Just like a president of a business will not commingle personal funds and company funds (or should not), you need to keep your personal assets separate from the assets of a trust or estate. This concept also applies should you be administering a trust that has split (see below discussion of trusts that split upon the death of the first spouse to die in a joint trust).

5) **Order multiple copies of certified death certificates**. Sometimes, a funeral home will order death certificates for you. Every account custodian is going to request a certified copy of the deceased person's death certificate. You will not get anywhere without one for each. See roadblocks discussion above. So, take account of how many bank accounts, investment accounts, life insurance policies, and the like the deceased person owned. Order a certified copy for each and some extra while you are at it. Ordinarily, it takes a few days to weeks for the county or city agency to turn these requests around; however, during the current pandemic it is taking much longer. Save yourself some time and order more than you think you need.

6) **Notify the following that the deceased person has died**:

- Social Security Administration
- Life Insurance Companies
- Banks and other financial institutions.
- Financial advisors, and stockbrokers.
- Credit agencies

7) **Collect mail**. One of your duties is to gather and protect the trust/estate assets. Many people do not disclose to their friends or loved ones every asset they own, or every credit card balance. So, you will in part be playing detective here. The mail will include some important hints as to the financial universe of the deceased person. The same can be said of digital assets, discussed below.

8) **Secure digital assets**. A digital asset in an electronic asset that is associated with the right to use, usually in the form of a username and password. Given their medium, digital assets are slightly different than most assets. They are highly regulated by state and federal law. Without proper planning, those regulations can cause problems when it comes time to administer an estate. Common examples of digital assets include:

• Social media: Facebook, Twitter
• Digital photos, images and videos (such as the photos stored on your iCloud account)
• Email: Gmail and Yahoo
• Bank accounts and other financial accounts
• Airline miles

Less common but still run-of-the mill for many of us who have our own businesses, include certain income-generating digital assets:

• Monetized YouTube channel, blog
• Social media influencer accounts
• Income generating blogs
• Intellectual property (patents, copyrights, trademarks)
• Domain name and websites

Hopefully, you can easily access the computer and/or smart devices to access these assets. If not, it is time to call counsel.

9) **Secure all property including home furnishings**. This is one of the more often overlooked obligations of a successor trustee or executor. Often the trust, or probate court, will require the personal representative to distribute the property in shares. This requires that all of the property be gathered, and their values accessed.

An important part of that is ensuring that the assets are not taken by relatives. Sometimes, after a death, a relative will take it upon themselves to simply take whatever they want. As the personal representative, you

are responsible for keeping that property safe and telling the relative that they will receive their share but that you have a duty to secure the property until it is time to distribute it. It is not advisable to distribute assets with monetary value until after you have determined the debts of the estate/trust, and determined what shares are owed to whom. Distribution is one of the last phases of estate/trust administration.

Moreover, securing the property may require that the property be stored in a secured, storage facility. Keeping property in an unsecure space such as a garage may not be sufficient.

10) **Consult with counsel**. At a minimum you will want to at least have a consultation with an attorney who handles probate and trust administration. I offer free consultations. You can sign up for that here: https://calendly.com/lawyercma/20-minute-meeting-estate-planning.

There is a lot to think about when it comes to administering the assets of your loved ones. Even if the estate is on the small end, you will still need to take affirmative steps – whether those steps involve court is a separate matter. Property held in an estate or a trust does not transfer to beneficiaries without action.

There are other situations that really beg the use of an attorney. First, if the trust splits into two shares upon the death of the first spouse to die. When a trust splits, you must act immediately to administer the trust. If you do not you may miss the opportunity for tax saving measures. For example, the trust may split into an optional disclaimer trust. This is a trust in which the surviving spouse has the opportunity to say, "no thanks!" to certain assets should it be wise to do so. Should the trust property inch toward the IRS's threshold value, the surviving spouse may wish to use the disclaimer trust to avoid a later tax bill.

Or, the trust instrument may require the creation of separate subtrusts. You may have heard of the term "AB" or "ABC" trust or "bypass trust" or "marital deduction" trust or "QTIP" trust. If you scan through the trust instrument and see the use of any of these types of trust, call counsel. You will certainly need help to divide up the trust assets. This is not something I suggest you do on your own.

Another instance in which you should call counsel is when you are aware that an heir or beneficiary will object, or has objected, to the trust, or you are estranged from him or her and anticipate, or have already experienced, trouble. You must always be mindful of your duties to the heirs/ beneficiaries; however, if there is an heir or beneficiary who might cause trouble, you really want legal counsel to ensure that you are following the right path. I have fixed issues with bright, and well-meaning successor trustees. It happens… often!

You also want to call counsel if the trust or estate is insolvent. You may need some assistance with paying creditors.

You may not need to hire counsel to oversee the entire administration. There may be some tasks that counsel may be aware of that you are not. Or, there may be some steps to take that you have not thought of. Counsel is here to help with that.

Best of luck in your administration journey.

If you would like to schedule a free consultation with this office, please click here.