Daniel A. Hunt

Estate Planning ESSENTIALS

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INTRODUCTION

Over the past decade, my law firm (the Law Offices of Daniel A. Hunt) has helped thousands of clients throughout California with living trust creation, administration, and litigation; probates; and conservatorships.

As a Certified Legal Specialist in Estate Planning, Trust & Probate Law, I am passionate about helping everyone to understand this area of the law. They say that only two things are certain in life: death & taxes. Estate Planning touches on both of these universal topics.

My passion for Estate Planning, Trusts, Probate, and similar legal topics has motivated me to create a great deal of educational content. Over the years I have delivered seminars, webinars, and lectures to thousands of people. More recently, I've switched my focus to digital content like blog posts, videos, and yes - this eBook.

The truth is, most of the population doesn't understand Estate Planning – and it ends up costing them when they pass away. According to a 2020 Caring.com survey, just 32% of respondents reported having at least one Estate Planning document. The most common reason? 35% replied that they just hadn't gotten around to it yet. In this eBook, my goal is to teach you some of the basics of Estate Planning, the pitfalls to avoid, and share helpful tips to help you feel confident and motivated to create or update an Estate Plan. But first, a bit about me so you understand what drives me...

MY STORY

When I was 15 years old, I got my Driver's Permit. With great excitement, I began the process of learning to drive a car. That excitement soon faded when, due to my inexperience, I got into a car accident and was sued by the other driver. I come from a large family of 8. We didn't have much money. The idea of being sued was terrifying! I didn't know what to do. I felt helpless and afraid.

To my great relief, our car insurance company's attorneys quickly resolved the lawsuit. Thanks to their legal efforts, my crisis disappeared - and so did my fear. Because of this experience, I decided to become an attorney. I wanted to help people solve their problems and find peace of mind.

Today, at my law firm, that is exactly what we provide for our clients. Whether you're facing an intimidating legal obstacle or just want to ensure that your loved ones will be provided for when you're gone, our firm finds solutions so you can feel at peace again. And we work tirelessly to make the process as easy and comfortable for our clients as possible.

With that foundation in place, let's dive into some of the basics. First up: the Frequently Asked Questions section will establish simple definitions and outline some of the main California Estate Planning issues.

THE BASICS: ESTATE PLANNING FAQs

Q: What is Probate?

A: Probate is the legal court procedure by which the state distributes your estate after you pass. Unless your estate is worth less than $166,250 in non-real property or $55,250 in real property, your survivors must probate your estate in order to collect their inheritance. The Probate process includes paying your creditors their claims, identifying your rightful beneficiaries and heirs, and distributing the remaining property according to your Will if you left one, or California's laws of intestacy if you didn't.

Q: Why do people want to avoid Probate?

A: Many people want to avoid Probate in order to:

1. Save time. In California, the average Probate lasts 9-18 months, and can last much longer if the estate is contested.
2. Protect privacy. Probate makes your estate proceedings public record.
3. Save money. Probate fees are established by California statute and split equally between the attorney and the estate's executor. The chart on page 52 shows the minimum fees by estate size.

Q: What is the Federal Estate tax?

A: The Federal Estate tax (aka “death tax”) is a tax on your right to transfer property at your death. This Federal Estate tax can take up to 40% of the taxable estate over the exemption amount. The chart below summarizes the tax exemption amounts and rates by year.

Year	Exemption	Tax Rate
2014	$5.34 million	40%
2015	$5.43 million	40%
2016	$5.45 million	40%
2017	$5.49 million	40%
2018	$11.2 million	40%
2019	$11.4 million	40%
2020	$11.58 million	40%

Q: How can I avoid Probate?

A: Let’s explore 3 options: gifting, joint ownership, and a Living Trust.

1. Gifting. Giving away your assets will avoid Probate if you have nothing left in your name upon your death. BUT it is difficult to predict when to give and how much because we don't know when we'll die. AND the donor may incur a gift tax if the gift exceeds $15,000 to any one person per year.

2. Joint Ownership. Adding a spouse or child to the title of an asset avoids Probate on the death of the first joint tenant. BUT when the second tenant passes, a Probate will be triggered. AND it is an irrevocable gift, resulting in loss of control of your property. AND if your only joint tenant predeceases you, the ownership reverts back to your own name.

3. Living Trust. A Living Trust is a document used to create a separate legal entity into which you can technically transfer all or any part of your assets while naming yourself (or another person) as trustee of the property.

Here are our top 5 advantages of a Living Trust:

1. Flexibility. A Trust is revocable and amendable.
2. Control. Your assets remain safely under your full control, beyond the reach of intended beneficiaries or their creditors.
3. Parental Advantages. Allows parents to designate a guardian for minor children, keeping them out of the foster care system if the parents were to pass.

4. Tax Advantages. A Living Trust offers significant savings on Capital Gains Tax. For estates of married persons over $11.58 million, an A/B Trust offers a shield against Federal Estate tax liability (eliminating $5 million in Probate/taxes on an estate of up to $22.8 million in 2019).

5. Avoids Conservatorships. If a person becomes ill or incapacitated, their Successor Trustee can manage their affairs without court intervention.

Q: How is a Trust formed?

A: An individual or couple simply executes Trust documents in the presence of a Notary Public. The Trust will reconvey that person's property to themself as Trustee (or Co-Trustee) of the Trust.

Title to any real property, bank accounts, or other assets with an aggregate value over $166,250 must be changed to the Living Trust in order to avoid triggering a Probate. A Trust should always be drafted by an attorney skilled in Estate Planning specifically.

Q: What is an Advance Health Care Directive and where can I get one?

A: An Advance Health Care Directive (aka Durable Power of Attorney for Healthcare) is a document that allows you to designate an agent to make health care decisions for you in the case of your incapacity. An Advance Directive also allows you to express your desires regarding end-of-life choices, such as life support and organ donation. The best place to obtain an Advance Directive is from a qualified Estate Planning attorney.

Q: I created an Advance Directive many years ago; is it still good?

A: You may want to create a new Advance Directive (AD) under the following circumstances:

- If your AD was executed before 1992, it has expired.
- If your AD does not include a HIPAA (Health Insurance Portability and Accountability) waiver, you will want to replace it. This waiver is necessary to allow your designated agent to access your medical records while making health care decisions for you.
- This document varies by state, so if you move to a new state, you will want to replace it.
- If your wishes change or something happens to your agent, you will want to replace your AD.

Q: What is a Durable Power of Attorney?

A: A Durable Power of Attorney (aka Financial Power of Attorney) is a legal document that allows you to designate an agent to act on your behalf with regards to financial matters while you're still alive. It is especially useful if you become incapacitated due to a medical emergency or declining mental capacity.

A Power of Attorney allows the person of your choice to assist you in tasks like paying utility bills, filing tax returns, claiming Social Security benefits, and more.

Because of the broad powers given to an agent under a Power of Attorney, it is advisable to first consult with an experienced estate planning attorney before executing this document.

Hopefully this section has provided an overview of some major relevant Estate Planning issues. With that foundation in place, the chapters that follow will provide more detailed information on key topics.

If you're just getting started with Estate Planning, you might be wondering: What's the best way to choose an attorney to assist you?

HOW TO CHOOSE AN ESTATE PLANNING ATTORNEY

You have many options when it comes to choosing an Estate Planning attorney. It can be overwhelming to figure out where to start! Here are 5 tips to consider when selecting an Estate Planner:

1. Ask for a referral from someone you trust. If you're not sure who to ask, here are 3 suggestions:

- A professional you already work with, such as a Financial Planner, an Accountant or CPA, or another attorney you are already working with on a different matter.
- County Bar Association. Most County Bar Associations have a referral program where they offer the public a list of pre-vetted attorneys in good standing who practice in Estate Planning.
- A friend or family member who has already gone through the process of creating an estate plan. If they liked their attorney enough to recommend them, that's usually a good sign.

2. Do your homework online to get a feel for the attorney and law firm. Here are 3 things to check:

- **Check their ratings on neutral online review sites like Google, Avvo, Yelp, and Martindale Hubbell.** These are usually a pretty good indicator of other real clients' experiences. It is generally a better indicator of what your experience will be like than a paid advertisement site like Superlawyers, Justia, or Findlaw. Keep in mind that anyone can write a review, so if there are a few bad reviews, that's a good sign that the reviews are authentic, because you can't please everyone.
- **Check out their online presence on social media. Many attorneys and law firms today are on social media.** They may have a Facebook page, a Twitter account, a Linked In profile, maybe even an Instagram. When you look at their social media presence, do they seem knowledgeable? Helpful? What vibe do you get from them? Do they seem stiff or comfortable? Are they serious or do they have a sense of humor? There's no right or wrong answer, but look for someone with whom you're comfortable and who matches your values.
- **If you want to check the attorney's credentials or disciplinary record, check the State Bar association website.**

3. Consider price, but not JUST price. The attorney should be clear and transparent about the cost of the work and the fee structure from the first meeting. Many Estate Planners offer a no-cost consultation and work on a flat fee basis, but some types of work may be hourly and based on the time spent. They should be clear on what their hourly fee is and give an estimate of how long the work will take or the total cost.

One mistake I see some people make is choosing an attorney based ONLY on cost. You don't necessarily always want the cheapest professional on the block – sometimes there is a reason they're willing to do it for cheap, like they don't really know what they're doing, or they're desperate for clients. Instead of making a strictly cost-based choice…

4. Consider education, experience, and specialization. What law school did the attorney attend? How long have they been practicing as an attorney? More importantly, how long have they been working in the Estate Planning field? If they only became an attorney 5 years ago, but they worked in the field as a paralegal for 10 years before that, keep that in mind.

Are they specialized in Estate Planning, or do they do a little of everything? Here in California, you may want to look for a state bar Certified Legal Specialist. This classification requires a rigorous exam and indicates the attorney is aware of current best practices and has a breadth of knowledge pertaining to Estate Planning specifically. It's a bit like choosing an orthopedic surgeon to operate on your foot instead of a general practitioner.

5. Don't necessarily limit yourself by geography. In today's day and age, attorneys are less limited than ever by geography. Thanks to technology, we can assist clients just about anywhere.

For example, our firm's main office is located in Sacramento, but we represent clients all over the state and even the country. That's because we offer virtual appointments through Zoom and phone appointments, our intake forms are electronic, we can email drafts of documents, and if a Notary is needed, we have clients find a local Notary and send us the final documents.

No matter where you live, location shouldn't be a barrier to finding a quality Estate Planning attorney.

So there you have it – 5 tips for choosing an Estate Planning attorney. Now let's talk about why you probably shouldn't try to create or update an Estate Plan on your own.

THE DANGERS OF DIY ESTATE PLANNING

In recent years, our firm has seen a growing trend of “do-it-yourself” Estate Planning. Some people believe they are saving money by creating their own Estate Planning documents or amendments. Whether they draft the documents themselves or use the Internet, we see many problems arise from DIY Estate Planning.

A DIY Trust Amendment Gone Wrong

This is a true story about a client of our firm. She became very sick and, knowing she would soon pass, wanted to make some changes to her Estate Plan. Instead of asking an attorney to draft an amendment to her Trust, she decided to simply write her own amendment on some Teddy Bear stationery.

Shortly thereafter, she passed away. The time had come to administer her Estate Plan. The handwritten amendment she had left created confusion regarding her intent for the distribution of her estate.

Because of the ambiguity of her note, the Probate Court had to help interpret what the client's intention had been. Ultimately, the confusion created by the DIY amendment cost the client's estate an additional $150,000.

Internet Estate Planning

This real-life example illustrates well why you should never attempt to create or amend your own Estate Planning documents.

In recent years, websites such as NOLO and LegalZoom have popped up offering do-it-yourself Estate Planning. While seemingly convenient, these websites take no responsibility for their documents if they fail to work when you pass away.

A good Estate Planning law firm, on the other hand, takes full responsibility for the documents they draft. The attorney will be there to help, should any issues arise during the trust administration. An attorney can review memos and notes taken while meeting with you and testify what your intentions were in creating your Estate Plan should the need arise.

Homemade Amendments

We have also had clients type up Estate Planning changes and get that document notarized. They do this thinking that a Notary Stamp will make the document legally binding.

Please note: A Notary Public's only job is to verify that a document signer showed them evidence of their identity. A Notary stamp in no way validates a document's contents.

Common Problems Created by DIY Estate Planning

Attempting to write your own Estate Plan or amendments can create a myriad of problems for the heirs left behind. Here are common problems that result from do-it-yourself Estate Planning:

- Having to prove to a Court that a Will was executed with the necessary legal formalities
- Failing to take advantage of appropriate tax planning
- Giving gifts inappropriately (such as to minor children, beneficiaries with drug problems, or beneficiaries who are on governmental assistance, causing them to lose their benefits)

DIY Estate Planning Costs More

While clients may hope to save a few hundred dollars by doing their own Estate Planning, the confusion and legal ambiguity created can and often does result in thousands of dollars of litigation later on.

The bottom line is that Estate Planning Law is complex and specialized. Even attorneys who practice in other areas of the law usually hire an Estate Planning attorney to create their Estate Plan. If you would like to create or make changes to your Estate Plan, be sure to seek the counsel of a qualified Estate Planning attorney.

HOW CREATING A LIVING TRUST SAVES YOU MONEY

While we're on the topic of money, let's face it: one of the top excuses people give for not setting up a Living Trust is that they're afraid it will be too expensive. I'd like to share a secret with you. **The truth is: creating Living Trust will very likely SAVE you money in the long-run.**

Here are 3 ways a Living Trust saves you money:

1. A Living Trust Helps Avoid Probate Fees.

There's a good reason many Californians create a Living Trust to avoid Probate: because Probate is expensive! Let's say you die with only a Will (no Trust) or with no Estate Plan at all. Let's say your estate is worth more than $166,250 in non-real property or $55,425 in real property. That means your estate will need to go to the Probate Court in order for your heirs to receive their inheritance. The Probate Court charges filing and other fees and also designates a statutory fee for the attorney and executor/administrator for their efforts. All of these costs add up to be quite expensive.

So how much does a Probate cost? It depends on the size of your estate. Let's take a look at some examples.

Example #1: Let's say the total size of your estate is $500,000. That includes your home, your investments, retirement, bank accounts, and anything else you might own. The statutory Probate fees on your estate will be $26,000 – and that is just to pay the attorney and the personal representative. There are additional filing fees and other associated costs on top of that, so let's round that up to $27,000.

Now let's compare the cost of a Living Trust-based Estate Plan, which is appropriate for most California homeowners. For a married couple, you're looking at about $2,000-2,500 for a complete estate plan, including a Living Trust, Pour-Over Wills, Advance Health Care Directives, Powers of Attorney, and other supporting documents. After death, an average Trust Administration costs around $5,000, although the cost can vary.

Ask yourself: Is it a smarter financial decision for this estate to use a Trust (total estate cost of approximately $7,000-7,500) or go through Probate (total estate cost of approximately $27,000)? **The answer is clear: a Trust-based Estate Plan will save this estate a lot of money.**

Example #2: What if your estate isn't that large? What if it's only worth $200,000 in non-real property? Your estate will still need to be probated because this amount is higher than the $166,250 limit. In this scenario, the statutory Probate fees for your estate will still be over $14,000.

Even factoring in the cost to administer the Trust after death, a Trust would still likely be a smart choice and save the estate thousands of dollars – not to mention time. **An average California Probate last 9-18 months; a typical Trust administration lasts just 3-6 months.**

Check out the Probate fee chart on page 51 of this eBook to determine what the Probate fees would be on your estate.

2. A Living Trust Helps Avoid Taxes.

Now let's talk about how a Living Trust can help you save money by avoiding taxes.

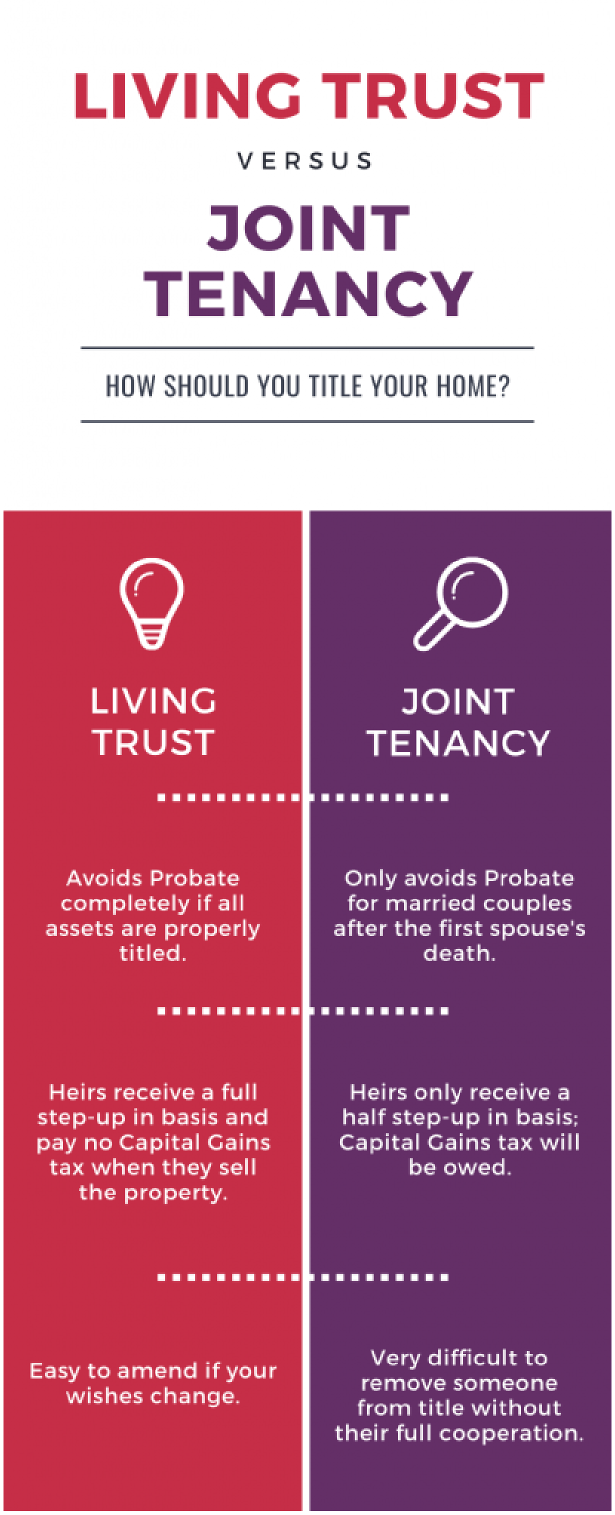
Federal Estate Tax:

Federal Estate Tax isn't as relevant for most of our clients as it used to be. In years past, estates that were around $1 million often used an A/B Trust to help avoid Federal Estate Tax. Today, the amount now sits at $11.4 million, which means that very few of our clients have to worry about this tax.

Still, if you're married and your estate is valued at over $11.4 million, an A/B Trust continues to offer a shield against tax liability. **Between Probate fees and taxes, an A/B Trust could help you save over $5 million on an estate of up to $23.16 million in 2020.** That's an idea worth talking about!

Capital Gains Tax:

A trust offers significant savings on Capital Gains Tax compared with joint tenancy.



Let's say you and your spouse purchase a home together in 1970 for $25,000. By the time one of you passes away, the house has appreciated in value and is now worth $350,000. If you need to downsize or enter assisted living and sell your home, Capital Gains taxes will be owed based on how much the value of the property has increased since you purchased it.

If the title to the house was held in Joint Tenancy, your home would receive a HALF step up in basis for Capital Gains taxes. That means the estate will owe Capital Gains tax on $187,500, totaling tens of thousands of dollars.

If, on the other hand, your home was titled as you and your spouse as Trustees of your Trust, you will receive a FULL step up in basis. You can sell your house after your spouse's death and owe $0 in Capital Gains taxes! **Having a Trust can save your estate from having to pay Capital Gains taxes when you and your spouse pass away.**

3. A Living Trust Helps Prevent Litigation.

Having a correctly drafted Living Trust can also save your estate money by preventing future litigation. When I first began this practice, my focus was on Estate Planning. In recent years, my focus has shifted to handling Trust and Estate Litigation, although I still take Estate Planning appointments here and there.

As a Trust & Estates Litigator, I have noticed that many of these cases start with one of two things: a badly drafted Estate Plan or a client who tried to change their documents without the assistance of a qualified Estate Planning attorney.

These issues can both be avoided by choosing an attorney who you trust to create or update your Estate Plan. Never attempt to alter your Estate Plan on your own, as this can invalidate your documents, create ambiguity, and lead to litigation.

How does avoiding litigation save your estate money? Consider that when a Trust or estate is litigated, the attorney’s fees can cost your estate $10,000, $15,000, or much more. It’s possible for your entire estate to be eaten up with attorneys’ fees when a

Trustee and beneficiaries go to Court to fight over a Settlor's intentions.

As you can see, it is well worth the money to hire an experienced Estate Planning attorney you trust to set up or update your Estate Plan. A Living Trust saves you money by avoiding Probate fees, taxes, and litigation.

Next up, let's take a closer look at 3 types of Estate Planning documents and the differences and similarities between them. Let's take a look at Wills, Trusts, and Advance Health Care Directives.

WILLS VS. TRUSTS

One common Estate Planning question we hear often is: What's the difference between a Will and a Trust – and which one is right for me?

Wills

A Will is an official written declaration of a person's desires pertaining to their estate upon their death. It typically names an Executor (the person in charge of carrying out your wishes when you die) and also designates a Guardian for minor children, if any.

A Will is only activated upon your death. A Will allows you to decide how you want your estate assets, like real property, personal property, and bank accounts, to be distributed. After you die, your original Will must be lodged with the Probate Court so your Executor can begin the Probate process. When the Probate is complete, the Executor will be able to distribute the estate assets to the beneficiaries named in the Will.

If you die without a Will, this is called dying "intestate". In this scenario, a family member or loved one must request to be named as the Personal Representative of your estate. Their request must be approved by a Judge before anything can be done. Eventually, your estate assets will be distributed to your "heirs-at-law", basically meaning your closest living relatives.

Types of Wills

There are several different kinds of Wills to be aware of. The 3 most common types are Testamentary, Holographic, and Pour-Over Will.

Testamentary Will (aka Last Will and Testament): This formal document must contain specific language required by law. In California, it should be signed in front of two adult, unrelated witnesses who do not stand to inherit from the creator of the Will. The person creating the trust must also have adequate mental capacity to understand what they are doing.

Holographic Will: A holographic Will is a hand-written document signed without the presence of witnesses. This type of Will tends to be more common in situations where time is short and death is imminent. While a holographic Will can be submitted to the Probate Court in California, it is not ideal as it is more vulnerable to being contested due to its informality and lack of witnesses.

Pour-Over Will: This type of Will is used in conjunction with a Trust as part of a comprehensive Estate Plan. A Pour-Over Will lists a Trust as the beneficiary of all estate assets. We will explain more about how a Pour-Over Will works with a Trust later in the Trust section.

Pro and Cons

Advantages of creating a Will are:

- Ability to choose the Executor(s) and guardian(s) of your choice.
- Ability to control who gets what and how much of your estate assets.
- Speeds up the Probate process by clearly designating an Executor.
- Cost for a simple Will in California is approximately $250.

Disadvantage of a Will:

- Does not avoid Probate. For more information on how to avoid Probate, read on to the next chapter.

Bottom line:

At a bare minimum, every Californian over the age of 18 should have a simple Will as part of their Estate Plan. But remember that a Will alone will not avoid Probate.

Living Trust

A Trust is a legal arrangement in which your assets are managed by a Trustee for the benefit of you or someone else. It can be used while the creator is still alive. It only controls assets that are placed into it.

A Trust can be used while you're still alive; hence the term "Living Trust". For example, if you become incapacitated, your Successor Trustee can step in to perform financial duties in your place while you're still alive.

Like a Will, a Trust distribution scheme can outline how you would like your estate to be distributed upon your death. **But a Trust offers the ability to set stipulations and customize the conditions of when and how the beneficiaries will receive their inheritance.**

For example, you can set a requirement that a beneficiary must wait until they reach a certain age of maturity before receiving their portion (for example, when they turn 25 years old). You can require a beneficiary to complete their education before receiving their inheritance. If a beneficiary struggles with addiction or with controlling their spending habits, you can create a distribution scheme that will limit the chances of them using their inheritance in a self-destructive or wasteful way.

Overall, a Trust offers greater level of customization and flexibility when compared with a Will.

Types of Trusts

There are several kinds of Trusts. Here are 4 of the most common varieties we create for our clients:

Revocable Living Trust: This is the most common type of Trust. As long as the Settlor (creator) has mental capacity, the document can be changed or amended at any time, without the consent of the beneficiaries.

Irrevocable Trust: As the name implies, this type of Trust cannot be changed without permission from the beneficiaries. The grantor (creator) legally gives up right of ownership to the assets in the Trust. An irrevocable Trust offers tax-shelter benefits in some circumstances.

Life Insurance Trust: For those who own very large Life Insurance policies, this type of Trust allows you to remove this asset from your estate. When the sum is eventually distributed, the beneficiaries will not owe any taxes on it.

Special Needs Trust: This type of Trust is often created for a child living with a disability. It allows them to receive an inheritance without being disqualified from receiving Supplemental Security Income (SSI) from the government.

Trust + Pour-Over Will

Many California Estate Plans include both a Trust AND a Pour-Over Will. The Executor named in your Pour-Over Will should be the same person you named as Successor Trustee in your Trust to prevent conflicting powers.

A Pour-Over Will does not contain information regarding the distribution of your estate assets. A Pour-Over Will directs that your estate be distributed according to your Trust, including any assets that may have accidentally been left out of your Trust. Thus it “pours over” your estate assets into your Trust.

If you die with a Trust and Pour-Over Will in place, your original Will still needs to be lodged with the Probate Court. However, the Court will simply note that you have a Trust in place and **no Probate will be opened on your estate.** Instead, your Successor Trustee will privately administer your estate, ideally under the supervision of an experienced Estate Planning attorney. At the conclusion of the Trust Administration, they will distribute the Trust assets according to your Trust.

Pro and Cons

Advantages of a Trust + Pour-Over Will:

- Ability to choose the Successor Trustee(s) and Guardian(s) of your choice.
- Ability to control who gets what and how much of your estate assets. PLUS, unlike with a Probate, the content and distribution of your assets will remain private.
- Saves the time and cost of a Probate.

Disadvantage of a Trust + Pour-Over Will:

- More expensive than a simple testamentary Will. In California, average cost for a complete Trust-based Estate Plan package is approximately $1,800-2,500.

Make Sure Your Will and Trust Don't Conflict

If you do use both a Will and a Trust together, be sure to choose an Estate Planning attorney you trust to draft the documents. One of the reasons to avoid DIY Estate

Planning and always consult with an experienced Estate Planning attorney is that **if a Will and Trust contradict each other, litigation can ensue**.

A recent case called Wilkin v. Nelson (2020) demonstrated what can happen when a Will and a Trust contradict each other. In this case, a wife had two pieces of real estate which were her own separate property. She wanted to leave this separate property to her two sons from a previous marriage, although she had re-married. She went to an attorney who created an Estate Plan for her, including both a Trust and a Will. She placed the two pieces of separate property into her Trust.

After the wife passed, her husband and sons discovered that her Will created ambiguity by stating that she wanted both her community AND separate property to go to her sons. Her surviving spouse felt that his deceased wife did not intend to leave everything to her sons, only her separate property.

The sons and the surviving husband took the legal battle to court. The husband was ultimately able to win the lawsuit by demonstrating that his deceased wife's intent was to leave only her separate property to her sons.

In Estate Planning, even a single word can create ambiguity, and ambiguity can result in expensive litigation. Be sure your Estate Planning attorney has the knowledge and experience to draft your Trust or Will clearly, using the proper language required by law.

The infographic below illustrates some of the main differences between Wills and Trusts.

Now that you understand the difference between Wills and Trusts, let's talk about another pair of often confused documents: the Advance Health Care Directive and a Do Not Resuscitate (DNR) Order.

ADVANCE HEALTH CARE DIRECTIVE VS. DO NOT RESUSCITATE ORDER

We frequently hear confusion from clients between these two terms, which both pertain to end-of-life choices. Let’s start with the DNR order first.

What is a Do Not Resuscitate Order?

A Do Not Resuscitate (DNR) order is a request not to have cardiopulmonary resuscitation (CPR) if your heart stops or if you stop breathing.

By law, emergency medical service professionals are required to administer life-sustaining treatments like CPR to patients. This makes sense, as most young, healthy people would want their life preserved if possible.

Why Create a DNR Order?

But some people may wish to avoid resuscitation efforts, especially those who are terminally ill or very frail due to advanced age.

Here are a few reasons why:

- CPR doesn't always work to resuscitate people, or "bring them back." The older and sicker they are, the less likely it is to work.
- If CPR does "bring them back," they will still have their chronic illness plus the new problems that led to needing CPR.
- Pressing on the chest during CPR often breaks the person's ribs.
- People who do survive after their heart has stopped may have brain damage. This can affect their ability to talk, recognize loved ones, dress themselves, or manage their bathroom needs.

Who Needs a DNR Order?

Not everyone will want to instate a DNR order. It is more common amongst the elderly who may feel satisfied with the life they have lived, especially if they have serious health problems. Patients who are less likely to benefit from CPR include:

- People who have experienced a severe stroke
- People with metastatic cancer
- People who have been hospitalized for severe infections (like pneumonia)
- People with low kidney function

If you already have one or more of these conditions, you should discuss your wishes about CPR with your physician and loved ones. It's best to do this early, before you are too sick and are considered unable to make your own decisions by your doctor or your loved ones.

How to Create a DNR Order

If you decide you don't want to receive resuscitation, you can fill out a DNR form, such as this one which was developed by the California Emergency Medical Service Authority. **You will need to have your doctor sign the form and put a DNR order on your medical chart/record.** Make sure your loved ones understand your wishes so they can advocate for you in an emergency. You can also keep a copy of that form on your person to avoid receiving this care from medical staff or first responders.

What is an Advance Health Care Directive?

An Advance Directive ("AD", aka Power of Attorney for Healthcare) is a California document that outlines your end-of-life preferences. It also allows you to name an agent to make medical decisions on your behalf if you cannot do so yourself.

Why create an Advance Directive?

In addition to designating an agent (and as many alternative agents as you desire), an AD will give direction pertaining to end-of-life decisions. **If you don't make your wishes known with an AD ahead of time, your doctor and loved ones may face some tough decisions.** Examples include:

An AD typically allows you to express your desires pertaining to:

- Life support: How long you want to remain on life support if you are in a permanent coma and how many doctors should be consulted concerning your condition.
- Pain medication: Whether you want to receive medication for pain relief, such as morphine, that may hasten your death.
- Organ donation: Specifying if you want to donate your organs, which ones, and for what purposes (education, transplant, etc.).

One important element of an Advance Directive is a HIPAA (Health Insurance Portability and Accountability) waiver. **If you already have an AD, be sure that your document has a HIPAA waiver** so your agent will have access to your medical history. Otherwise, your agent may one day need to make decisions on your behalf without that crucial, relevant information. Newer documents created since around 2010 should have a HIPAA waiver. Older documents do not and will need to be replaced.

Who Needs an Advance Directive?

Every person over the age of 18 needs an Advance Directive. As much as we like to think that medical crises only happen to the elderly, the truth is that accidents happen to people of all ages. Be sure that everyone in your family over the age of 18 has an Advance Directive in place should it ever be needed.

How to Create an Advance Directive

The best way to create an Advance Directive is to have an experienced Estate Planning attorney create one on your behalf. Most hospitals will also have generic forms available.

Your AD will need to be witnessed and signed by a Notary Public OR by two adult witnesses who meet the legal requirements to serve in this role. In California, your witnesses may NOT be:

- A health care provider or employee of your health care provider
- The operator or an employee of a community care facility
- The operator or an employee of a residential care facility for the elderly
- The person you have appointed as an agent.

After you sign your AD, keep the original in a safe but accessible place. **Make copies for your agent(s) and make sure you bring or send a copy to the hospital or your doctor's office to be put on your medical record.** California also maintains an Advance Directive Registry. As an optional additional step, you can pay a minimal fee and file your AD with the Secretary of State. The form to do so can be found here.

Review your AD from time to time. You may want to re-evaluate or replace it if:

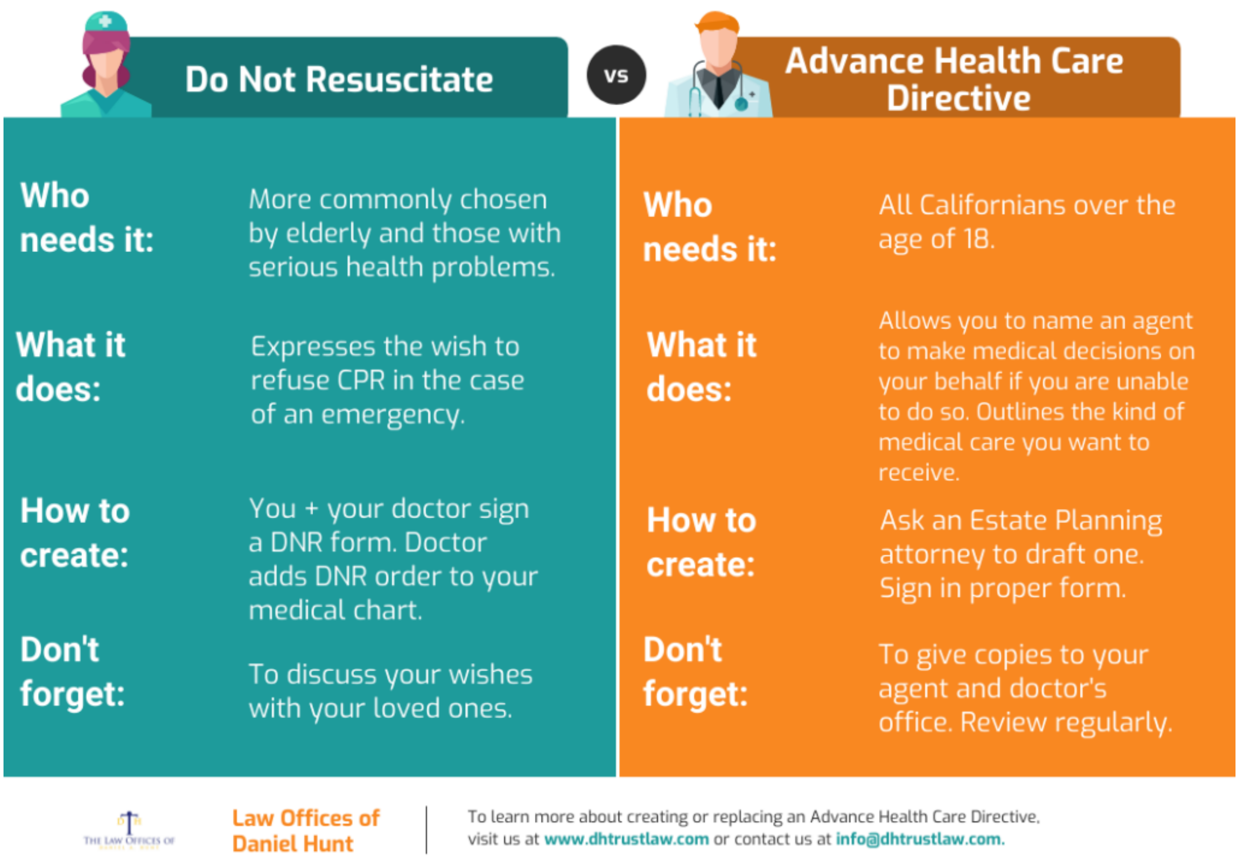
- You receive a serious diagnosis
- You get married, separated, or divorced
- Your spouse dies
- Something happens to your agent
- Your preferences change

In summary, an Advance Health Care Directive and a Do Not Resuscitate order are two important but distinct documents.

An AD is necessary for all adult Californians. An AD will allow you to name an agent and clearly express your wishes regarding pain medication, life support, organ donation, and other end-of-life decisions. See an Estate Planning attorney to create or update an Advance Directive.

A DNR order, on the other hand, may be appropriate for elderly people with serious health conditions who do not wish to receive CPR in the case of a medical emergency. Talk to your doctor for more information about creating a DNR order.

This compare and contrast infographic demonstrates some of the key differences between a DNR order and an AD.



EVERYTHING YOU NEED TO KNOW ABOUT DURABLE POWERS OF ATTORNEY

A few years ago, we had a client who came to us after her husband had a stroke and became incapacitated. Although they had a Revocable Living Trust-based Estate Plan, they had not created a Durable Power of Attorney. The husband was retired and the couple's main source of income was the husband's retirement account.

Because retirement accounts are assets that are not placed into a Trust, the wife was unable to access the husband's retirement accounts. Even though she was co-Trustee of their Trust, she was now in a position where she was cut off from her primary source of income and unable to pay for her spouse's medical care without it.

In the end, our client had to seek a Conservatorship to access the retirement funds. She could have saved the $5,000 and 3 months of time in obtaining a Conservatorship if she had had a Durable Power of Attorney naming her as her husband's agent.

What is a Durable Power of Attorney?

A Durable Power of Attorney is a document that authorizes someone else to handle certain matters on your behalf. A Durable Power of Attorney continues to be valid even if the creator becomes mentally incompetent. This is different from a traditional Power of Attorney which becomes defunct when the creator loses mental capacity.

A Durable Power of Attorney is a helpful incapacity planning tool. This document ensures that your finances will be taken care of if you become incapacitated for any reason. Having A Durable Power of Attorney in place reduces the confusion and uncertainty that family members often face when a family member has a medical emergency or begins to lose mental capacity.

Do I Need a Durable Power of Attorney If I Have a Trust?

Many clients who have created a Revocable Living Trust ask us why they would also need a Durable Power of Attorney. As demonstrated in the story above, one of the most compelling reasons to create a Durable Power of Attorney is the possibility of incapacity.

If you have a Revocable Living Trust, it's true that your Successor Trustee can step in to take control over the assets of your Trust if you become incapacitated. But some assets, like life insurance and retirement accounts, cannot be titled into a Trust. If you become incapacitated and want someone to access these assets, your loved ones will need a Durable Power of Attorney.

Types of Durable Powers of Attorney

General Durable Power of Attorney (aka Financial Power of Attorney): This is the most common type of Durable Power of Attorney. This document authorizes your “agent”

(aka attorney-in-fact) to act on your behalf in a wide range of business matters. A few examples include filing tax returns; buying and selling real estate; paying bills; and managing bank accounts. Often the document will allow the principal (creator) to designate exactly which tasks the named agent has permission to perform on their behalf.

Springing Power of Attorney:

This type of Durable Power of Attorney does not “spring into effect” until the principal (creator) becomes incapacitated. This allows you to avoid giving your agent immediate authority. In California, a Springing Power of Attorney usually includes this phrase: “This power of attorney shall become effective upon the incapacity of the principal."

How Do You Create a Durable Power of Attorney?

While generic forms can be found on the Internet, we strongly recommend that you only create this powerful document after counseling with an experienced Estate Planning attorney. Giving another person control over your finances is a major act of trust and unfortunately, we do see situations where this power is abused by family members. If you suspect someone is abusing a Power of Attorney, know that it is possible to take legal action to have them removed.

That being said, here is how to legally create a Power of Attorney as outlined in the California Probate Code, starting at Section 4000.

1. The principal must have the same legal capacity to enter into a contract; namely, they must be at least 18 years old and “of sound mind” (I.e. understand the meaning and effect of the document).

2. The Durable Power of Attorney must be signed by the principal in front of a Notary Public or two qualified witnesses. If you are authorizing your agent to handle real estate matters, it should be notarized so that it can be recorded.

How To Use a Durable Power of Attorney

The agent should bring an original of the Durable Power of Attorney with them when they conduct business as your agent. When they sign documents on your behalf, they should sign their name and then indicate that they’re signing as power of attorney. It’s helpful to ask about the preferred format before signing a given document.

When Does a Durable Power of Attorney End?

A Durable Power of Attorney ends if:

• You die.

• You revoke it. You can revoke your document at any time, provided you have the mental capacity to do so.

• You get divorced and your spouse was your agent. In California, if your spouse is your agent and you get a divorce, your Durable Power of Attorney is automatically terminated. It is a smart idea to create a new Power of Attorney upon filing for divorce.

• A court invalidates your document. This is rare, but if a court concludes that you lacked mental capacity to create your Power of Attorney or that you were the victim of undue influence or fraud, they can declare the document invalid.

• Your named agent is unable to serve. If your named agent is dead, incapacitated or otherwise unable to serve, your Power of Attorney will not work well. An easy solution to this is to name sufficient alternate agents within the document as backup to your first choice.

How to Revoke a Durable Power of Attorney

If the Power of Attorney was given to the agent and/or financial institutions, you should revoke the Power of Attorney in writing. You can have your Estate Planning attorney draft a Notice of Revocation and notify the former agent and the financial institutions that your agent has dealt with in the past.

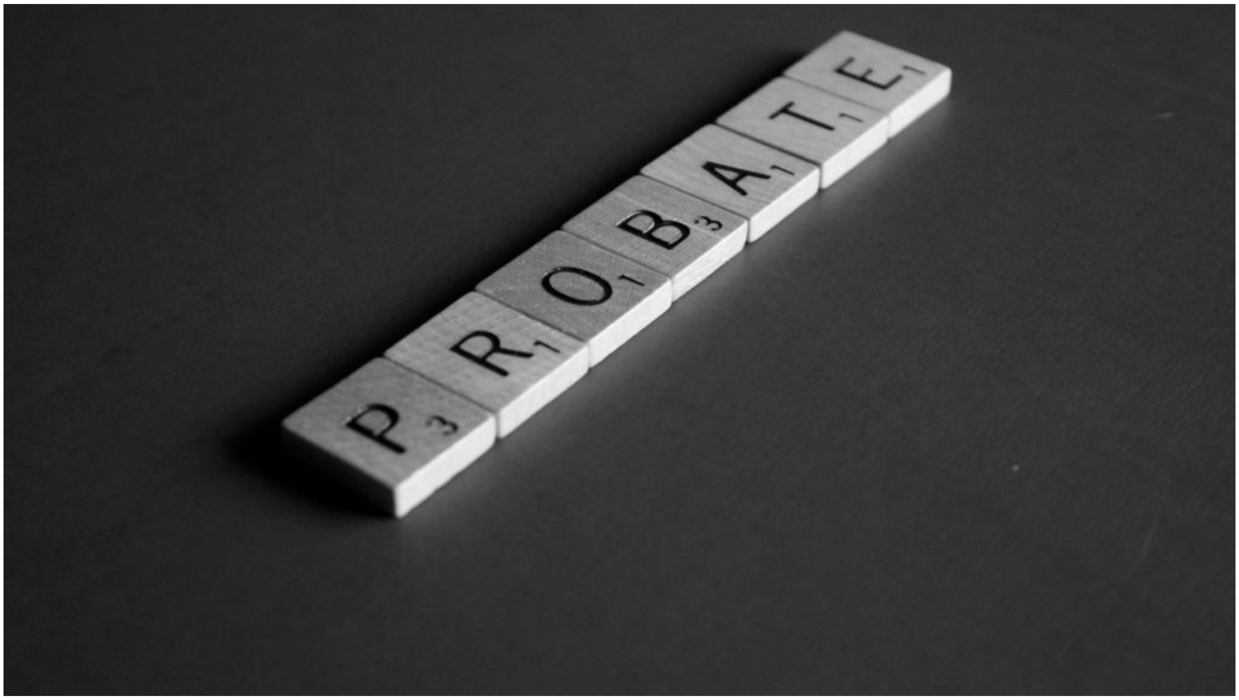
The Notice of Revocation should include your name, state that you are of sound mind, and your wish to revoke the Power of Attorney. It should also include the name of your agent and the date the document was executed.

After signing the Notice of Revocation, attach your new Power of Attorney (if you have one). Send these documents to your former agent and any institutions that your former agent had dealt with on your behalf. If possible, get back any copies of the revoked Power of Attorney from your former agent. Destroy any copies of the revoked document.

So that's it - everything you need to know about Durable Powers of Attorney! Now that we've talked about some of the primary Estate Planning documents, let's dive more into depth on the topic of Probate.

By now, you've probably realized that one of the biggest motivators for creating an Estate Plan in California is avoiding Probate. But how exactly does that work? Let's explore in detail the mechanics of avoiding Probate, for both small and larger estates.

HOW TO AVOID PROBATE IN CALIFORNIA



A few years ago, we had an unfortunate situation arise with a client who ignored our advice to create a Living Trust. She believed that a Trust was unnecessary for her, given that her estate was only of a modest size. After she died, the half-interest she had owned in a California home ended up being just over the limit for triggering a Probate. In the end, it took two years and $16,000 in Probate fees for her heirs to receive their inheritance from her estate.

As this story illustrates, California Probates are infamously long and expensive. Most people who know what a California Probate entails want to avoid it. Here are some valuable tactics to help you avoid Probate, whether your estate is small or larger.

Avoiding Probate for Small Estates

First, let's talk about how small estates can avoid Probate. In California (as of 2020), if an estate has less than $166,250 in non-real property (that's anything other than real estate), or real property worth less than $55,425, it is considered a "small estate". **For small estates, the personal representative of the estate can often avoid a formal Probate by using a procedure called a Small Estate Affidavit.**

If the estate does not include real property, then the personal representative can use a Small Estate Affidavit to obtain the personal property from whichever entity holds it. If the estate includes real property, you will need to file the Small Estate Affidavit with the Probate Court. We recommend seeking legal counsel to advise on the appropriate procedure for each individual circumstance.

How to file a California Small Estate Affidavit

If the decedent's estate includes real property, the personal representative will need to file a Small Estate Affidavit with the Probate Court. Here are the steps to do this:

1. The personal representative of the estate must obtain and complete a form called a California Small Estate Affidavit from the Probate Court where the decedent lived.

2. Next, add the following attachments:

- A certified copy of the decedent's death certificate
- Proof that the deceased person owned the listed property
- Proof of your identity (such as a driver's license or passport)
- An Inventory and Appraisal (Form DE-160) of all real property owned by the decedent in California. Before attaching this form, get it signed by a Probate Court Referee.
- You may need to get signatures from all legal heirs of the estate allowing you to inherit the listed property.

3. Sign the Small Estate Affidavit in front of a Notary Public.

4. Transfer the property. By law, this step cannot be completed until at least 40 days have passed after the date of death.

As you can see, a Small Estate Affidavit can be a useful tool for smaller estates to avoid Probate. Instead of waiting 9-18 months to distribute the property as with an average Probate, assets can be distributed after the 40 days have passed. It is also typically less expensive than a formal Probate proceeding.

Avoiding Probate for Larger Estates

What is considered a larger estate in California? If an estate has more than $166,250 in non-real property, or if it contains any real estate worth more than $55,425, this estate is considered larger and is subject to a Probate after death. For larger estates, there are several options to avoid Probate. Here are 3 ways to avoid Probate:

1. Gifting

One way to avoid Probate is to reduce the size of your estate by gifting to your family or intended beneficiaries. However, there are drawbacks.

First, no one knows when they are going to die. This makes it difficult to give away the exact amount that will allow you to avoid Probate but still have enough money to support yourself financially.

Second, be aware of gift tax implications. If you give away more than $15,000 in any one year to an individual, then you must file a gift tax return. However, you can make $15,000 gifts to as many people as you desire every year, tax-free. For more info on gifting, see page 71 of this eBook.

2. Joint Ownership

Adding another person as a joint tenant on the title of your assets, including real property, is a second way to avoid Probate. The surviving joint owner's interest in the asset will not pass through Probate. However, there are limitations and drawbacks to this strategy. Here are a few:

- When the second joint owner passes away, the property will need to be Probated if another person hasn't been added.
- Adding a child as a Joint tenant will be considered a gift, meaning a gift tax will be owed.
- For married couples, Joint Tenancy will not offer the full step-up in basis for Capital Gains tax that a they would receive if they used a Trust.
- For very large estates, using Joint Tenancy instead of a Trust means a married couple will forfeit a double Federal Estate tax exclusion.
- Joint Tenancy exposes one Joint Tenant to the financial liabilities of the other Joint Tenant.

3. Create a Living Trust

It's no wonder that so many Californians with larger estates choose to create a Living Trust. As we discussed in the section on How Creating an Estate Plan Saves You Money, a Living Trust is almost always a smart investment for practically all homeowners.

So how much would the alternative, a Probate on your estate, cost? It depends on the size of your estate. Take a look at the chart on the following page to find out!

How Much Would Probate Cost You?

Wondering how much a California Probate would cost your estate? Here is the 2020 fee schedule.

Assets	Minimum Probate Fees
$200,000	$14,000
$300,000	$18,000
$400,000	$22,000
$500,000	$26,000
$600,000	$30,000
$750,000	$36,000
$1 million	$46,000
$2 million	$66,000

So let's say you create a Living Trust, and you name a trusted loved one as your Successor Trustee. How can you help them prepare now for the job that lies ahead?

HOW TO PREPARE YOUR SUCCESSOR TRUSTEE

Whether your Successor Trustee is your spouse, a child, a friend, or another trusted associate, someday it will be their job to ensure that your wishes are carried out. How can you help them prepare now? Here are 4 tips to prepare your Successor Trustee to perform their duties:

1. Be clear about your wishes. Explain to them exactly what you want to have happen at the end of your life and after you pass. Clear communication means that when the time comes, they won't need to wonder about what you would have wanted. You can also express your desires in writing with a Letter of Instruction.

2. Create a Letter of Instruction - an informal, free-form letter that offers specific guidance not found in other Estate Planning documents. (Instructions can be found in the "Letters of Instruction" chapter of this eBook.) You can draft this letter on your own at any time. Many Letters of Instruction include gifts of personal property (like family heirlooms), instructions on the funeral / burial, instructions on caring for pets, and more. After you complete your Letter of Instruction, send copies to your Successor Trustee and to our office for your file.

3. Tell your Successor Trustee where your Estate Planning documents are located so they can be accessed when needed. You may or may not wish to share all of your Estate Planning documents with them while you're alive. Sometimes giving a copy of a Trust to a Successor Trustee can be problematic and confusing if you later choose to amend it. But you may wish to let them know you have named them in your Trust and tell them where to locate key documents as needed.

4. Direct your Successor Trustee to the page of our website called "For Successor Trustees". There they will find helpful information on preparing for their duties, PLUS a free downloadable "Successor Trustee Guide & Checklist". We hope these helpful resources will make their job easier when the time comes.

One last note: At our law office, Successor Trustees are entitled to a no-cost consultation when a Settlor passes away to discuss the Trust Administration process. It may be helpful to give your Successor Trustee the contact information for your Estate Planning attorney so they know who to contact when the time comes.

We mentioned in item #3 the possibility of amending or changing an Estate Plan later on. Let's talk about a commonly asked question: "When should I update my Estate Plan?"

WHEN SHOULD I UPDATE MY ESTATE PLAN?

There are many potential situations when updating an Estate Plan may be appropriate, including changes in the law and changes in your life situation or desires with regards to your estate.

Here are a few of the most common scenarios that may necessitate reviewing your estate plan:

I. CHANGES IN FAMILY RELATIONS

- You got divorced.
- Your spouse passed away.
- You were single when you created your estate plan and you got married.
- Changes regarding children, grandchildren, or other beneficiaries. (Think birth or adoption of a child, severe illness or divorce of a child, or financial irresponsibility of a child.)

II. CHANGES IN ECONOMIC CONDITIONS

- Your estate value increased or deceased significantly.
- You retired or changed your employment status.
- You acquired property in another state.
- Your business interests changed (for example: a new partnership or corporation).

III. EXTERNAL CHANGES

- Changes occurred in State or Federal income tax law, estate tax law, gift law, property law, trust law, or probate law.
- You moved to a new state.
- Your successor trustee/executor, guardian, agent, or beneficiary passed away.

A Good Rule of Thumb: Every 5 Years

How often should you review your Estate Plan? A good rule of thumb is to have your Estate Plan reviewed every 5 years by an experienced Estate Planning attorney. Think of it like a periodic tune up for your vehicle. When it comes to your Estate Plan, you may not know that something is wrong until it's too late.

IS IT TIME TO UPDATE?

The chart on the next page outlines some common Estate Planning issues and potential solutions.

ISSUE	POTENTIAL SOLUTION
Were your documents signed prior to 2004?	You may need a new Advanced Health Care Directive, aka "Durable Power of Attorney for Health Care" .
Have your trustees, executors, beneficiaries or agents passed away or become ill?	An amendment solves this situation and brings the documents up-to-date.
If you are married, is the value of your estate more than $11 Million?	You may want an A/B trust.
Is the value of your estate larger than $11 Million, including the death benefit of your life insurance?	You may want a life insurance trust to reduce your federal estate tax exposure.
Is it time to put your children down as successor trustees or change the order?	You may need an amendment.
Do you have a large percentage of your estate in a qualified retirement account such as an IRA, KEOGH, 401K, etc.?	Information regarding the new beneficiary rules is needed, and you may need a Financial Power of Attorney.
Do you want to avoid the new accounting requirements for trusts?	This can be done by signing a waiver.
Are you unsure if your estate will be taxable given the new estate tax exemption?	A "disclaimer" trust may be appropriate.
Was your trust executed prior to major law changes within the last 8 years regarding no contest clauses?	You may need an amendment.
Do the guardians for your children need to be changed or are they even necessary any longer?	You may need an amendment.
Have you not checked the title or beneficiary designation of all your assets within the past 3 -5 years?	Contact the financial institution to confirm that your beneficiaries align with your estate plan.

Hopefully this chart will help you evaluate when it may be time to review or update your Estate Plan. Next, let's talk about the most common error we see occur after setting up an Estate Plan - failing to properly transfer assets into the Trust.

HOW TO AVOID THE #1 ESTATE PLANNING MISTAKE

After you create a Living Trust-based Estate Plan, what's the next crucial step? Transferring your assets into that Trust! Remember that your Trust will only have value if you properly transfer your estate assets into it.

The #1 Estate Planning mistake we see is failing to transfer asset titles to a Trust. How does this happen? Here are 2 common pitfalls:

Pitall #1: Refinancing Errors

One common pitfall is allowing your home to be taken out of Trust when re-financing it, and then forgetting to transfer title back to the Trust when the process is complete. Make sure to ask the refinancing company if they will be putting your home back into the Trust when they are done. If not, an Estate Planning attorney can draft a deed to take care of this important step.

Pitfall #2: Forgotten Accounts

Another common pitfall is setting up a Trust and then, later on, forgetting to transfer a valuable account into the Trust. Every now and then, while administering a Trust after a Settlor dies, we discover a sizable asset has been left outside of the Trust. When this happens, if the value is greater than $166,250 (in 2020), then we have to open a

Probate in order to take possession of the forgotten asset. **That means that by failing to transfer all of your assets into your Trust, you might defeat one of the main reasons you likely created the Trust to begin with – avoiding Probate!**

How to Transfer Assets to a Trust

Not transferring assets to your Trust is an expensive mistake to make. To help you avoid it, here are some helpful tips on transferring 4 kinds of assets into your Living Trust: real estate, bank/ investment accounts, vehicles, and retirement accounts/life insurance.

Real estate:

Titles to real property must be transferred by a deed, usually a Trust Transfer Deed, and recorded with the County Recorder. Make sure that if your home is ever taken out of Trust for a refinance or for any other reason, that it is transferred back into the Trust.

If you need help checking the title or transferring real estate back into your trust, seek a qualified Estate Planning attorney to assist you in making sure this is done properly to avoid Probate.

Bank Accounts, Stocks, Bonds, or other Investments:

Contact the financial institution and request to change the signature card of your accounts to show title as you as Trustee of your Trust. This can usually be done by showing a Certification of Trust (which is a shortened summary of your Trust). Some institutions may request to see a copy of the Trust; policies vary.

Vehicles:

Transferring title to vehicles is generally not necessary, unless the car is extremely valuable (over $166,250 in 2020- think Rolls Royce). But if you'd like, you can put title in your name as Trustee of your Trust the next time you purchase a vehicle.

Retirement Accounts and Life Insurance:

You won't transfer title to retirement accounts or life insurance to your Trust, but you may want to change the beneficiary on these accounts to list the Trust as a backup beneficiary to your primary desired recipient. For example, many married couples list their spouse as their #1 beneficiary, with the Trust as #2, assuming they want the funds distributed according to their Trust.

NOTE: If you have named charities in your Trust, you will NOT want to name your Trust as a retirement account beneficiary, due to tax laws requiring liquidation.

We hope this overview on how to transfer assets into your Trust to avoid Probate has been helpful. If you have any questions about this process, please seek the advice of a qualified Estate Planning attorney.

As you may realize, not all assets are specifically distributed by your Trust. Personal property is one example. Many clients have special items they would like to leave to family members, especially family heirlooms or items with sentimental value. The best way to deal with items like this, and many more details not included in a Trust, is with a Letter of Instruction.

HOW TO CREATE A LETTER OF INSTRUCTION

What is a Letter of Instruction? **A Letter of Instruction (also known as a Letter of Intent) is an informal supplement to an Estate Plan which provides your Successor Trustee or Executor with detailed information concerning your wishes after you die.** While a Letter of Instruction is not as legally binding as more formally executed Estate Planning documents, it can provide useful information that will likely not be included in your Trust, Will, or other Estate Planning documents. Unlike with an Estate Plan, which should be drafted by a qualified Estate Planning attorney, you can draft a Letter of Instruction yourself. There are no rules about the structure or format.

What's in a Letter of Instruction?

What is typically covered in a Letter of Instruction? Here are some elements often included:

- Specific bequests for personal property, such as who you'd like to have family heirlooms, jewelry, firearms, etc.
- Personal desires concerning your burial, funeral, etc.
- Personal sentiments, messages to your loved ones, and expressions of love to be read when you are gone
- Instructions for the care of any pets
- Information to manage your digital life (like passwords to social media accounts)
- Details of the whereabouts and contents of a safe deposit box

- The location of legal and financial papers like your Estate Plan, birth and marriage certificates, tax returns, divorce or citizenship papers, and military records
- Contact info on any debtors (mortgages, credit cards, car loans)
- Names and contact info on any professionals who handle your assets, like attorneys, CPAs, bankers, or brokers

Why Write a Letter of Instruction?

Why isn't this type of information generally included in your Trust or Will? Because you don't want to have to amend or replace your documents every time this information changes. That would be expensive.

At our firm, amending a Trust starts at $350; a new Will runs $250. If all of this specific information was included in your Estate Plan documents, you could potentially be paying us a lot to constantly update it. Maybe 5 years from now, you'll change your mind about who gets your gun collection. Maybe the person you wanted to get grandma's wedding ring 10 years ago recently died or has become estranged from you. Maybe the pet goldfish you owned the day you created your Trust died the next day.

Because these types of things change frequently, we believe it's more cost effective for our clients to put this type of detailed information in the Letter of Instruction and update it regularly – for free.

3 Major Takeaways

If you remember just 3 things about a Letter of Instruction, remember these 3 key takeaways:

1. A Letter of Instruction is **not as legally binding as more formally executed Estate Planning documents**.
2. A Letter of Instruction **does not have a required structure or format**.
3. A Letter of Instruction should be **updated annually and kept in a safe place** where it is accessible to your Successor Trustee/Executor. You can also send a copy to your Estate Planning attorney to place in your file.

Between your Estate Plan and Letter of Instruction, your Successor Trustee should have all of the information they need to enact your wishes when you are gone.

But what happens if you move to another state? Do you have to start all over again? Let's talk about what happens to your Estate Plan if you move out of California.

ESTATE PLANNING & MOVING OUT OF STATE

As time goes by, you may find yourself moving out of California to be closer to family, to pursue a new job, or to retire. **Does moving to a new state mean you need to create a whole new Estate Plan? Probably not, but you may want to have it reviewed by a local attorney.**

Let's examine each of the most common components of an Estate Plan and whether you should replace or at least have them reviewed if you move out of state.

1. Revocable Living Trust

Many of our clients have a Revocable Living Trust-based Estate Plan. A Revocable Living Trust will be good in any state. **The one exception to this rule would be if**

you move to Louisiana. The unique inheritance laws pertaining to forced heirship and powers of appointment make it advisable to create a new Trust if you move to Louisiana.

If you divide your time residing in multiple states, you will probably want to choose to have the Trust drafted and executed in the state in which you spend most of your time, or where most of your assets are held.

If you purchase a home in the new state and choose to continue to use your original Trust, make sure that new property is titled into your Trust.

If your assets will be primarily in the new state, you may want to explore creating a new Trust with a local Estate Planning attorney.

2. Will

If you have a Will-based Estate Plan and move out of California, you will probably want to create a new Will in your new state.

Each state has their own rules on who can serve as executor, or personal representative, to administer your estate after you pass. For example, in Florida an executor must be related to you by blood or marriage or be a Florida resident. If your executor lives in California, the Florida Probate Court may not allow them to serve. So while your Will is technically still valid, you may want to create a new Will naming a local executor.

Other states may impose additional requirements on out-of-state executors. States may also differ on their requirements on what constitutes lawful execution of a valid Will.

Bottom Line: It's definitely worth checking into the rules in your new home state with a local attorney and possibly creating a new Will.

3. Advance Directive (Medical Power of Attorney)

For convenience, you will probably want to get new medical power of attorney forms in your new home state.

When it comes to medical power of attorney forms, be aware that each state has its own version and they can vary significantly.

In some states, a document that allows you to describe your medical wishes may be called a "Living Will" or "Declaration", while a separate document, often called a "Power of Attorney for Health Care," allows you to designate a person to make medical decisions on your behalf. By contrast, in California, we use one document called an Advance Healthcare Directive to do both.

The terminology within the documents can differ as well. In California, the person you appoint to make medical decisions on your behalf is called an “agent”, while they may be called a “proxy” in other states.

Some states will accept out-of-state Advance Directives. For example, Idaho state law holds that “any authentic expression of a person’s wishes with respect to health care should be honored” (I.C. § 39-4509(3)).

Other states don’t have any laws on the subject. That vagueness means that your agent may run into resistance or experience a delay when trying to present out-of-state documents to healthcare providers in your new state.

Bottom line: As a matter of convenience, your agents are likely to have an easier time getting your documents accepted if they are familiar to local medical providers. That’s why you will probably want to get new forms drafted if you move from California to another state.

4. Financial Power of Attorney

A Power of Attorney will be valid even if you move, provided it is drafted in a general enough manner. Still, it's a good idea to have it reviewed by an attorney in your new state. Your new state may have different rules for what makes a valid Power of Attorney. Also check with your bank to make sure they will accept your Power of Attorney and don't require any specific additional forms.

5. Beneficiary Designations

For assets like life insurance or retirement plans that are payable-on-death, **your beneficiary designations should be valid no matter where you live.** Your agreement is with the institution that controls the asset. Just make sure that the institution has current contact information for both you and the named beneficiary.

Amending Your Trust After Moving

If you're a client of our firm and you move out of state and wish to continue using our office to handle your Estate Plan, we can accommodate your desire for continuity. We offer virtual or telephonic Trust reviews with an attorney to discuss changes you may be considering.

If you wish to have us amend your Trust, we can email or mail documents for you to execute in front of a local Notary Public before sending them back to us to add to your Estate Planning file.

To sum it up, if you create an Estate Plan in California and move out of state, **some components of your Estate Plan are likely to remain usable. When in doubt, have your California documents reviewed by an experienced local Estate Planning attorney in your new state just to make sure.** Many attorneys offer a no-cost consultation which will allow you to hear their opinion on how your documents will hold up in your new home state.

ESTATE PLANNING GIFTING STRATEGIES

Can you give away your estate to avoid Federal Estate taxes after your death? How much money can you give away to loved ones without incurring a gift tax? In this chapter, we're going to explain what a is considered a "gift" in California and how gift taxes work. We'll also share common gifting pitfalls and ways to avoid them.

What Counts as a Gift in California?

California doesn't enforce a gift tax, but the Federal government does. According to the IRS, **the gift tax is "a tax on the transfer of property by one individual to another while receiving nothing, or less than full value, in return.** The tax applies whether the donor intends the transfer to be a gift or not."

Here are some examples of assets considered to be gifts when transferred to another person:

- Financial accounts such as bank, retirement, or brokerage funds
- Real property
- Assets like stocks and bonds
- Jewelry
- Vehicles
- No-interest or low-interest loans

Gifting as an Estate Planning Strategy

Some clients with large estates use a scheduled gifting Estate Planning strategy. By giving away their assets while they're still alive, they intentionally reduce the size of their estate so as to limit or eliminate the estate tax that will be owed upon their death. However, this must be done carefully and ideally in counsel with an experienced Estate Planning attorney and/or financial advisor to avoid incurring gift taxes.

Annual Gift Exclusion

In 2020, an individual can give away up to $15,000 tax-free to any number of people within a calendar year. A married couple could give away double that exemption amount for a total of $30,000 to one person in a given year. For example, if you're married with children, you and your spouse could give one child up to $30,000 total ($15,000 from each spouse) tax-free in a given year. Gifts of this amount or lower do not have to be reported, although you should keep records of the gifts. If you exceed that amount, you must file a gift tax return. You can give that amount of money to as many people as you'd like without it counting against your lifetime estate tax exemption.

Lifetime Gift Exclusion

A lifetime gift exclusion exists for large gifts. In 2020, the lifetime exemption, or total amount you are permitted to give away in a lifetime without incurring a gift tax, is $11.58 million. Once the entire lifetime gift amount is exceeded, any future gifts of more than $15,000 a year to any one person will trigger a gift tax. Gift tax ranges from 18% to 40% and is paid by the giver; recipients do not usually get taxed.

Gift Tax Exemptions

Here are some of the individuals and entities you can give as much as you want to without triggering a gift tax. These gifts won't reduce your lifetime gift and estate tax exemption.

Spouse: As long as your spouse is a U.S. citizen, you can transfer any amount of cash and property to them tax-free. If your spouse is not, the IRS sets an annual limit to what you can give tax-free. For tax year 2019 (what you'd file for in 2020), that limit is $155,000. For tax year 2020, the figure moves to $157,000.

Medical Institution: If you pay the bill for someone else's qualified medical expenses, it may be non-taxable if you send payment directly to the institution. Counsel with a tax professional if you would like to do this.

Charity: If you donate toward a registered non-profit organization, the IRS may not treat it as a taxable gift. Confirm with a tax professional or financial advisor that your desired organization qualifies for this exemption.

Educational Institution: Paying for a child's tuition won't cut into your gift-tax lifetime exclusion as long as you send the payment directly to the school (NOT the student). Keep in mind this applies to only tuition. For other educational expenses such as books, read on to learn about the 529 Plan gift tax exemption.

529 Plan Gift Tax Exemption

A 529 plan is "a tax-advantaged savings plan designed to encourage saving for future education costs". These plans enjoy their own tax breaks including a special gift tax exemption. You can contribute up to $75,000 toward a 529 plan without reducing your lifetime gift and estate tax exemption. The only caveat is: you can't make any more contributions toward the plan with the same beneficiary for the next five years.

Essentially, the IRS is letting you use five of your annual gift tax exclusions for one individual at once ($15,000 x 5 = $75,000). Otherwise, your contributions would be prorated. So if you only contributed $30,000 in one year ($15,000 x 2), you would need to wait two years to make any additional contributions to that plan.

5 Gifting Pitfalls to Avoid

If you're not careful, you could inadvertently make a "gift" and incur a gift tax, or incur other taxes that could have been avoided. Here are 5 gifting pitfalls to avoid.

1. Gifting highly appreciated assets while you're still alive. This gifting pitfall has to do with Capital Gains tax. Sometimes clients are tempted to give a highly appreciated asset to a child, like a family cabin or an investment home. When the child sells that property, they will have to pay Capital Gains tax on the appreciated value.

On the other hand, if you wait to distribute that property to your heirs under your Trust when you die, they will receive a step-up in basis when they sell it, saving them a lot of money in taxes. Consider waiting until you pass to give away highly appreciated assets.

2. Paying for an expensive vacation, wedding, etc. You may not be thinking of giving your son money for his honeymoon vacation as a gift. But if you're giving him more than $15,000, the IRS will consider it to be a gift. Instead of giving money to another person for a large purchase, pay for it directly.

3. Giving a loved one an interest-free loan. Again, in the eyes of the IRS, this is considered a gift and taxes will be owed. A better solution is to secure the loan with a Promissory Note with expected interest and payments.

4. Adding a family member to a joint bank account. You may have the best of intentions when adding your daughter as a joint owner on your bank account. It may just be a matter of convenience, so she can assist you in paying bills. But be cautious–if the joint owner you add takes out any amount of money from the account beyond what they put in for their own use, it will be treated as a gift.

A better option might be to draft a Durable Power of Attorney, allowing an agent to access to your bank accounts if needed. If you have a Revocable Living Trust, remember that bank accounts should generally always be held in the name of your Trust.

5. Giving a cash gift to help a loved one pay educational expenses. Instead of gifting $50,000 directly to your grandkids for college tuition or supplies, make tuition payments directly to the institution or contribute that money to a 529 Plan (as outlined above).

I hope this information has been helpful in planning your gifting strategy. If you have any questions about gifting, feel free to contact us.

CONCLUSION

We hope you have enjoyed reading Estate Planning Essentials. If you have any questions about this eBook, feel free to contact our firm at (916) 488-9788 or info@dhtrustlaw.com.

Don't forget to check out our website, dhtrustlaw.com, where you will find valuable Client Resources, free guides, educational videos, and a FAQ section, plus information on upcoming events like seminars and webinars.

You can also connect with us on Facebook and Twitter (@Dhtrustlaw).

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