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What's Involved In A Living Trust For A Single Person?

1. Documents Involved.

"Pourover" Will.

The Trust.

Trust Certificate.

"Blanket" Assignment Of Assets.

Durable Power Of Attorney For Asset Management.

Advance Health Care Directive.

2. Documents Explained.

2.1. "Pourover" Will.

It provides that any of your assets not already in the trust at your death are transferred to the trust. The "Blanket" assignment makes it virtually impossible for assets to not already be in your trust at your death. Therefore, "pourover" Wills are usually unimportant. The only time they become important is if you have minor children because in the Will you nominate guardians. For people without minor children, the Will will almost never come into force.[1]

2.2. The Trust.

It provides "who gets what" and how they get "it" upon your death. It also provides for your care if you become incompetent. This is a "Will substitute". It may create "testamentary" trusts, meaning trusts that only come into existence on your death. One testamentary trust might be a marital trust to hold assets for your spouse. Another testamentary trust might be to hold assets for your spouse and preserve your lifetime exclusion ("bypass" trust, also called the "exemption" trust). Also, testamentary trusts may be created to hold assets for your children and other heirs until they get to the ages you have set for them to own the assets outright.

2.3. Trust Certificate.

An abbreviated version of the trust designed to give to financial institutions and escrows when they ask for a copy of your trust. They are not entitled to a copy of your trust as it has private information which is none of their business.

[1] For a Will to come into force it must be entered into probate, and none of our clients' estates have to go through probate.

2.4. "Blanket" Assignment of Assets.

It declares that you are holding all of your assets as trustee of your trust. That works as to personal property to avoid probate. For real property – which means anything where your name appears on the title[2] – it must be listed in the assignment by (i) address; (ii) A.P.N.;[3] or (iii) legal description. This is an important document since it virtually guarantees that no probate will be needed (at least as to assets in California).[4]

2.5. Durable power of attorney for asset management.

This authorizes someone to act on your behalf for financial matters when you are mentally unable to do so. This supplements the trust so you should consider naming as your agent the same person(s) you name as successor trustees in your trust.

2.6. Advance Health Care Directive.

This is the California Medical Association's form for you to authorize someone to make health care decisions for you in case you become unable to do so. You can also elect to become an organ donor.

3. Estate Planning vs. Estate Tax Planning.

"Estate planning" means "who gets what and how do they get it when you are gone?" That is different than "estate ***tax*** planning." Estate ***tax*** planning addresses how to reduce the value of your assets so that there is little or no estate tax. The order is to first do the "estate planning" and, once that is done, move on to "estate ***tax*** planning" if your estate is large enough to need that type of help.

4. Decisions Required.

Estate planning can be divided into many topics. However, we will focus on these:

- Fiduciaries.
- Spousal planning.
- Children.
- Other beneficiaries.

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[2] Most people do not own real property directly. Instead, they own membership interests in LLCs or partnership interests in partnerships that own real property. Membership interests in LLCs and partnership interests in partnerships are personal property which are covered by the "blanket" assignment, meaning they do not have to be individually identified.
[3] Assessor's Parcel Number.
[4] This document has the force of law due to Estate Of Heggstad, by California's 1st App. Dist. Ct., 16 CA 4th 943 (6/21/93).

3.1. Fiduciaries.

3.1.1. In General.

The word "fiduciary" comes from the Latin root "fides" which means trust. There are three types of fiduciaries:

(i) executor (the person who runs the Will);

(ii) trustee (the person who run the trusts); and

(iii) guardian (the person who has control over minor children).

A Will does not go into effect unless there is a probate. In California the estates of people with fully funded family trusts do not go through probate. So, although you will have a document called a "Will", it will not go into effect (unless you have minor children). So, although you will nominate someone to be the "executor," that person will never act as the Executor. Probably that same person will be your choice as trustee and will act in that capacity. In other words our focus will be on finding the right person or persons, which might include a bank or trust company, to be the trustee or co-trustees.

3.1.2. Timing.

There are two time periods in which someone can act as trustee:

(i) when you are alive but incompetent; and

(ii) after you are dead.

3.1.3. Problem With Children As Trustees.

While you are alive but incompetent you need someone who will spend the money of the estate for your care without concern about preserving it for your heirs. For that reason children are not a good choice as trustee.

After you are dead, again, children are poor choices for several reasons. If you pick one child as trustee the others will hate the child selected as trustee. It doesn't matter how well your children get along while you are alive; naming one child as trustee is a formula for disaster. Similarly, naming all of the children as co-trustees is a formula for disaster.

3.1.4. Independent Third Parties.

The safest approach is to name an independent third party. Some people are blessed and have one perfect person - a parent, a sibling, a cousin, nephew, business partner - who would be an ideal choice as trustee were you to pass away prematurely (meaning before the age at which the assets are to be distributed outright to the children - more on that later).

3.1.5. Co-Trustees.

If you don't have one perfect person you may have two imperfect people to act together as co-trustees. Or you may have a person who is perfect to act in your place when it comes to making family-type decisions, but isn't good with money. In that case you might make that person a co-trustee with a national Blue Chip trust company such as:

Northern Trust
Wilmington Trust
U.S. Trust (Bank of America)
J.P. Morgan
Wells Fargo
Deutsche Bank

In those situations we have the institution as the "administrative trustee" (handling investments, accounting, cutting checks, filing tax returns) and the individual determining whether the child needs $100,000 for a car or $40,000 for a car.

Of course this topic is inter-related with the topic of distributions to the children because there are situations where the children may have powers over the fiduciaries at certain ages.

3.2. Spousal Planning.

3.2.1. Smaller Estates.

If your estate is about the size of the current lifetime transfer tax exclusion ($5,430,000), or is otherwise unlikely to be subject to estate tax,[5] the usual structure is for your assets to go into a marital trust. Your spouse will get all of the income. Your spouse can receive principal distributions for HEMS (health, education, maintenance and support). On your spouse's death the marital trust ends and the assets go to your remainder beneficiaries.

3.2.2. Larger Estates.

If your estate is likely to incur an estate tax, you may want a more complex structure. An amount equal to the lifetime transfer tax exclusion will go into a trust called the "bypass" trust.[6] In larger estates it is likely that the exclusion at death will have already been reduced to some extent due to gifts made during life (due to sophisticated estate tax planning). However, that is for another discussion.

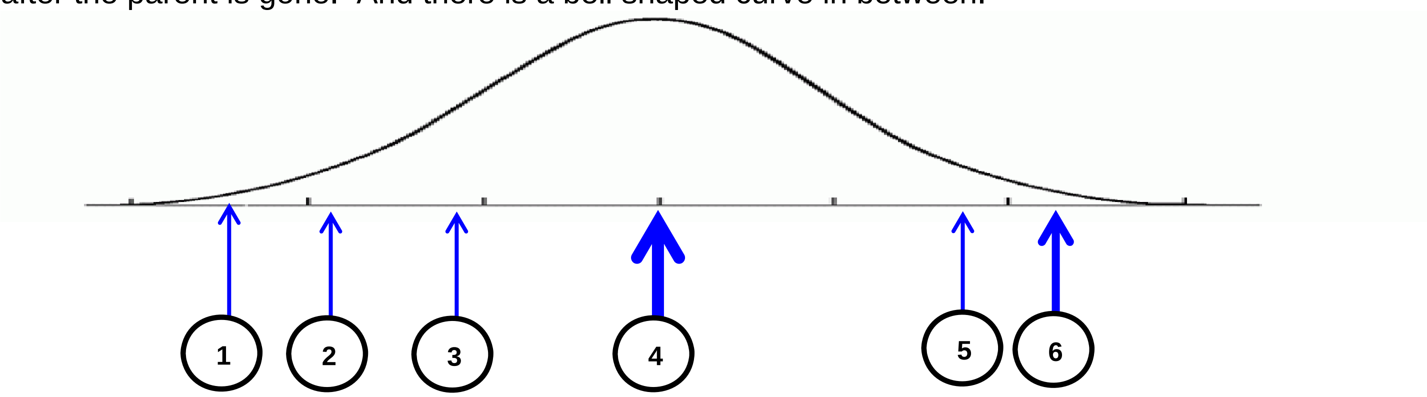
The excess assets will go to the "marital" trust[7] as described above. That allows your

[5] Your estate could be $20,000,000. However, if $15,000,000 of it is going to charity it is unlikely to be subject to estate tax due to the combination of the charitable deduction and the lifetime transfer tax exclusion.
[6] Other names for that are the "exemption" trust; the "exclusion" trust; the "family" trust (confusing name); the "B" trust; and the "credit shelter" trust.
[7] Sometimes called the "QTIP" trust or the "C" trust.

estate to take advantage of your spouse's lifetime transfer tax exemption.

3.3. Distributions To Children.

There are two polar extremes when it comes to how to handle distributions to children after the parent is gone. And there is a bell shaped curve in between.



1 **Blow It.** One extreme: everything outright to the children as soon as the parent (or surviving parent) dies. Let the children blow all the money and get on with their lives.

2 **Beneficiary Directed Trust.** When the beneficiary gets to a certain age, e.g., 35, the trustee contributes the trust's assets into a single member LLC and names the beneficiary as the non-member manager of the LLC. That gives the beneficiary the ability to directly mange the investment of the trust assets. The beneficiary may also be given the ability to remove the trustee and name a new one.

3 **Lapsed Years.** An example would be the distribution of 1/3rd of the assets to each beneficiary 5 years after the surviving parent's death; ½ of the balance 10 years after the surviving parent's death; and the balance 15 years after the surviving parent's death. Each child is treated equally: they all get their distributions on the same date. It works well when the children are of similar age, e.g., 28, 30 and 32. It does not work well when one of the children is significantly younger than the others.

4 **Birthday Clause.** The vast majority choose some variation on a "birthday clause." For example, the children get the principal one-third at ages 30, 35 and 40. Or 10% outright at 30 and the balance one-third at 35, 40 and 45. The idea is that the parent wants the children to, at some point, get the money, and have the trust end. The parent is not trying to have the assets pass on to future generations. The parent is trying to protect the children, to some extent, from their own mistakes and creditors. However, at some point the children will have to make it on their own.

5 **Incentive Distribution.** Some few people like incentive distribution clauses. For example, starting at age 25 the trustee will distribute an amount equal to the "total

income" line on the child's IRS Form 1040. Or, the trustee will distribute to the child, at age 30, an amount equal to what the child is able to show as the child's net worth according to a certified financial statement prepared by a certified public accountant.

6 **Complete Discretion.** An increasing percentage of parents want the trustees to have complete discretion as to both principal and income distributions. This is to (i) minimize the estate and generation skipping transfer tax and (ii) maximize the protection of the assets from the heirs' creditors (and from the heirs' own bad decisions). If the trust is created in a state like Nevada (365 years) or Delaware (unlimited duration), the trust can continue for the benefit of future generations ("**Dynasty Trust**").

3.4. Other Beneficiaries?

Having said that everything is going to the children when you are gone, is there some:

(i) religious institution;

(ii) disease related charity;

(iii) niece, nephew, aunt, uncle, housekeeper, friend;

to whom you wish to leave $10,000 or so? These "specific bequests" are intended to be dollar amounts unburdened by what would otherwise be their share of estate tax or expenses.

4. Other Topics.

This is just an introductory discussion. You might need to provide for aged parents; you might want to make a large charitable bequest. There are other possibilities.

5. Conclusion.

Please write down your choices and questions so that you have them at our meeting.