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**Introduction to Estate Planning- Explanation of Terms and Concepts**

1. **What is capacity?** **(Slide # 3)**

When we speak of capacity in a wills’ context, we are specifically speaking of mental capacity. The requirements to have capacity are as follows:

* 1. Must be 18 years of age or older
  2. Must be capable of knowing or understanding generally
     1. Your property
     2. Your family
     3. The effect of executing a will
     4. How the three factors are related to each other.

1. **What are some additional differences between a will and trusts? (Slide # 4)**

|  |  |
| --- | --- |
| **Will** | **Trust** |
| * Once probated, the will and all supporting documents become public record. | * Private unless court administration is used or required. This could be necessary where the testator was the trustee and there is no successor trustee named or where the beneficiaries are in conflict. |
| * Can be used for tax planning but the cost increases and could become as expensive as having a trust. | * More commonly used for tax planning. |
| * Can be used to appoint guardians for the care of minor children | * Cannot be used to appoint guardians for minor children. |

1. **What are the exceptions to probate?** **(Slide # 4)**
   1. The California Spousal Property Petition
   2. Small Estates Act
   3. Non-probate Assets
2. What is the California Spousal Property Petition? **(Slide #4)**

In California, a surviving spouse may file a petition to have property administered outside of probate under these circumstances:

* 1. Where the surviving spouse is the only beneficiary under the will, all the community, quasi-community and separate property of the estate can be transferred under the petition. Where there are other beneficiaries, a separate probate must be held for those assets being transferred to those beneficiaries.
  2. In the absence of a will, the community property can be transferred the spouse under the spousal petition. If the deceased spouse owned any separate property, then a full probate may need to be held for the administration of the separate property assets under the Intestacy Statute.

1. **What is the Small Estates Act?** **(Slide # 4 & 5)**
   1. The Small Estates Act: Personal property can be transferred outside of probate where the gross value of the estate is under $100,000.
      1. The successors of the decedent having an interest in the property can fill out and sign an affidavit which is presented to the holder of the property requesting a transfer of the property.
      2. This cannot be done until at least 40 days following decedent’s death. There must be no probate proceeding pending at the time or have taken place in CA or the personal representative or executor must consent.
   2. For the transfer of real property under the Small Estates Act, the successor must submit an affidavit with the court no sooner than 60 days following the decedent’s death.
2. **What’s included in the gross estate? (Slide # 5)**

* Real Property
* Personal Property
* Life Insurance
* Retirement funds.

1. **What’s not included? (Slide # 5)**

* Vehicles and other state registered property (e.g. mobile homes, commercial coaches, campers etc.)
* Unpaid salary: any amounts owed to the decedent from services in the armed forces and up to $5000 of unpaid salary of other compensation (unpaid vacation) for personal services from any employment.
* Joint tenancy, life estates or any other property passing automatically to surviving spouse
* Multiple-party accounts where the proceeds are payable to another surviving party, or payable on death payee or beneficiary
* Inter vivos trust assets

1. **Non-Probate Assets (Slide # 4 & 5)**

Non-probate assets are those assets which title passes automatically to another person at death. Examples of non-probate assets are:

* Life insurance policies with payable-on-death beneficiaries
* Joint tenancy with rights of survivorship
* Bank accounts, mutual funds, pension funds, IRA’s and other such accounts with payable-on-death beneficiary designations.

1. **Power of Attorneys (POA)** **(Slide # 8)**

A power of attorney is only valid if it was executed when the principal had capacity. Capacity, as used in this context, is the same as capacity in a wills context. Additionally, a power of attorney cannot be used to distribute property after the death of the principal because it is automatically revoked at death.

1. **What is a health care power of attorney (HCPOA)?** **(Slide # 8)**

It is an advanced health care directive. It facilitates the naming of an agent who will be able to make medical decisions for an incapacitated person. The health care power of attorney authorizes the agent to make decisions that the principal (person giving the power) would otherwise be able to make. It can also be durable.

1. **Advanced Health Care Directives (AHCD)** **(Slide #9)**

Most advanced health care directives include both the individual health care instructions and a HCPOA. The authority of an agent named in the AHCD becomes effective when the principal becomes incapacitated. That authority ceased to exists once the principal regains capacity.

1. **California Property Ownership** **(Slide # 12)**

* Community Property (CP): all marital property. E.g. house, bank accounts, furniture
* Quasi-community Property (QCP): property acquired or located in another state that would have been community property had it been acquired in CA or another community property state. E.g. Vacation home in Colorado bought with CP
* Separate Property: property owned prior to the marriage or received through gift or inheritance during the marriage: E.g. $20,000 to Wife from Aunt Mildred or car bought with $20,000 from Aunt Mildred.
  1. CP and QCP are owned equally by both spouses to the marital community. For gifting and estate planning reasons, CP and QCP cannot be distributed without the consent of both spouses.
     1. For property that is gifted without consent, the non-consenting party has the right to set-aside the gift.
     2. The same rule applies where community property is the subject of a will. The non-consenting spouse or that spouse’s agent has the right to set aside such bequests.
     3. Setting aside a gift or bequests involves having that particular transaction declared invalid by the court.
  2. Separate property of a spouse can only by gifted or bequeathed by the owner.
  3. It is therefore important to properly characterize property before any actions are taken regarding that property. It is a litigation trap for property to be bequeathed or devised without its proper character being known. Estate planning is meant to eliminate or reduce the chances of litigation. Not taking the time in the outset to properly characterize the subject property could undo that work.
  4. Note: A person cannot give away more than he/she owns. So here, if the husband dies, only his share of the CP and QCP is up for distributions. **(Slide # 14)**

1. **Probate Statutory Fees Table (Slide #20)**

Fees are the same for both the executor and the attorney.

|  |  |
| --- | --- |
| Estate Value | Fees |
| $100,000 | $4000 |
| $200,000 | $7000 |
| $300,000 | $9000 |
| $400,000 | $11,000 |
| $500,000 | $13,000 |
| $600,000 | $15,000 |
| $700,000 | $17,000 |
| $800,000 | $19,000 |
| $900,000 | $21,000 |
| $1,000,000 | $23,000 |
| $2,000,000 | $33,000 |
| $3,000,000 | $43,000 |
| $4,000,000 | $53,000 |
| $5,000,000 | $63,000 |
| $6,000,000 | $73,000 |
| $7,000,000 | $83,000 |
| $8,000,000 | $93,000 |
| $9,000,000 | $103,000 |
| $10,000,000 | $113,000 |
| $15,000,000 | $138,000 |
| $20,000,000 | $163,000 |
| $25,000,000 | $188,000 |

1. **Introduction to Tax Planning (Slide # 24)**
   1. **Federal Estate Tax**: CA no longer has an estate tax. Estates with a net worth of up to $5, 00,000 does not have to pay any estate tax. This number is effective until 2012. This amount is due to decrease in 2013 to $1,000,000.
   2. **Federal Gift Tax**: Gift tax is only due on gifts that exceed the $13,000 annual exclusion amount. This means that every person is allowed to give up to $13,000 per person, per year without incurring any gift tax.
      1. Married couples can combine their annual exclusion and gift a total of $26,000 per person, per year. Additionally, every individual has a lifetime exemption from gift taxes of $5,000,000 until 2012.
      2. CA does not have a gift tax.
   3. **Generation Skipping Tax**: A generation skipping transfer is a lifetime gift or transfer at death to a person who is 2 or more generations below the person making the transfer. E.g. from a grandparent to their grandchildren.
   4. Once estates exceed the amount stated above, persons seeking estate planning should also consider getting additional tax planning in order to avoid having to pay the estate tax or reduce the amount that will be paid. With a maximum tax rate of 35%, people with vast amounts of wealth can pay significantly in estate taxes.