It's Your Estate
Presentation Outline – Week Three

Wills & Trusts – What are the differences? Is one better than the other?

Will Definition – A Will is a legal document that says how you want your property distributed when you die.

In a Will you:

- Nominate an *Executor* to administer your estate upon your death
- Nominate Guardians of your minor children
- Designate the Beneficiaries of your estate

Types of Wills

1) Oral: *CA Probate Code §6110* Oral wills are not valid. Wills must be in writing.
2) Typewritten: *CA Probate Code §6110*
   Must be signed, dated, and signed by 2 disinterested witnesses
3) Holographic: *CA Probate Code §6111*
   All material provisions must be in the testator's handwriting and signed
4) Statutory: *CA Probate Code §6240*
   Statutory Form can be filled in, but NOT altered.
   Must be signed, dated, and signed by 2 disinterested witnesses
5) Pour-Over Will: Implies that you have a Trust. Tells the Probate Judge to administer anything you accidentally left outside the Trust as if it were in the Trust.

Probate: the court-supervised process of distributing a decedent's assets after death.

Small Estate Affidavit: *Probate Code §13100* can be used when personal property is less than $184,500.

Statutory Fees: *Probate Code §10810(a)*

The *Administrator/Executor* and the Attorney are each entitled to *Statutory* fees based on the gross value of the estate (not net of mortgages or indebtedness).

4% on first $100,000 : 3% on next $100,000 : 2% on next $800,000 : 1% on next $9 million

- $1 million gross estate - $23,000 x 2 = $46,000
- $5 million gross estate - $63,000 x 2 = $126,000

Benefits of Probate

Oversight may be warranted for complex/conflicted estates.

Ways to Avoid Probate

- Pay-on-death/transfer-on-death designations (bank/brokerage accounts, real property) – Pros/Cons
- Beneficiary designations (life insurance/retirement accounts)
- Titling (e.g., joint tenancy, community property)
  - Drawbacks:
    - Adding a child to title to real property is a gift if over $18,000 in any given year and exposes the property to sale by child, child's creditors, and child's divorce
    - Child loses full step-up in cost basis he/she would have otherwise received if he/she inherited it at death instead
    - Adding child to account title so he/she can easily manage it will result in the account going only to that child
    - Revocable Living Trust

Trust Definition – A contract between the Grantor and the Trustee concerning the management and distribution of trust assets while the Grantor is incapacitated and distribution to beneficiaries upon the Grantor's death.

Types of Trusts

1) Revocable Trust
   Can be changed. It's the foundation of a good estate plan.
2) Irrevocable Trust
   Cannot be changed unless all beneficiaries agree or without a court order. Used for gifting, reducing estate taxes, asset protection.

Benefits of a Revocable Living Trust

- No *Conservatorship* upon incapacity.
- No Probate upon death. Trust provisions are not made public.
- Assets are distributed without court involvement.
- Assets can be held in sub-trusts for a beneficiary and distributions can be made for their benefit under specified conditions, e.g., distributed at specified age(s) or stage(s). Holding assets in trust can protect the beneficiary's inheritance from creditors, predators, and divorce.

Drawbacks of a Revocable Living Trust

- Cost to establish.
- No court oversight.
- Trust Administration – It's still cheaper than Probate
- The Trust must be Funded
  - Your assets must be retitled from your name as an individual to your name as Trustee of your Trust.
  - Exceptions: Retirement Plans and Life Insurance Policies
- Common misconceptions:
  - It provides asset protection for the Grantor.
  - It complicates taxes. The tax ID number of the Trust is the Grantor's SSN until death. Taxes are paid exactly as they were before the Trust was created.
  - It must be amended every time you buy or sell a property.
  - Restating the Trust changes the date of the Trust.

When Trusts Go Wrong #1: The Trust isn't Funded!

- Schedule of Assets → It's helpful, but it doesn't transfer assets into the Trust. The Schedule shows the Grantor's intent that the assets should be held in the Trust and supports a *Heggstad Petition*.

When Trusts Go Wrong #2: Name the right person as Successor Trustee!

Being a Successor Trustee is a job. Who has the skills needed?

Job Duties: The Successor Trustee manages the Trust assets and makes distributions for the Grantor's benefit during the Grantor's incapacity, administers the Trust upon the Grantor's death, including paying remaining debts, coordinating with the CPA to file tax returns, appraises assets, provides an inventory and accounting of Trust assets to the beneficiaries, and makes distributions to the beneficiaries under the terms of the Trust.

The Trustee owes a *Fiduciary Duty* to the beneficiaries of the Trust. The Trustee is legally and ethically bound to act only in the best interests of your beneficiary(ies). The Fiduciary Duty owed by a trustee to a beneficiary is one of the highest standards of care that exists under the law. Your Trustee must be unquestionably trustworthy.

10 Traits to consider when "hiring" a Trustee

1) Integrity
2) Reliability
3) Unbiased
4) Resolute
5) Organized
6) Financial competence
7) Willingness
8) Time
9) Proximity
10) Age

When Trusts Go Wrong #3: Blended Families and Disinheriting Children

Frequently, Trusts are drafted to leave everything to the Surviving Spouse, but this could lead to the deceased Grantor's children being disinherited.

When Trusts Go Wrong #4: Don't be a Zombie!

Trusts allow people to hold assets in Trust for their beneficiaries, but some people take it too far and want to control their assets and the beneficiaries for years from beyond the grave.

Tip – When creating a Trust, think about what you're asking the Trustee to do. Would you want to do that job?

Time Permitting

Intestate Succession – The No-Plan Plan

"If you fail to plan, you are planning to fail!" Benjamin Franklin

Distribution is governed by California Law.

- Unmarried → Closest living family member
- Married: Community Property → Spouse
  Separate Property → Divided between spouse & children/next of kin

Definitions

Will: a legal document that says how you want your property distributed when you die.

Testator: the person who creates the Will.

Executor: the person named in a Will and appointed by the Court to carry out the Testator's wishes.

Administrator: the person appointed by the court to manage the estate of a person who dies without a Will.

Personal Representative: refers to both Executor and Administrator.

Probate: the court-supervised process of distributing a decedent's assets after death.

Conservatorship: a Court proceeding that appoints a responsible person to care for an adult who is unable to care for themselves or manage their finances.

Trust: a contract between the Grantor and the Trustee concerning the management and distribution of trust assets while the Grantor is incapacitated and distribution to beneficiaries upon the Grantor's death. The scope of the contract only covers the assets titled in the name of the Trust. If there are assets left outside of the Trust, they would be beyond the scope of the contract and could be subject to Probate.

Grantor/Settlor/Trustor/Trustmaker: the person who creates the Trust.

Trustee: the person who manages and distributes the assets in the Trust.

Beneficiary: the person who receives the assets in the Trust.

Fiduciary Duty: a legal obligation to act in the best interest of another party, or beneficiary, with the utmost good faith, trust, and loyalty. The Fiduciary Duty owed by a Trustee to a Beneficiary is one of the highest standards of care that exists under the law. Your Trustee must be unquestionably trustworthy.

Funding: the process of transferring assets into your Trust.

Statutory: means a rule or law that has been formally written down and codified.

Heggstad Petition: also known as a California Probate Code *§* 850 Petition, is a legal process that allows a property or asset to be transferred into or out of a Trust after the Grantor has passed away. The Petition is used when an asset was intended to be included in the Trust but was not.

Intestate Succession: the process of distributing a deceased person's assets to their next of kin.