

ESTATE PLANNING OVERVIEW

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TODAY'S FOCUS

Wills and Trusts

Powers of Attorney

Advance Health Care Directives

Consequences of Not Planning

Medi-Cal

The Need to Plan

- Anyone can experience an illness or catastrophic event making them incapacitated
- Therefore everyone needs to make legal and financial plans in advance
- If someone is elderly, or diagnosed with a dementia, the need to plan for incapacity is heightened

Why Do You Need to Plan?

- To make decisions about your finances, health care, and ensure that your wishes are known
- To authorize the person or persons of your choosing to carry out your wishes, and make decisions on your behalf.
- To prevent family fights, and to avoid the need for court intervention.

Why Do You Need to Plan?

If you become incapacitated, and you did not give anyone the legal authority to access your funds and pay your bills, the only option may be a conservatorship.

What is a Will?

A legal document which does the following:

- Names your beneficiaries
- Nominates an executor
- Recites the powers of the executor
- Nominates a guardian for minor children

DOES A WILL COVER EVERYTHING I OWN?

No, only those assets that you own in your name alone at the time of your death

A will does not affect the following:

- Assets held in a trust
- Assets owned in joint tenancy
- Life insurance policies
- Retirement plans
- POD and TOD accounts
- Spouse's share of community property

Can a Will be Changed?

Yes, so long as you have capacity

- An amendment to a will is known as a codicil.
- A codicil must be executed with the same formality as a will
- Crossouts, notes, additional words on the original will invalidate the document

What If I Die Without a Will?

The State of California will decide who your beneficiaries are under the rules of intestacy.

What Happens to My Will When I Die?

There will be a process called “probate”

- Court supervised
- Court appoints an executor
- Executor gathers all assets
- Executor examines and determines validity of any creditors’ claims
- Executor pays legitimate claims and taxes
- Executor distributes remaining assets to beneficiaries after court order.

How long does probate take?

- At least six months, but usually nine months or more
- If an estate is not closed in one year, the Court wants to know why

How much does probate cost?

- Court Costs: about \$2,000
- Publication in newspaper
- Fees to attorney and to executor (statutory):
 - 4% on first \$100,000
 - 3% on next \$100,000
 - 2% on next \$800,000
 - 1% on next \$9 million

Is A Will Enough?

- A will becomes effective only when you die and after the Court has accepted it for probate.
- You need documents that will protect you in the event that you become incapacitated during your lifetime.
 - E.g. Power of attorney (for financial management) and an Advance Health care Directive (for health care decision making).
 - To avoid probate, consider a Trust.

TRUSTS

What Is a Revocable Living Trust?

- A written document that does the following:
 - Says how your assets will be managed during your lifetime
 - Says how your assets will be distributed at your death
 - Names the person or persons who will manage your estate if you become incapacitated and after you die

How Does a Trust Differ From a Will?

- A trust is effective as soon as you sign it; a will is effective only after you die
- A trust is a life management tool; a will only “manages” your assets after you die
- After your death, your assets can be distributed from your trust without the Court; a will requires Court supervision (probate)

How Do You Create a Trust?

- Prepare and sign a document
 - Person who creates the trust is known as the “settlor” or “trustor” or “grantor”
- Transfer assets to the trust
 - Change title on all accounts (banks, brokerage firms, etc)
 - New deed for real property

Who Is “In Charge” Of a Trust?

- The trustee. The trustee manages the trust according to its terms; i.e., does what the trust tells the trustee to do.
- The settlor (creator of the trust) is usually the first trustee.
- The successor trustee. The successor trustee takes over managing the trust if the initial trustee resigns, becomes incapacitated or dies.
- A successor can be individual, bank, or professional fiduciary.

Transferring Title to the Trust

- If there is a change of trustee, the title to all assets needs to be changed
- Bank accounts and brokerage accounts: a new account card or form
- Real property: Affidavit of Successor Trustee
 - Recorded in the county Recorder's Office

Can a Revocable Living Trust be Changed?

- Yes, so long as the settlor has capacity
- Only the settlor (the person who created the trust) can make changes to the trust
- A trustee, unless that person is also the settlor, cannot change the trust
- Review your trust every few years, especially if family circumstances or laws have changed.

Changing a Revocable Living Trust

- When the settlor dies, the trust becomes irrevocable and cannot be changed.
 - Some rare exceptions, with court order.

What Does Not Go Into the Trust?

- Any qualified retirement plan; for example, IRA, 401k, 403b [warning: this could be a distribution and taxed]
- Life insurance does not need to be funded to the trust, but it can be
- An annuity does not need to be funded to the trust, but it can be

Consequences of Not Funding Your Trust

- If you do not transfer title of your assets to the trust, your trust is “empty” and your estate may be subject to probate.
- If you took your home out of your trust to refinance, be sure to put it back in.

Advantages of a Trust

- A life management tool: says how your assets are to be managed during your lifetime, during any period of incapacity and at your death
- Avoids probate and (usually) all court processes; distribution of assets after death is generally quicker than through probate

Advantages of a Trust -2

- Allows you to include out-of-state real property to avoid probate in other states
- Can be continued after your death if you do not want your beneficiaries to get a lump sum or you want to condition payments to beneficiaries

Advantages of a Trust -3

- As of 2017 trusts can protect against a Medi-Cal claim after death. So, if your home is in a trust, it will be protected.

Power of Attorney for Finances

- Legal document that gives another person (the agent) authority to access assets in the principal's name
- An agent can handle financial matters, but not health care decisions.
- Normally has no expiration date, but always terminates at death.
- Cannot be used to make gifts unless a specific power is given; especially no gifts to self (fiduciary duty).

Types of Power of Attorney

1. Can be “limited” or “general.”
2. Can be “durable” or expire at incapacity of the principal.
3. Can be “springing” or effective immediately.

Power of Attorney (continued)

Even if you have a trust, you still need a power of attorney because:

1. It allows your agent to deal with assets not in your trust, such as IRA's or other retirement plans
2. It allows your agent to transfer assets to your trust if you become incapacitated

Medical Decision Making

1. Advance Health Care Directive
2. Physician's Order for Life Sustaining Treatment (POLST)
3. Do Not Resuscitate (DNR)

Advance Health Care Directive

Consists of two parts:

1. Durable Power of Attorney for Health Care

- Naming health care agent and alternates

2. Health Care Instructions

- State your wishes for medical and end of life care, including artificial nutrition and hydration, use of a ventilator, CPR, and organ donation.
- Do you wish your life to be prolonged if you have a terminal, incurable and irreversible condition.

Advance Health Care Directive (cont.)

- Your health care agent steps in when a physician determines that you do not have capacity to make your own decisions. They speak for you when you cannot speak for yourself.
- Your health care agent has legal authority to make all health care decisions including those to provide, withdraw or withhold artificial nutrition and hydration
- Your health care agent has post death authority to authorize organ donation, autopsy, and disposition of remains

Advance Health Care Directive (cont.)

- You can write your own health care instructions if the form does not reflect your wishes adequately
- You should have a conversation with your health care agents to be sure that they understand your wishes
- Your instructions guide your health care agent and your medical team
- It gives assurance to your agent and medical team that the decisions are based on your wishes

POLST: Physician's Order for Life Sustaining Treatment

- Signed medical order indicating treatment wishes at the end of your life.
- Addresses CPR, medical interventions (comfort focused), and artificial nutrition.
- Usually completed by persons who have a serious or life limiting illness
- Is signed by your doctor as well as by you (or by your health care agent). Now it can also be signed by a NP or PA



EMSA #111 B
(Effective 1/1/2009)

Physician Orders for Life-Sustaining Treatment (POLST)

First follow these orders, then contact physician. This is a Physician Order Sheet based on the person's current medical condition and wishes. Any section not completed implies full treatment for that section. Everyone shall be treated with dignity and respect.

Last Name

First /Middle Name

Date of Birth

Date Form Prepared

A

Check
One

CARDIOPULMONARY RESUSCITATION (CPR): *Person has no pulse and is not breathing.*

☐ Attempt Resuscitation/CPR ☐ Do Not Attempt Resuscitation/DNR (Allow Natural Death)
(Section B: Full Treatment required)

When not in cardiopulmonary arrest, follow orders in **B** and **C**.

B

Check
One

MEDICAL INTERVENTIONS: *Person has pulse and/or is breathing.*

- ☐ **Comfort Measures Only** Use medication by any route, positioning, wound care and other measures to relieve pain and suffering. Use oxygen, suction and manual treatment of airway obstruction as needed for comfort. Antibiotics only to promote comfort. **Transfer** if comfort needs cannot be met in current location.
- ☐ **Limited Additional Interventions** Includes care described above. Use medical treatment, antibiotics, and IV fluids as indicated. Do not intubate. May use non-invasive positive airway pressure. Generally avoid intensive care.
- ☐ **Do Not Transfer to hospital for medical interventions.** **Transfer** if comfort needs cannot be met in current location.
- ☐ **Full Treatment** Includes care described above. Use intubation, advanced airway interventions, mechanical ventilation, and defibrillation/cardioversion as indicated. **Transfer to hospital if indicated.** Includes intensive care.

Additional Orders: _____

C

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ARTIFICIALLY ADMINISTERED NUTRITION: *Offer food by mouth if feasible and desired.*

- ☐ No artificial nutrition by tube. ☐ Defined trial period of artificial nutrition by tube.
- ☐ Long-term artificial nutrition by tube.

Additional Orders: _____

D

SIGNATURES AND SUMMARY OF MEDICAL CONDITION:

Discussed with:

☐ Patient ☐ Health Care Decisionmaker ☐ Parent of Minor ☐ Court Appointed Conservator ☐ Other:

Signature of Physician

My signature below indicates to the best of my knowledge that these orders are consistent with the person's medical condition and preferences.

Print Physician Name

Physician Phone Number

Date

Physician Signature (required)

Physician License #

Signature of Patient, Decisionmaker, Parent of Minor or Conservator

By signing this form, the legally recognized decisionmaker acknowledges that this request regarding resuscitative measures is consistent with the known desires of, and with the best interest of, the individual who is the subject of the form.

Signature (required)

Name (print)

Relationship (write self if patient)

Summary of Medical Condition

Office Use Only

SEND FORM WITH PERSON WHENEVER TRANSFERRED OR DISCHARGED

POLST: Physician's Order for Life Sustaining Treatment

- Goes with you to hospital, long term care facility or home
- Even if you have a POLST, you should have an Advance Health Care Directive
- If you are at home, the POLST should be by your bed or on the refrigerator
- At the hospital or long term care facility, it will be in your chart. When you move, the POLST goes with you

DNR: Do Not Resuscitate

- More narrow than a POLST. Only addresses CPR/defibrillation, assisted ventilation/endotracheal intubation, and cardiotoxic drugs
- Does not address artificial nutrition or hydration or any other medical treatment.
- DNR orders only apply when a person does not have a pulse, is not breathing, and is unresponsive.
- If the paramedics/EMS find a pulse, DNR will not prevent you from being taken to the hospital.

What is Medi-Cal?

- California's version of Medicaid.
- Funded by state and federal government.
- Based on financial need.
- Available for persons 65 or older, blind or disabled, who are low-income and have limited assets.
- Will pay for nursing home care, if care facility is Medi-Cal certified.

What is Medicare?

- Not based on financial need.
 - Eligible if you or your spouse are 65 or older and worked and paid Medicare taxes for at least 10 years.
 - Or disabled and have been receiving disability benefits for 2 years.
- Pays for ordinary and necessary medical expenses.
- Pays skilled nursing care, BUT for no more than 100 days.

- Neither Medi-Cal nor Medicare cover the cost of assisted living.
 - AKA: Board and Care Facility, custodial care.
- They only cover the cost of nursing care.
 - AKA: Skilled Nursing Facility (SNF)
 - Requires doctor order

Medi-Cal Qualifications If Living at Home

- Income:
 - Single person: \$600/month
 - Married: \$934/month
 - Higher income will not disqualify but there will be a share of cost.
- Resources:
 - Single person: \$2,000 in non-exempt assets
 - Married: \$3,000 in non-exempt assets

Exempt Assets

- Personal residence
- One vehicle
- Funeral/burial plan
- Term life insurance (any amount)
- Whole life Insurance, cash value: \$1,500
- Personal property (unless expensive art/antiques)
- \$1,500 burial account (may accumulate interest)
- IRAs/work-related pensions

Medi-Cal Qualifications

When One Spouse Enters Skilled Nursing Facility

- Institutionalized Spouse:
 - Assets: \$2,000 in non-exempt assets
 - Income: All income goes to facility except \$35/month
- Community Spouse:
 - Income: Can keep all his/her income.
 - If income less than \$3,023, he/she can receive allocation from institutionalized spouse to get up to that amount.
 - Assets: \$120,900 in non-exempt assets.

Transferring Assets

- If you sell, transfer or give away a non-exempt asset for less than fair market value, you will be penalized by being ineligible for Medi-Cal for a certain amount of time based on the size of the transfer.
- However, transfers between spouses and to blind/disabled child are not penalized.
- 30 month (2.5 year) “look back” period and spending down.

Medi-Cal Estate Recovery

- Upon death of Medi-Cal recipient, state of California will seek reimbursement.
- State sends the heirs or survivors a Medi-Cal Recovery questionnaire.
- Can go after anything in the recipients name on the date of death.

Medi-Cal Estate Recovery

- Personal residence is most common source of estate recovery.
- People incorrectly assume that an exempt asset always remains exempt.

Medi-Cal Recovery Reform

- If a Medi-Cal recipient is survived by spouse there can never be recovery.
- However, there will be a claim if the Medi-Cal recipient is the last to die and the home remained in his/her name at death.

Medi-Cal Recovery Reform

- New Rule: If the house is in a Trust then it will be protected from a Medi-Cal claim after death.

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