Understanding Your California Estate Plan

by

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Preface

I'm a practicing estate planning and administration attorney. I am certified as a specialist in Estate Planning, Trust, and Probate law by the State of California Board of Legal Specialization. I spend about half of my working days talking to people about taking care of their families and their property while they're alive and after they pass away. The other half of my working days are spent talking to those families after a death – sorting through the documents, deeds, bank statements, and the financial, logistical, and emotional impact when one generation passes on, transferring control to the next generation.

My goal in writing this book is to help people understand the documents and the process for planning and administering an estate in California. This book is not a substitute for working with an attorney. My experience has been that people who try to do their own planning – with a book, a website, or from scratch – end up making a mess that creates unnecessary stresses and expense for the people left behind. A good estate planning attorney will have read, written, and rewritten thousands of trusts during their working years. They have seen smooth transitions, and rocky ones. They have the legal training to write an estate plan that does what it's supposed to do, no matter who reads it.

Therefore, this book will not help you write your own estate plan. Nevertheless, I want to help you understand your estate plan, or why you should create one if you haven't yet. It's tough for people who don't think about wills, trusts, and powers of attorney all day, every day, to talk to people who do without being overwhelmed or confused. And it's tough to remember everything you hear, the first time you hear it, especially if the subject matter isn't familiar, or if you find the subject of your own mortality upsetting.

I wrote this book with my own clients in mind, thinking about the common questions they've asked or things they've told me are confusing. I hope it is helpful to them, and to you, too.

Dedication

When I give presentations about estate planning, I have a slide in my presentation deck that says "Good planning is about people, not property." I encourage my clients to start by thinking about their loved ones, and what they need, and want, and how my clients can provide for them.

So this book is dedicated to my loved ones – my wife Sylvia, my parents Jeanie and Steve, my stepmother Linda, and my brothers Jeff and David, who have provided me with love and kindness and taught me by example the importance of compassion and integrity and perseverance.

I'm indebted to my staff – Emily, Jayme, and Toby – who put up with my flaws and eccentricities, and work hard to make things turn out right for our clients, or at least as close as we can get to ever-elusive perfection.

Gregory A. Broiles

Important Terms

One of the toughest things for people trying to talk about estate planning is knowing which words to use. Here are some common terms you should be familiar with:

Trust: The word trust sometimes refers to a document ("She wants to change her trust because there's a new grandchild") and sometimes it refers to a group of assets managed by a trustee ("Let's make sure the house is in the trust.") Legally speaking, a trust is an agreement between a person who has property (the grantor) and a person who will manage the property (the trustee) for the benefit of beneficiaries.

Will: An estate planning document that takes effect at death, administered through a court process known as probate.

Trustor (or Grantor): The person who creates a trust, by transferring property to a trustee, for the benefit of a beneficiary.

Trustee: The person who manages property for the benefit of a beneficiary. When you see the word "trustee," think of "manager."

Executor: The person who administers a probate estate under court supervision.

Guardian: A person who takes care of the physical well being, or financial assets, or both, of a minor (a child under the age of 18) when the minor's parents cannot do so.

Conservator: A person who takes care of the physical well-being, or financial assets, or both, of an adult who cannot take care of themselves.

Power of Attorney: This term sometimes refers to a document ("I showed the power of attorney to the bank manager") and sometimes refers to a person ("She has power of attorney while her mom is in the hospital.") California recognizes powers of attorney for financial matters ("financial power of attorney") and for healthcare ("healthcare power of attorney" or "advance healthcare directive".)

Beneficiary: A person who receives money or property from a trust.

All of these terms can refer to more than one person – often, two married people will be the "trustors", and they will name themselves as "trustees", and their children as the "beneficiaries". In this book, I will usually refer to singular terms and roles for simplicity; but I don't mean to exclude the possibility that more than one person may fit the definition, unless I say otherwise.

Community property: Married people in California may hold property in one of two ways: as community property, or as separate property. All property acquired while a person is married is treated as community property, unless it is specifically defined as separate property. Property retains its character as "community" or separate even when it is exchanged – so if one or both spouses use community property money in a bank account to purchase a home, the home will be community property. If the home is later sold, the money received in the sale is community property. If that money is used to purchase another home – or a car, or some stock – the new property will also be community property.

Separate property: A married person's separate property includes:

1. All property owned by the person before marriage.
2. All property received by the person as a gift or inheritance.
3. Income received from separate property, such as rent, interest, or dividends.

A married person can give away or sell their separate property without their spouse's permission.

If two people are married but living apart, money they earn while living apart is separate property. When a court enters a judgment of legal separation, all earnings and income after the judgment are separate property.

The Four Documents

Four basic documents make up most Californians' estate plans:

A will

A trust

A financial power of attorney

An advance healthcare directive

A complete estate planning binder will likely have many other, less central documents. We'll discuss those later. But these four will be part of almost every plan for a California resident who owns real estate. If that's you – or your parent or other family member – you need to understand what they do, and why we use them.

The Will

If you've heard of only one estate planning document, it's probably the old-fashioned will.

A will sets forth how your property should be distributed after you die; it names a person (or several people) to manage your estate; and it names a person (or several people) to take care of your children, if you die with minor children and the children's other parent cannot care for them.

A will only takes effect at your death – and only through a process called "probate." A probate is a court proceeding – like a lawsuit – where a judge supervises the process of collecting a decedent's assets, paying their debts, and then delivering the remaining property to the right people.

In some states, the probate process is relatively quick and inexpensive. California isn't one of those states. In Santa Clara County, where I practice most often, a fast probate will be finished in about a year. I don't think of a probate as being slow until it's at least two years old, and it's not unheard of for them to take even longer.

Since California probates are expensive and slow, most people try to avoid them whenever possible. Because a will only works in probate court, we try hard to transfer property through a trust, or through beneficiary designations, instead of with a will.

Even so, a good estate plan will include what's called a "pourover will." The pourover will is really a safety net for the trust – any property that has somehow avoided transfer through the trust, or through a beneficiary designation, will be handled by the pourover will. The pourover will says that all of the property it controls will go to the trust – and from there to the beneficiaries of the trust.

Sometimes, a person will have very few assets – or their other assets can be transferred through beneficiary designations. Those people may choose to transfer their assets through a will rather than through a trust because they can't (or don't want to) spend the initially larger cost of trust planning with a trust.

How much more expensive is probate? Here's an example for a single person with $1 million in assets:

	Will	Trust
Initial cost of planning	$500	$3000
Court filing fees	$465 x 2	$0
Newspaper publication fee	$800	$0
Probate referee fee	$1000	$0
Attorney's fee	$23,000	$10,000
Trustee/Executor's fee	$23,000	$10,000
Total cost	$49,230	$23,000

While the initial cost of the trust is larger, the total cost for the estate plan – planning plus administration – is much lower when property is passed through a trust instead of through a will.

The Trust

The trust is the central document for most California estate plans. Most people in California choose to transfer their property through a trust for three reasons:

1. Speed. A trust can be administered much more quickly than a probate because trust administration is an informal process that's handled in a lawyer's conference room instead of a courtroom.

2. Privacy. When a trust is administered privately, very few public records are created that would allow outsiders to know what the value of the decedent's estate was, who's inheriting, and how much they're inheriting. A probate proceeding happens through public records – available to anyone who cares to go to the courthouse – which document in excruciating detail the value of the decedent's property, the debts they owed at the time of their death, the identity of the people who will inherit (including their addresses), and the amounts they will inherit.

3. Cost. Trust administration is typically much less expensive than a probate

It can be confusing to talk about trusts because lawyers use the word "trust" to refer to several different things. Sometimes, when we say "trust," we're talking about a document – "She's coming in tomorrow to modify her trust." Other times, we're talking about the actual assets, and how they're titled – "Is the house in the trust?"

Because of that confusion, it's easier to talk about "trust documents" and "trust assets."

The trust document is a set of instructions from the trustor (or grantor) to the trustee. The trust document identifies the name of the trust – often something like "The Smith Family Trust dated January 1, 2014," the initial trustees, the successor trustees, the beneficiaries, the trust property, and instructions for when and how the trust property should be managed and then given to the beneficiaries.

Revocable Trusts

Most trusts in California are revocable trusts. This means that while the trustors are alive and healthy they can modify or cancel the trust if they want to. If two people create a trust, and one of them dies, sometimes the survivor can modify the entire trust, and sometimes they're only allowed to modify the part of the trust that refers to the assets they own.

Revocable trusts are designed so that they have minimal tax and practical consequences. Transferring your property into a revocable trust will not change your property taxes or your income taxes. A revocable trust uses the social security number of its creator(s) as its tax ID number.

What don't revocable trusts do? Revocable trusts won't protect your property from your creditors, lawsuits, or put it out of reach of the Medi-Cal program for nursing home care.

Modifying a Trust Document

There are two ways to modify a trust: a trust can be modified with an amendment, which is an extra document that's attached to and read along with the original trust. A trust can also be modified by being restated. A restated trust document completely replaces the original, though it will keep the same name as the original trust.

In almost every case, it's better to restate a trust, rather than simply amending it. Amendments make it tough to read a trust and understand it – because the person reading the trust must first understand what the first version said, and then make mental changes to that understanding when they read the amendments. I've seen trusts with as many as eight amendments – and just keeping track of what was changed, and not changed, across each of the amendments is tough. Even worse, after the trustor dies, the beneficiaries each receive a copy of the trust – with all of the amendments, so everyone sees when someone's share of the trust got bigger or smaller, or if someone was added (or removed) as trustee.

With a restatement, the beneficiaries only see the final version – so someone who started out receiving 50% of the trust and ended up getting 10% of the trust will likely never know that an earlier version of the trust would've given them a much bigger share. The same is true for trustees – sometimes people's feelings are hurt if they're not named as the first choice to be trustee.

Trusts are usually amended because the client is unwilling to pay for a restatement or because the attorney is lazy and doesn't want to draft a restatement. The people who pay the cost – financial or emotional – of the client's penny-pinching or the attorney's lack of motivation are the beneficiaries and the trustee, who must wrestle with the resulting paperwork monster of an outdated trust with uncoordinated and sometimes conflicting amendments.

Trustees

In almost every case, the person who sets up a trust (the "trustor" or "grantor") will also serve as the initial trustee. This means that, by setting up a trust, they do not give up day-to-day control of their assets.

However, every one of us will die eventually – and before we die, we may be unconscious, develop dementia, or otherwise become unable to manage our own property. The trust document lists one or more people to serve as successor trustees when the initial trustee can no longer serve.

When a married couple creates a joint trust, they usually – but not always – act together as the initial trustee, and if one of the spouses cannot act as trustee because of illness or death, the other spouse continues to act as trustee.

Successor trustees can be individuals, or groups of people, institutions, or professionals hired to act as trustees. The most common choice is for a family member to act as successor trustee, with additional family members named as alternates if the first choice is unavailable.

It's possible to name two or more people to act together as trustee. My experience is this doesn't work very well – sometimes it's a problem because one (or more) of the trustees is from out of town, but the trustees must act together. Other times, it's because the trustees don't see eye to eye about decisions – one trustee wants to use their favorite bank, the other trustee wants to use their local credit union to handle trust money. One trustee wants to paint the house and buy new carpets before selling, and the other trustee wants to sell as-is; or, even worse, disagrees with the decision to sell the house, and the trustees argue about how to manage the trust assets. Sometimes this leads to a few years of unpleasant holiday get-togethers; sometimes it leads to siblings who never speak to each other again; and sometimes it leads to spending hundreds of thousands of dollars fighting in court about how to handle Mom & Dad's estate.

There are some cases where siblings cooperate well as trustees – but some of the worst fighting I've seen has come where Mom & Dad deliberately made several (or all) of their children co-trustees, knowing they didn't get along, thinking that "this will teach them to cooperate" or "this way nobody can pull a fast one." My experience has been that this leads to deep unhappiness and a slow, expensive trust administration, and I strongly recommend that trustors choose only one person to act as trustee.

One common misunderstanding concerns the powers of a trustee – many people believe (incorrectly) that a trustee can alter the estate plan, or choose what each beneficiary will receive. This is almost never the case, especially with adult beneficiaries. The trustee is in charge of day-to-day management of trust property – buying and selling things, paying bills, collecting rent, and so forth – but they must carefully and diligently follow the instructions set forth by the trustors in the trust document. The trustee cannot use trust property for their own benefit to the detriment of the beneficiaries, even if the trustee is also a beneficiary. The trustee also cannot unreasonably withhold trust property from trust beneficiaries, or refuse to provide them with information about the trust assets and trust management.

Beneficiaries

The beneficiaries are the people who enjoy or receive the benefits of the trust property. During the trustors' lifetime, the beneficiaries of a revocable trust are usually the trustors – the people who created the trust. If the trustors have dependents, they may also be listed as current beneficiaries.

When one or both trustors have died, then the benefit of the trust property shifts from the trustors to the other beneficiaries.

The trust document will usually specify when and how trust property is distributed. When the beneficiaries are adults who aren't disabled, the most common choice is to distribute trust property directly to them. When some or all of the beneficiaries are minors, or younger adults, the trust will likely suggest or require that the trustee manage the trust property for their benefit, without distributing it all at once. Minors (people less than 18 years old) aren't allowed, under California law, to hold or manage substantial amounts of money or property. Most people aren't ready to manage a large inheritance on their 18th birthday, so the trust document will often direct the trustee to hold property until the beneficiary is 21, or 25, or 30, or even older. I once had clients (in their late 80's) who thought their daughter would be ready to manage her own money once she turned 60!

The Financial Power of Attorney

A financial power of attorney is used to name one or more people to act on someone else's behalf. The person whose property will be managed – the person who creates the power of attorney – is called the principal. The people who will be acting on the principal's behalf are called agents or attorneys in fact.

A power of attorney is called a durable power of attorney if it is valid while the principal is incapacitated. For estate planning, this is often precisely when we most want the power of attorney to be valid, so almost all of the powers of attorney I create are durable powers of attorney.

A power of attorney that takes effect immediately upon signing is called an *immediate power of attorney*. The alternative is a *springing power of attorney*, which only takes effect when the principal is incapacitated.

I usually prefer to use immediate powers of attorney for my clients, because it can be difficult or slow to prove that a springing power of attorney really is in effect. The person named as the agent is usually someone who the principal trusts – a spouse, a child, or a very close friend or family member. The principal isn't afraid that the person named will abuse their power, so it's not a problem for the agent's powers to be immediately effective. Further, the agent must have the power of attorney – or at least a copy – before they can use it. If the principal keeps the power of attorney with their private papers in their home, and the agent would need to invade the principal's privacy to get at the document (which the agent isn't likely to do, except in urgent circumstances), the agent won't be tempted to misuse their powers. Often, the agent won't even know they're named as power of attorney.

Sometimes people find themselves without a close friend or family member to name as agent. They want to name someone to avoid an unnecessary conservatorship if they are injured or sick. Perhaps they name a neighbor, or a distant relative they're not close to. In this circumstance, it's safer to use a springing power of attorney.

A springing power of attorney will have language that says something like "This power of attorney will only take effect when two licensed physicians have stated in writing that I am incapacitated." While this sounds like a good idea, it can be difficult to get doctors to write those letters – the doctor may be concerned about confidentiality, or it may take time to get two different doctors to examine the principal. Also, capacity isn't necessarily a black or white issue – a person may have capacity in the morning, but not in the afternoon, especially if they have dementia or some other condition that has different mental effects at different times.

The Advance Healthcare Directive

An advance healthcare directive – which may also be called a healthcare power of attorney – is a document that names one or more people (agents or attorneys in fact) to make healthcare decisions for the principal when the principal is unconscious or incapacitated. The advance directive may also specify certain treatments that the principal does – or does not – want. Finally, the person named as healthcare agent has the power to choose the disposition of the principal's remains after the principal dies.

The living will document – which can be a separate document, or part of an advance directive – specifically discusses medical care when a person has a terminal illness, is in a permanent vegetative state, or will otherwise never again experience a meaningful life.

Healthcare directives are very important documents for minimizing painful fights within families. You may be familiar with the names of people who became nationally famous after their families fought ugly battles over the control of their healthcare – Karen Ann Quinlan, Nancy Cruzan, or Terry Schiavo. Some people are afraid that they'll be kept alive unnecessarily, causing a financial or emotional burden on their families, or that they'll endure additional pain and suffering before ultimately dying. Other people are afraid their lives will be ended prematurely because greedy family members or hospital bureaucrats are more interested in money than human life, or because someone is eager to harvest their organs.

Whatever your view is, the best way to be sure your wishes will be respected is to make a clear record of your choices, and to name someone as your agent who is practically and emotionally capable of carrying out your wishes – potentially over the objection of other family members or medical personnel who may have different values.

I believe that it's especially important to record your wishes in writing to minimize the burden on the person you choose to act on your behalf. Choosing to withhold medical care and allow death to occur – or prolonging the life of a person who may be experiencing physical or emotional pain – is a very serious decision. It's easier on the person who must make that decision if they can focus on following your clear instructions instead of being forced to guess what you would have wanted. Most of us respect the rights of others to make choices about their own lives based on their own values, conscience, and spirituality – even if those choices are not the same choices we would make in our own lives.

Making Sure Your Plan Succeeds

Real Estate

One of the most common questions I'm asked is "Do I need a will or a trust?" When I'm asked that question, the question I respond with is "Do you own real estate?" If a person owns real estate, it's very likely that the best form of estate plan for them will be a living trust, because California probates are slow and expensive.

Some states have deeds known as "Ladybird deeds" or "beneficiary deeds" – this sort of deed allows a person to control real estate during their lifetime, and specify someone else who will automatically become the owner upon their death. California law doesn't provide for this sort of deed – we have other choices, none of which is ideal.

Individual ownership

Real estate is held in the name of an individual (the deed will have language similar to "Buddy Holly hereby grants to Elvis Presley, an unmarried man…" or "Patsy Cline hereby grants to Loretta Lynn, a married woman as her sole and separate property…") will be subject to the probate process, no matter what, when the named individual dies.

Shared ownership

This is also true when a partial interest in real estate is held by an individual as a tenant in common ("David Crosby hereby grants to Stephen Stills, Graham Nash, and Neil Young as tenants in common…"), or when a married couple holds title as community property ("Fred Rutherford hereby grants to Ward Cleaver and June Cleaver, husband and wife as community property…").

It's possible for multiple people to hold property as joint tenants ("Rick Blaine hereby grants to Ilsa Lund and Victor Laszlo as joint tenants…"). Married people can hold property as community property with right of survivorship ("Pat Brady grants to Roy Rogers and Dale Evans, husband and wife, as community property with right of survivorship…"). Both of those methods will transfer real estate without probate – but only for the first death! When the last owner dies – or if all of the owners die at the same time in a tragic accident – the property will be subject to the probate process.

Adding a child to title

My clients frequently ask me about adding one of their children to the title of their home as a joint tenant as a substitute for more formal (and expensive) planning. There are several reasons I rarely approve of this approach.

First, this makes the child a current owner of the property, which means the parents need the child's cooperation if they want to sell or refinance the property. I've seen children refuse to cooperate with their parents' wish to sell the family property to move to a smaller, easier to maintain home – the child wanted to inherit the family property when the parents died, and he didn't want his parents to sell the property before they died, even though they worked hard to pay for it.

Second, adding a child as a joint tenant means they'll inherit the property when the parents pass away – which is often what the parents intend if they have only one child, but usually not what they intend if there are several children. Even if the child who inherits the property plays fair, and wants to add their brothers and sisters to the title after Mom & Dad are gone, this creates a bad gift tax result. The IRS views that transfer as a gift between siblings, and if the value of the transfer is more than $14,000, must be documented on a gift tax return. The amount of the gift (which can easily be in the hundreds of thousands of dollars, given the value of California real estate) reduces the child's lifetime gift amount.

Even worse, the property will be subject to reappraisal for property tax purposes when the inheriting child adds the other children to the title. When real estate passes between parents and children, the transfer is usually exempt from reassessment for property taxes. However – if Mom & Dad transfer their house to Child 1 at death through joint tenancy, and Child 1 wants to put Child 2, Child 3, and Child 4 on title (because they know that's what Mom & Dad really wanted), the county will reassess 75% of the property at current fair market value, because 75% - the property transferred by Child 1 to 2, 3, and 4 – was not transferred from parent to child, but from sibling to sibling, which is not exempt from reassessment.

Third, because the joint tenant/child is a current owner, this makes the property subject to their creditors if they're involved in a divorce, a lawsuit, a bankruptcy, or have tax problems. Imagine having to negotiate with your child's ex-spouse's lawyer about ownership of your house – or with a personal injury attorney after a car accident, or with the IRS.

Fourth, adding a child as a current owner creates a bad income tax result for the child if they ever want to sell the property. When property is transferred at death, it usually receives a "step up" in basis – this means that if the children sell their parents' home relatively quickly after the parent(s) have died, it's very unlikely that they'll owe any income tax. However, property received as a lifetime gift – rather than a gift at death – doesn't get a step up in basis, and the child receives the property with what's known as "carryover basis." Carryover basis means the child has the same basis as the person who gave the gift, with no reset at death. This means the child will owe income tax on some or all the profit when the home is sold, looking back to what the parents paid to purchase the house decades ago. The difference between stepped-up basis and carryover basis can easily mean hundreds of thousands of dollars in income tax that's due – or not.

For these reasons, I'm usually very reluctant to add children or others to title as current owners, when what the client really intends is a transfer at death.

Transfers for low value real estate

Two simplified court procedures can be used when a decedent's real estate is worth less than $50,000, or $150,000. There isn't much land left in the urban areas of California worth less than $150,000, and most people would prefer to avoid any court proceedings after death.

Real estate should be held in a trust

So, if all of the choices for holding title to real estate end in probate or with other problems, what can be done? This is where trusts are ideal vehicles for transferring property. A trust, in this scenario, is a little bit like a corporation – it exists separate from the individual people who are the current trustees or beneficiaries. If the current trustees – usually the trustors (the people who made the trust) die, or are too sick to manage trust property, we don't need to ask a court to determine control – the trust document itself specifies who will take over.

Think of the trustee as being like the President – if a president is incapacitated or dies, we don't need to have another election – we've got a backup person already named, the Vice President, and the Vice President takes over as President immediately. It works just like that for trustees – if the office of Trustee becomes vacant, the successor trustees can immediately take over managing the trust property.

This means that if property is held in trust we can transfer it after a death just as easily as we do when the owner is alive.

That simple fact is one of the basic rules of estate planning in California. Once you understand it and its implications, you will understand why most estate planning in California is done with trusts, why trusts are usually much better than wills, and how and why it's very important to make sure your property is titled in your trust.

In my office, when we create a new trust, we'll ask our client for the addresses of every piece of real estate they own. We get a copy of the current deed for the property – which will show how they hold title: as an individual, joint tenants, tenants in common, or community property. We then prepare new deeds, which will transfer each property from our client as they now hold title, to our client in their new role as trustee of their living trust.

The new deed will have language like this: "Desi Arnaz and Lucille Ball, husband and wife as to their community property, hereby grant to Desi Arnaz and Lucille Ball, trustees of the Arnaz-Ball Living Trust dated February 14, 2014 . . ."

When you walk out of your attorney's office with your new living trust, if your attorney has done a good job, all of your real estate will be titled in your living trust.

Unfortunately, the story doesn't end there. It's common for property to end up outside of the trust –because the mortgage has been refinanced, or because new real estate was purchased and the owners have forgotten that the new property must also be held in trust if they want to avoid probate.

When I meet with people to review their estate plans – it's a good idea to review your plan every 3-5 years, or if there are significant changes in your family, or your property – I always get copies of the current deeds for the real estate I know about, and I ask if they've purchased new real estate. 1 out of 3 times, I find some change in how real estate is titled, and we need to move real property back into their trust. This is an easy thing to do as long as the grantor is still alive. If the grantor dies, and only after death do we discover that property isn't held in the trust, the only ways to fix that all involve going to court.

Bank Accounts

Bank accounts (including credit unions) work in a very similar way. Ownership of a bank account is determined by the title of the account as it's shown on the records of the bank or credit union. This is usually shown in the name(s) that statements are mailed to – you might see something like "Billie Holliday / 1234 Main St. / San Jose CA 95128," and this would tell us that Billie Holliday owned that account as an individual.

Individual Ownership

Just like real estate, a bank account held by an individual is subject to the probate process at death.

There are two important exceptions to this rule. The first is for accounts with a beneficiary designation. These often show up as an entry on the statement that looks like "POD Charlie Chaplin." POD stands for "Pay on Death." If an account has a Pay on Death designation, the account automatically becomes the property of the people named in the designation when the account owner dies. While the account owner is still alive, the people designated have no ability to withdraw funds or to otherwise interfere with the account owner's control of the account. The beneficiaries don't even have the right to know how much money is in the account, and rarely even know they're named as beneficiaries.

The second exception is where the decedent has property worth less than $150,000 that would otherwise be subject to probate. When someone dies with less than $150,000 in probate property, it's known as a "small estate," and special shortcut procedures allow the family or friends of the decedent to get control of the property 40 days after death.

This means that small bank or credit union accounts can be collected without a lot of hassle. If you (or a loved one) keep a small bank account, you need not worry that will be subject to a full probate, or that it will somehow go to the government instead of your next of kin.

But – this is important! – this only applies to small accounts. The total of all of the accounts and other property subject to this rule must be less than $150,000. Sometimes there are life events that suddenly create a lot of cash – maybe a spouse or family member dies, and life insurance is cashed in – or perhaps valuable real estate is sold.

If you come to see me, and you tell me about your checking account with $5,000 in it, I'll tell you not to worry; your $5,000 checking account won't need to go through probate. But if you receive $300,000 in a life insurance payout – or if you sell your house for $800,000 to move in with one of your children, or a senior apartment – and you put that money in your little $5,000 checking account, suddenly it's a big checking account, and the exception for small estates won't apply.

Joint Tenants

Bank accounts can also be held as joint tenants. If the bank statement shows something like "Paul Simon and Art Garfunkel, JT TEN" ("JT TEN" is a short version of "joint tenants") or "Darryl Hall and John Oates, JTWROS" ("JTWROS" means Joint Tenants With Right Of Survivorship) – or even just lists multiple names, like "Groucho Marx / Harpo Marx / Chico Marx", then the account is held in joint tenancy.

Joint tenancies are often used as a cheap, informal way to transfer property at death without a will or trust. They are also frequently used within families to allow a child or other trusted relative to manage an elder's money if the elder is no longer willing or able to handle their own finances.

While these approaches work – mostly – there are several dangers to be aware of when accounts are held in joint tenancy.

The first danger is that when ownership has been reduced to a single person by the death of the other joint tenants, it is no longer a joint tenancy account. It is now an individual account, and it will be treated at the death of the last joint tenant as that person's individual property. So a joint tenancy between a husband and wife will ensure that if the husband dies, the wife has control of the account – and if the wife dies, the husband has control of the account. That's usually what people intend – but if the surviving spouse doesn't add another joint tenant, or otherwise change title before *they* die, then the account will be treated as an individual account.

The second danger is the money in the joint account is treated as the property of all of the account holders. The named account holders can withdraw all of the money – and so can their creditors, if they're involved in a bankruptcy, or a divorce, a business dispute, a lawsuit, or have tax problems. It's possible to argue about the true ownership of the funds – but it's horrible to be put in a position where you're paying an attorney to ask a judge to order someone else to give your own money back to you, and the other side has an attorney who's arguing they ought to keep your money instead.

I have seen cases where people have added their children as joint tenants, and the children have withdrawn some or all of the money – because the children had financial pressures, or thought they had a great investment opportunity, and were excited to get a chance to double Mom or Dad's money. Instead, they lost Mom or Dad's money, or spent it on their own bills and recreation, and Mom or Dad's money was gone.

The third danger is that the last surviving joint tenant may not use the money as the original owners intended. Let's imagine that Mom and Dad have four children – three of the children are dispersed across the state, or across the country, and only see their parents once or twice per year. The fourth child lives in Mom & Dad's home, or around the corner, and they help Mom & Dad pay bills and do household tasks. It's common for Mom & Dad to put that child on their bank account as a joint tenant, so the child can handle banking tasks and write checks. Someday, when Mom and Dad have passed away, that joint account will, on the bank's records, belong solely to the local child. The other children won't have access to the account. They may not even know it exists. Complicated legal arguments can be made about ownership of the funds, depending on who contributed them – but one of the goals of estate planning is to avoid courts and controversies.

Typically, Mom and Dad's expectation, when they set up the joint tenancy, was their money would be part of their overall estate at death –usually, they want the money to be split equally among their children or other beneficiaries. Usually, the child who is the last joint tenant cooperates with Mom and Dad's wishes, and shares the money with the other beneficiaries. This isn't always the case – and the situation is even more difficult if the last joint tenant dies or is involved in a divorce or a lawsuit before distributing the money.

Trust Ownership

Usually, trust ownership of the bank accounts is the best choice. How do you know if your account is titled in your trust? The statements should show the ownership like this:

Mike Brady and Carol Brady, Trustees
Brady Family Trust
1234 Pine St.
San Jose, CA 95128

.. or perhaps

Brady Family Trust u/a/d 1-1-2014
1234 Pine St.
San Jose CA 95128

There are several abbreviations used in connection with trusts. They include:

trt	Trust
ttee(s)	Trustee(s)
u/a/d	Under Agreement Dated
u/t/d	Under Trust Dated

A practical problem with trust names is they're often too long for the space allowed for them in the computers used by banks and other institutions – so "Mike and Carol Brady, Trustees of the Brady Family Trust dated January 1, 2014" becomes "Mike & Carol Brady Ttees, Brady Fam Trt u/a/d 1-1-2014." While this is tougher to read, it rarely creates a problem. The most important things are that the title on the account somehow mentions either "trust" or "trustee"; and avoiding ambiguity about which trust is involved. Including the date the trust was created can help distinguish between different trusts, especially for people with common names. There are many trusts named "Smith Family Trust" or "Garcia Family Trust" or "Nguyen Family Trust" – but when the date is included, the chances of confusion are reduced.

Why is trust ownership important? If financial accounts are held in trust, they can be managed by the successor trustee when the trustors are incapacitated, and almost immediately after death.

A financial account held as an individual, or as joint tenants, can only be accessed by the account owner(s) during their lifetime, with a financial power of attorney, or by a conservator appointed by a court.

When all of the owners of an account have died, the account is frozen – either until 40 days after the last death (for small estates) or until a court has appointed an administrator through the probate process. If it's a Pay On Death account, it will immediately belong to the named beneficiary – which means those funds won't be available to pay bills or funeral expenses.

You should ask your financial institution to provide you with new signature or ownership cards to retitle bank accounts or cash deposits of significant size, including treasury bills, money market accounts, and certificates of deposit. You should be listed as the trustee of your trust for each of these accounts.

If you are retitling a certificate of deposit, make sure that your bank will not treat the name change as an early withdrawal triggering a penalty. Because the trust's tax ID number is your social security number, most institutions do not treat this as a change in ownership.

You do not need to change the name(s) printed on your checks. There is no need to have the trust's name printed on your checks – individual names are perfectly acceptable.

After title has been changed, your next account statements should reflect the change and show you as trustee of your trust. It's a good idea to keep a copy of a statement with your trust so your trustee knows where to look for assets, and has confirmation that the account was held in trust.

Brokerage Accounts

Brokerage accounts are very similar to bank accounts. They can be held as individuals or joint tenants – with the same drawbacks discussed above for bank accounts.

The best way to hold brokerage (stock) accounts – just like bank accounts – is as the trustee of your trust. This allows for rapid replacement of the trustee(s) upon incapacity or death, and it allows the successor trustee to use the property to pay for funeral or other last expenses, to pay bills, to make specific gifts (such as "$1000 to each of my grandchildren"), and then to transfer the remaining property to the remainder beneficiaries. It also allows the trustee to manage the account when they can prove that the trustor(s) are incapacitated or dead. Imagine needing to watch a volatile stock's value fall like a rock while waiting out the mandatory 40-day waiting period for a small estate, or paying an attorney to ask the probate court for emergency, temporary letters of administration to sell the stock before the probate process has even begun. Neither option is pleasant to consider.

Brokerage accounts can also be designated for a certain person at death – they're usually called "TOD" (Transfer On Death) accounts, instead of Pay On Death accounts. TOD accounts have the same limitations and problems that POD accounts do for bank accounts.

Retirement Accounts

Retirement accounts such as IRA's, 401(k)'s, 403(b)'s, and deferred compensation plans are all controlled by the beneficiary designation form you fill out with the institution holding the account.

This is critical to understand – if the beneficiary designation says that an account will go to John, but the will or trust says that the account should go to Susie – or even that everything goes to Susie – the beneficiary designation will control who inherits. It doesn't matter what the will or the trust says, if there's a beneficiary designation that's pointing to a living person.

Sometimes clients are concerned because their IRA or other retirement account isn't titled in their trust like a bank account or investment account. The difference between a tax-favored retirement plan and a traditional bank or investment account is that you're not the *owner* of the funds in your retirement plan – the institution that manages it for you is the owner (often called the custodian), and you're considered a beneficiary. If you became the actual owner of the assets, you'd be taxed on them immediately.

If all of your intended beneficiaries are competent, non-disabled adults, this allows you to transfer your retirement assets simply and easily. Most of my married clients name their spouse as the "primary" beneficiary – and they often name all of their children as the "secondary" beneficiaries. Single clients often name all of their children as the primary beneficiaries. The good thing about this approach is that it's easy – the designated beneficiaries merely need to provide a death certificate and fill out a form with the institution, and they'll get control of the assets almost immediately after death. No probate, no trust administration – just quick access to the money.

Perhaps all of your beneficiaries aren't adults, or competent, or they're disabled and receiving needs-based assistance. People in those circumstances shouldn't receive money directly – so we don't want to name them as beneficiaries of retirement accounts.

In that case, the best thing to do is to name the trust as the beneficiary. Again, married clients will usually name the spouse as the primary beneficiary, and then the trust as the secondary beneficiary. Federal law requires a spouse be named as the primary beneficiary on a 401(k) or profit sharing plan (but not an IRA) for a married person, unless the spouse signs a form authorizing the account holder to choose someone else.

What happens if you leave the beneficiary designation blank, or if all of the named beneficiaries are dead? Sometimes, if it's a retirement plan created by an employer, the retirement plan will have rules that specify who will inherit the account. If there are no such rules, the account will go to the intestate heirs, as determined by California law. If the estate qualifies as a "small estate," then the intestate heirs can collect the account without probate – but if the estate is too big (valued at more than $150,000) then the account must be transferred through our expensive, slow probate process.

I recommend that my clients who have trusts include the trust as the last tier of beneficiary, no matter what – this ensures that the account will never need to go through probate. For a married person, the order of beneficiary designations usually looks like this:

Primary:	Spouse
Secondary:	Children
Tertiary (3rd):	Trustee of the Trust

For a single person, the beneficiary designations usually look like this:

Primary:	Children (or other family members/friends)
Secondary:	Trustee of the Trust

Including the trust as the last choice on the form – no matter how many choices come before it – will protect the account from probate.

Annuities

Annuities are special investment accounts that combine some of the features of life insurance or retirement accounts, with other features of brokerage or bank accounts. Typically, the annuitant – the person who puts their money into the annuity – transfers a certain amount of money to an insurance company. The insurance company makes promises about investment performance – they might promise that the money in the annuity will approximately match the performance of the stock market, or of certain stocks. They might promise that the annuity will grow at a certain interest rate – or at least at a guaranteed minimum interest rate. The interest rate they offer is typically more attractive than what's available from banks or money market accounts. What you give up for that more attractive interest rate is a government guarantee your money will be safe; and often you give up the ability to get at some, or all, of the money quickly without paying a penalty.

Annuities usually include some deferral of income taxation – this means that the balance inside the annuity can grow, and you don't pay income tax on the growth while the money is under the control of the insurance company. The other side of that coin is you – or your beneficiaries after you're gone – will have to pay income tax when money is distributed from the annuity, unless it's set up to pay the proceeds out like life insurance.

Annuities are similar to retirement accounts – they're usually set up with designated beneficiaries. After the annuitant dies, the annuity is payable to the people named as beneficiaries. Similar to retirement accounts, it's usually possible to name a primary beneficiary (or beneficiaries), and then secondary beneficiaries, who will inherit if all of the primary beneficiaries are dead.

And, just like retirement accounts, I encourage people to put the trustee of their trust at the bottom of the list, to make sure the annuity will never go through probate. The trustee of the trust should be at the top of the list if some or all of the people you'd otherwise like to name as primary beneficiaries are minors, or people with means-tested disability income, or people who can't manage their own funds.

Stock

While many people hold their stock in brokerage accounts, I still meet people who like to hold stock certificates – or who participate in "direct registration" programs, where the stock transfer agent for a corporation keeps track of share ownership directly. Direct registration is popular with people who want to avoid paying brokerage commissions, or who want to buy shares (even fractional shares) over time.

The choices for holding title are essentially the same as for brokerage or bank accounts – you can hold these assets as an individual or as joint tenants – but the best way to hold these assets is as trustee of your trust.

Businesses

If you own a small business, it's important to make sure it's included in your estate plan, too. The precise mechanics of this depend on how the business is organized.

If your business is a sole proprietorship, then legally speaking, you hold those assets as an individual. Be sure your assets are assigned to your living trust with an Assignment of Assets document.

If your business is a general partnership with no restrictions in a partnership agreement about ownership, your interest in the partnership should be transferred to yourself as trustee of your trust with a written assignment of interest signed by you *and* the other partners. This is also true for an assignment of your interest in a limited partnership.

If your business is a corporation, you will need to cancel the shares issued to you as an individual and reissue them in your name as trustee of your trust. It's a good idea to keep a copy of the new stock certificate with your trust.

If your business is a limited liability company, an assignment document should be signed transferring your interest as an individual to yourself as trustee.

Who controls the business?

If you are incapacitated, and your business is held in your trust, then your successor trustee acts as the owner of the business. If your business is a sole proprietorship, so the business assets are your assets – the trustee can manage the business directly. If your business is an entity like a corporation or a limited liability company, then the trustee is the owner of the shares or the membership interests, and can do whatever a shareholder or a member can. Therefore, in a worst case scenario, the shareholders of the corporation – the trustee – could hold an emergency shareholders' meeting, to elect new member(s) to the board of directors, who would then replace the CEO of the corporation, if the CEO were unable to act due to death or disability.

What about a business with a special license?

This is a serious problem with no simple answer. Many people – doctors, lawyers, taxi drivers, barbers, hairdressers, dentists, chiropractors, and so forth – can only participate, and in some cases act as the owner – of their business because they have special training and licensing.

A law practice, for example, can only be owned by an attorney. If an attorney who owns their own law practice dies, their spouse or family legally isn't allowed to keep running the business as if nothing had ever happened. They're required to transfer the practice to someone who *is* licensed to practice law, or to shut it down. Neither alternative is attractive, especially because it likely means a significant loss of income, and the sale (or abandonment) of an asset that could have substantial value to the surviving family.

Many other professions have similar rules. If you work, or own a business subject to these special rules, it's important to consider how those rules would apply to you and your business if you were to pass away, or if you were permanently or temporarily disabled.

Oil, Gas, & Mineral Interests

If you *own* oil, gas, or mineral interests, your interest is transferred into your living trust with a deed, just like an interest in real estate.

If you *lease* oil, gas, or mineral interests, you should sign a written assignment that transfers your rights under the lease(s) to yourself as the trustee of your trust.

Mortgages/Notes/Receivables

If you have loaned money to someone (that you anticipate will actually be repaid), you should assign your interest as lender to yourself as trustee of your trust with a written assignment document.

Tangible Personal Property

"That's all you need in life, a little place for your stuff. That's all your house is- a place to keep your stuff. If you didn't have so much stuff, you wouldn't need a house. You could just walk around all the time. A house is just a pile of stuff with a cover on it."

George Carlin, *A Place For My Stuff*, 1981

Tangible personal property means all of your things – your household furnishings, your appliances and fixtures, works of art, motor vehicles, photographs, clothing and jewelry, books, sporting goods - your "stuff", in George Carlin's words. These things are transferred into your living trust by signing an Assignment of Personal Property.

My clients usually choose not to fund vehicles into their living trusts. For reasons only comprehensible in Sacramento, the Department of Motor Vehicles makes it very difficult to transfer a vehicle into a trust, but very easy to transfer a vehicle out of the name of a decedent. I usually encourage married couples to own vehicles in joint tenancy – "Thurston Howell or Eunice Howell." This makes it easy for a surviving spouse to continue to manage the vehicle, and the children don't have problems transferring it after death. The exception to this rule is for vehicles of significant value – some very nice RV's can be worth hundreds of thousands of dollars, as can some collectible or antique vehicles. I prefer to see those vehicles titled in trust to minimize the chances of confusion or argument after death.

Keeping Your Plan Up To Date

"The best-laid schemes o' mice an' men / Gang aft agley,
An' lea'e us nought but grief an' pain, / For promis'd joy!"

R. Burns, *To a Mouse, on Turning Her Up in Her Nest with the Plough*, 1785

I recommend that clients review their estate plans every 3 to 5 years. It's difficult to come up with a good set of trustees and distribution plans that works for today, or next year – it's impossible to come up with a good set of trustees and distribution plans that works forever.

Events like these should prompt a visit to your attorney to revisit your plan:

- Marriage, remarriage, death of a spouse or divorce
- Birth or adoption of child or grandchild
- Children turn 18 or become financially independent
- Retirement
- Serious illness or onset of dementia of a family member
- Substantial increase or decrease in wealth
- Death, incapacity, or relocation of a beneficiary, executor, guardian, or trustee
- Marriage or divorce of a beneficiary
- Purchase of life insurance
- Inheritance of real property or substantial financial assets
- Purchase of real estate not held in trust
- Purchase of real estate outside of California
- Decision to make large charitable gifts
- Purchase/sale of a business, or substantial business growth
- Beneficiary develops a drug/alcohol/gambling problem
- Beneficiary becomes financially irresponsible
- Beneficiary begins a career with increased risk of

lawsuits (doctor, lawyer, etc.)
- Relocation to another state

Some of the most painful circumstances I've seen have been where a plan that made perfect sense the day it was signed is implemented many years later, when the assumptions that were the foundation for the plan were no longer true. I worked on one matter where the decedent, before her death, refused to spend money on attorney's fees to review and modify her trust. When she died, hundreds of thousands of dollars went to distant relatives she'd never met, instead of the niece who cared for her during her final years, because that's what the plan said as it was written.

What Happens After You're Gone

Guardians for Minor Children

Parents – whether biological or adoptive parents – are the natural guardians of their children. They are responsible for the care, education, and supervision of their children until the children are 18 years old. If a child has no parent who can or will act as guardian – perhaps due to death, disability, or abandonment - a guardian must be appointed by the court to take custody of the children and provide for their needs.

If you have left written instructions regarding your choice of a substitute guardian for your children, the court will usually honor your wishes. If you do not leave written instructions identifying your preferred guardians, the court will choose someone – who may be the most assertive or bossiest relative who asks to be appointed, instead of the person you (or your children) would have preferred.

Choosing a guardian can be the hardest part of estate planning for young parents. Here are some factors to consider when making this choice:

Does the guardian share your values? Will they raise your children in the same moral and religious environment that you have created in your home? Are your basic values similar, or compatible?

Is the guardian willing to serve? The person you nominate is not obligated to serve if they don't want to. I encourage parents to name several candidates, in order of preference, in case their first choice is unwilling or unable to serve.

How old is the guardian? The guardian must be 18, and should be able to serve until your child is 18. If your youngest child is 3 years old, you need to choose a guardian who will be physically, mentally, and temperamentally appropriate for the next 15 years.

Can your children remain in the same home? It can be very traumatic for a child who has just lost one or both of their parents to lose contact with their siblings, who may be the only familiar people left in their life. A potential guardian will ideally be capable of and willing to care for all of your children.

In California, only the parent(s) of a minor can legally nominate the minor's guardian. If the parent does not nominate a guardian, then the court will appoint a guardian from the people who have volunteered by submitting a petition to the Court. It is important to remember that a court proceeding is always required to appoint the guardian. Having a written nomination allows you to nominate the person that you want the court to appoint as guardian.

Identifying the Creditors

One of the first steps in handling any decedent's estate is identifying the creditors – the people to whom the decedent owed money. Almost everyone has at least a few creditors – even if the decedent lived a very frugal lifestyle and avoided borrowing money, most of us have – or will have – final utility bills, some final medical bills, and so forth.

In simple circumstances, these final bills can be paid without excitement or drama. These last bills sometimes cause a lot of worry for the people left behind – and that worry is unnecessary and unfortunate. The decedent no longer cares about their credit rating – and it's very important to make sure that we've identified all of the assets, and all of the creditors, and have a clear picture of the overall picture of the decedent's financial affairs before making significant payments.

Often, the creditors are identified by simply collecting the decedent's mail for a few weeks. If you want to make life a little easier for the people who will someday handle your affairs during sickness or after your death, you could make a list of your recurring bills, the relevant account numbers, and contact information for each creditor.

One common misunderstanding, or fear, is that the surviving family is somehow responsible for the decedent's debts. In general, they're not. A surviving spouse may (or may not!) be liable for the decedent's debts – but surviving children, or grandchildren, or friends, have *no legal obligation* to spend their money to pay the debts of a person who's passed away. The decedent's money and property must be used to pay debts before being given away as an inheritance. A person who dies with more debt than assets won't be in a position to make generous gifts to anyone – but if there's not enough left to pay all of the creditors, the creditors are the ones who bear the loss, not the family or friends.

It's important, however, that the person handling the trust or the estate waits to pay the bills in the correct order. California law provides that certain debts and obligations are to be paid before others – and as long as the person handling the estate pays the claims in the order of priority, they're free of personal responsibility for the debts. If the person handling the estate chooses to pay in the wrong order, they can be liable – not because they owed the money, but because they decided not to pay some people who deserved to be paid, and chose instead to pay others who weren't entitled to priority. This happens very rarely, but it's why we strongly encourage people handling others' estates to move very carefully and deliberately when paying debts.

How long do creditors have to collect a debt? In California, in general, an obligation based on an oral promise to pay must be collected (or a lawsuit filed) within 2 years; and an obligation based on a written promise to pay, or other writings or documents, must be collected (or a lawsuit filed) within 4 years.

There's a special, shorter period when someone dies. When a person dies, their creditors have one year from the date of death to collect whatever's due. That's it – one year. We can make this period even shorter through the probate process or with a special procedure for trusts. If the creditors don't collect money owed to them within one year of death, the (alleged) debt is cancelled, and cannot be collected.

Identifying the Beneficiaries

In addition to identifying creditors, the person handling a decedent's trust or estate must identify both the people who will inherit property, and the people who would receive property if the estate were handed under the rules of intestacy. (See page 64 for a discussion of intestacy.)

For a trust administration, the successor trustee must send a notice to all of the trust beneficiaries, and the (potential) intestate heirs. Those people are notified that a trust has become irrevocable – that they are, or are not, beneficiaries, and that they are entitled to request a copy of the trust from the trustee or the trustee's attorney. Sometimes the trustee chooses to send a copy of the trust along with the notice, to speed things up. People who get a copy of the notice have 120 days from the date they receive the notice, or 60 days from the date they receive a copy of the trust (whichever is later) to file a lawsuit to challenge the trust. If the deadline expires without a court filing, then the people who have received the notice have lost their opportunity to challenge the trust.

Important Note:

Challenging the trust is not the same thing as challenging the trustee's management of the trust. Imagine that Ben Cartwright dies, and his trust says that Adam, Hoss, and Little Joe are to receive equal shares. Adam is the trustee. Instead of sharing the trust assets with his brothers, he runs off to Virginia City to gamble with the proceeds from selling the family homestead. Hoss and Little Joe sue Adam for mismanaging the trust assets. This is not a challenge *to the trust itself* – in fact, Hoss and Little Joe are going to argue that the trust *should be enforced*, not that it was invalid. A challenge to the trustee's behavior when managing – or failing to manage – trust assets is completely different from challenging the terms of the trust, and is *not* cut off by the 120 day notice period.

If the decedent's assets are handled in probate court, then all of the beneficiaries named in the will and the (potential) intestate heirs will receive a copy of the petition for probate, and a formal notice telling the date, time, and place where the court will review the petition for probate. If one of them shows up in court to object, the court will set a hearing date to take evidence and review the arguments made by the participants about whether or not the will is genuine, or who should be named to administer the estate.

Identifying the Assets

Another core task of the person managing the decedent's trust or estate is identifying the assets. If the decedent was organized – or if they didn't have a lot of property – this can be easy. It can be as simple as a single checking account – or as complicated as tens of bank and brokerage accounts, multiple real estate parcels in multiple states, and many personal loans made to various friends and family members that need to be identified and collected.

This is an opportunity for you to do a favor for the people who will someday handle your assets – make a list of the things that you own, with account numbers, contact information, and approximate values. It's not realistic to expect that this will be perfectly up to date, but a list that's even a year or two out of date can be a big help.

One of the best sources for information about a decedent's property is their tax return, if they're making enough money to be required to file. Almost everything that we can own has some sort of tax consequence – if it's a financial account, it probably pays interest, or dividends, or reports capital gains, or you receive rent or distributions from it, and those items all end up on a tax return. Real property has property taxes that are deductible, so a person's property tax bills are usually itemized on their tax return, or at least filed in the same folder. Pensions and annuities generate 1099 forms, which are reported on the tax return, or filed in the same folder.

In addition to identifying assets, the person handling the trust or estate must get control of the assets – if the asset is real estate, we record an Affidavit of Death of Trustee, or a copy of the Letters of Administration, to give notice to the world that the decedent is no longer in charge of the property, but the trustee or administrator is. If the property is a financial account, we contact the financial institution and provide them with a Certification of Trust, or the Letters of Administration.

The person handling the estate is also in charge of getting a value for the asset as of the decedent's date of death. This is used, for most assets, to determine the income tax basis. The "basis" is what's used as the starting point to determine whether there was a taxable gain or loss when a decedent's property is sold, whether by the trustee/administrator during the administration process, or later by a beneficiary.

Real estate is usually valued by paying for a formal appraisal. While clients are often a little unhappy at paying for the appraisal, it's much better to have a written, documented opinion from a licensed professional if the valuation is questioned years or decades later by the IRS.

Stocks are valued by calculating the average of the daily high and low prices on the stock market on the date of death. Mutual funds are valued with the daily price as of the date of death. When someone dies on a weekend or other day when the financial markets are closed, we use the average of prices from the previous and next trading days. We have software in our office that calculates this, and most full-service brokers will handle this for their clients.

Bank accounts are comparatively easy to value – we get the statement issued after death, look at the value on the statement, and adjust it for transactions that happened after the date of death.

Collectibles – stamps, coins, antique/collector automobiles, figurines, and so forth – are usually evaluated by a professional who will prepare a written report.

Personal property of relatively low value – ordinary household furnishings, clothing, and personal effects – is usually given to family, donated to charity, or discarded without a lot of concern for its value. If necessary, it can also be valued professionally.

Inheritance Taxes

Inheritance tax – also known as estate tax, or "death tax" – is, luckily, something that most Californians need not worry about. The federal government imposes a tax when US citizens give away – during their lifetime, or at death – more than $5,340,000 (as April 2014.) Most of us would be delighted to have that problem.

For people with more than $5.34 million, there are two big exceptions to the estate tax – gifts to US citizen spouses, and gifts to charities. There is no tax due on a gift – in any amount – given to a US citizen spouse, or a tax-exempt charity. If Bill Gates dies and leaves his billions to his wife Melinda, no tax will be due. The IRS is willing to wait until Melinda dies, and they can collect their money at that time. Realistically, he's already said he's planning to leave the vast majority of his wealth to charity – and neither his estate nor the charities will need to pay a dime of estate tax when those generous gifts occur.

At the state level, California doesn't impose an inheritance tax at all – and to create one, it would be necessary to amend the California constitution, which isn't exactly easy. It's not impossible either, but that's not the sort of change that the Legislature can sneak through in the last few minutes of a legislative session.

However, not all states are as lucky as we are – Connecticut, Hawaii, Iowa, Kentucky, Maine, Maryland, Nebraska, New Jersey, Oregon, Pennsylvania, Tennessee, Washington, and Washington, DC all impose some form of estate, inheritance, or succession tax. California residents may be subject to those other states' taxes if they own real or personal property in those states. If you receive an inheritance from a resident of one of those states, it may be a little smaller when you finally receive it.

Property Taxes

Property taxes are often underestimated as a source of danger to your fortune. Real property in California is taxed at 1 percent of the assessed value, per year, plus various local charges. It's usually safe to expect to pay between 1.1 and 1.25 percent of the assessed value – look at your own property tax bill to find out what rate you're paying.

Longtime California residents appreciate the difference between "market value" and "assessed value." In 1978, the people of California enacted Proposition 13, which fixed the assessed values of real property at their 1975 values, the state tax rate at 1%, and allowed the assessed value to be increased each year by only 2%. However, there are two important exceptions to that rule – property is reassessed (to current fair market value) when property is transferred from one owner to another, or when new construction occurs.

This means that people who have been in their homes for a long time likely have comparatively low property taxes. It's common for me to meet with people who live in homes that could sell for more than a million dollars – but the county tax assessor's records show the house is worth something like $100,000. At a 1.1% rate, that's the difference between paying $1,100 per year, and $11,000 per year.

This means that property tax can be a big part of a family's yearly budget – and it can make the difference between owning a home or being priced out of the market.

Because of this, it's very important to be aware of the property tax rules when buying and selling property – and when leaving your property to the next generation.

There are two big exceptions to the "property reassesses upon transfer" rule – transfers between spouses are exempt, and transfers between parents and children are exempt. This means that spouses can be added and subtracted from title without property tax consequences, often because of marriage or divorce.

This also means that if you leave your house to your children when you die, the property taxes won't increase when they take title to the house.

While this is a very important exception, it's not as easy as it sounds. In families with more than one child, often one of the children want to take over the family home when Mom and Dad have passed away – so they want to buy the other children's interests in the family home.

Unfortunately, the property tax authorities view that as a sibling-to-sibling transfer, not a parent-child transfer, and they'll reassess the parts of the house purchased from a brother or sister.

Let's imagine that Mom & Dad have been living in their house since the 1970's. The house may be worth $900,000 on the open market today – but Mom & Dad's assessed value is only $100,000, so their property tax bill will be approximately $1,100 per year.

When Mom & Dad die, they leave their house (along with all of their other property) to their three children in equal shares. If the trustee is in a hurry to finish trust administration, and doesn't pay attention to property tax, they'll deed the house to the three children as tenants in common. Then, the child who wants the house will get a $600,000 loan (hopefully they can qualify!) and purchase the other two siblings' interests in the home.

This is where disaster strikes – the county will view that transfer as occurring between siblings – they're right, it is – and they'll reassess the 2/3 of the property that's changed hands (the child keeping the house inherited the last 1/3 from the parents). The new assessed value of the house will be $633,333 - $600,000 for the 2/3 purchased from siblings, and $33,333 for the (not reassessed) 1/3 received from parents. This means the property tax bill will be approximately $6,966 per year.

We can get a much better result than that – if the trustee is smart enough to get help from an experienced trust administration attorney, it may be possible to preserve the old assessed value for the entire property – so the property tax bill would remain at $1,100 per year, saving the child living in the house $5,800 per year. That adds up to a big savings very quickly – and it's even possible for the child who ends up in the home to pass it (and the low property taxes) down to their children, keeping the property taxes low for the extended family for decades.

How is this done? Instead of distributing the house to the three siblings, and then having them buy/sell amongst themselves, the trustee must borrow against the house before it's distributed. Keeping the same numbers – a $900,000 house split among three children – the trustee would find a lender willing to make a $600,000 loan secured by the home. The trustee now holds two assets – a $900,000 house burdened with a $600,000 mortgage, with net equity of $300,000 – and a bank account with $600,000 in it. (I'm ignoring closing costs for the loan for simplicity.) The trustee then distributes the home – whose value is $300,000 – to the child who wants the house, and $300,000 in cash to each of the other children. The tax assessor is satisfied, because the property transfer occurred between parent(s) – or, more precisely, their trust or estate – and a child, so no part of the property is subject to reassessment. The children who receive cash will receive the same amount they would've received if they'd sold their part of the house directly to their sibling, so there's no injury or inconvenience to them. The child who wants the house is delighted, because they're saving almost $6000 per year on their property taxes.

So what's the downside? It can be aggravating and expensive to find a lender who's willing to lend money to the trustee of a decedent's trust. There's usually no income available to make the monthly payments – so the lender is worried that the trustee won't be able to repay the loan. Most banks and conventional lenders won't make this sort of loan, so the trustee must turn to unconventional, or "hard money" lenders, and the terms they offer aren't as attractive as the rates or terms you see in big letters in the windows of your local bank, or in flashing ads on the Internet. It's not shocking to hear that a lender wants 3 points – 3% of the value of the loan – as their fee for making the loan. Therefore, it's important to do the math, and figure out how many years of reduced property taxes it'll take to repay the cost of the loan.

There are two other opportunities to minimize property taxes. The first is the opportunity created by Proposition 60 to move your base year within the same county. This option is only available to a person – or their spouse – who sells their principal residence when they're at least 55 years old. They can then purchase another residence in the same county, and transfer their old property tax base year to the replacement residence, which keeps their property taxes low in the new property. Proposition 60 is meant to allow senior citizens to downsize, perhaps from a large home where they raised their children to a smaller home more appropriate to a retired person or couple who don't need many bedrooms or a big yard for children to live and play in. It's not meant to allow people to trade up to a bigger, fancier home – so the base year can only be moved if the price of the replacement residence is equal to, or less than, the sales price for the home that was sold, if the new home is purchased (or constructed) before the old home is sold. If the new home is purchased within the first year after the old home was sold, the new home can be up to 105% of the sales price of the old home. If the new home is purchased within the second year after the old home was sold, the new home can be up to 110% of the sales price of the old home. Proposition 60 cannot be used more than 2 years before or after the old home is sold.

Proposition 60 can only be used once in your lifetime –

you can't swap homes every few years.

Proposition 90, which is very similar to Proposition 60, provides the second opportunity to people who move from one county to another. This sounds like a great opportunity – the problem is that each county gets to choose whether they'll allow transfers in using Proposition 90, and only nine counties (at the time this is written in April 2014) allow incoming transfers of base year values with Proposition 90:

Alameda
El Dorado
Los Angeles
Orange
Riverside
San Diego
San Mateo
Santa Clara
Ventura

In my experience, most people who want to use Proposition 90 are hoping to move away from the crowed, populated, urban counties and want to move to a quieter, more rural setting. While this can be found in El Dorado and some parts of Riverside counties, the other counties rarely feature the lifestyle or setting potential Proposition 90 users are seeking.

The opportunities provided by Propositions 60 and 90 are attractive – but they're even better when used with Proposition 58, which allows transfers between parents and children without reassessment.

Imagine that Mom has been living in the family home for 50 years – but she is in her late 80's, and is planning to move to a senior apartment, or an assisted living facility. One of Mom's children hasn't purchased a home yet. He wants to, but he hasn't been able to qualify for a mortgage while paying the property taxes charged on a newly purchased home.

Instead of selling her home and moving straight into an apartment or assisted living, Mom could purchase a home that would be a good match for the child who wants to buy a home. Mom can transfer her base year value from the family home where she's lived for decades, to the newly purchased home. As long as the value is less than or equal to the value of Mom's home, and the timing is right, Mom can move her low property tax value to the new home, assuming she will live in it as her primary residence for some time. When she's ready to make the final move, Mom moves out of the new home and into a senior apartment or assisted living – and sells or gives the new home to her child, who can use Proposition 58 to prevent reassessment from the decades-old base year value that Mom transferred from the family home.

Income Taxes

Income Taxes for the Decedent

The tax year for a person who passes away begins on January 1 (just like the rest of us) and ends on the date of their death. A person who has passed away is treated just like the rest of us for tax purposes– they're entitled to a personal exemption, and they can use the standard deduction or they can itemize their deductions.

If one spouse in a married couple dies, the survivor can file "married filing joint" in the year when the death occurred. After that year, they file taxes based on their new status – single, or head of household (if they qualify), or married (if they remarry).

The due date for a return for a decedent is the same as for the rest of us, too – April 15, extendable to October 15, and moved to the following business day if the 15th falls on a weekend or a holiday.

If the decedent was married, the surviving spouse will usually take care of the tax return. If the decedent wasn't married, the person in charge of the decedent's trust and estate is responsible for filing the return.

If the decedent didn't file a tax return because their income was low, it's likely no return will be required after their death.

The income and expenses for a decedent's return are what you'd expect – they're the same as they would've been if the person had lived all year, except they stop on the date of death. If a person dies on June 30, all of their income and expenses for the year – whatever happened between January 1 and June 30 – belongs on their personal income tax return. Income and expenses that occur after the date of death belong on either a trust income tax return, or an estate income tax return. They might also show up on the return for a surviving spouse, if they reflect income paid to a surviving spouse, or expenses paid by a surviving spouse.

Income taxes for the trust

Often, people are surprised to learn that trusts file tax returns, too. Trusts –and estates – file their federal income tax returns on form 1041 and their California income tax returns on form 541. You probably file your individual federal return on a Form 1040, and your California return on a form 540.

The tax year for a trust begins on the day it is created. Because ordinary revocable living trusts are written to be completely neutral from an income tax point of view, the IRS doesn't think that a revocable trust exists until the day after its creator dies. So, if Ronald Reagan had created the Ronald Reagan Trust while he was Governor of California (and a California resident), his trust might have been called "The Reagan Family Trust under agreement dated January 1, 1974." But, from the IRS' point of view, that trust wouldn't have had a separate identity (for income tax purposes) until he died – so the tax year for his revocable trust would start on June 6, 2004, the day after his date of death.

The tax year for a trust usually ends on December 31 of the calendar year. The trustee of the trust and the executor of the estate (quite frequently the same person) can have the trust and the estate file a single return to cover both entities. If this happens, the trust will file on the estate's schedule, which doesn't necessarily end on December 31.

Income taxes for the estate

If you're unlucky enough to have a probate estate to work with, the tax year for the probate estate begins on the day after death. The executor can end the tax year on the last date of any month except the month of death – after the first tax return is filed, where the executor chooses a year end, then returns are due on the 15th day of the 4th month after the end of the tax year.

Why would the executor want to choose a tax year that ends in a month other than December? Often, they won't. Most of us are accustomed to working with a tax schedule based on the calendar year. April 15 is the 15th day of the 4th month after December 31, which is when the tax year ends for individuals.

Sometimes an estate administration is over quickly (rarely, if the probate court is involved) and the executor and the beneficiaries want to wrap things up quickly. If the decedent passed away on September 15, and everything has been wrapped up by May 15, the executor could have the tax year end in May. This means that all of the activity would fit within one tax year, even though it happened in two calendar years. The administrator then needs to file one tax return (covering September 16 through May 31 of the following calendar year), which would be the initial and final return. Putting all of the activity on one tax return minimizes the cost of filing a tax return for the estate.

On the other hand, it can be confusing to work with tax years that aren't calendar years – most tax forms and software are written with calendar years in mind, and most of us are accustomed to thinking about taxes in February, March, or April and forgetting about them the rest of the year.

Advanced Topics

Probate

Probate is a court-supervised process for managing and distributing a decedent's assets after they have died. Some states have relatively streamlined, simple procedures for probate, and even multi-million dollar estates are processed through their court systems. California's probate process is comparatively slow and expensive, so most people choose to avoid it.

A probate begins when one or more people file a *petition for probate*, which is a little like a lawsuit except that it's not always an adversarial proceeding. In the petition for probate, the petitioner (the person who is asking the court to do something) usually requests that they be appointed as the administrator (manager) of the decedent's estate. Sometimes several people want to be the administrator, and they will file competing petitions for probate. Sometimes some heirs or family members feel that the petitioner isn't a good choice to be the administrator, so they will file an opposition to the petitioner's request to be appointed.

In most cases, however, petitions for probate are unopposed, and there aren't competing petitions. Whatever the situation, the judge's job is to sort through the different requests and name *someone* to be in charge of the decedent's estate.

If the decedent had a will, it's included with the petition for probate, and part of the petition asks that the judge rule that the will shall be treated as genuine, and given legal effect. Once in awhile, there are multiple wills, and there are arguments about which will is the latest (a will should *always* be dated), whether the will(s) are genuine, and whether or not the person who made the will was competent at the time they made the will, or if they were subject to undue influence.

The judge looks at all of the papers that have been filed, and chooses someone to act as administrator, and decides whether the will(s) that have been provided are genuine. Once the judge has decided, they will issue an Order for Probate, and Letters of Administration. The Letters are proof to others – like banks, brokerages, or title companies – that the administrator really is in charge of the estate, and they show the limits (if any) on what the administrator is allowed to do with estate property.

As soon as the Letters are issued, the administrator is obligated to send a notice that the probate is pending to every known creditor of the decedent. The administrator also provides the creditors with a copy of the claim form, which allows the creditors to notify the administrator and the court that they believe they were owed money (or something else) by the decedent. The creditors have 120 days from the date the letters were issued – or 60 days from the date they received notice of the administration, whichever is later – to file a claim with the court and the administrator of the estate. If the creditors don't file their claim within the required period, they're out of luck and the administrator isn't required to pay them.

During the four months after the Letters are issued, the administrator must file with the court an Inventory and Appraisal of the estate's assets. The administrator is responsible for valuing easy-to-value assets such as cash and bank accounts. A person known as a Probate Referee appraises property whose value is less obvious, or where valuation depends on a professional opinion. The probate referee is essentially a court-approved appraiser. The probate referee can value real property, personal property, and intangible property like stock, trademarks, copyrights, and so forth.

Once the administrator and the Probate Referee have come up with values for all of the decedent's property, the administrator files the Inventory and Appraisal form with the court, creating a public record of the type and value of the decedent's property as of the date of death.

If the administrator receives a claim form from a creditor, they have 30 days to respond by either approving or rejecting the claim. If the claim is rejected, the creditor must bring an action in court to contest the rejection, or the rejection will stand.

After all of the decedent's property has been inventoried and all of the decedent's creditors have been identified, the administrator is in a position to pay the decedent's debts. It may be necessary to sell estate property to raise cash to pay debts. If the estate has more debt than assets, then creditors will receive a fractional amount of their claim – or nothing – depending on what assets are available, and whether the debt was secured or unsecured.

After all of the debts have been paid, it is time to distribute assets. The administrator prepares and files a petition with the court, presenting an accounting of the property held at death, gains, losses, income, and expenses that occurred during the estate administration. The petition asks for the court's permission to make distributions to the people who will inherit the estate, and for permission to pay the executor's and attorney's fees. If everything has been done correctly, the court will issue the order, everyone gets paid, and the probate is closed.

Intestacy – Dying without an Estate Plan

When I die, will the government take all of my stuff?

No.

While it's technically possible for a decedent's property to go to the state – called *escheat* – this is very, very uncommon.

What is much more common is that a decedent's property will go to the same people they would have chosen, if they'd made a will or a trust – but it'll probably be a lot more expensive and slower than it needed to be.

Sometimes the decedent's property goes to the last people they would ever have chosen – this is most likely where there are disagreements within families, or bitter divorces.

And sometimes the decedent's property goes to distant relatives they never met, or hadn't spoken to in decades.

Those results are all perfectly avoidable – but imperfect creatures that we are, it's common for people to procrastinate or avoid putting together an estate plan.

One of the core purposes of a legal system is to minimize confusion, ambiguity, and disputes about ownership and rights. Rather than leaving the families and friends of decedents to fight amongst themselves about ownership where a decedent hasn't left instructions for the disposition of their property, each state provides its own default estate plan – called *intestacy* – for people who haven't made one themselves.

An intestate estate is handled just like a probate for a person who dies with only a will, except that it's handled according to the default plan thoughtfully provided by the California Legislature.

A Single Person's Default Estate Plan

If a single person dies without making an estate plan, this is (approximately) the default plan provided by California law:

If I have living children, I leave all of my property to my children in equal shares. If I have deceased children who had children (my grandchildren), then those grandchildren shall split what would have been their deceased parent's share in equal parts.

If I have no living descendants, I leave all of my property to my parents. If I have no living parents, I leave all of my property to my brothers and sisters. If I have no brothers and sisters, I leave all of my property to my grandparents. If I have no grandparents, I leave all of my property to my nieces and nephews. If I have no nieces or nephews, I leave all of my property to my cousins. If I have no cousins, I leave all of my property to my nearest relatives.

The court shall choose someone to be my executor. That person shall be chosen from this list, in order, if possible:

Children.

Grandchildren.

Other issue.

Parents.

Brothers and sisters.

Issue of brothers and sisters.

Grandparents.

Issue of grandparents.

Children of a predeceased spouse

Other issue of a predeceased spouse

Other next of kin.

Parents of a predeceased spouse

Issue of parents of a predeceased spouse

Conservator or guardian of the estate

Public administrator.

Creditors.

Any other person.

If I have minor children, the court shall choose someone to be their guardian. That person shall be chosen from this list, in order, if possible:

1. The other parent, even if they're a deadbeat who hasn't paid a dime in child support or sent a Christmas card or a birthday gift in 10 years.

2. The person(s) in whose home the child has been living in a wholesome and stable environment.

3. Any other person deemed by the court to be suitable and able to provide adequate and proper care and guidance for the child.

If I have minor children and I leave property or money to them, the court shall take control of the money or property. The money or property can be given to an adult to manage on the child's behalf, and the adult must report yearly to the court about how the money is used; or the court may place money in a special blocked bank account, where money can only be removed after a court hearing. On my minor children's 18^{th} birthdays, they shall be given immediate and unsupervised access to all of the money and property I have left to them, to spend as quickly as possible on whatever an 18 year old thinks would be fun.

A Married Person's Default Estate Plan

(See page 4 for a description of community property and separate property.)

I leave half of my community property to my spouse.

I leave the other half of my community property to:

My children in equal parts.
My parent(s) in equal parts.
My brothers and sisters in equal parts.
My nieces and nephews.
My grandparents.
My aunts and uncles.
My cousins.
[My other remote family, or family of a predeceased spouse]

If I die without any surviving children, grandchildren, parents, brothers, sisters, nieces, or nephews, then my spouse gets all of my separate property.

If I die with only one child, or grandchildren from only one deceased child, or no children but living parent(s) or brothers or sisters or nieces or nephews, then my spouse gets half of my separate property, and the other people listed in this paragraph get the other half.

If I die with two or more children, or children who have died leaving me with grandchildren, then my spouse gets one third of my separate property, and the other two thirds shall be split among the other people listed in this paragraph

The court shall choose someone to be my executor. That person shall be chosen from this list, in order, if possible:

Spouse.
Children.
Grandchildren.
Other issue.
Parents.

Brothers and sisters.
Issue of brothers and sisters.
Grandparents.
Issue of grandparents.
Children of a predeceased spouse
Other issue of a predeceased spouse
Other next of kin.
Parents of a predeceased spouse
Issue of parents of a predeceased spouse
Conservator or guardian of the estate
Public administrator.
Creditors.
Any other person.

If I have minor children and I leave property or money to them, the court shall take control of the money or property. The money or property can be given to an adult to manage on the child's behalf, and the adult must report yearly to the court about how the money is used; or the court may place money in a special blocked bank account, where money can only be removed after a court hearing. The court shall make my spouse follow these rules when managing this money for my children, even though my spouse is a functioning adult (and now a single parent) who can be trusted to manage hundreds of thousands of dollars or millions of dollars in other assets without any oversight or supervision. On my minor children's 18^{th} birthdays, they shall be given immediate and unsupervised access to all of the money and property I have left to them, to spend as quickly as possible on whatever an 18 year old thinks would be fun.

The Nightmare Scenario

The default plans described above are actually pretty close to what many people want, so they're not always a disaster, though they could usually be carried out much cheaper and much more quickly without going to court.

However, that's not the whole story. Once in awhile, the default rules – that work pretty well for most families – create a totally unacceptable result.

Let us imagine, for a moment, that you have worked hard for all of your life to accumulate some money and some property for the benefit of yourself and your spouse, and your lovely child. You, your spouse, and your child are happy, healthy, and well adjusted. Everything's great. And your child meets someone special, and they fall in love, and get married. Everything's even better now.

Except . . . your child's spouse isn't so great after all. They drink too much. They're unfaithful. They gamble away money meant to pay the mortgage. They're physically or emotionally abusive, except when they suddenly disappear for a few days and eventually wander back home wearing someone else's pants and no shoes.

Your child and their spouse decide that what they need to fix their struggling marriage is to have a child! So they do. And it turns out that adding a child to an already troubled relationship doesn't help.

So your child divorces the loser. And the judge in family court sees what an awful human being the other parent is (wouldn't this be nice?) and gives your child sole custody, and tells the ex-spouse they must pay child support.

The ex doesn't pay their child support, but otherwise has the decency to go live their life of debauchery somewhere else. Your child moves back in to your house, goes to work every day, works hard, and raises your beautiful, intelligent, charming grandchild as a single parent.

Now tragedy strikes. You and your spouse get sick, or you're in a terrible accident. You die, and your spouse dies. You're responsible, caring people so you have an estate plan that gives all of your money and your house to your child, who will continue to live in the home, raising your grandchild, doing the best they can.

And tragedy strikes again. Your child is in a terrible accident, or gets a terminal disease. Your child dies, and they didn't have an estate plan, because they're young, and young people never get sick or die.

However, the State of California is here to rescue the family. Your child's estate will be distributed according to the single person's default estate plan. Except . . . that means that everything goes to the very young grandchild, who certainly can't manage it on his or her own. So . . . your beautiful grandchild is sent to live with the deadbeat ex-spouse. Or the deadbeat ex decides to come live in *your* house so they can take better care of *their* child. And the deadbeat ex-spouse is now the grandchild's closest living relative, so the court appoints them as the manager of the grandchild's money and property, until the grandchild – now being raised to follow the example of the loser parent – turns 18, when the child will get unrestricted access to everything.

And that's an unpleasant picture. But it gets worse.

What if something happens to the grandchild? What if – due to lack of supervision, or following a bad example, or through simple neglect – the grandchild suffers from emotional distress, or drug or alcohol abuse, and dies – in an accident, or by overdose, or suicide? They were too young to make their own estate plan. The default estate plan is here to save the day, taking care of all of your property – given with love and careful planning to your child – who then left it to *their* child. In addition, upon that child's tragic death, the default estate plan says that all of the accumulated property goes to . . . the child's living parent. Your child's horrible deadbeat ex-spouse. The person who made your child and your grandchild miserable. Now they end up with all of your family's money, and your house, and they have plenty of cash to spend while looking for a new, younger spouse who doesn't have any annoying children.

Before I started working as an estate attorney, I probably would've said that scenarios like that never happen – that it's a contrived example meant to scare people. I would have been wrong. I've worked with several families in situations like that. They can and do happen. They're heartbreaking. When they do happen, there's very little to be done about it. The law says what it says; the rules about property passing to children and parents, in the absence of a written plan that specifies something else, might as well be carved in stone. While those rules usually create reasonable results, once in awhile they produce terribly unjust and inappropriate results.

What can be done? If the child in the above scenario had created an estate plan, they could've left property in trust for the grandchild. The property would have been managed by a trustee (who wasn't the evil ex-spouse) until the grandchild was 20, or 25, or 30 years old. That way, the property would never belong to the child – so the child couldn't be tricked into giving it to the other parent upon turning 18, wouldn't get a chance to spend it on wasteful or speculative things, and the money and property wouldn't automatically go to the other parent if the child died without creating their own plan.

Nursing home care

Nursing home care – and the cost of nursing home care – is a great source of anxiety and worry for many people. So let's get a few myths and misunderstandings out of the way first.

Not everyone will need nursing home care – and of people who need nursing home care, many of them experience short stays covered by Medicare or veterans' benefits, so the out-of-pocket cost for the family is minimal, or zero. Medicare will cover short nursing home stays that are necessary for recovery from a disease or condition that's covered by Medicare. If an elder falls and breaks a hip, stays in the hospital for a few days and is discharged to a nursing home for rehabilitation, then that nursing home stay will be paid for by Medicare. The same is true for nursing home care following a surgery.

There are alternatives to nursing home care – either cheaper, or more luxurious (but not both, generally). Nursing homes are also called, in the bureaucratic language, "Skilled Nursing Facilities" or SNFs. Other types of facility may be a better match for an elder's needs, or a family's budget.

Many of my clients have received care in what's known as a "board and care" facility. The bureaucratic name for these is a "Residential Care Facility for the Elderly," or RCFE. These are usually traditional single-family homes converted to provide housing for a small (perhaps 4 to 10) number of residents in a home-like setting. Meals are cooked right in the kitchen, and often served at a dinner table much like you may have in your own home. Residents typically sleep in single or double occupancy bedrooms, and spend their days reading, watching TV, playing board games, or socializing. The staff may live in the home, or there may be shifts of workers who come and go throughout the day. The staff is onsite all day and all night, every day of the year, so the residents aren't left alone. The staff will typically make sure the residents get any necessary medications on the correct schedule, and provide assistance with bathing, toileting, dressing, and eating as needed. In Santa Clara County in 2014, I'm accustomed to hearing people pay somewhere between $2000 and $4000 per month to stay in a board-and-care, which includes food, housing, and personal assistance from the staff. The staff are not nurses or doctors, and don't provide medical assistance, but they can help with basic personal care tasks. Board-and-care facilities can be a good choice for someone who can no longer live alone due to age or a decline in health, but want to avoid the institutional feel of a nursing home, and want to be in a more family-like setting.

Another option is "assisted living", which sometimes looks more like a large scale board-and-care, and sometimes looks like a nicer, more homelike nursing home. Assisted living are licensed as Residential Care Facilities for the Elderly – but they're usually much larger facilities, often have single rooms or single apartments for residents, and may feel more like a hotel or a single apartment than a family home. They're typically more expensive, and are more likely to have onsite facilities such as dining rooms, movies, game rooms, and so forth. They also do not provide medical care, but will typically provide assistance with eating, bathing, dressing, toileting, or medication management, sometimes for an additional fee in addition to the monthly charge.

Some people require a higher level of care than is possible in a board-and-care or assisted living. California law requires people who are using a feeding tube or who are being treated for bedsores receive medically supervised care in a nursing home or a hospital. Other people may need nursing home care because they aren't mobile enough to get out of bed; or because their mental state means they are unable to care for themselves, or to avoid doing dangerous or irrational things.

If long-term nursing home care is necessary, the cost can quickly exhaust a lifetime of savings. This book is being written in April 2014 – according to the California Department of Healthcare Services, the average cost in California for a month of nursing home care is $7549. My clients tell me that they're paying between $6500 and $8000 per month for care in Santa Clara County.

There are three ways that people pay for long term nursing home care: self-pay, long-term care insurance, and Medi-Cal.

Self-pay

Self-pay is what it sounds like: the nursing home resident, or their family, pays the nursing home directly for care. If the family has substantial savings, this may be the preferred alternative. There's a special version of the Golden Rule for nursing homes: the guy who has the gold makes the rules! If you're paying the bill directly, you have the widest variety of choices among facilities, and can choose a private room in whatever facility is most pleasant, or closest to family members who will come to visit. At up to $8,000 per month – or $96,000 per year – a long-term stay in a nursing home requires a lot of cash.

Long term care insurance

Long term care insurance can be a big help in paying for care. It will often pay for care in your home – or a board-and-care facility stay – or a nursing home. It's worth considering, if you can afford it. People who sell long term care insurance have told me that the "sweet spot" for purchasing long term care insurance is approximately 65 years of age. If you buy long term care insurance a lot earlier than 65, the premiums are lower, but you may be paying premiums for 30 – 40 – even 50 years before you actually need the benefits. On the other hand, waiting too long can mean that the cost is prohibitive or that the insurance companies won't even write the policy, if the potential buyer has been diagnosed with a health condition that makes long term care a virtual certainty.

Medi-Cal

Medi-Cal is California's version of the federal Medicaid programs. It is intended to pay for medical care for people who couldn't otherwise afford it. The good thing about the Medi-Cal program is that it helps many people with no other alternative. Unfortunately, in most California counties, Medi-Cal will only pay for care in a real nursing home – they won't pay for a board-and-care, even though it might cost half as much as a nursing home and provide a much nicer setting for the elder person.

The exceptions are the counties of Alameda, Contra Costa, Fresno, Los Angeles, Riverside, Sacramento, San Bernardino, San Diego, San Joaquin, and Sonoma. Those counties implement a program known as the "Assisted Living Waiver," and it is possible for a person who would be eligible for nursing home care to receive care in a board-and-care or assisted living facility that meets certain criteria.

Medi-Cal for long term care can be understood in three phases: qualification, maintenance, and estate recovery.

Medi-Cal Qualification

Medi-Cal benefits are limited to people whose assets are below certain limits. At the time this is written in April 2014, the asset limits for a single person who needs nursing home care are:

One home of any value
One vehicle of any value
$2,000 in cash or other assets

The asset limits for a married person who needs nursing home care, who has a spouse living at home, are:

One home of any value
One vehicle of any value

$119,240 in cash or other assets

Retirement accounts in the name of the Medi-Cal applicant such as IRA or 401(k) accounts are not counted as assets as long as the applicant is receiving regular distributions from the account at least yearly. Almost everyone who needs Medi-Cal for nursing home care is older than 70 ½, so the IRS' rules already require that they take Minimum Required Distributions (MRD's, or RMD's), so this is not usually a problem.

If a person needs nursing home care but has assets beyond those limits, the standard Medi-Cal answer is that they need to spend the assets on their care before they will be eligible. A good Medi-Cal planning attorney can usually help a family reorganize their assets and qualify within a few months.

Medi-Cal planning involves two basic strategies: converting non-exempt assets (that block eligibility) into exempt assets (that won't block eligibility). For example, it's not unusual for people of advanced age to defer maintenance on their homes in order to save money. Often, an older person's home hasn't been painted or maintained in years – the appliances are often out of date or broken, or the roof is failing. The older person may have been saving their cash for an emergency or a rainy day – but now that cash will block them from Medi-Cal eligibility. Instead of spending the savings on months of nursing home care, we might advise the Medi-Cal applicant to spend that money on improving their home. $30,000 in a bank account will prevent a single person from qualifying for Medi-Cal benefits; but if that $30,000 is exchanged for a roof and appliances worth $30,000, the applicant would be immediately eligible, and the value represented by the money isn't lost to the family. If the Medi-Cal applicant has a mortgage secured by their home, and they have substantial savings, the savings can be used to pay down the mortgage without causing ineligibility.

Sometimes, there are too many assets to spend on home improvements or a car. Perhaps the family would prefer to maintain some liquid funds to pay for necessities for the elder person, or the elder wants to see their savings passed down to the following generation(s). It can be very painful for someone who has spent decades carefully watching their money to see their thrift dissipated by a few weeks of spending, or to be used to pay for the same care in the same facility that they could get on the Medi-Cal program.

In those circumstances, a skilled Medi-Cal attorney can help the family transfer assets carefully to minimize any periods of disqualification caused by transferring assets. When a non-exempt asset is given away by a Medi-Cal applicant in order to gain eligibility, Medi-Cal will impose a penalty period as punishment for making the asset transfer. The penalty period is calculated by dividing the value of money or other property transferred by the average cost of a month's stay in a nursing home – this shows (roughly) the number of months of care that were transferred away. Medi-Cal says that the applicant will be ineligible for Medi-Cal benefits for that number of months, starting the first day of the month when the transfer is made.

Consider a single Medi-Cal applicant who has $18,000 in a checking or savings account. They're $16,000 beyond the asset limit for eligibility, and they decide to write a $16,000 check to one of their children on June 15 to bring their assets below the limit. We divide $16,000 by $7,549 – the "average private pay rate" (APPR), which is what the California Department of Healthcare Services has determined is the average cost for a month of nursing home care in California in 2014. The result is 2.12 months. The fractional .12 months are ignored, so the penalty period will be 2 months. The penalty starts to run on June 1 (the first day of the month when the transfer is made), so the applicant will be ineligible during June and July. On August 1 – assuming no other transfers were made, and that no additional assets are accumulated – the applicant would be eligible for long term care Medi-Cal.

Under the current rules, the worst case disqualification period is 30 months – so even if a person gave away 100 months worth of assets, they would only be ineligible for 30 months, or 2 ½ years.

There are several strategies for making transfers of assets that can be used to minimize the applicable penalties. A good Medi-Cal planning attorney can usually come up with an asset transfer strategy that will allow a typical middle-class family to qualify for long-term care Medi-Cal within 2 to 3 months. It is unnecessary to waste hundreds of thousands of dollars on nursing home costs before becoming Medi-Cal eligible.

Receiving Medi-Cal Benefits

While the Medi-Cal qualification process is focused on assets, during the Medi-Cal benefit period, most of our attention is focused on the income received by the Medi-Cal recipient. The Medi-Cal program expects the recipient to contribute almost all of their income towards the cost of their care. Medi-Cal then pays the difference between what the nursing home charges and the recipient's income.

Consider a single person who receives $1800 per month in Social Security payments, a pension of $800 per month, and takes a $1200 yearly distribution from their IRA (the equivalent of $100 per month). This person's monthly income, from Medi-Cal's point of view, is $2700 ($1800 + $800 + $100 = $2700). Medi-Cal allows a long term care recipient to keep $35 per month from their income to pay for personal care items, or a haircut, or other small things. The balance of the participant's income - $2665, in this case – is paid to the nursing home (usually by a family member acting on behalf of the participant) and is called the participant's "share of cost." The share of cost is calculated when the Medi-Cal participant initially qualifies for the program, and is recalculated when the Medi-Cal participant's income or expenses change.

Medi-Cal will then pay the difference. If the person in the above example stayed in a nursing home with a monthly charge of $8000, there would be a shortfall of $5335. That amount would be paid by Medi-Cal. Each payment by Medi-Cal on behalf of a person who is 55 or older is tracked by the Medi-Cal system. When the Medi-Cal participant (and their spouse, if they have one) passes away, then Medi-Cal requires that the people handling the decedent's (or spouse's) estate repay Medi-Cal for all of the benefits received at age 55 or later. This process is known as "estate recovery."

Estate Recovery

The Estate Recovery program is the subject of a lot of worry and misinformation. Many people believe – incorrectly – that when a person receives Medi-Cal benefits, that a lien is recorded against their home. While this is not literally true, Medi-Cal will track how much Medi-Cal has spent, and California law requires that they be repaid. One fact that's often overlooked is that the Medi-Cal claim does not need to be repaid while the Medi-Cal recipient *or their spouse* is still alive. Medi-Cal will wait until property transfers to the next generation before asking for their share.

The critical thing to understand about estate recovery is that it only applies to assets held by the Medi-Cal recipient at the time they die. If the Medi-Cal recipient transfers property out of their name before they die, then that property is outside the reach of the estate recovery program.

This means that even though a Medi-Cal applicant can own a home of any value, and a car of any value, and still be eligible for Medi-Cal, it likely makes sense to do some Medi-Cal planning before that person dies. The goal of that planning is not to create or maintain eligibility. The goal of that planning is to make sure that the Medi-Cal participant's property goes to their family or friends, instead of being sold to pay for the nursing home.

Planning for eligibility often involves transferring assets to get below the asset limits. Planning for estate recovery usually involves transferring assets to bring the Medi-Cal participant's resources down to zero, or as close as possible without impairing the quality of life of the Medi-Cal recipient. Therefore, even though a house or a car won't prevent someone from qualifying for, and receiving, Medi-Cal, most Medi-Cal participants and their families prefer to transfer those assets out of the participant's name prior to death to avoid estate recovery.

The good news is that since those assets are considered exempt – meaning they won't block eligibility – they can be transferred without triggering a period of disqualification. It's perfectly legitimate and sensible for an elder to transfer their home or their car to a family member to avoid estate recovery.

Depending on the value and type of assets involved, I often counsel people who want to qualify for Medi-Cal or avoid estate recovery to transfer their assets into a special irrevocable trust created specifically for Medi-Cal planning. An ordinary living trust, discussed earlier in this book, is a *revocable* living trust, meaning that the person who created the trust and put their property into it can revoke or change the trust at any time. A revocable trust does not protect assets from Medi-Cal for qualification or estate recovery. In order to move assets outside of Medi-Cal's view during the qualification process – and to keep them outside of Medi-Cal's grasp during the estate recovery process – the assets must be transferred out of the Medi-Cal recipient's control. This loss of control, which is required to protect the assets from Medi-Cal, is a very serious step that should only be undertaken when the need for long term nursing home care is almost certain.

Assets transferred away from the Medi-Cal recipient can be transferred directly to family members, or to a special irrevocable trust for Medi-Cal qualification. In most cases, the irrevocable trust is a better choice.

Divorce

What if I get divorced after making an estate plan?

When you file for a divorce, the court enters an automatic restraining order that prohibits either spouse from transferring their property (including into, or out of trusts) while the divorce is pending.

As the divorce is finalized, property and debts will be assigned from both spouses to one or the other.

When the divorce is final, each spouse should make a new estate plan. If they've lost a lot of property during the divorce, a simple will-based plan may be sufficient. If either have ended up with real property, they'll want to redo their trust as a single person.

The divorce decree will automatically cancel existing nominations of the ex-spouse as power of attorney, trustee, or executor. Nevertheless, it's still important to make a new plan, especially if the divorce was difficult or the former spouses are no longer on good terms. If you later remarry, redoing the estate plan is critical.

What if my kids get divorced?

If your children (or other beneficiaries) receive property from you at your death, the day they receive it, it's considered separate property, and they're not obligated to share it with anyone. This is true if they're single at the time they inherit, and it's true if they're married at the time they inherit.

However, their behavior after inheriting can turn that separate property – that they aren't obliged to share – into community property, that they would be obligated to share if they were to divorce, or if their spouse died with an estate or intestacy plan that gave their community property to someone else.

So it's important, especially if you're planning to give someone a significant amount of property, that they understand how important it is to pay attention to title. They must know when they're mixing separate property with community property and creating such a confused mess that a family court judge will throw up her hands and say "Forget it, this is all community property, split it in half!"

Should your ex-spouse get all of your property?

If you had children with someone you particularly dislike, you should pay special attention to your estate plan to minimize the chances that the other parent will end up with all of your property.

See the Nightmare Scenario at page 69 for a more detailed discussion of this – but the short version is, imagine that you give all of your property to your child when you die. Your child dies without an estate plan because they were too young to make their own, or because they never got around to making one. Maybe they like their other parent more than you do. Either way, your child's property, if they don't have children or a spouse of their own, will likely go to their living parent if they die. You're already dead. You've already given all of your property to your child. Now they're dead, and all of their property goes to . . . the other parent, who you don't like.

This means that your will or trust must specify that your child cannot inherit property directly until they're at least 18 years old, and you may even want to make that age 21, or 25, or 30. If the property intended to benefit your child is given directly to them, it will be subject to their estate plan, or their lack of an estate plan. You can specify in your plan that your property should be used to benefit your children but never given to the other parent. If you're in this circumstance, this is a significant risk that deserves attention.

Blended Families – Remarriage

One of the challenges of estate planning in modern times is coping with what we call "blended families" – where some or all of the husband's children aren't related to the wife, or vice versa. Remarriages with children from one or both sides can be emotionally difficult. After one or both spouses have died, it can be even worse, if there is bad blood or resentment between the two different "sides."

The core fear is typically that one "side" or the other will be treated unfairly – that they won't receive the assets they're (in their view) rightfully entitled to, or that they'll have to wait too long to enjoy them. Sometimes the fear is that one spouse dislikes the other's children, and will disinherit them. Sometimes the fear is that upon the death of one spouse, they'll be replaced (people who worry about this usually imagine the replacement spouse is younger and more attractive) with someone who soaks up all of the family's wealth and prevents it from going to the rightful heirs.

There is no perfect solution to this problem. One approach is to segregate some assets upon the death of the first spouse, into one or more trusts that the surviving spouse has limited access to, or no access to. Sometimes couples even choose to distribute some assets immediately upon the death of the first spouse.

In most families, it's tough to find a balance between providing adequately for the surviving spouse's needs and desire to keep living the same lifestyle the partners enjoyed together (often with a significantly reduced income) and making sure that the surviving spouse doesn't deplete the assets unacceptably.

I haven't found an easy answer to this, and I don't think there is one. Often it's possible to find an acceptable solution – sometimes this involves purchasing extra life insurance, or otherwise reallocating assets to take care of everyone.

People with Special Needs

Many people have loved ones who aren't able, for practical or bureaucratic reasons, to manage their own assets. This may happen because a person is born with disabilities or medical conditions. People may become disabled at any point in their lives due to injury or disease. Some people's disabilities take the form of mental illness or difficulty with social integration. Other people's disabilities manifest themselves as an inability to control their drinking, drug use, gambling, or other compulsive behaviors.

There are three basic concerns when planning for people with special needs:

1. Providing adequate support. Particularly where a person's disabilities are profound and long-lasting, the special needs person may be dependent on you for daily support. This may be financial, practical, or both. If you have family members who may outlive you by 10, 20, or 30+ years it's important to think about how you can continue to help them after you're gone – whether that means making sure they can continue to live in your house, or that funds are available to pay for food, shelter and housing elsewhere.

2. Coordination with public benefits. Many people with special needs receive some sort of public assistance. The three most common are SSI (available to people who have never been able to work due to their disability), SSDI (available to people who worked and paid into the Social Security system, then became disabled), and Medicaid (in California, we call this Medi-Cal.) SSI and SSDI provide beneficiaries with financial assistance to pay for food, housing, and clothing. Medi-Cal is typically available to people who are receiving SSI or SSDI (and in some other

circumstances) and it provides health insurance coverage. Each of these programs has limits regarding the income, assets, and ability to work circumstances of the beneficiary. When planning for a special needs person, it's important that we think carefully before giving them a gift which will cause them to be ineligible for assistance programs. If you are in a financial position to make a very generous gift that can support them indefinitely, then losing the modest benefits provided by those programs may be unimportant. On the other hand, even a relatively small inheritance can be a disaster for a disabled person who has found a functional mode of living which is then taken away from them (potentially including housing and medical care) until they've spent their inheritance. A "gift" of $20,000 or $30,000 in the wrong circumstances might be disastrous if, for example, it causes someone to lose access to their housing and psychiatric care and medications.

3. Not supporting harmful behavior. Some beneficiaries are effectively unable to control their own behavior. Receiving a large cash gift will result in their wasting it immediately or losing it to con men or scammers. Even worse, some beneficiaries will spend extra money on drugs or alcohol which may unintentionally cause death or injury by overdose.

For each of these concerns, the solution is similar – instead of providing immediate access to cash, a special trust (often called a "special needs trust") is created to hold property for the benefit of the special needs person. The special needs trust is managed by a trusted friend or family member, who makes money or property available as appropriate without disqualifying the beneficiary from receiving benefits, or allowing them to harm themselves.

Asset protection for you

Sometimes people believe that putting their assets into a living trust will protect them from creditors if they were to experience tax problems, bankruptcy, lawsuits, or apply for Medi-Cal benefits.

Unfortunately, this isn't correct. In California, living trusts are what lawyers call *self-settled* trusts, meaning a trust created by a person for their own benefit. A California self-settled trusts provides *no asset protection.*

There are still things that can be done to protect you. You can form an asset protection trust in another state, or another country, that may provide some level of protection. You can place assets in corporations, or limited liability companies (LLCs).

My personal view is that "asset protection" is often aggressively oversold by unqualified people who are eager to create unrealistic fears, and then exploit those fears to extract ridiculous fees for planning that is of little – or sometimes negative – value. I usually tell people that the first line of defense, if they're concerned about risk, is insurance. Asset protection schemes typically depend on claiming that an asset is unavailable to your creditors, which means it is also unavailable to *you*. Insurance adds assets that are available to defend you, or to pay legitimate claims. If someone is accidentally injured, you'd probably prefer to see them adequately compensated by insurance rather than forced to live a miserable life or depend on public benefits due to an error on your part.

Asset protection usually involves the loss of control over assets. While it is possible to use irrevocable trusts for asset protection in a Medi-Cal context, doing this involves giving up ownership of the property being protected, so I don't like to see people do this sort of planning until it's clearly necessary, or at least the most reasonable of unpleasant alternatives.

Asset protection for heirs

I've just explained that self-settled trusts aren't effective in California for asset protection. But that doesn't mean that trusts are useless – just trusts that you create for yourself. If you create a trust for someone else, that's not a self-settled trust, it's a *third party* trust (because it was created by you, a "third party.")

Third party trusts are very strong vehicles in California for asset protection. So far, the only circumstances where courts have been willing to force distributions to creditors from properly drafted third party trusts have been for child support judgments. In one case – where the trust beneficiary was a criminal, serving time in prison, who caused horrible injuries to his own brother, who sought to have his medical bills paid – the appellate court ruled that the trustee couldn't be compelled to make a distribution which would've been taken by the creditor.

While you can't protect your property from your creditors, you can protect your beneficiaries from *their* creditors. To do this, your trust should be written so that your gifts to them aren't immediately distributed upon your death, but so that the trustee has discretion about when, and how, to make distributions. You can allow your beneficiary to choose their trustee – so the trustee will have an incentive to cooperate with the beneficiary's wishes, while being outside of their formal control. Your trust can even be written to give your beneficiaries the power to designate someone to receive their share of your trust when they pass away – and you can put limits on that choice, so they could give their property to, let's say, their spouse or children or a charity, but not your ex-wife or ex-husband.

Conclusion

I hope this was helpful. I enjoy my work because I love getting to know people and hearing their stories. I enjoy helping them feel less anxious about the future and solving difficult problems. I hope that this book has helped you feel less anxious about the future and showed you ways that you can solve or avoid problems in your life.

Greg

About the Author

Gregory A. Broiles grew up in Riverside and Sierra Madre, California. In 1991, he graduated from the Johnston Center at the University of Redlands with a Bachelor of Arts degree in Sociocybernetics. In 1996, he earned his law degree from the University of Oregon School of Law in Eugene, Oregon.

In 1996, Greg moved to Oakland, California and worked in management of two Internet startup companies. He relocated to San Jose in 2000, where he married his wife Sylvia. In 2003, he opened his own law practice. In 2005, he graduated with honors from Golden Gate University School of Law with an LL.M. degree in Taxation. He has been licensed as an Enrolled Agent with the Internal Revenue Service, and is presently licensed in California as an attorney and as a real estate broker. In 2010, he was designated a Certified Specialist in Estate Planning, Trust and Probate Law by the California State Bar Board of Legal Specialization.