ESTATE PLANNING FAQS

NOTE: This section will help address many of your questions about estate planning. However, the information contained in this section is for educational purposes only and does not serve as legal advice or opinion. Your place of residence, particular circumstances, or changes in the law may affect whether the information in this section applies to you. You must consult with a tax or estate planning professional licensed in your state before using or relying on any of the information in this section.

- GENERAL MATTERS
- PROBATE
- REVOCABLE TRUST
- FIDUCIARIES
- DISTRIBUTION
- PLANNING FOR INCAPACITY
- ESTATE TAX
- GIFT TAX
- GST TAX
- LIFE INSURANCE
- RETIREMENT PLANS

GENERAL MATTERS

Why do I need an estate plan?

You want to ensure your affairs are properly managed if you become incapacitated. Your estate plan can provide for management of your financial affairs and your medical care in the event you become incapacitated.

You want to protect your family on your death. Your plan provides for the disposition of your assets after your death. In some cases, it may be appropriate to set up a Revocable Trust so that a person with financial experience can manage your assets for family members who are too young or inexperienced to handle financial matters or to help protect your family from creditors. Assets in a Revocable Trust are not subject to probate.

You want to save on estate taxes. Your plan can help reduce death taxes. If you are married and your assets, life insurance, and pension benefits total over $3.5 million, a properly drafted estate plan could save your family as much as $1.5 million in estate taxes (money that should go to your family, not the government). The amount saved is the 45% tax on any amount over $3.5 million owned by the surviving spouse after the first spouse's death.

How much will my estate plan cost?

The cost depends on many factors. I charge for my services primarily on a flat-fee basis. Generally, the more complicated the plan, the higher the cost. Fees may range from as low as

$3,000 for the basic estate plan (Family Protection Plan: Level One) to as high as $50,000 for more advanced estate planning.

Can I make changes to my estate plan after I sign it? How much will it cost to make changes?

Some parts of your plan may be “irrevocable” and cannot be changed. For example, if you give assets away, you cannot get them back. Some people want to set up trusts to fund the college education of their children or grandchildren and these trusts usually are irrevocable.

You can change your Will or Revocable Trust at any time. I do not charge for reviewing your estate plan three years after you finalize the plan. Future amendments to your plan are typically charged on an hourly basis. However, you might need an entirely new plan (costing as much as or more than your original plan) if your circumstances materially change or if there are significant changes in the law.

What should I send you before our first meeting?

A completed questionnaire. If you are interested in establishing an estate plan for your family, please contact me to obtain an information packet and to schedule a meeting. The information packet will give me important information about your family's circumstances and objectives, save time during our meeting, and get you thinking about the kind of plan you want. After reviewing your information packet, I will be in a better position to advise you about your estate planning options.

Other important documents. If you are able to find them, please send me a copy of the grant deed to your primary residence, as well as your current Will, trusts, powers of attorney, health care directives, premarital agreements, buy-sell agreements, and partnership agreements.

Return to top

PROBATE

What is probate?

Probate is a court supervised proceeding. A probate judge decides whether you have left a valid Will and he or she appoints an Executor (whom you can designate in your Will). The Executor makes a list of your assets, pays your debts, files any required tax returns, and manages your assets during this time. When the Executor's work is done, the judge will issue a court order transferring to your designated beneficiaries the legal title to your assets. If you die without a Will, also referred to as dying "intestate," the probate judge will still appoint an executor but your assets will be distributed to your heirs according to California intestacy laws, which may or may not reflect your wishes.

How long does probate last?

Probate can last anywhere from 6 months to two years.

What assets must be probated?

Generally, any assets that you own in your sole name must be probated.

What assets do not have to be probated?

Many assets do not go through probate, including assets held in a Revocable Trust, joint tenancy assets, bank trust accounts, assets such as life insurance, annuities, IRAs and retirement plan benefits that have a designated (non-minor) beneficiary, and assets passing to a surviving spouse.

How much does probate cost?

The cost depends mainly on whom you name as Executor, which lawyer the Executor hires, and how large your estate is. There are fees payable to the probate court (these can run from several hundred dollars to several thousand dollars) and to a court appointed appraiser (who charges 1/10 of 1% of the value of the assets appraised). The main costs of probate are the fees payable to your Executor and the Executor's lawyer for the work they do. In California, state law sets a fee for "ordinary services" by the Executor and the Executor's lawyer. As of 2007, the fee, based on the estate's gross assets and income, is:

- 4% on the first $100,000,
- 3% on the next $100,000,
- 2% on the next $800,000,
- 1% on the next $9,000,000,
- And lower fees above that.

If you name co-Executors, they split one fee. The fee is the same no matter how long the probate takes (although as more income is earned, the amount of the fee will increase). Depending on the size of the estate and the work done, the Executor and the Executor's lawyer can probably charge extraordinary fees for extraordinary services like tax-related work, litigation, or the sale of real property.

Return to top

REVOCABLE TRUST

What is a Revocable Trust?

A "Revocable Trust" (also referred to as a revocable living trust or a living trust) sets forth a legal relationship between the creator of the trust (often referred to as a "Settlor" or "Grantor"), the beneficiaries of the trust assets, and the trustee who manages the trust assets for the benefit of the beneficiaries. If you establish a Revocable Trust, you can be the initial trustee and designate a successor trustee to serve upon your incapacity or death.

Does having a Revocable Trust avoid probate?

Just signing a Revocable Trust will not avoid a probate. A Revocable Trust allows you to avoid probate only if, during your lifetime, you transfer legal title to your major assets out of your individual name and into the trust (this is often referred to as funding your trust).

Do I still need a Will if I have a Revocable Trust?

You still will need a Will to deal with assets that have been left out of the Revocable Trust. (For example, you might inadvertently forget to transfer certain assets into the trust). This kind of Will is called a "Pour-Over Will" because the Will directs the probate court to "pour over" your estate into the trust.

Can I control assets in a Revocable Trust?

You can control all of the assets in your Revocable Trust, serve as the initial Trustee, and retain the right to revoke or amend the trust at any time during your lifetime.

Can my family use assets in my Revocable Trust immediately after my death?

The successor Trustee can start managing your trust immediately after your death for the benefit of your family or any other designated trust beneficiaries.

Does a Revocable Trust save estate taxes?

You can minimize (and in certain cases entirely eliminate) estate taxes through a properly drafted Revocable Trust. A trust established under a Will (known as a "testamentary trust") can also be drafted to minimize taxes.

What if I become incapacitated?

If you become incapacitated, the successor Trustee can immediately start managing your trust assets for your benefit, thereby avoiding the need for a costly and time-consuming conservatorship proceeding. However, there are other approaches that you can use to avoid a conservatorship, such as a Springing Durable Power of Attorney. Also, community property is not subject to a conservatorship if one spouse is still competent.

Will a Revocable Trust protect my assets from my creditors?

A Revocable Trust will not protect your assets from creditors. However, a Revocable Trust (or a testamentary trust) can protect assets held for your beneficiaries from their creditors.

How should I hold title to my house?

The best way to hold title to your house depends on many things, including whether you own your house alone or with another person, whether that other person is your spouse, to whom you

want to leave the house - on your death, the income tax basis in the house, and whether you have a Revocable Trust.

How do I transfer assets to my Revocable Trust?

To transfer real estate into the Trust, you sign a grant deed. (There should be no property tax reassessment on transfers of real estate to the Revocable Trust.) You transfer partnership interests, securities, and deeds of trust by executing "assignments." If you want to transfer your existing bank and savings accounts (other than a small operating account) to the trust, you can close the accounts and transfer the cash into new accounts owned by the Revocable Trust.

Return to top

FIDUCIARIES

Who should be my Executor and Trustee?

The Executor and Trustee are often individuals whom the Settlor trusts and who have some "business" acumen. This may be a family member or friend or it may be a bank or trust company.

Whom should I name as the guardian of my minor children?

The guardian of your minor children should be an individual (or individuals) who is willing and able to raise your minor children if you are unable to do so, because of incapacity, death, or another reason. You should choose someone with whom your children will get along and who would have the time, ability, and inclination to look after them. Obviously, the guardian should be someone who has a similar philosophy to yours on how to raise children and who would respect your wishes on such matters as religion and schooling.

If you are considering naming someone much older than yourself (for example, your parents), consider whether they will have the stamina and tolerance for noise that it takes to raise children through the age of 18. If the guardian lives in another city, how will the children react to the move? Will the children be easily accessible to other members of your family? Is there a big gap in the standard of living you enjoy and that which the guardian enjoys?

Return to top

DISTRIBUTION

Should distribution to my children be outright or in trust?

If you leave assets to a minor child outright, then the court must establish a guardianship to manage the assets for the child. This is both expensive and cumbersome. When the child turns

18, he or she will receive the assets; but it may harm the child to receive your assets at such a young age.

The California Uniform Transfers to Minors Act (CUTMA) lets you transfer assets to a custodian who will administer the assets until your minor child reaches the age of 21 (if you make a lifetime gift) or the age of 25 (if you make a gift at death).

Finally, you can transfer assets to a minor through a trust. A trust protects young or financially inexperienced beneficiaries and can also save taxes. The Trustee will make distributions to the child or for the child's benefit according to the distribution instructions you set forth in the trust document. You can control the date when the trust ends and there is generally no limit on the age of distribution. You can also keep the assets in trust for the child's lifetime. Assets held in trust for a child can be protected from the child's creditors and from the child's spouse while the assets remain in trust.

Should there be one trust for all or should each child have a separate trust?

Each child can have his or her own trust or you can set up one "Pot Trust" for all children until the youngest reaches a certain age. There are pros and cons to each approach.

Using separate trusts means that if one child goes to a very expensive school, or has high medical costs, the other children's shares cannot be used to subsidize that cost. Older children do not have to wait for the younger children to reach a certain age before they receive their inheritances. By contrast, a "Pot Trust" allows the funds to be available for all the children while they are growing up and getting an education. When all the children have achieved a certain age (typically 21years), the Trustee then divides the remaining trust assets into separate trusts for the children. The Pot Trust is generally used where there may be insufficient assets for each child to have his or her own trust or if the Settlors wish to ensure that all of the trust’s assets are available to all the children in the event of medical emergencies, unequal educational expenses, etc.. When there is a big age gap between the oldest and youngest child, the Pot Trust may force an older child to wait a long time to receive his or her inheritance. There is also the risk that one child's needs may exhaust the entire Pot Trust.

When should my children receive their inheritance?

The age depends on your philosophy and the maturity of the child. Some people do not like the idea of ruling from the grave and they provide for distribution when the child turns 18. Others feel that a child should inherit money only when the child is more mature.

Often, a trust will provide for distribution in installments. Most people learn how to handle money only by handling (and losing) it; and most people do not have the opportunity to handle money until they are in their mid 20's at the earliest. A fairly common provision is that the child will receive one-third of the assets at 25, another one-third at age 30, and the balance at age 35. Thus, if a child were to spend all the assets distributed at age 25, he or she would still have the other two installments to enjoy later. However, some people prefer to set the ages later, to force

their children to earn their own living and become productive members of society, or to assure that some funds will be left when the children are in their retirement years.

Finally, some people believe that assets should remain in trust for the child's lifetime in order to afford the maximum protection against creditors. Sometimes (especially with large estates) there may be substantial tax benefits if you keep part of the inheritance in trust for the child's life.

Return to top

PLANNING FOR INCAPACITY

Who can make decisions for me if I am incapacitated?

Without a Durable Power of Attorney or Revocable Trust, a court probably would have to appoint a conservator to act for you if you became incapacitated. California law lists the relatives who have priority in being appointed as your conservator or you may nominate a conservator while you have the capacity to do so. The court supervision, accounting, and reporting requirements are similar to those in a probate estate, except that the court also requires additional investigations and reporting in order to protect the incapacitated person from unscrupulous or inept conservators.

What is a Durable Power of Attorney for assets?

By giving another person your "Power of Attorney," you authorize him or her to sign your name and take other actions for you concerning your assets. A "Durable" Power of Attorney remains effective even if you become incapacitated. Typically, a Durable Power of Attorney only becomes effective when you are no longer able to handle your own affairs, although it can become effective any time you choose.

There are some assets (like social security benefits or retirement accounts) that you cannot assign to a Revocable Trust. There are other assets that you may simply forget to transfer to your Trust. Therefore, a Durable Power of Attorney is important if you want to avoid a conservatorship.

What is an Advance Health Care Directive?

With an "Advance Health Care Directive," you authorize another person (your "agent") to make your medical decisions for you when you are no longer able to make such decisions yourself. Your physician can act on your agent's orders without incurring liability for doing so. Your Directive can express your wishes about being kept alive on life support systems if you are in a vegetative state and other end-of-life preferences. It can also express your wishes regarding organ donations and the disposition of your remains.

What is a Living Will?

Under California law, the "Living Will" is part of the Advance Health Care Directive, which can state your desire not to be kept alive artificially on life support systems.

Whom should I name to act for me when I become incapacitated?

The person designated as Executor or Trustee is typically also named as the agent or attorney-in-fact on one's Durable Power of Attorney.

The person named as agent for the Advance Health Care Directive should be someone who will carry out your wishes regarding your medical care, life support, and the disposition of your remains. This person need not be the same person to whom you delegate responsibility for your assets under your financial power of attorney.

Return to top

ESTATE TAX

What are estate taxes?

In general, estate taxes are taxes imposed on the value of assets that you own when you die. Generally, if the net value of your assets passing to someone other than your spouse is more than an "applicable exclusion amount" (see exclusion amounts below), there will be a tax.

How much are estate taxes?

California does not have a state estate tax. The federal estate tax for 2009 is 45% of your estate in excess of the estate tax exclusion amount set forth below:

2009 $3,500,000
2010 Repealed
2011 Estate tax reinstated at 2001 levels ($1 million per person)

The estate tax is completely distinct from income taxes and other taxes. Note that if you own assets in a state other than California, or if you own assets outside the United States, then there can be additional state or foreign estate taxes.

Will there be estate taxes on assets passing to my spouse at my death?

If your spouse is a United States citizen, there are no estate taxes on assets passing to that spouse, either outright or in certain kinds of trusts, because there is an unlimited marital deduction for assets passing to a surviving spouse. (There are special, complex rules if your spouse is not a United States citizen, despite your spouse's legal residence in the U.S. or immigration status.) Note that the unlimited marital deduction allows only for a deferral of estate taxes on assets passing to a surviving spouse. All such assets remaining in the surviving spouse's estate at the surviving spouse's death will be taxed at that point.

Can my estate get a marital deduction if I control who receives my assets after my spouse's death?

As long as your surviving spouse receives at least all the income for life from your assets, and no one other than your spouse receives the benefit of these assets while your spouse is living, you can take advantage of the unlimited marital deduction and still control who receives those assets at your spouse's death. This entails using a "QTIP Trust" as part of your Will or Revocable Trust. (If you wish, your spouse can also have the right to receive principal from the QTIP Trust for most living expenses.)

How can I reduce estate taxes on my estate?

There are many techniques for reducing estate taxes.

First, for married couples with net assets worth more than the "applicable exclusion amount," your estate plan can provide for the creation of separate trusts on the death of the first spouse. These trusts would preserve the deceased spouse's "applicable exclusion amount" and thereby reduce (or eliminate) the family's overall estate taxes.

Second, you can make "annual exclusion" gifts of up to $13,000 per person each year without incurring gift tax. Married couples can give up to $26,000 to each donee without incurring gift tax. These $13,000 gifts remove assets from your estate for estate tax planning purposes without any gift tax consequences. (You do not get an income tax deduction for making the gift, and the recipient does not have to report the gift as income.) You can make additional gifts each year, free of gift taxes, by directly paying for school tuition, medical bills, or both, of your family and friends.

Third, by giving away assets over the $13,000 annual exclusion gifts, you remove appreciation and income on gifted assets and that appreciation and income will not be subject to estate tax when you die.

Finally for larger estates, there are other more sophisticated strategies that you can use to reduce estate taxes.

Return to top

GIFT TAX

Should I make gifts?

You should make gifts if you want and can afford to do so. If you have more than enough assets to enjoy for the rest of your life, including emergencies, you should consider making gifts. Making lifetime gifts takes property out of your estate and is thus an easy way to reduce your estate taxes. Lifetime gifts will retain your income tax basis (whereas gifts made at your death receive a new basis equal to the value of the asset as of the date of your death).

How much can I give without any gift taxes?

Each person can give $13,000 to each beneficiary each year without incurring any gift or estate taxes. In addition, you can pay any person's school tuition (directly to the educational institution) and any person's medical bills (directly to the health care provider) without incurring any gift taxes, regardless of the amount of your gift. Finally, up to $1,000,000 given away during your lifetime will not give rise to any gift taxes. (However, any part of the exemption used during your lifetime will not be available to reduce your taxable estate when you die.)

There is a special rule for gifts to a beneficiary through a Section 529 “college savings plan” run by a state government, such as California's Golden State ScholarShare Savings Trust (www.scholarshare.com). As noted above, a person is entitled to give $13,000 per year to a beneficiary without incurring any gift taxes. With a qualified 529 Plan, a person is entitled to gift up to five times the annual exclusion amount of $13,000 (or up to $65,000) in one year without incurring any gift or estate taxes. However, if you were to make such a gift in year one, you could not make a tax-free gift to that same beneficiary over the next four years (the gift effectively "uses up" an equal amount of your annual exclusion gift for that beneficiary for the year of the gift and the four following years). Still, this can make sense because the beneficiary’s fund begins to earn income on the full amount of the gift beginning in the first year you make the gift. Regardless of the size of the gift in any given year, a qualified 529 Plan is an attractive estate planning device for several reasons. Although the donor remains the owner of the funds and retains control over the account, including the ability to change the named beneficiary, to withdraw funds from the account (subject to a penalty if used for other than qualified educational purposes), to transfer ownership of the account, and to name a contingent account holder, the contributions to the account are excluded from the donor/owner's gross estate for estate tax purposes. Moreover, when used to pay qualified educational expenses, the income on the account grows tax-free for both state and federal purposes and is excluded from the distributee-beneficiary's gross income. Another significant benefit for the beneficiary is that the 529 Plan is not considered an asset of a student for purposes of federal student financial aid. Parties considering a 529 account should consult a tax expert because there are complex tax implications that may not be obvious.

Are gifts to my spouse subject to gift taxes?

Generally, you can make gifts to your spouse without paying gift tax. Although such gifts are technically subject to tax, there is an offsetting unlimited marital deduction for assets passing to a spouse. (Again, there are different rules if your spouse is not a United States citizen.)

Can I make gifts in trust for my spouse and children rather than outright?

You can make gifts to a spouse or child in trust. Technically, the $13,000 annual gift tax exclusion does not apply to gifts made to a trust. However, if you want to use the child's $13,000 annual exclusion gift in connection with a gift to a trust, then the trust must contain a withdrawal power and you have to give the child a window of opportunity (generally 30 days) during which to withdraw the funds that you have put into the trust. If you make a gift to a spouse in trust, the trust has to satisfy certain requirements to qualify for the marital deduction referred to above.

Return to top

GENERATION-SKIPPING TRANSFER TAX

What is the generation-skipping transfer (GST) tax and what distributions are subject to the GST tax?

The GST tax is a transfer tax imposed on all gifts and distributions from you (or a trust established by you) to a grandchild (or great-nephew or great-niece) or an unrelated persons more than 37.5 years younger than you. The primary device for not paying the tax is the GST tax exemption. Each individual is given a GST exemption equal to the applicable exclusion amount, which is $3.5 million in 2009. Because of the GST tax exemption, the GST tax usually is relevant only in larger estates. There are rules for the automatic allocation of the exemption, but often the GST tax exemption must affirmatively be allocated; it is not done automatically.

How much are GST taxes?

When a GST tax is imposed, it is imposed at the highest estate tax rate and is imposed in addition to the estate or gift taxes on transfers. For 2009, generation-skipping transfers are subject to tax at a flat rate of 45%, in addition to the gift or estate tax that will be payable on the transfer. This tax is supposed to be repealed at the same time the estate tax is repealed - in 2010.

Should I make gifts during my lifetime or at my death to my grandchildren?

Gifts made during your lifetime using your $13,000 annual exclusion may save both estate and generation-skipping transfer taxes. It is therefore desirable to make these gifts if you are in the financial position to do so. Similarly, you should consider optimizing your $3.5 million GST tax exemption by giving some or all of this amount to grandchildren. Alternatively, you could carve this amount out of your regular lifetime gifts and leave it in trust for children during their lifetimes and then to grandchildren after the children die.

Return to top

LIFE INSURANCE

Do I need life insurance?

Life insurance is an important part of many estate plans. It can provide cash liquidity at the time of death to pay estate taxes. It can provide an "instant estate" to replace your salary and thereby provide for and protect your family. Finally, because it is possible to have the proceeds of life insurance excluded from your estate for estate tax purposes, it may be an effective way of lowering your estate taxes.

How much life insurance do I need?

The amount of life insurance will depend upon several factors, including the amount of cash that your heirs will need to pay taxes and other expenses; the amount of liquidity you leave to your heirs (outside of insurance proceeds) with which to pay taxes and other expenses; the standard of living that you want your heirs to have after your death; and the available cash that you have to pay the premiums.

What does life insurance cost and what kind of life insurance should I buy?

The cost of life insurance will vary according to the type of insurance, your age and health, and the amount of protection you want. Generally, the type of life insurance you buy will depend on how long you plan to keep the coverage. For example, if you are buying the insurance to help cover estate taxes on a valuable closely-held business, a policy that builds cash value (such as a whole life policy) might make the most sense because the need for cash will not likely go away. If you are taking out a policy to supply a standard of living for your children until they finish college, then a term insurance policy (which does not build cash value) may be sufficient because you can anticipate that these heirs will become self-supporting after a certain time.

Because estate taxes are usually payable only after the death of a surviving spouse, if you are buying insurance to help pay the estate taxes, you may want to consider buying a survivorship or "second- to- die" policy. This kind of policy pays off only after both spouses have died, but it is usually less expensive than buying a policy on the life of one of the spouses. Term insurance (which does not build cash value and becomes extremely expensive after age 70) can be bought on an annually increasing premium basis. Alternatively, you can pay somewhat more and have the premium fixed for 15 or 20 years.

Is life insurance tax-free?

Usually, life insurance is <u>income</u> tax free, but is still subject to estate taxes. The only time life insurance proceeds are not subject to estate taxes is if you have surrendered all "incidents of ownership" over the policy and the policy is not payable to your estate.

Who should be the owner of my life insurance?

Life insurance can be free of estate tax if the policy is owned by the person you want to name as beneficiary, or by an Irrevocable Life Insurance Trust (ILIT). As its name makes clear, an ILIT is an irrevocable trust - one that can never be changed. Thus, it is very different from a Revocable Trust.

However, not everyone wants to give up ownership and control of their insurance, especially where the policy has a large cash value or where the insured's children are very young. In that case (where you are the owner) the policy will be subject to estate taxes when you die (but, of course, subject to the possible use of the marital deduction and the $3.5 million "applicable exclusion amount" discussed above). In most cases where you or your Revocable Trust owns the policy, it does not make any difference whether the beneficiary is your surviving spouse, a trust under your Will ("testamentary trust"), or your Revocable Trust. It may be advantageous to make your Revocable Trust the primary beneficiary of the policy so that if you are the first spouse to

die, you will be able to fully use your "applicable exclusion amount." At a minimum, such a trust should be designated the secondary or "contingent" beneficiary if the first beneficiary dies before you. In general, you should not name your estate as the beneficiary of a life insurance policy because then the proceeds will have to go through probate.

Return to top

RETIREMENT PLANS

What taxes are there on IRAs and other retirement benefits?

When you or your beneficiary withdraws money from a traditional IRA or other retirement plan, there will be income tax. The IRA and retirement benefits also will be subject to estate taxes. Excise taxes can apply if you take money out of the plan before age 59½ (although under certain circumstances it may be possible to take funds out earlier without excise taxes) or if you do not take out certain minimum amounts each year beginning, generally, when you turn 70½.

Who should be the beneficiary of IRAs and retirement benefits?

The choice of beneficiary can affect how much you must take out of your plan during your lifetime and who will inherit the plan assets when you die. The choice of beneficiary is a complicated decision that cannot be answered easily. If you are married, your spouse may benefit from these plans without paying any estate tax and may be able to defer paying income taxes.

Return to top