

# Estate Planning

## ONE OF THE BEST GIFTS YOU CAN GIVE TO YOUR FAMILY



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Hello, my name is Don Vivrette. I was raised in a family that seemed to talk a lot about dying and death. Not in a morbid sense, but if you will, from a “business” standpoint.

What happens to your stuff after you die? In other words, Estate Planning issues. Over the years and certainly now that I am older, I seem to be talking to many people faced with this same standpoint. Often it is either medical conditions or who died.

I am not a writer, but I thought a conversation about Estate Planning might be a useful booklet. Here is my initial pass at that conversation. I am not a lawyer and am not giving legal advise. Just talking about issues to consider.

I hope this is interesting to you and that it starts a conversation for you for yourself, or a conversation with your family or with others.

Don.

# What is an Estate?

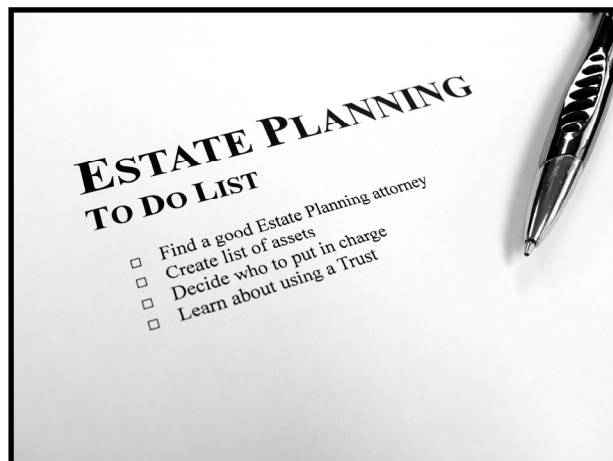
You have an estate whenever you own or have something. It is an estate when you are alive as well as after you die. Many people think you don't have an estate until you die, but it is often just as important to think about your estate while you are alive.

## Why have an Estate Plan?

An estate plan lets you document what you want to happen IF you become incapacitated and can't make decisions for yourself while you are alive and what you want to happen to your estate after you die. Spoiler alert, we all die at some time. In most cases we generally just don't know when or how.

The part of your estate plan that deals with **you** is critically important when you can't decide for yourself. This may be due to illness or an accident. It may be sudden or gradual. No one wants to think about this situation, but we probably all know of someone who has been affected by this. It may seem scary to think about, but it is even scarier to just hope it doesn't affect you.

In addition, if you have children under the age of majority, or if you own a business, what do you want to happen? If you say nothing, then the courts will assign a Conservator for the children and make the decisions for their care. The same would happen for a business. This again, may not be what you want to happen.



## What's involved in an Estate Plan?

Well, the first thing is planning. That sounds odd, but to make any plan, one needs to spend time thinking about important decisions. If you are incapacitated, who do you want to make decisions about your health? What would you say to that person if you were able to communicate? Do you want to be on a feeding tube if needed? Do you want to be resuscitated if there is a very low chance you will recover fully? There are no right or wrong answers to these questions. The only wrong decision is not doing anything.

And on the financial side, who would you want to be in charge when you are incapacitated? Can they access your accounts with a Power of Attorney? This is very important since your medical care can run for a long time and the bills need to be paid.

The goal of this document is not to scare you, but rather to have you pause and think about these issues.

The other side of estate planning is after you die. What do you want to have happen to your assets? If you don't document your wishes, then you will be "intestate". This is when you do not leave a will or a trust. Then the state decides based on a specific set of rules. These rules probably don't fit with your desires. If you are intestate, then your voice will not be heard about who gets what.

## What decisions do you need to make in an estate plan?

Many of the decisions you will make overlap through the documents. You will assign someone to be in-charge in the given situation. For example, who is in-charge of your medical care, or your finances, when you become incapacitated, and your stuff after you die?

This may be the same person or different people for each situation. Something to remember is the decisions made often overlap. Whoever makes medical decisions will impact the financial situation. If different people are in-charge of each, there may be conflict.

Now consider what you want to happen to your possessions after you die. This might be a very easy decision for you or very complicated depending on your situation. Remember, if you do nothing then the

state will decide who gets what regardless of your opinion or wishes.

What documents are involved in an estate plan?

- Advanced Health Care Directive
- Power of Attorney for Finance
- Will
- Trust
- Beneficiary designations

When you create a will or a trust, you will be asked how you want to distribute your estate. It is important to give some thought to your choices. It may be easy, just give each member of my family equal shares. Or are there situations where that does not work for you. Maybe there is an issue of the age of someone, or the capacity to manage the money with another.

One starting point could be to estimate what your estate is worth and then figure out how to divide it out. Often, we don't realize how much we are actually worth and so we don't know the impact on those getting an inheritance. But remember, this is YOUR estate, not others. You need to be comfortable with your choices. Don't worry about offending people with your choices. After all, you won't be there for them to yell at you.

## How are assets titled?

This is a very important issue to keep track of through much of your estate planning. While you are alive, but incapacitated, how

will your representative pay your bills. If an asset is not titled correctly, then they may not be able to access the money. For example, if your bank account is in your trust's name, then your Power of Attorney (POA) of Finance may not be able to write checks since the POA does not reach into the trust.

Also, when you die your assets normally get a step up in value to your date of death. But if the asset is titled as joint tenants, then only your half is stepped up, not the other half. In a community property state like California, an asset that is jointly owned by a married couple will normally be community property and would receive full step up in basis.

As a note, many assets get a step up in basis, however, your retirement accounts, like an IRA does not step up. When money is taken out of these accounts it will be taxed as ordinary income, unless it is a Roth account. Roth accounts come out without tax since they were funded with after tax money.

Another important item to know is the cost basis of the assets you own. This mainly involves your home and investments. A bank account, for example, does not have a cost basis, just the balance.

Cost basis is very important when you decide to sell an asset. If the sales price is higher than the cost basis, you will have a gain. Sounds good, but there is probably a tax issue. If you owned the asset for a year

or more, the gain is called Long Term Gain and is generally taxed at a lower rate. Assets you own for less than a year are considered Short Term Gains and are taxed at a normal tax rate.



## What is an Advanced Health Care Directive?

An Advanced Health Care Directive (AHCD) is important, because if you are incapacitated, who will make health care decisions for you? You can't decide because you're incapacitated.

It's common today, if you are admitted to a hospital or are having surgery, the facility will require you to sign an AHCD before admission or having surgery. They want to know who is in-charge, if you can't make decisions.

Many people think that if they are married, they can make decisions for their spouse and get information on their condition.

This is often not true. When HIPPA came into effect, you need permission to make these decisions or even to have a discussion with your spouse's doctor.

HIPPA came into effect to protect a patient's medical information. This placed a big responsibility on the medical profession. Only a patient can access their medical records, unless they give specific instructions to release this information to others.

You will need to make several decisions regarding your AHCD. First, who do you want to be in-charge if you are unable to make decisions when you are unable to make your own decisions. You need to trust that this person will honor your wishes. Who will listen to your desires and make them happen, even if this is not what they would do about themselves.

Speaking of your wishes, how will you communicate these wishes to your representative. It is clearly important that they understand your desires in a given situation. Remember, they will not be able to ask you since you will not be able to give directions

Does this person live in the area? Often it is important for them to be able to get to the hospital wherever you are to talk to the doctors and nurses to understand your situation and to have your representative give them directions.

The title of the person who will make medical decisions for you if you are incapacitated is called your Agent. It is recommended that you name several people in the order you want them to serve. This way, if one of them is not available or declines to serve,

you have already named their successor. And it may be useful to name a professional fiduciary to serve if needed.

The next decision is when do you want the AHCD to take effect. Your choices are immediate or springing. Immediate means just that, it's effective immediately. You can override the decisions of others while you are not incapacitated. You have the power to cancel the AHCD at any time, as long as you have the capacity to do so.

Springing, on the other hand, required two or more doctors to declare that you are incapacitated. This can take time and it is often difficult to get doctors to make this declaration today, but it remains your choice.

An AHCD deals with your health, but it also deals with your burial after you die. If you have planned for the disposition of your body after you die, include this in your AHCD. If you haven't, then include directions on what you want done. Otherwise, it will be up to your representative to decide how to deal with your remains.



## What is a Power of Attorney for Finance?

As with your AHCD, the person with your Power of Attorney (POA) would step in to handle your financial matters if you are incapacitated. This may or may not be the same person you listed for your AHCD. But make sure that if they are different, they can work together or there could be conflicts. The person who handles your POA is referred to as your Attorney in Fact.

Similar to an AHCD, a POA is needed to manage a spouse's accounts. This is especially true for a retirement account or employment related items. If your name is on the account, like a joint checking account, you clearly have access to that account without a POA.

Like the AHCD, a POA can be immediate or springing. If it is immediate, it should note that it is "durable". This means it will still be in effect if you become incapacitated. Otherwise, there is little reason to have one since while you are capable of han-

dling your finances, you don't need someone to manage it for you, unless that is what you want.

You can also create a POA for a specific purpose. Say you are selling your house, but you are going on vacation and will not be available to deal with the sale or even to sign closing documents. You can create a POA to cover that specific purpose. You can set it for a specific timeframe as well as specific actions that can be taken. Clearly you want to make sure you trust the person you are giving the POA, but it is an option.

A POA can cover any assets you own in your name. Assets in the trust may be restricted since they are not still in your name. The trustee or successor trustee deals with assets in the trust.

Remember, you have the power to rescind a POA at anytime as long as you have the capacity to do so. An attorney would question you to assure you are capable and not under duress before resending a POA. Also, at your death the POA terminates since you can no longer act on your finances, therefore the POA does not apply

## What is a Conservatorship?

A conservatorship can be assigned by the court for either the **person** (health) or your **finances**. Again, if you have not generated a AHCD or POA, then the court will decide and assign an attorney to oversee this action.



There has been a lot of notoriety about the Conservatorship of Brittney Spears. Her father petitioned the court to assign him as her conservator. That went on for several years and seems to have finally been dismissed. This is a very clear example of how public these types of proceeding can become.



## What is a Will?

Everyone has an estate plan. That plan is either your doing or the rules of the state. If you decide not to do at least a will, then the state will handle your estate according to the “intestate” rules of your home state.

Your estate will be forced into probate and will follow established rules and have nothing to do with your choices because you decided not to let your wishes be known. Your estate would go into probate and this will be discussed in detail later.

A will is also called your last will and testament. It instructs the executor of your estate on how to distribute any assets to your beneficiaries after your death. It's typically a simple legal document when compared with a trust.

A will is a document that states your

wishes after you die. It does nothing while you are alive but is very important when you die. It does not deal with your health nor finances while you are alive.

When you create a will, you should state whom you want to be your Executor. The court will need to approve this, but your wishes will be noted.

Many people think of a will as just stating who gets what when you die. However, a will is very important if you have minor children. The will would say who you want to appoint as guardian for the children until they reach the age of majority. This can be really important particularly in a contested family situation. The court will need to agree, but at least your wishes are known.

There are four types of wills. Each can be valid if the rules are followed.

Holographic will – Entirely handwritten and signed. It can not be typed; it must be handwritten. No date is required, and no witness is needed. HOWEVER, this is probably the most contested type of will. Clearly there are a lot of issues that can come up with this type of will.

Is this the last will to have been completed since there is no date? Is this their handwriting and signature? Was there some kind of duress? This is probably the least desirable type of will, but it is legal.

An example of this type of will currently in



the news is the handwritten will of Aretha Franklin who died in 2018. In 2023, it is reported that a will was found in the side of her sofa, almost five years after her death. This could cause a significant legal fight over validity as her “final” will and testament.

**Statutory will** – This will is mostly typed with some fill in the blanks entries. These can be downloaded from the internet and filled in. There must be witnesses for this type of will. It is probably best to have this notarized.

**Formal will** – This will can be entirely typed and is often generated by an estate attorney. Two witnesses are required and probably will be notarized.

**Pour over will** – This type of will is intended to work with a Trust. The will is intended to transfer any of your assets outside of your into the trust for processing. Often not all of your assets are titled into your trust. This will would move these assets into the trust. This type of will is typically typed, witnessed, and notarized.

Understand that a will alone does not avoid probate.

## What is Probate?

Probate is a legal process where your estate is handled because you did not have a trust. Assets in a trust are not subject to probate. Also, other assets that transfer on death avoid probate. Beneficiary



**Designation and Transfer on Death** designations “automatically” transfer outside of Probate. We highlight automatically, because there is still a process to go through, but it is not in probate.

If your estate’s gross value is under about \$185,000, then you would file a small estate claim and avoid probate. The court is still involved, but not probate.

Probate is administered by the courts in your home state. The court will assign an attorney to represent your estate, and another will represent the beneficiaries of your estate. This is time-consuming and expensive. The fees paid are often set by statute, leaving little room for lowering the fees.

In California, the statutory fees for probate are based on the gross value of the assets placed in probate. If your home is worth \$200,000 and has a mortgage of \$75,000, then the net value is \$125,000. But for probate it is \$200,000.

Probate is expensive, if an estate is valued at \$500,000 the statutory attorney fees (in California) are \$26,000 plus court fees and any added expenses related to the administration.

Probate also takes a lot of time. It is not unusual for probate to take up to two years to complete. No money can be distributed until the process is finished. In addition, this process is very public.

A positive of going through probate is that

a judge needs to rule on all decisions. That makes it difficult to protest after the fact. For example, creditors are notified as a part of estate administration. When this goes through probate, the process is finalized and a creditor can not come back later to renegotiate.



## What is a Trust?

A trust is a contract designed to hold your assets. If you have a trust, your assets are retitled into the trust. Not all assets need to be retitled, but generally an asset like your home would be placed into the trust.

The advantage of a trust is that it avoids probate. This lowers the cost of administration and raises the likelihood your wishes will be followed. The Executor of your estate will have a fiduciary responsibility to follow the wording of the trust. If there is a disagreement about the wording or intent of the trust, then the executor could go to the court for a legal decision.

A trust can either be revocable or irrevocable. A revocable trust or a living trust, is

completely changeable during your life, as long as you remain capable to make your own decisions. A revocable trust operates under your Social Security number as the “grantor”. No added reporting is needed since everything continues as before. The only difference is the titling of the assets. The ownership of the assets remains yours since you can revoke the trust at any time.

Frequently, if you want, you are the Trustee of the revocable trust when it is established. This way you control the assets you put into the trust and can make changes and even terminate the trust if you desire. A successor trustee would take over if you are incapacitated or after you die.

An irrevocable trust can not be changed after it is created. Assets are retitled into the trust and are no longer your property. A separate tax return is required since it will have its own tax ID.

There are many different types of irrevocable trusts. For example, one would be a Charitable Remainder Trust that pays you while you are alive, but when you die the remainder goes to charity. You get a tax deduction if you create this kind of trust while you are alive and can change the charities while you are alive.

As you get into estate planning and especially trusts, you may want to discuss having irrevocable trusts for your heirs. Under this type of trust, it may be possible to restrict their access to the principal of the

trust so these assets may be protected from creditors, divorces, and lawsuits. This is a specialized area that requires important discussions with your estate planning attorney. They can still take distributions from the trust, but not access principal except as specified in the trust.

The type of trust you establish depends on your intent. However, it is always important to name a trustee for the trust. This maybe you during your lifetime, but you should also name successor trustees for when you die or become incapacitated. It is recommended that you name two or three successor trustees in case one does not want to serve.

Speaking of incapacitation. While you are alive, a trust can help manage your finances if you become incapacitated. Your successor trustee will have access to all the assets titled into the trust. In a sense this is like a POA for finance for trust assets.

## What are Beneficiary Designations and Pay on Death directions?

A Beneficiary Designation is often used for life insurance policies and retirement accounts. With these in place, the beneficiary can get the funds after a few days with proper identification (like a driver's license) and a certified death certificate.

Decisions will need to be made as to what

to do with the money. For example, if you name a younger person as the Designated Beneficiary for a retirement account, they can decide to take out all the funds out today or leave them in an account to continue to grow. You can not control their action through a Beneficiary Designation.

A Pay on Death or Transfer on Death Statements works the same way for say bank accounts and real estate. These can expedite the process by avoiding probate and estate administration. However, again, you have no control over their actions through these designations.

It is important to review your beneficiary designation from time to time. Remember, these assets do not go through the estate administration so there will be no oversight by the executor. If you forgot that you got divorced or that someone died, then there will be issues. What is stated on the beneficiary designation is what will be done.

## What happens after you die to your estate plan?

When you die, any POA for Finance you have created automatically terminates. This is because you are no longer able to make decisions, so your designee can't either.

Your AHCD continues only in terms of your burial if you put these directives into your AHCD. After that is completed, the AHCD also terminates.

After your death, the Executor of your estate is in charge. They are to follow the letter of the will or trust you have created. The Executor is either the person you listed in your will or trust, or the person the courts have assigned because you didn't create these documents.

If the court decides, then you are clearly in probate and the courts will decide what is "best" for your estate.

What does an executor actually do? In simple terms here are the typical steps followed by an executor.

- Petitions the court to accept the executor per the trust or if no trust, open probate and assign either the executor named in your will or if no will, assign an attorney to represent the estate and the same for the beneficiaries.
- Identify all the assets of the estate and list them in an inventory. This is critical since these will ultimately be distributed to the beneficiaries in accordance with the will or trust or the court appointed executor.
- Notify all potential beneficiaries listed in the will/trust or based on intestate heirs.
- Notify creditors that an estate is in process of administration and to notify the executor of any outstanding claims against the estate.
- Seek court approval to sell any assets

needed to pay the debits of the estate.

- Determine all claims, verify them, and pay them as appropriate.
- Generate and pay federal and state income and estate taxes as needed.
- Distribute the remaining assets of the estate in accordance with the will or trust or court orders if neither exist.
- Close the estate.

This list is very simplistic. Often these tasks require many steps that follow specific rules. For example, notifying the creditors must follow specific wording of the notice, including the specific number of days. And even the requirement of placing a notice in the local newspaper to tell the public of the estate. It is highly recommended that an attorney who specializes in estate administration be contacted to ensure that the rules are followed.

The inventory listed must be valued to determine the value of the estate. This may require formal appraisals or simply researching the value of a stock as of the date of death. It may be appropriate to change the locks on the home, so beneficiaries don't come in and take the assets they feel are "theirs".

It is not unusual for some of the "assets" to come into question. Say mom loaned money to one of the children. Is this a loan or after the fact a gift? Often this can lead

to a dispute that may ultimately require the court to decide.

If you want specific items to go to specific people, then document this so there is less conflict. Remember, the executor is required, under their fiduciary responsibility, to follow the terms of the will or trust. A document like this can easily be added as an appendix to the trust so it becomes part of that document and therefore the executor will be authorized to make it happen.

Two important tasks of administration are accounting for all assets and communicating with the beneficiaries. The accounting begins with the inventory and covers all monies coming in and all monies paid out, including the distributions to the beneficiaries. At the completion of the administration, an accounting report is given to all beneficiaries.

Communication is also very important. Beneficiaries often believe they will get their part of the estate very quickly. They don't understand, or don't want to understand, all the required steps and the timeframe assigned to that task.

It is recommended that you keep a copy of these signed documents near at hand. Your AHCD, for example, would be important any time you are going to a hospital or having surgery. You should also tell the people you have listed on your AHCD, your POA and your will/trust who will handle this when needed where to find the copies. It is not helpful to have created

the documents if no one can find them.

## Conclusion, so now what?

To begin or continue the process of developing an estate plan, we suggest you contact an estate planning attorney that you will work with. It works best when the attorney is familiar with estate matters since it is a specialized field of law.

Next, reread this booklet to see the kinds of issues you can start thinking about before you meet with the attorney. It generally is more comforting to have a basic understanding of the process before you begin.

This booklet is a part of a 3 booklet series. The other booklets are on Financial Planning and Charitable Giving. All 3 work together and try to explain various areas we think relate to one another. Feel free to download all 3 booklets at [IYME.org](http://IYME.org).

**Disclaimer:** This document is intended as a learning exercise, not to provide legal advice. There are different rules in different jurisdictions and items we may have discussed may not be practical in your situation. Additionally, this is a general discussion and in no way relates to any specific individual or specific situations.