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**IN’S AND OUT’S OF ESTATE PLANNING**

**BY**

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**Introduction:**

This short book will give you, the client, an in-depth guide to estate planning, the options, and the benefits of a comprehensive estate plan. This book is designed as a guide that will help you determine if you need an estate plan, the right option/type of estate plan for you and your family, and the triggers of when you need to update the estate plan.

**What is an estate plan and why do I need it?**

An estate plan is the comprehensive document that people create to protect their families and their assets to ensure that their assets go to their loved ones rather than the government or creditors upon their passing. It can also be used to protect your assets during the course of your lifetime in the event that you are sued. An estate plan also is commonly referred to as a living trust or simply a trust. This is a bit of a misnomer because an estate plan has many documents within it and the trust is simply one document. The ONLY way to protect your assets in the state of California from probate is the creation of an estate plan. This estate plan can protect not only from the state probate process, but also the federal government death tax, and from creditors (people trying to sue you). This document is the most important document that you will create for you and your family. If done correctly, it can even protect you in the event of a divorce when combined with a post-nuptial agreement.

**What comprises an estate plan?**

An estate plan is a testamentary document that should have all of the following sub-documents within it: trust, pour-over will, durable power of attorney for finance/asset management, durable power of attorney for health care and conservatorship, HIPAA, schedules, and guardianship (if applicable). These documents combined make a complete estate plan.

**What is a trust?**

The trust is the most powerful of the estate planning documents. The trust allows you to protect your assets from the state government, the federal government, and creditors. This is also the document that dictates who your beneficiaries are, what amount of money/assets they get, and when they get these assets. You may also condition the distribution of your assets to your beneficiaries, such as my son has to have a college degree before he gets any money. The beneficiaries of your trust are the individuals who will receive your assets upon your demise. Within the trust you will also assign successor trustees (also known as first appointees) to make financial and health care decisions for you. These individuals will also reappear in the durable power of attorney documents that will be discussed later.

**What is a will, specifically a pour over will?**

This pour over will is the second document in an estate plan. It functions as a back up to the trust to “catch” assets inadvertently left out of trust. This is the main function of the pour over will. You can also use this document to release the executors (same people as successor trustees in the trust) from having to carry a bond.

**What is a durable power of attorney (DPA) for finance/asset management?**

This document is the first durable power of attorney document and allows you to assign someone (over the age of 18 and a U.S. citizen) to make financial decisions for you if you are incapacitated. The people you assign to do this for you are called successor trustees or appointees (they are also called executors in the will). The document we create is valid nationwide. This document is used if you are unable to make your own decisions. For example, you are in coma from a car accident or you start to suffer mental ailments/sicknesses that prohibit proper decision-making.

**What is a durable power of attorney (DPA) for health care/conservatorship?**

Similarly to the DPA for finance, this document allows you to assign someone to make health care decisions for you if you cannot do so for yourself. The people that do this for you are called successor trustees or appointees (again the should be over the age of 18 and U.S. citizens). This document is also valid nationwide but can be supplemented by a directive at your local hospital for more specific wishes like transfusion-free medicine or surgery, or declining the use of life saving drugs. The DPA for health care also goes by the names “advanced directive” or “living will.”

**What is the HIPAA directive?**

HIPAA stands for the Health Insurance Portability and Accountability Act of 1996. This legislation provides for data privacy and security provisions for safeguarding medical information. For the DPA for health care to be most effective, this document must be included as a stand-alone document at the end of the health care directive. This allows your chosen health care successor trustees to have access to your medical file to make appropriate decisions for you. If you do not have this document, no access to your medical file will be provided which will make it difficult for you to make health care decisions for your loved one.

**What are schedules?**

Schedules allow you to give items of sentimental value to whomever you choose. The schedules can be used to give away anything except for cash and real property. People commonly use these documents to give away jewelry, china, pictures, paintings, wedding rings, card collections, or even valuable jerseys of your favorite player (especially when signed by such player). In our office we will notarize this document for you and you can fill it in at your leisure. It will be valid anytime thereafter.

**What is guardianship?**

Guardianship is one of the most important documents of an estate plan. If you have little ones (minors), this document allows you to choose caretakers of your children until they are the age of 18. A guardian like a beneficiary can be anyone in the world. When your child turns 18, the guardianship will automatically fall off. This provision is the one most parents care about and is extremely important.

**WHAT KINDS OF ESTATE PLANS ARE AVAILABLE?**

There are many types of estate plans available. Unfortunately, I cannot talk about all of them here in this mini-book, but the most common type of estate plan is called the revocable trust. A revocable trust can be done for a married couple or for a single person. If you have joint assets between you and your spouse, a married trust might be the most appropriate. This also allows you the opportunity to double your estate tax exemption amount if your estate is a large one. At the time of this book, the federal estate tax exemption amount is $11.2 Million.

However, if you have single assets, or are expecting an inheritance it may be wise to have a single trust created. You do NOT have to be single to have a single trust created. Single revocable trusts are designed to hold assets that are in your name alone. Inherited assets are designated as sole and separate property but the mistake that married people make is that they combine these assets with their spouse. If you do that, and your marriage dissolves, then those assets are distributed via community property distributions, which in California is a 50/50 distribution.

 **Is asset protection part of a revocable trust? What is a land trust?**

The most common estate plans are revocable and amendable single or married trusts. These types of plans can include asset protection measures within them. If they do have asset protection (which means protection from creditors or people trying to sue you), they are referred to as “land trusts” or “REITs.” A land trust is a testamentary instrument that allows you hold your assets in a revocable trust, but makes it appear as if you have no assets connected to you. There is a wonderful article about land trusts on our website [www.sharmakliche.com](http://www.sharmakliche.com) under the estate planning blog section entitled “land trusts.” This blog will break down the land trust and give you a layman explanation of the benefits. Essentially, the land trust uses hiding mechanisms to hide your assets from creditors. It also allows for deed manipulation to hide ownership of property, name camouflaging to hide your attachment to your trust while still maintaining control of the assets held in trust, spendthrift provisions to protect your beneficiaries from creditors, the use of nominee trustees in certain cases to hide the fact that you created your trust, and more. It is an exceptionally useful tool for you to use in your estate plan. Although some of the terminology used in this paragraph sounds confusing it really is not. Here, in our office we offer free phone consultations to thoroughly explain our process and the different options available.

**Do I need an attorney to create an estate plan?**

Today, there are a variety of options for people to use when thinking about estate planning, however the best plans with the most comprehensive protective measures need to be created with an attorney. There are two main reasons for this; the first is if you use an attorney that attorney/law firm has a fiduciary duty to protect you. This means that if there are updates based on law that need to be done, it is the job of the law firm to inform you as to when those should be completed. Secondly, if there is a mistake in your estate plan and it gets overturned in court, the beneficiaries have someone to hold accountable, namely the attorney.

If you choose to use companies that offer to hold themselves out as document preparers but are NOT attorneys (such as the online companies currently out there), they specifically state that they are not attorneys and therefore they do not guarantee the accuracy of their documents. This language is there to let you know if you use them, it is not their problem if the document does not do what it is you want. Although cheaper to use these online companies, the document quality differs greatly between what an attorney can provide you versus what an online company will give you. For example, I have yet to see any online company offer asset protection measures in their revocable trusts. Instead they simply say asset protection is not available for revocable trusts, which is completely false.

In short, this document is the most important document you will ever create. Make sure you complete it with someone who is credible, reliable, and knowledgeable.

**How often do I need to update my estate plan once created?**

Once you have a comprehensive estate plan, there are three trigger factors that will require you to update your document. The first is if five years have passed. If it has been five years since you have updated your estate plan, you will need to update it. The durable powers of attorney need to be updated once every five years. The second is if there is a change in congressional law that affects you. For example, you are a same sex couple and now that marriage is legal for all, this is the perfect time to adjust your estate plan. Thirdly, if there is change to your family, such as having another child then the estate plan must be updated. A good estate plan changes as your life changes. Your attorney should inform you about changes to the law, and about the five-year rule. The changes to your family however are your responsibility to report to your attorney.

**How important is my attorney client relationship?**

In estate planning this has the utmost importance. There are two main reasons for this importance. One, there is a fiduciary duty your attorney has to you as the client to provide the best quality plan he/she can create. Two, this estate plan needs to be updated frequently. So, you should have a good working relationship with your attorney. This means that both you and your attorney are on the same page with the goals listed out in your plan, and you get along. There are going to be situations where either you as the client or your attorney are not a good match. Personally, I have told this to potential clients who I felt were not a good match with the philosophies of our law firm. It is ok if you feel like you would be better matched with someone else. This is something that you should tell your attorney and explain why you feel this way. When I suggest to a potential client why it would be better to for him/her to work with someone else, I do so thoroughly and kindly. It may be that you are looking for language that is not common, and the attorney is not comfortable writing the trust that way. Or you are looking for asset protection and the attorney that you chose does not know how to do that. More likely than not, you and your attorney will work together well. Having a good working relationship between the client and the attorney is the key to success.

**What should I look for when hiring an estate-planning attorney?**

When hiring an estate-planning attorney there are four main parameters to consider:

The first is competency. This means that the attorney is knowledgeable about the law and has a good understanding about how your estate plan will protect you and your family. This requires more than simply a basic understanding of estate planning because the estate plan is the most important document you will create during the course of your life. If the attorney is not able to fully answer your questions, please get a second opinion.

The second is affordability. The old adage of “you get what you pay for” remains true especially in estate planning. There are large discrepancies in the quality of an estate plan. The best attorneys cost more, but the additional costs are worth it. Remember, you will have to update your trust at least every five years and you want to make sure that the law firm that you are using is going to up to date on new laws, changes to existing laws, and able to provide you with the most current information that can be used to protect you and your family.

The third is accessibility. This is hardest part of an attorney client relationship is accessibility. The most common complaint about attorneys from clients is that the attorney never returns my calls. Accessibility is extremely important in estate planning because the laws change frequently. Your attorney should be able to return your call within 24 hours. You as the client should feel comfortable calling whenever you have a question. Depending on the type of estate plan you decide to get, especially ones with asset protection, business related questions might come up frequently which means you will need access to your lawyer.

The fourth and final one is your gut. Usually, your gut will tell you if the attorney you chose is a good match. I never go against my gut and I recommend the same for my clients.

**Closing**

The type of estate plan, the attorney/law firm that you choose, and the accessibility of the attorney to the client are the most important factors when making a decision. It is my hope that this information has been useful for you and will allow you to make the best decision for your family.

We have offices throughout Southern California from Valencia to Carlsbad. For a full list of offices, please go to our website: [www.sharmakliche.com](http://www.sharmakliche.com). We also offer free phone consultations 7 days a week. Please call us for a free legal consultation at 714.642.3838.

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