

Safeguarding You and Your Estate Plans Against Future Litigation

Estate Planning Council of Stanislaus County

Fall Seminar

Friday, October 25th

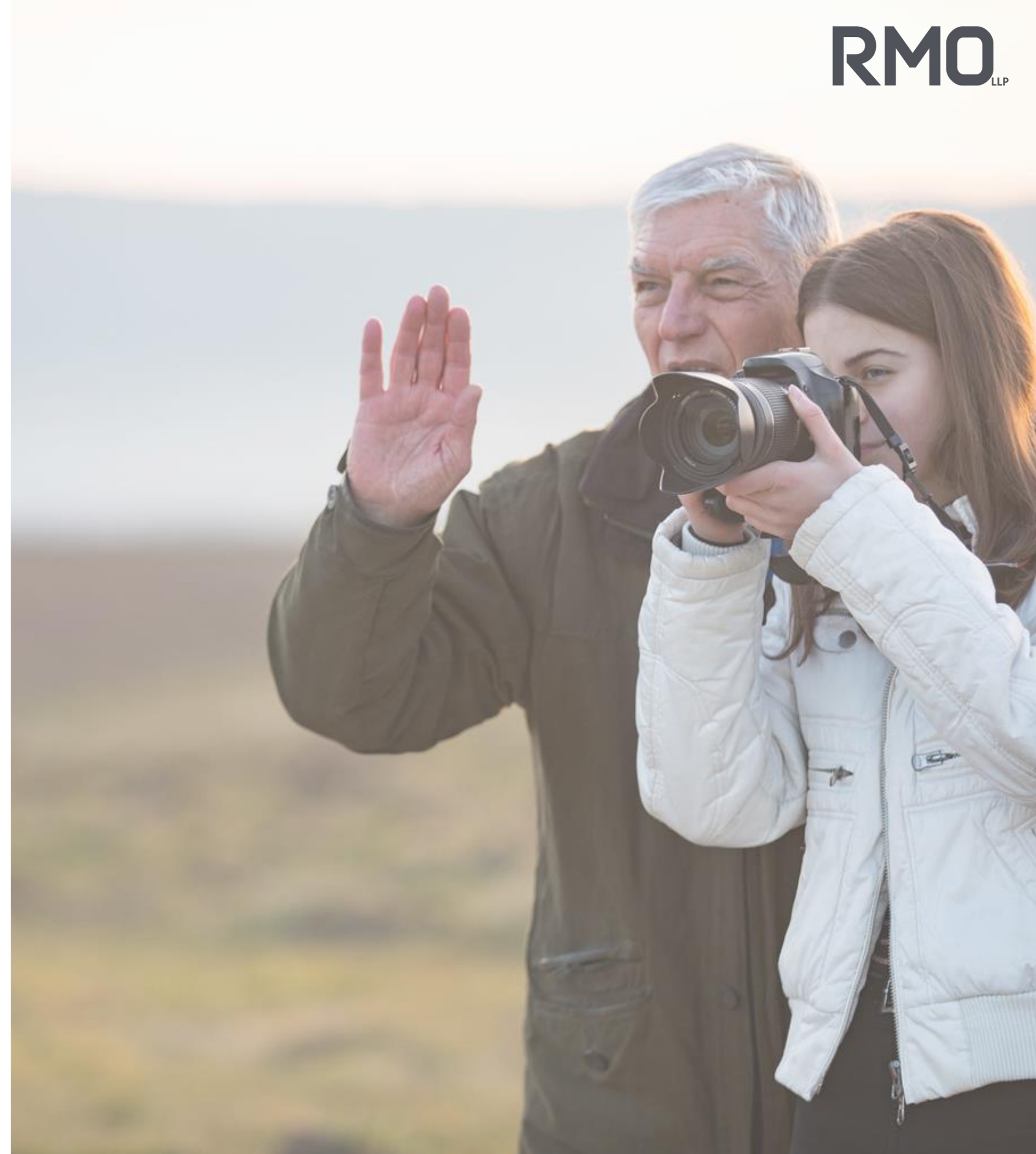
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Planning Issues

- “Signed Written Memoranda”
- “Jointly Used Property”
- Trustee Selection
- Family Business/Property Succession
- Unnecessarily Complicated Planning
- Amendment/Revocation Clauses
- Intersecting Documents
- “Crystal Ball” Planning
- Life Estates
- Alternative Dispute Resolution Provisions
- Recording Estate Planning Signings



Signed Written Memoranda

Typical “Signed Written Memorandum” Trust Clause:

- “Mike and Carol may dispose of their tangible personal property by a **signed written memorandum** executed by both of them after execution of this instrument. The memorandum must refer to this trust and must reasonably identify the items and who shall receive each item. The Trustee shall incorporate any duly-executed memorandum into this instrument as permitted by law.”

Typical Personal Property Residuary Clause:

- “The Trustee shall distribute any remaining tangible personal property not disposed of by a written memorandum as part of the residuary.”

Typical Residuary Distribution Clause:

- “.... Trustee shall distribute remaining property outright free of trust as follows:
...One share each to Greg, Marcia, Jan, Peter, Bobby, Cindy, and Alice...”

Solution:

- Authorize the trustee to take whatever action is necessary to administer the trust without risking breach. For example: “Trustee shall, in their sole and absolute discretion, distribute personal property as they deem fair and equitable in their sole and absolute discretion.”

Jointly Used Property

Scenario:

- H has separate property trust with tangibles: cars, boat, jet skis, etc.
- Before entering fifth marriage, H and soon-to-be wife create a marital property trust.

Problematic Provision:

- Marital trust contains the following language: "intent that all jointly used property shall belong to the marital property trust," and upon death of H, "all jointly used property is to be distributed to W."
- What does "jointly used" property mean?
 - A vehicle titled to H's separate property trust, but which W drives?
 - Boat? Motorcycle? Jet? Refrigerator? Microwave?
 - Subject to an 850 petition?

Solution:

- Do not use vague language.
- Include a Schedule A for any property of any significant value.
- For valueless property, follow previous recommendations.

Family Trustee

Scenario:

- Larry is the sole successor trustee of dad's \$10 million trust., consisting of marketable securities and an apartment building.
- Larry has two siblings: brother and sister. All three are equal beneficiaries of dad's trust. Larry and sister get along. Larry and brother do not speak.
- Larry, sister and sister's children live in the apartment building owned by the trust but refuse to pay rent because dad's trust gives them the apartment building. They just need to buy brother out. For this reason, Larry also does not feel compelled to rent out vacant units (one was dad's), losing \$5k in rental income per unit per month (~\$20k/mo.).
- Larry is a self-proclaimed crypto trading "genius" just with really bad timing – he lost the entire value of dad's portfolio over the span of a couple months.
- Brother seeks Larry's suspension/removal. 12+ failed attempts.
- Larry alone spent close to \$1 million in attorneys' fees and costs.
- Distribution delayed by nearly a decade due to litigation, by which time Larry had died.

Trustee Selection

Solution:

- Family Trustee
 - Surviving Spouse
 - Child/Children
 - Other Family Member
 - Friend
- Other Professional
 - Drafting Attorney
 - CPA
 - Financial Advisor
- Private Professional Fiduciary
- Trust Company/Bank



Family Business/Property Succession

Scenario:

- Family business and real property. Three adult children beneficiaries. What if:
 - All of the children want the business/property?
 - None of the children want it?
 - Value and sell, but what about ongoing operations/securing value?
- Child A has been running/managing the company/property and wants/deserves it.
 - Buy/Sell: Mandatory? Optional? Trustee discretion?
 - Valuation problems.
 - Valued as of when? Date of death? Date of buyout?
 - “In” Child A serving as CEO is in control of records
 - Five years of litigation over valuation records.
 - Child A as trustee - Breach of Fiduciary Duty/Conflict of Interest/Self Dealing?
 - Other ways to “true up” the contributing child? Lifetime gifts? Other?
- What if estate is illiquid? What if certain illiquid assets allocated to certain children?

Solution

- Give your trustee sole and absolute discretion to decide how to handle.

Unnecessarily Complicated Planning

Scenario:

- Decedent's trust names two sons as co-trustees of \$40 million off-shore trust with myriad of corporations/corporate structures.
- Requires trust assets be distributed and trust terminated in 5 years.
- Requires trustees to "take all action reasonably necessary" to reduce taxes.
- Two brothers can't work together.
- One brother incapable of serving, declines/defers to other brother, only to sue him for failing to adequately reduce tax liabilities.
- Litigation ensues for 8 years. Millions of dollars spent on lawyers, experts, etc.
- Trust not liquidated/distributed/terminated as designed.

Solution:

- Don't name feuding brothers as co-trustees.
- Rely on existing duties: loyalty, competency, etc.
- Obligate trustees hire professionals, who provide coverage/protection.

Amendment/Revocation Clauses

Scenario:

- Vague, ambiguous, and unnecessarily complicated amendment/revocation clauses.

Hypothetical:

- Settlor executes original estate plan, which requires he give notice of amendment/revocation to the acting trustee and the drafting attorney.
- Settlor goes to a new estate planning attorney and amends the trust to disinherit and original trust beneficiary but only provides notice to himself and not his former estate planner.
- Disinherited beneficiary sues, claiming settlor's failure to comply with the original trust's amendment/revocation requirements renders the amended trust invalid.
- Because the trust did not explicitly state that it's amendment/revocation procedure was the exclusive manner, settlor's compliance with state law was sufficient.

Haggerty v. Thornton (2024) 15 Cal.5th 72

Solution:

- If it is your and your client's intent that your mechanism be the exclusive manner of amendment/revocation the document should say that. Otherwise, state law may apply.

Intersecting Documents

Scenario:

- Existing trust documents, contracts, agreements, deeds.
- Family court orders/judgments.

Hypothetical:

- Second marriage. Mom and dad have individual trusts for their pre-marital assets and a joint trust for their marital asset, the family home.
- Joint trust gives the family home to the couple's two daughters, disinherits mom's two daughters from her previous relationship.
- After dad passes, mom amends her trust to give the home to all four daughters, but she never transfers the property from the joint trust to her individual trust.
- Not surprising, litigation ensues.
- Estate planners file and testimony revealed mom knowingly did not transfer the property. She wished to honor her husband's intent regarding the home but show her two daughters that she considered them all equal so she did not record the deed.

Solution:

- Letter of intent.

Crystal Ball Planning

Scenario:

- Failing to plan for all potential “what if’s”.

Planning Mishaps:

- Trust that names only settlors as trustees, with no named successors nor any mechanism for appointing or identifying any successor.
 - Surviving spouse ☐ professional ☐ kids ☐ professional fiduciary ☐ trust company ☐ trust company’s successor ☐ etc.
- Trust that names only settlors as beneficiaries, with no provisions for what’s to happen to the assets after they pass.
 - Why do all that planning at G1 only to end up back in probate with G2

Solution:

- Plan for “maximum flexibility”
 - Use of schedules or memoranda, as discussed previously.

Life Estates

Common Life Estate Beneficiaries

- Surviving step-parent/spouse
- Caregiving child
- Friend
- Caregiver

Issue:

- What do these people all have in common?



Life Estates

Scenario:

- Decedent leaves a partner and one adult child. Trust names child as trustee and gives life estate to partner. Child is remainder beneficiary.

Issues:

- Inherent conflict.
- Who pays for insurance? HOA? Utilities? Mortgage? Why?
- What is “maintenance” vs. capital improvement?
- How to monitor condition of property? Access rights? How frequent? Conditions?
- Occupant becomes disabled and needs wheelchair access?
- Replacement property?
- Can others live there? For how long? Life tenant gets rent, or trust?
- What if they abandon it? For how long? At what cost?
- Eviction?

Solution:

- Be specific about what the life estate provides and requires.

Alternative Dispute Resolution Clauses

- Increasing number of trusts, especially if there are family businesses, property, etc. have arbitration clauses
- Devil is in the details:
 - Be specific about the process and what's required, **and** what will happen if they don't follow the process.
 - Tie beneficial interest to cooperation.
 - Cover all disputes, including those between beneficiaries and trustees.
 - Require notice to all affected parties to ensure enforceability.

Recording Estate Planning Signings

Scenario:

- Settlor shows some signs of diminished capacity so it's suggested that the signing be recorded so settlor's intent & capacity are clear.

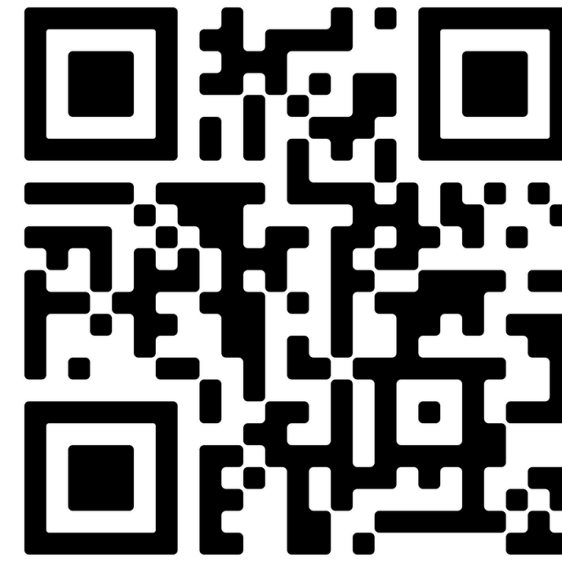
Issues:

- Settlor rarely appears comfortable on the recording. Not natural.
- We are not producers, directors, cinematographers, etc.
 - Bad lighting. Bad equipment. Bad actors.
- Why are you recording this signing if not part of your S.O.P.?

Solution:

- Just don't do it.
- There are better ways to protect your client and keep you out of the hot seat.
 - Take good notes.
 - Certificate of Independent Review.

Thank You



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