

LAW OFFICE OF  
**JOHN T. ANDERSON**  
1741 EAST WARDLOW ROAD  
LONG BEACH, CALIFORNIA 90807

JOHN T. ANDERSON\*

LISA R. NORMAN

ERIN M. PROTZMANN

\*Certified by the State Bar of California as a  
Specialist in Estate Planning, Trust and Probate Law

TEL (562) 424-8619

FAX (562) 595-9662

*John@trustlaw.ws*

*www.trustlaw.ws*

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## ***AVOID PROBATE WITH A LIVING TRUST***

### **Over 35 Years of Experience**

Practice limited to:

**Estate Planning • Living Trusts  
Wills • Conservatorships • Guardianships  
Health Care and Financial Powers of Attorney  
Trust Administration • Probate (when necessary)**

#### **Easy access to office**

No stairs, elevators, or underground parking  
Located on E. Wardlow Rd. between Cherry & Orange  
West of the Long Beach Airport

**QUESTION:** What will a Living Trust do for me that my present Will cannot do?

**ANSWER:** With a Will, if your estate contains a home or other real property or personal property valued at more than \$100,000 and both spouses pass away, California law requires the estate to go through Probate – a 1 to 1 ½ year (or more) court process. With a Living Trust, it is possible for the beneficiaries to receive the estate in a minimum amount of time with no court involvement.

<b>Size of Estate</b>	<b>Approximate Probate Expenses*</b>	<b>Approximate Cost of Living Trust (set-up)**</b>
<b>\$300,000 - \$10 million</b>	<b>\$18,000 - \$226,000</b>	<b>\$1,500 - \$3,000</b>

\*This is the statutory fee paid to the Executor and the Attorney.

There may also be additional fees due to the sale of real property during the Probate and so forth. Also, there are costs which must be paid to the court and a bond which may need to be posted.

\*\* There are additional costs and fees of administration at death.

## ESTATE PLANNING SEMINAR Outline

### I. PROBATE

#### A. Definition

Probate is the system by which the court oversees the payment of your creditors and distribution of your estate.

#### B. Advantages

The procedure allows the court to make certain that your debts are paid in the proper priority after proper claims are filed. Also, creditors have a limited time period to make their claims. Distribution is supervised to the beneficiaries you name in a Will; or, in the event you do not have a Will, to your heirs.

#### C. Disadvantages

Probate generally takes one year or more. There are expenses for court fees, the publication of notices and, sometimes, bond. Court appearances may be required; and, there are fees for the attorney and commissions for the estate representative that run from 4 percent of the first \$100,000; 3 percent of the next \$100,000; 2 percent of the next \$800,000; 1 percent of the next \$9 million; and so on, each, based upon the gross value of your estate (liens, encumbrances and debts are not considered) plus all gains on sales and receipts during Probate and less any losses. On an estate of \$200,000 that would be \$7,000 **each**, and on an estate of \$1 million, it would be \$23,000 **each**. In addition, extraordinary fees and commissions are often granted for things such as the sale of your home, Will contest, and estate tax work.

#### D. Will vs. No-Will

The difference between having a Will or not having a Will does not determine whether or not your estate goes through Probate. The difference is whether you dictate how your assets are distributed or the court decides, based upon what the State Legislature believes you would have done if you had gotten around to having a Will drawn-up. With a Will, you may also designate who will handle your affairs (Estate Representative); how your estate will be distributed; and, you may name a Guardian to raise your minor children.

#### E. What is my "Estate"?

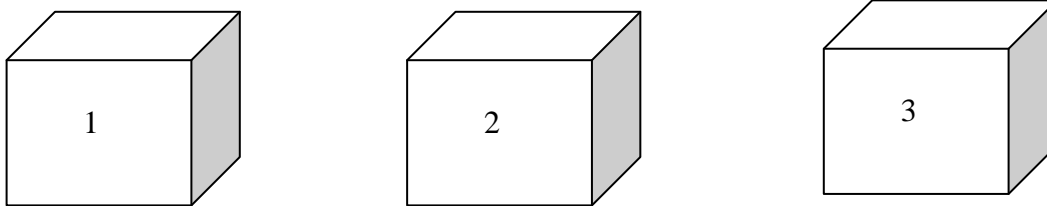
Your "Estate" defines what assets are subject to being distributed upon your death. In general, if married, it consists of your separate property (assets that you had before marriage or received by gift or bequest to you) plus one-half of your community property (assets acquired with your spouse during marriage). If single, it includes all of your assets.

## What is my Estate?

What a person means by your “Estate” can vary. For financial planners it means one thing, for Estate Tax Returns it means something else, and for Probate it has a third definition.

“MY ESTATE” for purposes of Probate is illustrated as follows:

Please try to visualize this. At your death, we sit down with a list of your assets-every item you own an interest in. In front of us are three boxes. Every item you own has to go in one of the three boxes. We determine which box it goes in by the type of asset and the way the asset is owned/vested. This will include all of your separate property and one-half of your community property.



**Box #1** gets all the assets you own with either a named beneficiary (such as a retirement plan, life insurance, or POD bank account) or joint owner (assets titled as “joint tenancy” or as “community property with right of survivorship”). These assets will pass to the beneficiary or joint owner without Probate.

**Box #2** gets all the assets you own in a valid Trust. The title to the property has been changed from you to the Trustee of the Trust. These assets will be administered and distributed as the Trust dictates without Probate.

**Box #3** gets everything else. Anything that did not qualify to go in Box #1 or Box #2 must be placed in Box #3. **This box represents your Probate Estate.** **If the assets in this box total more than \$100,000, your beneficiaries must go through court-supervised and controlled Probate proceedings.** If you have a Will, the Will will direct the court how to distribute these assets at the end of the proceedings. If you do not have a Will, the court will follow a standard distribution amongst your family members.

Depending on your individual situation, one or more of the boxes may be empty-if you never set up a Trust or do not transfer assets to a Trust, there will not be anything in Box #2.

If your desire is to avoid Probate, you need to focus on keeping the total value of the assets that will go in Box #3 under \$100,000.

II. **CHANGES IN 2002 AND 2011** (Including the Tax Relief Unemployment Insurance Reauthorization, and Job Creation Act of 2010, signed December 17, 2010.)

A. The Estate Tax

What was a \$675,000 “exemption” from estate tax in 2001 increased as follows, subject to change:

<b>YEAR OF DEATH</b>	<b>APPLICABLE CREDIT AMOUNT</b>	<b>EXCLUSION AMOUNT</b>	<b>MAXIMUM TAX RATE</b>
2009	\$3.5M	\$1,290,800	45%
2010	\$5M*	\$1,730,800	35%
2011	\$5M	\$1,730,800	35%
2012	\$5M	\$1,730,800	35%
1/1/2013	Reverts to \$1M absent further legislation		55%

*\*The estate tax is retroactively \$5M for 2010, or you can file an estate tax return and elect to exempt 100%, but only a modified step-up in basis is then available. You can receive a full step-up in basis if you do not elect the 100% exemption.*

2010 was a good year to die for estate tax purposes if you elect a 100% exemption on the estate tax return. At least eight billionaires died with zero estate tax. However, there was a limited step-up in basis on appreciated assets of \$1.3M and \$3M for spouses. The allocation of the basis step-up must be filed with the IRS and given to the beneficiaries. Or, you could go with the retroactive \$5M exemption and get a full step-up in basis.

B. Annual Gift Exclusion

Every individual has the ability to gift \$13,000 per year to any other individual in 2010. This \$13,000 annual exclusion is increased by the inflation rate. The increase from \$10,000 began in 1999 and thereafter. If the amount of the annual exclusion, as adjusted, is not a multiple of \$1,000, the amount will be rounded to the next lowest multiple of \$1,000. Thus, the annual exclusion will not increase until the cost of living adjustment is at least 10 percent. For gifts in excess of \$13,000, a Gift Tax Return (Form 709) must be filed. For 2011 and 2012 there is still no tax until lifetime gifts over the annual exemption exceed \$5M. In addition, the Generation Skipping Transfer Tax (“GSTT”), for gifts or bequests to a “skip” person (one who is more than one generation from the transferor) is increased to a total during life or upon death of \$5M. The GSTT is a 55% tax in addition to the gift or estate tax. This increase to \$5M currently expires December 31, 2012, reverting back to \$1M.

C. Pension Plans and IRA’s

For those of you with sizable pension plans or IRA’s, the plan assets are subject to federal estate tax (due within nine months of the individual’s death, or in the case of a surviving spouse, nine months of the spouse’s death), and to federal and state income taxes at the time the beneficiary withdraws money from the plan.

The combination of estate taxes and income taxes can result in a major reduction in the value of qualified retirement plan assets as a result of the double-taxation.

The goal for qualified retirement plan assets from an estate planning perspective is two-fold:

1. Make sure there are sufficient liquid assets in the estate, outside of the qualified plan, which can be used to pay the estate taxes on the qualified plan assets and the rest of the estate, without being forced to liquidate all or part of the qualified plan assets to pay the taxes. Frequently, this is done through establishing an Irrevocable Life Insurance Trust which is used to pay the taxes and is not a part of your estate for tax purposes; and,
2. Structure the beneficiary designation so that payments can be made from the qualified plan to the designated beneficiary over as long a period of time as the law allows. This allows the qualified plan assets to remain in an income tax deferred environment for as long as possible, to take advantage of tax-free compounding.

### III. GUARDIANSHIP/CONSERVATORSHIP

#### A. Guardianship

Guardianship is for your minor children. You need to designate who will (1) raise your children; and (2) handle their finances. This can be the same person(s) or two different people. If you do not designate someone, the court will name someone based upon a priority set forth in the Probate Code. Often you want someone other than your parents or siblings. You may want to consider religious and moral beliefs, geographical location, ages, health, family situation and finances.

#### B. Conservatorship

Conservatorship is for an adult who is physically or mentally unable to care for him or herself. It can be “of the person” (establishing where you live and health care decisions) or “of the estate” (handling your finances), or both. If you don’t designate whom you want, the court will do this for you if the need arises. Having agents for healthcare (Advance Directive for Healthcare) and finances (Durable Power of Attorney) will help avoid the necessity of a Conservatorship.

#### IV. ALTERNATIVES TO PROBATE

A. Community Property or Community Property with Right of Survivorship  
Community Property is a manner of holding title of ownership with your spouse and which confirms the asset is marital property. Either spouse, however, can, by Will, leave their share of community property to someone other than their spouse. In part for that reason, in 2001, a new manner of holding title was created, “Community Property with Right of Survivorship.”

B. Joint Tenancy  
Joint Tenancy is a manner of holding title of ownership with someone else (your spouse or any number of others) whereby if one dies the other(s) take(s) the deceased person’s share (right of survivorship). Usually you would not hold property this way with anyone other than your spouse. Joint Tenancy is easy to handle on the death of a Joint Tenant. It does not go through Probate or get divided with anyone except the surviving Joint Tenant(s).

There can be adverse income tax consequences for a Joint Tenant (spouse or not) if he or she sells assets which have appreciated (gone up in value) if they were held in Joint Tenancy. That is why we now call Joint Tenancy a “Tax Trap for the Unwary.” Such assets are subject to judgment levies and only the last of the Joint Tenants can Will it to someone else.

It is important to make clear your intention that an asset in Joint Tenancy is really intended to go to the survivor(s). All joint tenancy interests are equal and must be created by one document at the same time.

Tenancy in Common is not Joint Tenancy. Tenancy in Common interests may be different and may be created at different times.

C. Totten Trusts  
A Totten Trust is simply the name given to an account that you set up in your name “In Trust For” (“ITF” or “ATF”) someone else. The asset is yours to do with as you please until you die. Upon your death, it goes to the person you named. Your Will does not govern it. Many assets cannot be owned in this manner. It does not provide for alternatives, such as that person dying before you.

D. \$100,000 or Less  
If, at your death, you have assets (other than real property) of \$100,000 or less in value, an Affidavit can be prepared to allow the transfer of those assets to your heirs. If you have an interest in real property (such as oil and mineral rights or a Trust Deed) valued at \$20,000 or less, it can be appraised by a court-appointed appraiser and be transferred without a formal Probate proceeding. If you have an interest in real property valued at \$100,000 or less, a Summary Probate proceeding is available that is less involved than a normal “Probate.”

## V. REVOCABLE LIVING TRUSTS

### A. Inter Vivos vs. Testamentary

An Inter Vivos Trust (Living Trust) is a contract that you create and fund (put assets in) while you are alive. A Testamentary Trust is one that is set forth in your Will and must go through Probate to come into effect. The primary difference between the fully funded (all of your assets are in the Trust) Living Trust and a partially-funded (some assets are transferred) Living Trust or a Testamentary Trust, is Probate. A Testamentary Trust does not avoid Probate and thus you pay the attorney higher fees to prepare the documents and you pay him to Probate your estate.

### B. Advantages

1. With the fully funded Living Trust you pay slightly more now for estate planning; but, can avoid the time and expense of Probate.
2. It is possible to eliminate, or at least decrease, estate taxes on your death or the deaths of you and your spouse, if that is an issue.
3. You may avert the need of an expensive Conservatorship in your later years by naming a Trustee to take over upon your incapacity.
4. You can retain income tax advantages which are lost in joint tenancy.
5. You may change the terms by amendment or revoke (cancel) the Trust while you are alive. You are in charge.
6. You can provide for how you want assets distributed and on terms you desire.
7. Transfers can take place quickly upon your death (often within a few weeks).

### C. Disadvantages

1. It costs more than a Will, but this is insignificant compared to the cost of Probate.
2. You will spend some time taking inventory of your assets (putting a list together) and changing title to the Trust.

### D. Usual Types of Revocable Living Trusts

In discussing Revocable Living Trusts, you may be involved with Standard, A & B, Q-TIP (A/B/C), Spend-Thrift, or Disclaimer Trusts depending on your needs and the size of your estate.

For those of you who have an A/B or an A/B/C Trust (a Trust which divides on the death of one of you, into two or more Trusts, one or more of which becomes irrevocable), California Law requires that when a Trust becomes irrevocable, written notice be given to all beneficiaries, and, upon request, that they be provided with a copy of any Trust provisions which apply to them. Any provision of the Trust which attempts to circumvent this requirement is void.

As a result of the “portability of exemption” in effect for 2011 and 2012, which is only available by election on a timely filed Estate Tax Return, the unused portion of a deceased spouse’s exemption transfers to the surviving spouse so that the

surviving spouse will have an increased exemption. The deceased spouse's unused exemption is not lost. But just like the increased exemption, this is only effective, for now, in 2011 and 2012, so planning with an A/B or an A/B/C Trust to preserve the estate will often (and should) still be recommended.

A Special Needs Trust ("SNT") is an important consideration, in a Will for a spouse beneficiary with special needs; or, in a Trust for a non-spouse beneficiary with special needs. The special needs considered here are mental or physical conditions which make the beneficiary eligible for public benefits which an inheritance or gift could otherwise cause the beneficiary to lose.

## VI. OTHER ESTATE PLANNING TOOLS

### A. California Uniform Statutory Form Power of Attorney for Asset Management (Probate Code §4401)

1. These are useful to allow others designated by you to handle specified transactions or all of your financial matters for you. The Durable Power of Attorney may be in effect upon signing or may only come into effect upon your incapacitation, depending on what is specified in the document.
2. The Power of Attorney ceases upon the earliest of rescission (cancellation); a date you specify; or, your death.
3. **The Power of Attorney for Asset Management is extremely potent and is dangerous in the hands of a person you cannot totally trust since that person now has unsupervised access to all of your assets. Think carefully before signing such a document.**

### B. Living Wills

The Living Will really is not a Will at all. It is often confused with a Will or Living Trust. All a Living Will accomplishes is to allow you to request that your physician not use extreme, life-prolonging procedures. **This does not take the place of an Advance Directive for Health Care/Durable Power of Attorney for Health Care Decisions.**

### C. Advance Directive for Health Care (Probate Code §§4600 et seq.)

Previously known as a Durable Power of Attorney for Health Care Decisions, the Advance Directive for Health Care is a very useful document to allow you to (1) designate the person who can make medical decisions for you in the event of your incapacitation, and (2) request no extreme life-prolonging procedures. ***Everyone eighteen years or older should have an up-to-date Durable Power of Attorney for Health Care Decisions. These should include provisions for the HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT ("HIPAA").***

### D. Medi-Cal Planning

1. Long-term Care
2. OBRA-93/DRA-06

## VII. Question and Answer period as time permits.