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Part 2

Planning a Retirement Purpose with Private Retirement Trusts (PRTs)

Designing Defensible Retirement Plans Under California Law

PRESENTED BY
DUSTIN NICOLS

WEBINAR

PRIVATE RETIREMENT TRUST SERIES

Private Retirement Trust Series

Part 1

Introduction to
Private Retirement Trusts
July 8, 2025 | 12PM PST

Part 2

Planning a Retirement
Purpose with
Private Retirement Trusts
July 10, 2025 | 12PM PST

Part 3

Legal Logistics &
Implementation of
Private Retirement Trusts
July 15, 2025 | 12PM PST

Part 4

Private Retirement Trust
Funding Basics
July 17, 2025 | 12PM PST

Have a Question?

- Please use the **Q&A panel** to submit your questions at any time during the session.
- Questions will be answered **live throughout the session** as time allows, or **via follow-up after the webinar** if we don't get to them all.
- Thank you for joining us today!

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Today's Speaker

Dustin I. Nichols, Esq.

Managing Attorney

The Law Office of Dustin I. Nichols, A PC

Dustin I. Nichols is the Managing Attorney at The Law Office of Dustin I. Nichols, A PC in Newport Beach, California. For over 30 years, he has provided clients with common sense and uncommon thinking in integrated domestic and foreign corporate, estate, and business planning strategies, with a focus on niche retirement planning for California business owners. His practice spans entity formation, estate planning, trust administration, transactional matters, litigation, risk mitigation, and creditor exemption planning. He regularly advises on Integrated Estate, Corporate, and Integrated Exemption Planning structures, including the California Private Retirement Trust (PRT), and is often called upon by bankruptcy and litigation attorneys to assess the validity of complex asset protection plans. His deep knowledge of digital assets and blockchain technology enables him to offer clients the unique option of funding PRTs with cryptocurrency.

Dustin is a published author and frequent speaker on asset protection and retention strategies, having been featured in The Orange County Lawyer, Bloomberg Tax, and First American Trust Quarterly. He leads educational workshops and lunch-and-learns for CPA firms, RIAs, and insurance professionals on the PRT. He holds a Juris Doctor from Western State University College of Law and a Bachelor of Arts in Political Science from California State University, Northridge. He is a member of the California State Bar, certified before the U.S. Tax Court, and licensed to practice before the United States District Courts in the Eastern and Central Districts of California.

Introduction to PRT Planning with Retirement Purpose

- The Statue
- The Purpose of the Statute
- Compliance Issues
- Retirement Purpose - Totality of the Circumstances

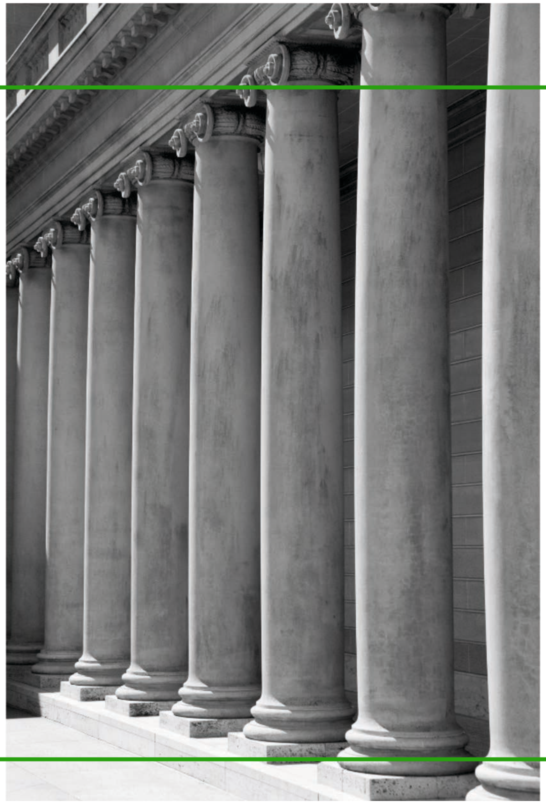
The Statue: CCP § 704.115(b)

“[a]ll amounts held, controlled, or in process of distribution by a private retirement plan, for the payment of benefits as an annuity, pension, retirement allowance, disability payment, or death benefit from a private retirement plan are exempt.”

The Purpose of the Statute

- The purpose of the PRT is to protect a debtor from his or her creditors and provide him or her with the basics necessities of life
- The PRT allows Californians to convert their "exposed" personal assets to "exempt" private retirement assets by enhancing (using in advance) their California exemption
- To be construed in a light most favorable to a debtor

  (In re Dudley, C.A.9(Cal.) 2001, 249F.3d 1170)



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Compliance Issues

- CCP § 704.115 fails to define a "private retirement plan", and the statute provides no guidance as to what qualifies as a plan
- Extensive knowledge of case law required since such holdings and judicial guidance tend to be based on particular fact-based scenarios that differ from case to case

Elements of a PRT

CCP § 704.115(a) doesn't define a PRT – Case law defines a PRT to be:

- A Private Retirement Plan (one per Company)
- A Private Retirement Trust (one per Employee)
- PRT must be sponsored by an Employer Company
- Managed by an independent trustee or custodian
- To provide retirement benefits "only" to an employed person
- Plan can be ERISA qualified or not qualified
  - Retirement plan documentation whether qualified or non-qualified
  - Schedule or formula of payments to be made to the Plan by employee or employer or both
  - Schedule or formula of payments to participant at retirement

PRT Basics

- Plan must be principally or primarily designed and used for retirement purposes to enjoy the exemption protection of CCP § 704.115(b)

- Courts look to the totality of the circumstances to determine whether there is a retirement purpose

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Totality of the Circumstances – 5 Factors

1. Debtor's subjective intent in designing and using the plan
2. Chronology or timing of the creation of the plan in relation to other events
3. Degree of control the debtor maintains over contributions, management, administration, and use of funds in the plan or account
4. Whether the debtor violated or complied with Internal Revenue Service (IRS) rules or the plan's rules in contributing to the plan
5. If the debtor withdraws money from the plan or account, whether those funds were used for retirement or a nonretirement purpose

Application and Other Considerations

- All factors are relevant; but no one is dispositive
- Inquiry is not limited to only those factors previously considered by other California and federal courts
- All factors are considered in the light of the fundamental inquiry, whether the plan was <u>designed</u> and <u>used</u> *for a retirement purpose*

Factor 1: Subjective Intent

- Subjective intent alone is not sufficient for the creation of an exemptible private retirement plan
- While the debtor's subjective intent cannot create an exemption, it may take one away

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Negative Analysis

In re Barnes:

- Prior to filing a bankruptcy petition, Debtors purchased an annuity with proceeds from a home sale
- Debtors asserted that the annuity is made exempt by the simple fact that they intend the annuity to fund, in part, their retirement

The annuity is not exempt because:

- It is not a private retirement plan within the meaning of CCP § 704.115(a)(1) and (b) since it was not purchased by an employer; and
- It does not represent the gradual investment of contributed funds

Factor 2: Chronology

- The chronology or timing of the creation of the plan in relation to other events may be used to negate the retirement purpose of the Plan
- Significance of Due Diligence Engagement

Positive Analysis

In re Stern:

- Stern transferred plan assets into an IRA
- $4.6 million arbitration award against Stern in 1991
- Stern creates Profit Sharing Plan in 1992 and transfers the proceeds of the IRA into the Profit Sharing Plan
- Creditor files a fraudulent transfer action in state court contending Stern's transfer was fraudulently designed to shield assets from creditors
- Stern files for Chapter 7 Bankruptcy
- The creditor removed the fraudulent transfer action to the bankruptcy court as an adversary proceeding

Stern's transfer of assets from an IRA to a Pension Plan on the eve of bankruptcy was not a fraudulent transfer designed to shield his assets from creditors

Negative Analysis

O'Brien v. AMBS Diagnostics, LLC:

- Judgment creditor sought to collect money from O'Brien's IRA
- Court declared that the IRA funds were only partially exempt
- Weeks later, O'Brien created the LLC and soon thereafter, created the 401(k) plan, adopted the plan and then rolled over the IRA funds into the 401(k) plan and claimed the full exemption
- O'Brien dissolved the LLC

The chronology of events confirms O'Brien's subjective intent was to shield assets from creditors

Factor 3: Degree of Control

- The kind of control which would show a nonretirement purpose would be substantially all control over contributions, management, administration, and use of funds
    - Independent PRT Trustee preferred

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In Re Cheng

- Debtor is the sole owner of Corporation that Sponsored Plans
- Debtor is the Trustee
- Debtor is the Beneficiary
- Debtor controls the Plans and assets

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Positive Analysis

Schwartzman v. Wilshinsky

The court found that a high degree of control was not exercised because

- Debtor did not take loans or disbursements
- Debtor did not overfund
- Debtor had no part in administering the Plan
- There is no evidence that Debtor used the Plan to hide assets

Factor 4: Compliance with Rules

- Qualified Plans:
  - Contributions must comply with the IRS rules
- Non-Qualified Plans:
  - Contributions must comply with the Plan and Trust rules

Failure to comply with the rules may support a finding of a nonretirement purpose

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Overfunding

In the Matter of Rucker

- Rucker has 3 wholly owned corporations that he used to establish a Pension Plan and several 401k Plans
- Rucker is the only beneficiary of the Plans
- Corporation contributed at least $30,000 more to Rucker’s Plan than paid to him in salary in 2001 and 2002
- Plan contributions were about equal to Rucker's salary

The Plans were not designed and used primarily for retirement purposes and are therefore not exempt under CPC § 704.115

Factor 5: Withdrawals and Loans

In re Jacoway

If the debtor withdraws money from the plan or account, whether those funds were used for retirement or a nonretirement purpose.

Courts have considered:

- Whether the withdrawals or loans benefited the plan's retirement purpose by preserving and enhancing the capital of the plan, and
- Whether any withdrawals diminished or will diminish the assets in the plan to such an extent that they are inconsistent with the majority of the assets being used for long-term retirement purposes

Positive Analysis

In re Bloom:

- Loaning more than half of the funds in the plan to herself without security did not negate retirement purpose where:
  - Plan procedures followed
  - Charged reasonable rate of interest
  - Timely and continuous payments
  - No evidence of an attempt to hide assets
- It is inappropriate to hold the debtor to the prudent investor standard. A poorly, even imprudently, invested plan may still be designed and use for retirement purposes.

Negative Analysis

In re Daniel:

- Debtor borrowed $75k from the Plan to buy a house and agreed to repay the loan in one year with 10% interest

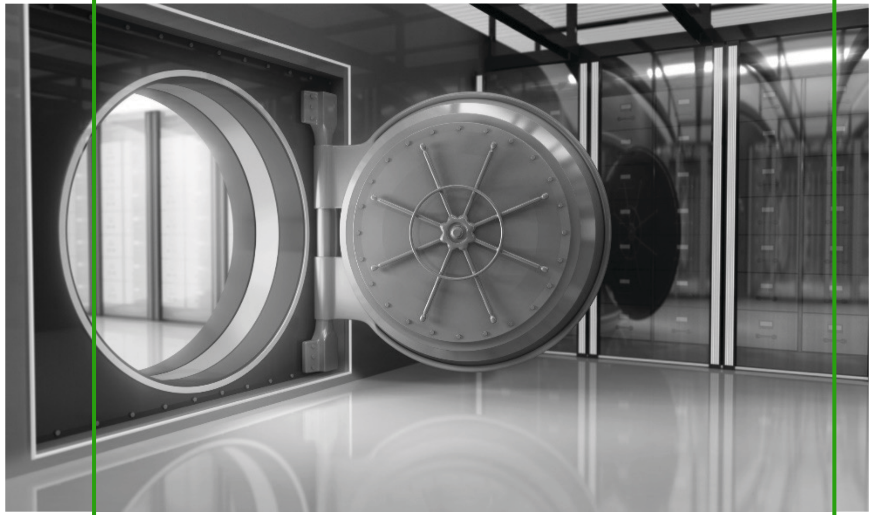
- No interest payments were made. When due, loan was rolled over and Plan got a new promissory note payable to himself as trustee.

- The transaction was more a withdrawal than a loan considering:
    - Debtor failed to establish ability to obtain similar funds commercially
    - Unsecured nature of loan at a favorable interest rate
    - Amount withdrawn was substantially equal to the Debtor's interest in the plan
    - Debtor rolled over his repayment to the Plan

Recap of Exemption Protection

The assets in a PRT only benefit from the exemption protection of CCP § 704.115(b) if the PRT is:

- Properly structured
- Properly funded
- Annually administered to maintain compliance with applicable laws



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Connect with Dustin

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For a complimentary 30-minute Integrated Exemption Planning consultation with Dustin Nichols, contact

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Thank you for attending!

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