

# Estate Planning

## WHAT IS THE DIFFERENCE BETWEEN A WILL AND A REVOCABLE LIVING TRUST?

Both a will and a revocable living trust are written legal documents which contain written instructions for the disposition of your property at the time of your death. Both a will and a revocable living trust may be revoked or amended by you at any time prior to your death.

If you dispose of your property through a will, a court-supervised process, known as probate, must be conducted before your assets can be transferred to your heirs

In the process of probate, the court appoints a person (usually the person that you nominate in your will) to administer your estate. The process includes publishing notice of your death, ascertaining and payment of creditors' claims, inventoring and valuing your assets, and ultimately distributing your assets to your heirs.

In probate all of the records relating to your estate that are filed with the court become public records. The probate process takes a minimum of six months to complete and frequently a more extended period of time.

In probate, the representative of your estate and your representative's attorney are entitled to a fee that is based on the value of your estate. For example, under existing California law, if you were to pass away with \$50,000 in the bank and a home that was worth \$300,000, the fee to which your representative and the representative's attorney would be entitled is \$10,000 each or a total of \$20,000.

Disposing of your property through the use of a revocable living trust avoids probate

By creating a revocable living trust during your lifetime, the process of probate can be avoided. The key to this avoidance is the creation of a written trust document followed by formal transfer of your assets to your living trust. Title to your assets must be changed so that they are no longer in your name but in the name of your trust. Deeds to real property must, therefore, be prepared and recorded, bank accounts transferred, and stock and bond accounts transferred as well. It is also imperative that in the written trust document you designate someone to manage and administer your property after you are unable to do so or in the event of your death. This representative is known as a "successor trustee." A successor trustee is legally bound to follow the written instructions of the trust document.

A private trust, and the documents relating to it, are not public records. The time that it takes to distribute the assets of a trust to the beneficiaries of the trust is typically shorter than the time associated with the probate process. While the successor trustee may charge reasonable fees for administering your trust and distributing the trust assets to your heirs, those fees are typically far less than the probate fees if the same property were to pass to your heirs under a will.

## **Are there any disadvantages to a living trust?**

Unlike a will which is subject to the probate process, a living trust is not under direct court supervision. Consequently, if your successor trustee does not act in a prudent fashion accountable to your heirs, that successor trustee may be able to take advantage of the situation to a greater extent than would be possible had that person been under direct court supervision. In the probate process, the actions and accountings of your representative must be reviewed and approved by the court.

In addition, in the more typical estate planning context, the cost to prepare a living trust will be substantially greater than the cost to prepare a simple will. In more complex estate plans, the difference in cost may not be significant.

The manner in which you hold title to your property is a critical factor in the estate planning process

The manner in which you hold title to your property must be ascertained and coordinated with any estate plan. For example, if a property is held by you in joint tenancy with another person, that property will pass to that other person upon your death without regard to the fact that you intended to leave that property to a different person through a will or a living trust. The manner in which you hold title or the manner in which you change title to property that you own can have significant adverse income tax, gift tax, and other legal consequences. Title to your assets must always be evaluated and coordinated with the type of estate plan that you ultimately establish.

## **Are there other methods of leaving property?**

A number of assets are transferred at death by beneficiary designations, such as life insurance proceeds, qualified or non-qualified retirement plans, including 401(k) plans and IRAs, "transfer on death" (or "TOD") securities accounts, and "pay on death" (or "POD") assets or accounts. These beneficiary designations must be carefully coordinated with your overall estate plan. Neither a will nor a living trust directly governs the distribution of those types of assets.

## **WHAT IS A LIVING WILL?**

Many people ask about "living wills." A "living will" was previously a document that a person could execute that stated his or her wishes concerning matters such as life-sustaining treatment and other health care issues and instructions concerning organ donation, disposition of remains, and funeral arrangements. What was formerly known as a "living will" is now known as an advance health care directive or durable power of attorney for health care. An advance health care directive is an important estate planning document in that it allows you to designate someone to make health care decisions for you when you can no longer make them yourself including statements of wishes concerning issues of life support, organ donation, disposition of remains, funeral arrangements, and instructions for your personal living conditions and environment.

## **WHAT IF YOU BECOME UNABLE TO CARE FOR YOURSELF?**

If you do not make any arrangements in advance, and you become unable to care for yourself, a court-supervised conservatorship proceeding may be required if you become incapacitated. Conservatorship proceedings are complicated, court-supervised, expensive, and cumbersome.

If you become incapacitated after you have established a living trust, the assets held in your trust can continue to be managed by the successor trustee designated by you and for your benefit without court supervision. With respect to your assets not held in a living trust, a durable power of attorney for property management should be considered. In such a document, you appoint another individual (the "attorney-in-fact") to make property management decisions on your behalf. The attorney-in-fact manages your property much like a conservator of your estate would function, but without court supervision.