Trust and Estates Mini-Transcript:
Court Buddy Cares Legal Meetup 1, May 8th, 2020

Quoted:

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Patricia (Introduction, 07:44): My name is Patricia De Fonte. I'm an estate planning lawyer here in California. It's important to remember that whatever it is that we say here today is not legal advice. We can't give you legal advice. The answer to any question in the law is always it depends and it really depends on us having hours and hours and hours worth of facts. So while we're really looking forward to getting all of your questions, just please remember that you can't really rely specifically in your situation on anything we might say today. Estate planning is about what you have, who you love, and who is counting on you. I'm looking forward to your questions.

Jennifer: (Q1, 32:43) What are the most important legal documents to have in place right now during the COVID-19 pandemic?

Patricia:

I would say right now the most important documents - since we can't follow our loved ones into the hospital, whether they're going in for COVID or just about anything else - are our advanced healthcare directives and HIPAA waivers. You can usually get these for free. Almost every state that I'm aware of has statutory forms for this. You can also get them from your doctors here in California. We can get them from Kaiser, UCSF, from all the major medical facilities. It's critical and these are things that you should share liberally with your loved ones and you should get copies of those from your loved ones. Really, just save them on your phone. Make sure that you understand what the people who are important to you want to have happen if they can't advocate for themselves and that you understand end-of-life decisions right now, [including] what should happen to someone's remains. Especially communicate what you would like if you think that maybe your spouse and your mother may not agree. We need to preserve family harmony in a time like this.

Jennifer: (Q2, 34:06) If you do have elderly parents and you're concerned about them or their health right now what's a productive way to begin a conversation with them about getting these kinds of documents in place, or even more broadly, about estate planning?

Patricia:

Often when we try to talk to our parents about their estate plans, they get a feeling that we're trying to determine how much of an inheritance we're gonna get. Or that we are mentally walking around their home and putting stickers on items that we would like to have for ourselves. It's really important not to talk about the money, but to couch the conversation in talking about asking your parents what their wishes are for themselves. Making sure that they understand that this is about them maintaining control. That you don't want to have to go to a judge to get permission to take care of them. That you'd rather that they create documents with a lawyer that spell out exactly what they would like to see happen. So that if they're incapacitated and they can't take care of themselves, that you or someone else that they really trust is already in a good position to be able to do that without interference from the courts.

Jennifer: (Q3, 75:31) What is the difference between a will and a trust? What happens if someone dies without one? What does it mean if a trust is funded and what happens if it isn't funded?

Patricia:

Okay, I'm gonna switch it around a little bit because what could happen if you don't have an estate plan is that you die intestate. And that means you don't have a will or a trust. Now, if you die intestate, different states have different rules about who gets your stuff. And then it depends. Are you married? Are you in a registered domestic partnership? Do you have children or are your parents still alive? So you really need to go back and look at the state. Usually you can just google it. Google the “table of consanguinity” to see who you're related to under the statutes and then you would just google an intestate succession in Florida, Michigan, California, wherever you’re from. And it'll tell you who would get your stuff if you didn't do anything. [It’s] really important for unmarried couples because often you want actually to leave your items to your loved partner but what you're doing is actually leaving everything to your estranged father so you have to be careful there.

There are two ways to make sure that the stuff that you have goes to the people you want to land with. One is their will and the other is through a trust. A will is a document that is lodged with the court after you die, so it's a public document. So you have to think; Am I comfortable letting anybody who's interested know that I have died, how much money I have, who I owe money (to because all of that comes out in the wash in probate court), and who will receive my assets, and when they will receive those assets, and if I have children and I'm naming guardians in that document the names of my children, and the names of the guardians. And sometimes people put in birth dates and addresses in this public document sometimes a will is perfectly appropriate. If you don't have a lot of assets and if all of your beneficiaries are stable adults, maybe it's okay.

A trust is a very different type of instrument. It first of all maintains your privacy because it's not the kind of document that would be lodged in a court unless there was litigation. So it's not in the first instance, like a will, immediately going to be available for public viewing. It also lets you control when people get their assets. So maybe you don't want your children to get their money when they're 18 because maybe they would go to Vegas with it. We know that about 33 percent of people lose their inheritance within three years of receiving it. So what you can do with the trust is make sure that the people you're leaving money to get it in small bites, in small amounts. Maybe you want to leave money for them to help them buy a house or start a business. Maybe you want to pay for their education, a college graduation, travel to maintain contact with family members but you're not as interested in just giving them large chunks of money. A lot of people think that they don't need a trust because they don't have a lot of stuff, but it's never about the stuff. It's always about who you're trying to take care of. And really I have a lot of clients who, whether or not they make a good salary, are really relying on life insurance to be the primary asset for the revocable trust. During life they're not worth that much, you know the money is coming in and the money is going right back out. But were something to happen to them, because they have an insurance policy there might be a million or four million for a surviving spouse or for the children on death. And in that instance you can really craft a plan that pushes your values and takes care of the people who are important to you.

The last question was about funding a trust. So when you die with a will, generally what happens is your bank accounts - anything that you can designate a beneficiary for, and we've all filled out those forms at the bank, those assets - those will pass directly. The bank will just give the money to the person who's listed on the card that you filled out. But the rest of your items, those would be what's called “subject to probate” and then the judge will decide when they can be given to the people you've named. Or if you've died intestate, the judge will decide who they should be given to. This can lead to a lot of fighting, because usually what's passed down under a will is your tiara collection, your skateboard, your vintage guitar. The stuff that people really want and have an emotional connection to. So it can be a little dangerous. And when you have a trust, you have to take the extra step after you've signed your trust of transferring all of your property into that trust. Usually your lawyer will do the work of transferring your real estate into a trust, and your lawyer really should be doing that because it's complicated and it has to be done exactly perfectly. Also I think it's unkind for a lawyer to send their client down to the county clerk's office and stand in line. When it comes to your bank accounts, most attorneys will want you to do that work on your own because it's important to understand how it works. You may not see your estate planning lawyer again, but you might change banks and you might open a new account and you might do some online banking. So it's really important to understand that every time you acquire a new asset, you really have to think about: Do I need to own this as the trustee of my trust? If you don't transfer your assets to the trust, it might not be the worst thing in the world. Maybe, depending on the jurisdiction where you are located, your lawyer or whoever is managing this with your loved ones, could go to the court and say, you know, “Your Honor, the house was supposed to be in the trust. There's language in the trust that says everything I own is supposed to be in there and you know for one reason or another it used to be in there but we did a refi and it was taken out. Or look, it's listed as an asset of the trust but for whatever reason, we don't know why, the transfer never happened.” It can be costly and it takes some time, but sometimes you lose. And then we're back to the probate court. And maybe it's gonna pass through intestacy so we don't know who's gonna get it and so really to maintain control. To make sure that your beneficiaries are getting the best tax treatment, and a surviving spouse is getting the best tax treatment, it's really important to transfer everything that you own into that trust. And to work with a lawyer who can help you do it if you get confused.

Jennifer: (Q4, 105:48) Is estate planning something that I can do on my own, online, with forms?

Patricia:

Oh, I mean you could, but you shouldn't. You really shouldn't. Almost every state has its own statutory forms, so you can absolutely get an advanced health care directive from your local government. You can absolutely get a durable power of attorney from your local government. And most states also have a statutory will that you can also fill out on your own and most of them come with really, really extensive instructions. The online “Pay $500, Pay $700 and then you magically have a trust;” I see a lot of those and they are full of little things that will cause enormous problems later. They really lack a lot of clarity. A really good trust is usually at least 50 pages long and every single paragraph relates back to a family that got in a big fight after somebody died. So if you go online and you create a trust that's about 12 pages long, you can imagine you're leaving out endless possibilities for people to fight.

Also those forms are generally not state specific. I'm here in California. We have prop 13 and so we really have to think about how we transfer real estate in California. And we also are a community property state. And so you may very well create a document that gives away things that you don't own because it's a community property asset. And that just leads to problems. It's really much better to work with an attorney. Estate planning is becoming more and more typical at legal services providers. So the same place that you would go for assistance with a family law issue or a landlord-tenant issue those types of places are starting to realize that estate planning is not something that is the cherry on top of a financial plan. That it really is a first step towards adulting and it's something that people from 18 years and older really need. So no matter what your price point is, you should be able to find an attorney who works only in exclusively doing estate planning. Who can talk to you about your different family members and your different assets and help you create a plan that doesn't hurt anybody. And even if taxes aren't an issue, you might think, “Oh, federal estate tax, it doesn't matter.” There might be things in your jurisdiction, like Prop 13 that affects real estate in California, that could have a really big impact on your plan. Don't do this alone. You will absolutely miss things. You don't know what to ask yourself.

Jennifer: So it's the theme that's running throughout today. We are trying to be of service and give you some practical tips, but really truly it's worth it. It's worth your time, talk to an attorney.

Patricia: If you really do have to do it on your own do it on your own with documents that were specifically created for you by your legislature, there's no reason to pay any of these people who are just trying to make a buck and are not lawyers. If you're gonna DIY, I mean go for it and DIY. But not through one of these ridiculous online services. They don't have malpractice insurance. If those documents are insufficient, there's no recourse for your family. There's no one for them to sue and you've wasted money already. I just find them to be predatory and I don't like that they exist.

Jennifer: All right, so if you really want to do it yourself, go to your state website. Find the forms that are available there.

Jennifer: (Q5, 124:10) How often should you update your estate plan?

Patricia:

Yes! Yes. So many people get their estate plan done and I think they just put it under the bed. It's then after they pass away it's covered in dust bunnies and out-of-date. So with my clients I like to see them every three years. I think generally a good practice is every time you do your tax returns to go to your estate planning binder or however yours is - stack of paper whatever you have, your folder - and make sure that all of your assets are transferred to your trust, if you have a trust. Or go and look through your documents and make sure. If you named "Hillary" to be an agent for you - she's supposed to do something on your behalf after you've passed away - is Hillary still around? Did she move to Fiji? Is she in jail? Where is Hillary? We don't know where she is. What if you have had additional children, and they are fifteen years younger than your other children. Does your estate plan properly provide for them? You always want to look at the people that you've named. And you want to make sure that your money - all of your assets - are set up to pass smoothly to the people that you most want to take care of. So I would say, absolutely! You know if you can, best practice, take a look every year. At the very least, make sure you meet with your lawyer if you already have an estate plan, if you have a lawyer, every three years. And then you really want to, anytime there is a major life change (a death, a divorce, birth), go back and look at your plan. Especially if you have been through something very emotional. If you've lost someone important. If you've been near someone through a catastrophic illness. You may have some very different ideas about what should happen to money or how you personally should be taken care of and you may want to amend your documents. It's really more your life that steers that bus. But a good practice is to definitely look at it at least every three years.

Jennifer: (129:00) Patricia, I've known her personally for a long time. She's here in San Francisco. She has great advice and more than that, she looks at the whole family. She looks at the personal aspects involved when she's trying to make an estate plan for her clients. So you're not only dealing with a smart lawyer you're dealing with a good person when you call Patricia, so keep her in mind.