
Irrevocable Trust Asset Protection

We help clients avoid the expensive and burdensome court process by having certain documents as part of their estate plan. The key documents are a Revocable Trust (and sometimes an Irrevocable Trust), Statutory Power of Attorney, Expanded Durable Power of Attorney, Advance Health Care Directive, and a HIPAA authorization.

First, having a trust is key to the future management of your assets in the event of your incapacity (whether it be a temporary or a permanent incapacity). Revocable trusts are trusts which are amendable by the person creating the trust. The assets inside the revocable trust are part of your estate at death (with some exceptions, i.e. charitable bequests, bypass trust creation at the death of the first spouse, etc.). There are many benefits in the use of revocable trusts. The most commonly known is the ability to avoid probate. They are also great tools to manage property in the event of your incapacity. *However, assets placed into a revocable trust will **not** be protected in the event it becomes necessary to qualify for long term care under Medi-Cal.*

Irrevocable trusts on the other hand are not amendable, with a few minor exceptions. In the context of planning for long term care, these types of trusts can be powerful asset preservation vehicles so long as there are trusted children or other family members that are willing to be a part of the plan. Irrevocable trusts are commonly utilized in high net-worth estates to reduce or eliminate estate tax exposure. Today, we have borrowed many of the strategies from high-end estate planning to achieve asset preservation for more modest estates to pre-plan for the possibility of a future long term care need.

To bring this concept to life, imagine the case of Uncle Bob. Uncle Bob has been a widow for five years. He is now 78 years old and he has two adult children. Bob's mother passed away at the age of 89 from Alzheimer's disease. Now, Bob is starting to exhibit early warning signs of cognitive impairment. Bob's daughter, Linda, is very concerned about her father and wants to make sure he is happy, healthy and secure. Bob is recognizing his own deficits and is worried about the future and how he is going to pay for his long term care.

Both of his children work full time and have children of their own. Bob owns a home in Newport Beach near the coast that he has lived in for 35 years. His home is now worth \$800,000 and Bob has about \$200,000 in liquid assets. Bob does not want to have to sell his home immediately in the event he needs funds to pay for his long term care (including skilled nursing care). In this case, an irrevocable asset pres-

ervation trust can provide an efficient solution and prevent a future Medi-Cal estate recovery action, while maintaining many of the tax benefits as though Bob owned his home in his own name.

After consulting with Bob and his daughter Linda, Bob has decided that a revocable trust and an irrevocable asset preservation trust are the ideal solutions for him. He decides to transfer his home by gift to the trust. Because of the way the trust is drafted, Bob can maintain his Proposition 13 property tax basis he has in his home and is still able to apply his Internal Revenue Code Section 121 federal capital gains exemption should his home be sold inside the trust while he's still alive.

The Section 121 Exemption, as it is commonly called, allows a single person to exclude up to \$250,000 of capital gains (\$500,000 for married couples) on the sale of a primary residence. Bob also decides that he'd like to move \$100,000 of his liquid assets over time to the irrevocable trust in order to avoid triggering a Medi-Cal ineligibility penalty period. He decides to transfer the other \$100,000 to his new revocable trust for his lifestyle and as a rainy day emergency fund and list his daughter Linda as a co-trustee. For future Medi-Cal eligibility, we devised a gifting strategy to the trust. He has approximately \$4,000 a month in income from Social Security and his pension, which is all he needs for his lifestyle at this point in time.



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Bob is very close to both of his children, but Linda has been the one who is most involved with Bob's healthcare and well-being. Bob has decided that he would like Linda to serve as Trustee of the irrevocable trust and as co-trustee with him on his revocable trust. Bob's son John is the successor trustee after Linda on his revocable trust and will serve as a successor trustee to Linda on Bob's irrevocable trust.

After Bob's home and the \$100,000 are transferred to Bob's irrevocable trust, Linda then manages the property inside the trust. Bob decided to list both Linda and John as lifetime beneficiaries and death beneficiaries. What this means is that during Bob's lifetime, Linda, as Trustee, has the authority to make distributions of trust principal and income to both John and herself. Bob is not a beneficiary of his irrevocable trust. Remember, by transferring the home and the \$100,000 to the trust, a gift was made to his children through the irrevocable trust and he no longer owns that



property. The children are free to do what they wish with the trust assets and in a good family such as Bob's, one might expect that Linda and John will look out for Bob's best interests down the road should he ever need them to.

Although we have tried to make this look like a simple transaction, there are many details and considerations that go into the design of this type of trust, as well as the gifting strategy to this trust. This is a complex trust and transaction. It is very important that you seek appropriate legal counsel to accomplish this transaction and not attempt to undertake this type of planning yourself.

The next document Bob needs to make sure is part of his estate and long term care plan is a Durable Power of Attorney. For our clients, we prepare two financial Power of Attorney documents. The first one is a Statutory Durable Power of Attorney and the other is an Expanded Durable Power of Attorney. We like to have both working together because each has a tactical advantage. The Statutory Power of Attorney is helpful because if a bank or financial institution refuses to accept it, they could be liable for attorney's fees and damages if they fail to accept California's statutory document. It has some teeth built into it through the state statute.

The Expanded Durable Power of Attorney on the other hand helps us to plan for Medi-Cal qualification, disclaimer planning, and other advanced estate and gifting planning just to name a few (should the need arise in the future and Bob does not have legal capacity to sign documents). It is much more comprehensive in terms of what it can do for you than the Statutory Form Power of Attorney, so we like to have both in place in your plan.

The last two documents that are critical in your plan are the Advance Health Care Directive and the HIPAA Authorization. The Advance Health Care Directive is California's statutory form for nominating an agent to make medical decisions for you if you cannot, gives you the ability to choose end of life decisions and lets you decide if you want to be an organ donor. It is important to list two or three agents in the order in which you would like them to serve just in case your first choice is unable or unwilling to act.

The HIPAA Authorization allows you to give certain people access to your medical documents, as well as to talk with your doctor about your health care or capacity. It can help a family member discover if you have been admitted to the hospital and allow your attorney to talk with your doctor about your capacity to sign documents. The Advance Health Care Directive is governed by State law and involves who can make medical decisions for you. The HIPAA Authorization is Federal law and governs the release of medical information to authorized parties.

Taking all of the documents listed above together, they make for a solid estate plan to ensure your family does not need court involvement to help you down the road.

About the Author

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Mrs. Geiger's practice is located in Carlsbad, California. Her firm focuses on Business Planning, Asset Protection, Estate Planning, Trust Administration, and Elder Law. She obtained her law degree from the University of San Diego School of Law where she served as an Editor on the board of the San Diego International Law Journal.

She is also involved in a variety of professional and community organizations. She serves as an editor for the North County San Diego Bar Association Magazine (The North County Lawyer). She is also an active member of the North County Estate Planning Council, Wealth-Counsel, LLC and ElderCounsel, LLC. Mrs. Geiger is a frequent speaker for many local organizations and the North County San Diego Bar Association.

Additionally, she is the author of an estate planning book and an elder law planning book. The book on estate planning is titled *Safeguarding the Nest, Third Edition* (2013) and her book on elder law planning is titled *How to Avoid the Catastrophic Costs and Effects of Long Term Care: A California Elder Law Guide* (2013). She also authored the law journal article "Authorization to Kill Terrorist Leaders and Those Who Harbor Them: An International Analysis of Defensive Assassination," *San Diego International Law Journal*, 4 *San Diego Int'l L.J.* 491, Spring 2003, and has published several articles.

Mrs. Geiger is admitted to practice before the United States Federal Court for the Ninth District and California State Courts and is an accredited V.A. Planning Attorney. On a more personal note, Brenda is married to Len, the CEO of a San Diego based company, and has two young children. She loves running, travel and spending time with her family.

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