



WHEN EXECUTORS AND TRUSTEES GO WRONG

A White Paper Presented By





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A parent or other person seeking to leave an inheritance depends on an executor or trustee to carry out that vision. Those selected – usually family members – take on a job that requires faithfully carrying out many tasks and treating all beneficiaries of an estate or trust fairly.

This is a big job and a lot can go wrong. What factors affect whether an appointment of an executor or trustee will be likely to work out? And what happens when sibling rivalries or other dysfunctional dynamics result in theft or wrongdoing by an executor or trustee?

In this white paper, we will discuss who to appoint and not to appoint as an executor or trustee. We will also explain what can be done to prevent wrongdoing or mistakes by the person or people who are chosen and what remedies are available if such things do occur.



USING ESTATE ADMINISTRATION OR TRUSTS

Estate Administration

If someone doesn't have a will, his or her final financial affairs will be handled by an administrator appointed by the court. The court also appoints an administrator when a will does not nominate someone to act.

If there is a will that designates a person to act, called an executor, and there are no disputes regarding its validity, the court will typically appoint that person as executor. The personal representative¹ will then carry out the steps of a court-supervised process of probate and estate administration.



Trusts

For many Californians, however, a common choice is to have property pass not by will, but by living trust.² Using a trust enables property to be transferred without going through court supervision.

In practice, living trusts often take the place of a will as the primary estate planning document that governs the distribution of a decedent's assets.³ But a trust is usually executed concurrently with a "pour-over" will, which names the decedent's trust as the sole beneficiary of the decedent's estate and therefore can be used as a means to bring a decedent's nontrust assets into the decedent's trust.

Trusts are also often used in families where someone has special needs or addiction issues or is unable to make financial decisions for themselves. These "special needs trusts" allow a beneficiary to continue to qualify for public benefits (most of which have strict income and asset thresholds), which may otherwise be unavailable had the beneficiary received a lump-sum distribution. A living trust may also avoid the need for a formal conservatorship or guardianship court proceeding, where a court-appointed conservator or guardian would be appointed to manage the decedent's assets if he or she were to become incompetent.

¹ The term "personal representative" refers to an administrator or an executor appointed by the court.

² The State Bar of California, "[Do I Need a Living Trust?](#)"

³ "[Why setting up a living trust may be wise, especially in California.](#)" Los Angeles Times (Liz Weston), 1-7-2018



CHOOSING AN EXECUTOR OR TRUSTEE

Effective estate planning therefore involves choosing a fiduciary⁴ who is honest, organized and available. Given the demands of the role, finding the right person is an important choice. And while choosing a trustee or executor is, of course, a personal decision, several common factors can help identify the right fit for someone's circumstances.

THE AARP OFFERS SEVERAL TIPS.⁵ THESE INCLUDE:

Seek Organizational Skills And Good Judgment – Look for someone with good judgment, common sense and the ability to stay organized while taking care of many detailed tasks. This means being focused, comfortable with paperwork and willing to enlist others' help when needed.

Think Carefully About Whether To Have Co-Trustees Or Co-Executors – When more than one person is named, co-fiduciaries can support each other in tackling tough decisions and provide checks and balances on each other. But naming more than one person also opens up the possibility of conflict if the people who have been appointed don't agree and can create gridlock in the administration of the trust or estate, as decisions often cannot be made unless they are unanimous.

Beware Of Naming All The Children Equally – Naming all the children equally as co-executors or co-trustees may be a recipe for disagreement and endless argument about who gets what, especially if the will or trust isn't clear. Naming only one child, by contrast, gives a lot of authority to that child, which might lead to resentment by the others.

Know The Role Corporate Or Professional Fiduciaries Can Play – Naming a bank or professional fiduciary firm as trustee or executor can be expensive and seem impersonal compared with a family member taking on the role. But if there are serious tensions between siblings or if no one in the family is willing to serve, using a corporate or professional trustee may make sense.

In short, several factors must be considered when choosing an executor or trustee. The person chosen needs to be trustworthy and willing, with the right temperament and skills for the job.

⁴ The term “fiduciary” refers to several relationships in which a person undertakes certain duties to act in good faith toward another. In the context of probate, this can include personal representatives, trustees, conservators and guardians.

⁵ F.M. Filisko, [“Choose the Right Executor or Trustee.”](#) AARP



MORE ON THE ROLE OF PROFESSIONAL FIDUCIARIES

Banks aren't the only options for fiduciaries. California has a group of individual private professional fiduciaries who are certified by the secretary of state to act in that role.⁶

These people tend to charge rates that are lower than financial institutions. They generally focus on small to midlevel estates that banks normally wouldn't handle.

In contested probate cases, these certified professionals are often proposed by the parties and/or appointed by the court to act as neutral fiduciaries while the beneficiaries of the estate litigate their interests.

⁶ [Professional Fiduciaries Act](#), California Department of Consumer Affairs



FAMILY DYNAMICS AS A CAUSE OF CONFLICT

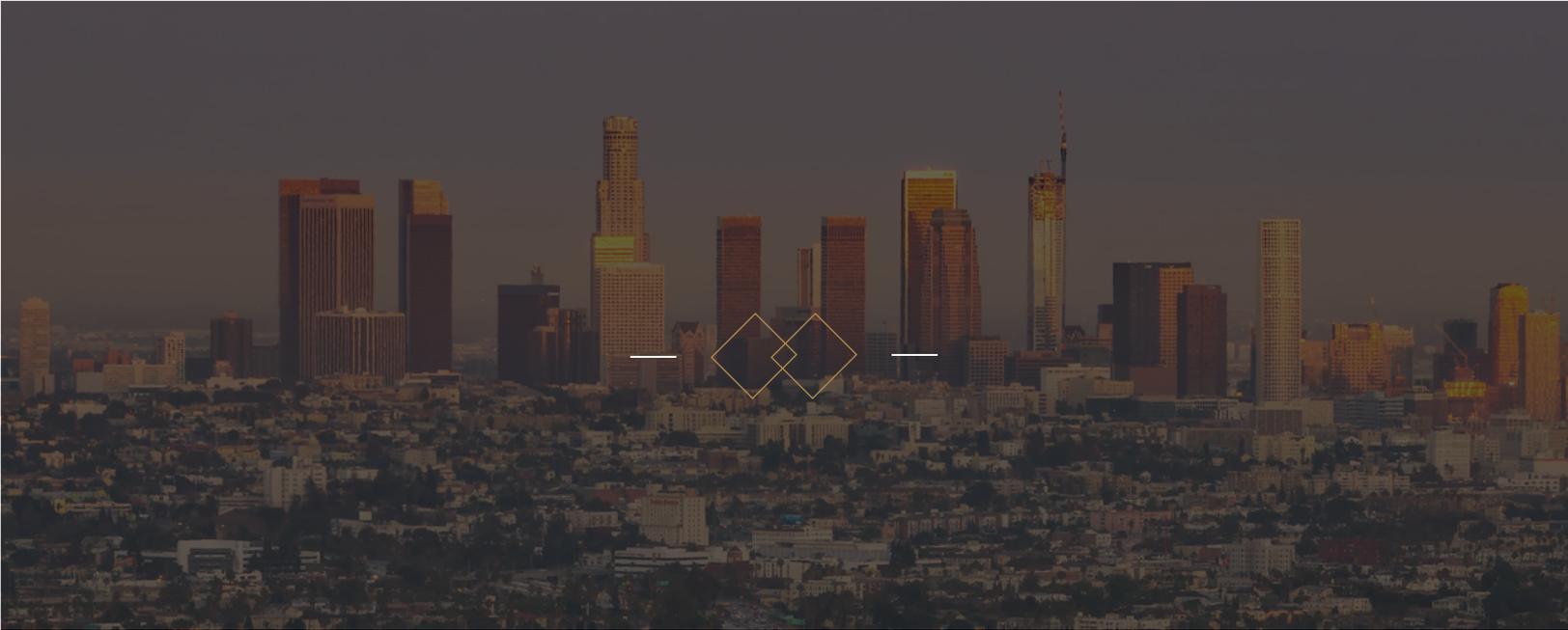
Most often, however, the people chosen as executors or trustees are family members, not corporate or professional fiduciaries. The most common scenario is a parent appointing a child. The potential for resentment and rivalries among siblings and other relatives in this emotionally charged family crucible can lead to theft, misuse of assets and other wrongdoing.

For example, adult children who become very involved in a parent's care may think they are entitled to a greater share of the parent's assets than their siblings. If an adult child (or his or her spouse) exerted undue pressure on a parent to change a will or trust (especially if that parent suffered from diminished mental capacity at the time),⁷ the validity of the will or trust itself may be called into question.

When such a sibling is appointed as an executor or trustee, he or she may feel a sense of entitlement to get more from the estate than other siblings – even if the trust or will divides the property evenly among all the children.

To be sure, not all wrongdoing by trustees or executors can be prevented. But carefully considering family dynamics when choosing an executor or trustee is critical. It can help minimize the possibility that a family member will fail to act evenhandedly in carrying out the required duties.

⁷ ["How a Will Treating Children Differently Can Still Be Fair."](#) The New York Times (Paul Sullivan),



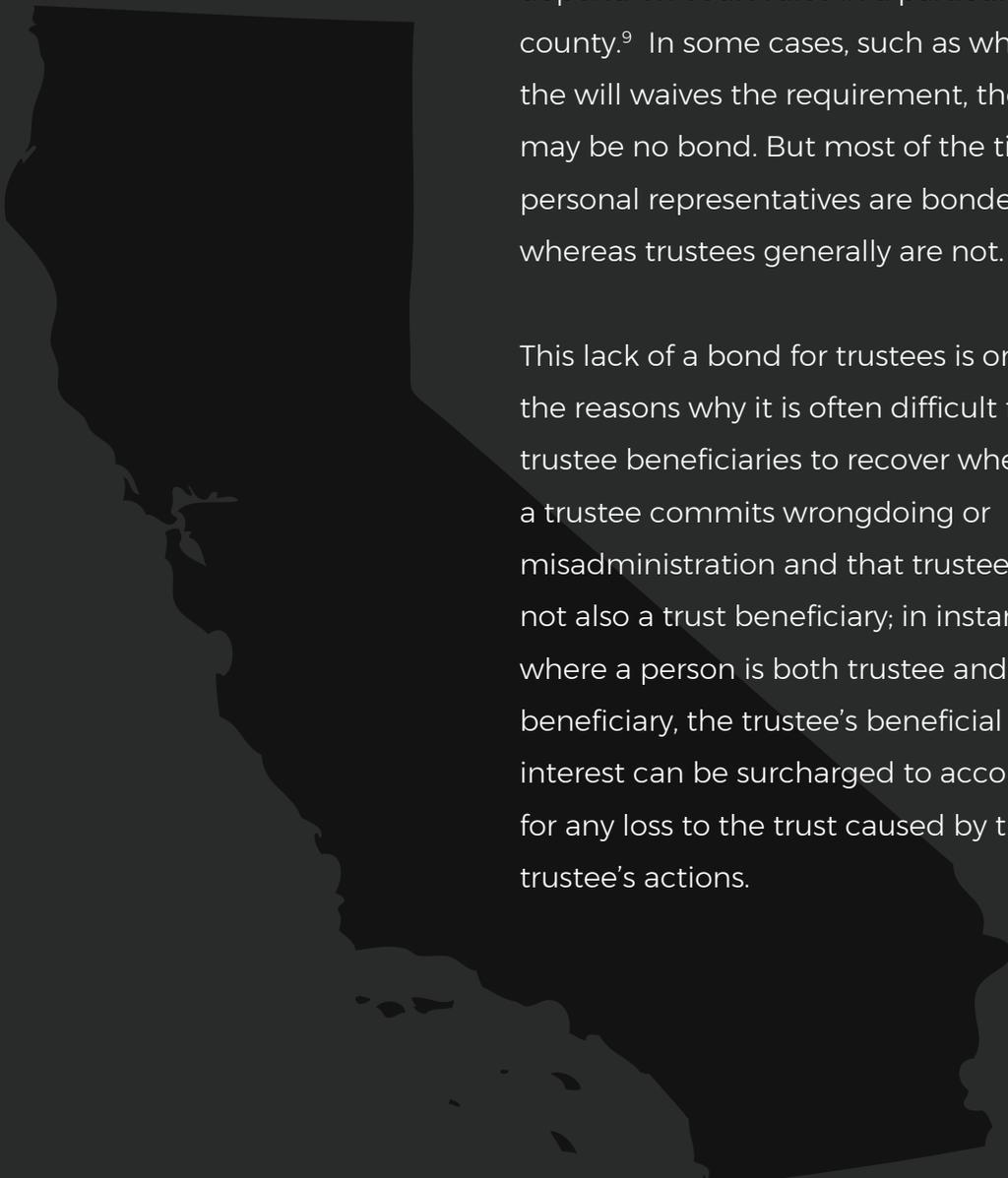
DUTIES OF A TRUSTEE OR EXECUTOR

Like every other state, California has specific rules and timetables for executors and trustees to follow,⁸ such as filing estate tax returns or notifying creditors and beneficiaries.

Taking on such a role is a significant commitment. It comes with substantial responsibilities to manage property well and distribute it in accordance with the terms of the will, trust or intestacy laws.

For personal representatives, these duties are carried out under court supervision and usually begin with being bonded. This bond is essentially like an insurance policy, to protect beneficiaries and creditors in the event that the personal representative fails to fulfill the duties of the role, either through ignorance or outright intentional misconduct.

⁸ [“Things to Know About Being an Executor of Estate.”](#) AARP Bulletin (Carole Fleck)



California Rules

In California, the exact requirements of a bond for personal representatives depend on court rules in a particular county.⁹ In some cases, such as when the will waives the requirement, there may be no bond. But most of the time, personal representatives are bonded, whereas trustees generally are not.

This lack of a bond for trustees is one of the reasons why it is often difficult for trustee beneficiaries to recover when a trustee commits wrongdoing or misadministration and that trustee is not also a trust beneficiary; in instances where a person is both trustee and beneficiary, the trustee's beneficial interest can be surcharged to account for any loss to the trust caused by the trustee's actions.

⁹ ["Preparing the Petition for Probate,"](#) The Superior Court of California, County of Santa Clara



COMMON TYPES OF WRONGDOING

Once someone has been appointed as executor or trustee, what types of breach of duty can occur?

Stealing from an estate or trust, through embezzlement, fraud or outright theft, is a glaring example of wrongdoing by a fiduciary. For example, a trustee may sell a piece of property without even telling the beneficiaries about it, pocket the proceeds and disappear.

But there are also many less dramatic ways in which trustees and executors breach their duties. These include favoring one beneficiary over another and various types of self-dealing, such as buying assets at a cut-rate price for themselves or other family members.





Common Examples Of Wrongdoing Include:

Refusing to distribute assets

Fiduciaries sometimes fail to distribute assets to the beneficiaries in a timely manner. If this involves a refusal to sell a house and distribute the proceeds, it may be because the fiduciary or a relative of the fiduciary is living in the house without paying fair rental value to the estate.

Wrongful expenditures and fiduciary fees

Expending estate cash on things unrelated to the administration of the estate or trust is a breach of duty. These issues often come to light in the context of a trustee/administrator's accounting to the beneficiaries (in the case of a trust) or to the court (in the case of an estate). Trustees are usually entitled to compensation for their work (pursuant to the terms of the trust), but it has to be reasonably related to their skill set and experience. Personal representatives are paid a statutory fee at the close of estate administration based on the gross value of the estate and may be entitled to additional "extraordinary fees" if the estate administration involved litigation, estate tax returns or the sale of real property.

Common Examples Of Wrongdoing (Continued)

Abuse of power

Executors and trustees often misuse their power to make things unnecessarily difficult for beneficiaries – e.g., favoring one beneficiary over the others or refusing to respond to a beneficiary’s reasonable requests for information. In many cases, this may stem from longstanding animosities within the family, but that certainly does not justify an abuse of power.

Gross incompetence in the role of executor or trustee can also be a breach of fiduciary duty. For example, failing to pay taxes for the estate and running up hefty tax fines from revenue agencies would be a breach of duty. Wrongdoing, however, is a much more common problem than incompetence.





LEGAL CHALLENGES TO WRONGDOING BY EXECUTORS OR TRUSTEES

Because personal representatives are supervised by the court, wrongdoing is less common than compared with trusts.

With trusts, however, there is generally no court supervision, making it all too tempting for a trustee to commit wrongdoing. To make matters worse, trustees are generally allowed to use trust assets to defend against legal action brought by beneficiaries (e.g., for attorneys' fees.)

This puts beneficiaries of trusts at a significant disadvantage against a trustee who has gone bad. For a beneficiary, it may ultimately be too expensive to take a case all the way to trial against a trustee - even when there has been serious wrongdoing and financial harm.

Nonetheless, it's important to be aware of what your potential legal remedies are when a fiduciary has committed wrongdoing.

THESE CAN INCLUDE ACTIONS TO:

Collect on a fiduciary's bond – As we noted earlier, most administrators are bonded, whereas most trustees are not.

Remove a fiduciary – California law allows a beneficiary to file a petition asking the court to remove an executor or trustee for cause. Such an action could include appointment of a temporary fiduciary.¹⁰

Compel an accounting of trust assets – An interested party can ask the court to require the trustee to give a detailed accounting of trust funds.

Seek an injunction prohibiting use of trust funds – Even if some of the funds have already been stolen or misused, such an action could still be taken to protect the remaining assets. This is an extreme remedy, however, and is available only in situations where the moving party can demonstrate both a high probability of success of the merits of the underlying action and the risk of ongoing harm to the trust if the trustee is allowed to maintain the status quo.

Recover damages in an action against the executor or trustee – A fiduciary who steals or misuses funds can be held personally liable. But before taking legal action, it's important to be aware of whether it would be possible to collect a judgment against the fiduciary.



¹⁰ Daniel Ebner, "[Shutting Down a 'Fiduciary' Who Is Misusing Trust Assets.](#)" Probate and Property Magazine, January/February 2013



FAMILIES, FIDUCIARIES AND WHAT MATTERS IN THE END

In his widely discussed book “Being Mortal,” surgeon and writer Atul Gawande discusses how the medical profession has often failed aging people and their families. Doctors have been reluctant to encourage families to engage in candid conversations about what matters most to them at the end of life.

California families concerned about inheritance could benefit from similar dialogue. This goes beyond merely deciding whether to go through probate or, like many Californians, use a living trust to avoid it. It also includes choosing your trustee or executor wisely and talking openly with family members about why that person was chosen, as well as who gets what property.

When making such choices, be aware that trustees and other fiduciaries often commit wrongdoing, especially if there are lingering family resentments. As we have discussed, if that happens, there are legal steps you can take. Even better, however, would be to avoid them in the first place by recognizing what matters most in the end: giving and receiving an inheritance that honors the legacy of the person who died.



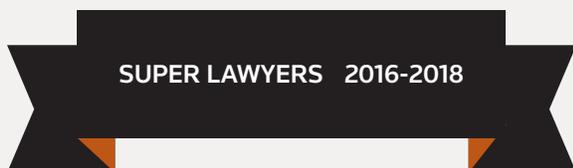
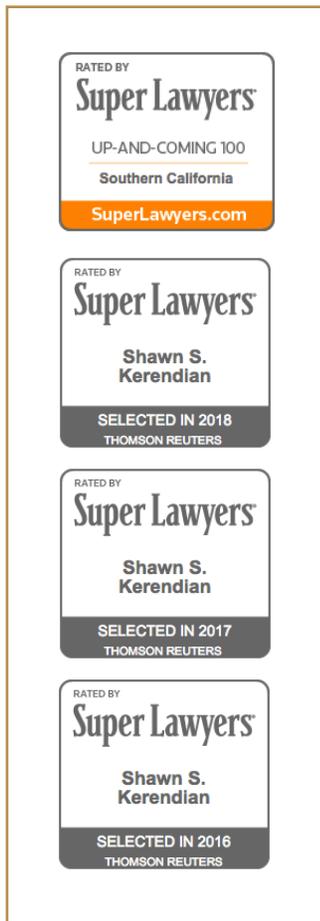


ABOUT ATTORNEY SHAWN S. KERENDIAN

Taking meaningful action for people affected by the wrongdoing of an executor or trustee requires a unique skill set. It calls for practical know-how in lawsuits involving complex, specialized areas of the law, as well as the ability to provide strategic guidance in sensitive situations that often involve family conflict.

As the founder and managing partner of Keystone Law Group, I have focused my legal practice on developing these specialized skills and using them to help clients. I have been recognized individually through selection as a Rising Star by Super Lawyers Magazine (2016-2018) and am certified as a specialist in estate planning, trust and probate law by the State Bar of California, Board of Legal Specialization. I have also been named a “Top 40 Under 40” Attorney in California by the Los Angeles and San Francisco [Daily Journal](#), a state-wide legal newspaper that is highly revered among attorneys in California.

For over a decade, I have used creative thinking and carefully crafted legal actions to protect people’s interests in trust or estate administration and any necessary litigation. I also supervise a team of well-trained attorneys that deliver these services, always with a clear focus on achieving each client’s goals most efficiently. Our firm’s work has helped hundreds of clients resolve disputes about trusts, estates and probate effectively using a full range of remedies allowed by law.



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