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Probate
Estate Planning
Small Business
California & Nevada

Estate Planning

Medi-Cal - Special Trusts - Pets

James A. Busse Jr., Esq.
PROBATE
ESTATE PLANNING
California SBN 225244
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Member ABA Estate Planning Committee for Small business and farm Estates,
Calif. Bar Estate Planning & Family Law Panel, Nevada Estate Planning Panel,
Los Angeles Superior Court Mediator for Litigated Cases – unlimited & probate,
LASC Probate Settlement Officer.
Published in LA Lawyer Nov 07 Medi-Cal Planning.
BS-Chem EE MBA JD

38 years McDonnell Douglas / Boeing
Electrician - Engineer – Senior Manager,
Design, Engineering, Contracts, Marketing
Control Systems, Vehicles (Air, Rockets, S-Stn), and Satellites

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DIY PLANNING?

- If you:

  Have no assets to speak of, own no business, have no rental property,
  have never been or will never be married or divorced,
  have one or fewer heirs or hate the ones you have,
  are sure you will never be disabled by accident or illness, and
  you have a big ego,

  do your own trust & will on line.

- Probate of will is done at a fixed cost which usually 4% or less than the value of an estate.
- The cost of fixing a bad or misapplied will or trust is unlimited.
- Cost of Attorney prepared basic Estate plan including at least 2 hours with attorney is easily found for $750 - $950.

Estate Planning – Who Needs it?

- Those who want to direct their Estate and save as much as possible from the State or Federal Government.
- Those who want to be sure their assets are used the way they want for their beneficiaries (heirs, pets, and charities).
- Certainty of estate distribution
- Tax Savings for beneficiaries
- Tax Savings for estate
- Business Continuation
- Asset retention
- Protect certain assets from Medical / Nursing home

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Terms

- Testator / Testatrix – One who makes a will
- Settlor – One who creates a Trust
- Trustee – One who controls the Trust
- Beneficiary / Devisee / Legatee – One who benefits from the Trust or Will
- Executor – Nominated by the deceased and appointed by the court. This person distributes the assets according to the terms of the Will and the orders of the Court.
- Administrator – A court appointed “Executor” for a person that dies without a will.
- Revocable Inter Vivos Trust (RIVT)
  - An Estate Planning Device created during the life of the settlor that owns the Settlor’s assets for the benefit of the Beneficiaries. The Trustees control the trust Assets according to the terms of the trust.
  - Initially the Settlor is the Trustee and the Beneficiary of the trust.
- Special Needs Trust – A trust that provides only for special needs of a disabled or Aged person usually receiving Medicaid or Medi-Cal.
- Pet – A Settlor’s non human live companion animal.

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Will Procedure

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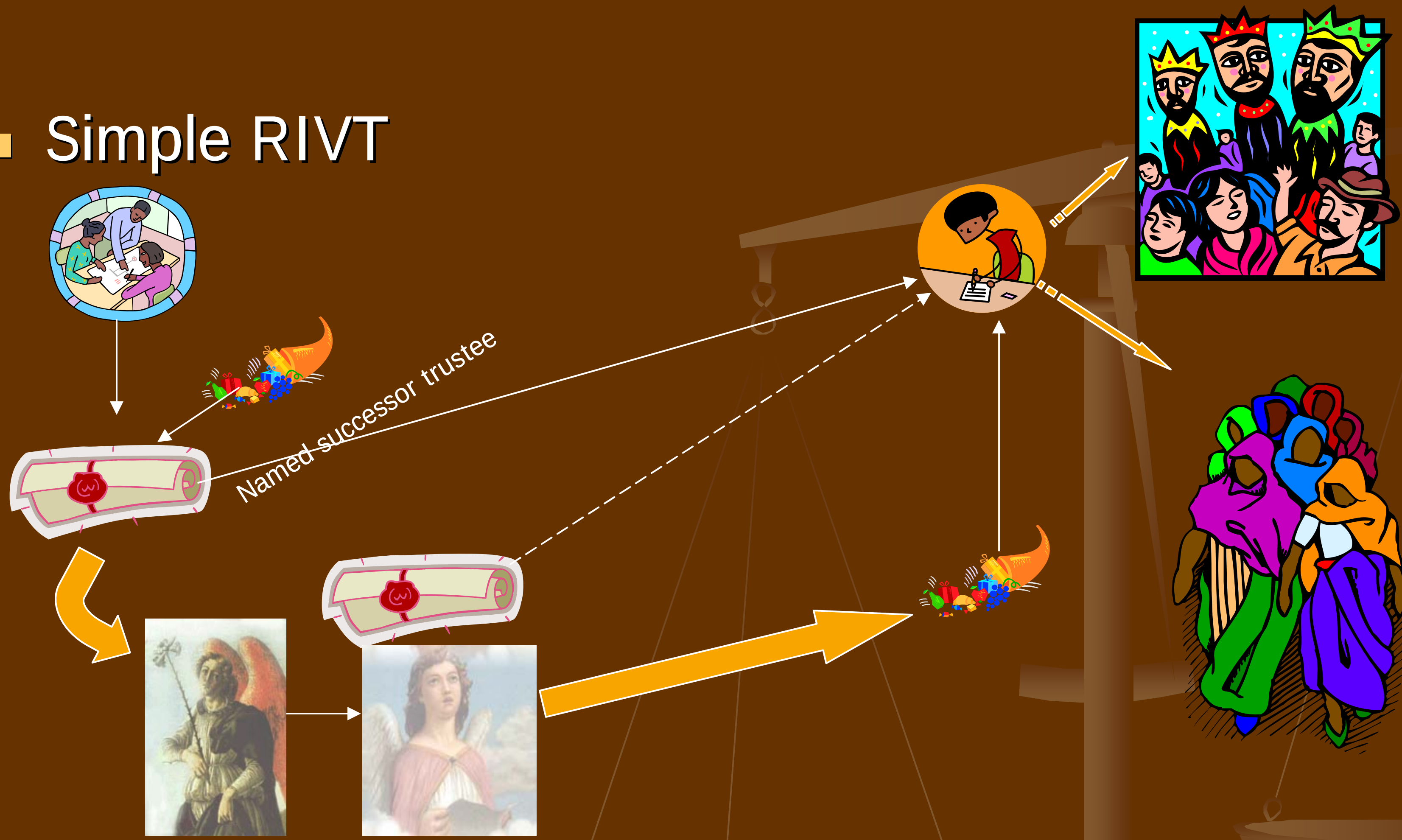
Trusts

- Simple RIVT



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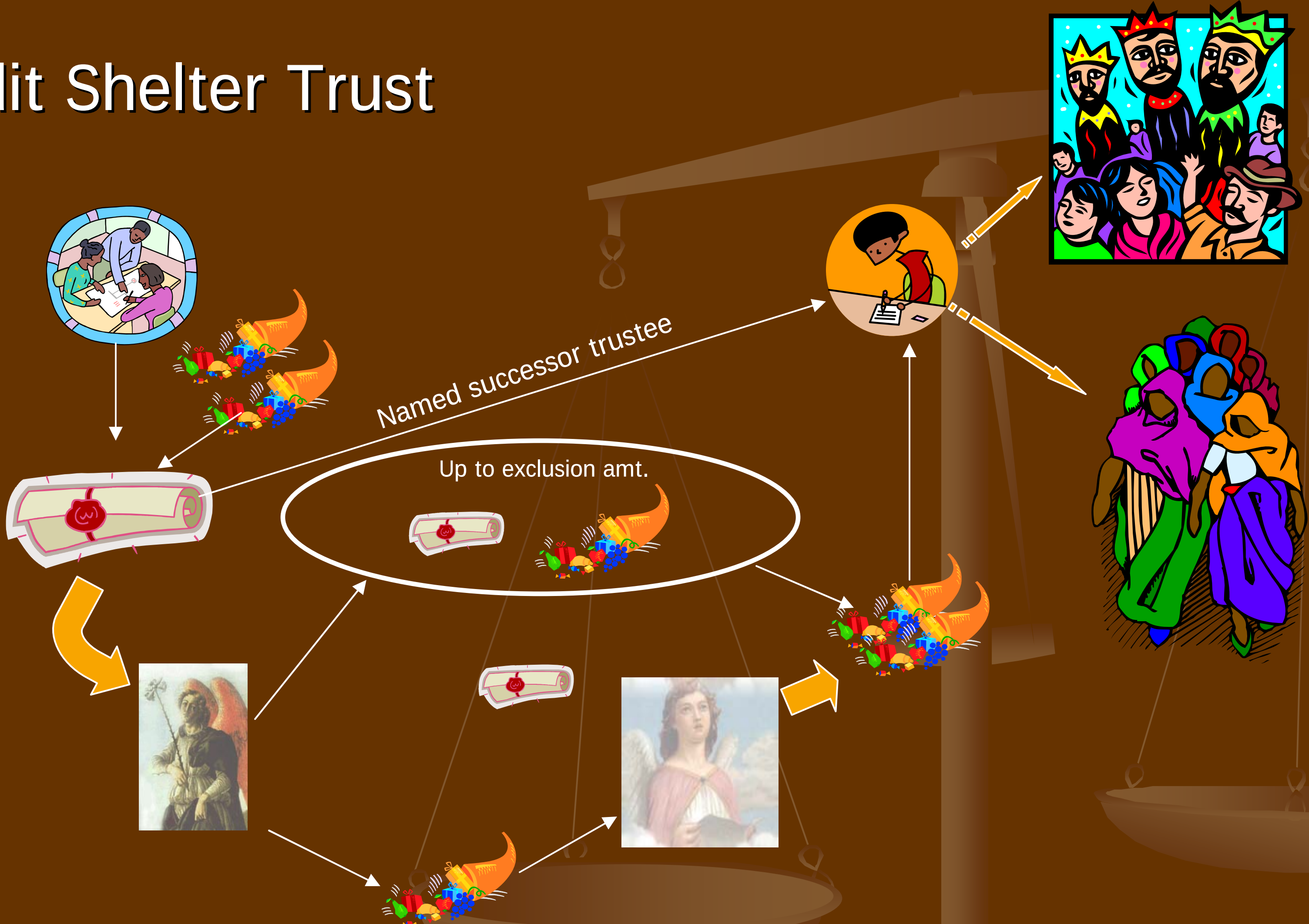
Trusts

- Credit Shelter Trust



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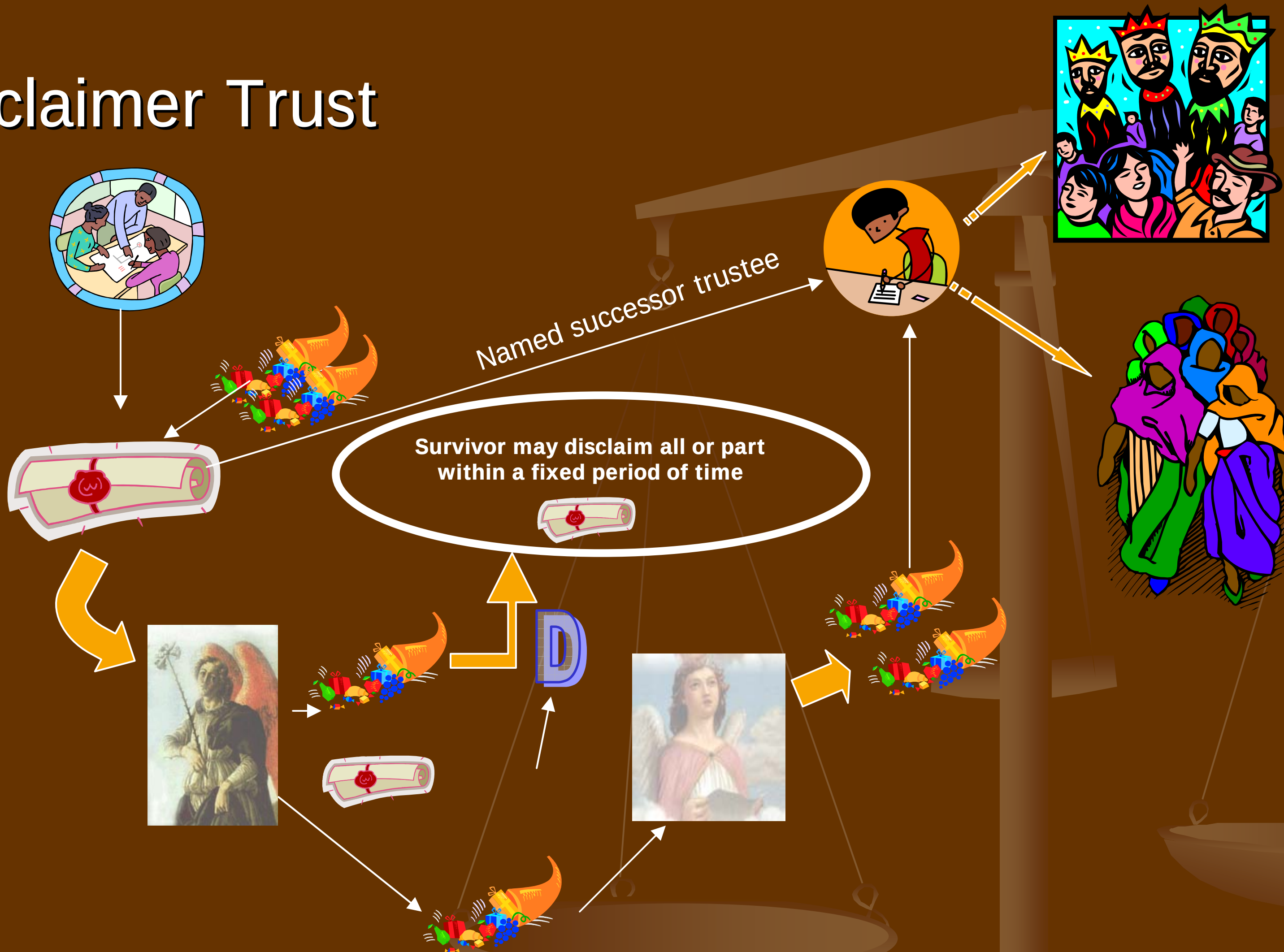
Trusts

- Disclaimer Trust



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Will

- All Wills are individual.
- If person dies intestate [no Will], Assets are distributed according to law, Cal Prob. Code 6401-6410 and 240.
- Probate fees are set by law
  - Some attorneys charge more some less.
  - Simple probates such as movement of property to a trust may be inexpensive.
- Property owned in other State must be probated in that State.
- A Will does not survive marriage or divorce. {Still good until divorce is final}
- A Will requires Probate to distribute assets with gross value over $100,000 in California, Other states have different limits.

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RIVT Trust

- One may have more than one trust.
- Trusts direct assets much like a Will (my Ford Truck to my son Joe...etc.)
- Married RIVT Has many options when first Settlor Dies
- Separate and ½ Community Property may be controlled in blended families via Credit Shelter or QTIP trusts.
  - Credit Shelter Trust protects the unified Credit for each Taxpayer. (Currently $2.0M each)
  - QTIP trust protects prior children from surviving Spouse.
    - Surviving Spouse may not freely use assets.
  - Disclaimer Trust allows surviving spouse to select trust progression according to future expectations and tax changes.
- Is good in all states and many countries.
- Trust may survive marriage, remarriage, or divorce.

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Will v. Trust

- Will
  - Probate (costs set by law)
  - 120 day claim period
  - Court supervision
  - Public
  - Inexpensive to establish ($200 - $1000)
  - Expensive to Probate
  - Probate required in each State where real property is owned
- Trust
  - May avoid probate
  - 1-year claim period
  - No court supervision
  - Private
  - More Expensive to establish ($500 - $15,000)
  - Good in every state
  - Must be managed

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Checklist to Determine if Estate Planning is Recommended

- ___ _Over one year since Estate Plan has been reviewed?
- ___ Are you uncertain what will happen to your assets if you or your spouse died today?
- ___ Do you have separate assets?
- ___ Have you been recently married or separated?
- ___ Do you have minor children? Who provides for them? With what assets? For how long?
- ___ How will accounts for working capital be released to continue the operation of your business if you and/or your partner were to die today?
- ___ If you became incapacitated, would your family have to go through court proceedings to carry on your affairs?
- ___ Do you have children not from your current marriage?
- ___ Could your business cause liability due to contract or an accident?
- ___ Is anyone other than your current spouse listed as a beneficiary on your life insurance?
- ___ Would you like to avoid Probate?
- ___ Does the TOTAL value of all you and your spouse's assets (House, life Insurance, cash, investments, EVERYTHING) exceed the exclusion amount? 08= $2 Mil, 09=$3.5 mil.
- ___ Do you plan to gift any property at your death to charities or institutions?
- ___ Will assets have to be sold to pay expenses at your death?
- ___ Are any members of your family unsure about their economic future in a family business?
- ___ Do you own any property that has appreciated significantly since you bought it?
- ___ Would nursing home expenses (currently about $7,000 per month) create a hardship for your family?
- ____Do you want care for your pet(s) if you are unable to.

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Medicaid & Medi-Cal

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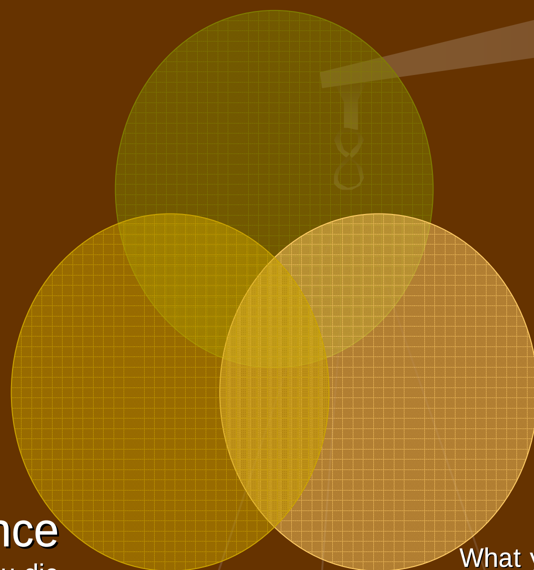
MEDI-CAL CONSIDERATIONS (1)

Eligibility
What you have when you apply



Recovery Avoidance
What is in your estate when you die

Share the Cost
What you get when your are on disability or in nursing home

Trustee must notify Medi-Cal Director within 60 days of decedent's death. The State then has 120 days to file claim. If not notified the TRUSTEE and each BENEFICIARY IS PERSONALLY RESPONSIBLE for repayment of recoverable costs to the State.

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MEDI-CAL CONSIDERATIONS (3)

- Access to assets causes Eligibility and Recovery Problems
  - Institutional spouse can not have access to more than $2000 in non exempt assets.
  - Many assets are exempt, such as the family home, up to about $105,000 in cash (for Spouse), the Family Car, some jewelry, and $35/month income.
  - Non exempt assets are: cash, mutual funds, 401(k) payments etc. Basically cash or convertible assets. IRA corpus may or may not be exempt.
  - Home retained in institutionalized spouse's name is available for recovery.

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MEDI-CAL CONSIDERATIONS (5)

- Access to Income creates a share the cost Problem
  - If income distribution is mandatory then that income is available for cost sharing.
  - If income distribution is optional it may not be available for cost sharing.
  - IRA, 401(k), retirement, life insurance, etc.

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MEDI-CAL CONSIDERATIONS (9)

- Regular AB trust Division at Death of First Spouse can cause Eligibility, Share the Cost and Recovery Problems
  - If institutionalized spouse dies first only recovery problems are left.
  - What if the Well Spouse dies first?
    - Institutionalized spouse gets his Surviving Spouse Share, and becomes a beneficiary with the ability to invade Credit Shelter Trust for reasonable and necessary expenses. i.e., Most everything is now available to the State because payment to the nursing home is a reasonable expense.

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MEDI-CAL CONSIDERATIONS (10)

- Options:
  - Prepare Related Documents in advance of any known illness
    - Client Specific
    - Use Power of Appointment conforming to IRC 2041
    - Complete Trust Will POA coordination required.
  - Dealing with a Known Illness
    - Must deal with Client's Specific Situation. (age, type of illness, recovery options, economic situation, etc.)

MEDI-CAL CONSIDERATIONS (11)

- Options:
  - Modify Trust Distribution on Death of First Spouse.
    - Difficult to do because the Basic A-B Trust creates a Trust. If the assets of the created trust are not available for distribution (irrevocable Trust with no distribution) then there is a 30 or 60 month "look back" period that disqualifies the institutionalized spouse. All income go toward Cost Sharing
    - If Credit Shelter trust has provisions for use of funds on some ascertainable standard, then ALL Principal is available.
    - Basic strategy is to treat the institutionalized spouse as already dead.

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MEDI-CAL CONSIDERATIONS (12)

- Options:
  - Provide for Special Needs.
    - Cutting the ill Spouse out of the distributive process may not be necessary.
    - Interrelated Will-Trust Scheme that distributes Trust Principal through the Will. Requires Probate and Contingent Clauses in each Will, Power of Attorney, and Trust. Makes Trust Principal unavailable for recovery by Medi-Cal but requires Probate. However Probates of this type are often not expensive or complex.

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MEDI-CAL CONSIDERATIONS (17)

- Deficit Reduction Act 2005 (DRA-05)
- Purpose is to limit acceptance into program and to increase recovery. i.e. to hurt the ordinary taxpayer:
  - Home Equity over $750,000 is not excluded
  - Changes to Annuities. State beneficiary, no balloon payout, etc.
  - Gifts of assets limited, Will trigger 60 month look back period from date one is otherwise qualified. Moreover, gifts are not rounded down and are cumulative.
  - Life Estate with right to revoke will not protect the property from recovery.
  - Life Estate may cause reassessment under Prop 13 (at least in LA County). Restrictions regarding Life Estate transferrs.
  - Proof of citizenship required.
  - DRA partially implemented in California. Full implementation planned in 09. Not retroactive.

SPECIAL NEEDS TRUSTS

- A Special Needs Trust is a place to park beneficiary's assets so the beneficiary can continue to receive Medi-Cal Benefits.
- The Trust funded with beneficiary's money does not escape Medi-Cal Repayment.
- There are other methods that allow the beneficiary to qualify for benefits and still avoid repayment. The government is fast closing these "loopholes."

Special Needs Trust Models (1)

- **1. THIRD PARTY SPECIAL NEEDS TRUST**

This special needs trust will be part of a trust established by a parent, child, sibling, or other family member for a disabled or incapacitated beneficiary.

- Characteristics:
  - a. Assets do not belong to beneficiary or spouse.
  - b. Settlor is not beneficiary.
  - c. No need to include payback provisions or notification provisions to the State.
  - d. Treated by Medi-Cal as "other trust." Counts only if payments made directly to beneficiary.

Special Needs Trust Models (2)

- **2. D 4 A "PAYBACK" TRUST**

Governed by OBRA 93 and 22 CCR 50489.9

- Characteristics:
  - a. Funded with assets belonging to beneficiary;
  - b. Established, per statute, by parent, grandparent, legal guardian, or court;
  - c. Must pay state back for all medical assistance received, up to full amount of trust at death of beneficiary;
  - d. Beneficiary must be under 65 and disabled at time of establishment of trust.

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Special Needs Trust Models (2)

- **3. "LITIGATION" SPECIAL NEEDS TRUST**

This special needs trust is designed to hold the proceeds of a judgment for minor or incompetent person who receives proceeds. It is governed by Probate Code Section 3600 et seq.

- Characteristics:
  - a. Subject to review by state before approval by court;
  - b. Requires notification by trustee at death of beneficiary and payment of any claims
  - State may make; statutory restrictions on how much can be placed in trust.

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The Intentionally Defective Irrevocable Trust

- The Intentionally Defective Irrevocable Trust is a grantor trust Created by the Medi-Cal beneficiary With the Medi-Cal beneficiary's property For the benefit of someone other than the Medi-Cal beneficiary
- And the Trustee is someone other than the Medi-Cal beneficiary AND
- Taxable to the Grantor for Income Tax Purposes.
- An OBRA 93 Trust for Eligibility and Share of Cost Determination

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IDIT Benefits

- *Sales of principal residence in an IDIT can claim exemption of gain under IRC § 121 exclusion*
  - $250,000 for one, $500,000 for married, of gains can be excluded from capital gains tax if property used as a principal residence 2 out of the last 5 years, or 1 out of last 5 years, if in nursing home
- *Avoids recognition of gain upon transfer into trust of property with debt in excess of basis under IRC § 1001*
- *Allows a step up in basis of property held in trust upon death of grantor under IRC § 1014, § 2036 and § 2038*
  - § 1014 that authorizes step up in basis if acquired from decedent (due to expire in 2009)
  - § 2036 includes property in grantor's estate when grantor retains an interest in the property or it income or the right to designate the persons who shall possess or enjoy the property or income
  - § 2038 includes property in grantor's estate where grantor holds a power of appointment at death
- *NO PERSON SHALL BE MADE INELIGIBLE TO THE EXTENT THE TRUST CONTAINS OTHERWISE EXEMPT INCOME OR PROPERTY* 22 CCR 50489.5

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Medi-Cal Summary

- With Medi-Cal belt tightening, The standard family where Mom and Dad moved here in the 50's or 60's, worked in aerospace or some other large industry, bought a home and maybe some vacation property, amassed large retirement benefits and IRA's and 401(k) funds, will have their estate seriously eroded if a spouse has to be institutionalized in a Nursing Home costing $5,000 - $7,000 per month and increasing if proper Estate planning is not accomplished.
- On-Line or fill in the blank Estate plans can cause major problems.
- Alzheimer's patients live a long time. Often they survive their family members.
- As of this date, Estate planning methods exist to work within the system to ensure eligibility, reduce cost sharing, and limit Recovery.
- Laws Change – What worked yesterday will probably not work today. What works today may not work tomorrow. DRA-05 in California 2008-2009.

- SUGGEST YOU REVIEW YOUR ESTATE PLAN WITH A COMPETENT ATTORNEY EVERY 3-YEARS OR ON SIGNIFICANT LIFE CHANGING EVENT.

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Pet Trusts

People with companion animals often live longer and more satisfying lives.
Pet care after the owner is unable is a reason some elderly do not keep pets.
A pet trust motivates a “guardian” to carry out the pet owner’s wishes.

- One’s pet may be the most deserving but can not be a direct heir of the estate.
- A pet trust gives some certainty should the owner become unable to provide proper care.
- Pet trusts are often attacked by dissatisfied beneficiaries.
- California §15212, Nevada has no pet trust statutes. (38 States + D.C. do)
- Drafting an enforceable pet trust can be complex: (care, taxes, assurity, guardian, trustee, protector, demise)

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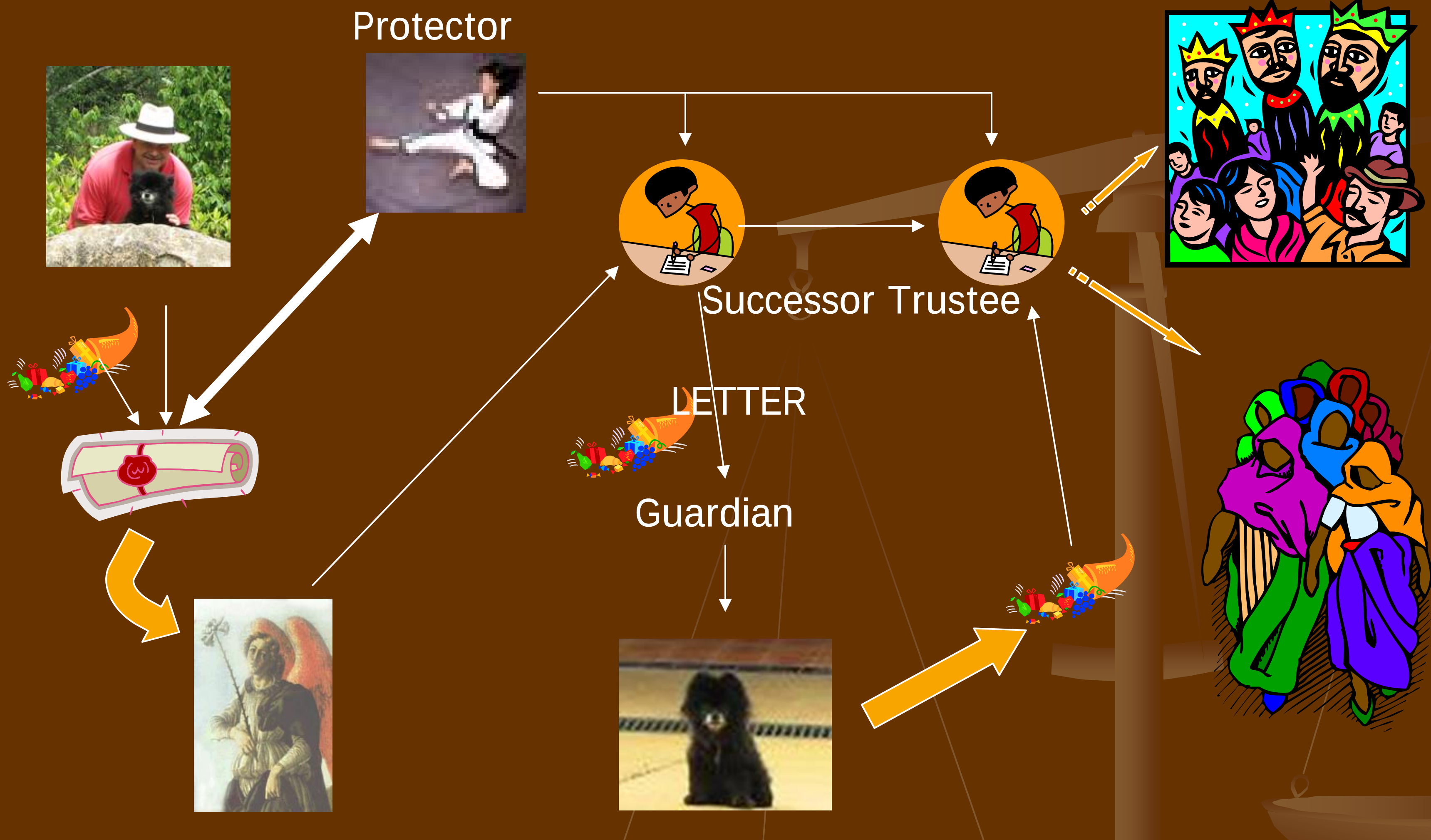

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Some Pet Trust Factors

- Funding the Trust
- Cost of Care
- Location of Care
- Ability to Move Situs
- Breeding the Pet
- Companions
- Perpetuities
- G & T Oversight
- Termination of Trust
- Nursing Home Pets?

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Even More Pet Trust Factors

- Alternate Guardian
- Special Trustee
- Protector
- Cost of Necessaries
- Exercise
- Pet's Expected Life
- Court Challenge
- Guardian's Expertise
- Facilities
- Alternate Facilities
- Rescue Organizations

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Pet Trust Summary

- Pet Trusts can operate during and after the life of the Settlor.
- Pets are property and care must be taken to avoid conflicts between Power of Attorney, Health Care Directives, Deeds and Testamentary instruments.
- Not all States recognize the nature and responsibilities of pet ownership nor do they recognize the relationships an owner has with their pets.
- People who own pets generally are in better health, more alert, and live longer.
- Certainty regarding the disposition of one's pet is often left out of an estate plan.