

# ESTATE PLANNING CHECKUP: ARE YOUR AFFAIRS IN ORDER?

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## 1. Do You Have a Will or Trust?

(Each of us should have a valid will or revocable living trust.)

Your will or trust should be current! A lot has changed in recent years.

- Is your named executor (or successor trustee) still living and still willing and able to serve?
- Do you have a backup executor/successor trustee named, just in case?
- Are all of your named beneficiaries still living, and do you still want to leave them what the will (or trust) says they are to receive?
- If you have minor children, have you designated guardians for them?
- Are any of your beneficiaries receiving SSI or Medi-Cal? Is there a Special Needs Trust in place for that person, or are they in line to inherit directly?
- Did you disinherit someone with whom you have since reconciled?
- Does your will or trust give someone a specific asset that you no longer own?

## 2. Does your trust need updating? [also see p. 9]

- Is your trust properly funded? (Do you hold title to your assets *as trustee of your trust*, or just in your own name?)
- If you and your spouse have an "A-B" trust that splits into two trusts at the first spouse's death to minimize estate taxes, do you still need such complexity if your combined estate is below the individual estate tax exemption amount (\$11,400,000 for 2019)?
- Have any of your successor trustees or trust beneficiaries died? Do you have a contingency plan in place, or will this create complications?

## 3. Are your beneficiary designations current?

The ultimate distribution of many assets will be determined by their beneficiary designations. *Life insurance, IRAs and other tax-deferred retirement accounts, annuities, and U.S. Savings Bonds all allow for designated beneficiaries.*

- Do you know who your designated beneficiaries are? Are they still alive?

- Have you named *contingent* (secondary) beneficiaries?
- Are any of your designated beneficiaries minor children (i.e., under 18)? Would you prefer to restrict their access to these funds until a later age?
- Did you name your “estate” as a beneficiary on anything? (This can subject that asset to probate, even if you might otherwise have avoided probate.)
- If you are leaving a gift to charity through your will or trust, have you considered naming the charity as a designated beneficiary on a tax-deferred annuity or retirement account (thereby eliminating the income tax liability)?
- If you named your spouse as your beneficiary and your spouse is now deceased, have you updated your beneficiary designations accordingly?

**4. Do you know how property titling will affect your plan of distribution?**

- *Joint Tenancy* may avoid probate, but is it the ideal solution? The other person could die first; the asset could be seized by the other person’s creditors; the other person could withdraw your assets without your knowledge or permission; there may even be negative tax implications.
- Don’t count on someone else to redistribute assets to your other intended beneficiaries after you die if that person was already on title as a Joint Tenant. Once the assets are in that person’s name alone, *they have no legal obligation to share with anyone else*. Even if they do carry out your wishes, they may be making taxable gifts that could adversely impact their own estate.
- Consider “ITF” (“in trust for”) or “POD” (“pay on death”) designations on accounts with power of attorney access as an alternative to joint tenancy.

**5. Does your designated executor or successor trustee know what to do and where to find important papers when the time comes?**

[See “Questions You Should Answer for Your Successor Trustee or Executor”- pg. 7]

**6. Do you have a current and valid Durable Power of Attorney (DPA) to address the possibility of your physical or mental incapacity?**

- In the event of your incapacity, who will take care of things for you?
- If you have a DPA, does your agent know that you have named him or her as your agent? Have you given your agent sufficient instruction to prepare him or her to manage your affairs?
- Is your DPA effective now, or is it a “springing” DPA (i.e., does it “spring” into effect only if and when you become incapacitated)? Who can determine your incapacity? What if your “incapacity” is a gradual mental decline?
- If you have a DPA, is your designated agent still living? Do you have an alternate agent named? Are your designated agents still the right folks for the job?

- Will your bank require you to do a separate power of attorney (on the bank's own form) in order for your agent to have signing authority on your bank accounts?

**7. Do you have a valid and current Advance Health Care Directive or Power of Attorney for Health Care Decisions?**

- **Durable Powers of Attorney for Health Care Decisions** executed **prior to 1992** all have expired and should be redone. (Old forms had 7-year expiration dates.)
- Since July 1, 2000, the **Advance Health Care Directive (AHCD)** is the standard form in California (although unexpired DPAHC's are still valid, too).
- Are the people you named as your agent and alternates still the best people for the job? Does the document include contact information for your agents?
- **Are the agents' addresses and phone numbers in the document current?**
- Do your agents each have a copy of the document?
- Does your doctor have a copy?
- Consider giving your agent(s) a copy of the ABA "*Guide for Health Care Proxies*."
- If you have made arrangements for your burial or cremation, do your agents know about this? Do they know where to find your contract or other papers?
- Do you have a "who to call in case of emergency" list in your purse or wallet?
- If you have a cell phone, do you have an "ICE" (in case of emergency) contact?
- [See also the POLST form (Physician Orders for Life-Sustaining Treatment) and the Emergency Medical Services Pre-Hospital Do Not Resuscitate (DNR) form.] If you have a DNR or POLST form, is there a copy on your refrigerator?

**8. Are you making gifts to family/friends/charity?**

- The annual limit for gifts to individuals is now **\$15,000** per person per year – the total of the gifts you make to any one person in one year over that amount normally requires the filing of a gift tax return. [Note that if you make a gift by naming someone as a Joint Tenant with you on real property or securities, this results in a completed gift for gift tax purposes – if the value of what you give to them is more than **\$15,000**, you have made a taxable gift that must be reported.]
- Remember, too, that when you give an appreciated asset to a family member or friend, they take the asset with your original cost basis. If you had a gain in the value of the gifted asset and the other person sells it, they will be responsible for paying a capital gain tax upon the sale.
- If you normally make cash gifts to your favorite charities, consider donating appreciated securities (stocks, mutual funds) instead if you have such assets. You still get a full value charitable deduction, no one pays tax on the capital gain, and you can use your cash for other things.

Note: There is *no limit* on gift funds paid directly to an educational institution for

another person's tuition (but not room and board, books, or other expenses), or for payments to third parties for another person's health care needs or medical expenses (in both cases, payments MUST be made to the third parties directly).

**9. If your spouse has died, have your assets been properly re-titled?**

- **Joint tenancy assets** should be re-titled in the name of the surviving spouse:
  - *Real property* requires the recording of an *Affidavit of Death of Joint Tenant* with the County Recorder in the county where the property is located. (There are other forms required as well for California real property.
  - *Bank and investment accounts* should be titled in the surviving spouse's name, using that person's Social Security number.
- **Trust assets** should be re-titled in the name of the surviving spouse as trustee (or whomever the successor trustee is, if not the surviving spouse); if an A-B trust is involved, assets should be further re-titled into the subtrusts and the irrevocable trust must have its own tax ID number; for irrevocable trusts, the trustee must file annual federal and state trust returns in addition to the surviving spouse's personal income tax returns.
- Note also that the surviving spouse may need to update his or her Durable Power of Attorney, Advance Health Care Directive, Will, and beneficiary designations.

**10. What about estate taxes?**

As of 2018, the individual estate tax exemption was increased to \$11,180,000, with increases for inflation in subsequent years, but this law "sunsets" on December 31, 2025, and we could return to the 2011 exemption amount as adjusted for inflation since then. Estates larger than the exemption amount are subject to an estate tax of 40% on the amount above the exemption. Spouses may combine their individual exemptions and double the amount that is exempt from estate tax. Gifts to qualified charities also are exempt from estate tax.

Since 2011, the estate tax exemption amounts are as follows:

| <u>Year of Death</u> | <u>Exemption Amount</u> | <u>Top Estate Tax Rate</u> |
|----------------------|-------------------------|----------------------------|
| 2011                 | \$5,000,000             | 40%                        |
| 2012                 | \$5,120,000             | 40%                        |
| 2013                 | \$5,250,000             | 40%                        |
| 2014                 | \$5,340,000             | 40%                        |
| 2015                 | \$5,430,000             | 40%                        |
| 2016                 | \$5,450,000             | 40%                        |
| 2017                 | \$5,490,000             | 40%                        |
| 2018                 | \$11,180,000            | 40%                        |

**2019**

**\$11,400,000**

**40%**

The individual exemption amount will continue to be adjusted for inflation in future years.

**11. If you own a business, what happens to it upon your death (or disability)?**

- Do you have a buy-sell agreement with someone or some other plan that will allow your business to continue in the event of your death or disability?
- Should you have life insurance to fund a buy-sell agreement?
- Will the business end with you?
- If a family member works in the business, have you arranged for that person to inherit the business at your death? How will this affect your other beneficiaries?
- Does the business have debts that need to be paid off at your death?

**12. If you have pets, have you made provisions for them?**

There are multiple approaches that can be taken to provide for your pets in the event of your death or incapacity. Legally, you cannot leave a cash gift directly to a pet. Here are some options to consider.

**RECOMMENDED:** Complete the SPCA's Pet Profile form for each of your pets, and consider the Monterey County SPCA's Guardian Angel Program.

- Add a note to your wallet or purse that says "I have pets at home that need care."
- Do a Limited Power of Attorney authorizes the designation of a pet sitter/guardian and address specifics.
- Add a statement in your general Durable Power of Attorney that says something like: "I hereby appoint \_\_\_\_\_ to care for any animals I have in the event of my incapacity and to follow such instructions as I have prepared, to access my account at \_\_\_\_\_ [*specify account number and make sure the pet guardian can access it*] and expend funds as needed for the care, safety, and maintenance of my animals, and to place my pets with temporary or permanent guardians if appropriate."
- Leave a provision in your will or trust that specifies the person(s) with whom your pets should be placed in the event of your death and that authorizes the distribution of a cash gift to such person(s) to cover the cost of food, grooming, veterinary care, etc. [*Example: "Pets. The trustee shall make appropriate arrangements for the continued care and feeding of any of the settlors' pets that survive the settlors. The trustee may, in the trustee's discretion, make distribution of a reasonable cash bequest to the person or persons who agree to take and care for the settlors' surviving pet(s), to cover the cost of food, grooming, medications, veterinary care, and other expenses as needed. The trustee shall have full discretion to determine the amount and timing of any such cash distribution(s)."*]

- Prepare a **Pet Trust**, either as a separate document, or as a component of your revocable living trust. [In California, Pet Trusts are governed by Probate Code §15212.] Note that the trustee of your pet trust should be an animal lover, but need not be the designated guardian for your pet(s).
- Prepare a **Pet Protection Agreement** (see [www.mypetprotection.com](http://www.mypetprotection.com) for details).

How much to leave for your pet(s)? This depends on the total number of pets, the type of animals you have, the pet's age, health and life expectancy. You may want to specify an upper limit on how much money to allocate for pet food, grooming, medications, veterinary care, boarding/kennel fees, toys, and any compensation for the pet guardian.

Make sure that your neighbors and relatives know how many pets you have and contact information for anyone that you want as an emergency guardian for your pet(s) in the event you are suddenly incapacitated.

### **Further Resources:**

**The Living Trust**, by Henry W. Abts III, (latest edition) is an excellent resource for the lay person, written in plain English. Covers not only living trusts but also probate, joint tenancy, estate taxes and many other important estate planning topics.

**Understanding Living Trusts**, by Vickie and Jim Schumacher (latest edition), is another excellent resource in plain English.

**How to Settle a Living Trust**, by Henry W. Abts III.

**What to Do When Someone Dies**, by Milton Berry Scott ([www.perebruin.com](http://www.perebruin.com)).

**The Executor's Guide**, by Mary Randolph (Nolo Press).

**Nolo Press**, 950 Parker Street, Berkeley, CA 94710 publishes numerous legal self-help books on a wide range of topics. Their publications are thorough, detailed and very well done, and they offer books on wills, living trusts, probating an estate, conservatorships, guardianships, powers of attorney, and many other topics. Write for a catalog or check your local bookstore.

**Legal Services for Seniors**, 915 Hilby Avenue, Ste. 2, Seaside, CA 93955. Phone: (831) 899-0492. Monday through Friday, 9AM to 5PM. **LSS provides help to seniors age 60 and up who are Monterey County residents.** Services are free, though tax-deductible contributions are welcome.

**Monterey Bay Aquarium Ocean Legacy Circle website:**

<https://montereybayaquarium.oceanlegacycircle.org/join-our-ocean-legacy-circle>

## QUESTIONS YOU SHOULD ANSWER FOR YOUR DESIGNATED EXECUTOR OR SUCCESSOR TRUSTEE

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Your Executor/Successor Trustee needs to know answers to the following questions (as many as apply in your case):

- Where do you keep your will or trust documents?
- Do you have any special directions regarding how your assets are to be distributed (especially tangible personal property like jewelry, art, books, guns, collectibles, furniture, etc.)?
- What sort of assets do you have? (Real estate, stocks, bonds, mutual funds, life insurance, annuities, U.S. savings bonds, bank accounts, partnerships, a business?)
- (If you have a living trust . . . ) Are all of your assets properly titled in trust name?
- Do any of your intended beneficiaries owe you money? If so, how should this be handled? Will this be considered a part of that person's share of the estate, or what?
- Will there be enough cash available to deal with foreseeable expenses and taxes?
- If there will be estate taxes due and payable, what assets will be used to pay for this?
- Is there any life insurance? If so, who is the beneficiary? Where is the policy?
- Are there other assets that will pay death benefits? If so, how do I claim these?
- Who are the designated beneficiaries on your IRAs, annuities, and other such assets?
- What are your debts/liabilities (and contingent liabilities) and how will these be paid?
- Will there be any ongoing support obligations for your dependents?
- Where are your important papers kept? [deeds, vehicle "pink slips", savings bonds, stock certificates, investment and bank account statements, insurance policies, pension information, military records, etc.]
- Do you have a safe or safe deposit box? If so, where is it located, and where do you keep the key or combination?
- If there is an operating business involved, what is the plan for business continuation or transfer upon your death? Where are the business records kept? How will employees be paid?
- What are the names, addresses and phone numbers of all your beneficiaries?
- What are the names, addresses and phone numbers of your accountant, attorney, investment advisor, insurance agent?
- Do you have a cemetery plot or prepaid mortuary arrangements? If so, where's the paperwork? If not, how will these expenses be paid in the event of your death?
- Are there any special circumstances involving your beneficiaries that I should know about? [problem relationships, troubled marriages, substance abuse problems, physical or mental disability, financial irresponsibility, threatened lawsuits, etc.]
- If you keep your financial records on a computer, please give details and password.
- If you have an alarm system on your home, what is the deactivation procedure? Who has a key?
- If you have pets, who will take care of them if you are incapacitated or deceased?

## **GUARDING AGAINST UNKNOWN POTENTIAL BENEFICIARY PROBLEMS:**

No matter how hard we try to anticipate and plan for every conceivable circumstance that might negatively affect the inheritance we leave to someone, there is no way to plan for everything. If you worry that unforeseen developments could potentially result in the dissipation of someone's inheritance, you might consider including language like this in your trust:

Trustee Power to Postpone Distributions. Notwithstanding any other provisions of this trust, the trustee shall have the power to postpone the distribution of all or part of any beneficiary's share of the trust estate if the trustee has cause to believe that there is a compelling reason to postpone the distribution in order to protect the beneficiary's share from dissipation. Compelling reasons shall include, but are not limited to, a beneficiary's serious disability, incarceration, drug or alcohol addiction or dependency, a pending divorce, gambling addiction, pending or threatened litigation, a serious tax disadvantage, or similar substantial cause affecting the beneficiary who would otherwise be entitled to the distribution outright. In such event, the distribution from or termination of any trust share may be postponed, and any such postponement may be continued from time to time, up to and including the entire lifetime of the beneficiary\* unless it becomes uneconomical to continue a trust for that beneficiary. The trustee shall give written notice to the beneficiary whose distribution will be affected by such postponement. Within the notice, the trustee must provide a written explanation of the reasons justifying the postponement, and, if appropriate, suggested corrective measures the beneficiary may wish to implement. Funds from the beneficiary's share may be used by the trustee to assist the beneficiary with any needed health care expenses, such as rehabilitation, prior to outright distribution. Exercise of this power to postpone distributions shall be entirely at the trustee's discretion; the trustee shall be under no affirmative duty to determine that there is no compelling reason for postponing a beneficiary's distribution prior to making a distribution to that beneficiary; and the trustee shall incur no liability to that beneficiary or anyone else for making a distribution even if there is a compelling reason to postpone such distribution.

\*[Alternatively, you can specify a maximum time limit (such as two years) for postponing an outright distribution to a beneficiary whose circumstances warrant such a delay.]



# CHECKLIST FOR EXISTING REVOCABLE LIVING TRUSTS

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- Have all asset transfers into the trust been completed?
  - grant deeds to transfer real estate into your trust?
  - bank and credit union accounts titled in the name of the trust?
  - securities accounts, stocks, bonds, limited partnerships titled in the name of the trust? (except IRAs or other tax-deferred retirement accounts – beneficiary designations control those)
  - tangible personal property (other than vehicles) transferred into the name of the trust?
  - promissory notes and/or deeds of trust assigned to the trust?
  - As new assets are acquired, are you taking title in the name of the trust?
  - Have your business interests been assigned to the trust?
- Are your beneficiary designations on life insurance, annuities and pension plans (IRAs, Keoghs, 403(b) plans, 401(k) plans, etc.) consistent with your overall estate plan? Did you know that you can name the living trust as the contingent beneficiary (but not the owner)?
- Does your insurance on trust assets (real estate, personal property) reflect trust ownership?
- Does your trust include estate tax savings provisions if you and your spouse have a combined estate worth more than the amount that is exempt from estate tax? Or do you have tax savings provisions from long ago that are no longer necessary? Does your trust need to be updated to accommodate tax law changes? (check current law)
- Does your trust (and power of attorney, if effective upon incapacity) include provisions that allow incapacity to be determined by persons you know and trust instead of by the courts?
- Have you named someone who is still a minor (under 18) as an outright or contingent beneficiary when you would rather see that gift deferred until a later age?
- If you are married, have you placed your jointly owned assets in community property title to take full advantage of the income tax benefits in the event of one spouse's death?
- Has anything changed that might require an amendment to the trust? (Births, deaths, disabilities, marriages, divorces, estrangements, inheritances or other changes in finances?)
- Is your chosen successor trustee still available and able and willing to serve?
- Do you have properly drawn and current Durable Powers of Attorney:
  - for asset management in the event of incapacity?
  - for health care in the event you need (or don't want) artificial life support?Have you given copies of such documents to those you named as your agent and alternate agents? (Or did you let them know where these documents are kept?)
- If you have an old "living will"/Durable Power of Attorney for Health Care/Directive to Physicians, does that document automatically expire after a term of years? [The law changed in 1992 and you now can make out a new Advance Health Care Directive with no expiration date.]
- Do you have a "pour-over will" that leaves everything to the trust just in case there's something that didn't get transferred to the trust during your lifetime? If you have minor children, does your will name guardians for those minor children? Are the guardians you've named still the best choice?