

What is Estate Planning?

By Deb L. Kinney

Estate planning is the process by which a person directs the manner in which her assets will pass to others upon her death. In addition, estate planning can and should include the following:

- Appointing and providing for guardians for minor children
- Protecting assets from the creditors and ex-spouses of beneficiaries
- Reducing federal estate taxes
- Maintaining financial health during incapacity
- Appointing an agent for medical decision making
- Avoiding probate
- Establishing and documenting family values and creating a moral legacy

IF YOU DON'T MAKE AN ESTATE PLAN, THE STATE OF CALIFORNIA WILL MAKE ONE FOR YOU

California, like all other states, has intestacy laws. Intestacy laws determine where property goes when a person dies without a will or a trust. It goes without saying that California's choices with respect to the distribution of your assets may not reflect the choices you would make yourself. In addition, if you die or become incapacitated and your assets are not held in a living trust, the California court system will most likely become involved.

WHAT IS A LIVING TRUST?

A living trust is a contract between you—as the *owner of your assets*—and you—as your *trustee*. All that is required to create a living trust is an agreement that documents your intentions and instructions with regard to your assets and the transfer of those assets into the name of your trust. Having your assets in a living trust does not change your relationship to your assets—you still make all the decisions with respect to buying, selling and investing. Nor does it change your relationship to the IRS—the IRS does not want to know about your living trust. You will continue to file your tax return using your own social security number. And, most importantly, a living trust is flexible. It is fully amendable and revocable during your life, so that if your circumstances change, your trust can change as well.

ADVANTAGES OF LIVING TRUST PLANNING:

Planning with a living trust can be the best way to avoid the delays and costs of probate.

Probate is the court supervised process by which a person's property is distributed upon her death. Probate proceedings are notoriously slow and expensive. In addition, they are open to the public. Any document filed with the court is a public record and is available to any person who wants to see it.

Creating a living trust allows you to privatize the entire process of asset transfer after your death. Instead of being subject to the timetable of the court, those responsible for handling the process are free to distribute trust property as soon as they have taken the appropriate administrative steps. The living trust agreement itself is private; only beneficiaries named in the trust are entitled to a copy, and only when their rights under the trust actually vest.

Planning with a living trust provides important protections during life.

If you become incapacitated and are no longer able to make decisions regarding your financial affairs, your living trust will govern both who will make decisions on your behalf and how your

money will be used. In contrast, if you do not have a living trust and you become incapacitated, it may be necessary for someone to ask the court to appoint a conservator for you. Your conservator will remain under the supervision of the court and will be limited in terms of how he or she is allowed to spend your money.

For example, your living trust can provide that in the event of your incapacity, your trustee should continue to take care of those who are dependent upon you for financial support (such as a partner or an elderly parent). A court-appointed conservator would not necessarily have this freedom. In addition, your living trust can empower your trustee to make decisions that are beneficial to you and your heirs in the long term (such as the continuation of gifting programs)--even if these actions have nothing to do with the short term goal of providing for your well-being.

Planning with a living trust facilitates long-term protection of assets and preservation and transfer of your moral legacy.

Using a living trust to transfer assets to beneficiaries will give you great flexibility with regard to how much control you wish to maintain over your property after your death. You can leave assets directly to charity or in trusts for the benefit of family and friends, an arrangement that generally has proven to preserve assets much longer than when assets are given to individual beneficiaries outright. In addition, you can structure your trust to favor the people who will most benefit from an inheritance or you can treat all beneficiaries alike—it's all up to you. In addition, leaving assets in trust can provide a measure of asset protection to beneficiaries and, in some cases, keep assets in the family for generations without being subject to tax.

SHOULD I BE WORRIED ABOUT ESTATE TAXES AND WHAT CAN BE DONE ABOUT THEM?

Under current law, each person can transfer up to \$2 million at death (\$1 million during life) without the transfer being subject to estate or gift tax. This limit is going up to \$3.5 million in 2009. In 2010, estate taxes are repealed for one year. In 2011, unless the law is changed between now and then (which is likely), the amount exempt from tax will go back to \$1 million. Regardless of ultimate exemption amount, it is clear that estate taxes are most likely here to stay in one form or another, at least for the foreseeable future.

If you have a taxable estate, various techniques exist to reduce or even eliminate estate taxes. Some of these techniques involve lifetime gifting, some have charitable components and many include the concept of "leverage"—finding ways to increase the actual value of the gift given from an estate tax perspective. The simplest form of estate tax planning is done by leaving assets in trust, which is easily accomplished with a living trust. A thorough estate plan will make use of all the techniques necessary to accomplish a client's goals of tax minimization and asset preservation and transfer.

DO I NEED A LAWYER TO CREATE MY LIVING TRUST OR CAN I DO IT MYSELF?

70% of all living trusts fail to accomplish their goals, generally because those in charge of creating the trust documents fail to transfer assets appropriately. In order to get the most from the estate planning process and to make sure that your living trust will accomplish what you want it to accomplish, it is wise to consult with lawyers who specialize in the area of estates and trusts. Familiar with the wide variety of planning options available, they will be able to tailor an estate plan that is just right for you.

*Deb Kinney is the principal attorney at **DLKLawGroup** ^{PC}, a law firm specializing in estate planning, trust administration, and probate. **DLKLawGroup** ^{PC} provides realistic solutions that reflect the goals and desires of each client from our offices in San Francisco, Santa Rosa, and Palm Springs.*