FREQUENTLY ASKED QUESTIONS RE: ESTATE PLANNING

What is a will?

A will is a traditional legal document in which you name the persons (or institutions) who will receive your property upon your death. In a will, you also name an executor.

After your death, the executor is required to manage the affairs of your estate and insure that your estate property is distributed in accordance with the will.

In a will, you may also name a guardian for your minor children, make specific gifts to persons or charities, provide for your funeral instructions and specifically exclude persons from taking any part of your estate.

What is a probate?

Probate is a court-supervised process which provides for the transfer of your property after your death to the beneficiaries who are named in your will. If you die without a will, your probated estate does not automatically pass to the government, rather it goes to your heirs at law who are usually your spouse and next of kin.

Having a will does not automatically trigger a probate. Not having a will does not automatically trigger a probate. Probate may not be necessary if your estate is smaller than $150,000, if your assets are held in joint tenancy or trust, with a beneficiary designation, or as spousal property.

Probate has advantages and disadvantages. For example, if a dispute arises about the distribution of the property, then Probate Court is accustomed to resolving such disputes fairly and in strict adherence to well-defined rules. In a probate, the court-appointed representative of the estate or the executor is usually required to notify interested persons before any distribution is made or any unusual action is taken. Those who disagree are given the opportunity to object.

A living trust is usually not court supervised and the trustee may take many different actions and make distributions without having to notify persons first. The law imposes duties and responsibilities on the Successor Trustee, but often times those responsibilities are not spelled out in the trust document or other

instructions. For instance, each next of kin, each person named as a beneficiary, and each person named as executor or alternate trustee is entitled to a formal, written notice from the Trustee and is entitled to ask for a copy of the Trust document. If such a notice is not sent, the time to challenge the trust is extended considerably. If you've been named as a Successor Trustee it is advisable to see an attorney within about 60 days of the death of the Trustor.

Disadvantages of a probate include its public nature. Many probates are lengthy, particularly when compared to the time required to distribute the assets of a living trust. There can also be large attorney's fees generated in a large probate.

How much does the probate attorney charge?

California state law regulates the maximum amount that an attorney may charge to represent an executor or court-appointed representative in a probate. The law permits a fee based on a percentage of the gross value and income of the probated estate, usually between 1% and 4%. All attorney's fees must be reviewed and approved by the court -- usually before the attorney can be paid.

What is a living trust?

The primary purpose of a living trust for estates not subject to death tax is to avoid a probate. In this instance, a typical living trust is a revocable document in which you transfer your property to yourself as trustee of the trust. Then you manage the trust property for your benefit during your lifetime. You name a successor trustee who manages the trust after your death or incapacity, after which the living trust usually cannot be modified or revoked.

After your death, the successor trustee distributes the trust assets to the beneficiaries you have named in the trust, without the necessity of a probate. A trustee is a person who occupies a position of trust and confidence and is subject to strict financial responsibility. A successor trustee is not supposed to mingle trust assets with his own. Most living trusts require a successor trustee to provide a written accounting to the beneficiaries of the trust from time to time. This involves good record keeping and bookkeeping skills and usually the help of an accountant or attorney.

For larger estates, post death attorney's fees and expenses for a trust administration are usually considerably less than probate attorney's fees and expenses.

Unlike a will, a living trust is not something that you sign and put away without much else to do. After you sign it, you must transfer title of your assets to the living trust. This can involve considerable paper work and several trips to the notary or bank for the witnessing of your signature.

A marital deduction/bypass (A/B) trust might reduce or eliminate federal estate taxes for a married couple. It is different than a simple living trust and requires substantial administrative tasks after the death of the first spouse. It may also require you to account to your heirs before you die, but it can result in large tax savings.

Can the way in which I hold title make a difference?

Yes. The way you hold title to assets may avoid a probate or may result in an income tax advantage but also may result in tax disadvantages. The way you hold title to an asset has very important consequences during your lifetime and after. Before you change title to an asset, you should understand the legal and tax consequences of any proposed change.

Regardless of what it says in your will or living trust, the way you hold title to an asset generally controls the distribution of that asset after your death. For instance, in your will you may state that you want everything you own to go to your children equally, but if you hold an asset in joint tenancy with just one of your children, or a spouse, generally that person may not be required to share that asset with others after your death.