CALDA

CALIFORNIA ASSOCIATION OF LEGAL DOCUMENT ASSISTANTS

Setting the standard...education, ethics, excellence

Estate Planning

This brochure provided to you by

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WHAT IS CALDA?

The California Association of Legal Document Assistants was established in August 1986, and was formerly known as "California Association of Independent Paralegals" (CAIP). CALDA is the time-honored organization for legal document preparation professionals and supporters of this profession. CALDA promotes and encourages high standards of ethical and professional conduct while offering its members educational opportunities, professional alliance, a website business listing, member forum exchange, and attorney approved printed brochure materials. Commitment is given to increasing public access to the legal system and CALDA recognizes the Legal Document Assistant's professional responsibilities to the public, to the legal system, and to colleagues.

WHO IS CALDA?

CALDA promotes growth, development, and recognition of the Legal Document Assistants' profession as an integral partner in the delivery of legal services. Membership consists of registered and bonded California Legal Document Assistants, Bankruptcy Petition Preparers, Social Security Disability Advocates, SSI Advocates, and sustaining members who support and enhance the LDA profession.

MISSION STATEMENT

CALDA is focused on helping the public become aware of the Legal Document Assistant profession as distinct from the Paralegal profession.

- Encourage high standards of ethical and professional conduct;
- Promote, encourage, and sponsor educational activities;
- Establish good fellowship and mutually beneficial networks among its members;
- Establish and maintain professional relationships with the legal community and other legal assistance/paralegal organizations;
- Afford business opportunities to all members of the profession regardless of age, race, creed, religion, or sexual preference;
- Promote the use of Legal Document Assistant services to the public;
- Carry out such other purposes as the Governing Board of the Association shall determine from time to time;
- The purpose of the Association shall be exclusively of a non-profit, mutual benefit nature, all within the meaning of Section 501(c) 6 of the Internal Revenue Code of 1986, as amended.

CALDA is a Nonprofit Mutual Benefit 501(c)6 Corporation. CALDA's mailing address: CALDA, P.O. Box 2571, Granite Bay, CA 95746. You can call us at (916) 791-9100. Fax: (916)-912-4974.

What is estate planning?

In a fundamental sense, estate planning is about control. With an appropriate estate plan in place, you, not the courts (or anyone else you would not choose), decide who will have control of the distribution of your assets and make financial decisions on your behalf in the event of your death or disability. You can also arrange who will make decisions about your medical care and end-of-life issues, or about who will have legal custody of your minor or disabled children. Properly structured, an estate plan will also minimize expenses and delays, such as those associated with probate process.

Who needs an estate plan?

It is sometimes said that "the only person who doesn't need an estate plan is someone who has no assets, no family, and who will never die or become incapacitated." Below are some of the issues commonly addressed in an effective estate plan:

1. Who will control my financial affairs if I become incapacitated?
2. Who will make medical and end-of-life decisions for me in the event of my incapacity? How do I ensure that the person I appoint will have access to all of my medical information?
3. What happens if I die before my children are able to take care of themselves? What do I do if the person I want to care for my children is not good with money?
4. How do I ensure that my estate assets will be distributed according to my wishes? Can I specify my final arrangements?
5. How do I arrange my estate to minimize or eliminate the costs and delays of probate?

It's difficult to imagine a person to whom one or more of the issues above would not apply:

Core concepts

Gaining some familiarity with a few basic concepts can go a long way toward helping you understand what's involved in developing your estate plan.

For wide range of people, there are three major topics that will be essential to understanding their estate plan:

A. How assets are owned and controlled
B. Probate
C. Common estate planning documents

Next we'll look at these "ABCs" of estate planning in more detail.

A. <u>How assets are owned and controlled</u>

Titling refers to the legal form in which are assets are owned. How your assets are titled will control who has access to your accounts during your lifetime and whether or not whether or not these assets will be subject to the probate process. The chart below illustrates some of the estate planning results of common forms of asset ownership:

Title	Description	How do assets pass at death?
Individual	Assets are held in one person's name.	Assets pass to beneficiaries named in the will. If there is no will, state law determines the beneficiaries. Assets are subject to probate with or without a will.
Joint tenancy with rights of survivorship: spouses	Each spouse holds assets equally.	When one spouse dies, his or her interest passes to the surviving spouse. Assets are not subject to probate at the first death.
Joint tenancy with rights of survivorship: non-spouses	Multiple individuals hold assets equally.	When a joint tenant dies, his or her interest passes equally to the surviving joint tenants. Deceased joint tenant's share of assets is not subject to probate.
Community Property	Each spouse owns half of all assets acquired during marriage, except gifts and inheritance, which generally remain the sole property of the spouse receiving the gift or inheritances.	At first spouse's death, his or her half of the community assets passes to his or her estate. Assets are subject to probate and pass to the beneficiaries by terms of the deceased spouse's will. If no will, state law determines the beneficiaries.
Community Property with Rights of Survivorship	Same as above	Deceased spouse's share passes to the surviving spouse rather than to his or her estate. Assets are not subject to probate.
Tenants in Common	Shared ownership by multiple individuals in separate, but undivided interests. The shares can be unequal.	Deceased co-tenant's share passes by the terms of his or her will. If there is no will, state law will determine beneficiaries. Deceased co-tenant's share will be subject to probate.
Contract property, including: • IRAs • 401(k)s • Pensions • Life Insurance • Annuities	While not technically a legal form of titling, this concept applies where control and distribution rights are specified by a written contractual agreement.	Benefits pass by written beneficiary designation to the named beneficiaries, and are not subject to probate. If no beneficiaries are named, benefits pass to the owner's estate, and are subject to probate.
Living Trust	Ownership interest(s) determined by the terms of the trust.	Assets pass according to the terms of the trust and will avoid probate. Note that assets passing by will from an estate to a trust will be subject to probate.

How your assets are titled also determines who will have authority to manage those assets if you're no longer able. In the event of your incapacity or death, an effective estate plan will provide for the management of all your assets using tools such as trusts and powers of attorney, discussed later.

B. Probate

Probate is a legal proceeding that is used to wind up a person's legal and financial affairs after death. In California, probate proceedings are conducted in the Superior Court for the county in which the decedent lived, and can take at least eight months and sometimes as long as several years.

As is discussed throughout this brochure, it is critical to keep in mind that only assets titled solely in the name of the decedent will be subject to probate.

During probate the court must determine the validity of your will and/or your testamentary trust, supervise an inventory of all your real property and other assets, the payment of all your debts and taxes and then finally the distribution of your probate estate to the people you name in your will (or according to state law if you left no will, which is known as intestacy), or in a testamentary trust. This process may take many months or longer. It is also a matter of public record. This delay in settling an estate and making final distribution of assets to the heirs is unnecessary and comes at the worst possible time. An appropriately structured estate plan can help clients avoid this delay in the distribution of your estate.

Smaller Estates: Affidavit for Transfer of Personal Property Worth $150,000 or Less

If you have the legal right to inherit personal property, such as money in a bank account or stocks, and the entire estate is worth $150,000 or less, you might not have to go to probate court. There is a simplified process you can use to transfer the property to your name. Note that this process won't work for real estate valued at more than $50,000. To calculate the value of the estate:

Include:

- All real and personal property
- All life insurance or retirement benefits that will be paid to the estate (but not any insurance or retirement benefits designated to be paid to some other person)

Do not include:

- Cars, boats or mobile homes
- Real property outside of California
- Property held in trust, including a living trust
- Real or personal property that the person who died owned with someone else (e.g.,joint tenancy)
- Property (community, quasi-community, or separate) that passed directly to the surviving spouse or domestic partner
- Life insurance, death benefits or other assets not subject to probate that pass directly to the beneficiaries
- Unpaid salary or other compensation up to $5,000 owed to the person who died
- The debts or mortgages of the person who died (You are not allowed to subtract the debts of the person who died.)
- Bank accounts that are owned by multiple persons, including the person who died

You can use the affidavit process if you have the legal right to inherit property from the person who died. You must be a beneficiary in the person's will or an heir at law if the person died without a will. Other people may qualify too, such as the guardian or conservator of the estate.

It can be very complicated to figure out if you have the legal right to inherit the property. If there is no valid will, the law dictates how to determine if someone is a legal heir by looking at the type of property, the relationship between all the persons claiming to be heirs, and other issues. If you are not sure if you qualify to inherit the property in question, consult with an attorney who has experience with inheritance law. Once you know the value of the property is $150,000 or less and you personally qualify to use the affidavit process, keep in mind you must wait at least 40 days after the person dies to transfer the personal property.

Costs associated with probate

When property passes through full probate, your estate will incur attorney's fees, court costs, and potentially other expenses, all of which can be quite substantial depending on the size and nature of your estate. Attorney fees are generally set by state law (see below for the maximum statutory rates for California) and are usually based on the ***market value*** of the assets in the estate being probated, ***exclusive of any debts or loans associated with the asset***. If you own real estate in California or your estate value is greater than $150,000, the fee schedule below would usually apply to your probate estate.

PROBATE ESTATE VALUES	STATUTORY ATTORNEY FEES*
$100,000	$4,000
200,000	$7,000
300,000	$9,000
400,000	$11,000
500,000	$13,000
600,000	$15,000
700,000	$17,000
800,000	$19,000
900,000	$21,000
1,000,000	$23,000
2,000,000	$33,000
3,000,000	$43,000
4,000,000	$53,000
5,000,000	$63,000

*Executor’s fees, if any, appraisals, and other expenses would be in addition to the amounts shown above.

Complication If, for example, you own real estate in another state, that property might have to go through probate in that state, in addition to a probate in your primary state of residency. This is known as an "ancillary" probate. With a living trust you can avoid these multiple probate proceedings and have that property pass to your beneficiaries according to the terms of your trust directly without the additional costs and delays of an ancillary probate.

In addition, some other types of assets might require appraisal; for example, collectibles, publishing royalties, or other intangible property such as leasehold interests or mineral rights. So not only will there be the added expense of paying for appraisals, there are the arrangements, scheduling, and logistics to be handled, all of which add to the delay in final distribution.

A word about taxes on estates Note that the cost of probate is sometimes erroneously referred to as a "tax". As we have seen above, while there can be substantial costs associated with taking an estate through the probate process, those costs arise from court costs, attorney fees, appraisals, etc. In recent years, the imposition of true taxes on estates has become much less important to the vast majority of individuals and families. In the case of federal estate taxes, the federal estate (and gift) tax exemption, which is indexed annually for inflation, is currently $11,400,000 per individual. (The preceding exemption amounts are effective through the year 2025.) Also note that there is an unlimited amount that can be transferred from one spouse to another using a provision known as the marital deduction. Finally, also note that there is no inheritance tax imposed by the State of California.

C. Common Estate Planning Documents

Will Preparing a will has long been a fundamental building block of any estate plan. With a properly drafted will, you can arrange for your estate to be distributed and administered according to your wishes. In your will you can:

- appoint an executor to manage your estate through the probate process
- appoint a guardian for your minor children or disabled beneficiaries
- make specific bequests of property or assets to specific beneficiaries
- designate assets to be placed in trust for family members or other beneficiaries
- specifically disinherit a potential heir (NOTE: disinheriting a spouse or minor children can be extremely difficult if not impossible.)
- create a "pour-over" provision so that any assets that, for one reason or another, were not previously transferred into your living trust would pass to that trust and be managed and distributed under its terms

Powers of Attorney ("POAs") The two major categories of POAs are:

1. those that are created to be used by someone to make financial decisions on your behalf, and
2. those created to be used by someone to make medical decisions on your behalf.

Delegating authority to someone to act on your behalf should you become unable to do so is an extremely important aspect of estate planning. During your lifetime, circumstances might arise when you can't represent yourself. A power of attorney ("POA") is a legal document that allows you, the "principal", to authorize another individual, the "agent" or "attorney-in-fact", to act on your behalf. You

can, of course, revoke any POA at any time in writing. Note that all POAs are revoked at the death of the principal. In addition, unless otherwise specifically provided in the POA document itself, all powers of attorney are automatically revoked in the event of the incapacity of the principal. If the POA contains language specifically authorizing agent to act during the incapacity of the principal, then the POA is known as a "durable" power of attorney, or "DPOA". Note that a financial POA will only be effective for assets held in the principal's name.

Advance Health Care Directive Also known as a "medical power of attorney", this category of power of attorney is designed to enable your agent to make medically-related decisions for you when you are unable to do so for yourself. By necessity, these POAs must all be durable powers of attorney in order to be effective when needed.

In addition, advanced health care directives have also evolved to typically contain additional provisions and directions to your agent related to your right to withhold certain medical treatments in certain circumstances, end-of-life decisions (so-called "living will" provisions), burial arrangements, and your preferences as to organ donation.

Final disposition instructions This document will let your survivors know how you want your remains to be handled after you die, whether you want burial or cremation, what your wishes for a ceremony are, and whether you have already made free arrangements at a funeral home.

HIPAA Waiver Some of the medically-related issues above under the heading "Advanced Health Care Directive" require that your agent have access to your medical information. Due to recent legislation* protecting an individual's privacy in connection with these records, your agent will need a document stating that in these specific cases you have waived this right to privacy so that your agent can make informed decisions on your behalf. ***Health Insurance Portability and Accountability Act of 1996 (HIPAA) and the Confidentiality of Medical Information Act (CMIA)

Deeds In this context, a deed is the recorded evidence of the legal ownership of real property. A "Deed of Trust" is ***not*** evidence of ownership in real property, but rather the legal and recorded proof of an indebtedness to be secured by the real property. In this section we are ***not*** referring to Deeds of Trust.

When you establish a Living Trust, in order for your real estate to be placed into the trust a transfer deed must be created and recorded for the transfer to be effective. There are many other kinds of deeds; however, this brochure will only deal with the most common types of deeds usually included as part of an estate plan.

Transfer on Death Deed ("TODD") In California, a recently-created form of deed allows an owner of real property to name a beneficiary on the deed itself, thereby avoiding probate. In California, TOD deeds are permitted, effective January 1, 2016. (Note that this law will expire in 2021 unless the current law is extended.) In very simple estate situations, it is possible that a "TODD" might suffice for a client's real property needs, and a living trust might not be necessary. However, there are certain characteristics and limitations of transfer on death deeds that might make a "TODD" insufficient in other client situations.

For details see the summary chart below:

TIME SENSITIVE	**The deed MUST be recorded within 60 days of its execution.**
RESTRICTIONS ON TYPE OF PROPERTY	This type of deed can only be used for: a property that contains one to four dwelling units; a condominium unit; or a parcel of agricultural land of 40 acres or less, which contains a single-family residence. A TOD deed CANNOT be used for business property, agricultural land with no single-family residence, empty lots or any other property that does not satisfy one of the requirements above.
TRANSFER OF PROPERTY MUST BE RECORDED BEFORE DEATH	If you intend to sell or transfer a property before your death, you MUST record your new deed before your death or the TOD deed will control.
TOD DEED vs REVOCABLE LIVING TRUST	You can supersede a TOD deed with a trust, but only if the trust is recorded. This would be a very confusing situation, so it would be better to REVOKE the TOD deed if you subsequently decide to prepare a trust.
MULTIPLE BENEFICIARIES	You may designate multiple beneficiaries. The result will be equal shares to all beneficiaries as tenants in common. If a beneficiary dies, his or her share will go to the other beneficiaries, ***not*** to his or her children.
NO ALTERNATE or "CONTINGENT" BENEFICIARIES	The deed will be void if your beneficiary(ies) pre-decease you. If some of the beneficiaries survive you, they will split ownership equally.
PROPERTY HELD IN JOINT TENANCY OR AS COMMUNITY PROPERTY WITH RIGHT OF SURVIVORSHIP	If a joint tenant or spouse dies, the remaining spouse or joint tenant(s) are the owner(s). After the other spouse or joint tenant(s) dies, ***then*** the TOD takes effect (if still in place). This means that spouses who co-own real estate and who wish to use a TOD deed both must each prepare and file their own TOD deed.
OWNERSHIP NOT TRANSFERRED DURING YOUR LIFETIME	No ownership or rights are transferred during the life of the transferor. The transferor (you) is NOT liable for debts of beneficiary.
SUBJECT TO DEBTS	The property remains subject to any liens, encumbrances, leases or debts of the transferor. The beneficiary is also liable for the unsecured debts of the transferor up to the value of the property at time of transfer.

Other Types of Beneficiary designations For certain estate plans, even many of those including a living trust, beneficiary designations can be significant and important elements of the overall estate plan. It is very common, and often appropriate, for clients to name one or more individuals as the beneficiary of bank, brokerage, and retirement accounts as well as life insurance policies.

Depending on each client's situation, it might be appropriate to not include certain bank accounts or investment brokerage accounts in the assets transferred into the trust. In such situations, it is possible with a minimum of paperwork to designate beneficiaries on bank accounts, commonly known as "payable on death" designations, and also on brokerage accounts, known as "transfer on death" designations. Each financial institution will have its own forms for completion. The same is true for life insurance policies.

Whether or not to name a living trust as the beneficiary of one or more retirement accounts, such as IRAs and 401(k) plans, is a much more complex consideration. Clients should seek the advice of tax and legal counsel as to whether their situation is appropriate for designating their living trust as the beneficiary of their retirement accounts.

Living Trust Since a living trust is frequently the centerpiece of an estate plan, it's important to understand what exactly a living trust is and how it works during your lifetime and after your passing.

All trusts are comprised of three parties:

1. the person(s) creating the trust, alternately known as the **trustor, grantor, or settlor**
2. the person(s) or institution with the legal authority to manage and control the assets held in the trust, known as the **trustee;** and
3. the person(s), charitable institutions, or other parties who will receive benefits under the trust are known as the **beneficiaries**

The trust document is a written legal agreement between the **trustor** and **trustee**, for the benefit of the trust's **beneficiaries**. In most cases for a living trust, the trustor will also be the initial trustee as well as the beneficiary. In the event of the trustor's death or incapacity, the successor trustee(s) will assume control of the trust assets.

A trustor remains in full control of trust assets during his or her lifetime. Also, there is no change in income tax reporting during the lifetime of the trustor in the case of a straightforward, probate-avoidance type living trust. (This will likely not be true in the case of more complex trusts.)

A living trust is generally understood to be a revocable living trust. It is sometimes referred to as a revocable inter vivos (meaning between living parties) trust. A living trust may be amended or revoked by the trustor(s) any time during the trustor's lifetime as long as the trustor is competent.

A living trust is a mechanism you can use to hold and manage property before and after your death as well as provide how those assets, and the income earned by the assets, will be distributed after your death. In the event of your incapacity, a successor trustee you have named will manage the affairs of the trust for you as beneficiary. A living trust is not subject to probate and therefore all provisions of the trust will remain private.

The trustee is given guidance in certain powers and authority to manage and distribute the trust property in a prudent fashion. The trustee is a party known as a "fiduciary." A fiduciary is an individual or institution occupying a position of trust and confidence and is subject to strict responsibilities with higher standards of performance than one dealing with his or her own property. Without the trustor's express written permission the trustee cannot use trust property for the trustee's own personal use, benefit, or self-interest. A trustee must hold the trust property solely for the benefit of the beneficiaries of the trust.

Funding the trust The absolute, hands-down, most common and very serious mistake made by people who have gone to the trouble of having a living trust drawn up is that they then fail to follow up with the details of making certain that all assets that should be placed in the name of the trust are, in fact, placed in the name of the trust. The tragedy of this failure is that the family will not realize the substantial benefits for which the trust was put in place in the first place.

Nailing down the funding of the trust is not as tedious and bothersome as it might seem when first confronted with the paperwork. What's required is to obtain and complete the appropriate forms from the respective bank, financial, or life insurance company. In the case of real estate, it will be necessary to prepare and file for recording the deeds for any real estate that is to be placed into the trust.

Conclusion At this point, you might be wondering is estate planning worth it?

Just ask a family who has had to go through the travails of probate, conservatorship, squabbling heirs, poor asset management, etc. if they would have preferred that the incapacitated or deceased person had taken the time to put an estate plan in place.

"***If you don't create your own estate plan, the government will make one for you that might not be what you had in mind…"***

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