



GUIDE TO WILLS & TRUSTS

Nicholas Kmetz, Esq.

Certified Specialist in Estate Planning, Trust & Probate Law by the
California Board of Legal Specialization

GOALS OF WILLS AND TRUSTS

- Goals of an estate plan:
 - Ensure that your assets pass to your intended beneficiaries in the way you want
 - Avoid unnecessary delay and costs
 - Allow agents to step in on your behalf in the event of incapacity
 - Provide guidance to family and loved ones



PROBATE

- Court supervised administration of a person's estate
 - Validating the Will, if any
 - Appointing a representative
 - Gathering assets
 - Settling affairs
 - Distributing assets to beneficiaries

WILLS

- Historically the Will was the main document that disposed of a deceased person's property
 - Provides instructions/guidance to the probate court
 - Appointment of Representative
 - Powers of Representative
 - Distribution Terms for Beneficiaries
 - Fiduciary role = Executor
 - If you have minor children, the Will can also designate who to name as guardians
 - Importantly, the Will does not avoid probate, it simply assists in the probate process
-

WHY AVOID PROBATE?

- Time Consuming: 1-2 years for most counties
 - Expensive – Statutory Fees:
 - 4% of the first \$100,000 of the value of the estate you account for;
 - 3% of the next \$100,000;
 - 2% of the next \$800,000;
 - 1% of the next \$9,000,000;
 - .5% of the next \$15,000,000; and
 - a reasonable amount set by the court of estates exceeding \$25,000,000.
 - Court filings are available to the public (no privacy)
-

ALTERNATIVES TO PROBATE

Small Estate Affidavit – if personal property (non-real estate) is less than \$208,850

Affidavit to Transfer Real Property of Small Value – if real estate is less than \$69,625

Petition to Determine Succession to Primary Residence – if principal residence does not exceed \$750,000

Spousal Property Petition – if the only beneficiary is the surviving spouse

Petition for Order Confirming Trust Assets (Heggstad Petition) – if there is an assignment of an asset to a Trust

HOW TO AVOID PROBATE PRIOR TO A DEATH?

Joint Tenancy Tiling & Retitling Property

- Can create major issues, particularly for capital gains or property tax

Transfer on Death / Payable on Death Accounts

- Can cause complications in the event of incapacity

Beneficiary Designations

- Best for assets that should not be transferred to a Trust (retirement accounts)

Revocable Living Trust

- Generally, the best solution, but does require “funding” the Trust

ISSUES WITH RETITLING TO BENEFICIARIES WHILE LIVING

- For real property, potential property tax reassessment
 - Example:
 - Parent wants to transfer primary residence to Child to avoid probate, but plans on continuing to live in the home. Parent's property tax basis is \$200,000, while current value of home is \$1,000,000. When the transfer occurs, property tax basis increases from \$200,000 to \$1,000,000 instantly.
 - For appreciating property, potential loss of capital gains step up
 - Example:
 - BAD: Parent wants to transfer primary residence to Child to avoid probate. Parent's capital gains basis in the property is \$200,000, while current value of home is \$1,000,000. After the transfer, Parent dies and Child sells property for \$1,000,000. Child is subject to capital gains taxes on the \$800,000 of gain.
 - GOOD: Parent transfers primary residence to Trust that names Child as beneficiary to avoid probate. Parent's capital gains basis in the property is \$200,000, while current value of home is \$1,000,000. After the transfer, Parent dies and Child sells property for \$1,000,000. Child pays zero capital gains taxes.
-

TRUST

- A trust is a legal entity that holds property for a purpose with a “Grantor,” “Trustee,” and “Beneficiary”
 - Grantor (also called Settlor or Trustor) – Person that creates the trust
 - Trustee – Person/entity that manages the trust according to its terms
 - Beneficiary – Person/entity that receives the benefit of the assets of the trust
 - Any assets owned by a trust will avoid probate upon your death, passing directly to the beneficiaries
 - No Court timelines and no statutory fees
 - Trusts are private
 - A trust can be Revocable or Irrevocable
 - Revocable is the most common and used to avoid probate
 - Irrevocable is primarily used for tax or asset protection planning
-

TRUST OR WILL?

- Typically, you want both
- Revocable Living Trust to ensure the assets avoid probate
- If you pass, and an asset is outside of the Revocable Living Trust, we would use a Pour-Over Will
 - Pour-Over Will is a Will that names the Revocable Living Trust as the beneficiary
 - Even if something is left out and goes through probate, it will still pass to the Revocable Living Trust to be distributed the way that you want

REVOCABLE LIVING TRUST

- Living Trusts are fully revocable and amendable by the Grantor
 - No limitation on your ability to access or use the assets
 - No complication for tax filings
 - There is no asset protection for the Grantor
 - Major decisions for most Revocable Living Trusts:
 - Successor Trustees
 - Primary Beneficiaries
 - Contingent Beneficiaries
-

SUCCESSOR TRUSTEES

Successor Trustees act in the event the original Trustee (normally you) is unable to act due to incapacity, death, or resignation

A Successor Trustee does not need to be an attorney, accountant, or financial expert – it needs to be some competent that you trust

Should at least have a primary and a secondary option

A Trust should have mechanisms to allow additional Successor Trustees to be appointed (ideally without the Court getting involved)

PRIMARY BENEFICIARIES

- Who do you want to receive your assets when you are gone?
 - Specific distribution (dollar amount) or Share of the balance (percentage)
 - How do you want the beneficiary to inherit?
 - Can be distributed outright
 - Or in trust, subject to certain restrictions
- In Trust allows us many options
 - Someone else as trustee to make distributions to the beneficiary
 - Make distributions in stages (Example: 1/3 @ 30; 1/2 @ 35; balance @ 40)
 - Make distributions based on a standard (health, education, support, and maintenance)
 - If drafted and administered appropriately, can provide significant asset protection for the beneficiaries
- What happens if the person you named predeceased you?
 - Divided among their descendants or divided among your remaining beneficiaries

CONTINGENT BENEFICIARIES

- These are your “doomsday” beneficiaries – in the event your primary beneficiaries are not available
 - Common Options
 - To your “heirs at law” (California default)
 - Specific extended family members
 - Family friends
 - Charities
-

TRUST FOR MARRIED COUPLE

- There is another major decision when it comes to Living Trusts for married couples
 - Upon the death of the first spouse:
 - The Surviving Spouse will retain their assets (all of their separate property and their ½ of community property)
 - There are a few options for what will happen to the Deceased Spouse's share of the assets
 - Deceased Spouse's share could pass to the Surviving Spouse
 - Simple, easy, and flexible – but no certainty
 - Deceased Spouse's share could pass directly to a beneficiary
 - Entirely or partially
 - Deceased Spouse's share could pass to an irrevocable Trust
 - Additional work at that first death, less flexibility, but more certainty
 - Also additional options for asset protection and/or tax planning
-

ABC Trust Structure

One Spouse
Dies

Surviving Spouse's
½ of Assets

Survivor's Trust (A) (Revocable)

*Funded with the surviving
spouse's assets*

Surviving Spouse can
amend the terms of this
trust, and live off assets
however he or she
chooses (no rules)

Deceased Spouse's
½ of Assets

Marital Trust (C) (Irrevocable)

*Funded with the excess of the
Deceased Spouse's asset*

Trustee: Surviving Spouse

Distributions:

Income – All to Surviving Spouse
for any purpose

Principal – To Surviving Spouse
for his/her Health and Living
Expenses

Bypass Trust (B) (Irrevocable)

*Funded the Deceased
Spouse's assets up to
current Exemption Amt.*

Trustee: Surviving Spouse
Distributions:

Income – All to Surviving
Spouse for any purpose

Principal – To Surviving
Spouse and/or children for
his/her Health and Living
Expenses

ESTATE TAXES

- There is no estate, inheritance, or death tax for California
 - But that is not the case for every state
 - Federal Estate Tax – 40% on assets over the estate tax exemption amount
 - 2026 - \$15 million
 - Anything below that is free from estate tax
 - Changeable by Congress
 - Assets to a spouse (marital deduction) or charity (charitable deduction) are free from estate taxes
 - The Marital Trust typically qualifies for the marital deduction as well
-

IRREVOCABLE TRUSTS

- Unlike a Living Trust, cannot be changed or amended by the Grantor*
 - Utilized to accomplish a particular goal, typically related to tax planning
 - Examples:
 - Bypass and Marital Trusts
 - Irrevocable Life Insurance Trust (ILIT) – holds life insurance outside of your taxable estate
 - Qualified Personal Residence Trust (QPRT) – holds your home outside of your taxable estate
 - Special Needs Trust (SNT) – protects someone's eligibility for government assistance
 - Irrevocable Gifting Trust – allows assets to grow outside of your taxable estate
 - Very specific to a person's goals, family, and financial situation
 - May include additional role – “Trust Protector” who has the power to adjust the Trust without Court involvement
-

FUNDING

Trust must be “funded” with your assets to ensure those assets avoid probate

Real Estate – Grant Deed

Business Interest – Assign interest / update operational documents

Life Insurance – Update ownership & beneficiary to be the Trust

Saving & Investment Accounts – Update ownership to be the Trust

Retirement Accounts – Update beneficiary designation to match intent

Checking Account – Depends

Cars – Specific exception under probate code

Personal Property – General Assignment to the Trust

Non-US Assets – Requires discussions with an attorney in that country

PHASES OF THE REVOCABLE LIVING TRUST

- Four main phases to a trust for two Grantors
 - During life and capacity
 - Continue to live life as you always have
 - After incapacity
 - Successor trustee steps in to manage affairs but you are still the beneficiary
 - After death of first Grantor
 - Depends on how the Trust is structured
 - After death of the survivor
 - Successor trustee step in and settles the decedent's affairs
 - Pay final bills and file final taxes
 - Must also send notice to beneficiaries of the Trust and heirs of the decedent (starts 120 day timer)
 - After affairs are settled, the trustee distributes the balance of the assets among the beneficiaries pursuant to instructions under the Living Trust