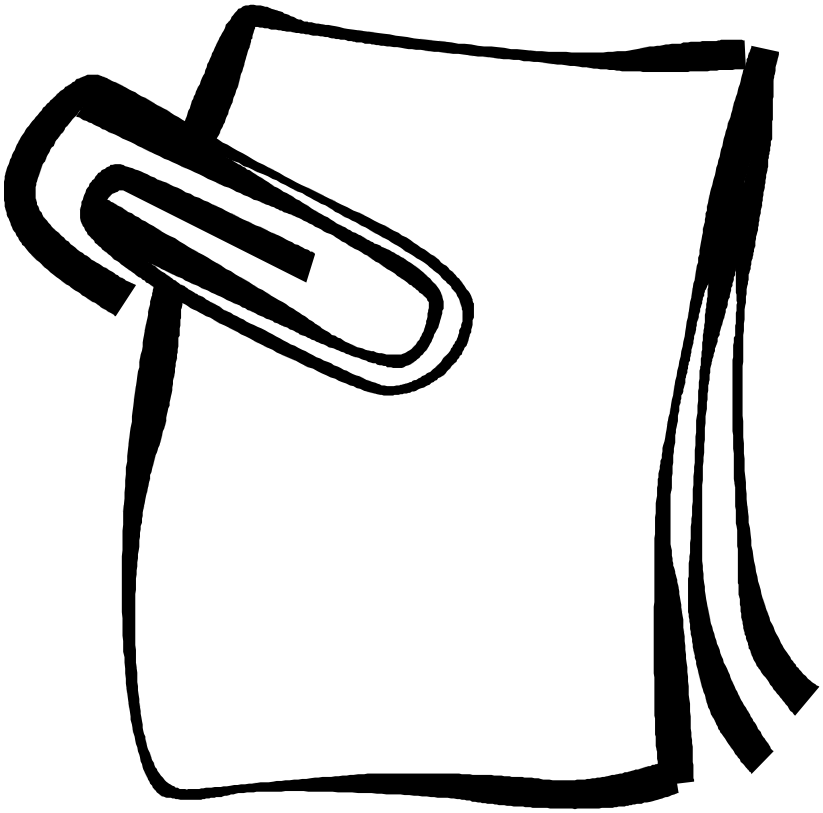
Introduction
to
Estate Planning Fundamentals



Summary of Contents

I. Introduction

II. The Primary Estate Planning Tools

a. Wills

i. Formal Wills

ii. Holographic Wills

iii. Statutory Wills

iv. Codicils

b. Living Trusts

i. How a Living Trust Works

ii. Pour Over Wills

iii. Parties to a Trust

iv. Irrevocable Living Trusts

v. Providing for Minors or Disabled Children

vi. Termination of Trust

vii. Amendments and Changes

III. Other Probate Avoidance Methods

a. Life Insurance Trust

b. Gifts

c. Joint Tenancy

d. Community Property with Right of Survivorship

e. Retirement Plans

f. Other

i. Pay-on-Death Bank Accounts

ii. Transfer-on-Death Accounts of Securities

iii. Transfer-on-Death Vehicle Registration

iv. Transfer-on-Death Deeds for Real Property

IV. Finalizing the Estate Plan

a. Storing Estate Planning Documents

b. Revising the Estate Plan

V. Conclusion

Table of Authorities

Introduction to Estate Planning Fundamentals[*]

I. Introduction

You've worked so hard to build your assets in order to provide financial security for your family, why not work just as hard to protect them in the event something should happen to you? That's the primary goal of estate planning – to protect, preserve and manage your estate in case you die or become disabled.[1] Some people believe they have no need for estate planning until they reach a certain age or they might believe that estate planning is only for the wealthy; however, according to Rande Spiegelman, CPA, CFP and Vice President of Financial Planning at Charles Schwab Investments, "it's wise for everyone to begin the estate planning process as early as possible."[2]

Proper estate planning can help an individual increase the size of their estate.[3] Its basic purposes are to assure that your money and other assets go to the people you choose, help assure that the property will be distributed in an orderly and efficient manner and minimize taxes.[4] Most estate plans are structured around either a will or a

---

[*] Artin Yadegarian, Western State University College of Law – Candidate May 2006

[1] Rande Spiegelman, Charles Schwab & Co. Inc., *Everyone Should Have an Estate Plan,* available at <http://www.schwab.com/public/schwab/research_strategies/market_insight/financial_goals/estate_planning/everyone_should_have_an_estate_plan.html?cmsid=P-1007944&lvl1=research_strategies&lvl2=market_insight&refid=P-1057966&refpid=P-1004556> (last visited April 20, 2006) – p.1.

[2] *Id*.

[3] *Estate Planning: How to Get Started*, available at <http://www.gofso.com/Premium/LE/14_le_ep/fg/fg-estate_planning.html#MORE> (last visited April 20, 2006) – p.1.

[4] I*d*.

trust, or a combination of both. In addition to these two primary estate planning tools, there are other essential tools that should also be considered;[5] all of which will later be discussed in detail.

If an individual dies intestate, meaning without a will, there are laws of intestate succession, which govern the distribution of the individual's estate.[6] In most states, if an individual does not have an estate plan, the assets will be distributed to the individual's spouse and children, and if there are none, to other members of the family.[7] During this process, the fates of your assets may be decided by attorneys, government bureaucrats and tax agencies.[8] In addition, taxes and attorney's fees can eat away at your estate and distribution of your estate to your heirs may be delayed.[9] Therefore, it is critical to consider all essential estate planning tools, start planning early and make sure to revise the plan in accordance to the changes in your life.

This paper focuses primarily on the essential estate planning tools available in order to effectively carry out the probate process – which in its broadest sense, refers to the process of putting the terms of your estate planning instruments in effect.[10] Part I of this paper provides an introduction to estate planning. Part II presents an overview of the

---

[5] The other essential tools that should also be considered include: life insurance trusts, gifts, holding title to property in certain methods (i.e. joint tenancy, community property with right of survivorship), retirement plans, pay-on-death bank accounts, transfer-on-death accounts for securities, transfer-on-death vehicle registration and transfer-on-death deeds for real property.

[6] Law offices of Aaron Larson, *An Introduction to Estate Planning and Administration*, available at <http://www.expertlaw.com/library/estate_planning/introduction.html> (last visited April 20, 2006).

[7] *Id*.

[8] Spiegelman, *supra* at 2.

[9] I*d*.

[10] Larson, *supra* at 1.

two primary estate planning tools. Part III will examine other estate planning tools that should be considered and further provides a detailed explanation of each. Part IV will explain the final steps of estate planning and Part V will conclude that it is very important to do your loved ones a favor and create an estate plan, because if you fail to do so, the government will do it for you.

This paper is intended to be an introduction to estate planning fundamentals with an emphasis on California law. Because of the extensiveness of this topic, only the most relevant issues are addressed; therefore, this paper should only be regarded as a starting point for estate planning. In addition, keep in mind that each state has its own laws and sets forth its own requirements; hence, this information is not intended to be a substitute for specific individualized legal or tax advice.

II. The Primary Estate Planning Tools

The two primary estate planning tools are wills and living trusts.[11] A will is a written document that takes effect at the death of the person signing it, known as the testator.[12] This document covers all of the testator's assets at the time of death.[13] A state court proceeding, referred to as probate, is administered upon the death of the testator and the provisions of the will are implemented in order to accomplish the testator's intent.[14] On the other hand, a living trust, sometimes referred to as an inter-vivos trust, permits an

---

[11] *Estate Planning: How to Get Started, supra* at 1.
[12] Robert L. Sommers, *Estate Planning,* available at <http://www.taxprophet.com/pubs/estat_n1.html> (last visited April 20, 2006) – p.2.
[13] *Id*.
[14] I*d*.

individual to transfer property to a trust during his or her life, while maintaining the ability to control the disposition of the property.[15] Whether you incorporate a will or a trust into your estate plan, it is important to consider the different types, each of which has certain requirements and different objectives.

A. Wills

A will is the final testament a person makes to ensure his or her assets go to whom he or she wants them to go.[16] A will is usually in writing and witnessed by two or more people.[17] However, some states allow more informal wills known as holographic wills.[18] The required formalities necessary to execute a valid will vary depending on the type of will being created. In the case where changes need to be made to the will, codicils may be used in order to make amendments to the will.[19]

i. Formal Wills

A formal will is often referred to as an attested will. This type of will must be in writing and witnessed.[20] California Probate Code (CPC) §6110 sets forth the requirements of a valid formal will.[21] CPC §6110 states that a formal, handwritten will

---

[15] Major Joseph E. Cole, Chief Circuit Trial Counsel, Eastern Circuit, *Introduction to Estate and Tax Planning Fundamentals*, p. 14.
[16] Michael Lynn Gabriel, Attorney at Law, *Estate Planning Volume 1*, available at <http://www.lawyeratlarge.com/Common/Previews/Estate1.html> (last visited April 20, 2006) – p. 14
[17] *Id*. at 6.
[18] *Id*.
[19] Ira and Linda Distenfield, *We the People's Guide to Estate Planning*, John Wiley & Sons, Inc., 2005, p.36.
[20] California Probate Code §6110 (a) & (c) (2005)
[21] California Probate Code §6110 (2005)

must be in writing, signed by the testator or in his name by someone in the testator's presence and at his direction.[22] It must be witnessed by at least two persons who are present at the same time, witnessing either the signing of the will or the testator's acknowledgement of signature and understand that the document is the testator's will.[23] If there are only two witnesses and one of the witnesses is also a beneficiary under the will, there is a presumption that the beneficiary procured the instrument by duress, menace, fraud, or undue influence.[24] However, this does not affect the validity of the will.[25]

ii. Holographic Wills

Some states find less formal wills to be valid. These states do not have strict requirements and permit a holographic will to be entirely in handwriting of the testator.[26] In some states, such as California, a holographic will is not required to be witnessed; however, other states require holographic wills to be witnessed.[27] In California, even if there are sections of the will that are not in the testator's handwriting, as long as the material provisions are in the testator's handwriting, the will be found valid.[28] Courts have interpreted material provisions to include those portions which express the testamentary intent of the testator. On the other hand, some states will not accept a

---

[22] California Probate Code §6110 (c) (2005)
[23] California Probate Code §6110 (c) (2005)
[24] California Probate Code §6112 (c) (2005)
[25] California Probate Code §6112 (b) (2005)
[26] Gabriel, *supra* at 6.
[27] *Id*.
[28] California Probate Code §6111 (a) (2005)

holographic will as valid if there are any pre-printed or typed portions of the will.[29] Even though it may seem that a holographic will requires less formalities, it raises various issues such as forgery; hence, it would be wise to avoid holographic wills unless circumstances permit for one.

iii. Statutory Wills

Many states have created statutory wills, which comply with all of the terms for a valid will in the state.[30] In California, anyone of sound mind and over the age of 18 may execute a statutory will.[31] Under CPC §6221, the testator shall complete the appropriate blanks and shall sign the will.[32] Each witness shall observe the testator's signing.[33] In addition, each witness shall sign his or her name in the presence of the testator.[34] When using statutory wills, which consist of pre-printed blanks, it is very critical to pay attention to detail. Since the forms are pre-written, it is important for the testator to select the correct form and make sure the form expresses his or her intent.

iv. Codicils

A codicil may be used in order to amend or modify a will.[35] However, this method is generally used when only a few changes need to made.[36] Codicils are best

---

[29] Gabriel, *supra* at 6.
[30] *Id.*
[31] California Probate Code §6220 (2005)
[32] California Probate Code §6221 (a) (2005)
[33] California Probate Code §6221 (b) (2005)
[34] California Probate Code §6221 (b) (2005)
[35] Benji O. Anosike, *How to Plan Your 'Total" Estate with a Will & Living Will, Without the Lawyer's Fees*, Do-It-Yourself Legal Publishers, 1995, p. 39.

used to address legal technicalities or typographical errors in the original document.[37] For substantive changes, such as the addition or deletion of beneficiaries, it is highly recommended to draft a whole new document.[38] Whenever you change your will, or change any term or provision, whether by a codicil or drafting a completely new will, you will have to go through all the signing and witnessing formalities.[39] As a result, the testator should plan the estate carefully and further draft the will to be error-free, in order to prevent multiple codicils.

B. Living Trusts

If you have ever asked yourself whether you need a living trust, chances are you have assets you want to protect. A living trust allows you to transfer your assets to a trust during your lifetime, while maintaining the ability to control the disposition of the property.[40] The best way to understand how a living trust can help you is to learn what happens without one. If an individual dies without leaving instructions for the distribution of the estate, either through a will or a living trust, the fate of his or her assets will be determined by the state laws, rather than by the individuals wishes.[41]

---

[36] *Id*. at 39 – 40.
[37] Distenfield, *supra* at p.36.
[38] *Id*.
[39] Anosike, *supra* at 40.
[40] Cole, *supra* at 14.
[41] Rande Spiegelman, Charles Schwab & Co. Inc., *A Living Trust Can Help You and Your Heirs,* available at <http://www.schwab.com/public/schwab/research_strategies/market_insight/financial_goals/estate_planning/a_living_trust_can_help_you_and_your_heirs.html?cmsid=P-1007911&lvl1=research_strategies&lvl2=market_insight&refid=P-1057966&refpid=P-1004556> (last visited April 20, 2006) – p.1.

i. How a Living Trust Works

A living trust is often referred to as a revocable living trust. The reason it is called "revocable" is because it can be altered anytime during your lifetime, you can even revoke the entire trust if you choose to do so.[42] The reason the trust is described as "living" is because it's created and managed while the individual is alive and the living trust estate survives the individual upon his or her death and will distribute the assets per the individual's request.[43] Finally, it is a "trust" because it creates an entity into which assets can be placed for normal use during the individual's lifetime and then be made available after the individual's death for distribution at his or her request.[44]

In order to avoid probate, a person or married couple can place assets in trust while they keep complete control over the property.[45] The living trust has actual ownership of the property even though the individual owns the trust throughout his or her lifetime. The trust holds all of the main assets; any assets left out of the trust will usually get dumped into the trust with a "pour over will," an important part of the living trust.[46]

ii. Pour Over Wills

A pour over will is a special kind of will associated with living trusts, which allows property not placed in your trust to end up in your trust after death.[47] A sample pour over will states:

---

[42] Distenfield, *supra* at 53.
[43] *Id*.
[44] *Id*.
[45] Cole, *supra*.
[46] Distenfield, *supra.*
[47] Distenfield, *supra* at 15.

> "I leave any property owned by me at death, and not already in my trust, to my trust. Please have my executor put it in my trust."[48]

Property in your name upon your death is subject to probate.[49] Since the goal of a living trust is to control all property after death, it must provide that any property not in the name of the trust be "poured" into the trust through your pour over will.[50]

iii. Parties to a Trust

A living trust normally consists of three parties: the grantor, the trustee and the beneficiary. Within each of these parties, there are additional members that make up the existence of a living trust.

The grantor (also known as trustor, settlor, or creator) is the creator of the trust and is generally the person who provides the funding for the trust.[51] More than one person can be the grantors of the trust, such as when a husband and wife join together to create a trust.[52] After the creation of the trust, the grantors have nothing further to do,

---

[48] Robert A. Esperti and Renno L. Peterson, *The Living Trust Workbook*, Penguin Books, 1995, p. 11.
[49] *Id.*
[50] *Id.*
[51] IRS, *Abusive Trust Tax Evasion Schemes – Questions and Answers*, available at <http://www.irs.gov/businesses/small/article/0,,id=106551,00.html> (last visited April 20, 2006) – p. 1.
[52] Find Law, Missouri Bar Center, *Revocable Living Trusts* available at <http://library.findlaw.com/1999/May/25/129711.html> (last visited April 20, 2006) – p. 1.

except if they wish to make any changes; where they will have to sign amendments to the trust.[53]

The trustee is the individual who holds title to the trust property and manages the property according to the terms of the trust.[54] The grantor often serves as the trustee during his or her lifetime and selects another person, referred to as the successor trustee to serve as the trustee upon the death of the grantor's death or in the event the grantor is unable to continue serving for any reason.[55]

The beneficiary is the person or persons who receive the benefits from the trust.[56] There are three types of beneficiaries – the primary beneficiary, the contingent beneficiary, and the remainder beneficiary.[57]

The grantors, usually husband and wife, are the initial beneficiaries of their trust.[58] When the living trust is created, the husband and wife, or individual in the case where the trust is for a single party, are designated as the trust beneficiaries.[59] These individuals are referred to as the primary beneficiaries since they have a beneficial interest in the trust assets and enjoy the income and principal from the assets in the trust.[60]

---

[53] Abts III, *supra* at 96.
[54] Find law, *supra.*
[55] *Id.*
[56] *Id.*
[57] Abts III, *supra* at 117.
[58] *Id.*
[59] Abts III, *supra* at 96.
[60] *Id.*

iv. Irrevocable Living Trusts

Living trusts may also be irrevocable, which means that the trust cannot be revoked or amended under any circumstance.[61] However, unless the terms of the trust expressly provide that the trust is irrevocable, the settlor may revoke or amend the trust.[62] If assets are transferred into an irrevocable living trust, the trust becomes the owner of the property, as opposed to the original grantor.[63] A disadvantage of this type of trust is obvious, once a transfer is made, the grantor loses the ability to control the assets.[64] However, the advantage of an irrevocable living trust is that as long as the grantor renounces his or her interest in the property by transferring the assets irrevocably to the trust, the property will not be included in the gross estate of the decedent.[65]

v. Providing for Minors or Disabled Children

One of the essential characteristics of a living trust is to provide for minor children or disabled individuals, in the event the parents die prematurely.[66] If a special living trust is not created and the parents were to die, the court would be required to set up a trust to hold the assets until the minor children become adults or for the continuing care of the disabled individual.[67] In these types of circumstances, the court usually

---

[61] Cole, *supra* at 15.
[62] Uniform Trust Code §602 (a) (2005)
[63] Cole, *supra.*
[64] *Id.*
[65] *Id.*
[66] Henry W. Abts III, *The Living Trust*, The McGraw-Hill Companies, 2003, p. 88.
[67] *Id.*

appoints a trustee which is unknown to the parents.[68] However, it would be much wiser and smarter for the parents to create their own trust to provide for their children or grandchildren and to name a trustee the parents have a relationship with and, more importantly, trust.[69] By doing so, the parents can provide care for their children in the manner they wish to do so and be assured that the trustee they have chosen will carry out his or her duties.

In the case of creating a special trust for the purpose of providing care for a disabled individual, there are additional considerations that need to be made. The trust must be tailored to the specific needs of the disabled person, whether the disability is mental or physical.[70] More importantly, the trust must be carefully prepared by an expert familiar with the federal and state law.[71] The reason for this requirement is so that the drafter takes into consideration any government benefits for which the disabled individual is eligible and receives and does not jeopardize the beneficiary's eligibility for such benefits.[72]

vi. Termination of Trust

The living trust will typically terminate when the assets are distributed from the trust.[73] As a result, no court action by the trustee of the trust is necessary.[74]

---

[68] *Id.*
[69] *Id.*
[70] Distenfield, *supra* at 138.
[71] Dennis Clifford, *Make Your Own Living Trust* – 4th Edition, Nolo Publishing, 2001, 15/17.
[72] Distenfield, *supra.*
[73] Abts III, *supra* at 99.

Nevertheless, in order to satisfy the IRS Code, a revocable living trust must specify a termination point.[75] This concept is known as the "law of perpetuity" which states that upon the death of both creators of the trust, "a snapshot in time is effectively taken that identifies every potential heir then living – such as the creators children, grandchildren, great grandchildren, and any fetuses, as well as aunts, uncles, nieces, and nephews."[76] This concept further states that the trust must cease twenty-one years after the death of every one of those heirs.[77] In spite of the "law of perpetuity," it not uncommon for those interested in creating trust to disregard this body of law since they don't care about the trust being terminated possibly as far in the future as eighty to one hundred years or more; as the twenty-one period is a lengthy time period beyond the scope of most people's imaginations.[78]

vii. Amendments and Changes

Unlike a will, making changes to your living trust is relatively easy and readily changeable.[79] The procedure requires the simple creation of another document (an official "Amendment To…") that clearly states the changes, making reference to the original trust.[80] Generally, in order to keep your living trust valid, you want the amendments to be executed formally in the same manner as the original document –

---

[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] Abts III, *supra* at 96.
[80] Distenfield, *supra* at 66.

witnessed and notarized.[81] However, minor informal changes need not be witnessed and notarized.[82] Examples of informal changes include "adding or taking away assets from the trust that do not affect the legal body of the trust document," which consists of the Article of Trust where beneficiaries and successor trustees are named.[83] Any changes made that have an effect or change the legal body are considered formal changes and require a signature in addition to being witnessed and notarized.[84] When in doubt as to how you should carry out your changes, it would be wise to consult an attorney in order to avoid your trust being invalidated.

Any asset of value that is acquired after the set up of the trust should be added as soon as possible. [85] This is accomplished by transferring title or, in the case where there is no title, by creating an Assignment of Interest.[86] In addition, the schedule portion of the original trust should be removed and replaced with a new schedule which lists the new assets and amend any other trust documents that are related to the new assets.[87]

As for selling or giving away assets in your trust, there are no restrictions whether you choose to sell, donate or simply give them away.[88] When selling or giving away assets, the only requirement is to amend the schedule where the asset is listed and if

---

[81] *Id.* at 69.
[82] *Id.*
[83] *Id.*
[84] *Id.*
[85] *Id.* at 70.
[86] *Id.*
[87] *Id.*
[88] *Id.* at 71.

necessary, to complete a formal trust amendment document that states the changes related to the trust. [89]

Future beneficiary designations, such as children, made by the grantors are known as the contingent beneficiaries.[90] As long as the grantors are alive and competent, the beneficiary designations can be changed; hence, such beneficiaries may be changed or even taken out of the trust as long as the original grantors who created the trust and living and competent.[91]

A remainder beneficiary is an individual who is irrevocably named as the beneficiary of a living trust.[92] A beneficiary designation becomes irrevocable when the individual making such designations dies or becomes incompetent.[93] In such circumstances, the named beneficiary becomes a remainder beneficiary.[94] Typically, the importance of the remainder beneficiaries comes into play only when the husband and wife name different beneficiaries.[95]

III. Other Probate Avoidance Methods

Wills and trusts are recognized as the two primary estate planning tools. However, there are various nonprobate transfers associated with a complete estate plan,

---

[89] *Id.*
[90] Abts III, *supra* at 117.
[91] *Id.*
[92] *Id.*
[93] *Id.*
[94] *Id.*
[95] *Id.*

which are used to transfer wealth through succession.[96] These nonprobate transfers are alternative probate avoidance methods that should be considered when planning your estate.

A. Life Insurance Trust

Similar to other trusts, a life insurance trust is a legal arrangement.[97] As the grantor, or creator of the life insurance, you must name a trustee as a beneficiary of any insurance policies placed in or purchased by the trust.[98] The trustee can then provide a range of fiduciary services, including custody, administration, investment management, and tax preparation and reporting.[99] Upon the grantor's death, the trustee collects the insurance proceeds, invests them prudently, and distributes the trust income and principal to the grantor's family or to other trust beneficiaries according to the terms of the trust agreement.[100] With these types of trusts, the grantor has the power to decide when, in what amounts and in what manner the insurance proceeds are to be distributed to the beneficiaries.[101]

---

[96] Cole, *supra* at 4.
[97] Merrill Lynch, *Life Insurance in Estate Planning,* available at <http://askmerrill.ml.com/publish/marketing_centers/products/eps022_Product> (last visited April 20, 2006) – p. 2.
[98] *Id.*
[99] *Id.*
[100] *Id.*
[101] *Id.*

B. Gifts

Another alternative method available in order to avoid probate is to give away property while you're alive.[102] The simple explanation is that if you don't own the property at your death, then it doesn't have to go through probate.[103] An advantage for giving gifts while you're alive is that it lowers probate costs; since as a general rule, the higher the monetary value of the assets, the higher the expense of probate.[104] However, a disadvantage is that to be qualified as a gift for estate planning purposes, you must give up all control over the gift; thereby not being able to enjoy the gift in the future.[105] Furthermore, for those who give out large gifts, it is important to know that giving more than $12,000 to any one recipient in one calendar year will require filing a federal gift tax return.[106]

C. Joint Tenancy

Joint tenancy is a method of holding title to property where two or more people own the property together.[107] When a joint tenant dies, his or her interest will automatically go to the survivor.[108] When this happens, there is no probate process and a

---

[102] ACLU, *Estate Planning Basics – Ways to Avoid Probate,* available at <http://action.aclu.org/site/PageServer?pagename=PG_nolo_Ways_to_Avoid_Probate> (last visited April 20, 2006) – p. 1.
[103] *Id.*
[104] *Id.*
[105] College of Family and Consumer Sciences, *Wills & Estate Planning,* available at < http://www.fcs.uga.edu/pubs/current/B1018.html> (last visited April 20, 2006) – p. 1.
[106] ACLU, *supra* at 2.
[107] Sommers, *supra* at 3.
[108] *Id.*

will or trust has absolutely no effect on the property.[109] Holding title to property in joint tenancy often works well when married couples purchase real property, vehicles, securities or other valuable property together.[110]

Despite the fact that setting up a joint tenancy is easy and doesn't cost a penny,[111] holding title to property as joint tenancy can have an adverse effect on the taxability of the property.[112] For example, half the value of any property owned by a married couple as joint tenants with right of survivorship shall be included in the gross estate of the spouse that dies first.[113] As a result, title to the property will transfer to the surviving spouse; however, the estate of the decedent will be increased by half of the value of the property even though the decedent has no control over the disposition of that property held as joint tenants.[114] The final result of this example is that the decedent's estate suffers a tax burden without the decedent receiving any benefits of controlling the property.[115]

D. Community Property with Right of Survivorship

California is a community property state which means that any earnings and assets acquired during marriage is equally owned by both spouses, regardless of which spouse actually earned the income or asset.[116] Property acquired before marriage, or gifts

---

[109] *Id.*
[110] ACLU, *supra* at 3.
[111] *Id.*
[112] Cole, *supra* at 12,
[113] I*d.* at 13
[114] *Id.*
[115] *Id.*
[116] Sommers, *supra.*

and inheritances received by one spouse during a marriage, are generally labeled as the separate property of that spouse.[117] Upon death, only one half of the community property is placed in the deceased spouse's estate; the other half remains the sole property of the surviving spouse and is not included in the decedent's probate.[118]

When a spouse dies intestate in a community property state, such as California, the surviving spouse acquires title to the community without probate.[119] Since community property is considered by law to be owned equally by both spouses, a spouse's estate consists of only one-half of the community property.[120] With the use of a will, either spouse can direct how his or her half should be distributed.[121] A surviving spouse is not automatically entitled to the deceased spouse's half of the community property.[122] If the deceased spouse does not have a will, his or her half will be distributed by state laws.[123] In California, all community property passes automatically to the surviving spouse if a spouse dies intestate.[124]

A couple owning their home as community property offers the surviving spouse a tax benefit.[125] When the surviving spouse inherits property, the IRS treats the property as if the surviving spouse purchased it for its fair market value on the date of the decedent's

---

[117] *Id.*
[118] Gabriel, *supra* at 9.
[119] *Id.*
[120] *Id.*
[121] *Id.*
[122] Sommers, *supra*.
[123] Gabriel, *supra*.
[124] *Id.*
[125] Susan M. Weschler, Suite101.com, *Estate Planning,* available at <http://www.suite101.com/article.cfm/estate_planning/39247/2> (last visited April 20, 2006) – p. 2.

spouse death.[126] The tax basis of the property is adjusted, so that instead of using the actual cost basis when the property was purchased, the date of death cost basis is used.[127] This adjustment is known as the "step up in basis."[128] Under the concept of community property, since both spouses own a 50% undivided interest, both halves receive a full step up in basis at the time of the sale and as a result, the capital gains tax gets reduced.[129] However, keep in mind that in 2010 the federal estate tax will be repealed and the adjustment in basis rules at death will be altered.[130]

With the repeal of the estate tax in 2010,[131] there will be a modification of the adjustment.[132] The income tax basis of property owned by an individual upon his or her death will no longer be allowed an unlimited "step up" to its fair market value on the day he or she died.[133] Instead, a basis step-up of only $1.3 million will be given, with an additional $3.0 million in step-up allowed on property passing to a surviving spouse.[134]

---

[126] *Id*
[127] *Id*
[128] *Id*
[129] *Id*
[130] SmithBarney.com, *Planning Perspectives,* available at <http://www.smithbarney.com/pdf/PS7015_070804.pdf#search='step%20up%20basis%202010%20effect%20on%20community%20property'> (last visited April 20, 2006) – p. 2.
[131] The application of the adjustment and the effect of the repeal in 2010 vary based on an individual's particular situation; hence, a tax or legal advisor should be contacted in order to understand the application of these rules to your particular scenario.
[132] New York Life, *Estate Preservation: Lifetime Gifts,* available at <http://www.newyorklife.com/cda/0,3254,11407,00.html> (last visited April 20, 2006) – p. 1.
[133] *Id.*
[134] *Id.*

EXAMPLE:[135]
H and W purchase a home for $20,000 in which the value increases to $500,000 at the time of H's death. The basis for H's share in the community property is increased to fair market value of $250,000. Under the "step up in basis" approach, W's share is also increased to fair market value of $250,000. W, the surviving spouse, can sell the house for $500,000 without having to pay any capital gains taxes. If, however, H and W held the house as joint tenants, only H's half Would have been increased to fair market value. W's basis for her Half would have remained as $10,000. If the wife later sold the House for $500,000, she would have to pay capital gains tax on $250,000 ($500,000 - $260,000 total basis).

E. Retirement Plans

Retirement plans such as an IRA accounts, presume that the spouse of the account holder is the beneficiary.[136] Thus, after the account holder's death, the funds from the retirement plan will not go through probate; instead, the surviving spouse will claim the benefits.[137] In the case where the account holder wishes to select a beneficiary other than his or her spouse, the spouse must consent in writing approving the named beneficiary.[138] The purpose behind this is to protect the surviving spouse in the event of the account holder's death before any payout has been made.[139] In the case where the account holder is single, he or she is free to name whomever he or she wishes to be the beneficiary.[140] If the account holder lives in a community property state, it is more than likely that the

---

[135] Gabriel, *supra.*
[136] U.S. Department of Labor, Employee Benefits Security Administration, *What You Should Know About Your Retirement Plan*, available at <http://www.dol.gov/ebsa/publications/wyskapr.html> (last visited April 20, 2006) – p. 1.
[137] *Id.*
[138] *Id.*
[139] *Id.*
[140] ACLU, *supra* at 1.

spouse of the account holder owns half of the account.[141] If any of the property contributed to the retirement plan was earned while being married, the property, or in this case, the money is characterized as community property; hence the spouse owns half.[142]

F. Other

Probate is the legal mechanism where the court state who gets the different portions of the decedent's estate.[143] Probate of the deceased's estate is necessary in situations where the decedent did not plan final affairs beyond preparing his or her will.[144] In addition to the above mentioned methods used to avoid probate, the following are other methods used to avoid probate altogether.

i. Pay-on-Death Bank Accounts

Pay-on-death bank accounts is one of the easiest ways to keep money out of the probate process.[145] All that is required is to fill out a form provided by the bank, naming whomever you want to inherit the money in the account upon your death.[146] As long as the account holder is alive, the person named to inherit the money has absolutely no rights to it; the account holder may spend the money, name a different beneficiary, or close the account.[147] After the account holder dies, the named beneficiary is entitled to

---

[141] *Id.*
[142] *Id.*
[143] Gabriel, *supra* at 5.
[144] *Id.*
[145] ACLU, *supra* at 2.
[146] *Id.*
[147] *Id.*

all the funds in the account after he or she proves his or her identity.[148] If the account is held jointly by husband and wife, the funds will become the property of the surviving spouse, without going to probate.[149]

ii. Transfer-on-Death Accounts for Securities

As of January 2006, 48 of the 50 states have adopted the Transfer-on-Death Security Registration Act, California being one of them.[150] The act provides non-probate transfer of specifically registered investment securities from owner to named beneficiaries at the time of owner's death.[151]

The Act works similarly to pay-on-death bank accounts. After ownership of the securities is registered, the owner is permitted to name a beneficiary.[152] As long as the owner of the securities is alive, the named beneficiary has no rights to them; however, upon the death of the owner, he or she can claim the securities without probate.[153]

iii. Transfer-on-Death Vehicle Registration

A number of states now offer a car owner, or the grantor, the option of naming a beneficiary on the vehicle registration so that the beneficiary can inherit the vehicle upon

---

[148] *Id.*
[149] *Id.*
[150] Securities Industries Association, *Transfer on Death,* available at <http://www.sia.com/state_affairs/html/transfer_on_death.html> (last visited April 20, 2006) – p. 1.
[151] Uniform Law Commissioners, *The National Conference of Commissioners on Uniform State Laws*, available at <http://www.nccusl.org> (last visited April 20, 2006) – p. 1.
[152] ACLU, *supra* at 2.
[153] *Id.*

the grantor's death.[154] Similar to other transfer-on-death options, the named beneficiary does not have any rights in the vehicle until the death of the grantor.[155] Additional information and forms are on your state's Department of Motor Vehicles website.

iv. Transfer-on-Death Deeds for Real Property

A transfer-on-death deed permits the owner, or grantor, to transfer real property upon his or her death.[156] The grantor is allowed to name a beneficiary and may also designate alternate beneficiaries in the event the original beneficiary does not survive him or her.[157] Although the property will not be subject to probate, it may be subject to estate and inheritance tax.[158] The deed may be revoked at any time prior to the grantor's death; however, a will does not revoke a transfer of death deed.[159] If the grantor wished to do so, he or she does not need the consent or agreement of the beneficiary.[160]

IV. Finalizing the Estate Plan

Updating and revising your estate plans and safeguarding your documents are just as important as planning your estate. It is essential that your estate planning documents are updated and revised on a regular basis.[161] It is also very important to store all original

---

[154] *Id.*
[155] Stephanie Morrell, KELN.org, *Transfer on Death Deeds,* available at <http://www.kein.org/bibs/morrill.html> (last visited April 20, 2006) – p. 3.
[156] Morrell, *supra* at 2.
[157] *Id.*
[158] *Id.*
[159] *Id.*
[160] *Id.*
[161] Buildawill.com, *Updating Your Will,* available at <http://www.buildawill.com/ep_13_updt.php> (last visited April 20, 2006) – p. 1.

estate planning documents in a secure location.[162] Furthermore, make sure that your trustee, attorney or other fiduciary knows where the estate planning documents are and how to gain access to them.[163]

A. Storing Estate Planning Documents

Following the completion of the estate planning documents, it is now time to store them in a safe place. Some people prefer to store them at home; however, most individuals believe that a safe deposit box is the best place to store estate planning documents.[164] According to attorney Rees C. Johnson, "a safe deposit is where there is the least risk that the documents will be destroyed by fire or other natural disaster, or lost, stolen or misplaced."[165] It is important to know that access to a safety box can be difficult if it is not jointly held.[166] You may also want to consider keeping the documents in a location that would not be accessible to anyone who should not see your will; keep in mind that if your will is accessible and if someone was so inclined, they could tamper with it.[167]

If the documents are to be stored at home, Mr. Johnson suggests that they should be place in the freezer of your refrigerator.[168] The reason for his suggestion is that he

---

[162] Rees C. Johnson, Attorney at Law, *Safeguard Your Estate Planning Documents ,* available at <http://www.rcjlaw.com?Safewaurd.htm> (last visited April 20, 2006) – p. 1.
[163] *Id.*
[164] Buildawill.com, *Storing Your Will,* available at <http://www.buildawill.com/ep_12_stor.php> (last visited April 20, 2006) – p. 1.
[165] Johnson, *supra.*
[166] Buildawill.com, *supra.*
[167] Wills 4 Free, *Frequently Asked Questions,* available at <http://www.wills4free.com/faq/faqmain.htm> (last visited April 20, 2006) – p. 1.
[168] Johnson, *supra* at 2.

believes that when the documents are to be stored at home, they should be stored in a relatively fireproof location.[169] In the event that a trust company is named as personal representative or other fiduciary, then the trust company will store and hold the estate planning documents.[170]

In addition to the importance of storing your estate planning documents in a safe place, it is just as important to notify your personal representative or fiduciary where the documents are stored.[171] In some cases, such as when the documents are stored in a safe deposit box, it is also important to notify the representative on how to gain access to them. If you decide to store the documents in a safe deposit box, Mr. Johnson suggests that in order to prevent obstacles for your representative, you should name him or her as your cotenant on your safe deposit box.[172]

B. Revising the Estate Plan

As mentioned earlier, it is essential to update your estate planning documents on a regular basis. Revising the documents should be considered every time there is change in your personal situation.[173] Such changes may include: marriage, divorce, birth or adoption of children, death of loved ones and change in medical conditions or health care needs.[174] In addition, the estate planning documents should be revisited when your

---

[169] *Id.* at 1.
[170] *Id.*
[171] *Id.* at 2.
[172] *Id.*
[173] Buildawill.com, *Updating Your Will, supra.*
[174] *Id.*

financial situation changes significantly, for the better or for the worse.[175] Another event which triggers the revision of your documents is when you move to another jurisdiction; different jurisdictions have different laws governing wills and estates which may affect the meaning or validity of your existing will.[176]

If any of the above events do occur or you decide that you need to revise your will for any other reason, you can do so by preparing a codicil or through the preparation of a completely new will. As explained above, if you need to make major revisions to your existing will, it is more practical to draft an entirely new will. However, if you need to make minor changes, then a codicil is the better option.

An important point that is often times overlooked is that the integrity of the original will and other estate planning documents should be protected.[177] As advised by attorney Rees C. Johnson, once you have executed your estate planning documents, you should abstain from writing on the originals.[178] If you plan on amending your will, you must do so with the same formalities you followed when executing your original will, which is in the presence of two witnesses, who in turn sign the will.[179]

V. Conclusion

Going back to all the hard work you put into building your assets, it should now make sense why you should work just as hard to protect them. The tools and techniques available in planning your estate and protecting your assets are as plentiful and

---

[175] *Id.*
[176] *Id.*
[177] Johnson, *supra.*
[178] *Id.*
[179] *Id.*

individualized as the estate owners themselves.[180] There are many issues that an individual must consider in determining which tool or technique they should use and how to incorporate each into their estate plan.[181] Without careful planning and considerations, asset ownership and property distribution decisions may have a significant, and often times conflicting, effect on the objectives of the individual planning his or her estate.[182]

---

[180] Cole, *supra* at 20.
[181] *Id.*
[182] *Id.*

Table of Authorities

Statutes

- California Probate Code §6110(a) (2005).
- California Probate Code §6110(c) (2005).
- California Probate Code §6111(a) (2005).
- California Probate Code §6112(b) (2005).
- California Probate Code §6112(c) (2005).
- California Probate Code §6220 (2005).
- California Probate Code §6221(a) (2005).
- California Probate Code §6221(b) (2005).
- Uniform Trust Code §602(a) (2005).

Law Review Articles

- Major Joseph E. Cole, Chief Circuit Trial Counsel, Eastern Circuit, *Introduction to Estate and Tax Planning Fundamentals*.

Other/Electronic Sources

- ACLU, *Estate Planning Basics – Ways to Avoid Probate,* available at <http://action.aclu.org/site/PageServer?pagename=PG_nolo_Ways_to_Avoid_Probate> (last visited April 20, 2006).
- Benji O. Anosike, *How to Plan Your 'Total" Estate with a Will & Living Will, Without the Lawyer's Fees*, Do-It-Yourself Legal Publishers, 1995.
- Buildawill.com, *Storing Your Will,* available at <http://www.buildawill.com/ep_12_stor.php> (last visited April 20, 2006).
- Buildawill.com, *Updating Your Will,* available at <http://www.buildawill.com/ep_13_updt.php> (last visited April 20, 2006).

- College of Family and Consumer Sciences, *Wills & Estate Planning,* available at < http://www.fcs.uga.edu/pubs/current/B1018.html> (last visited April 20, 2006).

- Dennis Clifford, *Make Your Own Living Trust* – 4th Edition, Nolo Publishing, 2001.

- *Estate Planning: How to Get Started*, available at <http://www.gofso.com/Premium/LE/14_le_ep/fg/fg-estate_planning.html#MORE> (last visited April 20, 2006).

- Find Law, Missouri Bar Center, *Revocable Living Trusts,* available at <http://library.findlaw.com/1999/May/25/129711.html> (last visited April 20, 2006).

- Henry W. Abts III, *The Living Trust*, The McGraw-Hill Companies, 2003.

- Ira and Linda Distenfield, *We the People's Guide to Estate Planning*, John Wiley & Sons, Inc., 2005.

- IRS, *Abusive Trust Tax Evasion Schemes – Questions and Answers*, available at <http://www.irs.gov/businesses/small/article/0,,id=106551,00.html> (last visited April 20, 2006).

- Law offices of Aaron Larson, *An Introduction to Estate Planning and Administration*, available at <http://www.expertlaw.com/library/estate_planning/introduction.html> (last visited April 20, 2006).

- Merrill Lynch, *Life Insurance in Estate Planning,* available at <http://askmerrill.ml.com/publish/marketing_centers/products/eps022_Product> (last visited April 20, 2006).

- Michael Lynn Gabriel, Attorney at Law, *Estate Planning Volume 1*, available at <http://www.lawyeratlarge.com/Common/Previews/Estate1.html> (last visited April 20, 2006).

- New York Life, *Estate Preservation: Lifetime Gifts,* available at <http://www.newyorklife.com/cda/0,3254,11407,00.html> (last visited April 20, 2006).

- Rande Spiegelman, Charles Schwab & Co. Inc., *A Living Trust Can Help You and Your Heirs,* available at <http://www.schwab.com/public/schwab/research_strategies/market_insight/finan

cial_goals/estate_planning/a_living_trust_can_help_you_and_your_heirs.html?cmsid=P-1007911&lvl1=research_strategies&lvl2=market_insight&refid=P-1057966&refpid=P-1004556> (last visited April 20, 2006).

- Rande Spiegelman, Charles Schwab & Co. Inc., *Everyone Should Have an Estate Plan,* available at <http://www.schwab.com/public/schwab/research_strategies/market_insight/financial_goals/estate_planning/everyone_should_have_an_estate_plan.html?cmsid=P-1007944&lvl1=research_strategies&lvl2=market_insight&refid=P-1057966&refpid=P-1004556> (last visited April 20, 2006).

- Rees C. Johnson, Attorney at Law, *Safeguard Your Estate Planning Documents ,* available at <http://www.rcjlaw.com?Safewaurd.htm> (last visited April 20, 2006).

- Robert A. Esperti and Renno L. Peterson, *The Living Trust Workbook*, Penguin Books, 1995.

- Robert L. Sommers, *Estate Planning,* available at <http://www.taxprophet.com/pubs/estat_n1.html> (last visited April 20, 2006).

- Securities Industries Association, *Transfer on Death,* available at <http://www.sia.com/state_affairs/html/transfer_on_death.html> (last visited April 20, 2006).

- SmithBarney.com, *Planning Perspectives,* available at <http://www.smithbarney.com/pdf/PS7015_070804.pdf#search='step%20up%20basis%202010%20effect%20on%20community%20property'> (last visited April 20, 2006).

- Stephanie Morrell, KELN.org, *Transfer on Death Deeds,* available at <http://www.kein.org/bibs/morrill.html> (last visited April 20, 2006).

- Susan M. Weschler, Suite101.com, *Estate Planning,* available at <http://www.suite101.com/article.cfm/estate_planning/39247/2> (last visited April 20, 2006).

- Uniform Law Commissioners, *The National Conference of Commissioners on Uniform State Laws*, available at <http://www.nccusl.org> (last visited April 20, 2006).

- U.S. Department of Labor, Employee Benefits Security Administration, *What You Should Know About Your Retirement Plan*, available at

<http://www.dol.gov/ebsa/publications/wyskapr.html> (last visited April 20, 2006).

- Wills 4 Free, *Frequently Asked Questions,* available at <http://www.wills4free.com/faq/faqmain.htm> (last visited April 20, 2006).