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Basic Estate Planning

Basic estate planning includes the drafting of revocable trusts, the last Will and Testament, and also durable powers of attorney, all of which are essential components of a good estate plan. Each of these has a specific role to play with respect to your estate, and most plans will comprise elements of each. Let's look at each separately, and how they interact with each other.

Revocable Trusts

A revocable trust, also known as a 'living trust', is usually the core component of an estate plan, and is fundamentally a means for you to protect and maintain assets intended for specific beneficiaries. In a nutshell, the trust can be created while you are still alive, and can even continue long after your death until such time as you wish the assets released. This is useful, for example, when children are minors, or otherwise unable to handle assets at the time of your passing, and you want the assets to be held in trust for them and not be released until they reach a certain age or ages.

Almost any asset can be held in a revocable trust other than pension benefits. If you are including insurance policies then the trust might be named as the beneficiary, not the owner. One benefit of a trust is that the assets it holds do not go through probate as they would under a Will, and so avoids the delays, publicity, and the costs of probate. A trust is also private, unlike the terms of a Will which are made public, and a revocable trust can be used in some cases to protect the beneficiary from creditors.

The drafting of revocable trusts should be carried out by a competent estate planning attorney as a part of your estate plan. If you are married you will usually name both you and your spouse as initial trustees, with the sole trusteeship passing to your spouse on your death, although this is subject to your determination. It will also be drafted with a successor trustee (or trustees) named to take over on the death or incapacity of the initial trustee(s).

A revocable trust can accomplish all the same things a Will can accomplish, and includes the names of the beneficiaries, how the assets should be managed, and also how and when the assets should be distributed to your heirs after your death. Charitable bequests can also be made within the trust. The term 'revocable' indicates that you can change the terms of the trust at any time by means of an amendment, or even revoke it and rewrite it. After your death, however, it cannot be changed.

Last Will and Testament

If you establish a revocable trust, you will still need a last Will and Testament to be drafted, known as a "pour-over" Will. This is an important part of your estate plan, ensuring that assets you may have inadvertently left out of your trust, such as a second home purchased after your trust was completed are transferred to your trust. The Will essentially 'pours the assets over' into your trust so the distribution of your assets is covered by the trust document.

Another reason for drafting a Will along with a living trust is to provide for the designation of a guardian for minor children. Without this guidance, the probate court would decide who is to be guardian, subject to a priority list, and this could become a contentious issue, particularly if the trust for them holds substantial assets. The court may not choose who you would choose, so making this choice in your Will ensures that your own wishes are observed, and avoids potentially divisive squabbles within the family.

Revocable trusts offer so many advantages over Wills these days that in most cases your planning will generally involve Wills used only as a 'pour-over' device and where minors are involved. However, there is a third type of provision you should consider: the durable power of attorney.

Durable Power of Attorney

These are legal documents that empower another to make medical and/or financial decisions on your behalf should you become too incapacitated to make them yourself. This is an integral part of your estate plan, because if you don't have durable powers of attorney in place, the courts, via conservator, make these decisions for you if you become incapacitated and cannot make them yourself. You will almost certainly prefer to nominate somebody yourself, rather than allow the court to make financial and medical decisions for you.

A durable health care power of attorney document may contain a living Will clause, and instructions from you regarding your care in the event you become incapable of making your own decisions. A durable financial power of attorney document will detail your wishes regarding your financial affairs under similar circumstances.

Creation of your personal estate plan will involve all of these elements. The pour over Will does not contain the bulk of the provisions regarding your estate – those will be contained in the revocable trust, but it will make sure that anything you acquire later will be covered, and the powers of attorney will make sure that your wishes are carried out irrespective of your medical or physical condition.

These are so fundamental to your estate plan that they should be attended to by a competent estate planning attorney, since even a modest error or ambiguity in drafting could result in them being contested or annulled.

Proper estate planning executed by competent legal counsel will ensure that each of the critical elements of your estate plan is prepared correctly. All the components will then coordinate in such a way that they not only meet your personal needs, but can also work to minimize any income or estate taxes that might be due after your death. This will minimize any financial burdens on your loved ones, and ensure that your estate is distributed exactly as you wish it to be – and in conformity with federal and California state law.