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- **No attorney-client relationship is created** by reading this handout, attending this seminar, or by the speaker providing information or answering your questions, regardless of whether the information provided by the speaker is provided to the entire group or to you directly and individually, one-on-one.

TWO IMPORTANT THINGS TO REMEMBER:
YOUR <u>MINOR CHILDREN</u> AND <u>YOUR HEALTH</u>

1. **<u>YOUR MINOR CHILDREN</u>**
   If you have minor children, you <u>need to put in writing who you want to raise those minor children</u> if something happens to you.

   If you designate a person in your estate plan, that person will have a priority to raise the children and handle their funds over everyone except the child's other natural parent.

2. **<u>YOUR HEALTH</u>**
   Every person 18 years of age or older should have an Advance Healthcare Directive that contains provisions for HIPAA. (THIS INCLUDES YOUR CHILDREN OR GRANDCHILDREN WHO ARE 18 OR OVER).

   An Advance Healthcare Directive allows doctors, hospitals, and other healthcare workers to release medical information about you to the person(s) you name.

   It grants those you have named the authority to make medical decisions for you if you are unable to do so. This could be for ongoing medical treatment, surgery, therapy, long-term care, or life support/end-of-life decisions.

<u>ESTATE PLANNING</u>

Wills and Living Trusts

If I have **$150,000 or less** in assets and **$50,000 or less in real property** what type of estate planning do I need?

1. <u>A WILL</u>
   In a will you can name whom you want to inherit from you and whom you want to raise your minor children if something were to happen to you.

   <u>A will does not help you avoid estate taxes or the probate process</u> *(as discussed below)*

2. <u>AN ADVANCE DIRECTIVE FOR HEALTHCARE</u> *(as discussed above)*

3. <u>CALIFORNIA UNIFORM STATUTORY FORM POWER OF ATTORNEY FOR ASSET MANAGEMENT</u> *(as discussed below)*

<u>WHAT ABOUT A "LIVING TRUST"?</u>

QUESTION: What will a Living Trust do for me that a Will cannot do?

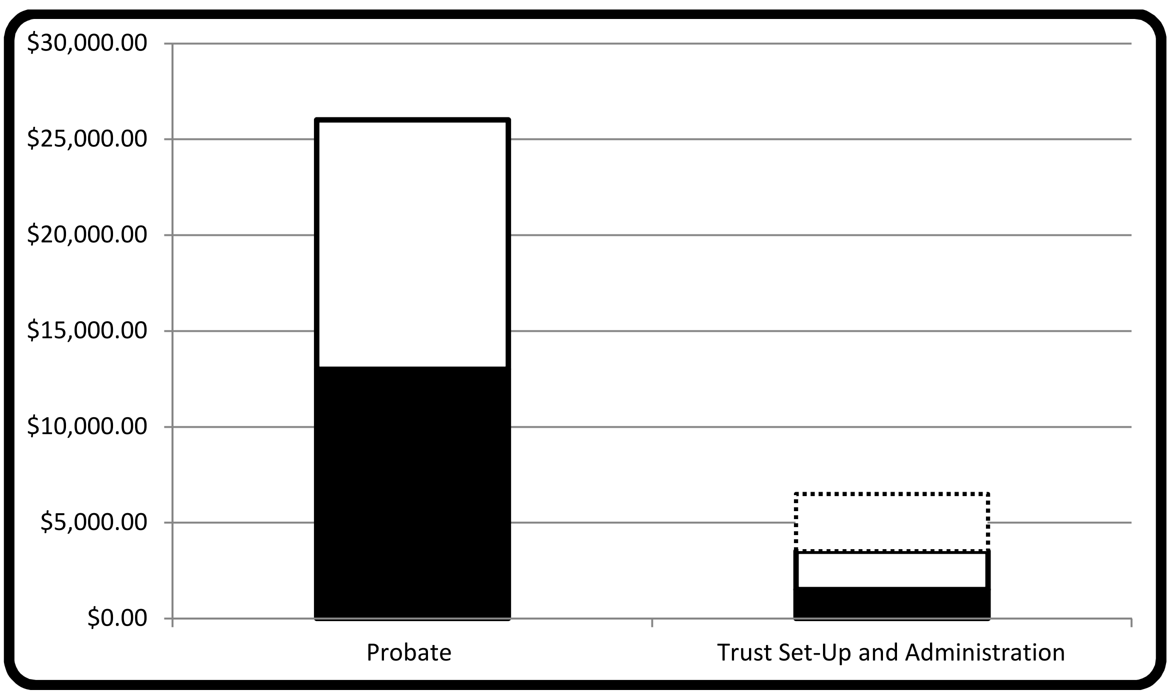
ANSWER: With a Will, **if your estate contains a home or other real property valued at more than $50,000 or personal property valued at more than $150,000** and both spouses pass away, California law requires the estate to go through Probate – a 1 to 1 ½ year (or more) court process. **With a Living Trust, it is possible for the beneficiaries to receive the estate in a minimum amount of time with no court involvement.**

Size of Estate	Approximate Probate Expenses*	Approximate Cost of Living Trust (set-up)**
$300,000 - $10 million	**$18,000 - $226,000**	**$1,500 - $3,000**

* *This is the statutory fee (set by the CA Probate Code) paid to the Executor and the Attorney on a percentage basis. There may also be additional fees due to the sale of real property during the Probate and so forth. Also, there are costs which must be paid to the court and a bond which may need to be posted.*

** *There are additional costs and fees of administration at death.*

<u>COST OF A $500,000 ESTATE</u>



I. PROBATE

A. <u>Definition</u>

Probate is the system by which the court oversees the payment of your creditors and distribution of your estate.

B. <u>Advantages</u>

The procedure allows the court to make certain that your debts are paid in the proper priority after proper claims are filed. Also, creditors have a limited time period to make their claims. Distribution is supervised to the beneficiaries you name in a Will; or, in the event you do not have a Will, to your heirs.

C. <u>Disadvantages</u>

Probate generally takes one year or more. There are expenses for court fees, the publication of notices and, sometimes, bond. Court appearances may be required; and, there are fees for the attorney and commissions for the estate representative that run from 4 percent of the first $100,000; 3 percent of the next $100,000; 2 percent of the next $800,000; 1 percent of the next $9 million; and so on, each, based upon the gross value of your estate (liens, encumbrances and debts are not considered) plus all gains on sales and receipts during Probate and less any losses. On an estate of $200,000 that would be $7,000 **each**, and on an estate of $1 million, it would be $23,000 **each**. In addition, extraordinary fees and commissions are often granted for things such as the sale of your home, Will contest, and estate tax work.

D. <u>Will vs. No-Will</u>

The difference between having a Will or not having a Will does <u>not</u> determine whether or not your estate goes through Probate. The difference is whether you dictate how your assets are distributed or the court decides, based upon what the State Legislature believes you would have done if you had gotten around to having a Will drawn-up. With a Will, you may also designate who will handle your affairs (Estate Representative); how your estate will be distributed; and, you may name a Guardian to raise your minor children.

E. <u>What is my “Estate”?</u>

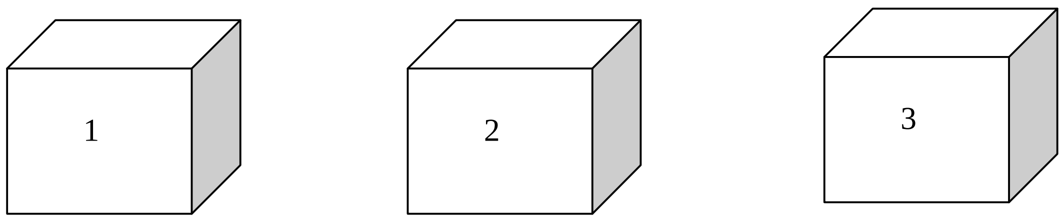
Your “Estate” defines what assets are subject to being distributed upon your death. In general, if married, it consists of your separate property (assets that you had before marriage or received by gift or bequest to you) plus one-half of your community property (assets acquired with your spouse during marriage). If single, it includes all of your assets.

What is my Estate?

What a person means by your "Estate" can vary. For financial planners it means one thing, for Estate Tax Returns it means something else, and for Probate it has a third definition.

"MY ESTATE" for purposes of Probate is illustrated as follows:

Please try to visualize this. At your death, we sit down with a list of your assets-every item you own an interest in. In front of us are three boxes. Every item you own has to go in one of the three boxes. We determine which box it goes in by the type of asset and the way the asset is owned/vested. This will include all of your separate property and one-half of your community property.



Box #1 gets all the assets you own with either a named beneficiary (such as a retirement plan, life insurance, or POD bank account) or joint owner (assets titled as "joint tenancy" or as "community property with right of survivorship"). These assets will pass to the beneficiary or joint owner without Probate.

Box #2 gets all the assets you own in a valid Trust. The title to the property has been changed from you to the Trustee of the Trust. These assets will be administered and distributed as the Trust dictates without Probate.

Box #3 gets everything else. Anything that did not qualify to go in Box #1 or Box #2 must be placed in Box #3. **<u>This box represents your Probate Estate.</u> If the assets in this box total more than $150,000 or more than $50,000 in real property, your beneficiaries must go through court-supervised and controlled Probate proceedings.** If you have a Will, the Will will direct the court how to distribute these assets at the end of the proceedings. If you do not have a Will, the court will distribute your assets according to the California Probate Code.

Depending on your individual situation, one or more of the boxes may be empty-if you never set up a Trust or do not transfer assets to a Trust, there will not be anything in Box #2.

If your desire is to avoid Probate, you need to focus on keeping the total value of the assets that will go in Box #3 under $150,000 and any interest in real property under $50,000.

II. ALTERNATIVES TO PROBATE

A. Community Property or Community Property with Right of Survivorship

Community Property is a manner of holding title of ownership with your spouse and which confirms the asset is marital property. Either spouse, however, can, by Will, leave their share of community property to someone other than their spouse. In part for that reason, in 2001, a new manner of holding title was created, “Community Property with Right of Survivorship.”

B. Joint Tenancy

Joint Tenancy is a manner of holding title of ownership with someone else (your spouse or any number of others) whereby if one dies the other(s) take(s) the deceased person’s share (right of survivorship). Usually you would not hold property this way with anyone other than your spouse. Joint Tenancy is easy to handle on the death of a Joint Tenant. It does not go through Probate or get divided with anyone except the surviving Joint Tenant(s).

There can be adverse income tax consequences for a Joint Tenant (spouse or not) if he or she sells assets which have appreciated (gone up in value) if they were held in Joint Tenancy. That is why we now call Joint Tenancy a “Tax Trap for the Unwary.” Such assets are subject to judgment levies and only the last of the Joint Tenants can Will it to someone else.

It is important to make clear your intention that an asset in Joint Tenancy is really intended to go to the survivor(s). All joint tenancy interests are equal and must be created by one document at the same time.

Tenancy in Common is not Joint Tenancy. Tenancy in Common interests may be different and may be created at different times.

C. Totten Trusts

A Totten Trust is simply the name given to an account that you set up in your name “In Trust For” (“ITF” or “ATF”) someone else. The asset is yours to do with as you please until you die. Upon your death, it goes to the person you named. Your Will does not govern it. Many assets cannot be owned in this manner. It does not provide for alternatives, such as that person dying before you.

D. $150,000 or Less

If, at your death, you have assets (other than real property) of $150,000 or less in value, an Affidavit can be prepared to allow the transfer of those assets to your heirs. If you have an interest in real property (such as oil and mineral rights or a Trust Deed) valued at $50,000 or less, it can be appraised by a court-appointed appraiser and be transferred without a formal Probate proceeding six months after decedent’s death. If you have an interest in personal and real property valued at $150,000 or less but more than $50,000, a Summary Probate proceeding is available 40 days after the decedent’s death that is less involved than a normal “Probate,” but a court hearing is required.

E. Revocable Living Trust

(discussed below)

III. REVOCABLE LIVING TRUSTS

A. Inter Vivos vs. Testamentary

An Inter Vivos Trust (Living Trust) is a contract that you create and fund (put assets in) while you are alive. This is the type of Trust that most people have and is generally what you hear people talk about.

A Testamentary Trust is one that your will provides for the creation of upon your death. A Testamentary Trust must go through Probate to come into effect. The primary difference between the fully funded (all of your assets are in the Trust) Living Trust and a partially-funded (some assets are transferred) Living Trust or a Testamentary Trust, is Probate. A Testamentary Trust does not avoid Probate and thus you pay the attorney higher fees to prepare the documents and you also pay him to Probate your estate.

B. Advantages

1. With the fully funded Living Trust you pay slightly more now for estate planning; but, can avoid the time and expense of Probate.

2. It is possible to eliminate, or at least decrease, estate taxes on your death or the deaths of you and your spouse, if that is an issue.

3. You may avert the need of an expensive Conservatorship in your later years by naming a Trustee to take over upon your incapacity.

4. You can retain income tax advantages, which are lost in joint tenancy.

5. You may change the terms by amendment or revoke (cancel) the Trust while you are alive. You are in charge.

6. You can provide for how you want assets distributed and on terms you desire.

7. Transfers can take place quickly upon your death (often within a few weeks).

C. Disadvantages

1. It costs more than a Will, but this is insignificant compared to the cost of Probate.

2. No probate four month creditor’s claim period.

3. You will spend some time taking inventory of your assets (putting a list together) and changing title to the Trust.

D. Usual Types of Revocable Living Trusts

In discussing Revocable Living Trusts, you may be involved with Standard, A/ B, A/B/C (Q-TIP), Disclaimer, Special Needs, or Spend-Thrift Trusts depending on your needs and the size of your estate.

1. Standard Trust
   A Standard Trust is our most common Trust and is usually appropriate for individuals or couples who have assets, the *gross value* of which is **between just under $150,000 and well under the estate tax exemption amount** ($5.34 million in 2014) or for individuals or couples who have any interest in real property.

2. A/B and A/B/C Trusts
   A/B and A/B/C Trusts are Trusts that may be appropriate for married couples who have assets, the *gross value* of which is **close to or over the estate tax exemption amount** (currently $5.34 million) or married couples with complex family situations (i.e., children from different relationships).

   A/B and A/B/C Trusts divide on the death of one spouse into two or more Trusts, one or more of which becomes irrevocable. With an A/B or an A/B/C Trust, it is possible for a married couple to pass up to twice the estate tax emption amount ($10.68 million in 2014) without paying any estate tax!

   With an A/B or an A/B/C Trust, California law requires that when a Trust becomes irrevocable, written notice be given to all beneficiaries, and, upon request, that they be provided with a copy of any Trust provisions which apply to them. Any provision of the Trust which attempts to circumvent this requirement is void.

   As a result of the "portability of exemption" (discussed below), which is only available by election on a timely filed Estate Tax Return, the unused portion of a deceased spouse's exemption transfers to the surviving spouse so that the surviving spouse will have an increased exemption. The deceased spouse's unused exemption is not lost. It may appear that as a result of portability of exemption, an A/B or an A/B/C Trust is unnecessary. But, just like the estate tax exemption amount, "portability of exemption" is subject to change. It is not guaranteed to be permanent.

   So planning with an A/B or an A/B/C Trust to preserve the estate will often (and should) still be considered.

3. Disclaimer Trust
   Sometimes making an A/B or an A/B/C Trust a "disclaimer" Trust is the best option. Making an A/B or an A/B/C Trust a "disclaimer" Trust gives the surviving spouse the option to keep the Trust as one Trust or "disclaim" all or part of the deceased spouse's share causing the Trust to split into two or more separate Trusts upon the death of the first spouse if doing so is determined to be appropriate at the time of the first spouse's death.

4. Special Needs Trust
   A Special Needs Trust ("SNT") is an important consideration, in a Will for a spouse beneficiary with special needs; or, in a Trust for a non-spouse beneficiary with special needs. The special needs considered here are mental or physical conditions which make the beneficiary eligible for

public benefits, which an inheritance or gift could otherwise cause the beneficiary to lose. A SNT allows the beneficiary with special needs to keep their public benefits while the inheritance or gift remains held in the SNT.

5. Spendthrift Trust

A Spendthrift Trust is used in situations where a person wishes to leave assets to a beneficiary who cannot handle money responsibly.

A Spendthrift Trust is generally not a separate Trust at all but is a provision in a Living Trust to limit the ability of a specific beneficiary to anticipate (act ahead of actually receiving an inheritance) by borrowing against a future inheritance or assigning it.

Also, a Spendthrift Trust limits the ability of most creditors of a beneficiary from attaching assets of a Trust before they are paid (i.e., distributed) to the beneficiary.

IV. TAX LAWS THAT AFFECT YOUR ESTATE PLAN

A. The Estate Tax

What was a \$3.5 million "exemption" from estate tax in 2009 increased to 5.34 million in 2014. This means that upon your death, the amount of your gross estate exceeding \$5.34 million is taxed at 40 percent.

B. Annual Gift Tax Exclusion

An individual (the "donor") has the ability to gift \$14,000 per year to any other individual in 2014. The donor can give an unlimited number of people \$14,000 per year without it counting toward the donor's lifetime gift tax exclusion amount (discussed below). There is no tax or reporting on this amount.

This \$14,000 annual exclusion is increased by the inflation rate. The increase from \$10,000 began in 1999 and thereafter. If the amount of the annual exclusion, as adjusted, is not a multiple of \$1,000, the amount will be rounded to the next lowest multiple of \$1,000. Thus, the annual exclusion will not increase until the cost of living adjustment is at least 10 percent.

C. Lifetime Gift Tax Exclusion

For gifts in excess of the annual gift tax exclusion amount (i.e., gifts that exceed \$14,000), a Gift Tax Return (Form 709) must be filed. The IRS expects you to keep track of the gifts you make throughout your lifetime that are above the annual gift tax exclusion amount.

For example, if you give another person \$100,000 in a calendar year, \$86,000 of that amount (\$100,000-\$14,000) will count toward your lifetime gift tax exclusion amount.

The lifetime gift tax exclusion amount is \$5.34 million. When you die, if the total amount you have given beyond the annual gift tax exclusion amount exceeds the lifetime gift tax exclusion amount, that amount will be taxed at 40 percent.

D. The Lifetime Gift Tax Exclusion Amount and the Estate Tax Exclusion Amount are "Unified."

Keep in mind that the lifetime gift tax exclusion amount and the estate tax exclusion amount are "unified." This means that if some of the lifetime gift tax exclusion amount is used during a person's lifetime, the amount that is excluded from estate tax upon that person's death is reduced accordingly.

E. Portability of Exemption

Portability was a concept introduced in 2010 and has been made "permanent" as part of the agreement Congress and the President reached at the end of 2012. Portability allows the surviving spouse to retain a deceased spouse's unused exemption, but **ONLY IF** portability is elected on a timely filed estate tax return upon the death of the first spouse.

F. <u>The Generation Skipping Transfer Tax</u>

The Generation Skipping Transfer Tax ("GSTT") exemption, for gifts or bequests to a "skip" person (one who is more than one generation from the transferor) is increased to a total during life or upon death of $5.34 million. The GSTT is a 40 percent tax in addition to the gift or estate tax. This is not $5.34 million in addition to the estate tax exemption.

G. <u>Pension Plans and IRA's</u>

For those of you with sizable pension plans or IRA's, the plan assets are subject to federal estate tax (due within nine months of the individual's death, or in the case of a surviving spouse, nine months of the spouse's death), and to federal and state income taxes at the time the beneficiary withdraws money from the plan.

The combination of estate taxes and income taxes can result in a major reduction in the value of qualified retirement plan assets as a result of the double-taxation.

The goal for qualified retirement plan assets from an estate planning perspective is two-fold:

1. Make sure there are sufficient liquid assets in the estate, outside of the qualified plan, which can be used to pay the estate taxes on the qualified plan assets and the rest of the estate, without being forced to liquidate all or part of the qualified plan assets to pay the taxes. Frequently, this is done through establishing an Irrevocable Life Insurance Trust which is used to pay the taxes and is not a part of your estate for tax purposes; and,

2. Structure the beneficiary designation so that payments can be made from the qualified plan to the designated beneficiary over as long a period of time as the law allows. This allows the qualified plan assets to remain in an income tax deferred environment for as long as possible, to take advantage of tax-free compounding.

V. GUARDIANSHIP/CONSERVATORSHIP

A. <u>Guardianship</u>

Guardianship is for your minor children. You need to designate in your estate plan who will (1) raise your children; and, (2) handle their finances. This can be the same person(s) or two different people. If you do not designate someone, the court will name someone based upon a priority set forth in the Probate Code. Often you want someone other than your parents or siblings. You may want to consider religious and moral beliefs, geographical location, ages, health, family situation, and finances.

B. <u>Conservatorship</u>

Conservatorship is for an adult who is physically or mentally unable to care for him or herself. It can be "of the person" (establishing where you live and health care decisions) or "of the estate" (handling your finances), or both. If you don't designate whom you want, the court will do this for you if the need arises. Having agents for healthcare (Advance Directive for Healthcare) and finances (Durable Power of Attorney) will help avoid the necessity of a Conservatorship.

VI. OTHER ESTATE PLANNING TOOLS

A. <u>California Uniform Statutory Form Power of Attorney for Asset Management</u> (Probate Code §4401)

1. These are useful to allow others designated by you to handle specified transactions or all of your financial matters for you. The Durable Power of Attorney may be in effect upon signing or may only come into effect upon your incapacitation, depending on what is specified in the document.

2. The Power of Attorney ceases upon the earliest of rescission (cancellation); a date you specify; or, your death.

3. <u>***The Power of Attorney for Asset Management is extremely potent and is dangerous in the hands of a person you cannot totally trust since that person now has unsupervised access to all of your assets.***</u>

<u>**Think carefully before signing such a document.**</u>

B. <u>Living Wills</u>
The Living Will really is not a Will at all. It is often confused with a Will or Living Trust. All a Living Will accomplishes is to allow you to request that your physician not use extreme, life-prolonging procedures. **This does <u>not</u> take the place of an Advance Directive for Health Care/Durable Power of Attorney for Health Care Decisions.**

C. <u>Advance Directive for Healthcare</u> (Probate Code §§4600 et seq.)
Previously known as a Durable Power of Attorney for Health Care Decisions, the Advance Directive for Healthcare is a very useful document to allow you to (1) designate the person who can make medical decisions for you in the event of your incapacitation, and (2) request no extreme life-prolonging procedures. ***Everyone eighteen years or older should have an up-to-date Advance Directive for Healthcare. These should include provisions for the HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT ("HIPAA").***

D. <u>Medi-Cal Planning</u>

1. Long-term Care

2. OBRA-93/DRA-06

VII. **Question and Answer period as time permits.**