

# BEING AN EXECUTOR & TRUSTEE

**Peter C. Kote**

**PROFESSIONAL FIDUCIARY SERVICES**

23601 Moulton Parkway, Suite E Laguna Hills, CA 92653

949.600.8625 [pkote@cox.net](mailto:pkote@cox.net) [www.trusteepro.com](http://www.trusteepro.com)

**Gary L. Van Arnam**

**Senior Vice President, Northern Trust, NA**

16 Corporate Plaza, Newport Beach, CA 92660

949.717.5513 [glv1@ntrs.com](mailto:glv1@ntrs.com) [www.ntrs.com](http://www.ntrs.com)

## **A. Executor**

1. Administers an estate based on the decedent's will or intestacy laws. The executor represents the estate to the court system and the primary responsibilities are:
  - a. locating and valuing assets – WHAT AND WHERE
  - b. follow court procedures and instructions - HOW
  - c. paying creditors –WHO AND WHEN
  - d. settling taxes - HOW
  - e. distributing assets –WHO AND WHEN
2. Duties of a Trustee and Executor are very similar however the Trustee does NOT normally have to report his or her activities to a judge.

**As Trustee you are held to the standards of someone with at least ordinary business ability.** With special skills, under California law; you will be held to a higher standard of care. You will be judged in light of the circumstances existing at the time transactions occur, rather than with the benefit of hindsight.

### **California Probate Code 16040(a) – Standard of Care**

The trustee shall administer the trust with reasonable care, skill and caution under the circumstances then prevailing that a prudent person acting in a like capacity would use in the conduct of an enterprise of like character and with like aims to accomplish the purposes of the trust as determined from the trust instrument.

### **California Probate Code 16014 – Special Skills**

- (a) The trustee has a duty to apply the full extent of the trustee's skills
- (b) If the trustor, in selecting the trustee, has relied on the trustee's representation of having special skills, the trustee is held to the standard of the skills represented.

- a. Exceptions for a Trustee going to court:
  - i. Pour-over Will – if the assets exceed \$100,000 in gross value, a probate may be required to transfer these assets to the Trust.
  - ii. If a beneficiary of the Trust believes that the Trustee has acted improperly or without regard for the beneficiary’s interest, the beneficiary may file a petition with the court to force the Trustee to make a full report and accounting or to redress an alleged breach of trust, including removal of the Trustee or surcharge against the Trustee.
  - iii. The trustee can request the court to sanction what the trustee should or should not do. This comes in handy if the trustee feels that his or her decisions will be second-guessed by a beneficiary. Trustee can also seek approval of the accountings in order to minimize any potential arguments with the beneficiaries.

**B. Things to do when a person dies** (not necessarily an executor or trustee legal duties and not in any particular order)

1. Notify immediate family and close friends
2. Evaluate the emotional impact on the family and arrange for support.
3. Arrange care for dependents, if any
4. Notify attending physician or coroner
5. Arrange care for pets, if any
6. Evaluate the need for security at Decedent’s residence
7. Cancel or rearrange home deliveries
8. Have Post Office hold mail?
9. Find perishable property (food, plants, etc) arrange for care or disposal
10. Find & review Decedent’s expressed funeral and burial wishes
11. Notify agent under any power of attorney
12. Prepare and arrange for obituary
13. Arrange for mortuary, cemetery, burial cremation, as appropriate
14. Arrange funeral/burial services
15. Keep records of all payments for funeral and other expenses
16. Locate safety deposit box, wills, codicils, trusts
17. Locate & investigate life insurance policies, brokerage accounts, etc.
18. Investigate Social Security benefits (burial expenses of \$250), Medi-Cal, other
19. Investigate employment
  - Accrued vacation, final wages, retirement plans, deferred compensation, medical reimbursements or union death benefits
21. Investigate veteran’s burial allowance and other benefits
22. Investigate fraternal organizations

23. Investigate refunds on insurance or canceled subscriptions (phone, cable, etc)
24. Investigate Keogh and IRA accounts
25. Investigate business, partnership and investment arrangements
26. Meet & retain an attorney regarding estate matters
27. Meet & retain a CPA as to tax and accounting matters –
28. Meet with life insurance agent to collect proceeds or consider options
29. Obtain Certified Death Certificates (10 to 25) check with attorney
30. Deal with fire, theft, liability and auto insurance in Decedent's property
31. Prepare an inventory, list of accounts and list of debts  
Executor has a duty to publish notice to creditors
32. Review credit cards and charge accounts, cancel as appropriate
33. DO NOT PAY any of Decedent's debts until confirmed with the attorney
34. Obtain valuations of assets, as appropriate
35. If trust is involved, arrange for any allocations and transfers
36. Organize the final income tax return for the decedent
37. Determine if an estate tax return is necessary
37. Protect & secure personal property - remember not all valuables look valuable
38. **Keep the beneficiaries informed regardless of legal duties to do so**

**Safe deposit box** – Make sure you know about all safe deposit boxes and all home safes, if any. If there is any danger of a will or trust contest, or a conflict between executor, trustee, family or beneficiaries DO NOT go to safe deposit box without the involvement of an attorney experienced with estate administration.

### C. General Trustee Duties

1. Collect, manage, appraises trust property; pay all debts and taxes and investment of trust assets and the accumulation and distribution of income and principal pursuant to the Trust.

**Specific duties include – loyalty, deal impartially with beneficiaries, avoid conflict of interest, not to undertake adverse trust, take control of and preserve trust property, make trust property separate and identified, enforce claims, defend actions and use special skills.**

2. Duties established by the Trust – Thoroughly understand the assets and nature of the trust – the trust document is a must read.
3. Even if there is exculpatory language in the trust this will not relieve the trustee of liability if there is gross negligence, acts of bad faith or reckless indifference to the interest of the beneficiary or for any profit from the breach (probate code section 16461)

4. **Do not hesitate to hire individuals with expertise** i.e. Lawyer, Investment Manager, CPA, Family Counselor. The trustee can hire others, but the trustee remains the person responsible.
5. Communication with Beneficiaries when trust becomes irrevocable:
  - a. Provide the beneficiaries with a periodic accounting.

Under California Probate Code 16460, a beneficiary has 3 years from the time of receiving an account or statement that “adequately discloses the existence of a claim against the trustee for breach of trust” to commence a claim against the trustee.
6. If no formal trust accounting is completed, there is no statute of limitations and your trustee liability exposure continues indefinitely.

California Probate Code 16060 – Duty to Inform  
“The trustee has a duty to keep the beneficiaries of the trust reasonably informed of the trust and its administration.”

California Probate Code 16061 – Request by beneficiary  
“Except as provided in Section 16064, on reasonable request by a beneficiary, the trustee shall provide the beneficiary with a report of information about the assets, liabilities, receipts, and disbursements of the trust, the acts of the trustee, and the particulars relating to the administration of the trust relevant to the beneficiary’s interest, including the terms of the trust.”

California Probate Code 16062(a)  
“Except as otherwise provided in this section and in Section 16064, the trustee shall account at least annually, at the termination of the trust, and upon a change of trustee, to each beneficiary to whom income or principal is required or authorized in the trustee’s discretion to be currently distributed.”
7. Trustee should avoid actual and perceived conflicts of interest.
  - a. loans and other acts of self dealing (do not co-mingle funds)
  - b. provide legal or accounting services
  - c. avoid deal making with a co-trustee
  - d. inform and get written consents or waivers if there is a perceived conflict
8. Trustee can become the intermediary of family disputes and long standing grudges

- a. early responses are critical – interested party summits or mediation before litigation
  - b. assure that you have given trustee adequate powers (trust statutory law, language in trust, decisional law created by the courts)
  - c. be sure to have explanatory provisions in trust to address likely problems or unique circumstances
  - d. explain trustee involvement to beneficiaries prior to trustee assuming responsibility
9. Number one question from beneficiaries – When will the trust be distributed?
- a. **Caution the beneficiaries against making any financial commitments based on their anticipated distributions. Many factors can change the amount or the timing of distributions.**
  - b. The trust can be distributed in increments but most likely the trustee will wait until they have a handle on the assets and liabilities associated with the trust
  - c. **People have been conditioned to the fact that trusts avoid probate and therefore assume all estate administration procedures are avoided and that the property in the living trust somehow passes to beneficiaries “automatically.” Trust administration process is often just as long as the probate process – it is a matter of many months and maybe years, not days or weeks!**
10. Trust Investments – must invest reasonable and in the best interest of the trust.
- a. Protect and preserve all trust investments avoiding speculation  
California Probate Code 16047(a) – Standard of care  
“A trustee shall invest and manage trust assets as a prudent person would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.”
11. Record keeping & accounting
- a. State law requires that you provide the Trustor’s natural heirs and the Trust beneficiaries with certain information upon a reasonable request and that you give a full accounting and report of all trust transactions to the beneficiaries not less often than annually or at the termination of the trust, unless the trust instrument or a beneficiary waives this requirement in writing.
  - b. Internal accountings will be needed to provide a permanent record of trust transactions, provide a source of data for preparation of income

tax returns, to distinguish between principal and income transactions.  
**It is highly recommended that you do a formal accounting which begins a three year statute of limitations.**

- c. Bookkeeping ledger
  1. Descriptive notations of all income and receipts
  2. Enter all dates, person to whom & from whom payment was made or received
  3. Nature of the payment
  4. Amount
  5. Never pay with cash
  6. Trust bank account statements
  7. Keep copies of all bills, bank deposit receipts, cancelled checks, copies of tax returns and copies of all correspondence relating to the trust
  8. Open a trust checking account with a “certified” copy or a copy of the trust
  - 9. Obtain a new Employer Identification Number for the trust and use this number for the account – NEVER use your own social security number or the decedent’s social security number.**
  10. Estate tax matters – hire a CPA experienced in estate administration and fiduciary tax returns
    - a. “Notice Concerning Fiduciary Relationship” (IRS Form 56)
    - b. California and Federal Income tax returns will need to be filed for the decedent and eventually for the trust (for income generated by the assets of the trust) as well. State form 541 and the federal form 1041 for trust must be filed annually.
    - c. If the “gross estate” is over or over \$5 million in 2011 and 2012; you must file an estate and gift tax return (Form 706). The gross estate is different from the “probate estate” and different from the “trust estate.”
    - d. Estate tax returns are due (9) months following the date of death, an executor can request a 6 month extension to file, but must pay the estimated estate tax on extension at the 9 month due date. Estate tax returns list the fair market value of the assets and therefore can take a considerable amount of time.
    - e. **ADVICE:** Mail your bank confirmations and request for appraisals ASAP.

- f. Be careful about identifying and segregating Trust B assets
- g. Alternate Valuation Date – For federal estate tax purposes, you may elect to use the value of the assets of either the date of death or at the “alternate valuation date” if the alternate value for all assets results in both a reduced value of the estate and a reduced estate tax liability. The alternate value is either six months after death or the fair market value of assets sold or distributed before the six months after death.
- h. Consult three different CPAs or Tax Attorneys regarding cost to prepare the 706 – rates vary widely.
- i. All property received by the beneficiaries of the estate is received estate tax free.
- j. Beneficiaries must be aware that the distribution of trust assets may carry out to the beneficiaries’ income earned by the Trust during the period of trust administration, which income may be reportable on the beneficiaries’ own individual tax returns.

12. Trustee Compensation – must be reasonable - guideline can be 1% to 2 % per year depending on value of the estate, but it depends on the amount and complexity of the work performed and the amount of work that is delegated
  - a. Avoid multiple layers of fees for the same duties
  - b. Survey local trust companies or private fiduciaries in your area regarding the services they perform and the fees they charge
13. Executor Compensation – There are statutory fees that must be approved by the probate court that set the maximum amount that can be charged as ordinary fees.
14. Trustees, Executors and Attorneys can be awarded “extra compensation” subject to approval by the probate court, and are based on factors such as: nature and difficulty of the services, results achieved, benefit to the trust estate, productivity of the time spent in performing the services, expertise and experience of the person requesting the fees and the amount of time spent by each person performing services.