Winning the Inheritance Battle

The Ultimate Guide to California Trust and Probate Litigation

(How To Get Your Rightful Inheritance From Your Parents' Wills, Trusts and Probate Estates)

by Scott Grossman

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WINNING THE INHERITANCE BATTLE:

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HOW TO GET YOUR
RIGHTFUL INHERITANCE FROM
WILLS, TRUSTS,
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Contents

Who can benefit from reading this book?

You can. You may be angry, maybe even filled with righteous indignation. You are a little confused. Things seemed much clearer before Mom or Dad died. You are hurt, mad, and all you want is for Mom or Dad's wishes to be carried out.

Take a breath. Slow down. If you have been wronged, there is a remedy. This book will help you understand what can be done if your rightful inheritance is being kept from you.

There is a lot of misinformation, misunderstanding, and ignorance about how to make sure you get the property your deceased loved one left to you.

By "property," I mean money, real estate, stocks, bonds, mutual funds, deeds of trust, promissory notes, or anything else with monetary value. In legal jargon, property also includes tangible personal items that have little or no economic value. Items like clothing, furniture, and photo albums are property, but they won't be discussed in this book. It never makes economic sense to start a lawsuit over only tangible personal items. Of course, if these items are part of a lawsuit that includes other property, then it may be productive to address the personal items too.

The world of post-death property transfers is filled with legal jargon. This book avoids most of it but there are a few words you will want to understand because they are simply unavoidable.

Trustee, executor, and *administrator* all mean different things:

TRUSTEE: the person in charge of a trust

EXECUTOR: the person in charge of a probate estate when a will has been admitted to probate

ADMINISTRATOR: the person in charge of a probate estate when there is no will

Probate and trust administration are different. **Probate** occurs when a person dies without a will, or had only a will but not a trust. Probate is a court-supervised proceeding to transfer the dead person's assets to whoever was specified in the will or to the intestate heirs (i.e. California's plan for who inherits when no one is specified in a will.) Probate always involves a court proceeding.

Trust administration occurs after the creator or creators of a trust die. The property owned by the trust must now be administered and passed to the people specified in the trust, according to the trust's terms. Trust administration can proceed from beginning to end without ever going to court.

Non-probate transfers occur when a property owner dies and title is held in a very specific way. When a joint tenant owner of real estate dies, the property passes to the surviving joint tenant(s) without going through probate or trust administration. A bank account titled P.O.D. (pay on death), T.O.D. (transfer on death), or which has a beneficiary designation is transferred to the named beneficiary without going through probate or trust administration. Whether property is passing

through probate, is subject to trust administration, or passing by non-probate transfer, if you are being denied your rightful inheritance, there is a way to get it back.

This book is for a person who has not received his or her rightful inheritance. (Usually, but not always, the person being denied is a son or daughter.) Everything in this book applies equally to anyone who is supposed to inherit from the probate estate or trust, whether or not you are related to the creator of the will (testator) or creator of the trust (settlor).

I wrote this book so that every beneficiary, no matter what their relation to the person leaving the property, will know what to do to ensure they receive their rightful inheritance.

Why am I being denied my rightful inheritance?

There are a number of reasons a beneficiary may not be getting the inheritance he or she deserves. Some trustees, executors, and administrators have no idea what they're doing—literally. They don't get any kind of professional help and may tell you they know what to do simply because Mom or Dad told them what to do before they died. They ignore the will or trust and insist they will do the job on their own schedule, the way they were told. Your requests for information probably get ignored or you get threatened with disinheritance if you question their judgment, actions, or failure to act. Don't be fooled or cowed. Further on in the book I'll show you how to successfully take on the ignorant trustee, executor, or administrator.

There are trustees, executors, and administrators who hide their heads in the sand, doing nothing, while keeping you from your inheritance. They "lock up" and don't do a thing to administer the trust or estate. Sometimes this happens because the emotional tie to your deceased loved one gets triggered when they try to deal with the will or trust. Some accomplish nothing simply because they have bad follow-through; they were a poor choice to assign the task of probating the will or administering the trust. Nevertheless, they have the responsibility but won't act, and yet won't agree to resign so someone else can get the job done. Sometimes their failure to do the work they took on leads to financial losses.

Their failure to act is not an excuse; an executor or administrator who fails to act can be removed. A trustee who fails to act can be held financially responsible if they breached their duty to you, thereby reducing your inheritance.

Some trustees, executors, or administrators only appear unwilling or unable to do the job of administering the trust or probating the will. What they are really doing is keeping you from the information related to the estate so that they themselves can benefit. While this is not usually the reason, it can't be ignored as a possibility. Red flags include: unwillingness to provide you with a copy of the trust or will, an unwillingness to provide financial information, and the threat of disinheritance if you keep asking questions about your inheritance. If these appear, you are dealing with a bully. Keep reading to learn how to effectively deal with them.

Some trustees or executors inform you that you have been disinherited—the trust has been amended or a codicil to the will was created, leaving you nothing. If you had a rocky relationship or were estranged from your mother or father, this may be true; you may in fact have been disinherited. In my experience parents are reluctant to write their children out of their wills and trusts. This does happen if the relationship was badly strained or altogether lost, where there is a history of substance abuse, or where a child has been so reckless with money the parent believes it is pointless to give him or her anything more because it will just be lost or misspent.

Far more often, a child has been disinherited because the trust or will was changed (or created when there was no estate plan) while the parent was suffering from some form of cognitive impairment such as dementia. Often in this situation, one child is living with the parent and/or is that parent's caretaker, or the child lives nearby and is managing the parent's health care and/or finances. This child probably chose who would draft the new document (or did it themselves with software or on the Internet), transported the mother or father to the person who drafted the new document, and probably kept the document in their possession after it was created. Sometimes they do this after taking control of their parent's financial affairs by being appointed trustee of the trust or attorney in fact under a durable power of attorney. Others wait to take control after their

parent's death. In either case, they go from getting their proportionate share of the estate to (usually) getting the whole thing. Trusts, wills, trust amendments, and codicils procured under these circumstances can be set aside (i.e. "thrown out") by a probate court judge.

The person who is stopping you from inheriting may be your brother, sister, aunt, uncle, some other relative, or someone not related to you at all. It really doesn't matter what their relationship is to you or your deceased loved one. Some trustees, executors, and administrators try to pull rank. They will claim that because of their special relationship to the deceased, they have the right to keep your inheritance from you. This is nonsense. California law doesn't allow a relative or friend to impose his or her own wishes on beneficiaries.

Who is behind this book, and why should I listen to him?

My name is Scott Grossman, and I have been practicing law in California since 1994. I am certified by the State Bar of California as a specialist in Estate Planning, Trust, and Probate Law. My practice is limited to trust litigation, probate litigation, and probate. I have tried dozens of cases to a verdict and settled many more. I have focused my practice on representing beneficiaries because I sensed a need to educate and assist beneficiaries, giving them confidence and support as they confront the person who is keeping their inheritance from them.

Why I wrote this book

I'm tired of seeing sons and daughters having their rightful inheritance kept from them. I'm tired of seeing other family members profit after having taken advantage of a vulnerable, naïve, or needy beneficiary. I am also tired of misleading lawyer advertising that makes it sound like probate or trust litigation should be an add-on to some other type of practice. If you are supposed to receive an inheritance and you haven't gotten good information, then you need it right now. But if you respond to an ad for a lawyer who says he does probate litigation or trust litigation as part of a broader practice, you may wind up in the hands of someone who has little or no idea what he's doing.

Stop reading right now! Put this book down and do a web search or flip through the attorney section of the Yellow Pages and count the number of lawyers who advertise that they do probate or trust litigation. Scroll through an attorney's entire website. Notice how many of these lawyers practice in completely unrelated areas such as personal injury, business litigation, bankruptcy, family law, real estate, corporate law—and the list goes on. What do any of these practice areas have to do with probate or trust litigation? Nothing.

I wrote this book to provide you with useful information to review and study in the comfort of your own home. Frankly, this book also saves me time. My firm gets calls all the time from people asking us to represent them in a probate or trust litigation. We represent people who aren't getting their rightful inheritance. I've put a lot of information into this book in order to dispel the myths, rumors, and outright lies concerning probate and trust litigation. I can't take every case, and not every case requires an attorney. But writing this book gives me a chance to talk to you about what you need to know about getting your rightful inheritance so

that you can make an informed decision about what steps to take with your case. Even if I cannot accept your case, I would like you to be educated about the process so you don't fall victim to the common mistakes so many people make.

In the stories that follow, some of my clients allowed me to use their real names, while others requested they be changed. The events described are all public record. These cases are included in the book to illustrate different types of trust and probate litigation. Too often a person comes to me believing that what's happened to them hasn't happened to anybody else. Hopefully, the cases in this book will show you that what's happened to you has almost certainly happened to someone else.

If you learn only one thing by reading this book, I hope it is that you have to take action in order to get your rightful inheritance. Nothing happens automatically in probate or trust litigation—nothing. Take action now. If you think you are being denied information to which you are entitled or money or property you should receive, you owe it to yourself to find out what is going on, and what you can do. Most people have an innate sense of what's right and can feel when things are going wrong. The feeling you have that you are not getting all you should is often a strong indication that something is going wrong during probate, trust administration, or non-probate transfer. Time is not on your side. Failure to act can prevent you from getting your rightful inheritance. If you think something is wrong, then NOW is the time to discuss your case with a lawyer.

This book is not legal advice

I am not allowed to give legal advice in this book. I can offer suggestions, outline likely situations, and identify traps, but don't take anything in this book to be legal advice about your case until you agree to hire me and I have agreed, in writing, to accept your case.

Why is this book about both probate litigation and trust litigation?

This book is about both probate litigation and trust litigation because both of them take place in exactly the same place: the probate court. Though there are some differences between the two, on the whole they are very similar. Where there are important differences between probate litigation and trust litigation, I've pointed those differences out. Where they are identical or substantially the same, they are discussed interchangeably.

How this book is organized

There are lots of possible reasons given by a trustee and/or executor for not giving you your inheritance. No two cases are identical but many are surprisingly similar. After years of helping beneficiaries I have noticed that most cases can broadly but accurately be categorized into one of three common situations, and this book is organized around them:

An important document got changed before your mother or father died and as a result of that change, you are now disinherited.

The document is sound but you haven't gotten your inheritance. In other words, the trustee can't or won't carry out the terms of the trust or the executor or administrator can't or won't carry out the terms of the will.

Some or all of the property was transferred to someone else while your parent was still alive (usually under questionable circumstances.)

Your case may fall into one or two of these categories. If you don't think any of these descriptions apply to your case, stop and ask yourself if your concerns really center on an inheritance dispute. If your concerns are about the welfare of an aging loved one, the care they receive, or the management of their finances, then this isn't the right book for you. This book addresses only how to obtain your inheritance after the death of a loved one.

Common Situation One:

The Will or Trust Was Changed to Disinherit You

Terry and Scott couldn't believe it. Their grandmother had died and their aunt Patti was in charge of their grandmother's trust. At first, they couldn't get any information from Patti. While Terry and Scott were never particularly close with Patti, they didn't expect any trouble because their grandmother had long made it known that when she died there would be an equal division of her property among her four children. Since Terry and Scott's father died before their grandmother did, they expected to inherit their father's one-quarter share of their grandmother's estate.

When Patti finally provided Terry and Scott with some information, they were shocked to see that their grandmother's trust had been changed while she had been suffering from dementia. She had created a trust decades earlier. She left it alone, even after two of her children died, probably because that trust left the predeceased children's shares to their children (the grandmother's grandchildren). Instead of there being a four-way split of their grandmother's property, their aunt Patti was going to inherit everything under a new trust.

Terry and Scott knew this was not what their grandmother wanted. They also knew that talking with their aunt was pointless. She was the one who had found a lawyer to draft a new trust, to draft a deed conveying her home from the original trust to the new trust, drove their grandmother to and from the appointments at the lawyer's office, attended the meetings with the lawyer, and wrote the check from their grandmother's account to the lawyer. Their aunt had done everything she could to get this new trust that left everything to her. Even worse, their aunt claimed that that was what her mother wanted. Their aunt was perfectly willing to ignore her mother's dementia when the new trust was created.

Terry and Scott filed a lawsuit to set aside their grandmother's new trust and will. Terry and Scott alleged that their grandmother had this new trust and will created at a time when she lacked the mental capacity to create a new estate plan and that her new estate plan was the result of their aunt's undue influence over her. Patti hired a large local law firm to defend the new trust.

During the course of the case some very interesting facts came out. Their grandmother had not been able to take care of herself for some years before creating her new trust. Shortly before creating her new trust she had been admitted to the local hospital. The doctors at the hospital diagnosed her with dementia. After she was discharged from the hospital, she continued to see her doctor of twenty years. However, Patti didn't tell this trusted physician about the dementia diagnosis. Later, when a request was made to have the doctor write a note stating that her mother was able to handle her own affairs, Patti again failed to tell the doctor about the dementia diagnosis. Even after their grandmother's regular doctor started prescribing anti-dementia medication, Patti didn't tell him about the hospital visit and earlier dementia diagnosis.

The dementia diagnosis didn't stop Patti from trying to get her mother to transfer her home directly to her. She created a deed for her mother and had her sign it. Patti tried to record the deed but she did it wrong, so it was rejected when she went to record it.

When her original plan failed, Patti took her mother to a local estate-planning attorney to have her trust changed. The estate-planning attorney also wasn't told about the dementia diagnosis or the existing trust that left everything in equal shares to the four children. Patti didn't tell any family members about this change to her mother's estate plan.

At trial, Patti explained to the judge that her mother had long told her that she would one day inherit the house. This would happen, she told the judge, because two of her brothers had died and her mother was

estranged from her other sister. The judge didn't believe Patti's explanation. He noted that Terry and Scott's grandmother had long had a plan to leave her property in equal shares to her kids, and if any of her kids died before she did, then their kids would inherit in their place. In fact, their grandmother created her first trust when she was already estranged from one of her daughters. The changes all occurred after the hospital admission, dementia diagnosis, and at a time when Terry and Scott's grandmother was dependent on their aunt Patti for her care. Giving the whole house to Patti was Patti's idea. The judge believed that the new trust was the product of undue influence and rendered a judgment invalidating the new trust.

WILL CONTESTS AND TRUST CONTESTS

A will contest is a lawsuit to invalidate a will. A trust contest is a lawsuit to invalidate a trust. Either type of contest can be based on lack of capacity, undue influence, fraud, duress, menace, or mistake.

Testamentary capacity requires the testator (the person who created the will) to reach the age of majority (eighteen years of age in California) and be of sound mind. California law says a person is not mentally competent to make a will if at the time of making the will he or she:

Does not have sufficient mental capacity to:

understand the nature of the testamentary act,

understand or recollect the nature and situation of his or her property, or

remember and understand his or her relations to living descendents, spouse, parents, and others whose interests are affected by the will OR

Suffers from a mental disorder with symptoms including delusions or hallucinations that results in his or her devising property in a way that, except for the delusions or hallucinations, he or she would not have done.

That's a lot of language with very specific legal definitions, so let's break it down. Under the first standard, a person lacks a capacity (i.e. is mentally incompetent) to create a will if they don't understand that what they are doing is creating a will. To most people this makes intuitive sense. After all, if a person's mind is so badly compromised that they don't appreciate that what they're signing is a will (as opposed to a birthday card, letter, check, etc.) then you would expect the will to be invalid.

The testator can also be found to be mentally incompetent if they don't understand or remember the nature of their relationship to the property they own at the time they making the will. In other words, the will is not valid if the testator does not realize he or she is giving away his or her property when they die. The testator's failure to remember their own property also makes them mentally incompetent. The testator doesn't have to have a perfect memory or recall all their property. But if they don't remember a significant item, such as owning their own home or individual retirement account, that is a strong indication of mental incompetence.

Under the first standard, the testator can also be found incompetent if they don't remember who their relatives are. Again, a perfect memory is not required. It is common, as people age, for some detail to escape them. Forgetting the grandchildren's names is probably not a sign of mental incompetence, but forgetting one or more children probably is.

Under the second standard, the testator has to be so compromised by a condition, for example Lewy body dementia, that they see or hear things that aren't there, which may cause them to deed or will their property to someone they otherwise would not have. This is often proved at trial by showing an existing will that has been replaced by a later will. Typically, but not necessarily, the old will leaves property to family members in equal shares. The new will usually favors one family member at the expense of all the other family members. This evidence, in conjunction

with proof that the testator was seeing or hearing things that weren't there, can be enough to invalidate the new will for lack of testamentary capacity.

When alleging lack of testamentary capacity it is important to know that California law presumes the testator is competent. A competent person can leave his or her property to anyone he or she wishes. The testator does not have to take into account the desires of the beneficiaries or anyone else. Overcoming this presumption requires proving it is more likely than not that the testator lacked capacity. Whether there is enough proof always depends upon the facts of the particular case.

Until recently, the determination of mental capacity was the same for both wills and trusts. A recent case has created a question about whether this is always the case or only sometimes the case. Let your attorney do the legal analysis of what standard applies to the facts of your case. Use this section as a starting point to decide if your loved one may have been mentally incompetent when their will, trust, codicil, or trust amendment was created.

California law defines undue influence as conduct that subjugates the testator's will to that of another, causing a disposition different from that which the testator would have made if permitted to follow his or her own inclinations. In other words, the person who created the will or trust wasn't making his or her own decisions about who would inherit; someone else was making the decisions and using your loved one to create the new plan. It is not enough to prove that, generally speaking, someone influenced the testator or had an opportunity to influence the testator. There must be proof that the influence was used to get the testator to sign a will. Undue influence is proven when it is shown that the testator's freedom to choose was overcome by someone exerting undue pressure, arguing with the testator, or using some kind of coercion so that the testator could not make his or her own choice.

It is very rare in such cases to have eyewitness testimony concerning the use of undue influence. Typically, people who exert undue influence do it out of sight and earshot of other people. More commonly, undue influence is proven by circumstantial evidence: for example, a person suffering from dementia changing their will of twenty years that left everything in equal shares to their children to one leaving everything to only one child.

The person subject to undue influence may be forgetful and may be dependent on other people but not so impaired that he or she is incompetent. Even though competent, a person in this compromised condition could be more easily taken advantage of (subject to undue influence) because of his or her condition. What happened to Terry and Scott's grandmother represented a case of undue influence. She was clearly compromised by her dementia, but she wasn't so far gone that she lacked the mental capacity to create a new trust. She was vulnerable to being manipulated and particularly vulnerable to someone she trusted, like her daughter.

Of course, some people have declined so far that they are both subject to undue influence and mentally incompetent. These are not mutually exclusive conditions. A person can be mentally incompetent, unduly influenced, or both.

When trying to prove lack of mental capacity or undue influence, the testator's medical records are going to be important. If the records are not readily available, they will likely be obtained by your attorney during the course of the litigation by serving a business records deposition subpoena. At trial, you will most certainly need an expert, such as a forensic geriatric psychiatrist, to testify that the medical records show your loved one was either mentally incompetent or compromised and therefore subject to undue influence.

At trial, the person challenging the will or trust carries the burden of proof. Under certain circumstances, that burden of proof can be reversed and put on the person who's offering the will for probate or claiming the new trust or trust amendment is valid. In order to reverse the burden of proof, three things must be shown:

First, the person who benefits under the will or trust must have had a confidential or fiduciary relationship with the testator. A confidential relationship is one in which a person "reposes trust and confidence" in another. A fiduciary relationship is one in which a person has a legal duty to act in the best financial interest of the other person. Probably the most direct way of proving a fiduciary relationship is showing that the person who benefits had been acting for the testator under a durable power of attorney or in some direct manner had control over the deceased loved one's finances.

Second, you must prove they were active in procuring the will or trust. This usually requires showing something more than the fact that they went to the attorney's office. Good proof will show some independent action in getting the will or trust created, such as the person who benefits under the new document made an appointment for the testator with an attorney, chose that attorney, or suggested the new will or trust be created.

Third, you must show the person offering the will for probate or inheriting under the trust unduly benefits from the will or trust. Technically, this is supposed to be a qualitative judgment. Practically speaking, when judges see someone's share change from a fraction of the estate to the whole thing, they find that to be undue benefit.

Fraud requires some kind of deception or tricking the other person into believing something false is really true. Fraud in the creation of a trust, although rare, can occur by misrepresenting what document it is that is

being signed, the nature of the document being signed, or the trust maker creating the document based on the false promise of another person. An example of fraud would be telling a person they are signing a durable power of attorney when they are really signing a trust.

Duress and menace involve the use of force or violence or the threat of force or violence against the creator of the trust. While this does happen from time to time, I've never seen such a case in my practice. I would guess that most people who would resort to violence against their mother or father aren't going to wait until they die to get their property. They would probably want the property transferred to them now. If this is your situation, you could pursue such a matter as a civil case of elder abuse or you could pursue it in the probate court.

Mistake can also be a reason for setting aside a trust. This is a situation where the rules for wills and trusts are different. A trust can be rescinded either because there is a "mistake of law" or a "mistake of fact" in signing the trust. Mistake of law means someone has misunderstood the law and as a result created a trust with terms that otherwise would not exist. For example, the settlor believes that he is obligated to leave all of his assets to his oldest child, so he creates a trust leaving all of his property to only his oldest child. California law says that the trust settlor can leave their property to any person they want in whatever shares or proportion they choose. If the settlor would have left his property in equal shares to all of his children but for his misunderstanding of the law, a mistake of law allows the trust to be set aside.

Mistake of fact occurs when the trust creator believes that something factually untrue is in fact true. For example, the trust settlor believes her son who disappeared years ago is dead. So, she leaves all of her property to her daughter. After the trust settlor's death, it is revealed that her son is alive. This mistake concerning the true circumstances regarding her son led the settlor to create a trust with terms that she otherwise would not have.

The law of mistake is different for wills. A will can be set aside for mistake if the mistake goes to the execution of the will (for example, the testator thought he or she was signing a durable power of attorney, not a will) or the formation of testamentary intent in its entirety. For example, if there is evidence a will was signed as a joke, there really wasn't any testamentary intent. If a will was signed to induce the person promised property under the will to engage in illicit relations with the testator, then the will wasn't created to leave property to that person but rather for an unsavory purpose. If a will is signed to stop the testator from annoyance by a would-be beneficiary, the will can be set aside.

By the way, I'm not making these odd-sounding situations up. They are all from published cases.

A will won't be set aside because the testator gave his or her money to the "wrong" person. If your childless aunt Mary told you for years that she was going to leave you enough money to buy a house when she died, but instead created a will leaving all her money to the ASPCA, you probably will not have a case. Aunt Mary's promises to you aren't worth anything. That she chose to favor furry animals over her niece or nephew is not the type of mistake a court uses to set aside a will if Aunt Mary knew she was signing a will and knew the terms of the will.

Though not often used, claims for reformation and a contract to make a trust can be powerful ways, in the right situation, to get your rightful inheritance. Reformation allows the court to change the terms of the trust to reflect the settlor's true intentions. Among other reasons, reformation can be available where the settlor created the trust as a result of fraud or mistake in reducing the settlor's intent to writing.

An unusual example of reformation came to my firm through our client Norman. Norman's grandmother created a trust to which she created a handwritten "attachment." The grandmother had two sons. Her trust left all of her property to one of her sons. In her handwritten attachment,

she made clear that she loved Norman very much and she wanted to do everything she could to protect him and make sure he received an inheritance. She was misinformed by an attorney that there was no way to leave an inheritance directly to Norman. Instead she was told she would have to leave an inheritance to Norman's father and hope that he left it to Norman rather than Norman's father's stepmother. She was absolutely unwilling to do this as she strongly disapproved of Norman's stepmother, so she left everything to her other son, Norman's uncle. The trust was drafted by Norman's uncle and his wife using cheap trust-drafting software from an office-supply store.

Norman knew his grandmother would not have left everything to only one son if she had been properly informed of her options. He also knew his grandmother told his uncle she wanted to leave money to Norman but that the uncle's wife created a trust leaving everything to her husband. So, because of his grandmother's mistake, Norman sought to have the trust reformed.

GIFTS TO A PERSON WHO DRAFTED THE WILL OR TRUST OR A CAREGIVER

California law specifically provides that a person who drafted a will or trust or is the caregiver to a person who creates a will or trust may not inherit from that person. However, this law is shot through with exceptions. It's very difficult to accurately summarize this law without turning this book into a legal treatise. So, to oversimplify, the practical effect of the law is that a lawyer who drafts a will or trust cannot inherit from the client and neither can the lawyer's spouse. A caregiver or a person who supervises an individual's care also cannot inherit from their client, and neither can their spouse. A major exception to this rule: If the lawyer or caregiver is a relative, they are not barred from inheriting.

The unscrupulous child who has either been a caregiver to their parent or has supervised the caregiving their parent received is not automatically disinherited under this law because they fall under this exception. However, do not confuse this failure to automatically disinherit them with an inability to do something about their unlawful conduct. You still have the ability to pursue a lawsuit based on everything that's been discussed above. If your parent needed a caregiver or needed assistance with day-to-day tasks, then you probably have a claim that the will or trust was created when your parent lacked capacity or was subject to undue influence.

NO-CONTEST CLAUSES

A no-contest clause is the part of a will or trust that says if you challenge the terms of the will or trust, then you are disinherited. Many people who correctly recognize that their parents' wishes were subverted by someone else get scared off from pursuing their case because of a no-contest clause in the will or trust. It is important to understand that the existence of a no-contest clause in a will or trust contest is usually meaningless to you if you have been disinherited. If the will or trust gives everything to the person who took advantage of your parent, then it doesn't matter if there is a no-contest clause because you would not inherit anything anyway under the existing will or trust. The only way you would be able to inherit is to file a will or trust contest. If you win, then the no-contest clause is set aside, along with the invalid will or trust.

If the person who took advantage was a little bit more subtle by having the will or trust leave you some substantial amount of property, then a bit of analysis needs to be done. If you lose your will contest or trust contest, you will be disinherited and you won't receive the property left to you under the challenged will or trust. If you are successful, on the other hand, you will not be disinherited because the will or trust and its no-contest clause will be set aside.

STOPPING A TRUSTEE FROM USING YOUR MONEY TO FIGHT YOU

Over the last thirty or so years the use of trusts in estate planning has exploded. During the same time period, life expectancy has improved dramatically. A person who created a trust two or three decades ago may encounter life changes that require amending their trust.

It is increasingly common to see trust contests that challenge a trust amendment rather than the trust itself. Most often the person who took advantage of a trust settlor when they were mentally incompetent, or subjected them to undue influence, will have themselves appointed as successor trustee. In most situations a trustee is allowed to use trust funds to pay for the cost of litigation. This leaves the wrongdoer in control of trust money and able to use that money to fund the litigation to defend their own misconduct. However, in a trust contest that challenges a trust amendment, the trust itself will still exist at the conclusion of the litigation. What's really being disputed is who will inherit from the trust. Under these circumstances you can get an order from a judge either preventing the trustee from using trust funds to defend the litigation or informing the trustee that he or she will be personally responsible for the litigation costs if they lose. This can be a powerful tool with which to bring the wrongdoer to the negotiating table.

This is different from will contests involving a codicil to a will. Similar relief against an executor when only the codicil, not the will itself, is being challenged, is not available.

Common Situation Two:

The Document is Sound But You Haven't Received Your Inheritance

Deborah's mother, Molly, passed away. More than a decade before she died, Molly told her she had created a living trust that held all her assets. Upon her death, a few items were to be given to a close friend, a niece, and a nephew but the large majority of her estate would be divided evenly between Molly and her brother, Brad. When the trust was created Molly was in good health and in her right mind. Molly told Deborah that Brad, as oldest child, would be the trustee when Molly died. Deborah knew her mother was capable of making her own decisions, the choices she made were reasonable, and the trust contained the terms her mother wanted. Molly told Brad where to find her trust when she died and told Deborah that Brad would take care of everything.

For a year after her mother died, Deborah remained in communication with her brother. Their relationship had always been a little rocky but they managed to get along during this time. Her brother did nothing obviously wrong and Deborah had little reason to be suspicious of his conduct. When the first anniversary of their mother's death passed, Deborah asked her brother when the trust assets were going to be distributed. She couldn't get a response. Deborah then asked for a copy of their mother's trust. Brad kept promising to send her a copy, but never did. After inquiring several more times, Deborah's brother finally replied that he was owed some money by their mother. This came as a complete surprise to Deborah. As far as she knew, her mother had been financially secure and didn't need any help. Deborah became increasingly suspicious of her brother's motives. Finally, her brother told her that the entire trust estate would be going to him because their mother owed him a great deal more money than was in the trust.

Deborah doubted Brad's story. She wanted to learn the truth and get the inheritance her mother intended for her. First, a demand letter was sent to Brad for a copy of their mother's trust. When he didn't produce it, Deborah sued Brad to obtain a copy. The court ordered Brad to give Deborah a copy of the trust.

As Deborah suspected, the trust said exactly what she had been told by Molly before she died. Deborah then sued Brad for her half of the residuary trust estate. Brad again claimed he was owed more money by Molly than was in her trust. During discovery, bank records were subpoenaed and Brad was made to show all the documents that supported his claim. He couldn't prove he was owed any money at all. Molly's bank records showed she had made either gifts or loans to Brad during the two years preceding her death. Deborah got a court order forcing Brad to immediately distribute her share.

The no-contest clause doesn't matter

It is very important that you distinguish between challenging a will or trust and acting to make a trustee carry out the terms of the trust. If you are trying to enforce the terms of the trust, it is not a trust contest, and therefore the no-contest clause won't be triggered. In other words, if you accept the terms of the trust and just want the trustee to do his or her job by carrying out the terms of the trust, your lawsuit against the trustee will not result in your getting disinherited.

It is not uncommon for trustees to make a false threat to use the no-contest clause to disinherit you. Todd's experience is instructive. Todd was extremely upset with his sister Sally. Two years had gone by since their mother's death and Sally had not distributed anything to Todd. Todd had no problem with his mother's trust. He believed it accurately reflected her wishes, even though it left more property to Sally than to him. He simply wanted what his mother had left him and it didn't appear Sally was ever going to get around to distributing the property to Todd unless somebody made her do so. Whenever Todd talked to Sally about distribution, she told him he would be disinherited under the no-contest clause if he did anything.

Todd contacted us about what could be done, and it turned out that his situation was clear-cut. He wasn't challenging the trust, just the ineffective way his sister was administering it. We drafted a petition that demanded, among other things, that Sally distribute Todd's share to him. Todd finally received his full inheritance.

THE NEGLIGENT OR UNRESPONSIVE TRUSTEE

There's no way to know in advance if the trustee will be negligent or unresponsive. But, as the old saying goes, you'll know it when you see it. There are two ways to deal with the negligent or unresponsive trustee. First, petition the court for their removal. Second, petition the court to compel them to do what they are supposed to do.

REMOVING THE TRUSTEE

A petition for removal makes the most sense if the trustee is supposed to remain in place for an extended period of time. An example of this would be where the trust does not call for the outright distribution of trust property. This can happen because the trust calls for distributions over staggered periods (e.g. one third of the trust assets at age thirty-five, one half the remainder at age forty, and the remainder at age forty-five), is managing property for a minor child, or is managing property for incompetent adults.

Often people want their trustee removed because they are angry at the trustee. On a pragmatic level, trustee removal may not make sense if the trust calls for an outright distribution and what you seeking is to have that property distributed now. Trustee removal is another cause of action in addition to the distribution. In other words, it is yet one more thing you have to prove and one more thing for the court to decide. It often increases litigation costs and delays a conclusion of the case. This is usually an acceptable tradeoff if the trustee is supposed to manage the trust for an extended period of time, is causing losses due to poor management, or is stealing trust property. If you have proof of truly terrible conduct that endangers the trust property, then you may be able to have the trustee suspended and a temporary trustee appointed while the removal petition is litigated.

Jason and Stephanie's situation illustrates when petitioning to remove a trustee makes sense. Jason and Stephanie had lost both their parents. They knew their parents had created a revocable living trust and that the trust had been drafted by their parents' attorney. They were surprised to learn that their parents had not chosen either of them to serve as the successor trustee, but rather a private fiduciary who had been suggested by their parents' attorney. Jason and Stephanie knew that their parents were perfectly competent and had made their own choices in setting up their trust. So, they had no reason to doubt the validity of the trust or the choices their parents had made. They simply wanted to see the terms of the trust carried out in a timely and efficient way. The trust divided the property into equal shares for the two of them and called for distributions to each of them of one third of their shares at age twenty-five, one half the remainder at age thirty, and the entire remainder at age thirty-five.

But Jason and Stephanie encountered one problem after the next. Calls to the trustee about the status of the trust administration went unreturned. Letters to the trustee about the status of the trust administration resulted in letters back that told them little about what was going on and gave them only a vague timeline of when trust administration would be completed. Trust income tax returns were filed late. When they finally were filed, the result was that both Jason and Stephanie had to file amended personal income tax returns. Distributions based on their ages weren't made and requests for the distributions were ignored. After more than a year of this frustration, Jason and Stephanie had reached their limit and took action.

It was obvious the trustee had breached her fiduciary duties to Jason and Stephanie. She hadn't consulted with either of them about the investment management of the trust assets, even though she would be managing these assets on their behalf for years to come. She failed to communicate with them about nearly all the aspects of trust administration. She failed to make timely distributions to them, even though they each

had made written requests, as they were allowed to do under the trust, for distributions. And the trustee was charging fees that were outrageous based on the actual work she had done. A petition was filed with the probate court for removal of the trustee. Their lawsuit ultimately resulted in the removal of the trustee, a reduction in the fees paid to her, and the appointment of Jason and Stephanie as co-trustees of their parents' trust.

PETITION TO INSTRUCT THE TRUSTEE

Trustee removal is usually not an acceptable tradeoff if the goal is just to get the trustee to do his or her job and bring the trust administration to a close. A petition to instruct the trustee to perform a particular task usually makes the most sense when the trust calls for an outright distribution. If you know what property the trust holds and you want your share distributed according to the terms of the trust, this can be the fastest, most effective remedy available.

Either type of petition requires going to the probate court. The trustee has the right to object to your petition. You can expect whatever trust you are dealing with to have language in it that says the trustee can use trust funds to hire an attorney to pay for the cost of any litigation. In my experience, every trustee who is able to use trust funds to pay for the cost of their defense will do so. That doesn't mean that their use of trust funds is necessarily appropriate. If the trustee defends an action in bad faith, the trustee can be ordered by the court to personally pay for the cost of his or her own defense. On the other hand, if the trustee is taking an action not to defend the terms of the trust or protect trust assets, but rather to benefit himself or herself, then here, too, the court can order the trustee to personally pay the cost of the defense.

FAILURE TO PROVIDE COPIES OF DOCUMENTS

Getting a copy of the will or trust should be a simple matter. The will is supposed to be lodged with the superior court in the county where the decedent was living at the time of his or her death. The lodged will is a public record. If you want a copy, you or your attorney can go to court, look up the will, and obtain a copy. The executor or administrator of the probate estate is not required to provide a copy to the beneficiaries. Smart ones will provide copies in order to avoid a problem—but not every executor or administrator is smart (or, for that matter, cooperative). However, if someone other than the executor is in possession of the will, then that person (the custodian) is required to send a photocopy of the will to the nominated executor.

The trustee of the trust is required to provide a copy of the entire trust, as amended, upon written request to the heirs and beneficiaries of the trust settlor. This means the trustee has to send a copy of the trust and its amendments—the trustee does not get to pick and choose what will be sent. Everyone mentioned in the trust who receives property from the trust (the beneficiaries) has a right to a copy. Blood relatives (e.g. children and grandchildren) have a right to receive a copy of the trust and its amendments even if they are not beneficiaries. Even if a child is disinherited, he or she still has a right to a copy of the trust and its amendments.

If a written request is made for a copy of the trust and its amendments and the trustee does not respond within sixty days, the heir or beneficiary can petition the probate court to compel the trustee to provide a copy of the trust. I have yet to see a successful defense to this request as long as there is proof of the written request. If the court grants the order to provide a copy of the trust, then the trustee may also have to pay the attorneys' fees and court costs of the proceeding.

FAILURE TO ACCOUNT

Executors and administrators of probate estates are required to account at least annually to the beneficiaries of the probate estate. If the first year of the probate is coming to an end and the executor or administrator is not able to close the probate estate, they have the option of filing a status report with the court. If the status report asked for a relatively short period of time in which to conclude the administration of the probate, the probate court probably will not require an account be filed at that time. However, a beneficiary who is concerned that the executor or administrator is mishandling the assets of the probate estate may want to request that the court order the executor or administrator to provide an account. Under all circumstances, when the executor or administrator wants to close the probate estate, an account will have to be filed unless each and every beneficiary consents in writing to waive the account.

Trust accounts must be provided every year to the income beneficiaries of the trust estate. Under some circumstances they may be necessary more frequently. Trust accounts are a window into how the trustee is administering the trust. When a trustee refuses to account or delays providing an account, this is a red flag—something may be wrong. Some trustees don't account because they are lazy. That's not good, but it is not necessarily a sign of financial danger. Some trustees refuse to account, or will promise an account that never gets produced. This can be an indication the trustee is mismanaging trust assets or is taking property to which they are not entitled. When a written demand is made for an annual account and none is produced, probate court judges are quite likely to grant the petition and instruct the trustee to account.

For both probate and trusts, the beneficiaries should review the account and decide whether it's acceptable or objectionable. If there is a concern that assets are missing from the estate, money has been spent in an inappropriate way, the value of the assets have declined due to the ineptitude of the trustee, or money was distributed to the wrong people, then you

will want to file an objection to the account. Sometimes the account is just the starting point for further inquiry. It may be necessary to research real estate records to see when a property was sold, to whom, and for how much. Bank records may need to be subpoenaed in order to review account statements and cancelled checks to see if money was used improperly. If you have any doubts at all about the propriety of the account produced, you must object to it to preserve your rights.

In the objection, you will point out what's been done wrong (to the extent you can identify it), and if the beneficiaries are getting less than they should, the amount the executor, administrator, or trustee should be surcharged in order to make the beneficiary whole. If the amount is unknown, that's okay. You can always ask for an amount to be proven at trial. If the losses caused by the executor, administrator, or trustee occurred recently, then seeking interest is probably wasted effort. On the other hand, if it happened more than a year ago, you may want to seek additional damages for interest too.

FAILURE TO PROPERLY INVEST ASSETS

Improper asset management is a much bigger difficulty in trust administration than probate. In a probate, the executor or administrator has very limited choices about what to do with the probate assets. The executor or administrator can keep the assets as they are at the time of the testator's death or they can sell those assets and put the proceeds in an interest-bearing account.

For example, the executor or administrator can keep the testator's home as it is through the entire course of the probate, and then at the conclusion of probate record a deed passing the home in equal shares to the beneficiaries. The executor or administrator could also choose to sell the house during the course of the probate. As with the sale of any house, certain expenses will be incurred. Once the house is sold, the executor

or administrator can take the net proceeds from the sale and put those proceeds in an interest-bearing bank account. What the executor or administrator does not get to do is engage in any form of sophisticated asset management. That's because the rules for probate are different from trust administration.

When the trustee is managing trust assets, unlike in a probate, the trustee is required to make asset management decisions. On a practical level, a trustee who is in charge of a trust that simply calls for the distribution of all assets to the beneficiaries upon the death of the trust settlor is probably going to either pass those assets out to the beneficiaries "as is" or sell the assets and put the proceeds in an interest-bearing account. The cash will then be distributed to the beneficiaries according to the terms of the trust.

A trustee in charge of a trust that requires management of trust assets for more than a year is going to have to engage in asset management. The trustee is required to abide by the "prudent investor" rule. This means the trustee is required to evaluate a number of factors to create a plan for the investment of trust assets for the benefit of the beneficiaries. If the trustee takes the time to evaluate these factors and create a plan, then he or she is unlikely to be liable for a decrease in the value of the trust assets. If the trustee fails to create a plan and the trust assets decline in value, the trustee is almost certainly liable. In my experience, very few trustees create any sort of investment plan. Their failure nearly always leaves them liable for a reduction in the value of the trust assets.

A related situation arises when the trust provides for outright distributions, but the trustee delays the administration of the trust. In addition to petitioning the court to instruct the trustee to carry out the terms of the trust, you will want to determine whether the trustee's failure to distribute the asset in a timely manner caused you losses. If the value of real estate, stocks, bonds, mutual funds, or any other asset held by the trust

declined in value while the trustee took no action to preserve the assets' value, the trustee may be liable for a surcharge. A surcharge is a court order assessing damages against the trustee for value lost due to his or her breach of duty.

OMITTED SPOUSES AND CHILDREN

Omitted spouses and children find themselves in the unusual situation wherein the will or trust is correct as written but they are still being denied a rightful inheritance. A spouse is considered to be omitted if, at the time the will or trust was created, the testator or settlor was not married to the spouse. A child is considered to be omitted if, at the time the will or trust was created, the child was not yet born.

An omitted spouse does not have to challenge the will or trust in order to obtain an inheritance. Instead, the omitted spouse files a petition with the probate court making the claim of omission from the will or trust. If the omitted spouse can prove that he or she was married to the testator or settlor after the will or trust was created, then the omitted spouse is entitled to a share of the probate or trust estate. That share is one half of the community property and up to one half of the deceased spouse's separate property.

The omitted spouse statute does not apply to: a surviving spouse who was deliberately disinherited by the deceased spouse; a surviving spouse who was provided for by the deceased spouse through a transfer occurring outside of the will or trust and the will or trust makes clear that this transfer was in lieu of an inheritance under the will or trust; or where there is a valid agreement waiving the right to a share of the deceased spouse's estate.

The omitted spouse statute is a valuable protection for spouses entering a second or later marriage where no action is taken to develop a joint estate plan with the new spouse. It ensures the new spouse a degree of financial protection when their spouse dies.

The omitted spouse statute can also be misused by abusive or domineering spouses, even in a first marriage. Here is a rather extreme example, as related by my client's son-in-law.

Given his father-in-law's conduct over his sixty-two-year marriage and the way he'd acted in the last couple of years of his life, attorney Jeff Kane knew his mother-in-law's case could not be resolved with just any estate planning or trust attorney. He needed someone who specialized in litigation. "A mistake could end up costing you a lot of money and even more than that, it might cost you the sense of justice that is so important to some people. I knew that my mother-in-law, because of her age, would have ended up accepting far less than what she should have received."

Pat and Joe married when they were both just eighteen years old. They had been married for over sixty years when Joe passed away. During the course of their marriage they had five children together. Pat and Joe started out with nothing, but as Joe was promoted through the ranks of the beverage industry they began purchasing rental properties in the Huntington Beach area of California in the early 1970s.

This wasn't your typical marriage. Thirty years prior to his death, Joe left Pat to "see the world," but he continued to use Pat to collect rents, pay business expenses, and provide bookkeeping and tax preparation and he even enlisted her help to set up a new business. A strong Catholic, Pat refused to get a divorce. "She continued to do all of the things that a wife would do for a husband, with the exception of living with him and enjoying the money that they created together," Jeff said. At the time of his death, Joe's estate was worth several million dollars.

As the years went on, Joe provided Pat with a monthly stipend of $1,000 to $2,000. However, just two weeks prior to his death, he asked Pat to sign a document that said she agreed to receive nothing when he died—not even the small stipend he had been paying her. In addition, he had revised his trust to state that should Pat make any attempt to seek money from him or his trust, all of their children and grandchildren would be disinherited and would receive nothing. When Pat refused to sign the document, Joe attempted to protect himself by revising his trust to include a no-contest clause. Fortunately for Pat, ten days before the amended trust was drafted, the laws in California were changed and Joe's intended no-contest clause no longer provided his trust the protection he thought it did.

"I knew there were instructions in place for Joe's trust to defend itself against attacks from the very people who were seeking to attack it," Jeff said. "My mother-in-law was very pessimistic about her chances. She's eighty years old, very proud, and she was reluctant to lay out for the world to see all of the facts and personal details of her life with Joe."

"Scott took a strong personal interest in the case. He took on some of the anger that we felt after having watched Joe coerce Pat into signing over deeds to the properties that they owned together with no consideration for her welfare." Joe had taken the money from the sale of the properties and bought more properties, putting them in his name only. "Scott devoted a lot of time to learning the intricacies of this case. I think that gave Pat strength. "

Jeff continued, "In court I see these attorneys mosey up to the podium, and I'm actually embarrassed for my profession sometimes. Not only is there a lot of money at stake, but many of the people embroiled in these cases are looking for justice after being mistreated or taken advantage of. I know that in the minds of many, justice equals money, but in this particular case justice had a huge moral and ethical component to it as well."

Pat's case settled in seventeen months, resulting in her being awarded half of Joe's $7.7 million estate. In addition, as part of the settlement, the trust agreed to not attempt to invoke the no-contest clause, and to instead allow all of the children and grandchildren of the marriage to remain beneficiaries. Jeff remarked on how important this was to Pat's family. "Pat was in poor health with very little fight left in her. Had Joe's attempts to disinherit her been allowed to stand, it would have been the final indignity for her. But I now see her holding her head up and acting very proud that she finally stood up to Joe."

"Scott was able to bring her a decisive measure of justice and provide her some dignity. She was able to stand up in a legal forum and say, 'No. This is not right. I'm going to tell everybody what this man did to me over the course of a sixty-year marriage and let them determine if this is right.' And when the other side buckled under and paid up, it was vindication for her."

Like an omitted spouse, an omitted child does not have to challenge the will or trust in order to obtain an inheritance. The omitted child files a petition with the probate court making the claim that the child was born after the will or trust had been created. If the omitted child is able to prove their case, he or she receives a share of the probate or trust estate. That share is the same amount the child would have received if his or her parent had died without a will or a trust. Omitted children include adopted children, children born out of wedlock, and foster children if the foster child lived with a foster parent while he or she was under eighteen years old and would have been adopted by their foster parent but for a legal barrier. An omitted child will not inherit if their deceased parent's will or trust affirmatively states the parent's intention not to leave anything to their child, the deceased parent left substantially all of their property to the other parent of the omitted child, or the deceased parent provided for their omitted child by a transfer passing outside of the will or trust, and the will or trust says that this transfer is in lieu of an inheritance under the will or trust.

CO-TRUSTEES WHO CAN'T GET ALONG

It's common for parents to want to treat their children equally in their estate plan. As a way of doing this, parents sometimes choose not only to leave their estate in equal shares to their children but also to nominate more than one of their children to act as co-trustees. This is especially common in blended families wherein the husband wants one of his children to be a co-trustee and the wife wants one of her children to be a co-trustee. Sometimes this works out fine. But sometimes, the co-trustees just can't get along or one co-trustee is trying to perform his or her duties while the other co-trustee won't do anything.

When the co-trustees can't get along, their failure to act can be grounds for them to be removed. This may result in the replacement of one of the co-trustees or both of them. If you are one of the co-trustees and you are trying to carry out your duties as a co-trustee but your counterpart will not cooperate with you, then you need to get to court and either seek instructions on how you should act alone or ask the court to remove your co-trustee. If for any reason at all the administration of the trust grinds to a halt and the beneficiaries suffer any sort of financial harm as a result, both trustees are potentially liable for the losses suffered by the beneficiaries. However, if you have filed a petition for instructions and alerted the court to the problems caused by a disagreement between you or by your co-trustee's failing to act, you will minimize your own liability.

COMMON SITUATION THREE:

My Parent's Property Was Transferred to Someone Else While My Parent Was Still Alive

The third common scenario a beneficiary may encounter is an unlawful transfer of property to someone while their parent was alive. Under this scenario there is no complaint about the terms of the will or trust. The problem is that there is little or no property to go to the beneficiaries because it was transferred before death. By an unlawful transfer of property I'm not referring to the sale of the family house to people who buy it for fair market value or the sale of mutual funds in the open market. Rather, an unlawful transfer of property is the transfer of property for less than fair market value or as a gift. Usually the transfer is to a family member or caregiver.

Typically, such transfers made while your loved one is alive are made without the recipient paying any money for the property they receive, without the advice of an attorney, and often at a time when a fiduciary relationship already exists. Leaving aside the legal analysis, looking at a transfer that is uncompensated, made without anyone advising the decedent, and to someone who has some sort of financial or personal relationship with the decedent just doesn't look right to most people. When you lay out the facts of the transfer, most people just get a bad feeling about what occurred. This initial gut reaction is usually a good indicator there was an improper transfer that can be set aside. If the evidence is strong enough to show that the taking of property was done in bad faith, the judge can impose double damages.

ABUSE OF A DURABLE POWER OF ATTORNEY

Sometimes the person receiving the property is brazen enough to carry out the transfer of property on their own. This will occur through the use of a durable power of attorney. It could be a durable power of attorney that a bank requires them to sign. Or it could be a durable power of attorney that had been created by your deceased loved one. In either event, if the durable power of attorney did not specifically allow for the principal (the person who created the power of attorney) to make gifts to the agent (the person who acts under the durable power of attorney) then the gift can be set aside.

Some durable powers of attorney will include a provision for making gifts. Have the power of attorney reviewed by your attorney. There's a good chance the power of attorney either places conditions on the ability to make gifts or limits the amount of the gift to the annual exclusion amount from gift taxes. Most attorneys (i.e. the agent or the person who acts for the principal) who abuse their authority don't limit themselves to small amounts. They tend to grab as much as they can.

A Note about Blended Families

(and Some First Marriages)

A blended family is one in which the husband, wife, or both parties are in their second or later marriage. Oftentimes in blended marriages the couple will use what is commonly referred to as an A-B Trust. An A-B Trust is a trust that starts and continues as one trust while both trust settlors are alive but splits into two subtrusts when the first spouse dies. There are a number of different funding formulas for A-B Trusts. In general terms, they call for some division of the couple's property between the A Trust and the B Trust after the death of the first spouse. (An irreverent way of remembering which letter applies to which person is that "A" stands for above ground and "B" stands for below ground.) Blended families use this type of trust to try to ensure an inheritance for the husband's children from his half of the estate, for the wife's children from her half of the estate, and to ensure that the surviving spouse is supported as long as he or she lives. Couples on their first marriage use this type of trust for estate tax planning purposes and also to ensure the children from the marriage get the first deceased spouse's half of the property in the event the second (surviving) spouse remarries and leaves the property to a new spouse.

Sometimes after the first spouse dies the relationship between the survivor and the decedent's children changes for the worse. The surviving spouse is usually the sole trustee of the trust after his or her spouse dies. The surviving spouse may decide he or she no longer wishes to stay with the plan he or she had with the deceased spouse. So, the survivor executes a trust amendment that purports to change the entire trust. This will require a challenge to the trust amendment to limit its effectiveness to just the A Trust. This happens both in blended families in which the aging survivor has a fraying relationship with the deceased spouse's children as well as in first marriages wherein the aging survivor becomes more dependent over time on just one of the children.

Ken spoke with us after his sister Jenny presented him with their mother's amended and restated trust. She finally showed him their mother's trust nearly two years after their mother died. The amended and restated trust stated that all the property went to Jenny and that Jenny was the trustee now that their mother had died. Ken knew this couldn't be right. He had a copy of his parent's original trust. The original trust called for a division of the trust property between the A and B Trusts when their father died about ten years before the division had occurred.

The original trust specifically said the B Trust was irrevocable and couldn't be amended when the first spouse died. Despite this language, their mother found an attorney willing to draft an amended and restated trust, and the entire trust was changed. Jenny took the position that her mother had the right to do this. Ken could only get his inheritance by filing a petition to challenge the purported amendment to the B Trust. Ken would be wise to demand an accounting from Jenny and perhaps assert that Jenny had violated the no-contest clause in the B Trust by asserting that her mother's amended and restated trust was a valid amendment of the B Trust.

Sometimes the surviving spouse fails to fund the A and B Trusts by just ignoring the fact that a division of assets has to occur and leaving everything in the original trust. If nothing else happens between the deaths of the two spouses, this is not a problem. However, if there is a failure to fund and there is a purported amendment to the entire trust, then the failure fund has to be addressed so that the subtrust gets funded and the children receive what they should from it.

Some spouses get generous with property in the deceased spouse's trust when they don't have the authority to do so. Suppose a husband dies and his wife funds the house and some mutual funds into the B Trust (that's the husband's subtrust because he died first). The wife is entitled to all the income generated by the B Trust and may be able to take property to support herself. Instead she makes a gift of the house and mutual funds

to her son. Actually, she has no authority to make that gift. A petition will have to be filed to take back the property that was unlawfully transferred from the B Trust.

A variation on this situation is one in which one spouse enters into the marriage with a trust that has already been funded. They might even amend that trust to make their new spouse a co-trustee. During the marriage, a brand new trust is created with new terms that favor the new spouse and possibly the new spouse's children from an earlier marriage. This scenario often raises questions of undue influence and lack of mental capacity.

Janet's father is a good example. Nicholas had four daughters, including Janet. He was a successful businessman who purchased commercial properties and held them in his trust. His trust left everything in equal shares to each of his daughters. Nicholas married his third wife, Rena, after creating his trust. Rena brought minimal assets to their marriage. Years later, Nicholas amended his trust to make Rena a co-trustee of his trust. Years later, Nicholas suffered a very serious stroke.

Rena took Nicholas to an estate-planning attorney who drafted a new trust that kept all the property in trust for Rena's benefit for the rest of her life. Upon Rena's death the trust called for a small sum of money to go to Nicholas's four daughters and for everything else to go to Rena's son. The estate planning attorney drafted deeds conveying all the real estate from Nicholas's trust (which held his separate property) to Nicholas and Rena as community property and then from the two of them to the new joint trust.

Rena did many things wrong. As co-trustee of her husband's original trust she had a fiduciary duty to him and his children. She played an active role in procuring both the joint trusts. As trustee of the joint trust she had conflicting duties to the beneficiaries of the original trust. She obtained a benefit from the new trust that she never would have had

under the original trust. The burden of proof in this case can be shifted on to Rena to show that her husband made the transfer free of undue influence.

Rena also signed the deeds conveying the property from the original trust to Nicholas and her as community property and then again when the properties were conveyed to the joint trust. Rena has exposed herself to a lawsuit in which the trustee of the original trust sues Rena to take back title to the properties, and for double damages.

HOW TO PAY FOR LITIGATION

Some people are apprehensive about filing a will or trust contest because they don't know what it's going to cost. Some are afraid that they just don't have enough money to hire an attorney and pursue their case. Some people believe there is no need to do anything because "the judge will do what's right."

There is nothing that happens automatically to cause a will or trust to be set aside, to get a nonperforming or negligent trustee to act, or to get a thief to return property wrongfully taken from a loved one. Even though a will has to be admitted to probate, and therefore gets reviewed by a judge, a judge doesn't have the authority to set a will aside unless a will contest is filed. A trust may never be subject to judicial scrutiny. Even if it is, a judge cannot declare a trust invalid unless a trust contest is filed. It is naïve to believe the judge will "make things right" without the proper pleadings being filed in court. Filing the proper pleadings and proving your case in court is the only way to ensure you get your rightful inheritance.

Pursuing any form of probate or trust litigation is going to cost money. How much your case will cost depends on the nature of the case, the lawyer you hire, and how combative the opposition is. Every attorney will take a case if you can pay the attorney's hourly rate and the costs related to pursuing your case. Costs include things like filing fees, deposition transcript costs, court reporter fees, subpoena fees, expert witness fees, travel expenses, etc.

If you are concerned about the cost of your case or just don't have the money to hire an attorney, you should discuss having an attorney take your case on a contingency fee basis. A contingency fee means the attorney will not charge you on an hourly basis and will not require you to pay for any of the costs of the case while your case is being litigated. Instead, your attorney will agree to take a percentage of the amount recovered for you and will be reimbursed for the cost that have been advanced only when the recovery is obtained. If you don't get any money or property, your lawyer doesn't get paid and you don't owe your lawyer anything. Your lawyer bears all the risk unless and until something is recovered for you.

The costs that are reimbursed should only be the direct out-of-pocket costs for your case, not office overhead. The percentage the attorney will receive usually ranges from one quarter to one half of the amount recovered. The earlier in the proceedings the case settles, the lower the percentage will be. If the case settles at a late stage or a trial is necessary, then the attorney will receive a larger percentage.

Eleven Questions to Ask Before You Choose Your Probate and Trust Litigation Lawyer

Is the lawyer's practice focused exclusively on trust and probate law?

Choose a lawyer who exclusively, or at least primarily, practices in the area of trust and probate law. This is a constantly evolving, complex area of practice. You need a knowledgeable and experienced lawyer representing you and your interests who is intimately familiar with the intricacies of the California Probate Code and probate law. Those are the laws governing probates, trusts, and non-probate transfers. You cannot leave your welfare and financial interests in the hands of a lawyer who is a jack of all trades but master of none.

Is the lawyer a planner or a litigator?

Estate planning attorneys focus their practices on trust and probate law. However, they spend their time drafting trusts and wills. Many estate planners have never set foot in a courtroom. If there is a dispute concerning a will or trust, you want an attorney who litigates these disputes, not one who spends the majority of time drafting the document. A probate and trust litigator will know what evidence is important, how to gather it, and how to present it at trial. An estate planning attorney won't.

What will the lawyer do to educate me about my situation and answer my questions?

Your lawyer should offer you a book, DVD, and/or informative website so you can better understand your situation. At a minimum, you need to know if the lawyer can help you. You should know about the lawyer's experience and qualifications before you pick up the phone or walk in the door. Your probate and trust litigation lawyer must be a good com-

municator and be willing to answer all of your questions. Any skilled trust litigator knows that educated clients are better equipped to make sound and informed decisions about their case.

Is the lawyer certified by the State Bar of California as a specialist in estate planning, trust, and probate law?

The State Bar of California certifies lawyers with the requisite experience and education as specialists in Estate Planning, Trust and Probate Law after they have applied for certification and passed a separate exam given by the State Bar. Fewer than 1 percent of all lawyers practicing in California are so certified. You can check to see if a lawyer is certified by going to the State Bar's website (http://www.calbar.ca.gov) and typing the lawyer's name in the box labeled "attorney search."

Have the lawyer's clients provided testimonials?

Any lawyer can tell you how great they are. A lawyer with satisfied clients can prove it by showing you their testimonials. While no one's experience will be exactly like yours, a lawyer with lots of satisfied clients is an indication of the treatment you can expect from that lawyer.

Is the lawyer attentive while you are talking?

It is crucial to have a telephone or face-to-face consultation with any lawyer before signing a retainer agreement. This is your opportunity to find out if the lawyer is focused on you and your concerns or whether you are being treated (and can expect to be treated in the future) as just another numbered file in their office. If the lawyer is checking emails or taking calls during your meeting, look elsewhere.

Is your personality compatible with the lawyer's personality?

In order to work effectively with your lawyer, you must be comfortable with him or her. Make sure the lawyer you retain is someone with whom you can talk, to whom you can listen, and with whom you will be able

to share the most intimate details of family relationships and finances, since those are usually the heart of a probate or trust litigation case.

Is the lawyer proactive?

You should hire a probate or trust litigation lawyer who is able to provide you with a plan of action. Your attorney should listen to you and then take charge.

Is the lawyer willing to attempt a negotiated settlement of your matter?

A small percentage of contested trust and probate cases actually go to trial. Most settle at some point in the litigation process. An experienced lawyer knows that very few cases are perfect cases. Even strong cases may have a few problems that can cause complications. A good lawyer knows letting a case drag on unnecessarily only drives up his or her client's costs. Your attorney should make every reasonable effort to negotiate a settlement on your behalf, while at the same time diligently preparing your case for trial. Cases settle when the lawyers are prepared and dedicated. Cases that don't settle have to be tried.

Is the lawyer making outlandish promises to you?

Be wary of any lawyer who guarantees a specific result in your case. All litigation comes with inherent risks. A case is influenced by present circumstances, future developments, and the decisions and attitudes of the judge. Every case has strengths and weaknesses, and your lawyer should point out all of them. Your attorney should tell it like it is and inform you about your chances of obtaining a particular outcome in your case. You cannot trust an attorney who simply tells you what you want to hear.

Will your lawyer see your case through to the end?

Most lawyers who deal with trusts and estates don't like litigation and don't do very much of it. A lawyer who does not devote his or her practice to litigation may want a quick exit from your case. Assuming you

select a lawyer who is focused on trust and probate litigation, you still have to ensure that he or she knows how to enforce a settlement agreement or judgment. Most cases settle at some point before trial. Settlement agreements usually have a clause in them requiring arbitration if one party accuses another of breaching their agreement. Be sure your attorney is able and willing to arbitrate if the other side violates the settlement agreement.

WHAT MAKES A GOOD CLIENT?

The clients who have had the greatest success with our firm are the ones who want a cooperative, consultative relationship. We know our clients know their family better than we ever will; and we know the law and legal procedure better than our clients ever will. It is very important that there be a free flow of information between us. On occasion a client will apologize for asking too many questions. It is our belief that the only dumb question is the one you don't ask.

On the other hand, some clients want to run the entire show. They want to direct what pleading should be filed, and when. They want to choose what discovery to pursue. They want to do as much research as possible on their own in order to minimize the expense of litigation. Frankly, this makes for a bad relationship. Discussion about legal strategy and tactics is always appropriate. A client deciding what to file and when, is not. A client who investigates facts to assist their attorney can be helpful. A client who thinks their work is a substitute for their attorney's efforts is a problem. Cooperation is the key to a good attorney-client relationship.

CASES WE WON'T TAKE

Our firm is highly focused on helping people obtain their rightful inheritance. Our motto is, "We speak for the dead." That means we don't take other types of cases that are also heard in probate court. We don't take cases where anything other than inheritance is at issue. For example, we don't take conservatorship or guardianship cases, even though they are also heard in probate court.

We don't often take cases started by other attorneys. We don't have a hard and fast rule about this, and we will examine each case presented to us. Sometimes a person realizes there is a problem with their current attorney before any real damage is done. Some don't realize there is a problem until it is too late. If you think you have a problem with your current attorney, you need to look into making a change as soon as possible. The longer you let a problem go on, the less likely you are to get another attorney to take your case.

Frequently Asked Questions

Can I make the trustee pay my attorney's fees?

Probably not. The general rule in California civil court is that each side is responsible for paying their own attorney's fees. There are, however, a few exceptions to this rule. First, if you are alleging the trustee's errors have cost you money, then you can make a settlement offer to the trustee for a specific amount of money. If the trustee declines the settlement offer and you get a judgment for a greater amount of money, the trustee can be ordered by the court to pay you reasonable attorney's fees and court costs from the time you made the offer through trial. Second, if a trustee objects to your petition in bad faith, the trustee can be held responsible for your attorney's fees and court costs. Bad faith is a very high standard and quite difficult to prove. There are not many cases that fall in this category. For those that do, the entire cost of the litigation can be put on the trustee. Third, if you have made a written request for a trust after the trust settlor has died and sixty days have passed without the trustee sending you the trust, the court can impose reasonable attorney's fees and costs on the trustee.

Can I make the other side pay my attorney's fees?

Probably not. Cases against non-trustees are subject to the first two exceptions to the general rule that each side pays its own attorney's fees discussed immediately above.

Can I get punitive damages?

Yes, in certain types of cases. Punitive damages are available when a person has in bad faith wrongfully taken, concealed, or disposed of property belonging to a probate estate or trust, or has taken, concealed, or disposed of the property by the use of undue influence in bad faith or

through elder financial abuse. In this situation the punitive damages are twice the value of the property recovered. Two things are worth noting about this law. First, bad faith must be proven. Second, if bad faith is proven, the judge has no discretion in setting the amount of punitive damages. The punitive damages must be twice the amount of the property recovered.

Can I collect interest for the trustee breaching his or her duty to me?

Yes. There are three situations in which a trustee's breach of duty can result in their having to pay you interest. First, if the trustee breaches their duty to you (a trust beneficiary) and you suffer a loss as a result, the trustee can be held liable for the loss as well as interest on the loss. Second, if the trustee breaches their duty and personally profits from that breach, you can get damages for the trustee's profits plus interest on those profits. Third, if the trustee breaches their duty, any loss of profit as a result of that breach, plus interest, are your damages.

How do I remove a trustee?

A trustee can be removed when the trustee has breached their duties, when the trustee is insolvent or otherwise unfit to administer the trust; when the hostility or lack of cooperation among co-trustees impairs trust administration; when the trustee fails or declines to act; when the trustee's compensation is excessive under the circumstances; when the trustee is the attorney who drafted the trust and is not related to the settlor; when the trustee is substantially unable to resist fraud or undue influence; when the trustee is substantially unable to manage the trust's financial resources or is otherwise substantially unable to properly execute the duties of the trustee; and for other good cause. You must file a petition with the probate court alleging that one or more of these reasons for removal exist. You must then prove your case at trial.

How do I get the personal financial records of the person who took my parent's property?

You can't. Even with persuasive proof that a person has taken your parent's property, that person's personal financial records are protected under California's constitutional provisions guaranteeing a right to privacy. However, those records are almost certainly unnecessary for your case. If the person took money from an account, then there will be some record showing a transfer or withdrawal of assets. If property was conveyed, a recorded deed will show the transfer. You can still prove your case without getting the wrongdoer's personal financial records.

Will the person who took advantage of my parent by having their trust amended have to pay his own attorney's fees?

Yes, if they are not the trustee. If they are the trustee then you can expect them to rely on provisions of the trust or California's probate code to say the trust is responsible for their attorney's fees. However, several published cases state that there is no duty for a trustee to defend a trust amendment. So they will probably be responsible for their own attorney's fees.

Can I get my parent's medical records now that he or she is dead?

Not by just asking for them and not by using a durable power of attorney. Your parent could have consented to you seeing or getting copies of their medical records while they were alive. If you had a durable power of attorney for health care (also called an advance health-care directive) then you could have used that document to get the medical records. But the durable power of attorney for health care is valid only as long as your parent is alive. Once your parent dies, the only way to get their medical records is by serving a business records deposition subpoena after a lawsuit has been filed.

Do my parents' verbal instructions override the will or trust?

No. Never. It is a very common misconception among family members serving as trustee or executor that something Mom or Dad told them supersedes the written content of their trust or will. That is never the case. If a change was to be made, then it had to be made while your mother or father was still alive. Once they die, the written terms of their will or trust control what the trustee or executor must do and determine who will receive their property.

WHAT YOU CAN DO

Obviously, by requesting this book you've begun your search for an experienced probate and trust litigation attorney. Remember, the legal process does take time and there are limits on the time you have to file a lawsuit, sometimes as little as 120 days. You should weigh your options for counsel carefully but you should begin your investigation immediately.

CONTACT ME

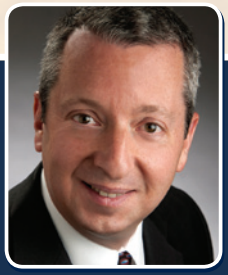
If you would like to schedule a consultation to discuss your case, call us at (888) 443-6590 or visit our website at www.GrossmanLaw.net and send a request to schedule a consultation.

Winning the Inheritance Battle

If you believe you have been cheated out of your rightful inheritance or manipulated by an incompetent or dishonest trustee, or told you have been disinherited before you've even seen the will or trust of a deceased loved one, attorney Scott Grossman has important initial words of advice: "Take a breath. Slow down. If you have been wronged, there is a remedy."

Winning the Inheritance Battle: The Ultimate Guide to California Trust and Probate Litigation provides detailed, jargon-free information in a concise format to help readers navigate the seemingly complex world of wills, trusts, and probate proceedings and to understand how such things as unsuitable trustees, unlawful transfers of property, and undue influence over the creation of a will or trust can negatively affect the distribution of a loved one's property.

Organized around three commonly encountered situations, ***Winning the Inheritance Battle*** outlines the processes and procedures of probate and trust administration, using actual case histories to present scenarios and answer a score of questions, ultimately empowering the reader to make informed decisions.



ABOUT SCOTT GROSSMAN

"I'm tired of seeing sons and daughters having their rightful inheritance kept from them."

Attorney Scott Grossman has been practicing law in California since 1994. Certified by the State Bar of California as a specialist in Estate Planning, Trust, and Probate Law, he limits his practice to the representation of beneficiaries because he is tired of seeing honest sons and daughters denied the inheritances they rightfully deserve.

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