Do I Need Estate Planning?

Compliments of
Law Office of
Roger Franklin
16000 Ventura Blvd., Suite 908
Encino, California 91436
(818) 986-5253
rogerfranklin@prodigy.net
www.RogerFranklin.org

Table of Contents

"Do I really need estate planning?"

Yes. Most people need at least some estate planning. Even the modest estate requires important decisions. Estate planning means putting your property to the best possible use for your benefit during your lifetime and the use of your "beneficiaries" after your death. Your beneficiaries are the people you want to receive your property when you die. Estate planning can reduce taxes, attorney fees, and other costs.

After graduating from the University of California, Berkeley, I graduated three years later in 1966 from LMU Loyola Law School. I was admitted to the State Bar of California on January 4, 1967. Immediately thereafter I began working as a Los Angeles County Deputy Public Defender representing defendants in misdemeanor and felony court and jury trials in West Los Angeles, Culver City, Malibu, Santa Monica, Beverly Hills, and West Hollywood. When I opened my own law office in October of 1970, I noticed that my clients were always asking the same questions or had the same concerns regarding their estate. I realized then that my clients knew more about their favorite movie star or sports hero than they knew about their estate, which is natural. Most people approach their estate planning with mixed and troubled emotions. It may be the first time they have had to realistically face the fact of their eventual death. They are required, perhaps for the first time, to come to grips with problems in the unfamiliar environment of legal concepts and legal language. It is a sobering fact that the death rate is 100%. It was with this in mind that I wrote the first edition of my booklet *Do I Need Estate Planning?* in 1985.

This booklet is a work in progress, gleaned from over fifty years of practicing law and drafting wills and trusts. Currently this booklet is only available on-line. This booklet contains some of the questions and concerns most frequently asked by my clients regarding wills, trusts and estate planning. Perhaps the answers and explanations to these questions and concerns will make you more knowledgeable regarding your estate planning decisions. I sincerely hope so!

"Which is better, a Living Trust or Will?"

Living trusts have become exceedingly popular in the last decade. An entire industry has sprung up to market these trusts to the public. Inter vivos trusts (living trusts) are often the focus of advertisements, free seminars and media coverage. Newspapers are filled with advertisements for living trust seminars, tapes, forms and do-it-yourself kits, all touting the "horrors of probate."

Therefore, it is not surprising that the first and most frequently asked question I hear from a prospective new client is, "Which is better for me, a living trust or a will?" A living trust is, as the name implies, a trust established during your lifetime. In a revocable living trust, you transfer all, or almost all, of your property to your trust for lifetime management. The property held in your living trust is not part of your estate and is, therefore, not subject to probate administration. With a living trust, your estate avoids probate costs, attorney fees, and expenses. Distribution can proceed quickly and with much less expense than probate. With only a will, and without a trust, the people you select to inherit your property will receive it. However, the property will be distributed through the probate process. A living trust is not necessary to protect your property, but it can be used to avoid probate.

However, probate is not a bottomless pit. When your estate goes into probate, it does not mean that your heirs will not ever receive it. Probate is simply the court-supervised legal process used to carry out the instructions in your will. However, probate is not free. Your executor and your attorney will receive a standard statutory fee. Probate is not quick. It can take up to a year or more before there is a final distribution of your property to your beneficiaries. This is why many people prefer to avoid probate and have, instead, a revocable living trust.

Therefore, which is better, a revocable living trust or a will? For most people, I usually recommend a revocable living trust over a will. I believe that the advantages of a living trust are outweighed by its disadvantages, and that the advantages of a living trust outweigh the advantages of will. However, living trusts are not necessarily for everyone. They must be used wisely after obtaining professional guidance in order to evaluate thoroughly the potential benefits and disadvantages.

The **advantages** of a living trust include:

- **Increase Privacy**. The contents of a living trust are not recorded, so the public cannot learn who your successor beneficiary is after you die, or what assets are included. A trust is not a document of public record as is a will and the inventory and appraisement. Typical documents filed in a probate include inventories of all of the decedent's assets, the appraised value of each asset and the names of the beneficiaries. A reporter, marketer, creditor or a merely curious person needs no excuse to view, copy, distribute or publish these documents.

- However, some jurisdictions may require that your trust be filed in court if your "pourover" will is probated. Further, banks, stock transfer agents, and others may require a copy of your living trust to identify the trustee and the trustee powers. This destroys the privacy advantage.

- **Avoid possible conservatorship**. Living trust assets are not subject to conservatorship if you become unable to care for yourself. If you become incapable of managing your living trust, your named other trustee takes over with no need for court action. This could save thousands of dollars in legal fees and costs. However, a durable power of attorney for property management can provide the equivalent protection at far less cost.

- **Change or revoke any time**. Until you die, you can amend or revoke your living trust. However, upon your death, it becomes irrevocable, and your wishes expressed in your trust must be carried out. However, as explained below, once your property has been transferred to your trust, an amendment (as opposed to a new trust) is required to make changes to avoid retransfer of all assets. This means that beneficiaries whose interests are reduced or eliminated will see the changes. If you want to revoke your trust, you must first transfer all assets in the trust back to you. You should consult an attorney before revoking your trust to insure that the trust assets are properly transferred back to you. This can be both expensive and time-consuming. With a will, you also

can amend or revoke it, but at far less cost, with more privacy, and without the burden of transferring property.

Another advantage of using a trust rather than a will to dispose of your personal property is that a trust can confer a power of appointment that permits you, as settlor, to dispose of trust property in a dated and signed writing this is executed after the date of execution of the trust and without any additional formalities. This is very useful for a person who frequently desires changes in provisions for deposing of tangible personal property.

I often get asked by my clients whether one who holds a power of attorney for a settlor or trustee can modify, revoke, terminate a trust, or act on behalf of the settlor or trustee. California law provides that an attorney-in-fact under a power of attorney may perform any specified act on behalf of the principal only if the power of attorney expressly grants that authority to the attorney-in-fact and only as provided in the trust instrument. Civil Code §4264. My trusts do not provide for such authority.

- **No effect on real estate**. Placing your California real estate and other major assets into your living trust has no effect on your property or income tax situation. A separate tax return for a living trust is not required. However, if you own real property in states other than California, a transfer to your living trust may subject you to a real property transfer tax. You should consult an attorney in each state where you own real property to find out whether transferring your real property will subject you to a transfer tax or a real property reassessment. This can be both expensive and time-consuming.

- **You retain complete control until you die**. While you are alive and managing your living trust, you handle your assets the same as before. However, when you die, a disinherited relative, creditors and others cannot acquire assets in the living trust. Your will applies only to property not included in the living trust, such as cash in your wallet or purse.

- **The costs of probate are avoided**. It is true that by saving probate costs, more of your assets can be passed on to the people you want to receive your assets. The probate process can be expensive, cumbersome and lengthy. The use of a trust may be effective to either eliminate or reduce these expenses.

The **disadvantages** of a living trust include:

- **Initial costs of a living trust can far exceed those of a will**. Preparation and drafting of your estate plan in which a living trust is used usually requires drafting not only of the living trust, but also of a "pourover" will. Since your trust must be funded to be effective, your attorney also will need to draft deeds to your real property, transfer stock, and draft other instructions so that your assets can be placed into your trust. After paying your attorney to draft these deeds and documents, you will incur an additional expense to record the deeds and to your broker to transfer your stock.
- The initial cost of a living trust is far **more expensive** than a simple will or testamentary trust.
- Revocable living trusts are far **more complicated,** and they are frequently misunderstood by clients.
- Living trusts are **often not fully funded** at the time of death, leaving property that must be probated. You must make sure that your assets are properly transferred to the trust, or your estate will be in probate court anyway. Signing a revocable living trust does not automatically transfer all your assets to your trust. You must change title of ownership to each asset to your trust's name --- for example: "Mary Jones, Trustee of the Mary Jones Family Trust, dated July 1, 1993." If you own many real estate holdings, invest in business ventures or partnerships, or even change your investments regularly, this can be a real paperwork headache. If you pay a lawyer to do it, it gets even more expensive. If your property is not properly transferred, the probate-avoidance feature of the trust will not be realized at death. Many of the trusts being mass-marketed today end up as useless, empty shells because the trust was not funded before death.

- Remember that a revocable living trust affects only your assets that are actually transferred to your living trust. A living trust does not affect your assets left in your name alone, joint tenancy assets, or your assets held as "tenants in common" or "community property." Certain specific assets such as cooperative apartment, stock in professional corporations, partnerships, and country club membership may be difficult or impossible to transfer to your revocable living trust.
- Even after a trust is properly funded, many persons discover that dealing with their assets during their lifetime in their capacity as trustee (rather than individually) can be somewhat of a **continuing hassle**. Banks, title companies and other third persons may be reluctant to engage in transactions with a trustee without additional assurances or documentation. Trustees are often asked by financial institutions to provide a copy of the trust. This request destroys the privacy of the trust. Further, many lenders require that real property owned by your trust be deeded back to you before they will lend money on the property. Depending upon their activities, some persons may find these lifetime hassles outweigh the post-mortem advantages of the trust.

- Living trusts require the **constant attention** of the trustee, who frequently is a family member with little or no knowledge of trust law.

- Many experts believe that there are advantages to **the predictability of the probate** tax laws over the ever-changing rules regarding trust.

- Living trusts can be inappropriate to use if there are **problems with creditors or family disputes.** In these situations, a court-supervised probate proceeding may be preferable to a living trust. The probate deadlines and procedures have recently been considerably streamlined and may offer substantial protection to your survivors. A living trust provides no protection against your creditors during your lifetime. Probate proceedings usually cut off rights of most creditors who do not file claims within a short statutory period after receipt of notice of administration of the estate. If no notice was sent, the creditor must file within four months after issuance of letters or petition for

additional time after learning of his or her claim, but in no event more than one year after issuance of letters.

- A trustee may choose to give notice to creditors and file the notice with the court, thus permitting the trustee to benefit from the short four-month statutory period provided for probate estates. If the trustee does not do so, creditors will generally have one year to present their claims.
- If your beneficiary fails to survive you, any gift made to that person lapses (fails) unless a substitute taker has been designated or the anti-lapse statute applies. The anti-lapse statute provides that gifts to your kindred or to the kindred of your spouse who do not survive you will pass to their lineal descendants who survive you. Anti-lapse statute applies only to wills, but not to living trusts.

- **Legal Certainty**. Well-established principles of will construction and statutes designed specifically to address problems of testamentary disposition do not necessarily apply to a living trust. There is a substantial body of case law, dating from the advent of English common law, which provides guidance to the attorney in drafting wills and to the courts in interpreting them. These principles of will construction may not apply to the interpretation of a revocable living trust, which has been in popular use to avoid probate only for the last ten to fifteen years. For instance, statutes and case law relating to class gifts, adopted or after-born children and revocation apply to wills but not necessarily to living trusts.

- Once property is transferred to the living trust, an amendment (as opposed to a new trust) is required to make changes to avoid the retransfer of all assets. This means that beneficiaries whose interests are reduced or eliminated will see the changes. A will can be redone in its entirety with the same ease as a codicil. If you want to revoke your trust, you must first transfer all assets in the trust back to you. Thus, you may be required to retain an attorney to draft deeds to real property and instructions concerning other transfers so that the property can be placed back into your individual ownership.

- The tax savings in using a living trust are problematic. Income tax savings are touted as one of the more significant benefits of a revocable trust. However, a revocable living trust generally does not provide any personal income tax savings. Further, contrary to what is being advertised, a **revocable trust does not avoid estate or gift taxes** if you use a revocable living trust as opposed to a will. Use of a revocable living trust, rather than a will, does not save your estate one cent in estate tax. No gift tax is incurred when you transfer property to your trust because the gift is not complete --- you, as the settlor, can reacquire the property at any time.

Will vs. Revocable Living Trust

	No Will or Trust	Simple Will Only	Living Trust
Can I avoid probate?	No	No	Yes
Can I reduce or avoid federal estate tax?	No	No	No
Will my estate stay private when I die?	No	No	Yes
How long should it take after my death until all assets are distributed, and the estate is closed?	6-18 months	6-18 months	4-9 months
Can I retain control over my assets while	Yes	Yes	Yes

I am alive?

What is the cost for a simple will or trust?	$500.00	$900.00

Choosing between a revocable living trust and a simple will is a very personal decision. Such a decision depends upon your financial situation, your potential tax liability, the complexity of your portfolio, your age and other personal matters, even, perhaps, your personal tolerance for paperwork and details.

Before I can recommend a living trust, your estate, the status of the intended beneficiaries and your goals must be considered. A trust may be an extremely useful and effective part of your estate plan. However, living trust is not appropriate in all cases. A careful review of the potential benefits and drawbacks must be made before deciding whether you should include a trust as part of your estate plan.

What can I do when confronted by a promotion for a living trust?"

Not unlike the snake oil salesmen of yesteryear, a common problem for everyone, but especially the elderly, is the consistent advertising and promotional material designed to gain access to your estate or finances in order to "sell you" a product that you either do not need or want. In the end, what the promoters receive are huge commissions on the placement of your trust or financial plan. What you receive are legal documents or investment that do not meet your needs or, worse yet, end up costing your estate to correct problems created by these plans.

First, if you have purchased a trust plan or financial product, please call my office to have it reviewed. I can advise you on whether you may undo the plan if it does not meet your needs.

If you have not purchased such a plan but you have been solicited to do so, watch for the helpful signs and take preventative measures.

- Before considering a living trust or any other estate or financial planning document or service, please consult my office or with an attorney who is knowledgeable in estate planning, and who is not trying

to sell a product which may be unnecessary. **Remember, only an attorney can give you legal advice and draft legal documents, including a living trust.**

- Always ask time to consider and reflect on your decision. Do not allow yourself to be pressured into purchasing an estate or financial planning product.

- Know you cancellation rights. California law requires that sellers who come to your home to sell goods and services (not including insurance and annuities) that cost more than $25.00 must give you two copies of a notice of cancellation form to cancel your agreement. You, the buyer, may cancel this transaction at any time before midnight of the third business day after the date of this transaction.

- Be wary of home solicitors who insist on receiving confidential and detailed information about your assets and finances.

- Know whom you are talking to and insist on identification of the person and a description of his or her qualifications, education, training, and expertise in the field of estate planning.

- Always ask for a copy of any document you sign at the time it is signed.

- Report high-pressure tactics, misrepresentations or fraud to the police immediately.

Some of these individuals or companies may advertise themselves "independent legal assistants," "paralegals," "legal document assistants" or similar titles. However, none can practice law in California! A new California law effective January 1, 2001 provides new stringent rules, regulations and criminal penalties to prevent such abuse. The new law states that paralegals, or similarly named individuals or companies, cannot provide legal advice, cannot represent a client in court, cannot contract his or her services to anyone but an attorney, and cannot select, explain, draft or recommend the use of any legal document to anyone but the attorney for whom the paralegal works. Only an attorney can

legally and ethically give you advice on the law and draft legal documents, including a will and living trust. If you are not sure whether an individual is a duly licensed California attorney, you should call the State Bar of California to verify membership at (415) 538-2577. If you suspect that someone who is not a licensed attorney is attempting to advise you on the law, draft your will or living trust, or, worse, sell you an estate plan, you should contact the State Bar of California at (888) 460-SENIORS to ask advice or report a scam. This number connects to the bar's "intake unit," which summarizes complaints and refers them to a special section of the state attorney general's office for criminal or civil prosecution.

"Will all my estate be controlled by my will?"

Wills frequently contain a residuary clause that reads something like this: “I give the residue of my estate as follows . . . “However, not everything you own is controlled by your will. There are several categories of assets that may pass to assigned individuals outside your will, and thereby avoiding probate, no matter what your will may say.

The first and most obvious is your life insurance policy. Your policy is a contract between you and your life insurance carrier, which permits you to name one or more persons (beneficiaries) who will be entitled to the proceeds of your policy upon your death. A life insurance policy is an important and valuable asset in your estate. In many cases, it may be the largest asset you own. Many people who are not worth a million dollars may decide to have a life insurance policy in that amount. Your life insurance policy, instead of your will, names the beneficiaries and they get the proceeds.

Retirement benefits may be similar to your life insurance policy, since the individual benefits at your place of employment are usually set by you and your employer, not your will.

There is another type of property that passes outside your will --- property owned in joint tenancy. When property is owned in joint tenancy, the right of survivorship passes to the remaining joint tenant upon the death of the other one. Joint tenancy are magical words. By using them, you are doing a form of estate planning because you are saying that your co-owner

(joint tenant) will inherit the entire property upon your death, no matter what your will may say.

"Will I have to pay estate and gift tax?"

Some clients are concerned about possible estate taxes when they die. The cost of probate pales beside the federal estate taxes your estate may have to pay at your death. However, not everyone needs worry about federal estate taxes. If you are married and leave everything to your spouse, no federal estate tax will be due after the death of the first spouse no matter how large the estate.

Prior to 2011, the former law provided only a $1 million exemption from estate tax, and marginal rates ranging from 41% to 55%. The lower $1,000,000.00 exemption amount dramatically increased the number of people who paid estate tax. Fortunately, in January 2011 and again in 2017, Congress passed major estate tax relief. The federal estate tax exemption for 2022 is **$12.06 million**. The estate tax exemption is adjusted for inflation every year. The size of the estate tax exemption meant that a mere 0.1% of estates filed an estate tax return in 2020, with only about 0.04% paying any tax. In 2022, the estate tax exemption covers estates worth as much as $24,120,000.00. As of 2022, upon a married couple's death, the first $24,120,000.00 of their estate is shielded from estate tax; everything that exceeds that amount is subject to a 40% rate. For individuals, the first $12,060,000.00 of an estate is shielded and the rest is taxed at 40%. The $12,060,000.00 exemption is indexed for inflation using the CPI that applies to the individual. Because of those high exemption rates, plus the yearly increase for inflation, roughly 99.9% of the estates of Americans who die in 2022 will not pay estate tax at all. To make things simple, if your estate is worth $12 million dollars or less, you do not need to worry about the federal estate tax. However, any estates worth more than that are taxed only on the amount that surpasses the $12 million threshold.

However, you may be surprised at just how large your estate really is. For example, in Southern California, the market value of a modest home can easily exceed $800,000 --- and it may not take much more in the way of assets to bump you up to well over one million dollars. The federal estate tax exemption is calculated on net equity. Thus, if your house is worth $800,000.00 and has a mortgage balance of $200,000.00, only the

$600,000.00 equity of your house will apply toward your federal estate tax exemption. However, remember that assets left to a surviving spouse qualify for the marital deduction, regardless of the amount. Notwithstanding, I support the complete repeal of the federal estate tax. I urge my clients to contact their congressperson and insist that he or she support the repeal of the estate tax.

For that "fortunate" .01% whose individual estates exceed $12 million dollars there are the qualified terminable interest property trust (Q-tip), the life insurance trust, and the charitable remainder trust, which do provide for estate tax relief. I have purposely left out of this discussion those federal estate tax considerations because that subject is beyond the limited scope of this booklet.

Finally, notwithstanding the above, if you are still worried about having your heirs pay estate taxes, one of the best estate planning techniques to reduce your potential estate tax does not require one of those complicated and expensive living trusts. This estate planning technique rests with the so-called "annual exclusion," which currently allows an individual to give up $16,000.00 each year to as many heirs as he/she chooses, without any gift tax! A husband and wife can give up to $32,000.00 per donee per year without incurring a gift tax. Further, if any of your children or your grandchildren are going to college, you can share their good fortune with them. Payments made directly to a college for their tuition are not treated as taxable gifts. This is, in effect, a substantial boost to the $16,000 annual gift tax exclusion. You can give the gifts to as many people as you want. If your annual gift to each person is at or under $16,000.00, the gifts are tax-free. The recipients do not have to be related to you. If you want to give more, you can do so --- you would just have to file a gift tax return.

Gifts are typically free of both gift and income taxes for the recipients, so your children, grandchildren, brother and/or sisters or anyone receiving your gifts will be able to enjoy any money you give them without having to worry about Uncle Sam wanting an immediate his share of the gift. The recipient of a gift is not the one who may owe taxes; it is the donor --- although you would have to be a very generous soul indeed to ever owe a dime in gift taxes. That is because you would have to give away more than $12,060,000.00 above the "annual exclusion," in your lifetime before gift taxes would be owed.

What Is The Lifetime Gift Tax Exemption?

The lifetime gift tax exemption is the total amount that can be given away by an individual over his or her entire lifetime to any number of people that will be free from gift taxes, but the amount gifted will, in turn reduce the amount that can be given away by the individual at death free from federal estate taxes. In other words, the lifetime gift tax exemption is tied directly to the federal estate tax exemption so that if you gift away any amount of your lifetime gift tax exemption, then this amount will be subtracted from your estate tax exemption when you die.

Under the provisions of the American Taxpayer Act of 2013, the lifetime gift tax exemption will equal the federal estate tax exemption and will be indexed for inflation in future years. Confused? Don't be. Here is an example: If an individual gives away $3,000,000.00 during his or her lifetime and then that individual dies, then the individual's federal estate tax exemption will only be $9,060,000.00

Here is another example. Let us say that you gave your daughter a $120,000.00 gift. Then you will have made a taxable gift to your daughter equal to $104,000.00 The $120,000.00 gift is reduced by the $16,000.00 annual gift exclusion and thus equals $104,000.00 in taxable gifts. In turn the $104,000.00 taxable gift will reduce your $12,060,000,00 lifetime gift tax exemption down to $11,956,000.00.

It is my opinion that the estate tax (or death tax) is the cruelest of taxes and I supported and applaud its permanent repeal. When a loved one dies, the surviving spouse, child or children should not be forced to face both the undertaker and the tax collector at the same time. This tax affects the estates of about one-half of one percent of the people who die. Congress created it to make sure a handful of wealthy families did not end up dominating the nation. However, the tax remains a threat to the estates of the middle and upper-middle classes. Although I believe in the repeal of the federal estate tax, if that is not possible, I support the $12,060,000.00 (indexed for inflation) exemption. Given that this higher exemption amount protects all but the extreme wealthiest from estate taxation, it is a prudent political choice.

"Whom should I choose as my child's guardian?"

Your choice of a guardian for your child or children is, perhaps, the most important decision you must make. Matching the needs of your child and the qualifications of prospective guardians require the balancing of complex factors. These are some factors you should consider:

1. While **age** in itself does not determine a person's fitness or unfitness to be a guardian, you should consider whether a particular candidate has the necessary maturity, experience, temperament, patience, and stamina to undertake the responsibilities as guardian of your child or children. It is generally inadvisable to appoint grandparents or other older persons as guardians. Appointment of grandparents may pose a twofold problem. First, they may be too old to take on the responsibility of young children and, second, where there are two sets of grandparents, if only one is chosen, the other side may be very upset and cause an immediate conflict and the associated emotional trauma for your child or children. Possible rivalries between your child and the children of the guardian also should be considered.

2. The individual selected should have a **genuine interest** in the welfare of your child, through either family relationship or friendship, and should be an individual in whom both your child and you have confidence.

3. In view of the psychological blow your bereaved child or children are likely to have sustained, the guardian should have an **understanding of the emotional problems** of children or should be willing and able to obtain skilled guidance on this subject.

4. **Integrity and stability** are essential qualities in a guardian, since the individual selected will have the closest contact with and greatest influence over your child. A married person is usually nominated as guardian. Since stability in the marriage is important for a peaceful and secure environment for your child, you may wish to require, as a condition of the nomination, that your nominee be married and living with the nominee's spouse at the time of your death. A change in

marital status does not always make the person unacceptable; a widowed or divorced nominee may still be a satisfactory guardian.

5. The guardian should be **physically able** to undertake the care of an additional child or children, and should have the time necessary to devote to this task. A family with several children or a family in which both husband and wife work may not be the best choice.

6. Children deprived of their parents may derive a sense of security from **remaining with their brothers and sisters**. If you have more than one child, the guardian should be capable of assuming the care of all, if possible.

7. The **personal situation** of the guardian may be important to you: religion, age, marital status, other children, personality traits, and similar factors. The stability of the marriage also should be taken into consideration.

8. It is important that **sufficient funds** be available to cover the costs of caring for your child through the period of guardianship and, if your child is to live with the guardian, to enable the guardian and family to meet the increased strain on their resources of having a new person or persons added to the household. If you cannot provide sufficient funds to cover all expenses satisfactorily, the persons chosen as guardian should be in a financial position to meet the balance of the necessary expenses without subjecting the guardian and family to privation. Financial difficulties owing to your child's arrival in the family of the guardian must be avoided to prevent resentments with the family unit. The guardian also should be someone who has no conflicts of interest with your child.

9. The individual nominated as guardian should be **consulted in advance** so that willingness to serve can be definitely ascertained. Any alternates or successors also should be consulted.

10. The guardian should be **willing and able** to give your child an upbringing similar to what you would have provided financially, socially, orally, and in other ways important to you.

Often the management of property owned by your child, or arrangements for payments for your child's support, maintenance, and other needs, are placed in hands different from those entrusted with the guardianship of your child. Thus, a different individual, or an institution, may be appointed guardian of your child's estate or may be established as trustee of a trust for your child's benefit. When such arrangements are set up, it is important that the guardian of the person be someone who can cooperate with the financial or property managers.

If there are other candidates available who are acceptable to you and are themselves willing to undertake the responsibility, other guardians should be nominated in your will in case the nominee first named should die or become unable or unwilling to serve.

The choice of the guardian is a decision that you should review with some frequency, perhaps as often as every two years. Your child's needs and problems often change rapidly; moreover, the personal, financial, and marital situation of the nominee may change, as well as the degree of friendliness and intimacy between you, the nominee, and their respective families.

"Whom should I choose to be my executor?"

My clients invariably asked, "What is an executor?" The answer is that an executor is a person nominated by you to carry out the directions in your will, and to dispose of your property according to your testamentary plan. Other than how you want to dispose of your assets, one of the most important things that you will have to decide in devising an estate plan is who your executor will be. California law requires than an executor be appointed to handle an estate because someone must be responsible for collecting the estate's assets, protecting the estate's property, preparing the inventory of the property, paying valid claims against the estate, representing the estate in claims against others, defending the estate in claims brought by others, and distributing the assets to your beneficiaries.

Having been advised what an executor is, my clients then ask, "Whom should I choose to be my executor?" There is no consensus, even among lawyers, about who makes the best executor. To answer this question, I have prepared some suggestions that might aid you in making that decision:

The position of executor involves substantial responsibilities and potential liabilities. Although your executor's attorney will assist in gathering the assets of your estate, paying your obligations, and distributing your assets, your executor is responsible for the proper administration of your estate. For instance, the law now requires that your executor give notice of your death to your creditors or potential creditors who are known or who are readily ascertainable without an extended search. This is a new added responsibility of your executor.

Among those you will want to consider as executor of your will are your spouse or other family member, friends, business associates, and corporate fiduciaries qualified to act in this state. The size and complexity of your estate are important considerations. Other factors, such as an individual's familiarity with your property and wishes, or the existence of a closely held family business, may indicate naming a family member or a business associate. On the other hand, a corporate executor may be better qualified to handle investment and recordkeeping problems, and the expertise of its staff may make the hiring of separate tax accountants, appraisers, or investment advisors unnecessary. You also should consider location, impartiality, business experience, reliability, and physical capability of potential nominees to perform the executor's duties. Other factors to be considered are whether the individual can deal effectively with the beneficiaries and whether he or she may have any major conflicts of interest with your estate or your beneficiaries.

You may name a single executor or name two or more persons as coexecutors. Nomination of coexecutors may encourage judgments that are more considered because coexecutors must generally act together in exercising their powers. For example, nomination of a family member as coexecutor along with an institutional fiduciary combines both the family member's familiarities with your assets and the institutional executor's experience and expertise in estate administration. However, such a plan also can result in disagreements, possibly leading to stalemates damaging to your

estate, and having multiple decision makers can make estate administration more cumbersome and less efficient.

To reduce estate administration expenses, you may nominate a family member or friend on the expectation that the executor will waive his or her statutory commissions. However, that individual may need to retain tax or investment advisors for assistance, thus resulting in additional expenses. The appointment of multiple executors does not increase the total statutory compensation payable because the commissions allowed are divided among those serving.

To be sure that a nominee will accept the duties of serving as executor on your death, you may wish to discuss the matter with the proposed nominee, explaining the time and responsibilities that the position will require. A corporate fiduciary may decline to serve as executor as a matter of policy if the estate is too small to generate sufficient fees. This factor should be kept in mind if the corporate executor is the only nominee or if the corporate fiduciary would then result in the need for an administrator with will annexed to be appointed by the court.

Although a nonresident may act as executor, a nonresident of the United States may experience substantial difficulty in obtaining appointment as executor. The probate court will be reluctant to waive bond, and a bond may be difficult or impossible to obtain. The probate court often will require a nonresident to post bond even if the will waives bond, absent a special showing that a bond should not be required ---- the nonresident alien is the sole or primary beneficiary of your estate. Moreover, a bonding company will be reluctant to issue a bond for a nonresident alien unless the individual owns assets in the United States and submits a detailed financial statement.

You also should be aware that if, after executing your will, your marriage is dissolved or annulled, a provision naming your former spouse as executor or other fiduciary is revoked.

Whoever you choose as executor, make sure your will provides for a backup in case the original executor is unable or unwilling to serve. If you do not, the court will assign one for your estate.

"*Whom should I choose to be my trustee?"*

A trust will is appropriate in the common situation of a

married couple with minor children, when the estate is somewhat larger then that contemplated by a simple will. If you want a "simple will" with no trust provisions or a revocable living trust, you may simply skip this section. However, if you want a testamentary trust or information concerning trustees in general, you may find the information informative.

Although my clients often assume that the person they nominated as executor and guardian also should be nominated as trustee, I must advise you regarding the important differences in the quality's desirable in a trustee. An executor's responsibilities are generally short term and demand less investment and management skills than those required for a trustee. A guardian, on the other hand, should be someone who is willing to assume responsibilities for the personal welfare of your child, but who need not be concerned with property management. The testamentary trustee must be able to manage property, to respond to the trust beneficiaries' personal and financial needs, and to assume long-term responsibility for the administration of the trust. Of course, the person nominated as executor also will be nominated as trustee, and this if often desirable to assure continuity of management between the estate and the testamentary trust.

First, what is a trustee of a testamentary trust? A trust is a fiduciary relationship with respect to property that arises because you have manifested the intent to create the trust. It subjects the trustee (who holds legal title to the property) to equitable duties to deal with your property for the benefit of your beneficiaries. The trustee of a testamentary trust is the manager of the trust property for the benefit of the persons whom you have designated in your will as the beneficiaries. The duty of the testamentary trustee is essentially to fulfill your purpose in creating the trust as expressed in your will.

The trustee's management duties will vary according to the nature of the trust property. The management skills required of a trustee holding a single parcel of realty under a long term, net-net lease to a responsible tenant will be minimal compared to those required of a trustee holding a diversified investment portfolio or a substantial interest in a closely held business. Your selection of a trustee should, therefore, be made only after a careful examination of the particular problems likely to be faced in the management of the type of assets to be held in the trust.

Many fiduciary obligations of a trustee have been codified. For example, a trustee (1) must act in the highest good faith toward the

beneficiaries, (2) may not deal with the trust for the trustee's individual profit, (3) may not enter into a transaction in which the trustee's interests are adverse to the interests of the beneficiary, and (4) may not commingle the trust property with the trustee's own funds. Furthermore, even if a trustee receives no compensation, the trustee must use at least ordinary care and diligence in the execution of the trust.

I have briefly summarized below the advantages and disadvantages of both institutional and individual trustees. I have purposely left out the tax considerations in the choice of a trustee because that subject is beyond the scope of this booklet. Not all the considerations will be applicable to your individual situation or circumstance.

Should I nominate an institutional or individual trustee in my will?

The advantages of an **institutional trustee**, such as a bank, are:

- **Permanence.** An institutional trustee can act as trustee during the entire duration of the trust, and this will provide continuity of administration. Moreover, the illness or disability of a particular individual will not significantly impair the administration of the trust.

- **Professional management**. An institutional trustee employs many experienced persons having a variety of specialties and has available facilities that cannot be matched by the typical individual trustee. In addition, most institutional trustees, such as banks, maintain various common trust funds that enable small trusts easily to diversify their investments.

- **Impartiality.** An institutional trustee is generally thought to be more likely to treat successive or concurrent beneficiaries equitably.

- **Financial responsibility**. The financial responsibility of an institutional trustee is normally beyond question, so that the beneficiaries are assured of having an effective remedy in case of breach of trust. Because institutional fiduciaries are examined by various governmental agencies, this gives additional assurance that the trust will be properly managed.

The **disadvantages** of an institutional trustee are:

- **Cost of administration**. Many of my clients feel that the cost of an institutional trustee is too great. To make an accurate assessment, however, the cost of an institutional trustee must be compared with the total cost of professional accountants, investment advisers, and custodial services that a particular individual trustee might be required to use.

- **Conservative investment approach**. Many of my clients believe that the investment approach of an institutional trustee is more conservative than necessary. For example, an institutional trustee will not ordinarily make investments in real property, an investment that has generally kept pace with the current economy. On the other hand, many of my clients favor a conservative investment approach.

The advantages of an **individual trustee** are:

- **Personal relationship**. If a close friend or member of your family is chosen as trustee, he or she is more likely to be aware of your desires and the personal needs of your children and grandchildren.

- **Cost of administration**. It is often thought that the cost of administering a testamentary trust can be eliminated by the appointment of a family member or close friend as trustee. This may often be true, but to evaluate accurately the cost factor, you should consider the charges of investment counsel, accountants, and other persons whom the individual trustee may need, or choose, to employ to discharge his or her duties adequately. Depending on the value and nature of the trust assets and the ability and available time of the individual trustee, the total cost of an individual trustee may be more or less than the cost of an institutional trustee.

- **Speed**. It is more likely that a quick decision can be reached by an individual than by an institution, because the institution frequently must act through committees and must observe other formal procedures.

- **Investment approach**. Although the language that I use in drafting your will significantly affects the trustee's investment approach, an individual often will be less conservative in the management of a trust than an institution. Whether a less conservative tendency by the trustee is an advantage or a disadvantage depends on your point of view.

  The disadvantages of an individual trustee are:

- **Lack of professional management**. If an individual trustee is not adequately compensated for his or her services, the quality of the trust management may suffer. It is an unpleasant fact that "volunteer" work is often given low priority. In addition, individual trustees tend to neglect keeping adequate records for the trust. Further, unless the individual is well qualified in all areas of trust management or seeks competent advice, the trust will not be properly administered. This may require costly accounting services and, possibly, lead to litigation may years later.

- **Difficulty of finding competent individual**. An individual who accepts a trusteeship must make a major commitment of time and responsibility; it is therefore often difficult to find an individual who is both willing and able to act as trustee.

"Should I hold title to my home and other property in joint tenancy or in community property?"

If you are married, whether you hold your property as community property or as joint tenants can have significant tax consequences for a surviving spouse.

Married couples are attracted to the probate-avoidance benefits of joint tenancy. However, while joint tenancy avoids probate on the first death, it does not offer the same protection on the death of the second spouse.

There are many reasons to think twice about owning property in joint tenancy with someone else --- even your spouse. Perhaps the most important reason is that whoever dies first loses all control over how the jointly owned property will be eventually distributed. For example, if you should die before your spouse, and your spouse remarries, your property could be inherited by people you have never even met!

A married couple's assets held in joint tenancy do not trigger federal estate taxes because of the unlimited marital deduction. Thus, there is no limit on the amount of assets that can be left tax-free to a surviving spouse. The trouble comes when the second spouse, who now holds the entire estate, dies. If he or she has assets over $5,340,000.00 at his or her death, the excess amount is taxed.

Traditionally, husbands and wives have held their property as joint tenants to avoid lengthy and costly probating of the estate when one spouse dies. However, in California spouses are allowed to hold their assets as community property. This vesting may not avoid probate on the death of one spouse, but it does lower the income tax consequences when the survivor disposes of the couple's assets.

"Basis" is the tax term for the figure used to calculate the capital gains tax due on the sale of property. It is the price you paid for the property. Therefore, if you bought a vacation cabin on the shores of Lake Arrowhead for $25,000.00 and then sold it for $300,000.00, your taxable gain is $275,000.00. Under federal law, all your property assumes a basis equal to its fair market value at the time of your death. This is called the "stepped-up basis." The stepped-up basis of property is passed on to your spouse or children, which means that if they then sell the property for that price, no capital gains tax will be due.

A surviving spouse is only eligible for a step-up in the base value of his or her share of the assets of the marriage if those assets were held as community property. For assets held as joint tenants, the base value of the deceased's half is assigned the fair market value on the date of death, the surviving spouse keeps the original value.

Here is the difference. In assets held as community property, the base value of the halves-held by both the deceased spouse and the surviving spouse is generally set as of the date of death. For instance, if you and your spouse purchased that vacation cabin in Lake Arrowhead many years ago for $25,000, but it is presently worth $400,000 when one spouse dies, both receive a value of $200,000 for the share of the deceased and $200,000 for the survivor's share.

However, for the assets held as joint tenants, the base halve of the deceased's half is assigned the fair market value as of the date of death, but the surviving spouse's share is assigned the original value. Taking the $400,000 Lake Arrowhead cabin, the deceased's share would be worth $200,000, but the survivor's share would be worth just $12,500 (one-half of the original purchase price). Obviously, the income tax consequences of selling your cabin would vary greatly. If the community property survivor sold the cabin for $400,000, no taxes would be owed; however, the joint tenant survivor would owe taxes on a gain of $187,500!

The primary advantage of community property ownership is that if a surviving spouse receives the deceased spouse's half by will, the survivor's cost basis of the entire property is stepped-up to the market value. In 1987, this major income tax advantage was extended by the Internal Revenue Service to joint tenancy property held by spouses if the joint tenancy property was acknowledged before death also to be community property. If you are married and you do not want to change from joint tenancy ownership of your property, you may simply append a note to your wills explaining that it is your intention that your possessions, no matter how held, are to be considered community property. The following statement may be attached to your wills:

> "*We agree that all the property we hold in joint tenancy is truly and completely community property, and we are holding it in joint tenancy for convenience only. We do not intend to change the character of the ownership of the property by holding it in joint tenancy."*

I recommend that you and your spouse sign and date the statement, preferably before a witness, and file it with your wills. The statement does not have to be notarized. Such a statement may allow both halves of any asset to be revalued as of the date of death of the deceased spouse.

Effective only after July 1, 2001, title to property may be taken as community property with right of survivorship where declared to be in the transfer instrument and signed by the grantees.

Should I put my child's name on the deed to my house to avoid probate?"

Generally, I do not recommend that you make your child or children a joint tenant on either your home or on your bank accounts. If you make your child a joint tenant on your home, you no longer control your home. You must obtain your child's consent before selling your home, or before seeking a loan against it. In addition, your child's creditors, or their ex-spouse, may successfully make a claim against your home. I concur with the Wisdom of Ben Sira (33:19, 21) when he counseled, "***As long as you live, give no one power over yourself --- son or wife, brother or friend. Do not give your property to another, in case you change your mind and want it back . . . It is better for your children to ask from you than for you to be dependent on them."***

By making your child a one-half owner of your home, you have made a gift of one-half the current value of your home. Internal Revenue Service rules allow tax-free gifts between individuals of no more than $14,000.00 annually. Since the value of this gift exceeds $14,000.00, you must now file a gift tax return and your estate may have to pay gift taxes on your death.

You can avoid the need to file a gift tax return by retaining sole title to your home and leaving your home to your child or children in your will. At your death, the standard $12,060,000.00 federal estate tax credit will allow the house to pass to your child free of gift or estate tax (provided, of course, that your total estate is worth $12,060,000.00 or less).

If you leave your home to your child or children by your will, you will not avoid probate. However, the cost of probating the house may still be more palatable than the consequences of joint tenancy.

"What are the tax consequences of selling our family home?"

The Taxpayer Relief Act of 1997 significantly changed the potential tax liability upon the sale of the family home by completely scraping the traditional system of "rollover" referrals of tax liability on the profits from the sale of your home. The Taxpayer Relief Act of 1997 also ended the complex $125,000 onetime tax-free "exclusion" on the profits for home sellers 55 years and older. In its place, the Taxpayer Relief Act of 1997 substituted a much simpler system that allows the vast majority of taxpayers who sell their principal residences to escape federal capital gains taxes on their profits.

Married home sellers who file their federal income taxes jointly will be able to take up to a $500,000 in home sales gains, tax free, provided they used the property as their principal residence for two of the prior five years. Taxpayers who file singly will be able to take up to $250,000 profit without capital gains taxation.

The IRS eliminated its old form 2119 for the sale of a personal residence. Consequently, tax-exempt main home sales below the $250,000 and $500,000 thresholds need not be reported on your IRS tax returns. If your home sales profit exceeds these amounts, however, report the capital gain sale on Schedule D.

"How often can sellers make use of the new tax rules?"

As often as once every two years, assuming they have gains.

"Will the new law allow widows, widowers, and empty nesters with sizable capital gains to buy smaller, less expensive homes without tax penalty?"

Absolutely. That is the whole point of streamlining the system --- to allow people to choose the type of housing they want, including renting, without worrying about the tax consequences.

"What if sellers have gains that exceed the $250,000 or $500,000 limits?"

Any gains you have above the limit will be taxed at the new 20% capital gains rate. Beginning in the year 2001, homebuyers who occupy their

homes for more than five years may qualify for an even lower capital gains rate of 18% on gains above the statutory limits.

Will putting my assets into my living trust protect me against my creditors?

No. Putting your assets into your living trust will not protect you against your creditors or against third party claims. In contrast to a corporation or limited liability company, which the law deems a person, a trust is not a person, but rather a fiduciary relationship with respect to property. Legal title to property owned by a trust is held by the trustee. A trust is simply a collection of assets and liabilities. A trust itself cannot sue or be sued. A trust does not fall within the statutory definition of a judgment debtor. Further, a trust is not included within the definition of a person.

"What is the Health Care Decisions Act?"

The Health Care Decisions Act, which became operative July 1, 2000 and replaced the old Durable Power of Attorney for Health Care Law, is an estate-planning tool for addressing beforehand your health care needs in case you become incapacitated. An "Advance Directive" is a document that you can use to appoint another person, such as a family member or friend, who can make health care decisions for you if you become unable to make your decisions. The person may make all decisions about your health care, subject only to limitations you specify on that person's authority and several restrictions imposed by law.

Why Complete an Advance Directive?"

An Advance Directive will be helpful even if you have executed a "Living Will" or a Declaration Under California Natural Death Act because it applies to all health care decisions and allows you to appoint a person who can carry out your wishes if you become incapable of making your decisions. The other primary reasons for completing an Advance Directive are to avoid court proceedings, possible delays in receiving needed medical care, and emotional and financial stress on family or friends. These benefits

are available because an Advance Directive can be effective by simply completing a form, without going to court. It may be advisable to sign an Advance Directive before surgery or other medical care. Persons with chronic conditions that may "flair up" and leave them unable to make decisions also might consider signing an Advance Directive. Persons with no close relatives living nearby may want to identify a close friend to make medical decisions for them in the event they should become unable to make such decisions for themselves. As a practical matter, many people may want to keep an Advance Directive in effect at all times, just as they maintain insurance to protect their interests in the event of unforeseen occurrences.

"Who can complete an Advance Directive?"

Any person who is a California resident, is at least 18 years old, is of sound mind, and is acting of their free will may sign an Advance Directive.

"Can a person appointed in an Advance Directive manage my financial affairs?"

A person appointed in an Advance Directive is allowed only to make health care decisions, arrangements for medical services, and related decisions. It does not cover authority for financial or banking transactions.

"Must the appointed person be an attorney?"

Although the Advance Directive has the term "attorney" in the form, and the person appointed to make decisions is called an "attorney-in-fact," he or she does not need to be an attorney. There are only a few limits on who may be appointed.

"How should I select a person to make my health care decisions if I am unable?"

When you decide to pick someone to speak for you in medical crises, in case you are not able to speak for yourself, there are several things to think about. I recommend naming one person to serve at a time, with at least one successor or back-up person, in case the first person is not available when

needed. I have listed thirteen factors that should help you decide who the best person is to make those decisions.

1. Meets the legal criteria in California for acting as your agent.
2. Would be willing to speak on your behalf.
3. Would be able to act on our wishes and separate his/her own feelings from yours.
4. Lives close by or could travel to be at your side if needed.
5. Someone who is courageous and will do what is in your best interest.
6. Someone who is accessible.
7. Someone who agrees to be your agent.
8. Knows you well and understands what is important to you.
9. Is someone you trust with your life.
10. Will talk with you now about sensitive issues and will listen to your wishes.
11. Will likely be available long into the future.
12. Would be able to handle conflicting opinions between family members, friends, and medical personnel.
13. Can be a strong advocate in the face of an unresponsive doctor or institution.

Tips in designating an agent:

- Appoint only have one agent, NOT multiple people with co-authority.
- Make sure that all contact information for your agent is with your Advance Health Care Directive (home, work, cell numbers & email address).
- Make sure that your agent speaks and understands English

"How long does the Advance Directive last?"

Unless you specify otherwise, the Advance Directive will last for an indefinite period. Notwithstanding this document, you have the right to make medical and other health care decisions for yourself as long as you can give informed consent with respect to the particular decision. In addition, no treatment may be given to you over your objection, and health care necessary to keep you alive, may not be stopped or withheld if you object.

"Can I revoke the Advance Directive at any time?"

Yes, you can cancel or revoke your Advance Directive at any time, by simply notifying your agent or health care provider either orally or in writing. Your Advanced Directive is automatically revoked if your former spouse is designated as your agent to make your health care decisions when your marriage is dissolved or annulled. If the only copy of your Durable Power of Attorney is in your home, you can usually just tear it up. If you passed out multiple copies, it may be in your interest to revoke it in writing.

"How much will it cost to draft an Advance Directive?"

In conjunction with your will or revocable living trust, upon request, my office will provide you with a free statutory form of an Advance Directive and the necessary witnesses for the formal signing. There is a fee if you need or want an Advance Directive tailored to your particular needs and concerns.

"Suppose I want my doctor to withhold or withdraw life-sustaining procedures?"

Your agent under your Advance Directive can be given authority to refuse, consent to, or request, the withdrawal of any form of medical treatment. Your Advance Directive will prevail over your declaration under the California Natural Death Act, unless expressly provided otherwise in your Advance Directive.

"What are your office procedures for the signing of my trust and will?"

Before coming in for your initial consultation, please review this booklet and complete the client questionnaire, which is on the home page of this web site. Please give the utmost attention to completing the questionnaire as fully and completely as possible. I will use the information provided to draft your will or trust. After completing the questionnaire, please call my office and schedule an office consultation. Please **do not mail**

or email your client questionnaire to my office. Instead, please bring it with you to our initial consultation.

During the initial consultation, I will go over the information contained in the questionnaire and discuss your estate plan objectives. During both the initial consultation and signing ceremony, I do not take any telephone calls, except for an emergency, or interrupt our meetings in any way so that I can give my full attention to you and your estate plan. Accordingly, I expect the same from my clients. So, please remember to ***turn off your cell phone*** during both the initial consultation and the signing ceremony of your estate planning documents. Based upon this initial consultation, I will draft your trust and will and email them to you for your review and approval. My office no longer mails these estate planning documents to clients. Therefore, if you do not have an email address, or you do not want me to send your trust and/or will by email, then please advise me and my office will call you when I have completed the drafts of your trust and/or will so that you can pick them up at my office. If both the trust and will meets with your approval, you will be asked to call my office for an appointment for the formal signing of your trust and will.

My office needs at least seven business days to prepare your will, trust, and other documents in final form for your signature. If there are corrections, additions, or changes that need to be made, please advise me immediately. Please do not wait until the day scheduled for the formal execution of your trust and will to notify my office of any such changes, additions or corrections. If you wait until the date set for the signing, it will be too late to make the corrections and the formal signing will then be rescheduled. However, if my office is given at least seven business days to make the corrections, additions, or changes, your revocable living trust and will can then be corrected and/or changed and the date set for the formal signing can proceed as scheduled.

If you have legal insurance from your employer through the MetLife Legal Plan, or ARAG, I accept payment from these legal insurance plans as payment in full for the legal services rendered, except costs. The only item for which you will be responsible is the cost to record your trust transfer deed, which ranges from $75.00 to $150.00 for each deed. Additionally, in accordance with my contract with The Legal Services Plan, if you have coverage through this legal plan, you are entitled to a 20% discount off my

regular fee, exclusive of recording costs. Current legal fees are posted on the home page on this web site.

California law requires you to sign your will in the presence of two witnesses. My office will provide two impartial witnesses, usually one of my secretaries or another attorney in my office and me. My office procedure for formal execution of your will is to ask five questions and hope that you will answer each correctly and honestly. I will ask you to (1) identify yourself to the witnesses; (2) to acknowledge that the document is your will; (3) to admit that you understand it; (4) to confirm that it fully complies with your wishes and desires; and (5) that you consent to have myself and a member of my office staff act as witnesses to your will. You will then be asked to sign your will.

I am a notary public. I will notarize your signature on your living trust and trust transfer deed. There is no additional charge for the notarial services. Recent California law now requires that, even though I may personally know you, for me to notarize your signature I will still need government issued picture identification, such as a current driver's license. So please be certain to bring such identification with you to the office signing of your trust and deed. I will also take your thumbprint, which is required by law when a signature on a deed is being notarized. There is no extra charge for this notary service.

Finally, if you have small children, please make arrangements to have someone watch your child or children during both the initial office conference and the formal signings of your trust and wills as I will need your complete attention during these office meetings. My office has an abundant supply of children's books for your child to read in the waiting room during the formal signing of your will, trust, and deed. There is also Wi-Fi available for them to use during our office conference.

"What are your office policies regarding the privacy of client information?"

You may provide my office with nonpublic information about your personal finances and property. This nonpublic information is necessary so that I can advise you regarding your estate plan. It is my office policy <u>never</u> to disclose any nonpublic information about you to anyone, except where

you specifically so request. My office will retain records and files relating to the drafting of your will and/or trust. In order to guard your nonpublic personal information, my office maintains physical, electronic, and procedural safeguards that comply with the Code of Professional Responsibility that governs the legal profession.

I do keep conformed copies of your will and trust in your file. Your file is stored in a secure and locked place in my office, on our office computers, which are all password protected, and on . The computer disks are stored both in a secure and locked place in my office and in a Wells Fargo Bank safe deposit box for the protection, safety, and privacy of your trust and will. However, these copies are <u>not</u> considered duplicate originals

"Where should I keep my will and trust?"

After the formal signing of your will and trust, my office will provide you with two conformed copies of each. Attached to your conformed copies of your will is a cover page that provides a place for you to write in the location of your original will. If more copies are needed, additional copies can be made upon request. Conformed copies may be sent to persons nominated as executors, trustees, or guardians. Corporate executors and trustees, especially, like to receive copies of wills in which they are nominated as fiduciaries. Beneficiaries under your will and trust generally should <u>not</u> be sent copies.

For your protection, confidentiality, and privacy, I do <u>not</u> store copies of your trust and will in the Cloud. Although my office will <u>not</u> keep a duplicate original will or living trust for safekeeping, my office will keep a conformed copy of your will and trust in your file, which is stored in my law office. I also keep a conformed copy on my office computers, which are password protected, and on multiple flash drives. The flash drives are stored both in a secure and locked place in my private office and in a safe deposit box at Wells Fargo Bank for your protection, safety, and privacy. However, these stored copies are not considered duplicate originals. In the future, should you want my office either to amend, review, revise, or revoke your will or trust, I will then have available, both on my computer, flash drives, and hardcopy form, a conformed copy of your will and/or trust to aid in that assignment. However, you will have the only original will and living trust.

My office policy is that only the original will is signed. For your protection, your will specifically provides, in the opening paragraph, that "There is only one signed original of my will." The reason for my policy is that if you had executed your will in duplicate, and if one duplicate original wills cannot be found after your death, a presumption that you destroyed it with revocatory intent may arise. While all facts bearing on the possibility of revocation must be considered in determining whether such a presumption applies, the absence of the duplicate original will inevitably cast doubt on the validity of the remaining duplicate. Further, execution of your will in duplicate adds nothing to the validity of your will.

Your executed original will and trust should be kept in a place in which (1) the risk of loss of your will and living trust or its destruction by fire or other calamity is reduced to a minimum; (2) your will and trust are available to you during your lifetime; (3) your will and trust are not available to persons adversely affected by it.

The most common places that meet these requirements are (1) your safe-deposit box; or (2) the vault of a corporate executor or trustee if your will nominates a bank or trust company as executor. The contents of your office or home safes are usually available to others, and accordingly, the original will should not be kept in them.

"Can a person who has my safe deposit box key gain access to my safe deposit box after my death?"

Yes. California law permits a person who has a key to your safe deposit box at a financial institution to have immediate access to your box to remove your will, trust instrument and instructions for disposition of your remains, and to inventory the contents of the box. Nothing else may be removed from your box. The key holder must provide proof of your death and reasonable proof of his or her identity before being allowed access to the box. The financial institution will make a photocopy of the wills and trust instruments removed from your box. The person given access must deliver all wills found in the box to the clerk of the superior court, with a copy to your executor or beneficiary.

Because your will and living trust are personal and subject to change, your executed original will and trust should not be given to a beneficiary,

and it may even be unwise to give a beneficiary a conformed copy of the will or trust.

After the signing of your will and trust, I will provide you with four other documents: (1) a **check-list** regarding future events when or if you should consult my office to update or revise your will; (2) a **personal inventory form** to list your assets and their location to assist you and your executor; if I also draft your living trust, I will also provide you with (3) **Certificate of Trustee forms**, which authorizes you, as trustee, to present a certificate of trust to any person in lieu of providing a copy of the trust instrument to establish the existence or terms of the trust; and (4) **a letter** summarizing your responsibilities and duties as trustee and how to transfer various assets into your trust.

Disclaimer

The opinions and information contained in *Do I Need Estate Planning?* should not be acted on, or considered as a substitute for obtaining legal advice, without first consulting a qualified attorney, particularly as estate planning varies from individual to individual. My booklet is not meant to be an exhaustive study on the subjects of wills, living trusts and estate planning. Rather, its purpose is to make you more informed before coming to my office to discuss your estate plans.

Do I Need Estate Planning? is a work in progress, being revised at least once annually. I have endeavored to make *Do I Need Estate Planning?* as accurate as possible on the date of its latest publication. The information in the booklet may be changed without notice and is not guaranteed to be complete, correct or up-to-date. While I try to revise the booklet on a regular basis, it may not reflect the most current legal developments. Laws are continually changing and evolving. This is especially true of the property, tax, probate and trust laws. Congress is constantly revising and amending the tax code and its regulations. The California Legislature is also continually revising and amending the Probate, Tax, and Civil Code. The California courts are also busy interpreting, and in some instances, misinterpreting, the various laws regulating taxes, will, trusts, and real property. Therefore, what may be true and prudent today, may not be so tomorrow. Accordingly,

always seek legal advice before you make any major decisions that may affect your tax and estate-planning situation.

I trust that my booklet was helpful, and I look forward to providing legal services for you. Please feel free to contact my office with any questions, comments or suggestions you may have regarding the information contained in my booklet.

(Rev 01/11/2022)