Estate Planning Basics

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Do you have a Will? A recent survey indicates nearly 60% of American adults do not.

What happens if you don't have a Will? Generally, if you die without a Will, assets that do not otherwise pass outside of probate (e.g., by beneficiary designation, titling, contractual arrangement, small estate affidavit) will go through court administered probate proceedings. Probate proceedings are a public record so anyone can access information about your estate and beneficiaries. The process can take from several months to several years to complete and your beneficiaries may not receive their inheritance until the probate is completed.

In California, where probate is particularly onerous, court-appointed administrators and attorneys hired to handle the probate are, by law, entitled to set fees based on the gross value of the probate assets (not net of mortgages and indebtedness). As an example, if the only probate asset in California was a home valued at $500,000, the administrator and attorney would be entitled to statutory fees exceeding $25,000 no matter what was owed on the home. Statutory probate fees on a gross estate of $1 million, $3 million, or $10 million would total $46,000, $86,000, or $226,000, respectively (see attached probate fee schedule). In other states, where probate is somewhat less onerous, probate proceedings can still consume 5% or more of an estate.

What happens if you *do* have a Will? If you have a Will, your named executor/personal representative will distribute your estate to your designated beneficiaries in the manner specified. Although tax planning can be done in a Will, and you can control the manner and timing of distribution to beneficiaries, having a Will does not avoid probate.

What is a Revocable Living Trust and how is it different from a Will? People often use a Revocable Living Trust to avoid probate, for tax planning, and to control the manner and timing of distribution to beneficiaries. Unlike a Will, which is a public document filed with the court, the Trust is private contract between yourself as the Grantor or Trustor (the person granting assets to the trust) and yourself as the Trustee (the person(s) managing the trust assets until you are incapacitated or deceased) for the benefit of the beneficiary (you during your lifetime, and then beneficiaries you name to inherit your assets after your death). Property held in the name of the Trust is not subject to probate proceedings.

You will need to transfer your assets (e.g., real estate) into the Trust, generally with the assistance of an attorney. You continue to control and manage the assets as you do now, but upon your incapacity, your designated successor trustee(s) can manage the assets without a court having to appoint a conservator. Upon your death, the successor trustee(s) will distribute the assets to your beneficiaries privately, according to the terms of the Trust, and avoid probate.

A "Pour Over" Will is typically prepared in conjunction with a Living Trust, but only to catch any assets that may not have been transferred to the Trust before death, so those assets can also be distributed according to the Trust's terms. We hope to never use the Will, however, because all assets passing by way of a Will pass through probate. Guardians for any minor children are nominated in the Will.

What does a basic estate plan typically consist of? A basic estate plan is typically comprised of the following documents:

1. Revocable Living Trust;
2. Certification of Trust;
3. Pour Over Will;
4. Financial Power of Attorney;
5. Advance Health Care Directive *or* a Health Care Power of Attorney and a Living Will, depending on the state; and a
6. HIPAA Authorization

How do you find a qualified yet reasonably priced estate planning attorney? It is important to work with an attorney who specializes in estate planning, trust, and probate law, preferably a State Bar Certified Specialist in Estate Planning, Probate & Trust Law if your state certifies such specialists, because the law in the area is very specialized, changes often, and involves complex and interrelated tax matters (i.e., income/capital gains tax, property tax, generation-skipping transfer tax, gift tax, and federal estate tax). Be sure to choose an attorney who will provide you with a complimentary consultation by phone or in person, and one who will charge a fixed fee rather than an hourly rate whenever possible, so you don't have to worry about unknown or unexpected costs.

Very importantly, be sure to find out whether the quoted fee includes "funding" or transferring your assets into the trust. Often attorneys offer low fees by not taking the time to ensure your living trust is funded, or by only preparing deeds to transfer your real property to the trust but otherwise leaving you to transfer your assets to the trust yourself.

To the extent possible, the transferring assets to your living trust should be handled with the guidance of an attorney. Only that way can your brokerage accounts, retirement accounts, life insurance, business assets, etc. be coordinated properly with your overall estate plan. An unfunded trust is why many living trusts fail and the estate ends up in probate despite the existence of the trust.

Remember, a living trust only applies to assets that actually flow through the trust. Yes, the Pour Over Will is there is there to "catch" any assets that don't flow through the trust so they can be distributed according to the trust's terms – but only after they go through probate – a second best solution at best, and one that is entirely avoidable with a properly funded trust.

Why is a Financial Power of Attorney Necessary? A Financial Power of Attorney enables a designated individual or individuals to handle any assets that are not in your trust during your incapacity (e.g., transfer assets that should be in your living trust to your trust).

Why is an Advance Health Care Directive *or* a Health Care Power of Attorney and Living Will Necessary? A Health Care Power of Attorney allows a designated agent to make health care decisions for you in the event you are incapacitated. It grants the agent the power execute health care forms and consent to surgery and the like if you are unable to make those decisions for yourself. A Living Will is used to express your preferences regarding life-sustaining care. In some states, including California, these two documents are combined in an Advance Health Care Directive.

What is a HIPAA Authorization? A Heath Insurance Portability and Accountability Act (HIPAA) Authorization circumvents the privacy laws surrounding your health information so your named fiduciaries can talk with your medical providers about your medical condition.

What is a Certification of Trust? A Certification of Trust is document which reflects how title should be taken in your name as Trustee of the trust. So, when you're buying a house, for instance, and want to take title in the name of the trust you can provide the Certification of Trust, which is a legal document, to escrow rather than your entire trust.

What kind of tax planning is involved? Estate plans are drafted to minimize taxes, including federal estate taxes, which are currently assessed at a maximum tax rate of 40% on assets exceeding the "applicable exclusion amount" of $13.61 million in 2024. Under current tax laws, the applicable exclusion rate is scheduled to drop to $5 million (adjusted for inflation) in 2026. Many people do not realize that life insurance proceeds are included in the taxable estate, which can sometimes bring an estate over the exclusion

amount. With proper planning, however, exposure to estate taxes can be dramatically reduced.

What about advanced estate planning for larger estates? Certainly those whose estates exceed the exclusion amount can benefit from a variety of techniques, such as gifts or sales to irrevocable trusts (IDGTs), grantor retained annuity trusts (GRATS), qualified personal residence trusts (QPRTs), and charitable trusts (CRTs and CLATs), to name a few. These techniques are designed to minimize or completely eliminate estate taxes. Moreover, life insurance proceeds can be completely removed from the taxable estate through the use of irrevocable life insurance trusts (ILITs).

What about blended families? Special consideration is taken drafting estate plans for blended families to address the sometimes competing interests of the current spouse and children from prior marriage(s). Without careful planning, there may be unintended and unfortunate consequences.

What can you do to protect your beneficiaries who have special needs or who need protection from divorcing spouses, creditors, and "predators"? Special provisions can be drafted into your revocable living trust (or you can set up a standalone trust) to protect a beneficiary who is receiving or applying for government benefits so that an inheritance will not compromise those benefits. You can also protect a beneficiary's inheritance from creditors, predators, and divorcing spouses by having lifetime protective trust provisions drafted into your revocable living trust. Once a beneficiary receives an inheritance "in hand" it can be too late.

How do you provide for your pets? More and more people are providing for pets in their estate plan by incorporating pet trust provisions into their revocable living trust or setting up standalone pet trusts. In these trusts you can designate preferred caretakers for your pets and set aside funds for their care and support.

Are you concerned about asset protection? Many people are concerned about asset protection in our increasingly litigious society. From entities such as limited liability companies to domestic and offshore asset protection trusts, implementation of such strategies often involves a cost-benefit analysis.

How often should you review your estate plan? You should review your estate plan periodically, at least every two to three years, because of changes in tax and other laws. Certainly, estate plans should be reviewed when there has been a significant change in assets, or when there has been a major life event such as divorce, remarriage, or the birth or adoption of a child. Many estate planning attorneys will review existing estate plans and provide recommendations at no charge.

Statutory Probate Fees in California

Gross Estate Value	Statutory Fee
$100,000	$4,000 x 2 = $8,000
$200,000	$7,000 x 2 = $14,000
$300,000	$9,000 x 2 = $18,000
$400,000	$11,000 x 2 = $22,000
$500,000	$13,000 x 2 = $26,000
$600,000	$15,000 x 2 = $30,000
$700,000	$17,000 x 2 = $34,000
$800,000	$19,000 x 2 = $38,000
$900,000	$21,000 x 2 = $42,000
$1,000,000	$23,000 x 2 = $46,000
$1,500,000	$28,000 x 2 = $56,000
$2,000,000	$33,000 x 2 = $66,000
$3,000,000	$43,000 x 2 = $86,000
$4,000,000	$53,000 x 2 = $106,000
$5,000,000	$63,000 x 2 =$126,000
$6,000,000	$73,000 x 2 = $146,000
$7,000,000	$83,000 x 2 = $166,000
$8,000,000	$93,000 x 2 = $186,000
$9,000,000	$103,000 x 2 = $206,000
$10,000,000	$113,000 x 2 = $226,000
$15,000,000	$138,000 x 2 = $276,000
$20,000,000	$163,000 x 2 = $326,000