

Here's How and When to Do It

ACTION GUIDE

September 2005

Handling Postmortem Trust Administration: A Checklist

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Scope of Guide

This Action Guide sets forth lists of suggested steps to accomplish the various tasks required when administering a trust following the death of the settlor when no probate proceeding is anticipated. The Action Guide provides a checklist for attorneys advising the trustee with respect to: identifying all assets of the decedent; bringing trust assets under the control and management of the trustee or the trustee's agents; determining how to deal with nontrust assets; identifying all debts and liabilities, including taxes, and making sure that they are paid; and finally distributing the remaining property to the trust beneficiaries or to proper subtrusts. This Action Guide is not intended to provide substantive legal information or to explain why each step is necessary. The authors specifically acknowledge that the use of this checklist in administering trusts following the death of a settlor is not the current standard of practice in California. Indeed, none of the coauthors follows every aspect of the checklist in his or her own practice. Because many specialized legal issues are discussed only briefly in this Action Guide, the practitioner should retain expert counsel to handle those specialized issues.

Revision Highlights

- Revised discussion of the need for probate administration of nontrust assets. See step 4.
- Discussion of new notice of proposed action procedure (Prob C §§16500–16504). See steps 4, 30.
- Discussion of new Affidavit of Change of Trustee (Prob C §18105). See steps 10, 24, 38.
- Expanded discussion of real property change-in-ownership issues. See steps 10–11.
- Revised discussion of income taxation of simple and complex trusts, including the effect of new IRS regulations. See step 27.
- Expanded coverage of the generation-skipping transfer tax, including the effect of new and proposed IRS regulations. See step 33.

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Abbreviations

AMT	alternative minimum tax
DOD	date of death
DHS	Department of Health Services
DNI	distributable net income
EGTRRA	Economic Growth and Tax Reconciliation Act of 2001
ERISA	Employee Retirement Income Security Act
ESBT	electing small business trust
ESOP	employee stock ownership plan
FMV	fair market value
FTB	Franchise Tax Board
GST	generation-skipping transfer
IRD	income in respect of a decedent
ISO	incentive stock option
LLC	limited liability company
LLP	limited liability partnership
NOL	net operating loss
NPS	nonparticipant spouse
POD	pay-on-death
PS	participant spouse
QFOBI	qualified family-owned business interest
QDRO	qualified domestic relations order
QDOT	qualified domestic trust
QSST	qualified Subchapter S trust
QTIP	qualified terminable interest property
TIN	taxpayer identification number

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Cutoff Dates

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We reviewed case citations through these cutoffs:

Shepard's California Citations at 35 C4th 613, 128 CA4th 408, 161 L Ed 2d 618, 403 F3d 631, 359 F Supp 2d 1376.

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Shepard's Federal Citations at 161 L Ed 2d 618, 403 F3d 727, 360 F Supp 2d 1377.

We reviewed California and federal statute citations for amendments and repeals through these cutoffs:

Stats 2005, ch 43.

119 Stat 323.

We try to add significant statutory and judicial developments, subsequent histories of cases, and other matters such as new forms and regulations after legal editing is done, but you should not assume that all developments after the listed cutoff dates have been included.

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Initial Steps

STEP 1. OBTAIN, REVIEW, AND SUMMARIZE ESTATE PLANNING DOCUMENTS

REVIEW PLAN, PREPARE EXPLANATION, FIND DOCUMENTS

- a. Thoroughly analyze all relevant estate planning documents.
- b. Prepare a written or visual explanation of the estate plan for client.
- c. Locate originals of documents.

CONSIDER IMPACT OF EGTRRA-2001

When analyzing documents, keep in mind that under the [Economic Growth and Tax Reconciliation Act of 2001 \(EGTRRA-2001\)](#) (Pub L 107-16, 115 Stat 38):

- a. The exemption equivalent for the estate tax is \$1.5 million in 2004 and 2005, \$2 million in 2006–2008, and \$3.5 million in 2009. [IRC §2010\(c\)](#). In the year 2010, the estate tax is repealed. [IRC §2210\(a\)](#).
- b. The exemption for the generation-skipping transfer (GST) tax is the same as the exemption equivalent for the estate tax. [IRC §2631\(c\)](#). In the year 2010, the GST tax is repealed. [IRC §2664](#).
- c. The law will automatically allocate GST exemption to any transfer to a trust created during grantor's lifetime that is an "indirect skip" ([IRC §2632\(c\)](#)), and will permit a "qualified severance" of a trust into an "exempt" trust and a "nonexempt" trust. [IRC §2642\(a\)\(3\)](#).
- d. The top marginal estate tax rate is 48 percent in 2004, 47 percent in 2005, 46 percent in 2006, and 45 percent in 2007–2009. [IRC §2001\(c\)](#).
- e. The "qualified family owned business interest" (QFOBI) deduction ([IRC §2057](#)) was effectively repealed in 2004. [IRC §2057\(j\)](#).
- f. The credit for state death taxes was reduced to 25 percent of the statutory amount for decedents dying in 2004, and replaced by a deduction for state death taxes paid starting in 2005. [IRC §§2011\(b\)\(2\), 2058](#).
- g. The gift tax exemption is \$1 million, without any increases or changes. [IRC §2505\(a\)\(1\)](#).
- h. Although the estate and generation-skipping transfer tax will be repealed in 2010, the gift tax will continue, with a top marginal rate of 35 percent. [IRC §2502](#).
- i. In 2010, the basis for assets owned by a decedent will be "carry-over" basis, subject to a modified step-up. [IRC §1022](#).

NOTE 

NOTE 

Absent further legislation, all of the provisions implemented by [EGTRRA-2001](#) will end December 31, 2010, and pre-[EGTRRA-2001](#) law will once again be effective for 2011.

STEP 2. PREPARE FOR FIRST MEETING WITH CLIENT

PREPARE TO ESTABLISH CLIENT RELATIONSHIP

- a. Identify client or clients.
- b. Evaluate conflicts in representation, including (in-house) conflict of interest in representing the successor trustee or trustees as clients, and evaluate the need for signed waivers of conflict.
- c. Prepare an engagement letter.

PREPARE FOR MEETING

- a. Prepare an agenda.
- b. Prepare any needed authorizations to obtain records or information.
- c. Review known asset data.
- d. Check cost-of-living adjustments and determine amounts as of the date of death (DOD) for:
 - (1) Applicable credit amount ([IRC §2010\(c\)](#));
 - (2) GST exemption amount (same as [IRC §2010\(c\)](#) applicable exclusion amount) ([IRC §2631](#));
 - (3) [IRC §2032A](#) aggregate decrease in value amount, if applicable (for farming or other qualified use property);
 - (4) Gift to noncitizen spouse exclusion amount. [IRC §2523\(i\)](#).

STEP 3. ADVISE CLIENT OF ITEMS TO BRING TO FIRST MEETING

ASK CLIENT TO BRING DOCUMENTS

Ask client to bring the following documents:

- a. Original estate planning documents.
- b. Death certificates (certified).
- c. Asset and liability information, including copies of account statements and other asset documents through the date of death, if available.

STEP 4. FIRST MEETING WITH CLIENT

CONFIRM CLIENT RELATIONSHIP

Present engagement letter and review it with client.

IDENTIFY OVERALL PLAN

- a. Identify the following:
 - (1) Decedent's family members and heirs, including surviving registered domestic partner ([Prob C §§6401–6414](#));
 - (2) Trust beneficiaries;

- (3) Other interested persons such as putative spouses, foster children, stepchildren, or potential posthumously conceived children ([Prob C §§249.5, 6450](#)), or caregivers who might be claimants; and
 - (4) Donative transfers to prohibited transferees ([Prob C §§21350–21356](#)). See *Rice v Clark* (2002) 28 C4th 89, 120 CR2d 523; see also *Conservatorship of Davidson* (2003) 113 CA4th 1035, 6 CR3d 702. But see *Bernard v Foley* (2005) 130 CA4th 1109, 30 CR3d 716.
- b. Ascertain citizenship of surviving spouse.
 - c. Determine title to assets.
 - d. Identify and illustrate overall plan and distribution scheme.
 - e. Review checklist/questionnaire from client, or give one to client to complete.
 - f. Gather a preliminary estimate of asset values and liabilities.
 - g. Discuss income tax basis adjustment of assets. [IRC §1014](#).
 - h. Determine whether decedent made taxable gifts after 1976.
 - i. Discuss adequacy of insurance coverage on real and personal property.
 - j. Discuss trustee’s exercise of discretionary powers. [Prob C §§16080–16082](#).
 - k. Determine if there are any qualified conservation easements. [IRC §2031\(c\)](#).
 - l. Identify potential problems, *e.g.*, family concerns, potential litigation.
 - m. If an [IRC §6166](#) election for a closely held business is anticipated, discuss the rate of interest on payment of the estate tax in installments.

**IDENTIFY ISSUES THAT
REQUIRE IMMEDIATE
ACTION**

- a. Advise client of trustee’s duty to serve statutory “Notification by Trustee” and of trustee’s liability if this is not done. [Prob C §16061.7](#).
- b. Advise client to notify Social Security, Department of Veterans Affairs, pension plan, and other payors of lifetime benefits of decedent’s death.
- c. Advise client to arrange for safekeeping of any assets at risk (*e.g.*, personal property).
- d. Ascertain whether there is:
 - (1) An S corporation and whether the trust has qualified Subchapter S trust (QSST) provisions. Consider electing small business trust (ESBT).
 - (2) Any partnership, LLC, or LLP interest for which an [IRC §754](#) election should be made.
 - (3) A need to make an election to continue the partnership regarding income and property tax issues if decedent was a general partner. See [Corp C §§16801\(2\)\(A\), 16601\(7\)\(A\)](#).