

California Wills, Trusts and Estate Planning

ANDREW M. MEINZER

ATTORNEY & COUNSELOR AT LAW

3848 W. Carson St., Ste. 220

Torrance, CA 90503

P.O. Box 14147

Torrance, CA 90503

Voice (310) 375-3350 Fax (310) 375-3550

ameinzer@meinzerlawoffice.com

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This brief synopsis is to provide a basic understanding of California Wills, Trusts, and Estate Planning law. It is not an exhaustive treatment of the subject. For more detailed information, obtain the counsel and assistance of an attorney by calling for an appointment.

There are many reasons to have a good Estate Plan. A good Estate Plan provides for distribution of one's assets on death to chosen persons and entities. Ideally, a good Estate Plan will avoid the time and expense of Probate, and for married couples, it may minimize estate taxes. Although often overlooked, important additional reasons for having a good Estate Plan are to provide (1) a vehicle through which one's assets can be managed for his or her benefit after lack of capacity, and (2) a mechanism for one's health care decisions to be made according to his or her wishes after lack of capacity.

Intestacy

If one dies without a Will, then he or she dies "intestate." If one dies intestate, then a formal Probate administration generally is required to dispose of the decedent's assets, and they will be distributed to "heirs at law" according to statutes. In other words, when a

person dies without a Will or a Trust, his or her assets will be distributed to his or her family in the manner provided by law, regardless of whether that result was desired.

Testacy and Wills

If one has a Will at death, then he or she dies “testate.” If one dies testate, then the Executor named in the Will distributes the decedent’s assets to the persons and entities named as Beneficiaries of the Will.

Some of the benefits of dying testate are obvious. One such benefit is the ability to choose the Executor to carry out the terms of the Will; in contrast, with intestacy, anyone can serve as Administrator of the Probate administration, although there is a preference for family members. Further, with a Will, one is able to provide for distribution of assets in a desired manner, including specific gifts of property to specific persons and entities.

Other benefits of dying with a Will are less obvious. If one has minor children, then through a Will he or she can nominate a Guardian to provide care to such minor children after the parent dies. Similarly, one can streamline the Probate process (thus minimizing the time and cost) by specifically authorizing his or her Executor to administer the Estate according to the Independent Administration of Estates Act.

A Will, however, provides no benefit during life because it remains dormant until the death of the person whom executed it. Further, a Will does not avoid the time and expense of Probate, although it can streamline the Probate process, as discussed above.

The three parties to a Will are as follows:

1. The Testator is the person that executes the Will.
2. The Executor is the person named in the Will to carry out the terms of the Will.
3. The Beneficiaries are the persons named in the Will to receive distributions of assets after the death of the Testator.

A Will must satisfy certain requirements to be valid and enforceable. Specifically, the Testator must have “testamentary capacity.” Testamentary capacity essentially is understanding the nature of the act of signing a Will, having familiarity with one’s assets, and having knowledge of one’s relatives.

A Will also must be in writing. A formal Will must be signed by the Testator and two witnesses being present at the same time, witnessing the Testator sign his or her name, and acknowledging that the Testator understood that the document is a Will. Beware of preprinted forms at office supply stores and on the Internet because they often do not comply with local laws.

Probate

Regardless of whether one dies intestate or testate, there generally will be a Probate administration. A Probate is a formal court proceeding through which the Executor or Administrator pays the decedent’s debts and then distributes all of the decedent’s remaining assets.

The Probate process is time consuming because the Probate court generally closely monitors the acts of the Administrator or Executor of the Estate. Consequently, he or she must obtain prior court approval before taking certain actions. Obtaining such prior court approval requires the attorney for the Administrator or Executor to request court approval by preparing a petition and filing it with the court. Then after the petition is filed with the court, the parties must wait weeks or months for the court to hear the petition. A typical California Probate lasts at least one year.

The Probate process can be costly. The Executor or Administrator is entitled to a fee for his or her services, and such fee is a percentage of the assets of the Probate estate. Similarly, the attorney for the Executor or Administrator is entitled to the same percentage fee, plus possible extraordinary fees for extraordinary services. With the high value of real

estate in California, fees based on a percentage of the assets can be very high. Further, additional costs of a Probate include fees to file petitions with the court and the cost of the surety bond.

Revocable Living Trust

With a Revocable Living Trust one can avoid the time and expense of Probate, minimize estate taxes payable on death (for married couples), and provide a vehicle through which one's assets can be managed for his or her benefit after loss of capacity to make decisions. Different types of Trusts are created to satisfy different types of goals. This brief synopsis, however, is concentrated on the Revocable Living Trust.

Definition of Revocable Living Trust: A Trust is an arrangement through which one person or entity manages property for the benefit of another person or entity. A Trust document provides the terms of such arrangement. A Trust is a Living Trust when it is effective during the life of the person whom created it. Further, a Trust is Revocable when the person that created the Trust retains the power to terminate the Trust or modify its terms. Thus, a Revocable Living Trust is an arrangement through which one person or entity manages property for the benefit of another person or entity when the arrangement is effective during the life of the person whom created it, and he or she retains the power to terminate it or modify its terms.

Parties to Trusts: The three parties to a Trust are as follows:

1. The Settlor (or Trustor) is the person whom creates the Trust.
2. The Trustee is the person whom manages the property of the Trust according to the terms of the Trust.
3. The Beneficiaries of the Trust are the persons or entities whom benefit from the Trust (*i.e.*, receive distributions of property from the Trust).

The terms of a Trust generally provide for an initial Trustee followed by Successor Trustees. The Successor Trustees assume responsibility after the initial Trustee is unable or unwilling to serve.

Because the Successor Trustees will have great authority, the Settlor must exercise great care in selecting Successor Trustees. The Successor Trustees must be responsible and trustworthy, have common sense, and be willing and able to act in the best interest of the Beneficiaries (generally including the Settlor). Further, one or more of the Successor Trustees should be younger than the Settlor (especially when the Settlor is a senior citizen) to provide for a Successor Trustee that will be available to carry out the terms of the Trust after the death of the Settlor.

Similarly, a Trust generally provides for a primary Beneficiary followed by contingent Beneficiaries. Usually the contingent Beneficiaries receive no distributions of assets from the Trust until asset distributions to the primary Beneficiary terminate.

Capacity Required: As with a Will, the Settlor must have capacity when executing a Trust, and the Trust must be in writing. In contrast to a Will, however, a Trust must have property; this requirement is discussed in more detail below.

Trust Funding: To be effective, the Trust must be funded. A Trustee has authority over, and the terms of the Trust apply to, only those assets that are funded into the Trust. In other words, after a person creates a Revocable Living Trust, he or she must change title to his or her assets from his or her name to the name of the Trust. This requirement is generally a mere formality with a Revocable Living Trust because the Settlor usually serves as the initial Trustee; thus, the Settlor transfers his or her assets to himself or herself as Trustee of the Trust.

Although it may be a mere formality, it is imperative that such transfers be accomplished. If such transfers are not accomplished, then the Successor Trustees will

have no assets over which to exercise control. Consequently, the Successor Trustees will not be able to manage the Settlor's assets for the benefit of the Settlor (after the Settlor's incapacity to make decisions) or to distribute them to the Contingent Beneficiaries (after the Settlor's death).

Benefits of Revocable Living Trust: Generally, a person (or a married couple or domestic partners) creates a Revocable Living Trust and makes himself or herself the initial Trustee and the primary Beneficiary. Thus, after transferring assets into the Trust, he or she continues to manage the property (as Trustee) for his or her benefit (as the primary Beneficiary) just as he or she did before creating the Trust.

In addition, through a Revocable Living Trust a person provides for contingent Beneficiaries to receive the Trust assets on his or her death. Thus, the Revocable Living Trust provides a mechanism for transferring property directly to Beneficiaries on death without a Probate.

Moreover, a Revocable Living Trust provides a mechanism for management of one's property for his or her benefit after loss of capacity to make decisions. The person whom creates the Revocable Living Trust is usually the primary Beneficiary of it. Further, he or she names Successor Trustees to assume management responsibility after he or she dies or loses capacity. Accordingly, the Successor Trustees will assume responsibility for managing the Trust property for the Settlor/Beneficiary after he or she becomes incapacitated to make decisions.

A Settlor of a Revocable Living Trust has great latitude regarding distribution of assets on death. A Revocable Living Trust can provide for distribution of assets to virtually any person or entity chosen by the Settlor.

A Revocable Living Trust is particularly useful to a person with young children. A Revocable Living Trust can enable the Successor Trustee to manage the assets for the

benefit of the Settlor's minor children in a manner that mimics the Settlor's lifetime management of the assets. Further, a Revocable Living Trust can enable the Successor Trustee to manage assets for the benefit of the Settlor's young adult children while preventing them from receiving outright distribution until attaining an age of sufficient maturity.

The nature of a Revocable Living Trust is such that it is nearly transparent during the life of the Settlor. Real property transferred into the Revocable Living Trust is not reassessed for purposes of property taxes. Further, the Settlor will continue to file individual income tax returns. Similarly, the Settlor need not apply to the Internal Revenue Service for an Employer Identification Number; rather, the Settlor will continue to file income tax returns based on his or her personal Social Security Number.

For married couples, property transferred to a Revocable Living Trust maintains its character as either separate property or community property.

Another benefit of a Revocable Living Trust is that it is mostly private. The only people entitled to know of the Revocable Living Trust's terms are those people interested in the Trust. In contrast, with a Probate, the terms of the Will and all petitions filed with the court become part of the public record. Further, court hearings occur in court rooms that are open to the public.

Because of the importance of Trusts and the potential harm that may arise if they are not drafted properly, one should obtain the counsel and assistance of an attorney to draft a Trust. Please call for an appointment.

Documents in Support of Revocable Living Trust.

Because a Revocable Living Trust must be funded to be effective, a good estate plan will include a Schedule of Assets, a "Pour-Over Will", and a General Assignment of Assets. Without going into detail, each of these items is designed as a back-stop in case

the Settlor does not transfer title of assets into the Revocable Living Trust. In such case, these documents are available to ensure that all assets are transferred into the Trust—even after the Settlor has died, if necessary.

Joint Tenancy

Many people seek to have assets distributed on death to intended recipients by making such intended recipients joint tenancy owners of the assets. Although joint tenancy ownership can accomplish this goal, it generally should be avoided as an estate planning technique.

One loses control of an asset when he or she makes another person a joint tenant owner of the asset. Making another person a joint tenant of an asset conveys to that person a present ownership interest in that asset. Consequently, creditors of that person could seek satisfaction of debts from the joint tenancy asset. This fact is especially problematic for a senior citizen whom makes a child or someone else a joint tenant of the senior citizen's home. If the joint tenant becomes bankrupt or divorced or has other creditors, then the senior citizen could lose his or her home in satisfaction of the joint tenant's obligations.

Further, compared to receiving an asset as an inheritance on death, there may be negative tax implications for the person made a joint tenant of an asset. An explanation of such negative tax implications is beyond the scope of this synopsis, however.

Another use of joint tenancy occurs frequently with senior citizens. Unable or unwilling to manage their own finances, senior citizens often place a child's name on a bank account as a joint tenant. Usually, the reason for doing so is to empower that child to manage finances and pay bills for the senior citizen. The problem is that senior citizens often do not realize that by doing so they engage in estate planning. Specifically, that child will receive all of the funds of the joint tenancy bank account on the death of the senior citizen—to the exclusion of any other children or relatives of the senior citizen.

For these reasons among others, joint tenancy ownership should be avoided as an estate planning and asset management technique. The better alternative is to place all assets into a Revocable Living Trust for the benefit of the senior citizen. Any assets that are left outside of the Revocable Living Trust can be managed for the senior citizen's benefit through a Power of Attorney.

Powers of Attorney

A Power of Attorney is a document through which one person (called the Principal) names one or more persons (called Agents, and sometimes called Attorneys-in-Fact) to manage finances, assets, health care, and personal care for him or her on incapacity to make decisions.

There are two types of Powers of Attorney based on the nature of the powers conferred on the Agent:

1. Power of Attorney for Financial Management; and
2. Power of Attorney for Health Care.

A Power of Attorney for Financial Management authorizes the designated Agent (or Attorney-in-Fact) to make financial management and asset management decisions for the Principal. Through a Power of Attorney for Financial Management, the Principal may authorize the Agent to perform, among other things, the following tasks:

1. Management of real property;
2. Management of personal property;
3. Operation of a business;
4. Management of investments; and
5. Payment of bills and debts.

A Power of Attorney for Health Care authorizes the designated Agent to make health care decisions for the Principal. Significantly, a Power of Attorney for Health Care

can contain specific directions to the designated Agent regarding particular treatments that the Principal desires or does not desire. Such specific directions may pertain to, among other things, life support, coma, resuscitation, severe burns, and dementia. Through a Power of Attorney for Health Care, the designated Agent will have both the authority to make health care decisions for the Principal and clear directions regarding particular treatments that the Principal desires and does not desire. Thus, a Power of Attorney for Health Care will provide peace of mind both to the Principal and to the Agent that the Agent will carry out the desires of the Principal.

A good estate plan will include both a Power of Attorney for Financial Management and a Power of Attorney for Health Care.

Conservatorship

Without a good estate plan consisting of a Revocable Living Trust and Powers of Attorney for Financial Management and Health Care, an individual that loses capacity to manage his or her own finances or personal care will likely require a Conservatorship. Unless one has a Revocable Living Trust or Powers of Attorney, there is nobody with authority to make decisions for him or her—not even his or her spouse or domestic partner.

In such a case, establishing a Conservatorship is the only way for anyone to gain authority to make financial and healthcare decisions for a person lacking capacity to make decisions for himself or herself. Like a Probate administration, a Conservatorship is a formal court proceeding; however, in the case of a Conservatorship, the court appoints a person or entity (*i.e.*, the Conservator) to make decisions for the person lacking capacity (*i.e.*, the Conservatee). The Conservatorship limits or removes the Conservatee's authority to make decisions for himself or herself.

Like a Probate, a Conservatorship is time consuming and costly because of constant court supervision and because many acts require prior court approval. As discussed above

regarding Probate, obtaining such prior court approval requires the attorney for the Conservator to request court approval by preparing a petition and filing it with the court. Then after the petition is filed with the court, the parties must wait weeks or months for the court to hear the petition.

A Conservatorship endures until either the Conservatee regains capacity, or more likely, until the Conservatee dies.

In most cases, the Conservator is required to be represented by an attorney. Even if not required, however, the Conservator should obtain the counsel and assistance of an attorney for guidance through the Conservatorship proceedings. Please call for an appointment.

Attorney Assistance Recommended

Because of the importance of Wills, Trusts, and Powers of Attorney and the potential harm that may arise if they are not drafted properly with specific language, one should obtain the counsel and assistance of an attorney to draft Wills, Trusts, and Powers of Attorney. Similarly, Executors, Trustees, and Agents should obtain the counsel and assistance of an attorney for guidance regarding carrying out the terms of Wills, Trusts, and Powers of Attorney. Please call for a consultation.

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