

# Sempre Avanti!

*Always forward...*

Welcome to the **SPRING 2010** issue of *Sempre Avanti!* We hope that you are all well. At **Creighton Law Offices**, we often encounter the question, *"If I have a trust, why do I need a will?"* This is such an important question that we have dedicated this issue to answering it.

## THE "POUR OVER" WILL

Even if you have a revocable trust in place and most, if not all, of your property is held in your trust, you should still **always** execute a **Last Will & Testament**. The reason is that if, upon your death, there are any assets that are not held in

your trust (i.e., due to oversight, like forgetting to transfer property you inherited late in life into your trust), the terms of your **Last Will & Testament** can ensure that the assets are transferred into your trust so that they will be distrib-

uted in accordance with the terms governing the trust. Such a **Last Will & Testament** is commonly referred to as a **"Pour Over Will"** because it directs the Executor of your Will to **"pour"** the assets **"over"** into your trust.

VOLUME 2/NUMBER 1  
SPRING 2010

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## WHAT IF I DON'T HAVE A "POUR OVER" WILL?

If you die without a **Last Will and Testament** in place—**EVEN IF YOU HAVE A TRUST IN PLACE**—the law considers you to have died **intestate**. With a few exceptions (see the **"Note"** below for those exceptions), any of your property that is not held in your trust at the time of your death is considered to be part of your **"probate estate"** and will pass to your **heirs at law**, rather than to the beneficiaries of your trust. Unfortunately, the identities of your **heirs at law** are determined by California law, **not** by the terms of your trust. It may turn out that your estranged brother Billy — or, as you preferred to call him, **"Bully"** — will end up with everything in your **probate estate**.

In addition, depending on the **cumulative value** of the assets that make up your **probate estate**, a **FORMAL PROBATE PROCEEDING** may be necessary to oversee the distribution of those assets to your **heirs at law**.

**Note:** In addition to the property held in your trust, other property that would not be part of your **probate estate** would include property that: **(1)** automatically passes to someone else, as would be the case if the assets were held in **joint tenancy** with another person, **OR (2)** passes to others under a **beneficiary designation**, as would be the case with a **pay-on-death ("POD")** bank account, life insurance benefits, or retirement plan benefits.



*Where will assets NOT held in your trust at the time of your death end up going?*

## IF I HAVE A WILL, WON'T MY ESTATE GO THROUGH PROBATE?

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*If you have a Pour Over Will in place, then, at least at the end of the probate proceeding, your property will be transferred into your trust and distributed according to the terms governing the trust and not to your heirs at law...*

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The requirement for a person's estate to go through a **formal probate** is not dependent upon whether or not he or she has a valid **Last Will & Testament** in place at the time of his or her death; rather, it is dependent upon the **cumulative value** of the assets that make up the person's **probate estate** at the time of death. In California, if the **cumulative value** of those assets is equal to or greater than **\$100,000**, then the decedent's estate must go through a formal probate. While this is not usually welcome news, if you have a **Pour Over Will** in place, then, at



least at the end of the probate proceeding, your property will be transferred into your trust and distributed according to the terms governing the trust and not to your **heirs at law** (unless your heirs at law are the beneficiaries of the trust).

## WHAT EXACTLY IS PROBATE?

**Probate** is a *court-supervised* process by which a decedent's estate is administered. There are four (4) main objectives of the probate process:

**1. TO CREATE AN INVENTORY** of all of the property that makes up the decedent's probate estate and to determine the fair market value of each item of property, as of the date of death;

**2. TO ENABLE THE EXECUTOR OR ADMINISTRATOR TO GAIN LEGAL CONTROL OF THE PROPERTY** that makes up the decedent's probate estate (an "**Administrator**" is a personal representative of the estate who is appointed by the court *in lieu* of an Executor, if the decedent died **intestate**);

**3. TO PAY ALL OF THE DECEDENT'S VALID DEBTS**

(including his or her income taxes and probate expenses); and

**4. TO DISTRIBUTE THE PROPERTY THAT REMAINS** after the payment of the decedent's debts and taxes, and expenses of probate, to his or her **heirs at law**—if the decedent died **intestate**—or to the beneficiaries named in the decedent's **Last Will & Testament**. (Note: The beneficiary of a **Pour Over Will** is, of course, the decedent's trust.)

The probate proceeding usually **takes much longer** than people realize because of the requirement that the Executor report numerous actions to the court and because the beneficiaries, or heirs at law, have certain time-frames in which to object

to the Executor's actions. It usually costs more to administer a decedent's estate via a probate proceeding than if the decedent's property passed to his or her beneficiaries via some other "**probate-avoidance**" manner, such as under the terms governing the decedent's trust. Finally, the probate proceeding is a **public proceeding**, meaning that all of the documents filed with the court during probate (including the decedent's **Last Will & Testament**) are available to, and can be copied and disseminated by, members of the public.



## WHAT HAPPENS IF MY PROBATE ESTATE IS WORTH LESS THAN \$100,000?



**IF** the cumulative value of all of the property that you hold outside of your trust, in your own name, and **not** in a **probate avoidance** manner (see the “**Note**” on Page 1), totals less than \$100,000, **THEN** Executor of your **Pour Over Will** may transfer that property to the Trustee of your trust **without** going through a formal probate proceeding. **For example**, let’s say that everything you own is held in your trust **except** for one small bank account, which was held in your own name at the time of your death. Let’s also assume that,

at the time of your death, the balance of that one account, which makes up your **probate estate**, totals \$18,000. Since this is less than \$100,000, your estate can avoid a formal probate proceeding. However, the bank where that small account is held will generally require your Executor to sign certain paperwork swearing to or affirming the facts that **(1)** the Executor is authorized to act on behalf of your estate and **(2)** your estate (or at least **that portion of your estate that is not held in your trust**) is worth less than \$100,000 in value and, therefore, not subject to probate. Then the Executor of your **Pour Over Will** (who may also be the Successor Trustee of your trust) can transfer the money in that account into an existing trust account and distribute all of the funds to the beneficiaries of your trust.

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*The Pour Over Will includes provisions that identify who you have nominated to take care of your minor children and their estates upon your death.*

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## WHO’S GOT THE KIDS?

Finally, if you have minor children (i.e., children under the age of 18 years), a **Last Will & Testament** serves another vitally important function. In this case, the **Last Will & Testament** is the document that usually includes provisions that identify who you have nominated to take care of your children and their estates upon your death (i.e., the “**Guardian**,” or “**Guardians**” of your children and their estates). But if you die **intestate** and have minor children, the question of who will raise the children

and tend to their property is left to a judge of the probate court—and that judge may not appoint the person or persons you would have wanted to take care of your children.

Therefore, if you have minor children, please be sure to execute a **Last Will & Testament—REGARDLESS OF WHETHER YOU HAVE A TRUST IN PLACE**—so that you will have a say in who cares for your minor children and their property after you’re gone.



*Who will care for your children when you are no longer able to?*





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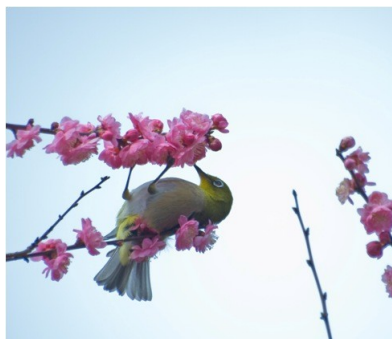
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*Spring is here,  
Spring is here  
How do you think I know?  
Flowers are blooming  
I know it must be so.  
Spring is here,  
Spring is here  
How do you think I know?  
Birds are singing  
I know it must be so.*

*Spring is Here  
Nellie Edge*

## The Fine Print

The information contained in this newsletter is for **general information purposes** only and is not intended to offer legal advice on specific cases.

If you have any questions about the information in this newsletter, please contact **Creighton Law Offices** or another appropriate professional legal services provider to determine how this information might affect you.

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### IRS Circular 230 Disclosure:

To ensure compliance with requirements imposed by the IRS, we inform you that any US tax advice contained in

this communication is not intended to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code, or (ii) promoting, marketing, or recommending to another party any matter addressed by this communication.

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**Creighton Law Offices** is located in San Mateo, California. The firm specializes in providing exemplary estate planning, trust administration, probate, and long-term care planning services to its clients.

**Coming soon! Creighton Law Offices** is preparing to launch a new website that will feature, among other things, more information on the **Pour Over Will** and other estate planning topics. We encourage you to contact us with suggestions for what you would like to see on the site or in our newsletters.

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If you would like additional copies of this or previous newsletters, or know someone who would benefit from receiving this information directly, please contact **Peter** at (650) 344-0700.