

JAY D. FULLMAN
A PROFESSIONAL CORPORATION

800 South Beach Boulevard, Suite A
La Habra, California 90631

Telephone (562) 694-6005

- ▶ E-Mail: Jay@FullmanLaw.com
- ▶ Website: www.fullmanlaw.com

TRUSTS - THE PROBATE ALTERNATIVE



PROBATE SUMMARY

When Probate is required

Will but no Trust, OR

No Will and no Trust, AND

Cash and personal property with gross value of \$180,400, OR

Real property with gross value of \$50,000, or more

PROBATE SUMMARY

Even with a Trust, Probate may be necessary if the Trust is not properly funded

PROBATE SUMMARY

Distribution under Probate:

With Will - designated beneficiaries

With no Will - legal heirs under CA law

Advantages of Probate

Probate court supervises administration of assets

Protection of:

- (a) Deceased's heirs
- (b) Deceased's creditors
- (c) Federal and state taxing authorities

Disadvantages of Probate

(1) Fees and expenses:

- ▶ Attorney fees
- ▶ Executor / Administrator fees
- ▶ Probate Bond fees
- ▶ Probate Referee fees
- ▶ Court fees

Disadvantages of Probate

- (2) Delays in distribution and lack of availability of assets to heirs
- (3) Concern about assets being wasted; possible forced sale of assets
- (4) Inconvenience of dealing with the court and bureaucratic rules
- (5) Probate proceedings are open to the public; not private

Trusts (Revocable / Living / Inter Vivos)

History and Summary

Originally to manage large estates

Contract to protect and distribute assets

Family Company concept

TRUSTS

Roles of people involved

Trustor / Settlor / Grantor / Creator

Trustee - manager

Current beneficiaries

Future (contingent) beneficiaries

Advisors: attorney, financial planner,
accountant, etc.

TRUSTS

Many types of trust; different uses and functions. Focus on family trusts

Revocable and amendable (not irrevocable)

Living - during lifetime (not testamentary)

Inter Vivos

TRUSTS

Advantages of Trusts:

- (1) Allows easy asset management during Trustor's lifetime; personal control
- (2) Cost savings: Eliminates probate costs; reduced costs of administration
- (3) Trust assets are usually more rapidly available to beneficiaries
- (4) Trusts can be used to reduce or eliminate **estate taxes** by allocating assets to 2 separate (A-B) trusts

TRUSTS

- (5) Trustor selects beneficiaries and directs desired distribution of assets (e.g., by age, sobriety/drugs, creditor protection, life estate in real property, pay for education, provide \$\$ to purchase home, pay for wedding, etc.)
- (6) Reduces legal contest on dispositive (distribution) provisions
- (7) Continuation of a family-owned business is much easier

TRUSTS

- (8) Forced sale of assets is less likely than in Probate; help preserve assets
- (9) Annual Gifting may be used even if Trustor is incapacitated
- (10) Qualified Domestic Trust (QDOT) extends tax benefits to non-citizen spouse
- (11) No government involvement, but Court supervision available for disputes and for instructions to trustee

TRUSTS

(12) Selection of successor trustee(s): family member, family friend, professional fiduciary, or an institutional trustee

(13) Should help avoid Court Conservatorship for assets of person who becomes incapacitated - successor trustee steps in during Trustor's lifetime

(14) Shields family finances from public disclosure

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Disadvantages:

- (1) Start-up cost
- (2) Tax filings if trust becomes partially or totally irrevocable and has income (like Probate)
- (3) Expense of trustee if trustee is an institutional or professional trustee
- (4) Failure to properly fund the trust can increase expense or defeat the plan

TRUSTS

- ▶ Advantages almost always out-weigh disadvantages
- ▶ Revocable Living Trust is usually the foundation of an estate plan for individuals and married persons who own any real property or have assets of \$180,000 or more

TRUST FUNDING

A Trust without assets is of no value

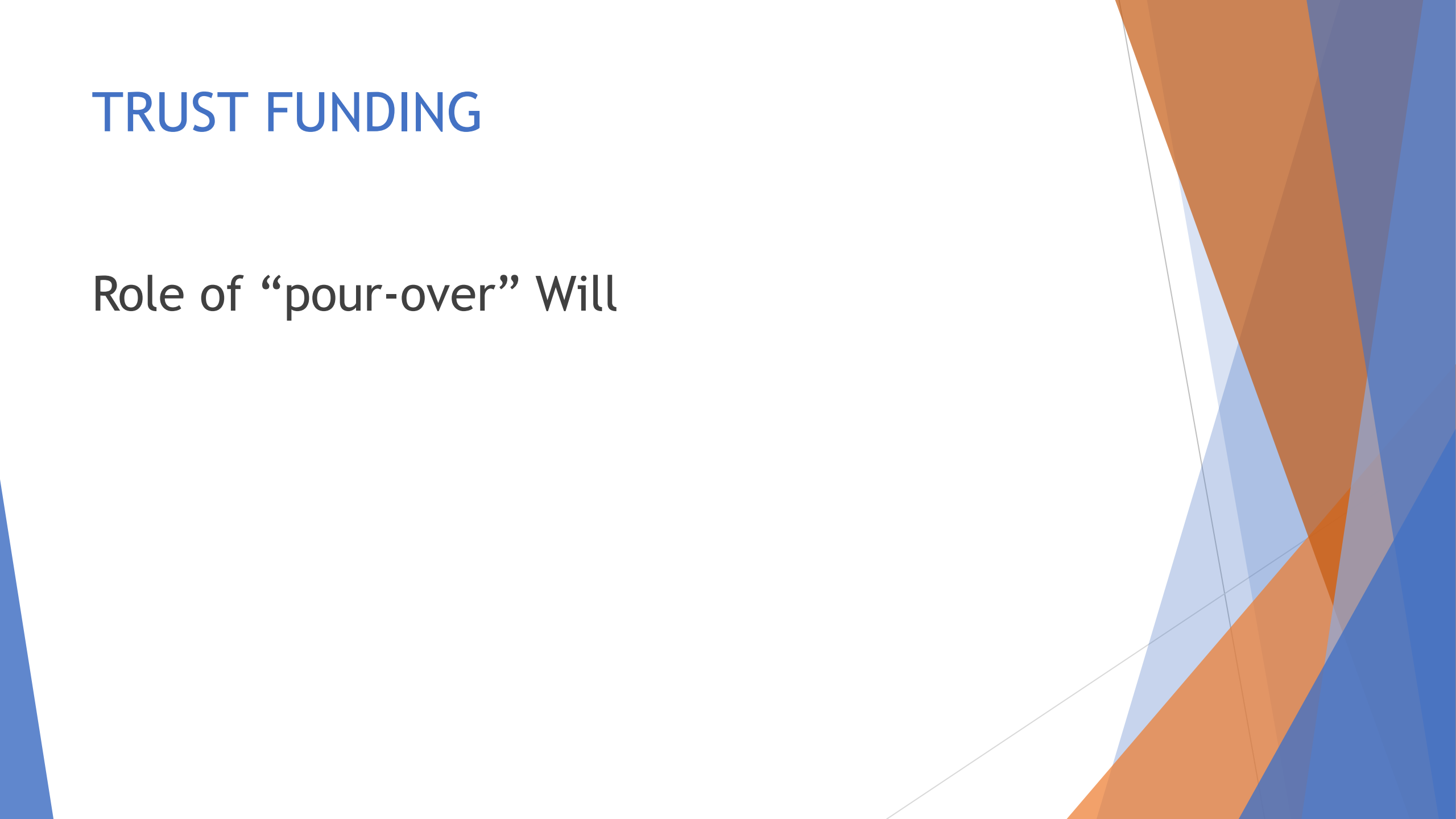
TRUST FUNDING

Procedures to fund a Trust:

- (1) Real property - deed
- (2) Corporate stock - change stock title or assign ownership
- (3) Bank and financial institution accounts - change title with the institution
- (4) Individual investment accounts & annuities - change title with the institution
- (5) Partnership, LLC, REIT, tenants in common - change title or assign

TRUST FUNDING

Role of “pour-over” Will



TRUST FUNDING

Assets that typically are NOT transferred to Trust

- (1) Life Insurance
- (2) Tax-Qualified Plans (IRA, 401K, 403B / TSA - Tax Sheltered Annuity)
- (3) Pension Plans
- (4) Automobiles

Planning for Digital Assets

Definitions:

- Digital Assets: Any electronic record
- Examples:
 - Social media apps - Facebook, Twitter, Instagram
 - E-Mail accounts
 - Blogs
 - On-line financial accounts - Pay-Pal, Venmo
 - On-line Gaming accounts
 - Cloud-based data
 - Computer-stored data

Planning for Digital Assets

Options to Allow Access to Digital Assets:

- On-line app tool that directs the custodian of the digital asset to disclose some or all data to designated recipient
 - On-line tool is established separately from standard terms of service
 - Affirmative action is required
- Owner may identify a trustee (or other fiduciary) to access/receive some or all of owner's electronic data
 - Specific power must be given in will, trust, POA
 - Specific evidence must be presented to the custodian, for access (account, authority, death certificate)

Responsibilities of Successor Trustees

- ❖ Trustee for Incapacitated Trustor - Medical opinion
- ❖ Trustee for Deceased Trustor

Responsibilities of Successor Trustees

For Incapacitated Trustor:

- (1) Review Trust and seek professional advice as needed
- (2) Accept responsibility as Trustee in writing
- (3) Protect Trust assets
- (4) Coordinate with Agents - POA and AHCD
- (5) Notify banks and other institutions as needed

Responsibilities of Successor Trustees

For Incapacitated Trustor:

- (6) Apply for disability or other benefits
- (7) Pay Trustor's bills and handle necessary transactions
- (8) Maintain separate accounts and do not comingle with personal funds
- (9) Keep accurate records
- (10) Provide accounting if required

Responsibilities of Successor Trustees

After death of Trustor :

- (1) Review Trust and seek professional advice
- (2) Accept responsibility as Trustee in writing
- (3) Protect Trust assets
- (4) Obtain EIN/TIN for bank and proper tax reporting
- (5) Notify banks and other institutions; change titles, transfer assets

Responsibilities of Successor Trustees

After death of Trustor :

- (6) Apply for any death benefits
- (7) Inventory Trust assets and determine values
- (8) Pay Trustor's bills, administration expenses, sell assets as necessary, and handle all transactions
- (9) Provide notice to beneficiaries and heirs; keep beneficiaries informed

Responsibilities of Successor Trustees

After death of Trustor:

- (10) Maintain separate accounts; do not comingle with personal funds
- (11) Keep accurate records and provide accounting to beneficiaries
- (12) Sell assets as necessary
- (13) Prepare any necessary tax returns
- (14) Distribute assets to beneficiaries per Trust

Selecting a Trustee

Options for Trustees:

- Beneficiary
- Family Member
- Friend
- CPA / Attorney / Financial Advisor
- Professional Fiduciary
- Financial Advisory trust company
- Title company or Bank trust company

Common Trusts other than Revocable Living Trusts

- (1) Irrevocable Life Insurance Trust (ILIT), frequently to provide fund separate from estate, especially for payment of estate taxes
- (2) Special Needs Trust (SNT), to preserve government benefits for disabled beneficiary
- (3) Separate Property Trusts

Common Trusts other than Revocable Living Trusts

- (4) Qualified Personal Residence Trust (QPRT) for tax-beneficial gift of home
- (5) Minor's Trust, usually for support
- (6) Charitable Trusts: charitable gifts with tax benefits
- (7) Grantor Retained Interest Trust (GRIT), Grantor Retained Annuity Trust (GRAT), to minimize taxes

Common Trusts other than Revocable Living Trusts

Possible disadvantage if Trust is *irrevocable*:

- Trust assets are not be controlled by grantor
- Trust may not be changed, even if desired due to change in circumstances, whether economic, family, marital, etc.

Alternative Procedures that may Avoid Probate

- a. Alternatives to use of Revocable Living Trusts
- b. Joint tenancy property left to surviving joint tenant
- c. Community property, to spouse, with right of survivorship
- d. Transfer on Death Deed
- e. Employee benefit plans, including pension plans
- f. Individual Retirement Account (IRA)

Alternative Procedures that may Avoid Probate

- g. Life insurance with beneficiary
- h. Private Annuities and commercial annuities
- i. Financial accounts with TOD / POD beneficiary designated
- j. Powers of appointment, exercised through Will or Trust
- k. Lifetime Gifts to charity or to individuals

Alternative Procedures that may Avoid Probate

- l. Irrevocable Trusts
- m. U.S. Treasury Savings Bonds with beneficiary designated
- n. Stock brokerage accounts with beneficiary
- o. Totten trusts with beneficiary
- p. Uniform Gift to Minors Act accounts

Charitable Transfers

Charitable Gift Annuity

- (1) “Gift” of asset to charity in exchange for annuity
- (2) Asset may be cash, stocks, real estate
- (3) Provides donor with immediate charitable income tax deduction
- (4) Provides partially tax-free payments, usually with higher payment amounts
- (5) Capital gains tax avoided on appreciated asset

Charitable Transfers

Charitable Remainder Trust

- (1) “Gift” of asset to charity (remainder interest to charity)
- (2) Lifetime income options (variable state date, payment percentages, term)
- (3) Benefits: Bypass capital gain, increased income, tax deduction, flexibility

Charitable Transfers

Charitable Lead Trust

- (1) “Gift” of asset to charity reverts back to donor (or family) after term
- (2) Income from asset during term goes to the charity
- (3) Benefits: charitable tax deduction and/or estate tax deduction

Asset Protection from Creditors

- a. Certain assets are exempt from judgments (e.g., employment benefits, tax-qualified retirement plans, life insurance)
- b. Use of business entities (corporations and LLCs) to manage and protect assets
- c. Some types of trusts provide asset protection, but most, including revocable living trusts, do not

Avoiding a Conservatorship

- a. Conservatorship - Court Order; Court supervised process to control:
 - (1) Person - living arrangements, medical care
 - (2) Estate - property and assets owned by the Conservatee.
- b. Avoid Conservatorship of Person: Advance Health Care Directive
- c. Avoid Conservatorship of Estate: Power of Attorney, and Living Trust

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E-Mail: Jay@FullmanLaw.com

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