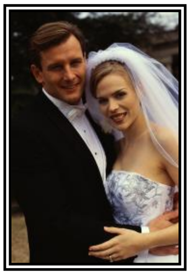


# California Consumer Guide to Wills, Living Trusts and Estate Planning

## [2025 Edition]

**Book a Call now!**

**DISCLAIMER: The information in this brochure is for residents of the State of California only. It provides for advice only and is not a complete statement of the law concerning all planning options. The laws governing tax and estate planning matters are complex and constantly changing. Should you desire legal advice, please consult with competent legal and/or tax counsel.**

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# Robert P. “Bob” Bergman
# Estate Planning Attorney and Counselor at Law

***Planning for Your Most Important Asset…Your Family***

Hi. I am attorney Bob Bergman. I have lived in Santa Clara County since 1968, and I’ve been a practicing attorney since 1980. Through my law practice I help families with disability and inheritance planning, including planning to avoid Conservatorship if you become disabled, and Probate at your death. I also help families take maximum advantage of the estate tax and inheritance laws to pass on their property quickly and inexpensively to their children or other heirs after death, which can include planning for asset protection for the inheritance for many generations. I also assist families that have children or other relatives with special needs with comprehensive supplemental needs trust planning to preserve an inheritance for the care of the special needs person.

My clients are at all stages of life, including married and unmarried, registered domestic partnerships, those with children, those without children. My wife, Jennifer A. Lotz, is a labor and employment attorney, and I am the father of twin daughters Giovanna and Sabrina.

I am a Certified Specialist in Estate Planning, Trust & Probate Law, certified by the California State Bar Board of Legal Specialization. To become board certified as a specialist, you must have years of experience in your practice area, pass a competitive examination, have specific continuing legal education in your field of practice, be recommended by your fellow attorneys, and be approved by the Board of Legal Specialization. I am also a member of WealthCounsel, an association of estate planning attorneys with thousands of members throughout the United States. WealthCounsel attorneys share ideas and planning techniques and are on the cutting edge of estate planning issues and trends in the United States. As a member of WealthCounsel, I do not practice alone, as I have access to the combined wisdom and expertise of my fellow attorneys in the WealthCounsel network.

My approach is like an architect designing a custom home for my clients. In our meetings together, we will create a “blueprint” together for your custom estate plan that has the features and benefits you request and need. Then, once we finish the design of your estate plan, I will build your estate plan like a contractor, using the sophisticated drafting software available only to WealthCounsel members, combined with my years of experience as an estate planning attorney.

On the lighter side, I have sung and acted with several Bay Area performing companies, including the Lyric Theatre (Gilbert & Sullivan Society of San Jose), Lamplighters of San Francisco, the Stanford Savoyards, Mission City Opera, the West Valley Light Opera Association, the Sunnyvale Community Players and the South Bay Music Theater. I am also an avid amateur military historian and collector of military board games and miniatures.

***<u>Education, Professional Memberships and Licensing</u>***

San Jose State University (B.A., “With Great Distinction”), Santa Clara Law School (J.D.)

Certified Specialist, Estate Planning, Trust and Probate Law, State Bar of California Board of Legal Specialization

Member, WealthCounsel a national organization of estate planning attorneys (www.wealthcounsel.com)

Host of “Plan Your Estate Radio” on KDOW AM 1220, San Francisco Bay Area

Former Speaker on estate planning, Foundation for Personal Financial Education and Financial Knowledge Institute

Former Columnist, Times Media newspapers (Santa Clara County) and India Parent magazine

***<u>Prior Related Training and Experience:</u>***

Real Estate Broker and former General Counsel, Century 21 LAD Realty

Former holder of Series 7 and 66 securities licenses, and California life insurance license

Former Vice President and Business Development Officer (Comerica Bank Institutional Trust Department)

Former Financial Planner (MetLife Financial Services)

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# A Practical Definition of Estate Planning

**"I want to control my property while I'm alive and take care of me and my loved ones if I become disabled. I want to give my property to whom I want, the way I want, and when I want. Furthermore, if I can, I want to save every last tax dollar, professional fee, and court cost legally possible."**

Estate Planning involves determining your needs, wants and desires for your property and your family. To carry out your wishes may also involve preparing several legal documents. It may involve planning for a special needs child, a second marriage, a noncitizen spouse, or other special things in your life. Planning is also needed for a child who has a drug, alcohol or gambling problem or other financial difficulties. Proper planning can also provide asset protection for the inheritance you are passing on to your children or others.

Whether you are unmarried or married or in a domestic partnership, preparing a proper estate plan will help you avoid the expense and time delays of a Probate proceeding, help avoid the need for a Conservatorship if you become incapacitated while still alive, and may also reduce or eliminate the Federal Estate Tax (also known as the "Death Tax") at your death. About two-thirds of people in the United States do no Estate Planning at all. In this brochure, you will find out about many of the problems that can happen if you fail to plan. You will also find some solutions to those problems.

The growth of online websites, do-it-yourself software, and self-help books may give the impression that estate planning is as easy as ordering dinner in a restaurant or "falling off a log." You may also get the impression there are "standard" wills, living trusts, and other legal documents that create an estate plan. Unfortunately, there is no such thing as a "simple" Living Trust or a "simple" estate plan. While there are similarities, <u>every</u> estate plan is unique to the individual's or couple's situation.

Estate Planning is a legal specialty that takes thousands of hours of study and years of practice to master. "Do-it-Yourself" websites, software and books from the bookstore cannot take the place of the knowledge and skills of an experienced estate planning attorney. Also, because attorneys in California can say they practice in any area of law without being specifically qualified or trained to do so, many general practitioner attorneys sell "wills and trusts" as part of their law practice. These attorneys, like general practice doctors, are often trying to practice law at a level well beyond their experience and knowledge.

An inexperienced general practice attorney trying to prepare a proper estate plan would be like a general practice doctor trying to be a brain surgeon. If you had a brain tumor, you would not try to operate on yourself. You also would not use just any doctor to do the operation either. You should not try to do your own estate planning or use a general practice attorney for the same reasons. Estate planning has many legal issues and other complications. That is why you need a competent, experienced estate planning attorney to guide you.

# What is Your Estate?

To start our discussion about estate planning, let us define what is meant by "your estate." Your estate contains all the things you own, including:

- ✓ Your personal residence
- ✓ Other real estate, such as a second home, commercial buildings, multi-family dwellings, apartments, raw land, and deeded timeshares, etc.
- ✓ Memberships in vacation clubs or cooperative apartments
- ✓ Annuities
- ✓ Life insurance on your life, often overlooked because it doesn't become part of your estate until you die
- ✓ Retirement plans, such as IRAs, 401(k), 403(b), 457, Keogh Plans, Simple IRAs, SEP-IRAs, etc., and pension plans
- ✓ Stocks, bonds and mutual funds owned directly or through a brokerage account, not including any of these owned in retirement plans
- ✓ Real Estate Investment Trusts (i.e., REITs)
- ✓ Cryptocurrency accounts such as Bitcoin, etc.
- ✓ Checking accounts, savings account, money market accounts, and certificates of deposit
- ✓ Business interests, including any shares owned in a corporation, LLC, LLP, or FLP
- ✓ Stock options and restricted stock units through your employer
- ✓ Personal property, e.g., furniture, jewelry, clothing, antiques, works of art, vehicles, boats, planes, RVs, etc.
- ✓ In other words…<u>ALL YOUR STUFF</u>!

Your estate also includes…

# YOUR FAMILY!

That's right. Your spouse, domestic partner or life partner, your children, grandchildren, parents, grandparents, aunts, uncles, nieces, nephews, cousins, or even those you choose to make your family – they are part of your estate. Therefore, estate planning includes not only planning for your property, but also planning for those in your family you care for.

# Why Do Estate Planning?

There are several reasons for you to do estate planning. Here are just a few:

- ✓ You want to avoid a Conservatorship while you are alive if you become disabled
- ✓ You want to avoid the Probate process for your family when you die
- ✓ You need guardians for your young children, and you're afraid that they might lose their inheritance
- ✓ You have a special needs child or other beneficiary
- ✓ You are concerned about your family fighting over their inheritance
- ✓ You are worried that your estate might be lost due to the expense of an extended nursing home stay
- ✓ You have a loved one in the hospital in a coma or dying

- ✓ You are worried that your home or business might have to be sold after your death to pay for taxes, debts, or other fees and costs
- ✓ You are in a second or later marriage, and you want to make sure that your share of the property passes on to your children or grandchildren and not to those of your spouse
- ✓ You and/or your spouse are not U.S. citizens, and you want to make sure that your property can be passed on to them
- ✓ You want to minimize or eliminate the federal estate tax (i.e., the "Death Tax"), preserve your estate, and pass it on to the next generation.
- ✓ You want to provide asset protection for the inheritance of your spouse, partner, and/pr children
- ✓ You want to reserve low property tax assessed value for your California residence to your children or grandchildren to the extent legally permitted
- ✓ You want to minimize capital gains income tax for your heirs when they sell real estate, stocks, bond, mutual funds or other capital assets after you have died
- ✓ You want to pass on your values to your children and grandchildren

**AND**

# You Want Peace of Mind!

Ultimately, the reasons to do estate planning are specific to each family, and no two families are exactly alike.

Here in Santa Clara County where I practice law, families come from a wide variety of cultural, religious, ethnic, and family backgrounds. About half of my clients are from countries other than the United States, including India, China, Taiwan, South Africa, Great Britain, Vietnam, Russia, the Netherlands, Ukraine, the Philippines, France, Ireland, Germany, and many others. Many are naturalized U.S. citizens, and many are permanent residents. Because of the many financial, spiritual, and cultural differences between these families, estate planning must be customized to the specific needs of each family.

In this Consumer Guide, most of the discussion and issues will apply equally to unmarried individuals and married couples, registered domestic partners and unregistered "life partners." In addition, many of the issues apply whether you have children or not. Whenever something only applies to married couples or those with young children, I will clarify it.

# The Most Popular Planning Option<br>Do Nothing at All!

Your first planning option is to do nothing. Nada. Zip. Zilch. This is the most popular planning option, "chosen" by default by about two-thirds of the people in the United States.

There are some definite advantages to doing nothing:

**No Out-Of-Pocket Costs!**
**No Lawyers!**
**No Paperwork!**
**You Do not Have to Think About Dying!**
**You Will Be Gone, So Why Worry About It?**

If you die without an estate plan in place, the law calls this dying "intestate." This means you have no "Last Will and Testament." The person who dies with or without a Will is called a "decedent."

If you die intestate in California, state law has written a distribution plan for your estate. It is called the "laws of intestate succession." The laws of intestate succession decide who gets your property, how much they will receive, and when they will receive it. The people who receive your property are your "heirs."

The laws of intestate succession generally distribute property to your "next of kin," or those relatives who are most closely related to you. However, because the laws are specific to each state, your property could be distributed to distant relatives you don't even know or could be distributed to stepchildren or to other relatives you would not want to receive your property. Your estate will usually also have to go through a formal legal process called Probate Administration through the Probate Court in the county where you were a resident when you died.

# Slightly Better Planning Option
# Make a Last Will and Testament

If you make a Will, you die "testate." This means you have a Last Will and Testament you have written. With a Will, you instruct the Probate Court for how you want your property distributed when you die. This can differ from what the laws of intestate succession would indicate. You can also name or "nominate" guardians for your minor children in your Will and waive certain court costs and expenses that the law might require, such as a requirement that a bond be posted with the Court. However, like doing nothing, having a Will still means your estate often must go through the formal Probate Administration process.

# Probate: "The Attorneys' Retirement Plan"

In California, administration of an estate through the Probate Court will be required if you die owning property in your name or payable to your estate that is worth at least $166,250 in total value (prior to April 1, 2022) or $184,500 in total value (after April 1, 2022), which could include real property worth up to $55,425 in value (prior to April `, 2022) or $61,500 (after April 1, 2022). The total value includes property such as stocks, bonds, mutual funds, checking and savings accounts and real property.

For decedents who died prior to April 1, 2022, with real estate of less than $55,425, transfer occurs by appraisal and an affidavit (referred to generally as a small estate affidavit for real property or a Probate Code Section 13200 affidavit) executed by the beneficiary and filed with the court. No court hearing is required. For deaths on or after April 1, 2022, the threshold amount is now $61,500.

Otherwise, with real estate of less than the threshold amount of $166,250 or $184,500, as applicable, (See Probate Code §§13150- 13158) transfer occurs by appraisal and a separate petition (referred to generally as a petition for succession to real property or a §13150 petition) executed by the beneficiary and filed with the court. A court hearing is required.

If you qualify, small estates can be taken over with an affidavit under Probate Code Section 13100, which will require a certified copy of a death certificate and at least 40 days since the death of the owner of the assets. This small estate affidavit can be used with personal property of the decedent, such as bank accounts and brokerage accounts, cars, etc.

In a full Probate, the Probate Judge will supervise the ultimate administration of your estate. Certain types of property can be passed on to your heirs without going through the full Probate process. These can include:

- ✓ Property held as “Joint Tenants with Right of Survivorship” with one or more other people
- ✓ Property held as “Community Property” with your spouse or California Registered Domestic Partner
- ✓ Property held as “Community Property with Right of Survivorship” with your spouse or California Registered Domestic Partner
- ✓ Life Insurance, annuities and retirement plans you made payable directly to one or more people (i.e., your “beneficiaries”) who are then living at your death
- ✓ POD (“Pay on Death”) or TOD (“Transfer on Death”) bank or brokerage accounts you owned at financial institutions you made payable directly to one or more beneficiaries who are then living at your death
- ✓ Eligible real property that has a “pay on death” beneficiary”
- ✓ Property eligible to be passed using a Small Estate Affidavit
- ✓ **Property titled in the ownership of a Revocable Living Trust, either alone or with your spouse.**

**IMPORTANT NOTE: Your property that passes through Joint Tenancy with Right of Survivorship, Community Property with Right of Survivorship, beneficiary designations, and POD or TOD is not subject to the Probate process at all. This means you cannot change who receives property by a Will or Living Trust.**

# Ancillary Probate Proceedings:

If you own real estate in more than one state, there will have to be an “ancillary” or secondary Probate proceeding in each other state where you own real property. This is because the Probate Court in each state controls the distribution of real property within its own borders. Each Ancillary Probate proceeding will have its own filing fees, costs, and time delays, which will be different for each state.

# The Probate Process in California

In the Probate process, a person who has died is a "decedent." Probate is the court-supervised administration and distribution of a decedent’s property or estate after death. Probate is typically filed in the county where the decedent was a resident.

When a decedent’s estate goes through Probate, the following steps must occur:

1. Paperwork is filed with the Probate Court, setting a court hearing date in the future. Depending on the county and how busy the Probate Court is, this could be from 30 to 60 days in the future or longer. More and more counties are now handling the paperwork electronically through “e-filing,” such as San Mateo and Santa Clara counties where I regularly practice.
2. Direct notice of the hearing is sent to the heirs of the decedent. The "heirs" are those people who will inherit the decedent's property by the decedent’s Will, as well as the intestate heirs of the decedent, determined by the laws of the State of California in the Probate Code. This notice even includes intestate heirs who have been specifically disinherited in a Will by the decedent, meaning that the decedent did not want those heirs to receive any inheritance at all. They still are entitled to direct notice of the Probate hearing date.

3. A required notice of the filing of the Petition and the hearing date is also published in a newspaper of general circulation in the County where the decedent lived. This notice is to permit any interested party, including creditors and/or heirs, to make an appearance at the Probate hearing if they have objections.
4. On the scheduled court hearing date, if there are no objections, the Probate Judge signs an Order for Probate that appoints a Personal Representative to handle the decedent's property. This person is the "Executor" if the decedent had a Will (called dying “testate”), or the "Administrator" if the decedent did not have Will (called dying “intestate”).
5. Once the Order for Probate is filed, the Clerk of the Probate Court issues Letters Testamentary (if there was a Will) or Letters of Administration (if there was no Will). The “Letters” grant authority to the Personal Representative (i.e., Executor or Administrator) to handle the decedent’s property, including settling debts and maintaining and selling the property.
6. The decedent's property and debts are identified, the decedent's known creditors are directly notified, and the property is then valued both by the Personal Representative and perhaps by a court-appointed appraiser called the “Probate Referee.” The Personal Representative values bank accounts (i.e., cash), and the Probate Referee values real property, stock, bonds, mutual funds, works of art, jewelry, etc. Even though they are typically not subject to Probate, the Probate Referee also values retirement plans such as IRAs and 401k plans. The valuation is eventually filed with the Probate Court in a document called the Inventory and Appraisal. The Probate Referee receives a commission for this work, based on the appraised value of the Estate.
7. The Probate Judge identifies the decedent’s heirs, following the laws of intestate succession or the Will of the decedent. The Probate Judge follows the decedent's Will if one exists, or the laws of “intestate succession” if there is no Will.
8. After several months have passed and creditors have been paid, the Personal Representative petitions the Probate Court to approve an accounting of the Probate administration, and for an order to pay the attorney’s fees and Personal Representative fees; and
9. **FINALLY – The decedent's remaining property is distributed to the decedent’s heirs.**

# Advantages Claimed for Probate Proceedings

There are several possible advantages for a decedent’s estate in a Probate proceeding:

1. The Probate Court protects the heirs and beneficiaries. If there are any questions or disputes between heirs and beneficiaries, creditors of the decedent, or other issues that arise, the Probate Court is there to supervise. The Probate Court is there to act as a referee and final judge of any disputes that arise between heirs, people who think they should have been heirs, creditors, etc.
2. Probate cuts off the claims of creditors after the four-month period following the issuance of “Letters Testamentary” or “Letters of Administration.” Notice of the Probate must be published in a local newspaper that has general circulation in the area where the decedent lived. Anybody who thinks the decedent owed them money for any reason then has a four-month period after the Order for Probate is filed in which to file a creditor’s claim with the Probate Court. Failure to file such a claim by the creditor within the four-month period means that the claim is terminated. (Note: This does not apply to secured creditors, such as a bank mortgage)
3. The transfer of title is a public record that prevents potential problems with title companies ensuring the transfer of the title: Because the distribution of real estate from a Probate is done by a court order of the Probate Court, a title company may rely on that judgment

4. The Probate estate of the decedent is a separate taxpayer, and some tax savings may result (generally not a big issue); and
5. Probate costs may also be deductible for income tax or death tax purposes (also generally not a big issue.)

# Costs of Probate

**The Dollar Costs of Probate:** There are many fees and costs associated with Probate. We calculate various fees based on the gross value of the decedent's estate, not the net value.

For example, if you own a house with a fair market value of $1,050,000 and you have a $600,000 mortgage on the house, you would consider that to be a $400,000 asset, because your equity in the property is $400,000 ($1,000,000 market value minus the $600,000 mortgage). However, in Probate Court, the fair market value of your home determines the value of the estate for the calculation of various fees and costs. This is like the valuation of a house when sold by a realtor, where the realtor's commission is a percentage of the "sale price" and not the seller's equity in the house. That means that, for Probate, your house would be valued at $1,000,000.

***Example:*** Under current law, a $1,000,000 estate consisting of a house worth $750,000 and $250,000 in bank accounts and investments would have the following anticipated fees and costs:

1. Current Probate Court filing fee of $435.00, and a final distribution court filing fee of $435.00 (with an additional $60.00 if the final petition is done "ex parte" with no formal notice).
2. Statutory Attorneys' fees of at least $23,000, with more fees authorized by the Probate Court if the attorney does "extraordinary" legal services for the estate.
3. Statutory Personal Representative's fees of $23,000.
4. Probate Referee's fee of about $1,000, plus costs; and
5. Newspaper publication fee of $115 to $400 or more for the local newspaper where the decedent lived.

## TOTAL COST OF OVER $48,000, OR NEARLY 5% OF THE GROSS VALUE OF THE ESTATE!

**Other Probate Costs:** There are several other costs of Probate, such as:

# Lost Privacy

When your estate goes through Probate, everything becomes public record!

- ✓ **Everything you owned**
- ✓ **What your property was worth**
- ✓ **Everybody you owed, and how much you owed them**
- ✓ **The names and ages of your heirs, and where they live**
- ✓ **What assets your heirs will receive from your estate**

Because of the public nature of Probate, there are criminals who specifically go through the Probate records to locate heirs that may be too young or financially immature to handle their inheritance. They then contact these heirs with investment schemes or other fraudulent plans so they can separate the heirs from their inheritance.

# Lost Time

Probate proceedings can take a long time. The typical Probate takes from 1 to 2 years or longer! It is not unusual for Probate proceedings to last for several years if assets are difficult to sell or distribute. Because of the time of Probate proceedings, this can lead to **lost opportunities for your children or other heirs.** Because your assets stay in the Probate process for several months or even years, your assets are not available to:

- ✓ Pay tuition for education for your heirs
- ✓ Provide money for an heir to purchase a home, or start a business or professional practice
- ✓ Pay off an heir's debts to avoid bankruptcy
- ✓ Provide money for an heir's medical expenses or treatment
- ✓ Provide money for any other need that an heir may have

# Conservatorship: ("The Living Probate")

There is another problem with having no Will or just having a Will. If you suffer incapacity because of a heart attack, stroke, accident, or illness, you may lose the ability to handle your financial affairs. However, even your own spouse or partner will have no legal right to sign your name or handle your business affairs! Instead, they will need to go to the Probate Court and obtain a Conservatorship for you.

A Conservatorship is a guardianship for an adult. In some states, the term "guardianship' refers to both adults and minor children. The Court appoints two types of Conservators to take care of you, the "Conservatee," and your property. The Conservators can be the same person.

The two types of Conservators are:

**The Conservator of the Person:** This person has authority to make medical and health care decisions for you, including your medical treatment, where you will live, what you will eat, and everything else concerning your health.

**The Conservator of the Estate:** This person takes control of your property, including having it valued, accounting for all income and disbursements from your property, and taking care of your property. This person also has the legal right to deal with government agencies on your behalf, file and defend against lawsuits, handle your investments, and file your tax returns. Everything done with your property is all subject to court review.

The Conservator of the Estate must file regular accountings with the Probate Court, and the Court appoints a Court Investigator to interview your family and friends and the proposed Conservator, which is done on at least an annual basis if you are "conserved."

You will pay all the costs of the Conservator out of your property. Like a Probate proceeding, a Conservatorship proceeding has filing fees, notice requirements, attorneys' fees, accounting fees, and other costs associated with it.

# Avoiding Conservatorship

You may avoid the Conservatorship of the Person and the Conservatorship of the Estate by having, at a minimum, the following legal documents:

# The General Durable Power of Attorney

California law makes it possible to grant authority to an individual to handle day-to-day financial matters for you if you lack the capacity to do so for yourself. The General Durable Power of Attorney will enable the person you appoint, called your "Attorney in Fact" or "Agent," to have as little or as much authority as you grant. Your Agent also has the authority to exercise many of your personal rights on your behalf, such as filing or defending a lawsuit, signing or enforcing contracts, running a business, filing your tax returns, or dealing with government agencies and programs such as the IRS, Social Security, Medicare, and Medi-Cal (the Medicaid program in California).

A well-drafted General Durable Power of Attorney will be very detailed and will deal with many more issues than the simple form that is generally available in any stationary store. If this document is properly drafted and used with a Revocable Living Trust, the need for a Conservator for you may be completely avoided. A Conservatorship will otherwise cost several thousand dollars to establish and will require regular accountings to be filed on your behalf. In Santa Clara County, for example, it will likely be $12,000 or more for an <u>uncontested</u> Conservatorship. If needed, however, you may nominate a Conservator of your Estate in a Durable Power of Attorney or in a separate document.

If you wish, your Agent may also make gifts from your property to continue a charitable giving program you have, or to reduce your taxable estate for estate tax purposes, to pay tuition for your children or grandchildren, or many other reasons. Properly drafted, your Agent may also do additional estate planning with your assets and engage in long term care planning to preserve some or all your estate if you need to go into a nursing home.

# The Advance Health Care Directive

California law makes it possible to grant authority to an individual to make health care decisions for you if you lack the capacity to do so for yourself. For example, this could occur if you suffered injuries in an accident and are in a coma, or a court declared you mentally incompetent.

The Advance Health Care Directive is a legal document prepared and signed by you while you are alive. It generally takes effect when and if you cannot make health care decisions for yourself. The document permits you to outline the treatment, medications, etc. that you do not want, funeral arrangements, and other special wishes and desires which you may have concerning your health care. Because of the personal nature of the document, you can even appoint a non-relative to make these health care decisions for you. This may be appropriate if you believe that your close relatives would not be able to make clear decisions for you because of being too emotional.

A well-drafted Advance Health Care Directive will be very detailed and customized especially for you. It will deal with many more issues than the simple forms (called the "statutory form") that are available through hospitals or physicians. In addition, you may nominate a Conservator of the Person for yourself in this document, or in a separate document, in case one is needed.

# HIPAA and CMIA Authorization Form

The Health Insurance Portability and Accountability Act, better known as the "HIPAA law," is a law concerned with medical privacy. <u>Absent written authority, any health care provider for you can reveal none of your confidential medical information to anyone, including your spouse or partner, without risking liability for revealing this information</u>.

The HIPAA and CMIA Authorization Form provides that written authority, permitting those persons you identify to obtain whatever medical information you authorize. California also has a medical privacy law, called the Confidential Medical Information Act ("CMIA"), and the form covers that as well.

## Another Planning Option
## Use Joint Tenancy Ownership

Some people plan their estate by owning everything as Joint Tenants with their spouse, partner, or children in "Joint Tenancy," "or "Joint Tenants with Right of Survivorship," which can be abbreviated as JTWROS, JTROS, or even JT, on real property titles, banking and brokerage account statements, and other assets.

Joint Tenancy has many features that make it attractive. First, a Joint Tenancy comprises one or more "Joint Tenants" who collectively own property, such as a house or bank account. One of the major features of Joint Tenancy is the "right of survivorship," so the <u>last</u> surviving Joint Tenant owns <u>all</u> the property.

Property held in Joint Tenancy does <u>not</u> go through the Probate Court process, but instead passes to the surviving Joint Tenant or Joint Tenants by operation of California law. This means, however, that if a person makes a Will or Living Trust and tries to leave their interest in a Joint Tenancy property, the Will or Living Trust does <u>not</u> control where the property goes – the Joint Tenancy laws take over and distribute the property to the surviving Joint Tenant(s).

Even though Joint Tenancy property passes to the surviving Joint Tenant(s), the value of the <u>deceased</u> Joint Tenant's interest in the property is still part of their estate for the federal estate tax. This includes real estate, stocks, bonds, mutual funds, brokerage accounts, checking and savings accounts, certificates of deposit, and similar types of property.

**IMPORTANT NOTE: Even though Joint Tenancy ownership avoids Probate at the death of the first Joint Tenant, <u>it does not avoid Probate at the death of the surviving Joint Tenant</u>. Joint Tenancy ownership does not ultimately avoid Probate – it only delays it until the death of the last Joint Tenant!**

## Income Tax Concept of "Cost Basis" for "Capital Assets"

Property such as a personal residence, investment real estate, stock, bonds, mutual funds, jewelry, patents, trademarks, good will for a business, vehicles, furniture, and precious metals are called "capital assets." The sale of a capital asset may trigger an income tax "capital" gain or loss. Whether or not there is a capital gain or loss is determined using the tax concept of "cost basis."

Cost basis refers to the value of capital assets for capital gains income tax purposes, used to calculate a capital gain or loss on the sale of the asset. Typically, the cost basis is the purchase price or acquisition price of the capital asset. Someone purchasing a home for $500,000 would have a "cost basis" of $500,000. If the house goes up in value and is sold, the <u>increase</u> in the value of the property over the original cost basis is "capital gain." This may trigger a federal and state income tax on that capital gain. If the property in this example with a cost basis of $500,000 was then sold for $700,000, there is a potential capital gain of $200,000 ($700,000 sale price minus $500,000 cost basis). In a similar fashion, if a capital asset was sold at a loss, you have a "capital loss" instead of a "capital gain."

# "Step Up" in "Cost Basis" On Death of Owner

Under current law, when a person dies, their ownership interest in a capital asset receives an income tax "step up" or increase in the cost basis of the capital asset. This increase in capital gains cost basis permits income tax savings if the property is later sold by whoever inherited the deceased person's interest in the property.

**Note: The "step up" in cost basis does not apply to capital assets held inside of qualified retirement plans such as IRAs and 401k plans. Such otherwise capital assets are "cash" in the Internal Revenue Code, and no "step up" occurs when the owner dies.**

# Joint Tenancy vs. Community Property Ownership

Joint Tenancy ownership of property by a married couple is defined in the law as husband and wife each owning a "divided" one-half interest in the property. Community Property ownership of property by a married couple is defined in the law as husband and wife each owning an "**un**divided" one-half interest in the property. The difference in the ownership definitions can lead to quite different income tax results when the first spouse dies.

# Capital Gains Income Tax Treatment for Joint Tenancy Property

When a married couple owns property as Joint Tenants, the Surviving Spouse will receive a "step up" in the cost basis of the property equal to the "divided" share of the spouse that died. If real estate originally purchased for $200,000 (the "cost basis") is now worth $800,000, the equity in the property would be $600,000. The divided equity interest of each spouse would be $300,000 each. At the death of the first spouse, the Surviving Spouse would receive a new cost basis of $500,000 calculated as:

**$200,000 original cost + $300,000 divided equity interest of Deceased Spouse = $500,000**

If the property were sold for the fair market value of $500,000, the Surviving Spouse would have a potential taxable gain of $300,000 (i.e., the Surviving Spouse's divided share of the equity). Under current law, the State of California will tax that $300,000 as ordinary income for the Surviving Spouse, and the IRS will tax it at rates from up to 20% for the highest income earners.

This tax treatment applies to any "capital asset" such as real estate, stocks, bonds, mutual funds, precious metals, jewelry, works of art, collectibles, etc.

**[Note: This example does not apply to the sale of a personal residence, which may quality for special exemptions of taxable gain of $250,000 for each owner of the property]**

# Capital Gains Income Tax Treatment for Community Property

Property owned as Community Property by a married couple has many differences with Joint Tenancy:

1). Each spouse may dispose of his or her share of the Community Property by Will or Living Trust.

2). Community Property will be subject to Probate (although a simplified procedure in the Probate Code called a "Spousal Property Petition" may permit the rapid transfer of Community Property to the Surviving Spouse with no full-length Probate proceeding); and

3). When property is held as Community Property, the Surviving Spouse will receive a better "stepped-up" cost basis than when the property is owned as Joint Tenants. The benefit will be so much better that Joint Tenancy ownership <u>should not even be considered</u> by a married couple!

When a married couple owns property as Community Property, under the law it cannot be determined which half of the property was owned by the Deceased Spouse, because the ownership is <u>an undivided one-half interest!</u> This means that when the first spouse dies, the tax law treats each half of the property as owned by the Deceased Spouse. Using the previous example of a property purchased for $200,000 now worth $800,000, the equity in the property is still $600,000. However, the **<u>un</u>**divided one-half interest of the Deceased Spouse is equal to <u>each half of the property.</u> Therefore, at the death of the first spouse, the Surviving Spouse would receive a new cost basis calculated:

**$200,000 original cost basis + $600,000 equity interest of Deceased Spouse (both halves of the property) = $800,000**

**If the property were sold for the fair market value of $800,000, the Surviving Spouse would have a potential taxable gain of $0! This means the effective capital gains tax rate is 0%, because there is no taxable capital gain.**

How can the Deceased Spouse own 100% of the equity at death? It is how Community Property is defined in the law. The Deceased Spouse is treated as if he or she owned 100% of the property at death. This means that 100% of the value of the property is "stepped up" at the first death. Ownership as Community Property is more beneficial than Joint Tenancy ownership for a married couple.

# <u>Community Property with Right of Survivorship (CPWROS)</u>

This form of ownership is only available to married couples. Ownership in this form has a right of survivorship like Joint Tenancy, but Community Property treatment for other purposes. Property held in this form of ownership <u>may</u> have the tax benefits of Community Property, specifically the 100% "step up" in cost basis discussed above for Community Property, although that is not clear under Federal law. The term "Community Property" is defined by the Internal Revenue Service as eligible for the benefits of a full "stepped up cost basis" to the current fair market value. The term "Community Property with Right of Survivorship" is <u>not</u> defined by the Internal Revenue Service.

"Joint Tenancy with Right of Survivorship" is also defined by the Internal Revenue Service. Because CPWROS property is like Joint Tenancy ownership with the "survivorship" feature described above, the concern is that the Internal Revenue Service will treat CPWROS property in the same way as Joint Tenancy property for income tax purposes for the "step up" in cost basis discussed in the previous two sections of this brochure.

Because of the uncertainty in the law, I do <u>not</u> recommend this form of ownership for married couples in the State of California.

**AN IMPORTANT NOTE: Property owned by a married couple in Joint Tenancy or Community Property might avoid Probate on the first death but will <u>not</u> avoid Probate on the second death unless steps are taken to remove the property completely from the Probate process. The Revocable Living Trust can accomplish all the benefits of these forms of ownership, with none of the detriments.**

# Another Planning Option
# Use Beneficiary Designations

Beneficiary designations include assets where you can name one or more beneficiaries to receive the assets upon your death. Typical assets include retirement plans such as Individual Retirement Accounts (IRAs), 401(k) plans, 403(b) plans, 457 plans, pension plans, and annuities. They may also include checking accounts, savings accounts, certificates of deposit, money market accounts, brokerage accounts and, in some states, real property.

Beneficiary designations, while useful for small value assets, can create many problems when used as the sole means of estate planning. While it may seem obvious, for a beneficiary designation to work properly, the person named as the beneficiary must survive the person who owns the assets. If the beneficiary does not survive the owner, and there is no contingent or secondary beneficiary named, then the asset will probably end up payable to the owner's Probate estate.

If it is payable to the owner's estate, it will pass by the laws of intestate succession, which basically are the laws of "who gets your property when you die if you don't have an estate plan of any kind." Your property may end up inherited by more distant family members or may even pass to a family member who the owner specifically did not want to receive the asset.

As another example of the wrong person receiving the asset, take the following example: Husband names wife as beneficiary of his life insurance. Later, the couple gets divorced; however, husband fails to change the beneficiary of his life insurance. Under California law, beneficiary designations naming the other spouse are revoked on retirement plans and bank accounts when a couple gets divorced, <u>but not with life insurance</u>. If the husband gets remarried and fails to change the life insurance beneficiary, the proceeds will go to the first wife instead of the second wife. Probably not the result the husband intended!

If assets name a minor beneficiary to receive the asset, this will trigger a Guardianship proceeding for the property. The property is subject to the Probate Court until the minor beneficiary reaches age 18 years, when it will be turned over, free of any conditions or restraint. Probably not the best result for an 18-year-old to receive an inheritance outright.

# Best Planning Option
# Using the Revocable Living Trust

The best and most flexible estate planning option is to use a revocable living trust. A revocable living trust is a contract made between the owner of property (the "Trustor") and a "Trustee," named by the Trustor of the property to handle the property during the Trustor's lifetime.

The living trust is "revocable," so the Trustor may amend, modify, or even revoke and replace the living trust. There are several types of living trusts available. They are described below:

# The "Bare Bones" Living Trust

This living trust is familiar because it is common. Suze Orman, Nolo Press, legalzoom.com – all these are sources for "do-it-yourself" living trusts. You can also get books at Barnes and Noble to make your own living trust or buy software from the bargain bin at an office supply store or by shopping at Amazon.

I call these "bare bones" living trusts, because they are typically very incomplete, and often will not survive legal challenges after someone had died. Like a skeleton with no muscles or skin, they will often collapse in a heap when tested. Unfortunately, the test will come after someone has died, when it is too late to make changes or correct the problems without an expensive visit to the Probate Court to fix the problems through Court action.

These planning options have the following in common:

- ✓ **They prepare "one size fits all" documents with no customization**
- ✓ **They rarely reflect the specific needs and wishes of your family**
- ✓ **They are cheap, and you get what you pay for**
- ✓ **They can't ask you questions that must be asked**
- ✓ **They can't legally answer your questions**
- ✓ **They miss many important issues such as blended families (i.e., children from previous marriages or relationships), non-citizen spouses, special needs children or other heirs, etc.**
- ✓ **They accept no legal responsibility if something goes wrong, and their plan doesn't work!**

No matter how much you read about living trusts, no books, websites, or software alone can guide you into creating a living trust estate plan appropriate for you and your family. Books, websites, and software can't ask you the important, hard questions, and they can't answer questions about your situation. Only a trained, experienced estate planning attorney can do that.

## The "Trust Mill" Trust

Many companies come through communities offering free living trust seminars in multiple locations. They will advertise cheap "Living Trust Packages," or amazing discounts on fees. In the small print on their ads, it will often read "your living trust package will be delivered to you by a licensed insurance professional." These companies are interested in only one thing – access to your financial information. The living trust package provides them with that financial information so they can sell you costly annuities or mutual funds. They are not any better than the "bare bones" living trust, and often much worse.

## The Fully Funded Revocable Living Trust

The best living trust solution is a fully funded revocable living trust prepared by an experienced estate planning attorney. "Fully funded" refers to the legal concept of "funding" a trust, which means the transfer of property into trust ownership.

## Who Should Prepare Your Living Trust Estate Plan for You?

Be careful about having your living trust estate plan prepared by an attorney who advertises that they do Wills and Living Trusts, and bankruptcy, personal injury, divorce, general business, or several other additional areas of practice. Such a person is likely a "general practitioner" attorney, who may have no special expertise in estate planning. You need to know that estate planning is a legal specialty under the law, and you need to work with somebody who devotes all or a substantial part of their practice to estate planning.

Just like you would not have your general practice doctor do surgery on your brain, you should not use just any attorney to prepare your estate plan for you. There is no legal requirement that an attorney be specially trained to prepare Wills and living trusts and sell them to the public. Many general practice attorneys prepare Wills and trusts, often after attending a seminar and buying forms to use. These attorneys are usually not estate planning attorneys and cannot assist you in the special planning needs for you and your family.

Use an expert planning attorney who devotes all or a substantial part of his or her practice to estate planning, such as a Certified Specialist in Estate Planning, Trust & Probate Law who is also a member of WealthCounsel, a national association of attorneys who specialize in estate planning using proprietary software to draft custom plans for their clients. I am both a Certified Specialist in Estate Planning, Trust & Probate Law, and a member of WealthCounsel.

# The Revocable Living Trust: An In-Depth Discussion

The Revocable Living Trust is an estate planning tool with tremendous flexibility and potential for individuals and married couples to avoid Probate and Conservatorship. For married couples, it can also help to minimize or even eliminate the federal estate tax, often called the "Death Tax.," which is discussed later in this brochure. For individuals and most married couples, the avoidance of Probate and Conservatorship are the major benefits.

# Avoiding Probate and Conservatorship Using the Revocable Living Trust

As previously discussed, the Probate laws of the State of California require a Probate proceeding when a person dies owning real and/or personal property that is more than certain proscribed amounts, as noted on Page 4 above.

Property owned by a revocable living trust is not subject to a Probate proceeding, because under the Probate laws, such property is not considered to be owned by you for the purpose of the Probate process. You do not have to involve the Probate Court to handle the ultimate distribution of the property to your heirs or beneficiaries.

Even if all a person's property in California is not owned by their revocable living trust, it still may be possible to have their property declared to be part of their living trust by the Probate Court without going through a formal Probate proceeding. This may be possible if there is a schedule of assets attached to the living trust that identifies the bank accounts, real estate, brokerage accounts, etc. that you intended to be owned by your trust, or other written documents that should the intention by the person that such property be part of their trust. It may be possible to have a Probate Court order such property to be turned over to your living trust using a petition under Probate Code Section 850, typically called a "Heggstad Petition" I can handle this type of proceeding in Santa Clara, San Mateo and Contra Costa counties, where this legal relief is regularly granted by the Probate Court. Still other counties in California may still require a full Probate proceeding.

By using a revocable living trust combined with a well-drafted General Durable Power of Attorney and Advance Health Care Directive (described above), you can avoid the need for a Conservatorship for you as well.

# The "Death Tax" (Federal Estate Tax)

For some families, another issue may affect them when someone dies in the United States and owns property anywhere in the world. It is called the federal estate tax, often called the "Death Tax."

When you die, the federal government imposes a tax on the value of your assets you owned. Some states also impose an inheritance tax on your estate. California has no inheritance tax.

The federal estate tax affects U.S. Citizens, non-citizen residents, and even property in the United States owned by nonresidents at time of death.

# The Unlimited Marital Deduction

With a married couple, if one of the spouses dies (i.e., the "Deceased Spouse") and leaves some or all his/her property to the spouse that survives (i.e., the "Surviving Spouse"), then the Surviving Spouse will qualify for a special Death Tax benefit called the Unlimited Marital Deduction. The Deceased Spouse's property can be left outright to the Surviving Spouse, or in an irrevocable (i.e., "unchangeable") trust that permits the Surviving Spouse to have the use and benefit of the Deceased Spouse's property without having the right to decide who will eventually receive the property when the Surviving Spouse dies.

The Unlimited Marital Deduction or "UMD" will apply if the Surviving Spouse is a United States citizen or a permanent resident of the United States. With a United States citizen, the UMD is automatic, and it means that an unlimited amount of property can be left to the Surviving Spouse from the Deceased Spouse's estate with no Death Tax.

With a non-citizen Surviving Spouse, the UMD may only be used if the property is placed into an irrevocable trust called a Qualified Domestic Trust, or QDOT. The property of the Deceased Spouse can benefit the Surviving Spouse that is a non-citizen for his or her lifetime.

If the Unlimited Marital Deduction applies, there is no Death Tax imposed on the Deceased Spouse's property when it passes to the Surviving Spouse. An unlimited amount of property of the Deceased Spouse can be passed on to the Surviving Spouse, and it acts as a deduction from the value of the Deceased Spouse's taxable estate for Death Tax purposes.

The Unlimited Marital Deduction defers the Death Tax until the death of the Surviving Spouse. When the Surviving Spouse dies, their own property and the property received from the Deceased Spouse, whether outright or in trust, is added together to determine the value of the Surviving Spouse's Death Tax estate. If the estate is then passed on to the Surviving Spouse's heirs, a Death Tax might be owed if the estate is too large.

## The "Death Tax" Applicable Exclusion Amount ("AEA")

The current Death Tax laws for residents of the United States grant an exemption from taxation of a certain value of estate, technically called the Applicable Exclusion Amount or "AEA." The AEA covers transfers at death to people other than your Surviving Spouse who is a U.S. Citizen, such as your children, a non-citizen spouse, or other heirs. These transfers could be outright or in trust.

The following is a brief history of the AEA over the past several years, concluding with the current rules put into effect in January of 2018.

In 2008, the Death Tax AEA covered an estate valued at $2,000,000 or less. In 2009, the Death Tax AEA increased to $3,500,000, with a maximum tax rate 45% of your estate if your estate was greater than $3,500,000 in value at your death.

## TRUIRJCA
## (The Tax Relief, Unemployment Insurance Reauthorization and Job Creation Act of 2010)

In 2010, for that year and that year only, the Death Tax was repealed. This meant that the family of New York Yankees' owner George Steinbrenner would not have to pay any Death Tax, nor would the families of at least three other billionaires who died in 2010. Unfortunately, the Death Tax was scheduled to return on January 1, 2011, with an AEA of $1,000,000 and tax rates from 41% to 55% for estates larger than that amount!

However, in December of 2010, Congress passed, and the President signed the "Tax Relief, Unemployment Insurance Reauthorization and Job Creation Act of 2010" (TRUIRJCA), which I will refer to as the **Tax Relief Act of 2010** or **TRA-2010**. This new law put the Death Tax back in place for 2010 with a $5,000,000 exemption. It also extended the Death Tax through the end of 2012, again with an Applicable Exclusion Amount (AEA) or exemption from the tax of $5,000,000 for tax year 2011 and $5,120,000 for tax year 2012, both years with a maximum estate tax rate of 35% for estates larger than the Death Tax AEA. TRA-2010 also gave the option of using the 2010 tax law with the repeal of the Death Tax for the estates of those persons dying in 2010. The new law also put back in the old capital gains "stepped up" basis rules changed for 2010. The reasons an estate might have wished to be covered by the 2010 law are beyond this the scope of this brochure.

## ATRA - The American Taxpayer Relief Act of 2012

Unfortunately, again, TRA-2010, while solving the uncertainty for families where someone died in 2010 through 2012, still had the Death Tax scheduled to return on January 1, 2013, with that AEA of $1,000,000, and tax rates ranging from 41% to 55% for estates larger than that amount.

After delaying dealing with the issue until the last days of December of 2012, two years after the last Death Tax law, Congress and the President finally acted in the first couple of days of January of 2013. The result was the "American Taxpayer Relief Act of 2012," or "ATRA."

ATRA raised the AEA to cover an estate size of $5,250,000, with a 40% tax rate on estates larger than that amount. This change in the Death Tax AEA was "permanent." However, in Washington "speak," "permanent" only means until they play with it again.

For 2017, the AEA was $5,490,000, with a 40% tax rate on estates larger than that amount.

## TCJA
## (The Tax Cuts and Jobs Act of 2017)

In late 2017, Congress played with the Death Tax AEA again, along with several major changes to the Internal Revenue Code, with the passage of the **Tax Cuts and Jobs Act of 2017.** This new tax law raised the AEA to an astonishing **$11,200,000**, indexed for inflation in subsequent years, which rose to **$12,920,000** for persons dying in 2023, **$13,610,000** for persons dying in 2024 and **$13,990,000** for persons dying in 2025.

However, there was no permanence written into the law, because the higher AEA is going to "sunset" on December 31, 2025. This means that the higher AEA will revert to the lower AEA that would have been in effect until the law in 2017 (indexed for inflation). The actual effect, unless Congress acts to make the changes "permanent," will be to basically "halve" the AEA effective January 1, 2026. **The best current estimate is that the AEA will be $6,500,000 to $7,000,000 on January 1, 2026.**

**The new Trump Administration may end up extending this estate tax exemption, which would mean that the AEA will go up again in 2026 and thereafter. Time will tell.**

It is still not completely clear at this time just what the effect will be on gifts made while there is a higher AEA for gifts when the donor dies after December 31, 2025. Either the higher gifts will be "grandfathered in" and permitted to stand, or else they may be subject to estate tax if the IRS applies the lower AEA in the future.

# The "Typical" Revocable Living Trust for Married Couples and Planning Options

The typical Revocable Living Trust historically prepared in California is often called an "ABC Marital Trust." This Trust will name the Husband and Wife as the Trustors (i.e., those establishing the Trust), and the Trustees (i.e., those in charge of the Trust and its property), and the Beneficiaries (i.e., those receiving the benefit of the Trust).

This typical Trust will provide that, upon the death of the first spouse (i.e., the "Deceased Spouse"), the Trust either will be or may be divided into two or more trusts to be administered separately from that day on. One or more of the trusts will for be the benefit of the children of the marriage or other heirs of the Deceased Spouse, while one or more of the trusts will benefit the remaining spouse, or the "Surviving Spouse."

Whether or not the ABC Marital Trust <u>requires</u> a division of the couples' property into two or more trusts or <u>permits</u> a division depends on how the trust is drafted. Most revocable living trusts drafted in the 1980s and 1990s <u>required</u> the division of the property into two or more trusts after the death of the Deceased Spouse. As seen in a later section, this may not be the best solution for many families.

# What is the "A Trust" in an ABC Marital Trust?

The "A Trust," or the "Survivor's Trust," is established for the Surviving Spouse. It typically contains the one-half of the Community Property owned by the Surviving Spouse of the marriage, plus any separate property owned by the Surviving Spouse. It may also contain property received from the Deceased Spouse's estate. The property from the Deceased Spouse's estate will likely qualify for the Unlimited Marital Deduction to avoid any Death Tax liability, discussed earlier in this brochure.

The Survivor's Trust is "revocable," so the Surviving Spouse may amend, cancel, or modify the terms of the Survivor's Trust if desired.

On the death of the Surviving Spouse, the Survivor's Trust will usually add its property to the property owned by Trust B. The property from the Survivor's Trust will then qualify for the Death Tax AEA of the Surviving Spouse in effect in the year of death.

### What is the "B Trust" in an ABC Marital Trust?

The "B Trust" or the "Bypass Trust," "Exemption Trust," or "Credit Shelter Trust" (all typical names used) will likely contain the Deceased Spouse's one-half of the Community Property, plus any separate property owned by the Deceased Spouse. However, the total value of property that can be placed into the Bypass Trust without a Death Tax is limited to the Death Tax AEA. The Death Tax AEA will be determined in the year of the Deceased Spouse's death.

Bn

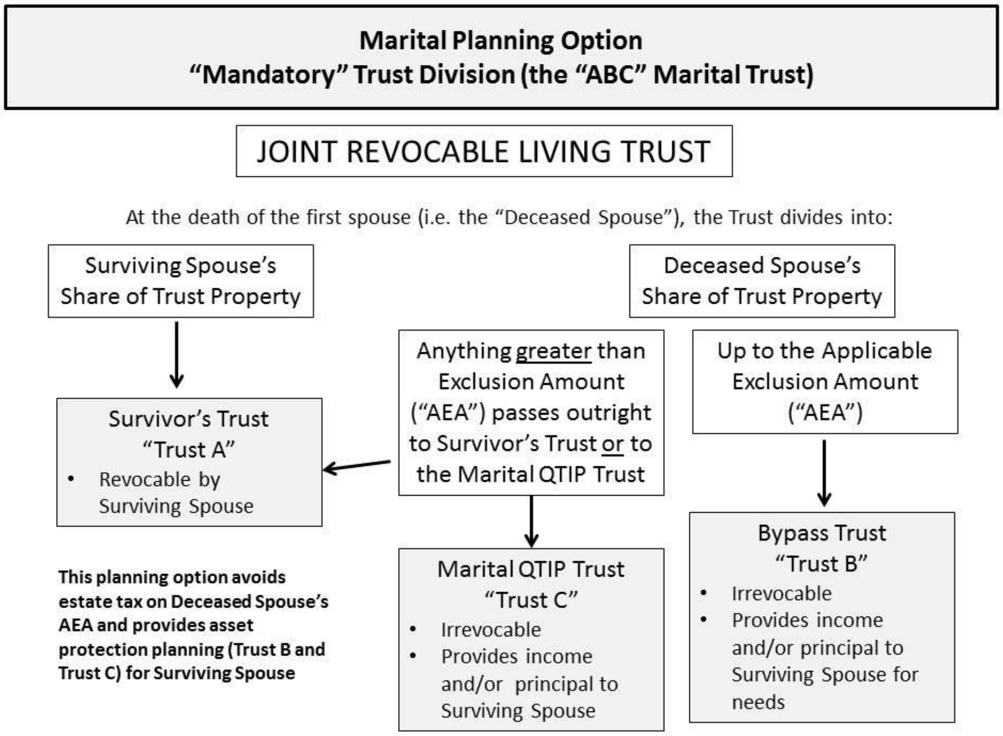
The Death Tax AEA for 2024 will be $13,610,000, and will be indexed for inflation in future years, at least until 2026, when the higher AEA amounts are scheduled to revert to the tax structure of 2017. The Bypass Trust property will generally "bypass" taxation in the estate of the Surviving Spouse when the Surviving Spouse dies.

### What is the "C Trust" in an ABC Marital Trust?

The "C Trust" or the "Marital QTIP Trust" should contain any property of the Deceased Spouse that is <u>greater</u> than the AEA. The Marital QTIP Trust qualifies for the Unlimited Marital Deduction, discussed previously. The Marital QTIP trust may also receive property directly from a Deceased Spouse's estate to be held of the benefit of the Surviving Spouse, even if there is no B Trust ever created.

Starting on the next page are summaries of the three main planning options I use for married couples, taken from my client worksheets. You may find this information useful in helping you decide whether living trust planning is for you:

**PLANNING OPTION: MANDATORY "ABC" MARITAL TRUST DIVISION**




**Description of Option:** This option requires the division of the trust property into separate shares on the Deceased Spouse's death (see diagram above) It is designed to shelter as much of the trust property owned by the Deceased Spouse as possible from the Federal Estate Tax (the "Death Tax") by using the Deceased Spouse's Federal Estate Tax Applicable Exclusion Amount, or "AEA." It also provides asset protection planning for the Deceased Spouse's property that passes into one or more resulting trusts for the benefit of the Surviving Spouse. The shares are described below.

## THE SURVIVING SPOUSE'S SHARE

**The Survivor's Spouse's Share** of the trust property consists of the Surviving Spouse's separate property (if any) owned by the trust, and the Surviving Spouse's one-half interest in the community property owned by the marriage. This share will pass into a new trust called the "**Survivor's Trust**" which is commonly known as **"TRUST A"** in popular usage.

The **Survivor's Trust** is revocable (changeable) by the Surviving Spouse. The Surviving Spouse can do whatever he or she wishes with the **Survivor's Trust** property, including changing the future beneficiaries of the property when the Surviving Spouse dies.

## THE DECEASED SPOUSE'S SHARE

The **Deceased Spouse's Share** of the trust property consists of the Deceased Spouse's separate property (if any), and the Deceased Spouse's one-half interest in the community property owned by the marriage.

This share will pass into one or more new trusts, depending on the total value of the Deceased Spouse's trust property at death.

For a Deceased Spouse's estate that is less than the Federal Estate Tax "Applicable Exclusion Amount or "AEA" (currently $13,610,000 in 2024)," only one new trust is created, called the "**Bypass Trust**." (or "Exemption Trust" or "Credit Shelter Trust" as alternative names used) The **Bypass Trust** is commonly known as **"TRUST B"** in popular usage.

The **Bypass Trust** can hold any amount of the Deceased Spouse's property up to the amount of the Federal Estate Tax Applicable Exclusion Amount ("AEA") that applies in the year of the Deceased Spouse's death. Any property of the Deceased Spouse that is <u>more than</u> the Federal Estate Tax AEA will either pass outright to the **Survivor's Trust**, or to a **Marital QTIP Trust** described below.

## BYPASS TRUST FEATURES AND BENEFITS

The **Bypass Trust** has the following features and benefits for the Surviving Spouse and, ultimately, your children or other heirs:

1. **It is Irrevocable:** The **Bypass Trust** is irrevocable (i.e., unchangeable).

2. **HEMS Distributions and Asset Protection:** The Surviving Spouse is typically the Trustee in charge of the **Bypass Trust**, making investment decisions and distribution decisions of income and, if needed, principal for his or her lifetime needs. The amount and timing of distributions are subject to standards, called "ascertainable standards" by the Internal Revenue Service. They are intended to permit the Surviving Spouse to maintain the lifestyle enjoyed prior to the death of the Deceased Spouse, assuming there is sufficient income and assets to do so. Distributions are to be for the needs of the Surviving Spouse in the following categories (abbreviated as **HEMS**):

   **Health:** Medical care and treatment, insurance premiums, vacations, etc.

   **Education:** Training or retraining for a new or better job, etc.

   **Maintenance, & Support:** Food, clothing, shelter, recreation, vacation, etc.

   If the Surviving Spouse wishes to have distributions made for reasons other than **HEMS,** then an Independent Trustee can be appointed by the Surviving Spouse to make those distributions. This Trustee will typically be an attorney, CPA, bank, or trust company that has legal obligations to act impartially. The Independent Trustee will have the discretion to both withhold distributions or make distributions for <u>any</u> reason (i.e., not just HEMS). This provides high level of asset protection.

   The **Bypass Trust** can also provide for distributions to be made to or for the benefit of the descendants (i.e., children, grandchildren, etc.) of the Deceased Spouse or other persons such as a parent or grandparent.

   Because of limitations on distribution of property to the Surviving Spouse from the **Bypass Trust** and the fact that the Surviving Spouse <u>does not own the property in the **Bypass Trust**</u>, the **Bypass Trust** provides a high level of asset protection for the Surviving Spouse's inheritance from the Deceased Spouse.

3. **Bypass Federal Estate Taxation.** For Federal Estate Tax purposes, the property in the **Bypass Trust** is treated as inherited by the children or other heirs of the Deceased Spouse, but it is not distributed to them or for their benefit until the death of the Surviving Spouse. As such, the Surviving Spouse does not own the **Bypass Trust** property, so the value of the **Bypass Trust** property, <u>including any future growth</u>, is <u>not</u> included as part of the estate of the Surviving Spouse

for Federal Estate Tax purposes at the death of the Surviving Spouse. This is why it is called the "**Bypass Trust**" – because it bypasses the taxable estate of the Surviving Spouse.

4. **Powers of Appointment.** The Deceased Spouse can give the Surviving Spouse the ability to direct the ultimate distribution of the **Bypass Trust** property by granting a **Power of Appointment** to the Surviving Spouse. By using a **Power of Appointment,** the Surviving Spouse can do additional estate planning with the **Bypass Trust** property, such as change the distribution plan for the property, or, for example, even create a new distribution plan to deal with an unexpected new situation such as a disabled child, grandchild, or other relative.

   There are three different **Powers of Appointment** that may be granted to the Surviving Spouse over the Deceased Spouse's share of property. They are described in more detail in Section Ten. Briefly, they are as follows:

   a. **A Limited Power of Appointment,** which causes the **Bypass Trust** property to avoid being included as part of the estate of the Surviving Spouse, which avoids Federal Estate Taxation on the **Bypass Trust** property, including any appreciated value at the death of the Surviving Spouse. See Section Ten for details on when this option may be appropriate.

   b. **A General Power of Appointment,** which causes the entire value of the **Bypass Trust** property to be included in the taxable estate of the Surviving Spouse for Federal Estate Taxation. This may be desirable if the total estate of the Surviving Spouse and the Deceased Spouse is not likely to ever exceed the Federal Estate Tax Applicable Exclusion Amount. This is because any capital assets owned by the Surviving Spouse and the **Bypass Trust** will be received a new income tax cost basis for income tax purposes. See Section Ten for details on when this option may be appropriate; or

   c. **The (Limited) General Power of Appointment,** which cause the value of the **Bypass Trust** property to be included in the taxable estate of the Surviving Spouse for Federal Estate Taxation, <u>but only up to the amount of property that would avoid Federal Estate Tax if included in the Surviving Spouse's taxable estate</u>. Any amounts over that value would pass as if there was a **Limited Power of Appointment,** which would mean that the excess value is <u>not</u> included in the Surviving Spouse's taxable estate.

## IF THE DECEASED SPOUSE'S ESTATE IS GREATER THAN THE FEDERAL ESTATE TAX APPLICABLE EXCLUSION AMOUNT

For a Deceased Spouse's estate that is <u>greater than</u> the Federal Estate Tax "Applicable Exclusion Amount," in the year of the death of the Deceased Spouse, then the "extra" property (called the **"Marital Share"**) can either be given outright to the Surviving Spouse by being added to the **Survivor's Trust ("TRUST A"**) or placed into a special trust called a **Marital QTIP Trust** for the exclusive lifetime benefit of the Surviving Spouse. The **Marital QTIP Trust** is commonly called **"TRUST C"** in common usage.

If a **Marital QTIP Trust** is used, then this option will provide the maximum amount of asset protection for the Surviving Spouse. In the event of remarriage of the Surviving Spouse, the **Marital QTIP Trust** will protect the Deceased Spouse's property for his or her heirs from a new spouse of the Surviving Spouse. Property in the **Marital QTIP Trust** will also enjoy "asset protection" status against creditors of the Surviving Spouse. The **Marital QTIP Trust** has the following features and benefits for the Surviving Spouse and, ultimately, your children or other heirs:

1. The **Marital QTIP Trust** is irrevocable (i.e., unchangeable).

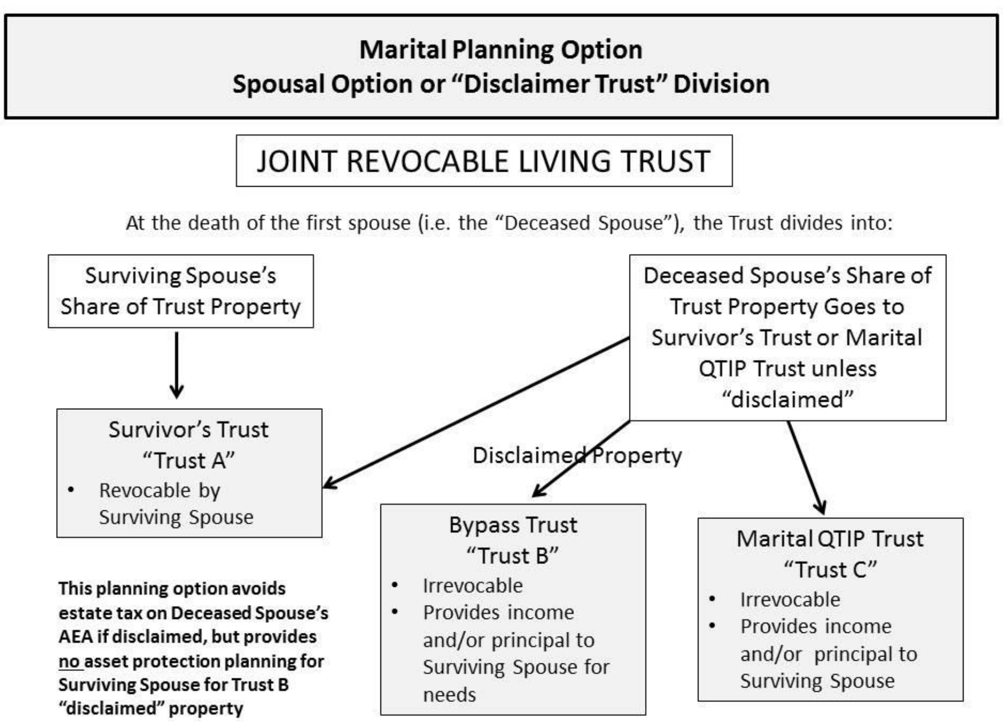
2. Like the **Bypass Trust,** the Surviving Spouse can be the trustee of the **Marital QTIP Trust.** The **Marital QTIP Trust** provides for the mandatory distribution of income and, if needed, principal for the needs of the Surviving Spouse for the lifetime of the Surviving Spouse. Like the **Bypass Trust**, the amount and timing of distributions are subject to the **HEMS** distribution "ascertainable standards" described for the **Bypass Trust** above. Also like the **Bypass Trust**, an Independent Trustee can be appointed by the Surviving Spouse to make for reasons other than health, education, maintenance, or support. This will provide asset protection for the property in the **Marital QTIP Trust. Note: <u>Distributions may not be made to or for the benefit of anyone other than the Deceased Spouse</u>.**

3. For Federal Estate Tax purposes, the property in the **Marital QTIP Trust** is considered to be owned by the Surviving Spouse, and the value of the **Marital QTIP Trust** is <u>included</u> as part of the estate of the Surviving Spouse at the death of the Surviving Spouse.

4. **Powers of Appointment.** The same **Power of Appointment** options described earlier on page 22 for the **Bypass Trust** are available for the **Marital QTIP Trust.** **<u>BRIEF SUMMARY OF THE MANDATORY "ABC" MARITAL TRUST OPTION</u>**

- ✓ **<u>Maximum asset protection</u> in favor of the Surviving Spouse and children for the Deceased Spouse's property held in the Bypass Trust and the Marital QTIP Trust**
- ✓ **<u>No</u> flexibility for deciding whether the Bypass Trust is created, as it is mandatory**
- ✓ **When drafting, can decide whether the property of the Deceased Spouse that is greater than the Federal Estate Tax Exemption passes directly to the Survivor's Trust or to the Marital QTIP Trust**
- ✓ **Option to grant a Power of Appointment (described earlier on page 22) to the Surviving Spouse over the Bypass Trust property and/or the Marital QTIP Trust property.**

## PLANNING OPTION: "SPOUSAL OPTION" TRUST DIVISION – THE "DISCLAIMER TRUST



Like the **Mandatory "ABC" Trust** planning option, but instead of requiring the division of the trust property into shares, this planning option leaves all the Deceased Spouse's property to the Surviving Spouse, either distributed to the **Survivor's Trust** and/or a **Marital QTIP Trust.** The Surviving Spouse, after consultation with legal and tax counsel, makes the decision whether to create a **Bypass Trust** by a written "disclaimer" of some or all the Deceased Spouse's property.

The written "disclaimer" causes the Deceased Spouse's property that is disclaimed by the Surviving Spouse to pass into the **Bypass Trust** for the benefit of the Surviving Spouse. The disclaimer must be exercised in writing within nine (9) months of the Deceased Spouse's death to be valid. This planning option provides maximum flexibility to the Surviving Spouse to decide whether to create a **Bypass Trust** at all.

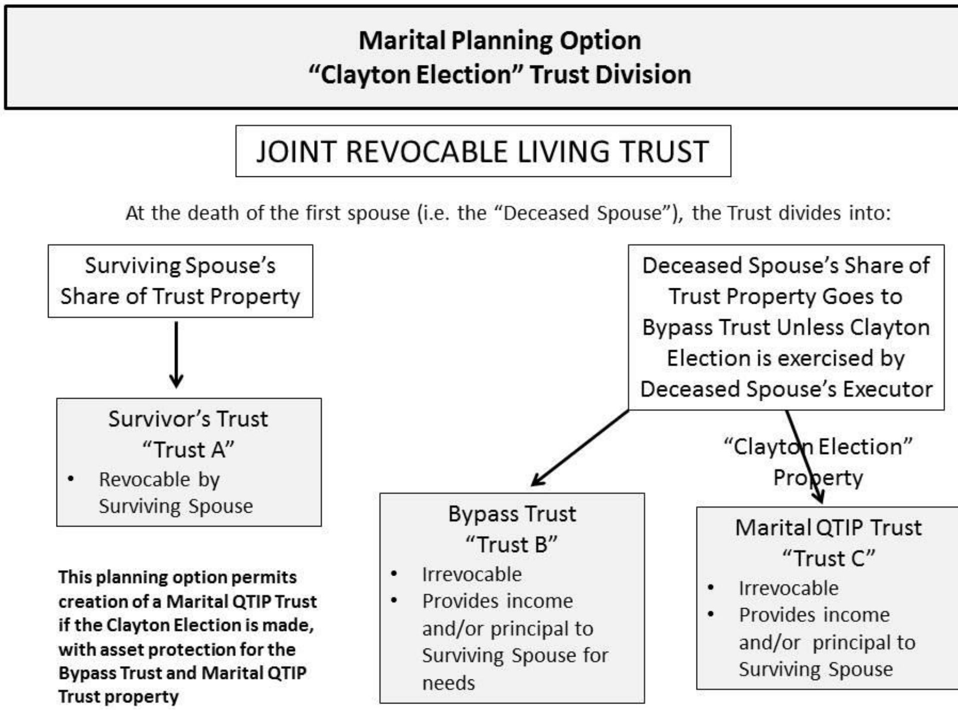
**IMPORTANT NOTES: The Bypass Trust created in this option will function in the same way as the Bypass Trust in the MANDATORY "ABC" TRUST option for federal estate tax purposes, with the following important exceptions:**

- ✓ **Because the Bypass Trust in this option is created by the exercise of a disclaimer by the Surviving Spouse, it is treated as having been created with the Surviving Spouse's own property. Because of this, there is no asset protection available for the property in the Bypass Trust against creditor claims against the Surviving Spouse.**
- ✓ **Additionally, because of the disclaimer, the Surviving Spouse may not be given any power of appointment at all over the Bypass Trust property, as the exercise of the disclaimer effectively is already the exercise of a power to appoint.**

**BRIEF SUMMARY OF THE SPOUSAL OPTION OR "DISCLAIMER" TRUST DIVISION**

- ✓ No asset protection for the Deceased Spouse's property that passes directly to the Surviving Spouse or into a **Bypass Trust** created by the Surviving Spouse's disclaimer. However, asset protection is still available if some or all the Deceased Spouse's property passes into a **Marital QTIP** Trust for the benefit of the Surviving Spouse.
- ✓ Maximum flexibility for deciding whether the **Bypass Trust** ("Trust B") needs to be created at all, and how much of the Deceased Spouse's property will be transferred into the **Bypass Trust**.
- ✓ Option to grant a Power of Appointment (as described earlier on page 22) to the Surviving Spouse over **Marital QTIP Trust** property (not available to **Bypass Trust** property because the **Bypass Trust** is created at the option of the Surviving Spouse).

## PLANNING OPTION: THE "CLAYTON ELECTION" TRUST DIVISION




The Clayton Election Trust Division option is like the **Mandatory "ABC" Trust** option, but instead of requiring the division of the trust property into shares, this planning option leaves all the Deceased Spouse's property to the **Bypass Trust** to be held in trust for the Surviving Spouse's lifetime use and benefit.

However, if the Personal Representative (i.e., Executor) under the Pour-Over Will of the Deceased Spouse decides to make a "Clayton Election" over some or all the Deceased Spouse's property, then the elected property will instead pass into a **Marital QTIP Trust** for the benefit of the Surviving Spouse. This may be desirable for estate tax planning or other reasons, such as protecting the inheritance of the Deceased Spouse's children.

This planning option provides no flexibility for the Surviving Spouse to decide whether to create and transfer property into a **Marital QTIP Trust**. That decision is made by the Deceased Spouse's Personal Representative named in the Deceased Spouse's Last Will and Testament (and typically should not be the Surviving Spouse).

If it is created, the **Bypass Trust** and the **Marital QTIP Trust** function in the same way as the **Bypass Trust** and **Marital QTIP Trust** in the **Mandatory "ABC" Trust** planning option. Property in both the **Bypass Trust** and the **Marital QTIP Trust** will enjoy "asset protection" status against the Surviving Spouse's creditors.

Any of the **Powers of Appointment (**described earlier on page 22) may be granted to the Surviving Spouse over the **Bypass Trust** property and the **Marital QTIP Property.**

**BRIEF SUMMARY OF THE 'CLAYTON ELECTION" OPTION:**

- ✓ Maximum asset protection for Deceased Spouse's property that passes into any **Bypass Trust** or **Marital QTIP Trust created** whether the "election" is made, with some flexibility for deciding whether a **Bypass Trust** is created at all.

# Portability of Unused Applicable Exclusion Amount for the Surviving Spouse

The "American Taxpayer Relief Act of 2012, or "ATRA" now provides that if a spouse dies and some or all the Applicable Exclusion Amount ("AEA") is not used at their death, it may be "saved up" for use by the Surviving Spouse's estate on the death of the Surviving Spouse. This concept is called "portability," and it can create some new planning opportunities for married couples.

Portability means that if the Deceased Spouse's AEA is not used for the direct transfer of property to a non-citizen spouse, children, or other heirs, or transfer into a Bypass Trust for the benefit of the Surviving Spouse, the unused portion may be claimed by the Surviving Spouse's estate at the death of the Surviving Spouse.

As good as it may sound on paper, there are significant problems with portability:

1. First, to claim portability of the unused AEA at the death of the Surviving Spouse, it will be necessary for the Surviving Spouse to prepare and file an IRS Form 706 (Estate Tax Return) with the Internal Revenue Service. This is a requirement <u>even if there are no estate taxes due because of the death of the Deceased Spouse.</u> Failing to file this tax form will mean a permanent loss of the Deceased Spouse's AEA in the estate of the Surviving Spouse. Portability is <u>not</u> automatic but requires taking specific legal action by the Surviving Spouse which, if not taken, causes the loss of this estate tax benefit.
2. Second, portability of a Deceased Spouse's unused AEA may only be claimed for the <u>last</u> Deceased Spouse of the Surviving Spouse. This means that if a Surviving Spouse files required paperwork and then remarries, portability of the unused AEA of the previous Deceased Spouse is lost when the Surviving Spouse dies.

However, for many Surviving Spouses, the larger AEA in effect now combined with the ability to file an estate tax return to claim portability of a Deceased Spouse's unused AEA suggests that they no longer must consider any estate planning and need not consider using a Bypass Trust or any other trust to hold the property of a Deceased Spouse because, if there is no estate tax problem, why complicate things? Wouldn't a simple living trust that just leaves everything to the Surviving Spouse solve the problem?

The next section discusses this issue and explains why more complicated trust planning may still make sense despite portability.

# Non-Tax Reasons to use a Bypass Trust Where Estate Taxes Are No Longer an Issue

Portability combined with the higher AEA now available will mean that most estates of married couples no longer must do Bypass Trust planning <u>if the purpose of the planning is solely for estate tax planning purposes.</u> However, as seen in this section, there are several non-tax reasons to continue to do Bypass Trust planning.

First, in states where there still is an inheritance tax (not the case in California), a Bypass Trust can still make sure that the inheritance tax does not hit the total estate on the death of the Surviving Spouse. However, Bypass Trust planning has a lot of features and benefits for the Surviving Spouse that have nothing to do with taxation of any kind. Here are some of the additional benefits of Bypass Trust planning:

## A Bypass Trust is Irrevocable

First, the Bypass Trust is an irrevocable trust, so it cannot be changed after it is created. The Surviving Spouse is typically given the right to receive lifetime income from the Bypass Trust, and principal as well if needed to maintain the Surviving Spouse's lifestyle. This can protect the Surviving Spouse and the ultimate beneficiaries of the Bypass Trust if the remarriage of the Surviving Spouse occurs, as the Bypass Trust assets will always be separate and distinct from the new marriage. This can prevent the Bypass Trust assets from being intentionally or accidentally left to a new spouse instead of to the Bypass Trust beneficiaries if the Surviving Spouse remarries. If the couple prohibits the distribution of principal from the Bypass Trust to the Surviving Spouse, the Bypass Trust principal will not be an available resource if the Surviving Spouse later must apply for Medi-Cal for long term care.

## HEMS Distributions

Distributions from the Bypass Trust are limited to those needed for the Surviving Spouse's health, education, maintenance, and support, which I abbreviate as "HEMS." In a well-drafted revocable living trust, the Bypass Trust may also grant the power to make distributions to the Surviving Spouse for any reason, and not just for the Surviving Spouse's needs for "HEMS." These distribution standards make sure that the Surviving Spouses is cared for without writing a blank check.

## Asset Protection

The Deceased Spouse's property placed into the Bypass Trust can also be protected against creditors of the Surviving Spouse, which is another important feature of the Bypass Trust. Because the Surviving Spouse does not own the property in the Bypass Trust, and because of the HEMS distribution limits described above, it is exceedingly difficult for a creditor of the Surviving Spouse to take any of the property in the Bypass Trust. This can provide significant asset protection for the Surviving Spouse, especially if the Surviving Spouse is in a high-risk profession such as a doctor, lawyer, accountant, or architect.

## Limited Power of Appointment for the Surviving Spouse Over Bypass Trust Assets

Even though the Bypass Trust is irrevocable, the ultimate beneficiaries of the Bypass Trust property might be changed at the death of the Surviving Spouse. This can happen if the Surviving Spouse is given a "limited power of appointment" to direct the distribution of the Bypass Trust property. A limited power of appointment can change the beneficiaries of the Bypass Trust, change the amount or percentage the beneficiaries will receive, or even change the way the property is passed on to the beneficiaries. What can be changed depends on the actual grant of power given to the Surviving Spouse by the Deceased Spouse.

This important potential power is useful for doing additional estate planning to reflect changed family circumstances.

# How Inheritances Are Lost
# Planning for Your Children's Inheritance

Traditional estate planning in the past focused on avoiding Probate and Conservatorship and minimizing or eliminating the Death Tax. However, little or no attention was paid to planning for the safe passage of assets on to the next and subsequent generations of heirs without them being lost through several reasons.

There is a proverb from Asia that roughly translates as, "from rice paddy to rice paddy in three generations." This means that the first generation of a family, many times poorly educated but hard working and driven by strong cultural values, often has built a family fortune to pass on to the next generation.

Here in Santa Clara County (the "Silicon Valley") where I practice law, this can be seen in the many family businesses and fortunes built by the first members of a family to move into the valley, often from other parts of the country or the world. Orchards, farms, restaurants, department stores, wineries, convenience and grocery stores, and many other businesses fit this pattern. It can also be seen in the many success stories of immigrants and others achieving financial success in the tech industry.

The second generation here in the Silicon Valley is often better educated, with the education paid for from the family fortune built by the first generation. This generation may still have many of the values of the first generation and may also have an interest in continuing the family business, building further wealth.

The third generation, however, is often still better educated than the previous generation, and has likely been raised entirely in the new culture. This generation often has no interest in the family business, which can lead to the family business and wealth being lost due to lack of interest. Even if the third generation is interested, there are several forces conspiring together to destroy the wealth of the family.

Through stories in this section, I will discuss how families and their heirs lose inheritances. Finally, I will discuss how, with proper planning, a family can work together to guarantee, as much as possible, that the family wealth will not be lost.

## Bill's Story

Bill had been in financial difficulty his whole life. He had maxed out his credit cards, was late on his rent, and already had several judgments against him for unpaid bills. His wages at work were being garnished by various creditors. At age 30, his prospects were bleak.

Then Bill's parents died, leaving him everything they owned, including their house. Unfortunately, they left their property outright to Bill. Bill's creditors took all the cash, and soon, because Bill had never learned how to handle his finances, he lost the house to foreclosure. Forty years of hard work and sacrifice by his parents was gone in less than two years, at the end of which Bill was still in debt and had nothing left from his parents. **If only someone been put in charge of Bill's inheritance to handle it for him**.

## Ruth's Story

When Ruth's parents died, they left her a nice inheritance. Unfortunately, four years later, Ruth was in a car accident that incapacitated her, leaving her in a wheelchair. Ruth now needed 24-hour care due to her injuries. Because Ruth had property, she had to use up all her property to pay for her care, including the inheritance from her parents. Not only was her property lost paying for her care, but the inheritance from her parents was lost as well. Ruth is now trying to survive solely on government assistance. **She hopes that the government will be there for her, but she is uncertain of her future care.**

**Marisa's Story**

Marisa had been happily married to Jim for ten years and had two wonderful children. Two years ago, Marisa's mother Jane died, leaving her home and investments totaling over $800,000. Marisa sold everything and converted it into cash.

When the check arrived from her mother's lawyer for her inheritance, Marisa put the check into the joint account she held with her husband. Five years later, Marisa died, and everything they owned together, including Marisa's inheritance, went to Jim. Jim then remarried, started a new family, and left everything to his new wife and new child, with nothing going to Marisa's children. **Could Marisa's mother have made sure that Marisa's inheritance from her would pass to Marisa's children?**

**John's Story**

John had started his furniture store with high hopes. He had sunk everything he owned into the fixtures, inventory, lease, etc. When he ran out of money and his business failed, all his vendors and other creditors came after him for payment. He had to file for personal bankruptcy, facing the loss of almost everything he owned. Unfortunately, his troubles were just beginning. To add insult to injury, one month after he filed for bankruptcy, his father died, leaving him an inheritance of $500,000. Because he was in bankruptcy, the court-appointed bankruptcy trustee seized his inheritance, and used it to pay his creditors. When the bankruptcy trustee was done, John was no longer bankrupt, but $450,000 of his inheritance had gone to his creditors. **Could John's father have done something to protect John's inheritance?**

**Janet's Story**

Janet's parents died, leaving her about $500,000 she promptly invested in a diversified portfolio of stocks bonds, and mutual funds. A few years later, Janet was out driving near the farmer's market at her local mall when she lost control of her car and drove right through a crowd of people waiting in line for kettle corn.

Although nobody was killed and it was ruled an accident by the police, Janet ended up seriously injuring 10 people. The resulting lawsuits against her for negligence ended up in judgments against her that were more than her automobile and homeowners' insurance. The resulting collection efforts by her judgment creditors took nearly everything that Janet owned, including the $500,000 inherited from her parents. **Could the accidental loss of Janet's inheritance have been avoided?**

**Mike's Story**

Mike lost his parents when he was 16 years old. He went to live with his aunt and uncle, who were also given control of the property left for Mike by his parents, which totaled over $300,000.

Unfortunately, when Mike turned 18 years of age, he demanded his inheritance from his aunt and uncle, who were obligated by law to turn the money over to Mike. Because Mike had no experience handling money, he spent his inheritance like there was no tomorrow. He dropped out of high school, bought a sports car, partied with his friends, and ran through his entire inheritance within two years.

Instead of using the money to finish high school and go on to college or to start a business, at the end of two years, Mike had no money left, and he was reduced to working at a minimum wage job just to put food on the table. **If only someone else could have handled his inheritance for him until he was educated and knew more about money.**

# The Common Thread

All the children in the stories related above shared the following in common.

## They all lost their inheritances because they received their inheritances outright from their parents.

Is there an alternative that can protect a child's inheritance from being lost in one of these ways?

Yes. I call it the **"Castle Trust Planning Option."**

# Protecting an Inheritance With The Castle Trust Planning Option

The Castle Trust Planning Option protects your children's or other heir's inheritance by passing the inheritance in trust instead of outright to them. It can be appropriate whether you are married or unmarried. The Castle Trust Planning Option has the following benefits:

- ✓ Your children or other heirs have the use and benefit of the property held in trust, and the Trustee of the trust may use as much of the income and other property in the trust necessary for their needs in the areas of health, education, maintenance, and support.
- ✓ Your children or other heirs do not own the property – it is owned by the trust, which is an irrevocable trust.
- ✓ The lack of ownership of the inheritance by your children or other heirs provides a high level of asset protection for their inheritance. Because the inheritance is not owned, it is almost impossible for the beneficiaries to lose it in a divorce, a lawsuit, bankruptcy, or through mismanagement.
- ✓ When properly structured, this planning option can also pass on the children's or other heirs' inheritance to their own children or other heirs, with the same asset protection as before; and
- ✓ Finally, property passed on in this way using your Death Tax AEA can then be passed on to your children's or other heir's descendants for possibly several generations free from the Death Tax! Imagine passing on several hundred thousand or even millions of dollars that can grow for several years without being touched by the Death Tax system. This is one of the major benefits of the Castle Trust Planning Option. **The Castle Trust Planning Option is the sensible alternative to leaving an inheritance outright to a child or other heir.**

# The Children's Legacy Plan Planning for Your Minor Children's Care

If you are a parent with minor children (i.e., under the age of 18 years), then there is an important question to ask yourself:

# IF YOU WENT OUT TO DINNER TONIGHT AND DIDN'T COME HOME, WHAT WOULD HAPPEN TO YOUR CHILDREN?


It is a hard question, but, without proper planning, your children could end up in the county “foster care” system.

Even police and social workers who work in the foster care system will admit that it is overcrowded, underfunded, and “broken.” Most will work hard to avoid taking your children into custody and putting them into foster care. However, for them to do that, they need to be assured that your children will not be at risk if they are left in the care and custody of other adults until the Probate Court can appoint one or more guardians for your children.

Your children could end up with relatives you would want to raise them or could end up with relatives you would not want to raise them. On the other hand, with proper planning, they could end up with friends that share your values and beliefs.

**The Children’s Legacy Plan:**

1. Helps to keep your minor children out of foster care if something happens to you.
2. Provides for Temporary Caretakers or “First Responders” that can temporarily take custody of and care for your minor children until Permanent Guardians can be appointed by the Probate Court.
3. Nominates Permanent Guardians for your children to give the Probate Court guidance on your wishes.
4. Confidentially identifies those family members you want not want to serve as guardians for your children. This can be for emotional, physical, or sexual abuse, drug or alcohol problems, poor financial habits, history of mental illness, history of criminal behavior, etc.
5. Provides a medical power-of-attorney for each of your minor children so someone you trust can make medical and health care decisions for them if you are not available or unable to do so.
6. Provides written instructions for each of your children’s caregivers such as their daycare, pre-school, elementary or high school, etc., so they know who to call and what to do if they find out that something has happened to you.
7. Provides written instructions and guidance for the guardians of your children, letting them know how you wish for your children to be raised, what activities you want them to be involved in, and who the people are in their lives you wish to continue in their lives, including any restrictions on contact with those people.

The Children’s Legacy Plan provides for all, at an affordable cost that will provide “peace of mind” for you and your children. The Children’s Legacy Plan is especially important to consider if your family lives in other states or even other countries. It helps to have one or more local friends who could temporarily care for your children until family can arrive to start the Guardianship process in the Probate Court. This can keep your children out of the foster care system.

# Hire an Experienced Estate Planning Attorney

By this time, you have concluded that estate planning is not something that you try to do yourself. Trying to do your own estate planning is like trying to operate on yourself if you need surgery or trying to fix the problems with your modern car engine with all its computerized functions --- you will likely end up with a worse problem than when you started and may have been better off doing nothing at all!

Estate planning is both an art and a science. To do it well involves hundreds of hours of study, and hours and hours of continuing education every year. There is no such thing as a “simple” estate, despite what the “LegalZooms” or “Suze Ormans” of the world may imply. Proper estate planning requires an experienced practitioner who can not only answer your questions, but also knows what questions must be asked.

# My Four Step Estate Planning Process

**Step One – The Preliminary Planning Session: Prior to this meeting, I will expect you to either view one of my "on demand" webinars (available through www.lawbob.com) or else attend one of my live living trust seminars. I will ask for a Planning Priorities Quiz that can be accessed online that will help guide the meeting. If you are unsure of what level of trust planning you want or need, this Session will help you decide.**

This Session may be conducted in person in my office, or virtually through a Zoom meeting. You will be able to pick the type of consultation directly through my website at www.lawbob.com.

After the Preliminary Planning Session, I will create a secure online folder with the worksheets for you to complete as much as possible for your Plan Design Meeting. I will quote you a fixed fee for the estate planning, and then have you sign an engagement letter through DocuSign.

If you are married or in a registered domestic partnership, or if you are unmarried and you and your partner wish to coordinate your planning, an additional consent form must be signed.

We may also schedule your Plan Design Meeting at the end of the Consultation. You also have the option of scheduling your Plan Design Meeting through my online calendaring system when you are ready to proceed.

**Step Two – The Plan Design Meeting:** At the end of your Plan Design Meeting, one-half of your estate planning fee will be earned and payable to me. We will go over your homework, confirming your choices and answering your new questions that came up as you went through your binder. In this meeting, I create a "blueprint" for your estate plan that reflects your wishes and desires. All planning decisions will either be confirmed or decided in this Plan Design Meeting.

Prior to the Plan Design Meeting, I ask that you provide me with copies of any existing wills, trusts or other estate planning documents. I also ask that you bring or provide originals or copies of recent statements for all bank, brokerage, and retirement accounts, with any life insurance policy statements, LLC or Partnership Agreements and, if available, the deeds and current property tax statements for any real estate you own (unless I can obtain those myself). Having this information available will make your Plan Design Meeting effective, because I can better advise you of your planning options with this information.

Some of the decisions made in the Plan Design Meeting may include:

1. Who will be guardians for minor children?
2. Who will be Successor Trustees for your living trust and Financial Agents to handle other financial matters under your general durable power of attorney?
3. Who will be your Health Care Agents to make medical and health care decisions for you if you become incapacitated?
4. How your property is to be held and distributed to care for you while you are alive, and how it is to be distributed after your death?
5. Are there any special distribution instructions for your property, such as an outright distribution, structured distribution, special needs distribution, or Castle Trust Planning Option; etc.?

**Step Three – The Review:** I will put drafts of your main estate planning documents into a shared online folder such as Dropbox or Box so that you can review, question, and comment on the drafts. We can discuss further changes, modifications, etc. before everything is put into final form for signing. The balance of my fixed fee is earned when drafts of documents are provided to you, but payable at the Signing Appointment.

After completion of the Review, we may schedule a Signing Appointment where you will come in to sign your estate plan.

**Step Four – The Signing Appointment.** Having 95% or more of an estate plan in place soon is better than a 100% perfect estate plan that you never sign and implement. The balance of fees are due at this meeting.

After signing, you will then have 60 days from signing to have anything that you wish to change be corrected in your plan, such as misspelled names or changing the order of successor trustees or other people you have named to care of you and/or your property.

# Other Estate Planning Options

Planning for the orderly distribution of the family's wealth is complicated. I offer several levels of planning designed to serve the needs of a wide range of families. The level of customization for planning will be different depending on the level of planning selected.

Foundational estate planning involves the preparation of a revocable living trust with several additional legal documents such as special Wills called "Pour-over Wills," Advance Health Care Directives, and Durable Powers-of-Attorney. Foundational estate planning avoids Conservatorship, avoid Probate, and provide for the orderly distribution of family wealth from one generation to the next. Foundational estate planning may also include tax planning for the Federal Estate Tax and asset protection planning for the inheritance passed to a spouse, partner, children, or other heirs.

Advanced estate planning techniques do things such as provide for income tax and estate tax free inheritance for heirs, provide asset protection for retirement plans passed on to the next generation, and special planning for special needs children and adults.

All foundational and advanced estate plans are prepared personally by me based on your wishes and concerns. I do not use document preparation services or other staff.

# Living Trust Based Estate Plans

My various living trust-based estate plans (details outlined in my webinars and seminars) accomplish some or all the following goals, depending on the level of planning selected:

1. Avoid Conservatorship while you are alive through using c legal documents such as the Living Trust Agreement, General Durable Power of Attorney, and Advance Health Care Directive (all levels of planning).

2. Avoid Probate at your death through the Living Trust Agreement and your Pour-Over Will (all levels of planning).

3. Provide asset protection planning for any inheritance received by a Surviving Spouse or partner through the Living Trust Agreement (more advanced planning).

4. Provide asset protection planning for any inheritance received by children or other heirs through the Living Trust Agreement (more advanced planning).

5. Pass on property protected from the federal estate tax for two or more generations through the Living Trust Agreement (more advanced planning).

6. If married, can permit planning to minimize or eliminate the impact of the federal estate tax through the Living Trust Agreement (more advanced planning).

7. Plan for many family situations through the Living Trust Agreement, such as:
    - ✓ Second marriage
    - ✓ Substantial separate property assets in a marriage
    - ✓ Children from a prior marriage or relationship
    - ✓ Special needs children or other beneficiaries
    - ✓ Non-citizen spouses, beneficiaries, or proposed trustees
    - ✓ Guardians for minor children

**ASSET PROTECTION PLANNING:** Providing asset protection planning for a Surviving Spouse, partner, children, or other heirs can be especially important if a person has any of the following problems or issues:

- Heir is too young or financially immature
- Heir has a drug, alcohol or gambling abuse problem
- Heir is in a bad marriage
- Heir has lawsuits or judgments against them, or is in bankruptcy
- Heir is a special needs person, relying on government assistance for shelter, income, custodial medical care, or medical insurance
- Heir dies without doing estate planning
- Heir goes through a divorce without planning for their received inheritance
- Heir is in a high-risk profession or occupation such as law, medicine, accountancy, etc.

# What is Included in a Living Trust Plan

The following are some of the documents and planning options included in a typical living trust plan. Not all options are available in every level of living trust planning.

| DOCUMENTS AND PLANNING OPTIONS | INCLUDED IN PLAN? |
|---|---|
| **Custom Drafted Living Trust Agreement** | **Yes** |
| **Estate tax planning** | **Yes (for married couples)** |
| **Planning for a non-citizen spouse** | **Yes** |
| **Planning for a special needs person, which can also be done as a separate Supplemental Needs Trust, which is highly recommended** | **Yes** |

| | |
|---|---|
| **Asset protection planning for Surviving Spouse or** | **Yes** |
| **Castle Trust Planning (Asset protection) for children or other heirs** | **Yes** |
| **Nominating guardians for your minor children for each client** | **Yes** |
| **Pour-Over Will for each client** | **Yes** |
| **Durable Power of Attorney for each client** | **Yes** |
| **Advance Health Care Directive for each client (may be customized)** | **Yes** |
| **HIPAA and CMIA Authorization for each client** | **Yes** |
| **General Assignment of Property** | **Yes** |
| **Certification of Trust** | **Yes** |
| **Personal Property Memorandum for each client** | **Yes** |
| **Documents to self-maintain some parts of Living Trust Plan** | **Yes** |

# The Children's Legacy Plan Revisited

As noted previously in this brochure, the Children's Legacy Plan can assure as much as possible that your minor children will never spend a minute in foster care. You will provide detailed instructions regarding every phase of your children's lives to the people that will care for your children. Using a unique combination of legal and non-legal documents, you can provide for the short-term, temporary care of your children if you become incapacitated or die and provide for the long-term care of your children until they reach adulthood.

| DOCUMENTS AND PLANNING OPTIONS | INCLUDED IN PLAN? |
|---|---|
| **Designation of Temporary Caretakers** | **Yes** |
| **Nomination of Permanent Guardians** | **Yes** |
| **Confidential Exclusion of Guardians** | **Yes** |
| **Instructions to Caretakers** | **Yes** |
| **Instructions to Guardians** | **Yes** |
| **Medical Power of Attorney for Minor Children** | **Yes** |

**The Designation of Temporary Caretakers** identifies those persons you are confident could temporarily care for your minor children until court action has been taken to appoint a temporary and/or permanent Guardian for your children.

**The Nomination of Permanent Guardians** identifies those persons you are requesting be appointed by the Court to care for and raise your children.

**The Confidential Exclusion of Guardians** identifies those persons you would not want the Court to choose as Guardians for your children, because it contains reasons these persons are to be excluded.

The **Instructions to Caretakers** and **Instructions to Guardians** are provided as part of the plan for you to complete and give to those caring for your children (e.g., day care, preschool, school, babysitters, etc.), including a format for instructions how you wish for your children to be raised.

The **Medical Power of Attorney** grants authority to persons to make medical and health care decisions for your children if you are unavailable to make those decisions yourself. It is not a substitute for a permanent guardianship but can handle temporary situations and that time period covered by the Designation of Temporary Caretakers described above.

# The Supplemental Needs Trust for Special Needs Children and Others

Children and others who are disabled are especially vulnerable, and special planning must be pursued for them because of their special needs. A Supplemental Needs Trust (SNT) makes provision for a special needs person without jeopardizing their present or future government benefits and supplements those benefits to provide a higher level of care and quality of life that the government cannot provide.

This brochure does not cover the particulars of SNT planning, but below is a brief list of costly mistakes that parents can make when planning for their special needs child or other person. A more detailed article describing these mistakes (and others) in more detail may be obtained by calling my office at (408) 247-0444 or emailing me at rpb@lawbob.com.

**MISTAKE #1: Disinheriting the child.**

**MISTAKE #2: Procrastination.**

**MISTAKE #3: Failure to coordinate a planning team effort.**

**MISTAKE #4: Ignoring the child's special needs when planning for the child's benefit.**

**MISTAKE #5: Creating a "generic" special needs trust that does not fit the child.**

**MISTAKE #6: Failure to properly "fund" and maintain the plan.**

**MISTAKE #7: Choosing the wrong trustee.**

**MISTAKE #8: Failing to invite contributions from others to the trust.**

**MISTAKE #9: Relying on siblings of your special needs child to use their money for your special needs child's benefit.**

**MISTAKE #10: Failing to protect the special needs child from predators.**

A separate Supplemental Needs Trust is highly recommended for your child or other relatives with special needs. It can be funded while you are still alive, can accept contributions from family members and friends, and can be the beneficiary of your estate, proceeds from life insurance distributed from an ILIT, or even the beneficiary of a retirement plan (if planned inside a Retirement Plan Trust).

# Seminars, Webinars, and Workshops

As part of my ongoing effort to educate and inspire the public to act and do comprehensive estate planning for their families, I offer regular free seminars and workshops for the public, companies, nonprofits and government agencies. I also offer free seminars for churches, parents' groups, civic organizations, and even extended families who wish to find out more about planning for their family's future.

ESTATE PLANNING WEBINARS

**Webinars and Seminars :** To view an "on demand" webinar on estate planning, or attend one of my public estate planning seminars, visit my website at www.lawbob.com and look for the menu item "WEBINARS AND SEMINARS," or use the QR code to the left to find available webinars.

You will be able to select one or the other in the dropdown menu.

My occasional live estate planning seminars are generally offered on Saturday mornings in the community. My webinars are available 24 hours a day.

**Private Seminars:** I am also available to come to your organization to present give a private estate planning workshop. Just call my office at (408) 247-0444, or email to rpb@lawbob.com, and I will get back to you to schedule your private seminar. I provide all the handout materials and equipment (laptop, projector, screen. etc.), and you provide the location.

# Schedule a Brief Consultation Today

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Scheduling a brief Consultation with me is easy. Several appointment time slots are available each week, and I try to accommodate your needs as much as my schedule permits. Use this link to schedule, or visit www.lawbob.com or use the QR Code:

## Book a Call now!

Limited consultations may be available in homes, hospitals, or care facilities. However, due to the increased time and expense of providing estate planning services in such circumstances, including the necessity for multiple trips, I reserve the right to bill such consultations at my usual hourly rate (currently $500.00 per hour) for consultation time, and $150.00 per hour for travel time to and from my office to the location. Hourly fees are subject to change without notice. If estate planning must be completed quickly due to the health of the client, I may charge a premium of up to 100% of my usual fixed fees for estate planning depending on time limitations for when the estate plan must be created and executed.

**I hope this brochure has been useful for you, and that it encourages you to act today to have your estate plan prepared. Thank you for your interest.**

## *About Robert P. Bergman*
## *Estate Planning Attorney and Counselor*

**Robert P. "Bob" Bergman is an estate planning attorney and counselor who specializes in the preparation of foundational estate planning, including the use of custom-drafted wills, revocable living trusts, advance health care directives, and powers-of-attorney. He is a Certified Specialist in Estate Planning, Trust & Probate Law (California State Bar Board of Legal Specialization)**

**Bob prepares more advanced estate planning tools such as life insurance trusts for asset protection and estate tax planning, charitable remainder trusts, special needs and supplemental needs trusts for special needs persons, and the "Retirement Plan Trust" (designed to provide asset protection and maximum tax advantages for an inherited IRA for children or other heirs). He also prepares special legal documents for families with minor children to keep them out of the foster care system, known as the "Children's Legacy Plan."**

**Bob's detailed approach to the planning process assures that his clients' wishes and desires are implemented in the estate plans that he prepares. In practice since 1981, Bob leaves nothing to chance.**

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ESTATE PLANNING WEBINARS

*"California Consumer Guide to Wills, Living Trusts and Estate Planning"*