

ROBERTA J. ROBINSON

A LAW CORPORATION

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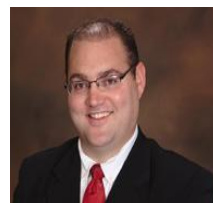
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WHAT'S NEW IN ESTATE PLANNING

2015 ANNUAL REVIEW



Estate Taxes

- \$5,430,000 Estate Tax Exemption: You can leave \$5,430,000 free of estate tax upon your death! A couple can leave a total of \$10,860,000 without estate tax. The exemption is indexed for inflation and increased by \$90,000 this year.
- 40% Estate Tax Rate: If you leave more than \$5,430,000 to your beneficiaries, there will be a 40% tax on the excess over \$5,430,000.
- Portability & Filing of Federal Estate Tax Return: If your estate is less than \$5,430,000, you can transfer your left over estate tax exemption (DSUE) to your surviving spouse!
 - Your executor **must** file an estate tax return (Form 706) to make this election, even if no 706 is required to be filed.
 - If your spouse died in 2011 or after, a portability election had to be made on a timely filed Form 706.
 - Your surviving spouse can use your exemption to make lifetime gifts or leave assets tax-free at death.
 - If you are a surviving spouse who plans on remarrying, considering gifting the left over exemption (DSUE) during your lifetime. You will lose your DSUE if your new spouse dies before you.
- Amend AB Trust? A married couple with an A-B Trust needs to evaluate whether to amend their trust to make Trust B optional instead of mandatory. Trust B may no longer be necessary for estate tax planning, although it still offers many other benefits.

- Is Your Spouse a U.S. Citizen? Any amount passing to a U.S. citizen spouse is tax free because of the “marital deduction”. However, if your spouse is not a U.S. citizen (e.g. Resident Alien with a Green Card), you have to establish a QDOT Trust for your spouse to get the “marital deduction”. In San Diego, we have a growing population of Resident Aliens.
- Stepped Up (or Down) Income Tax Basis: Your heirs will receive the date of death value of the assets as their new income tax basis. Your lifetime gain or loss will be gone. In President Obama’s State of the Union address, he suggested eliminating the new income tax basis at death.
 - Can Trust B Get a New Basis? If a “QTIP Election” is made for Trust B at the death of a spouse, can Trust B get a stepped up basis on the death of the surviving spouse? This is one of the top 15 issues of the current Treasury’s Priority Guidance Plan.
- Obama Green Book Proposals: The President proposes the follow laws to start in 2018:
 - \$3,500,000 Federal Estate and GST Exemption
 - \$1,000,000 Gift Tax Exemption
 - 45% top transfer tax rate
 - Portability of the Estate Tax Exemption

Gift Taxes

- \$14,000 per person (\$28,000 per couple) Annual Exclusion: These gifts can be made each year without filing a gift tax return. These Annual Exclusion gifts do not count against your Lifetime Exemption, below.
 - 529 College Savings Accounts: You can pre-fund 5 years’ worth of annual exclusion gifts into a 529 plan, for a total of \$70,000 per person (\$140,000 per couple) for **each** beneficiary (e.g. grandchild). Earnings used for higher education are tax free.
 - Medical and Educational Expenses: You can pay anyone’s medical care and educational expenses if you make your payment directly to the provider of services.
- \$5,430,000 Lifetime Exemption Amount: You can give up to \$5,430,000 (\$10,860,000 for a couple) during your lifetime without paying a gift tax, although a gift tax return will be due. The portion of your exemption used during your lifetime will not be available at your death.
- 40% Gift Tax Rate: If you give more than \$5,430,000 to your beneficiaries, there will be a 40% tax on the excess over \$5,430,000. Any amount you give to your spouse is tax free.

- Carryover Income Tax Basis: When you make a gift, you give your income tax basis (cost, plus improvements, less depreciation) to the recipient. In general, this means that your donee will continue to hold your capital gain or loss.
- What is a “DING”, “NING”, or “WING” Trust? This is an irrevocable “incomplete non-grantor trust” (ING) established to eliminate state income tax on the sale of assets (13.3% top rate in California). Trust grows like an IRA without current California income tax.
 - Out of State: The trust is established in a state which has no income tax (the “DING” is in Delaware, the “NING” is in Nevada, and the “WING” is in Wyoming). Need non-California trustee.
 - Incomplete Gift: The Grantor retains enough power over the trust so that it is an “incomplete gift”, so no gift tax is due and the assets get a new basis at death. Examples: Grantor stays on committee that directs trust distributions. Grantor can change the ultimate beneficiaries of the trust with a special power of appointment.
 - Non-Grantor: The Grantor gives up enough control so he is not the owner for income taxes. Need non-California trustee.
 - Operation of Trust: The Grantor transfer low basis assets (such as stock) to the Trustee. Several year later, the Trust sells the stock. There is a Federal Income Tax on the gain, but there is no State income tax.
 - Watch Out for the California Franchise Tax Board: If there is “California Source Income” (e.g. business or real estate), a California Trustee, or a distribution to a California beneficiary, California will assess a California Income Tax.

Generation Skipping Transfer Tax (GST)

- Another Tax? In addition to the estate tax and the gift tax, there is another transfer tax called the generation-skipping transfer tax, which has been in existence for decades. If you make transfers to your grandchildren or great-grandchildren, you are skipping over the generation of your children. This is when there can be a GST tax in addition to an estate or gift tax.
- \$5,430,000 GST Exemption: You can make these generation skipping transfers up to \$5,430,000 (\$10,860,000 per couple) during your lifetime or at death without paying a GST tax.
- GST Exemption is NOT Portable: Unlike the estate tax exemption, the GST is not portable to your spouse. Use it or lose it! A married couple can use both their GST exemptions in an “A-B Trust”.

- GST Trust: You can make the GST exempt transfer to a trust which can provide for your child during the child's lifetime. The trust will be protected from the child's creditors and a divorcing spouse. Upon the child's death, there will be no estate tax since you are skipping over the generation of your child. The trust will be then be held for the benefit of your grandchildren.
- 40% GST Rate: If you transfer more than \$5,430,000, there will be a 40% GST tax on the excess over \$5,430,000. Remember that the GST tax is in addition to the estate and gift tax. Thus, if you make a generation skipping transfer of more than \$5,430,000, there will also be a 40% tax on the excess over \$5,430,000.

Income Taxes

- Income Tax Rate on Trusts and Estates (IRC §1(i)): The Federal Income Tax rate on income accumulated in an irrevocable trust or probate estate is 39.6% (top rate) on \$12,300 of income. Income which is distributed to a beneficiary is taxed at the beneficiary's rate.
- Trust and Estate Income Tax – Misc. Itemized Deductions (Treas. Reg. §1.67-4): “Unusual” expenses that are fully deductible: Tax preparation for estate, GST, trust and probate estate final income tax returns. “Common or Customary Expenses” must exceed 2% AGI threshold that are deductible: Investment Advisor Fee. Trustees need to get itemized (not bundled) bills from providers of services.
- Charitable Income Tax Deduction – Conservation Easements (IRC §170(h)): You can place a “conservation easement” on land to restrict its development or a “façade easement” on a building to never change the exterior. If you can prove the reduction in the value of the property from its “best and highest use”, you can claim a charitable income tax deduction. Must have good supporting appraisals to avoid “substantial valuation misstatement penalty”.
- Trust Avoids 3.8% Net Investment Income Tax – (Aragon, IRC §469): There is now a “Net Investment Income” of 3.8% on income from a trust's “passive activities”. If a trustee shows “material participation” in the activity, the 3.8% tax does not apply. In Aragon, the activities of the trustees/kids who worked for the property management LLC owned by the trust were considered “material participation”.

Administration

- The Murdered Cannot Take (Jesse): Murderous wife had to pay back “restitution” to deceased husband's estate (the “direct victim”) life insurance, 401k, and proceeds of sale of house.

- Notice to Victim's Compensation (PC §§216, 9202): If there is a Probate and an heir or beneficiary is or has been in prison, a Notice must be sent to the California Victim's Compensation Board.
- Transfer of Property in European Economic Union (EU Reg): EEU "member" could have "habitual residence" in one state (e.g. Greece) and property in another state (e.g. Germany). Country of residence controls succession to all property. Except: UK, Ireland, and Denmark.

Debtors and Creditors (Bankruptcy)

- Bankruptcy: Includes Inherited IRA's (Clark): Mother left daughter \$450,000 IRA, and daughter created "inherited IRA account". 10 years later, daughter filed for bankruptcy.
 - Unprotected – Inherited: The inherited IRA was not protected from daughter's creditors since it was not the daughter's "retirement fund". Child must withdraw over life expectancy, could withdraw entire amount without penalty, and couldn't make retirement contributions.
 - Protected - IRA Trust: If mother left IRA payable to an "IRA Trust" for the benefit of the daughter, it would have been protected from daughter's creditors.
- Bankruptcy: Includes Inheritance (Dale): Chapter 13 bankruptcy includes all inheritance received until the close of the bankruptcy.
 - Unprotected – Outright Distribution: If a parent leaves an inheritance outright to a beneficiary with creditor problems, the creditor will be able to reach the inheritance.
 - Protected – Discretionary Trust: If a parent leaves the inheritance "in trust" for the benefit of the child, the creditor of the child will not be able to reach the assets of the trust. The trust must be established by the parents before the child is entitled to assets. There is no protection if child establishes the trust for his own benefit.
- Bankruptcy: Includes Fraudulent Transfers to Revocable Trust (DeNoce): Dentist transferred real estate to a revocable trust which he called a "retirement trust". Although true retirement plans may have bankruptcy protection, assets in a "revocable trust" are not protected from creditors.
- Disclaimer is not a Fraudulent Transfer (Vance, PC§ 283): A child with a creditor problem "disclaimed" his right to his inheritance, which then passed to the grandchildren. The creditor could not reach the disclaimed assets. However, a beneficiary's federal tax lien attaches to an inheritance despite disclaimer (Deinlein, IRC §6321). Better for parent to leave assets in trust for a child with creditor problems.

Elder Abuse

- Elder Abuse by New Wife (Lintz, PC §§810-812, 6100; Fam C §721): New wife took husband to her own attorney although husband had long history with his own attorney. New wife pressured husband to change his estate plan to omit his children and leave estate to new wife and her children. New trust was held void as a result of wife's undue influence. Financial elder abuse claim can be made against an overbearing spouse!
- Elder Abuse by Purchaser of Real Estate (Bounds, Welf & I C §§15610.30(a)(1), (3)): Purchaser pressured 88 year-old woman with Alzheimer's disease to sign an escrow contract to sell property. Woman had an attorney trying to protect her, but purchaser pursued the elderly woman directly.
- Reverse Mortgage Voidable (Townsend, Civ C §38): Reverse mortgage was voidable since borrower was incapacitated. Lenders are at risk. Need to appoint conservator for the protection of the lender since an incompetent person has no capacity to contract.

Legislation

- Affordable Care Act – Expanded Medi-Cal Coverage under Age 65: If under age 65 and less than \$15,500 income, eligible for health care and long term nursing care regardless of assets owned. If over age 65, asset test still applies for long-term nursing care.
 - Third Party Special Needs Trusts (SNT): Parents still need to consider leaving the inheritance for a disabled child in a Special Needs Trust because 1) child will one day be over 65 and won't be eligible if child owns assets outright, 2) child needs management of assets, 3) assets will be protected from child's creditors.
- New California Notary Language – Consumer Notification (CC 1889.a): Starting January 1, 2015, notary must include a block that notary does NOT endorse the legality or validity of a document, rather the notary verifies the identity of the signer.

<p>A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.</p>

- Future: Patient Assisted Suicide? (PAS - Compassionate Choices): Brittany Maynard, a 29 year old woman from Anaheim, CA, moved to Oregon for Patient Assisted Suicide (PAS). Five states allow PAS: Oregon, Washington, Montana, Vermont, and New Mexico. Oregon requires: life expectancy less than 6 months as established by two physicians, 15 day waiting period to get the prescription medications. Compassionate Choices (formerly the Hemlock Society) is bringing its resources to campaign in California.

Litigation

- Trust Law does not apply to Public Pension Plan (Meyers, PC §82): Disabled person brought action under California Trust Law to remove the trustees of a public pension plan for arbitrarily denying his application for disability benefits and disregarding his medical reports. Court ruled that California Trust law doesn't apply to the pension plan.
- Is an Arbitration Clause in a Trust Binding? (McArthur): Parent created a trust with an arbitration clause. If beneficiary contested, would be required to arbitrate the claim. The Court found that arbitration clause was not binding on the beneficiary, who never agreed to it as would be the case in a contract situation. This case may not be conclusive for the future.
- Is Investment Advisor Liable for Trust Losses? (Hasso): Grandparent established long term irrevocable trust for grandchildren. Investment advisor promoted highly leveraged hedge fund investments. The Court found the investments were inappropriate for the purpose of the trust and the advisor was liable for the losses.

Community and Separate Property

- Whose Life Insurance is it? Big Girls Do Cry – (Valli- Fam C §852 v Evid §662): Husband did not “transmute” community property to wife’s separate property when he bought life insurance during the marriage on his own life and named wife the owner and beneficiary. The Family Code presumes the asset is community property unless there is a “written transmutation” to separate property. The Family Code trumps the Evidence Code which uses “form of title”. The insurance belonged 50% to the husband and 50% to the wife.

Same-Sex Marriage

- Supreme Court Pending Cases – Same Sex Marriage (DeBoer): This summer the Supreme Court will decide 1) whether the Fourteenth Amendment (due process) requires a state to license a marriage between two people of the same sex, and 2) whether the Fourteenth Amendment requires a state to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state. 6th Circuit ruled against same sex marriage: Kentucky, Ohio, Michigan, and Tenn.
- California Allows Same Sex Marriage:

California law allows same sex marriage. The history of California law is:

- Proposition 22: Limited marriage to a man and a woman
- California Supreme Court: Held Proposition 22 unconstitutional
- Proposition 8: Constitutional amendment to limit marriage to a man and a woman
- US Supreme Court (Windsor): Held Proposition 8 unconstitutional.

Retirement Plans

- Spousal Rollover of IRA Payable to Trust (PLR 201430026): A spouse can rollover an IRA payable to her, but can she rollover an IRA payable to her deceased husband's trust? The rollover was allowed in this case because the spouse had the power to revoke her husband's trust and remove the trust property.
- Qualifying Longevity Annuity Contract (IRC 2014-30): Starting at age 70 ½, a pension plan participant must start withdrawing Required Minimum Distributions (RMD) and pay income tax on the RMD. However, up to 25% or \$125,000 of the pension can be invested in a "qualifying longevity annuity contract" (QLAC) and this deferred annuity will be excluded in determining RMD (required payout will be lower). The QLAC payouts begin at an advanced age, e.g. age 85. It appears that tax policy is acknowledging that we are living longer and should invest for the future.

Trustees

- See Duties and Liabilities of Trustee: Attached

Valuation

- What was the Value of a Madoff Account? (Kessel): Decedent's estate requests refund for estate tax paid on a Madoff account that decreased in value substantially after the Decedent's death. What was the value of a Madoff account before the Ponzi scheme was discovered? Would a willing buyer have known that the account value was too good to be true?
- What is the Value of a Fractional Share of Artwork? (Elkins, IRC §2031): If you transfer a portion of an artwork (on paper) to your children during your lifetime, what is the value of the artwork upon your death? The IRS claimed the value would be 100%. The taxpayer's appraisal established the value should be discounted by 41%. The taxpayer won.
- What is the Value of a Family Owned Investment Company? (Richmond, IRC §2031): The family owned Investment Company held publicly traded stock that had substantial capital gain. The taxpayer claimed a discount valuation for the present value of the built-in capital gain. The taxpayer won.

Wills and Trusts

- Can a "Will" Revoke a "Trust"? (Schlict): The proper way to revoke or change a trust in your lifetime is to sign an "Amendment to Trust". In this case, the decedent signed a Will with the intent to revoke his trust. The court agreed. If you don't want to wind up in court, do it the right way – sign an Amendment to Trust.

- What Can Go Wrong with a Gift to my Caretaker? (Jenkins): Decedent paid off his Caretaker's mortgage and built a house for his Caretaker. Caretaker prepared a deed to transfer the house to herself, and decedent signed it. The Court found undue influence to make a donative transfer for inadequate consideration by a "disqualified person". What should have been done? Decedent should have consulted an independent attorney and obtained a "Certificate of Independent Review" to make a gift to a caretaker.
- Is it Too Late to Sue the Rockefellers? (ASARCO, LLC): The cost of environmental cleanup was charged to the business operated by Decedent. The estate brought an action against the Rockefeller trust beneficiaries for the operation of the Rockefeller mining facility over 100 years ago. The court held that the action was brought too late and was barred by the statute of limitations.

About Our Firm

Roberta J. Robinson, A Law Corporation, provides services in the areas of estate and gift taxation, probate and trust administration, and wills and trusts. We are committed to providing the highest level of legal services in an understandable and compassionate way. The information provided in this newsletter is for informational purposes only and is not intended to be legal advice. No one should act on the basis of the content of this newsletter without seeking legal advice from an attorney.

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DUTIES AND LIABILITIES OF THE TRUSTEE

When you are the trustee of a trust, you assume certain duties and obligations. An attorney is best qualified to advise you about these matters. You should understand the following:

1. MANAGING THE TRUST'S ASSETS

A. Prudent Investments

You must manage the trust assets with the care of a prudent personal dealing with someone else's property. This means that you must be cautious and may not make any speculative investments.

B. Keep Trust Assets Separate

You must keep the money and property in this trust separate from anyone else's, including your own. When you open a bank account for the trust, the account name must indicate that it is a trust account and not your personal account. Never deposit trust funds in your personal account or otherwise mix them with your or anyone else's property. Securities in the trust must also be held in a name that shows they are the trust property and not your personal property.

C. Interest-Bearing Accounts and Other Investments

Except for checking accounts intended for ordinary trust expenses, trust account must earn interest. You may deposit trust funds in insured accounts in financial institutions, but you should consult with an attorney before making other kinds of investments.

D. Other Restrictions

There are many other restrictions on your authority to deal with trust property. You should not spend any of the trust money unless you have been advised to do so by an attorney. Do not pay fees to yourself or reimburse yourself without being advised to do so by an attorney. If you take actions which violate the trust, you may be removed as trustee or you may be required to reimburse the trust from your own personal funds, or both. You should consult with an attorney concerning the legal requirements affecting sales, leases, mortgages, and investments of trust property.

2. INVENTORY OF TRUST ASSETS

A. Locate the Trust Property

You must use your best effort to locate and take possession of all trust property.

B. Determine the Value of the Property

You must arrange for the valuation of trust property, including cash, securities, and real estate. An attorney can advise you about how to do this.

C. Prepare an Inventory

Within a reasonable time, you must prepare a written inventory of all trust assets and their values on the date you became trustee.

D. File a Change of Ownership

You must file a change of ownership statement with the county recorder of assessor in each county where the trust has real property in California, as provided in Section 480 of the California Revenue and Taxation Code.

3. CREDITORS

You must use your best effort to identify all of the known creditors of the trust, determine the amount owing, and settle all valid claims.

4. INSURANCE

You must determine that there is appropriate and adequate insurance covering the assets and risks of the trust. Maintain the insurance in force during the entire period that you are trustee.

5. ACCOUNTING

A. Keep Accounts

You must keep complete and accurate records of each financial transaction affecting the trust. You will have to prepare an account of all money and property you have received, what you have spent, and the date of each transaction. You must describe in detail what you have left after the payment of expenses.

B. Annual Accounting to Beneficiary

You must provide an annual accounting to each current beneficiary of the trust. Save your receipts because a beneficiary may ask to review them. If you do not provide the annual accounting as required, a beneficiary may petition the court to order you to do so. You may be removed as trustee if you fail to comply.

6. CONSULTING AN ATTORNEY

You should cooperate with the attorney for the trust at all times. You and your attorney are responsible for completing the trust administration as promptly as possible. **When in doubt, contact your attorney.**

ACKNOWLEDGMENT OF RECEIPT

I acknowledge that I have received a copy of this statement of the Duties and Liabilities of the Trustee.

Date: _____

Signature of Trustee

Type or Print Name of Trustee

NOTICE: 1. This statement of duties and liabilities is a summary and is not a complete statement of the law. Your conduct as a trustee is governed by the law itself and not by this summary.

2. If you fail to perform your duties or to meet the deadlines, a beneficiary may succeed in obtaining a court order to reduce your compensation, remove you from office, and impose other sanctions.