

IT'S YOUR ESTATE

BASIC ESTATE PLANNING OVERVIEW

Alexandra Murphy, J.D.
Anderson Law Group, Inc.
Estate Planning + Business Law

1000 North Coast Highway, Suite 10, Laguna Beach, California 92651
amurphy@andersonlawgroupinc.com | (949) 715-4303
www.andersonlawgroupinc.com

I. This session is intended to help you understand the following basic estate planning:

- What is Estate Planning and Who Needs an Estate Plan
- Common Documents including a Will, Revocable Living Trust, Financial Power of Attorney and Advanced Healthcare Power of Attorney
- The Importance of Asset Titling
- Probate Process: fees, advantages, and disadvantages
- Types of Wills and Intestate Succession
- Tangible Personal Property
- Understanding a “Step Up in Tax Basis”

II. WHAT IS ESTATE PLANNING AND WHO NEEDS AN ESTATE PLAN

A. Persons who have one or more of the following should engage in Estate Planning:

- Spouses
- Minor children
- Dependents (parents, handicapped individuals, and children)
- Assets over \$184,500 in California
- Owners of real property
- Specific items of personal property that they want to go to someone in particular (e.g., jewelry, antiques, and art)
- Charitable objectives
- Issues that need to be dealt with after their death: providing for unrelated persons, businesses, pets, special needs

B. What you can expect when you meet with an attorney to discuss estate planning:

- Initial Consultation: Getting to know each other
 - ***Ask First Form***
 - Initial Client Handout
- Designing your Estate Plan
- Review and Signing Ceremony
- Funding your Trust
 - Transfer Title to Assets to your trust or nominate beneficiaries.
- Trust Maintenance
 - If your trust is not updated and after-acquired assets are not properly transferred to your trust, your estate plan will not work as planned.

III. BASIC ESTATE PLANNING DOCUMENTS

- Last Will and Testament or Pour-Over Will
- Revocable Living Trust
- Advanced Healthcare Directive also known as the Healthcare Power of Attorney (HCPOA)/HIPAA release/Living Will
- Financial or Durable Power of Attorney (DPOA)
- Nomination of Conservator (usually in DPOA or HCPOA)
- Nomination of Guardian (usually in Will)
- Assignment of Personal Property

IV. TITLING PROPERTY IN YOUR ESTATE

A. Joint-Tenancy with Right of Survivorship

- Joint Ownership – owners own same proportional right, with right of survivorship.
- Downsides:
 - Effects ability to transfer ownership of asset – an owner must get approval of other owner(s) to sell.
 - Individual owners cannot give their assets away to another person – as per the right of survivorship, it goes to the other joint tenant.
 - No Double Step Up in Property Tax Basis for Married Couple on Death of First Spouse. For married couples, we suggest owning property as “husband and wife as community property with right of survivorship,” and then transfer property into a revocable living trust.
 - Still a probate on death of last joint owner.

B. Community Property with Right of Survivorship

- Must be a married couple to own community property.
- In California, spouses own 50% of all assets (property, wages and salary) acquired by either spouse during the marriage.
- Double step up in tax basis of all community property assets on death.

- Downsides
 - On divorce, community property is split 50-50.
 - Still a probate once second spouse passes.

C. Beneficiary Designations

- Life insurance, annuities, IRAs, 401(k)s and other retirement accounts pass to the beneficiary you designate on your beneficiary form. This is an important part of estate planning.
- It is critical to keep your Beneficiary Form up to date. Changing your Will or Trust does not change your beneficiary on your designated beneficiary form.
- If you name “my estate” as a beneficiary, that asset will go through probate.
- Pay on Death: You can name a person on your bank accounts that you Pay-On-Death to avoid Probate.

V. TYPES OF WILLS AND INTESTATE SUCCESSION

A. Purpose of a Will

- To provide instructions on the disposition of your assets at death.
- A Will can name who will receive assets when the creator of the Will dies, as well as an Executor who handles assets subject to the Will.
- A Will can also name a guardian for minor children.
- A Will only applies to assets in the probate estate and having a Will does not avoid probate of the estate assets if used as the sole estate planning mechanism.

B. Why have a Will

- Avoid dying intestate.
 - Intestacy is the word for dying without a Will. California law has a plan of where your assets go per the laws of intestacy if you die without having created your own plan.
 - CA Legislature Defining Intestacy
 - https://leginfo.ca.gov/faces/codes_displayText.xhtml?lawCode=PROB&division=6.&title=&part=2.&chapter=1.&article=
- Appoint Executor to probate your Will and be in charge of your assets.
- Appoint Guardians for minor children.

C. Types of Wills

- Formal Will:
 - A will must be in writing, signed and dated by the person creating it in the presence of two valid witnesses (disinterested, must be 18).
- Holographic:

- Self-written in own hand writing.
- Form Statutory Will
 - <http://www.calbar.ca.gov/Portals/0/documents/publications/Will-Form.pdf>
- Pour-Over Will
 - In conjunction with a revocable living trust – directs any probate assets to pour over to the revocable living trust.

D. Downfalls of a Will

- Can cause Probate if you have real property or assets over \$150,000.
- A Will giving outright to a person does not protect against the beneficiary’s creditors, lawsuits or failed marriages.
- No continued control over your assets.
- No private administration.
- Costly to administer if large estate. See statutory probate fees below.

E. What is Probate

- Legal process for the administration of an estate.
- The personal representative (either the Executor who is designated in the Will, or an administrator who is another person who agrees to act or is otherwise not designated in the Will) administers the estate. They are each entitled to statutory fees explained below.
- The probate estate includes all assets of the deceased for which there is no “probate avoider” such as a beneficiary designation form or other titling of assets to avoid probate.
- If no there is no Will, all assets are distributed under intestate succession.
- Proceedings and Asset Information are Public.
- All your debts and taxes are paid.
- Creditors can come forward and have a forum to get paid.

F. Advantages of Probate

- The probate proceedings are controlled by a judge who controls family disputes and makes decisions regarding assets.
- Limit on creditor claims
 - Creditors have to submit claims within a 4-month period provided they have been notified.
- Executor may have to post a bond and must provide an accounting, which protects the estate.
- Notice of Proposed Action: estate beneficiaries are kept informed by personal representative/executor.

G. Disadvantage of Probate

- Costly. See probate fees below. Usually trusts can be administered much more cost effectively, even with the help of an attorney and CPA.
- Time consuming (1-2 years).
- Not the private transfer of family assets.
- Public record of assets.
 - Will of Michael Jackson:
<https://www.nytimes.com/interactive/projects/documents/michael-jacksons-will?mcubz=1>

H. Probate Fees

CALIFORNIA STATUTORY FEES & COMMISSIONS [Probate Code Section 10810]
The personal representative (executor or administrator) handling the probate of an estate and the attorney representing the personal representative are each entitled to the statutory fees shown on this schedule.

Computations

- 4% on first \$100,000
- 3% on next \$100,000
- 2% on next \$800,000
- 1% on next \$9,000,000
- 0.5% on next \$15,000,000

Example: \$1,000,000 gross estate probate fee to attorney is \$23,000 plus \$23,000 to executor, plus court costs, publication, probate referee fee, any extraordinary fees.

I. Probate Estate Administration: Every probate estate is unique, but most involve the following steps:

- Filing of a petition with the proper probate court.
- Notice to beneficiaries under the Will and to heirs at law.
- Petition to appoint Executor (in the case of a Will) or Administrator for the intestate estate.
- Inventory of estate assets by Executor/Administrator (valued by a California Probate Referee).
- Notice to Creditors – 4 months.
- Appraisal of estate assets by Probate Referee.
- Payment of estate debts to rightful creditors.
- Sale or transfer of estate assets.

- Payment of federal estate and income taxes, if applicable.
- Final distribution of assets.

www.scscourt.org has a great self-help website and information about probate
http://www.scscourt.org/self_help/probate/probate_help.shtml

VI. TANGIBLE PERSONAL PROPERTY

- Tangible personal property includes everything that is not real property, but property that you can feel and touch, *e.g.*, automobiles, jewelry, art, boats, planes, furniture, China, silver, photos, clothes, etc.
- Tangible personal property is usually valued or appraised and then distributed per the terms of someone's Will or Trust.
- Tangible personal property can be a source of disagreement and fighting in the family during an estate administration.
- Consider a lottery system or a way to dispose of tangible personal property if family members cannot agree.
- Consider an independent person or professional to assist with distributions of tangible personal property.
- Consider lifetime giving of tangible personal property such as jewelry and China if you are not using it so you can see the benefits of having made the gift by watching your loved ones enjoy the items.

VII. UNDERSTANDING A "STEP UP IN TAX BASIS"

A. Understanding What is your Basis

- Example of a Chart to figure out Basis.
- Understanding basis is very important to estate planning.

B. Step Up in Basis

- When you inherit property at someone's death you might get to step up the basis of the inherited asset to the value of the asset on the decedent's Date of Death.
- Thus, you can avoid capital gains. Capital gain is from date of death to date of sale.

Example: Chart to understand basis

Asset Type	Ownership Community or Separate Property (CP/SP)	Purchase Price	Debt or Improvements	Basis	Fair Market Value
Primary Residence	CP	\$500,000	\$100,000 (kitchen and bath remodel)	\$600,000	\$1,000,000
Apple Stock	SP	\$100 a share	n/a	\$100 a share	\$500 a share
Investment Property	CP	\$600,000	\$100,000 mortgage	\$500,000	\$800,000

- If you sell an asset or make a lifetime gift of an asset, the beneficiary receives your basis in the asset. This is called carry-over basis. If you or the beneficiary sell the asset, then capital gains tax is due on the difference between the basis (plus any improvements) and the sales price.
- At the death of one spouse, the surviving spouse receives a stepped-up basis to the value of the asset as of the decedent spouse's date of death. This means if the surviving spouse sells the asset, the surviving spouse only pays gain on the difference between the value as of the date of death of the decedent spouse and the sales price. This is a tax savings.
- Your heirs may also receive a step up in basis on the death of the surviving spouse when the heirs inherit an asset.
- Example. You have a piece of land that you bought in 1980 for \$500,000. You have put \$100,000 of improvements into the land by building a structure. It is not your primary residence or investment property. Your cost basis is \$600,000. Now the fair market value is \$1,000,000 and want to sell your land.
 - If you sell it while you are alive you would owe capital gain tax on \$1,000,000 less \$600,000; a total of \$400,000 would be subject to capital gains taxation.
- Example: Primary Residence. You get a \$250,000 exemption on capital gain tax per person (\$500,000 if married). You are single and you bought your primary residence in 1980 for \$500,000. You have put \$100,000 of improvements into the house by improving the kitchen and bath. Your cost basis is \$600,000. Now the fair market value is \$1,000,000 and you want to move or downsize. Since your home has a low basis, if you can afford not to sell the home but you want to downsize or go into assisted living, consider renting the home for your life and on death your heirs can sell and receive a step up in basis. The capital gain tax calculation is as follows:
 - \$1,000,000 less \$600,000 for a total of \$400,000 less \$250,000 exclusion because it is your primary residence. Thus, \$150,000 would be subject to capital gains taxation.
 - If your heirs inherit the residence which is worth \$1,000,000 on your date of death, and they then sell the residence for \$1,000,000, there is no capital gains tax to pay.