

# JMBM Taxation and Trusts & Estates Groups

JMBM  
Client Services

## A Basic Guide to Estate Planning

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# Why You Need A Plan

**Y**ou probably know that Wills and Trusts are fundamental parts of an estate plan even if you do not already have a Will or a Trust. What you may not realize is that even if you have not prepared an estate plan with a Will and possibly a Trust, you have an estate plan—the one created for you under the California Probate Code. Unfortunately, the plan created for you by the Probate Code is inadequate for most people for one or more of the following reasons:

1. Assets may not pass according to your wishes upon your death;
2. Your heirs may needlessly pay estate taxes to the federal government; and,
3. Your family and friends may suffer undue inconvenience and expense.

This booklet describes many of the important estate planning issues and introduces some of the principal estate planning techniques that can help avoid these problems.

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Even if you have not prepared an estate plan with a Will and possibly a Trust, you have an estate plan — the one created under the California Probate Code.

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# Estate & Gift Taxes

**E**state planning raises difficult issues. Unfortunately, if you ignore these issues now, you may cost your family thousands or even millions of dollars later, as well as cause considerable anguish. Few people are uninterested in minimizing the taxes payable upon their death, especially after a lifetime of paying income taxes (federal, state and local), sales taxes, property taxes, excise taxes and the like. Most people who create an estate plan have two goals: first, preserve as much of their wealth for their family members and other beneficiaries as possible and second, provide for an orderly disposition of their assets to their designated beneficiaries. We routinely add a third goal—avoidance of probate.

Proper estate planning takes far less time and effort than most people imagine. Most estate plans can give you peace of mind that you have done the right thing. There are often solutions and alternatives for the most difficult problems. The only mistake you can make is to ignore the need for estate planning.

Saving estate taxes, which can consume as much as half of an estate, is one of the main concerns of estate planning. A basic knowledge of the estate and gift tax system, together

known as the wealth transfer tax system, is essential to understanding the benefits of careful estate planning.

## Tax Legislation

The American Taxpayer Relief Act of 2012 (“ATRA”) made significant changes to the estate and gift tax rules for 2013 and after. ATRA made the \$5,000,000 estate and gift tax exemption permanent, and provided it would be adjusted for inflation as of 2010. The Tax Cuts and Jobs Act of 2017 nearly doubles the estate and gift tax exemption under ATRA for 8 years. In 2019, the amount that an individual can cumulatively transfer free of tax during lifetime and at death (to a recipient other than a spouse who is a U.S. citizen and/or certain charitable organizations) is \$11,400,000. This exemption amount, officially called the “Applicable Exclusion Amount,” is indexed for inflation. The top tax rate for transfers exceeding the \$11,400,000 exemption amount is 40 percent. The generation-skipping transfer (“GST”) tax exemption is also \$11,400,000 per individual. These increased exemptions will expire on January 1, 2026. ATRA also made permanent certain “portability” provisions, so that a deceased spouse’s unused estate tax exemption (but not GST exemption) may be used by a surviving spouse.

# Estate & Gift Taxes

Year	Top Estate Tax Rate	Applicable Exclusion Amount
2019	40 Percent	\$11,400,000

## Annual Gift Tax Exclusion

In addition to the exemptions described above, every individual can make gifts during life of up to \$15,000 per recipient per year without paying gift tax. This amount adjusts for inflation and may increase in future years.

## Unlimited Marital Deduction

An individual can transfer an unlimited amount of property to a spouse (who is a U.S. citizen) without estate or gift tax and without reducing the individual's estate and gift tax exemption. Gifts to non-citizen spouses can be taxable to the extent the value of the gift exceeds an annual exclusion amount (\$155,000 for 2019).

## Unlimited Charitable Deduction

Finally, an unlimited amount of property can be transferred to most types of charitable organizations without estate or gift tax and without reducing the estate and gift tax exemption.

## Estate Planning Under Estate Tax Regime

Beyond the tax-free amounts mentioned earlier, most gifts and transfers at death in 2019 and beyond are taxable. If the assets of your estate are not liquid enough to pay the estate tax, your beneficiaries may have to sell some assets to raise funds to pay the tax. Because of the high rates of tax, you should take full advantage of the tax-free amounts. The remainder of this section assumes that the estate tax rules are in effect with a \$11,400,000 exemption amount and a tax rate of 40 percent.

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In addition to annual gifts of \$15,000 to any beneficiary, direct payments to educational and health care providers are tax-exempt in any amount.

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# Estate & Gift Taxes

## Non-Taxable Gifts

A common strategy to minimize estate taxes is lifetime gifting, using the annual exclusion. A married couple (husband and wife, or a same-sex couple) with children can make annual gifts of \$30,000 (\$15,000 per parent per child) to each child without paying any tax or even filing a gift tax return. Gifts need not be made directly to the child, and may instead be made to a trust for the child's benefit. In addition, direct payments to educational and health care providers are tax-exempt in any amount for the benefit of any person. Further, contributions to qualified charitable organizations are tax-exempt gifts. Over the course of five years, a married couple with three children can transfer \$450,000 to their children, thereby removing the transferred funds from their estate and saving up to \$180,000 in estate taxes. At the same time, the couple can directly pay for their children's (and grandchildren's) school tuition and health care, all without paying any gift tax.

Once a gift is made, all appreciation on the gifted asset is out of the donor's estate. Therefore, if you own stock of low value that you expect to appreciate in the future, you could make a gift of that stock now (either as an annual exclusion gift or as a taxable gift, which

is still tax-free if less than your available exemption amount); if the stock's value increases by the time of your death, all of that appreciation would not be part of your taxable estate.

## Taxable Gifts

Tax-free gifts described above are often the simplest way to remove assets from your estate at no transfer tax cost. However, taxable gifts (i.e. those on which you must either pay gift tax or apply your exemption) are a more tax-efficient way to transfer assets than transferring assets at death. This is because the gift tax is tax exclusive (i.e. the amount of gift tax due is not included in the taxable gift), while the estate tax is tax inclusive (i.e. the tax due is part of the taxable estate). Therefore, it is more expensive to pass assets at death.

### Example

Assume there is a tax rate of 40 percent and you have used your entire \$11,400,000 exemption. If you wanted to make a \$450,000 gift to a child, you would need \$630,000: \$450,000 for the gift and \$180,000 for the taxes.

# Estate & Gift Taxes

In contrast, to pass \$450,000 to a child at death you would need \$750,000: \$450,000 for the bequest and \$300,000 in taxes on the \$750,000 necessary to make such a bequest.

## Effective Exemption Amounts

The above gifting techniques require that you relinquish control over the transferred property. Although gifting is effective from a tax standpoint, it can be disruptive during life. There are certain ways to place some restrictions over the transferred assets, but such arrangements (like trusts) can be expensive to implement. Because of these issues, many people find it difficult to make outright gifts and instead choose to rely on planning to avoid the estate tax upon their death.

However, even without making any lifetime transfers, a married couple can save hundreds of thousands of dollars (or much more) in estate taxes through proper estate planning. For example, assume that a married couple can transfer \$22,800,000 of assets tax-free (i.e. two \$11,400,000 exemptions). However, to do so, they must ensure that the marital deduction and their estate tax exemptions are

both coordinated and fully used. The following examples demonstrate the proper usage of these tax benefits for similarly situated married couples with a community property estate of \$25 million.

## *Everything to Surviving Spouse*

In the first scenario, assume a spouse dies (the “deceased spouse”) and decides to leave the deceased spouse’s entire estate (\$12.5 million, or half of the community) to the surviving spouse (also referred to in this guide as the “survivor”). There is no tax on the deceased spouse’s \$12.5 million because of the unlimited marital deduction. Shortly thereafter, the survivor dies with an estate of \$25 million (\$12.5 million from the deceased spouse and \$12.5 million of the survivor’s own one-half interest in the former community). At a 40 percent tax rate, the survivor’s estate will owe \$5,440,000 in estate tax (\$25 million estate less \$11,400,000 of exemption, multiplied by 40 percent).

Subject to the discussion below on portability, this large tax liability (approximately 22 percent of the estate) is the result, in part, of wasting the deceased spouse’s estate tax exemption. The deceased spouse’s exemption was wasted because the deceased spouse left all assets to the surviving spouse tax-free

# Estate & Gift Taxes

Tax on Second Death (Scenario 1)		Tax on Second Death (Scenario 2)	
Gross Estate	\$25,000,000	Gross Estate	\$13,600,000
Less Applicable Exemption	\$11,400,000	Less Applicable Exemption	\$11,400,000
Taxable Estate	\$13,600,000	Taxable Estate	\$2,200,000
Tax	\$5,440,000	Tax	\$880,000

under the marital deduction, but left no assets to beneficiaries (other than the surviving spouse) who can receive assets up to the exemption amount tax-free.

## *Use of Exemption*

In the second scenario, upon the deceased spouse's death, \$11,400,000 of the deceased spouse's estate (equal to the exemption amount) is transferred to a "Bypass Trust" (sometimes called a family trust, credit-shelter trust or B Trust) for the benefit of the deceased spouse's family (i.e. the surviving spouse and their children) and the remaining \$1,100,000 of the estate is transferred to the surviving spouse. Again, no estate tax is due because the deceased spouse's exemption amount applied to the \$11,400,000 and the unlimited marital deduction applied to the remaining \$1,100,000. Upon the survivor's death, the estate would be \$13,600,000 (the \$1,100,000

received from the deceased spouse and the survivor's own \$12.5 million interest in the former community). The \$11,400,000 in the Bypass Trust established at the deceased spouse's death is not part of the survivor's estate, because the survivor's use of the assets is restricted (as discussed below). The estate tax on the survivor's estate would be \$880,000, a savings of nearly \$4.6 million over the first example.

Subject to the discussion below on portability, without a Bypass Trust, the deceased spouse's exemption is not used at all because the assets pass tax-free to the survivor under the marital deduction. Assets which could have passed tax-free to their children (or other non-spouse beneficiaries) are instead included in the survivor's estate. Using the Bypass Trust, the first \$11,400,000 of the deceased spouse's assets are never taxed, because they are exempt from tax at the deceased

# Estate & Gift Taxes

spouse's death and not included in the surviving spouse's estate on his or her subsequent death. Additionally, we have assumed here that the assets transferred to the Bypass Trust did not appreciate after the deceased spouse's death. If the assets appreciate, the benefits of keeping them out of the surviving spouse's estate is even greater.

## Limits on the Bypass Trust

To achieve this result, the assets of the Bypass Trust are not transferred outright to the survivor. Instead, the survivor's rights in the Bypass Trust are limited. The survivor may receive all of the income and may also receive principal of the Bypass Trust if necessary for health, maintenance, support and education—these are fairly broad standards intended to maintain the standard of living the couple shared when both were living. Because the survivor's rights are restricted, the assets in the Bypass Trust are not considered part of the survivor's estate. Upon the survivor's death, the assets in the Bypass Trust would go to their children (or elsewhere if so directed), and could be held in trust until those children reach specified ages, or even for the children's lifetimes.

This division of the estate upon the death of the first spouse to save estate

taxes is sometimes referred to as an "A-B Trust." The B Trust is the \$11,400,000 Bypass Trust that passes assets free of estate tax to the couple's children, with certain benefits for the surviving spouse. The A Trust is the survivor's trust, which includes the survivor's own interest in property, plus all property of the deceased spouse that passes tax-free to the surviving spouse because of the marital deduction.

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The portability provisions allow a surviving spouse to use a deceased spouse's unused estate tax exemption.

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## Marital Trust

A deceased spouse's estate in excess of \$11,400,000 can pass either to the surviving spouse or to a separate trust called a "Marital Trust" (sometimes called a QTIP Trust or C Trust). Transfers to a surviving spouse in a properly structured Marital Trust are not subject to estate tax upon the death of the first spouse. All income of the

# Estate & Gift Taxes

Marital Trust must be distributed to the surviving spouse for the remainder of the surviving spouse's life, and the surviving spouse may also be given access to the Marital Trust principal. Upon the surviving spouse's death, the remaining assets of the Marital Trust will be included in the surviving spouse's estate. The use of a Marital Trust assures that the portion of the deceased spouse's assets remaining after the death of the surviving spouse will pass as directed by the deceased spouse during his or her lifetime. While the surviving spouse can change the beneficiaries of the survivor's trust, the surviving spouse generally cannot change the beneficiaries or the other terms of the Marital Trust.

## Portability Between Spouses

ATRA continued a recent concept in the estate tax laws called "portability." The portability provisions allow a surviving spouse to use a deceased spouse's unused estate tax exemption. For instance, assume a married couple has a community property estate of \$16 million. Upon the first death, the deceased spouse's entire estate is left to the couple's children (\$8 million). No estate tax is due because the deceased spouse's exemption is applied to the \$8 million estate. But \$3,400,000 of the deceased spouse's \$11,400,000

exemption has not been used. In past years, that \$3,400,000 would have been wasted. However, under portability the surviving spouse can elect to use that \$3,400,000 at his or her death. This would increase the survivor's gift and estate tax exemption to \$14,800,000, which is helpful if the survivor lives many years and his or her estate appreciates substantially.

Similarly, in the foregoing examples (married couple with \$25 million estate), if the deceased spouse left his or her \$12.5 million estate to the survivor and did not create a Bypass Trust to shelter the deceased spouse's \$11,400,000 exemption amount, the survivor could elect to use the deceased spouse's \$11,400,000 exemption on the survivor's death (provided an election to do so is made on a timely filed federal estate tax return following the deceased spouse's death). When the survivor later dies, there would be \$22,800,000 of exemption available (the deceased spouse's \$11,400,000 plus the survivor's own \$11,400,000). The tax result is essentially the same as under the second scenario (creation of Bypass Trust). However, portability allows a step up in income tax basis on the second death for all of the couple's assets and reduces some complexity by creating fewer trusts after the first death. Despite this, the Bypass Trust has some

# Estate & Gift Taxes

advantages over portability:

- Assets in a Bypass Trust may appreciate after the deceased spouse's death and the entire Bypass Trust, including appreciation, will pass to the beneficiaries without any estate tax.
  - Portability is more complicated if the surviving spouse remarries, and under some circumstances the surviving spouse's ability to use the deceased's spouse's exemption may be lost.
  - The Bypass Trust ensures that the deceased spouse's exemption will be used for the deceased spouse's intended beneficiaries;
- under portability, the surviving spouse could use that exemption for the benefit of others (e.g. children with a subsequent spouse).
- The Bypass Trust assures the deceased spouse that his or her assets will eventually end up with his or her beneficiaries after the second death. Under some forms of portability, this is not the case because the deceased spouse's assets remain within the surviving spouse's control.
  - The deceased spouse's GST tax exemption can be allocated to the Bypass Trust, but is lost under some forms of portability.

**M**uch of estate planning focuses on avoiding probate. Although probate is an everyday occurrence and an executor or administrator, with the assistance of a competent attorney, can complete the probate process without major inconvenience, it is an unnecessary disruption that should almost always be avoided if possible.

## What is Probate?

Probate is the process of identifying a deceased person's property, paying any debts, identifying who is entitled to the deceased person's assets (whether heirs or other beneficiaries), and distributing the property to those beneficiaries. An executor (usually named in the Will) does this work, most often with the assistance of an attorney. Unlike most trust administrations, the probate court supervises this entire process. If your

assets must go through probate, the beneficiaries that you designate by your Will must wait for the assets while the probate process unfolds in court.

## Advantages and Disadvantages of Probate

Probate has advantages and disadvantages. The primary advantage is that the process is court-supervised, which ensures that property is accounted for and distributed as intended. But probate has several significant disadvantages, which are summarized below.

### Expense

Probate can be an expensive process. The executor and the executor's attorney are each entitled to a statutory fee according to the schedule below:

Gross Value of Estate	Executor's Fees & Attorneys Fees (Each)
First \$100,000	4 Percent
Next \$100,000	3 Percent
Next \$800,000	2 Percent
Next \$9 million	1 Percent
Next \$15 million	0.5 of 1 Percent

# Probate

For all calculations above \$25 million, the fee is a reasonable amount to be determined by the court.

In addition to the above, the court may allow additional compensation for extraordinary services in an amount the court determines is just and reasonable.

Under this schedule, the probate of a gross estate of \$1 million (this amount is a gross figure that does not exclude debts) will cost more than \$45,000. In addition, attorneys and executors may get “extraordinary” fees over and above the above amounts if an estate is complex.

## Delay

Probate is time-consuming. Even if affairs are in order, it can be at least a year before the beneficiaries receive their bequests. Frequently, probate can take multiple years to conclude.

## Publicity

Probate is a public process. After a person dies, his or her Will becomes a public document. Proceedings are held in open court. This may be especially distressing to individuals who try during their lives to protect their families from the media or would simply like their affairs to remain private. Probate can provide the media and the general public access to information about

family finances and other personal matters.

## Inconvenience

The combination of these disadvantages makes probate a very inconvenient process. Those who have gone through the process often are dissatisfied with the procedure and will probably tell you that it is a waste of time and money. In the end, probate is unnecessary. There is no need to be in court, and careful planning can avoid probate court entirely.

## Avoiding Probate

The following methods of holding title can be used to avoid probate. Keeping assets out of probate does not, however, exclude them from your taxable estate.

## Retirement Accounts

If you have an IRA or Keogh plan, or contribute to a 401(k) account through your employer, you can name beneficiaries who will receive these assets upon your death. If you are married, you should generally name your spouse as the primary beneficiary of these plans. Regardless of who you name as beneficiary, these assets pass without going through probate if the beneficiary survives you. If you want to put these assets in trust for your beneficiaries, you might consider

naming your Living Trust (explained below) as the beneficiary of your retirement accounts. However, this requires careful planning to avoid adverse tax consequences.

## Life Insurance

Life insurance proceeds go to the persons named on the policy's beneficiary designation form. These proceeds are ordinarily not subject to the probate process, but if a beneficiary is not named, or if the named beneficiary does not survive the deceased, the proceeds may be subject to probate. The proceeds can also be included in the gross estate of the deceased.

## Joint Ownership

If you own valuable property (e.g. real estate) with someone else, you can avoid probate when the first owner dies. For instance, assets held in joint tenancy pass to the survivor without probate. You can also transfer some assets held as community property to your surviving spouse without probate. When one owner dies, it is easy for the

survivor to transfer the property into his or her name alone, without probate. After that, however, the survivor will have to find another method to avoid probate on his or her death.

## Create a Living Trust

A Living Trust is the most flexible probate-avoidance technique. In fact, it was created to enable people to avoid probate. A Living Trust is a separate entity which owns your property. The Living Trust's ownership of property has virtually no legal or tax consequences while you are alive, because you control the Living Trust.

After your death, the successor trustee transfers property owned by the Living Trust to the family members, friends and/or charities you designate, without probate. The terms of the Living Trust, which are similar to a Will, authorize this transfer. Probate courts generally do not supervise property that is owned by a trust. The features of the Living Trust are discussed next.

# Living Trusts

In the Introduction, we noted that your estate plan should direct the disposition of your assets according to your wishes and limit the taxes, costs and inconvenience of transferring your assets upon death. In the past, a Will (alone, without a Living Trust) was used to accomplish these transfers. Your Will can direct the transfer of the assets that you are legally entitled to dispose of in any way you want. In a Will, you can bequeath assets in trust or outright, you can make bequests to charity or to friends and you can establish an A-B Trust to reduce estate taxes. However, if your assets exceed \$150,000 in value or if you own real property, a formal probate proceeding is required, with all of the disadvantages discussed above.

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**Because the Living Trust is revocable, it is disregarded for most purposes during your lifetime.**

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## Living Trusts Overview

A Living Trust is a special entity that you, as “grantor,” create by preparing and executing a formal trust document,

declaring that you are holding certain property “in trust.” You retain the right to revoke or amend the trust at any time, or to take the property back out of the trust.

Because the Living Trust is revocable, it is disregarded for most purposes during your lifetime. You pay taxes on any Living Trust income during your lifetime, and your creditors could seize trust assets to pay your debts as if you continued to own those assets directly without a Living Trust.

However, at your death, a portion of the Living Trust becomes irrevocable (since you are no longer around to revoke it) and takes on new life as a separate entity. Any property owned by the Living Trust is not subject to probate, because it is not owned by you or your estate. However, the probate court has authority to resolve disputes about the Living Trust, and the Living Trust usually remains liable for your debts (including any estate taxes). Like any other decision, the decision to have a Living Trust has its advantages and disadvantages.

## Advantages

The major advantage of a Living Trust is that it can accomplish almost all of your estate planning goals in a single document. First, it directs the

# Living Trusts

disposition of your assets as you desire. Second, if properly administered, your beneficiaries will avoid the cost and inconvenience of the probate process. Third, upon your disability, a successor trustee can manage the Living Trust for your benefit during your lifetime, thereby possibly avoiding a public conservatorship proceeding in court. Finally, if you are married, a properly drafted Living Trust can save hundreds of thousands, or even millions, of dollars in estate taxes upon death.

## Disadvantages

The only disadvantage is the slight inconvenience and cost of establishing and administering a Living Trust. To take full advantage of the probate avoidance goal, you will have to retitle your valuable assets (e.g. your home, other real estate, bank accounts, brokerage accounts and partnership or LLC interests). However, this small initial cost will completely avoid larger costs that would be imposed later if you did not have a Living Trust.

## Management of Trust Assets by Trustee

### Grantor as Trustee

You are in complete control of the Living Trust's assets during your life. You are the grantor, beneficiary and trustee of the Living Trust and you can use Living Trust assets in any way you see

fit. If a married couple creates a Living Trust, both spouses can be named as co-trustees. If one spouse is unavailable to act as co-trustee, the other spouse can act as sole trustee with complete control over the Living Trust assets.

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There are often compelling reasons to have a corporate trustee as a successor trustee.

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## Successor Trustee

Should you become incapable of managing your assets, the successor trustee named in the Living Trust instrument can take over the management of the assets without the requirement of a court-appointed conservator.

### *Individuals as Successor Trustees*

Your successor trustee(s) can be children, other relatives or friends who are responsible and in whom you have confidence. If the successor trustee is also the beneficiary of the Living Trust at the grantor's death, the successor trustee's only duty may be to distribute

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the property to himself or herself at that time.

## **Corporate Trustee**

The successor trustee can also be a bank or other financial institution. There are often compelling reasons to have a corporate trustee as a successor trustee. First and foremost, corporate trustees usually possess the professional skills and expertise to administer the Living Trust appropriately. Second, if you rely on individual trustees, you may have to name numerous successors to serve in the event that any individual serving is unable or unwilling to continue. Third, the use of corporate trustees can result in lower overall administrative costs to the trust, since a corporate trustee typically provides accounting and investment advisory services along with trust administration for a single fee.

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**Corporate trustees usually possess the professional skills and expertise to administer the Living Trust appropriately.**

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## **Upon Death**

Upon the death of the grantor, assets pass according to the provisions contained in the Living Trust. The Living Trust may provide for assets to be distributed outright to children, to be held in trust until the children reach certain ages, or held in trust for their lifetimes. Assets could be distributed outright or in trust to friends or charities. These dispositive provisions accomplish exactly what a Will can accomplish, while at the same time avoiding probate on assets in the Living Trust.

## **Married Couples**

When a married couple creates a joint revocable Living Trust, both generally act as co-trustees during life. The community or separate property character of the couple's property (assuming they live in a community property state, such as California) should not be altered by placing the property in trust. Each spouse has complete ownership interest in such spouse's separate property and a one-half ownership interest in the community property during marriage and at death or dissolution of the marriage. If either spouse becomes incapacitated, the other spouse, as sole trustee, can take all actions relating to community property, and administer the incapacitated spouse's separate property for his or her benefit, without

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requiring a conservatorship proceeding in court.

## Trust Funding

If you create a Living Trust, it is essential to “fund” it by transferring assets into it during your lifetime. Only assets held in the name of the Living Trust can be managed by the trustee and ultimately pass at your death without probate. You can freely add to or withdraw assets from the Living Trust at any time without amending the Living Trust. Once transferred to the Living Trust, the assets will continue to be held under trust until consumed, sold, or removed from the Living Trust, at your discretion. Amending the Living Trust will not affect ownership of the assets, so assets do not have to be re-confirmed as belonging to the Living Trust after an amendment.

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You can freely add to  
or withdraw assets  
from the Living Trust  
at any time.

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The funding process includes: (1) executing new deeds to convey your real estate parcels to the Living Trust, (2) retitling your bank and brokerage accounts in the name of the Living Trust, (3) assigning interests in entities such as partnerships and LLCs to the Living Trust, and (4) making sure your other valuable assets are held by the Living Trust.

**A** Living Trust can dispose of all of your property in the same way a Will can. However, a proper estate plan should contain a “pour-over” Will. This is a backup document to the Living Trust. It will transfer (pour-over) into your Living Trust any property that you did not transfer into your Living Trust while you were alive.

However, transfers made pursuant to a Will are generally subject to probate if the assets you hold directly (not in the Living Trust) exceed \$150,000.

In addition, the Will is the document in which you nominate guardians for any minor children. The guardians are the people your minor children (under the age of 18) will live with upon your death. Typically, a married couple nominates the surviving spouse as the guardian of any minor children. However, it is also necessary to nominate successor guardians who will serve if both spouses have died. The appointment of a guardian (other than a natural parent) is subject to approval by the court.

# Disability

Estate planning also involves planning for disability. The best planning device for your assets is the Living Trust, since the trustee manages the assets. If you are unable to manage your own property, the successor trustee will do so for your benefit. Certain other documents allow those close to you and trusted by you to make decisions. The principal types of these documents are Powers of Attorney.

A Power of Attorney gives the person you designate the power to act for you in certain circumstances. There are two typical types of Powers of Attorney. One type deals with decisions relating to health care, while the other deals with financial decisions, including asset management. If a Power of Attorney is “durable,” it continues to be effective even if you become incapacitated. By contrast, a “non-durable” Power of Attorney ceases to be effective when you become incapacitated.

## Advance Health Care Directive (“AHCD”)

An AHCD gives the person you designate (the “agent”) the power to make health care decisions for you if you are unable to do so yourself. The agent can be a spouse, other family member or friend, but cannot be a health care provider or operator of a

residential care facility.

Under an AHCD, the agent must exercise his or her power according to your desires which you have made known in any manner. Subject to your expressed desires, the agent has broad powers to make health care decisions for your physical and mental care, including terminating extreme measures for life support.

You can revoke an AHCD at any time. An unrevoked AHCD will remain in effect indefinitely unless you specify an expiration date. Statutory form AHCDs are widely available, but certain formalities, such as having the document witnessed or notarized, must be followed when executing an AHCD. To ensure that an AHCD is legally effective, you should follow these procedures precisely. As with a Will or Living Trust, you should consult with an experienced attorney if you have any questions.

## General and Special Powers of Attorney

These types of Powers of Attorney deal with various financial decisions and give the person you designate (your “attorney in fact”) the power to handle property and make management decisions in your place for assets not held in the Living Trust. This can be

a simple, inexpensive way to arrange for someone to make your financial decisions. Although not accepted in all situations, a Power of Attorney can become extremely important if you are unavailable to act for any reason.

A financial Power of Attorney can become effective immediately when you sign it, or on the occurrence of a contingency such as your incapacity (the latter form is called a “springing power” because it is not effective immediately). The Power of Attorney can be revoked at any time, but will remain in effect indefinitely unless you specify an expiration date.

The powers given to your attorney in fact can be narrow or broad, depending on your needs and wishes as expressed in the document creating the Power of Attorney. Some powers, however, are not available to the attorney in fact unless you expressly authorize them in the Power of Attorney. For example, an attorney in fact may not make gifts on your behalf or alter your estate plan, unless you specifically authorize him or her to do so.

The attorney in fact under a General Power of Attorney is usually authorized to make decisions in the areas of (1) property management (real property transactions, tax matters, banking

transactions and the like) and (2) personal management (such as paying for health care, food and shelter).

A General Power of Attorney can be an effective method of avoiding a conservatorship if you become incapacitated. Even if you already have a Living Trust, there may be property management matters which fall outside the scope of the Living Trust for which a General Power of Attorney would be effective.

A Special Power of Attorney is more limited in scope than a General Power of Attorney. For example, we typically recommend Special Powers of Attorney that authorize the attorney in fact to transfer your assets to your Living Trust. This power could be exercised in the event of your incapacity, so that no assets remain outside of the Living Trust at your death. Such a Special Power of Attorney can create a last minute opportunity to fund the Living Trust and avoid the probate of assets not transferred to your Living Trust.

Special Powers of Attorney can be prepared to allow an agent to handle an almost infinite variety of specific or limited tasks. Special Powers of Attorney are appropriate when you prefer not to grant broad authority to your attorney in fact.



# Your Needs Are Unique

This brochure describes some basic aspects of estate planning. Wills and Living Trusts are the necessary foundation of any estate plan. However, there are many other elements of estate planning that are beyond the scope of this summary. For some clients there may be specific family needs that must be addressed. For others, there may be liquidity concerns. And of course, for many clients, there are a variety of techniques available to reduce the overall estate tax burden. Please call us to discuss estate planning for you and your family that is appropriate for your needs.

Visit us online at  
[jmbm.com/trusts-estates](http://jmbm.com/trusts-estates)

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For more information about JMBM's estate planning expertise, contact us at:

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