

THE STATE BAR OF CALIFORNIA

DO I
NEED
ESTATE
PLANNING?

GET THE
LEGAL
FACTS
OF LIFE

Do I need estate planning?

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1 *What is estate planning?*

Estate planning is a process. It involves people—your family, other individuals and, in many cases, charitable organizations of your choice. It also involves your *assets* (your property) and the various forms of ownership and title that those assets may take. And it addresses your future needs in case you ever become unable to care for yourself.

Through estate planning, you can determine:

- How and by whom your assets will be managed for your benefit during your lifetime if you ever become unable to manage them yourself.
- When and under what circumstances it makes sense to distribute your assets during your lifetime.
- How and to whom your assets will be distributed after your death.
- How and by whom your personal care will be managed and how health care decisions will be made during your lifetime if you become unable to care for yourself.

Many people mistakenly think that estate planning only involves the writing of a will. Estate planning, however, can also involve financial, tax, medical and business planning. A will is part of the planning process, but you will need other documents as well to fully address your estate planning needs.

The purpose of this pamphlet is to summarize the estate planning process, and illustrate how it can help you meet your goals and objectives. You will discover that estate planning is a dynamic process. Just as people and assets and laws change, it may well be necessary to adjust your estate plan every so often to reflect those changes.

2 *What is involved in estate planning?*

There are many issues to consider in creating an estate plan. First of all, ask yourself the following questions:

- What are my assets and what is their approximate value?
- Whom do I want to receive those assets — and when?
- Who should manage those assets if I cannot — either during my lifetime or after my death?
- Who should be responsible for taking care of my minor children if I become unable to care for them myself?
- Who should make decisions on my behalf concerning my care and welfare if I become unable to care for myself?
- What do I want done with my remains after I die and where would I want them buried, scattered or otherwise laid to rest?

Once you have some answers to these questions, you are ready to seek the advice and services of a qualified lawyer (see #18). Such a lawyer can help you create an estate plan, and advise you on such issues as taxes, title to assets and the management of your estate.

3 *Who needs estate planning?*

You do — whether your estate is large or small. Either way, you should designate someone to manage your assets and make health care and personal care decisions for you if you ever become unable to do so for yourself.

If your estate is small, you may simply focus

on who will receive your assets after your death, and who should manage your estate, pay your last debts and handle the distribution of your assets. If your estate is large, your lawyer will also discuss various ways of preserving your assets for your beneficiaries and of reducing or postponing the amount of estate tax which otherwise might be payable after your death.

If you fail to plan ahead, a judge will simply appoint someone to handle your assets and personal care. And your assets will be distributed to your heirs according to a set of rules known as *intestate succession*. Contrary to popular myth, everything does not automatically go to the state if you die without a will. Your relatives, no matter how remote, and, in some cases, the relatives of your spouse will have priority in inheritance ahead of the state. Still, they may not be your choice of heirs; an estate plan gives you much greater control over who will inherit your assets after your death.

4 *What is included in my estate?*

All of your assets. This could include assets held in your name alone or jointly with others, assets such as bank accounts, real estate, stocks and bonds, and furniture, cars and jewelry. Your assets may also include life insurance proceeds, retirement accounts and payments that are due to you (such as a tax refund, outstanding loan or inheritance).

The value of your estate is equal to the “fair market value” of all of your various types of property – after you have deducted your debts (your car loan, for example, and any mortgage on your home).

The value of your estate is important in determining whether your estate will be subject to *estate taxes* after your death (see #11) and whether your beneficiaries could later be subject to *capital gains taxes*. Ensuring that there will be sufficient resources to pay such taxes is another important part of the estate planning process.

5 What is a will?

A will is a traditional legal document which:

- Names individuals (or charitable organizations) who will receive your assets after your death, either by outright gift or in a trust.
- Nominates an *executor* who will be appointed and supervised by the probate court to manage your estate; pay your debts, expenses and taxes; and distribute your estate according to the instructions in your will.
- Nominates guardians for your minor children.

Most assets in your name alone at your death will be subject to your will. Some exceptions include securities accounts and bank accounts that have designated beneficiaries, life insurance policies, IRAs and other tax-deferred retirement plans, and some annuities. Such assets would pass directly to the beneficiaries and would not be included in your will (see #13).

In addition, certain co-owned assets (see #12) would pass directly to the surviving co-owner regardless of any instructions in your will. And assets that have been transferred to a *revocable living trust* (see #6) would be distributed through the trust—not your will.

For some, a *California Statutory Will* (a fill-in-the-blanks form) may be sufficient. This form can be printed out from the State Bar website at **calbar.ca.gov** (go to *Will Form* under *Quicklinks*). Keep in mind, however, that you must execute your will in the manner required by California law. *Failure to do so could invalidate the entire will.* You should discuss such requirements with a qualified lawyer.

For more information, order a free copy of the State Bar pamphlet entitled *Do I Need a Will?* (For information on ordering this pamphlet, see #18.)

6 *What is a revocable living trust?*

It is a legal document that can, in some cases, partially substitute for a will. With a *revocable living trust* (also known as a *revocable inter vivos trust* or *grantor trust*), your assets are put into the trust, administered for your benefit during your lifetime and transferred to your beneficiaries when you die—all without the need for court involvement.

Most people name themselves as the *trustee* in charge of managing their living trust's assets. By naming yourself as trustee, you can remain in control of the assets during your lifetime. In addition, you can revoke or change any terms of the trust at any time as long as you are still competent. (The terms of the trust become irrevocable when you die.)

In your trust agreement, you will also name a *successor trustee* (a person or institution) who will take over as the trustee and manage the trust's assets if you should ever become unable to do so. Your successor trustee would also take over the management and distribution of your assets when you die.

A living trust does not, however, remove all need for a will. Generally, you would still need a will—known as a *pour over will*—to cover any assets that have not been transferred to the trust.

You should consult with a qualified estate planning lawyer to assist you in the preparation of a living trust, your will and other estate planning documents. Also, keep in mind that your choice of trustees is extremely important. That trustee's management of your living trust assets will not be automatically subject to direct court supervision.

For more detailed information, see the State Bar pamphlet *Do I Need a Living Trust?* (See #18 for pamphlet ordering information.)

7 *What is probate?*

Probate is a court-supervised process for transferring a deceased person's assets to the beneficiaries listed in his or her will. Typically, the executor named in your will would start the

process after your death by filing a petition in court and seeking appointment. Your executor would then take charge of your assets, pay your debts and, after receiving court approval, distribute the rest of your estate to your beneficiaries. If you were to die *intestate* (that is, without a will), a relative or other interested person could start the process. In such an instance, the court would appoint an *administrator* to handle your estate. *Personal representative* is another term used to describe the administrator or executor appointed to handle an estate.

Simpler procedures are available for transferring property to a spouse or for handling estates in which the total assets amount to less than \$100,000.

The probate process has advantages and disadvantages. The probate court is accustomed to resolving disputes about the distribution of assets fairly quickly through a process with defined rules. In addition, the probate court reviews the personal representative's handling of each estate, which can help protect the beneficiaries' interests.

One disadvantage, however, is that probates are public. Your estate plan and the value of your assets will become a public record. Also, because lawyer's fees and executor's commissions are based on a statutory fee schedule, a probate may cost more than the management and distribution of a comparable estate under a living trust. Time can be a factor as well. A probate proceeding generally takes longer than the administration of a living trust. Discuss such advantages and disadvantages with an estate planning lawyer before making any decisions.

8 *Can I name alternative beneficiaries?*

Yes. You should consider alternative beneficiaries in the event that your primary beneficiary does not survive you.

And if a beneficiary is too young or too disabled to handle an inheritance, you might consider setting

up a trust for his or her benefit under your will or living trust.

Once you have decided who should receive your assets, it is very important that you correctly identify those chosen individuals and charitable organizations in your will or trust. Many organizations have similar names and, in some families, individuals have similar or even identical names. An estate planning lawyer can help you clarify and appropriately identify your beneficiaries.

9 *Who should be my executor or trustee?*

That is your decision. You could name your spouse or domestic partner as your executor or trustee. Or you might choose an adult child, another relative, a family friend, a business associate or a professional fiduciary such as a bank. Your executor or trustee does not need any special training. What is most important is that your chosen executor or trustee is organized, prudent, responsible and honest.

While the executor of a will is subject to direct court supervision and the trustee of a living trust is not, they serve almost identical functions. Both are responsible for ensuring that your written instructions are followed.

One difference is that the trustee of your living trust may assume responsibilities under the trust agreement while you are still living (if you ever become unable or unwilling to continue serving as trustee yourself).

Discuss your choice of an executor or trustee with your estate planning lawyer. There are many issues to consider. For example, will the appointment of one of your adult children hurt his or her relationship with any other siblings? What conflicts of interest would be created if you name a business associate or partner as your executor or trustee? And will the person named as executor or successor trustee have the time, organizational ability and experience to do the job effectively?

10 *How should I provide for my minor children?*

First of all, in your will, you should nominate a guardian to supervise and care for your child (and to manage the child's assets) until he or she is 18 years old. Under California law, a *minor* child (a child under age 18) would not be legally qualified to care for himself or herself if both parents were to die. Nor is a minor legally qualified to manage his or her own property. Your nomination of a guardian could avoid a "tug of war" between well-meaning family members and others.

You also might consider transferring assets to a custodian account under the *California Uniform Transfers to Minors Act* to be held for the child until he or she reaches age 18, 21 or 25. Or you might consider setting up a trust to be held, administered and distributed for the child's benefit until the child is even older.

11 *Will my beneficiaries' inheritance be taxed?*

It depends on the circumstances. Assets left to your spouse (if he or she is a U.S. citizen) or any charitable organization will not be subject to *estate tax*. Assets left to anyone else—even your children—will be taxed if that portion of the estate totals more than \$5 million. In 2013, unless Congress changes the law, the exemption will drop to \$1 million. For estates that approach or exceed these amounts, significant estate taxes can be saved by proper estate planning before your death or, for couples, before one of you dies.

In addition, while you are living, you can give away as much as \$13,000 a year to each of your children or to anyone else without incurring *gift tax*. You could also pay your grandchild's college tuition or medical insurance premiums (or anyone's tuition or medical bills, for that matter) free of gift tax—but only if the payments are

made directly to the educational institution or medical provider.

Keep in mind that tax laws often change. And estate planning for tax purposes must take into account not only estate and gift taxes, but also income, capital gains, property and generation-skipping taxes as well. Qualified legal advice about taxes and current tax law should be obtained from a competent lawyer during the estate planning process.

12 *Does the way in which I hold title make a difference?*

Yes. The nature of your assets and how you hold title to those assets is a critical factor in the estate planning process. Before you take title (or change title) to an asset, you should understand the tax and other consequences of any proposed change. Your estate planning lawyer will be able to advise you.

- **Community property and separate property.**

If you are married or a registered domestic partner, assets earned by either you or your spouse or domestic partner while married or in the partnership and while a resident of California are *community property*. (Note: Earned income in domestic partnerships, however, may not be treated as community property for federal income tax purposes.)

As a married individual or registered domestic partner, you may continue to own certain *separate property* as well — property which you owned prior to the marriage or domestic partnership. A gift or inheritance received during the marriage or partnership would be considered separate property as well.

Separate property can be converted to community property (and vice versa) by a written agreement (it must conform with California law) signed by both spouses. However, taking such a step can have significant tax and other

consequences. Make sure that you understand such consequences before making any such change.

- **Tenants-in-common.** If you own property as *tenants in common* and one co-tenant (co-owner) dies, that co-tenant's interest in the property would pass to the beneficiary named in his or her will. This would apply to co-tenants who are married or in a domestic partnership as well as to those who are single.

- **Joint tenancy with right of survivorship.** Co-owners (married or not) of a property can also hold title as *joint tenants with right of survivorship*. If one tenant were to die in such a situation, the property would simply pass to the surviving joint tenant without being affected by the deceased person's will.

- **Community property with right of survivorship.** If you are married or in a registered domestic partnership, you and your spouse or partner could also hold title to property as *community property with right of survivorship*. Then, if your spouse or domestic partner were to die, the property would pass to you without being affected by the deceased person's will.

Married couples and registered domestic partners also have the option of jointly holding title to property as *community property*. In such a situation, if one spouse or partner were to die, his or her interest would be distributed according to the instructions in his or her will.

13 *Are there other ways of leaving property?*

Yes. Certain kinds of assets are transferred directly to the named beneficiaries. Such assets include:

- Life insurance proceeds.

- Qualified or non-qualified retirement plans, including 401(k) plans and IRAs.
- Certain “trustee” bank accounts.
- *Transfer on death* (or *TOD*) securities accounts.
- *Pay on death* (or *POD*) assets, a common title on U.S. savings bonds.

Keep in mind that these beneficiary designations can have significant tax benefits and consequences for your beneficiaries – and must be carefully coordinated with your overall estate plan.

14 *What happens if I become unable to care for myself?*

You can help determine what will happen by making your own arrangements in advance. Through estate planning, you can choose those who will care for you and your estate if you ever become unable to do so for yourself. Just make sure that your choices are documented in writing.

A *power of attorney*, for example, is a written legal document that gives another person the right and authority to act on your behalf. It can be limited to special circumstances or it can be general. That authority will end if you become incapacitated – unless you have a *durable power of attorney*. A durable power of attorney will remain in effect while you are incapacitated. This means that if you were suddenly unable to handle your own affairs, someone you trust – your legal agent or *attorney-in-fact* – could do so for you.

Or you might choose to set up a *springing power of attorney*, which would only become effective at a specified future date or event (your loss of capacity, for example).

You can authorize your agent to simply pay your bills. (This is usually a safer arrangement

than adding someone else's name to your bank account.) Or you can empower your agent to handle nearly all of your affairs. Your agent, however, cannot take anything of yours as a "gift" without your specific written authorization. These powers of attorney all expire when you die.

Make sure that you understand all of the terms before signing a power of attorney. And be absolutely certain that your chosen agent is both capable and trustworthy. There are those who have lost their life savings to unscrupulous agents—even to agents who are family members.

If you set up a living trust, it is the *trustee* who will provide the necessary management of the assets held in trust. In such a case, you might consider setting up a *durable power of attorney for property management* as well to handle limited financial transactions and to deal with assets that may not have been transferred to your living trust.

With an *advance health care directive*, you can also designate someone to make health care decisions for you in the event that you become unable to do so for yourself. In addition, this legal document can contain your wishes concerning such matters as life-sustaining treatment and other health care issues and instructions concerning organ donation, disposition of remains and your funeral. (You can revoke the directive at any time, as long as you are still competent.) Give copies to your health care agent, alternate agent, doctor, health plan representatives and family. And if you are admitted to a hospital or nursing home, take a copy with you.

If you become unable to make sound decisions or care for yourself and you have not made any such arrangements in advance, a court could appoint a court-supervised *conservator* to manage your affairs and be responsible for your care. The court's supervision of the conservator may provide you with some added safeguards. However, conservatorships can also be more cumbersome, expensive and time-consuming than the appointment of attorneys-in-fact under powers of attorney.

In any event, even if you appoint attorneys-in-fact who could manage your assets and make future health care decisions for you, you should still document your choice of conservators in case a conservatorship is ever necessary.

15 *Who should help me with my estate planning documents?*

- **Can I do it myself?** Yes. It is possible for a person to do his or her own estate planning with forms or books obtained at a stationery store or bookstore or from the State Bar. At the very least, a review of such forms can be helpful in preparing you for estate planning. If you review such materials and have any unanswered questions, however, you should seek professional help.

- **Do I need a professional's help?** It depends. If you do seek advice, keep in mind that wills and trusts are legal documents that should only be prepared by a qualified lawyer. Many other professionals and business representatives, however, may become involved in the estate planning process. For example, certified public accountants, life insurance salespersons, bank trust officers, financial planners, personnel managers and pension consultants often participate in the estate planning process. Within their areas of expertise, these professionals can assist you in planning your estate.

The State Bar urges you, however, to seek advice only from professionals who are qualified to give estate planning advice. Many professionals must be licensed by the state.

Ask the professional about his or her qualifications. And ask yourself whether the advisor might have an underlying financial incentive to sell you a particular investment, such as an annuity or life insurance policy. Such a financial incentive could bias that professional's advice. Unfortunately, some sellers of dubious financial products gain the confidence and private financial information of

their victims by posing as providers of estate or trust planning services.

16 *Should I beware of “promoters” of financial and estate planning services?*

Yes. There are many who call themselves “trust specialists,” “certified planners” or other titles that suggest the person has received advanced training in estate planning. California has experienced numerous promotions by unqualified individuals and entities which only have one real goal—to gain access to your finances in order to sell insurance-based products such as annuities and other commission-based products. To better protect yourself:

- Consult with a lawyer or other financial advisor who is knowledgeable in estate planning, and who is not trying to sell a product that may be unnecessary—*before* considering a living trust or any other estate or financial planning document or service.

- Ask for time to consider and reflect on your decision. Do not allow yourself to be pressured into purchasing an estate or financial planning product.

- Know your cancellation rights. California law requires that sellers who come to your home to sell goods and services (with some exceptions) that cost more than \$25 must give you two copies of a *notice of cancellation* form to cancel your agreement. You, the buyer, generally would be able to cancel this transaction up until midnight three business days later. Depending on the circumstances, you may have longer to cancel life insurance or annuity transactions. If you are 65 or older, for example, you would have 30 days to cancel.

- Be wary of organizations or offices that are staffed by non-lawyer personnel and that promote one-size-fits-all living trusts or living trust

kits. An estate plan created by someone who is not a qualified lawyer can have enormous and costly consequences for your estate. Do not allow yourself to be pressured into a quick purchase.

- Be wary of home solicitors who insist on obtaining confidential and detailed information about your assets and finances.

- Find out if any complaints have been filed against the company by calling local and state consumer protection offices or the Better Business Bureau.

- Insist on the person's identification and a description of his or her qualifications, education, training and expertise in estate planning. Also, keep in mind that legal document assistants are not permitted to give legal advice. And paralegals must work under the direct supervision of a lawyer. (As a precaution, ask to speak directly to the supervising attorney if you are not given an opportunity to do so.)

- Be aware that state law prohibits some professionals — broker-dealers, investment advisors and insurance brokers, for example — from using senior-specific certification, credentials or professional designations to mislead consumers. Insurance brokers and agents cannot use certain “senior designations” that even imply special expertise or training in advising seniors in particular on finance, insurance or risk management unless certain conditions are met. For more information, go to **insurance.ca.gov** and type *senior designations* into the search box.

- Always ask for a copy of any document you sign at the time it is signed.

- Report high-pressure tactics, fraud or misrepresentations to the police or district attorney immediately.

17 *How much does estate planning cost?*

It depends on your individual circumstances and the complexity of documentation and planning required to achieve your goals and objectives. The costs may vary from lawyer to lawyer. Generally, the costs will include the lawyer's charges for discussing your estate plan with you and for preparing your will, trust agreement, power of attorney or other necessary legal documents. Some lawyers charge a flat fee for estate planning services. Others charge on an hourly basis or use a combination of both types of fees.

18 *How do I find a qualified lawyer?*

If you do not know a lawyer who is qualified to help you with your estate plan, ask someone whose judgment you can trust—a friend or employer, for example. Or call a local State Bar-certified lawyer referral service. For an online list of certified lawyer referral services, visit the State Bar's website at calbar.ca.gov/lrs. Or, for the phone numbers of certified services in your county, call 1-866-44-CA-LAW (442-2529). Out-of-state callers can call 415-538-2250 to hear the same message. Or check the Yellow Pages of your telephone directory or contact your local bar association.

State Bar-certified lawyer referral services, which must meet minimum standards established by the California Supreme Court, can help you find the right lawyer for your situation. Most of these services offer half-hour consultations for a modest fee. Attorneys who are members of certified lawyer referral services must carry insurance, agree to fee arbitration for fee disputes, meet standards of experience and be State Bar members in good standing.

In addition, the State Bar certifies "specialists" in 11 legal areas, including estate planning, trust and probate law. The designation of "specialist" means that the attorney has met certain standards.

However, there are lawyers with experience in estate planning who do not seek such certification. For a list of specialists, go to **californiaspecialist.org**. Or call the State Bar at 415-538-2120.

If you do decide to hire a lawyer, make sure that you understand what you will be paying for, how much it will cost and when you will be expected to pay your bill.

For more information, see the State Bar pamphlet *How Can I Find and Hire the Right Lawyer?* You can order this pamphlet and other State Bar consumer pamphlets free of charge by sending an e-mail to **pamphlets@calbar.ca.gov**. Or, to find out how to order the State Bar’s consumer publications by mail, call 1-888-875-LAWS (875-5297). Or visit the State Bar’s website — **calbar.ca.gov** — where you’ll find the pamphlets, as well as information on ordering them.

The purpose of this pamphlet is to provide general information on the law, which is subject to change. It is not legal advice. Consult a lawyer if you have a specific legal problem.

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