

# **ESTATE PLANNING**

## **INTRODUCTION:**

Estate planning is a process that involves people, assets, and your wishes. You should consider how your assets will be managed for your benefit if you are unable to do so, when should certain assets be transferred (e.g., during your lifetime, at your death, or sometime later), and to whom those assets should go.

Estate planning is not just about wills. Regardless of the amount or value of your assets, it is important to have a basic plan in place. It is most successful when you consider your medical, personal, emotional, spiritual, and financial needs and those of your family and friends. Such a plan ensures that those needs and your wishes are met.

Taking an inventory of your assets is a good place to start. Make a list of your assets and debts. You can use the CLRC's Personal Records File and Taking Care of Business Form (see APPENDICES EP2 and EP3). Assets typically include bank accounts, investments, personal possessions, real estate, and business interests. Assets that have beneficiary designations, such as life insurance policies, IRA's, qualified retirement plans, and some annuities are important parts of your estate, which require coordination with your other assets in developing your estate plan.

Additionally, you should ask yourself a series of questions:

- Who would you want to inherit your assets?
- Who do you want to handle your financial affairs if you are ever unable to do so yourself?
- Who do you want to make medical decisions for you if you become unable to make them for yourself?

For example, if you were injured in a car accident and you had to spend a few weeks in the hospital recovering, consider:

- Who would pay your rent and other bills?
- Who would feed your pets?
- Who would pick up your children from school?
- If you were unconscious, who would you want to make medical decisions for you?

Remember, estate planning is based on the idea that when you prepare in advance, you can prevent problems down the road.

There are four main documents to consider when planning your estate:

1. Advance Health Care Directives;
2. Powers of Attorney for Financial Affairs;
3. Wills; and
4. Trusts.

## **I. ADVANCE HEALTH CARE DIRECTIVES**

A. **What is an Advance Health Care Directive?:** An advance health care directive (AHCD) is a set of written instructions communicating your wishes about the medical care and treatment you would like to receive if you reach the point where you can no longer make decisions for yourself. AHCD's are written in advance to let your doctor and other health care providers know your thoughts concerning your medical treatment. Although you are not required to have an AHCD, nor will you be denied medical care if you chose not to have one, it may help to ensure that you get the treatment that you want. Through this document, you can make legally valid decisions about your future medical care. Every state recognizes advance directives, but the law governing directives vary from state to state.

- 1) **California Law:** In California, an AHCD must be signed and dated. It does not have to be notarized, but then you must sign the document in the company of two witnesses. The witnesses must also sign the document and have knowledge of its contents. You can revoke an AHCD at any time.
- 2) **Taking Effect:** AHCD's only go into effect when you can no longer make your own health care decisions. As long as you are able to give "informed consent," your health care providers will rely on you and not on your advanced directive. When your doctor determines that you have regained capacity to make or communicate health care decisions, then your AHCD's authority will end and your consent will be required for treatment.
  - (i) **Informed Consent:** Informed consent means that you are able to understand the nature, extent, and probable consequences of proposed medical treatments and you are able to make rational evaluations of the risks and benefits of those treatments. It also means that you are able to communicate this understanding.

B. **There are 4 Parts to an Advance Health Care Directive:**

- 1) **Power of Attorney for Health Care (POA):** This document names someone (e.g., a relative or friend) as agent to make medical decisions for you when you are not able to do so. A POA deals with all medical decisions unless you decide to limit its power. You can also give specific instructions about treatments you want or do not want, or about other issues that concern you. For example, your agent will have access to your medical records, unless you limit that right. It is also important to keep in mind that you are allowed to name an alternate agent. This means that if your first agent is not available, then an alternate agent can step in and can make decisions on your behalf. However, it is not a good idea to name two agents together. There is the potential for your two agents to disagree and your wishes may not be carried out.
  - (i) Keep in mind that the power of attorney for health care does not authorize anyone to make legal or financial decisions for you. That is done through a separate power of attorney for financial affairs.
  - (ii) You health care agent cannot make certain decisions for you. California law prohibits your agent from committing you to a mental health treatment facility; or authorizing convulsive treatment therapy, psychosurgery, sterilization, or an abortion.

- 2) **Living Will:** A living will outlines your desires regarding life-sustaining or life-prolonging medical treatment. Most states include these types of instructions in their medical durable power of attorney forms. California does not recognize a separate living will as legally binding. Effective July 2000, California law combined the power of attorney for health care and the instructions for health care decisions into one form called the Advanced Health Care Directive.
- (i) **Life Sustaining Treatments:** These are treatments or procedures that are not expected to cure your terminal condition or make you better. They only prolong your life. Examples include mechanical respirators to help you breathe, kidney dialysis to clear your body of waste, or cardiopulmonary resuscitation (CPR) to restore your heartbeat.
  - (ii) **Terminal Condition:** Terminal condition is defined as an incurable condition for which administration of medical treatment will only prolong the dying process and without administration of these treatments, death will occur in a relatively short period of time.
  - (iii) **Permanent Unconscious State:** This means that a patient is in a permanent coma caused by illness, injury, or disease. The patient is totally unaware of himself, his surroundings and environment, and to a reasonable degree of medical certainty, there can be no recovery.
- 3) **Organ Donation:** This section allows you to express your desire to donate specific organs or tissue, if that is what you decide.
- 4) **Primary Physician:** This section provides a space for you to record the contact information for your primary physician.
- C. **Do Not Resuscitate (DNR) Form:** This is a written order to medical personnel that resuscitation should not be attempted if an individual suffers from cardiac or respiratory arrest. A DNR can also be made using an advance health care directive.
- D. **Conservatorship:** A court proceeding in which the court supervises the management of an incapacitated person's finances and/or personal care.

Whichever forms you chose to complete, or decisions that you make, it is good practice to discuss your wishes with your family, caregivers, physicians, and other health care providers.

## II. POWER OF ATTORNEY FOR FINANCIAL AFFAIRS

- A. **What is a Power of Attorney for Financial Affairs?:** When making decisions about your estate, you also want to consider appointing someone to make financial decisions on your behalf if you are unable to do so. A power of attorney for financial affairs is a legally binding document that designates a trusted person to act on your behalf if you become incapacitated (incapacity is determined by a doctor or a judge). This document must be signed and notarized. The power of attorney ends when you pass away, at which point your will would take effect. It is important to keep all of your insurance information (health, long-term care, life

insurance, and special needs policies) in an accessible place for your power of attorney to locate.

- 1) **Durable Power of Attorney:** This document goes into effect at its signing, and continues through any period of time when you are determined unable to make decisions for yourself.
- 2) **Springing Power of Attorney:** This document only goes into effect when you are determined to be unable to make decisions for yourself.

### III. WILL

A. **What is a Will?:** A will is a legal document, drafted and executed in accordance with state law, which becomes irrevocable at your death. In a will, you can name beneficiaries (people or organizations who will receive your assets), a guardian for your minor children (a person(s) who will care for your child until he/she turns 18 years old), and an executor (a person who manages and distributes your assets according to your wishes). It is important to note that a will does not cover everything that you own. It does not cover life insurance policies, retirement plans, assets owned as a joint tenant, living trusts, or your spouse's half of any community property.

- 1) **Ways to Make a Will:** In California there are three main ways to make a will. It is a good idea to consult with an attorney to ensure that your estate planning document complies with state laws.
  - (i) **Handwritten or Holographic Will:** A handwritten will is written by the individual, in his/her own writing, expressing intent on how various assets should be distributed. A holographic will, is a will completely in one's own handwriting that is signed and dated. This document does not need to be notarized or signed by witnesses; however, any typed material may invalidate the will.
  - (ii) **Statutory Will:** California law provides for "fill-in-the-blank" will forms. This type of document can be found on the California Bar Association's website. For an individual who does not have a large personal estate, this document can be sufficient.
  - (iii) **Will Prepared by a Lawyer:** A qualified estate planning lawyer can make sure that your will conforms to California state law. The lawyer can also offer suggestions, explain potential tax benefits, and help you understand the many ways property can be transferred, which may be economical in the long run for you and your beneficiaries.

B. **Do I Need a Will?:** If an individual dies without a will (dying intestate), California law determines the beneficiaries of your estate. This means that a court decides to whom your assets will be distributed. There is a line of progression that courts will follow when dividing your estate. If you were married, for example, your spouse receives all of your community property. Your spouse will also receive part of your separate property as well. The remainder of your estate will be distributed to your closest kin, including children, grandchildren, parents or siblings. If you were not married, your assets would be distributed to your closest kin.

- 1) If you have specific wishes about to whom you would like to distribute your assets, it is important to document those wishes in a will. Even if you think that everyone knows what you want, if it is not in writing then it may not be sufficient.
- C. **Can I Change My Will?:** A will can be changed after it is signed. In fact, you should review your will periodically because if it is not up to date upon death, the estate may not be distributed according to your wishes. You should also review your will when there are major changes in your family (such as births or marriages), when you purchase or sell a piece of real estate, or when the value of your assets significantly increase/decrease. If you move to another state, it is a good idea to have an attorney look over your will to ensure that it is in compliance with the state laws.
- 1) **How to Change a Will:** A will can be changed through a codicil, a legal document which must be drafted and executed in accordance with the same state law that applies to the will. You should not change your will by crossing out words or sentences; rather any modifications should be done through a codicil.
- D. **How is a Will Carried Out?:** The process by which the provisions in your will are carried out following your death is known as “probate.” In addition to making sure that the executor correctly distributes all assets to intended beneficiaries, it also provides for the determination of the validity of any claims by creditors against your assets at your death. At the beginning of a probate administration, a petition is filed with the court, usually by the person named as your executor. After notice is given and a hearing is held, your will is admitted to probate and an executor is officially appointed. One disadvantage to probate, is its public nature. The provisions of your will and the value of your assets become a public record. In addition, because a lawyer’s fees and executor’s commission are based on a statutory fee schedule, the expenses may be greater than the cost of a comparable estate managed and distributed under a living trust.

#### IV. TRUST

- A. **What is a Trust?:** Like a will, a trust is a written agreement where you name beneficiaries who will be given, or who will inherit, your assets. A trust is a written agreement between the individual creating the trust (trustor) and the person named to manage the assets held in the trust (trustee). Depending on the type of trust, it can be revoked or amended during your lifetime. You can be your own trustee until death. Once you pass away, the terms of the trust cannot be changed or altered in any way. Having a trust eliminates the probate of your will if your assets were held in trust at your death. If you have a living trust, you may also want to consider drafting a pour over will. For example, you may buy many things over the course of your life and may not include each item in your trust. A pour over will covers any assets that are not contained in the trust at your death. Consult with an estate planning attorney for more information about trusts. A state or local bar association can refer you to an attorney in your area.
- B. **Types of Trusts:**
- 1) **Charitable Remainder Trust:** A trust where the remainder of your trust goes to a charity.

- 2) **Testamentary Trust:** A trust, which is set forth in your will, to provide for children or others who need management of their assets.
  - 3) **Irrevocable Trust:** A trust which cannot be changed during your life.
  - 4) **Living Trust:** The most common type of trust is created while you are alive and allows you to control the distribution of your estate.
- C. **Funding a Trust:** Once your trust is created, the trust must also be funded. The funding of a trust is simply the transfer of assets from your name to whomever is acting as trustee of your living trust, which can be you or another person whom you designate. Deeds to real property must be prepared and recorded, bank accounts transferred, and stock and bond accounts transferred.

**V. CONTACT INFORMATION**

<p><b>For estate planning assistance:</b>          California Bar Association          (415) 538-2000 or <a href="http://www.calbar.ca.gov">www.calbar.ca.gov</a>          (San Francisco)</p>	<p>California Bar Association          (213) 765-1000 or <a href="http://www.calbar.ca.gov">www.calbar.ca.gov</a>          (Los Angeles)</p>
<p>California Bar Association          (916) 442-8018 or <a href="http://www.calbar.ca.gov">www.calbar.ca.gov</a>          (Sacramento)</p>	<p>American Bar Association  <a href="http://www.abanet.org/rppt/public/home.html">http://www.abanet.org/rppt/public/home.html</a></p>