

Full video w Roger

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Introduction

Roger Royse: Hello and welcome back. This is Roger Royce with the 10,000 Startups Podcast, and today we have a guest who's going to talk with us about kind of basic estate planning in California. It's something not only startup entrepreneurs need to know about, but pretty much everybody, in any state, especially this state.

So welcome Marina Modlin from Modlin Legal, to tell us about estate planning.

Why Estate Planning Matters

Roger Royse: So let's kind of start off and tell me why, do people need to think about, planning their estates even at a young age?

Marina Modlin: Why do people need to think about estate planning?

Well, they kind of don't, unless there's a chance that they can die. In California, the state of California has already provided everyone with a default estate plan, but the problem is that, it's slow, it's confusing, it's time consuming, and it's obscenely expensive. So if any of those things don't work for you a hundred percent, [00:01:00] you do have an opportunity to improve on pretty much all of them.

But in order to take advantage of that, you have to kind of opt into the alternative legal system, which we kind of generally call estate planning. Meaning you actually have to sit down and do your estate planning and then better opportunities are available.

What are typical components of an Estate Plan?

Roger Royse: Tell me, what are the basics, what do we mean when we say estate plan?

I think we all understand that means a will. But what else is customary or essential, in California?

Marina Modlin: So typical estate plan, kind of the basic estate plan, it generally consists of a will, a trust, a power of attorney, and a healthcare directive. So a will, everyone knows. Typically a will is where you get to write down who gets your stuff after you die.

But actually the main function of the will at this point is to nominate guardians for any minor children that you have. Those are the kids that are under 18 who would need parents if something happened to you. and to actually serve as a backup to the trust.

And the trust is kind of the [00:02:00] meat of the estate plan, as far as finances go. A Trust is like a legal entity that actually owns your assets and within the body of the trust, it talks about who is going to be in charge of your assets after you and where they go. That's the part that used to go into the will, but now it doesn't. It goes into the trust. So, Will and trust, they work together.

And then power of attorney and healthcare directive. Those are your incapacity planning documents. So I'm Marina, I'm alive. I make decisions for myself. Tomorrow, I get hit by a bus. I'm in a coma. Somebody has to step in and make decisions for me. So the power of attorney authorizes somebody to make financial decisions for me, and the healthcare directive authorizes somebody to make medical decisions for me, as well as kind of end of life preferences like burial, cremation, organ donation, pet care, and things like that.

Understanding Living Trusts

Roger Royse: So on the trust, is that what we call a living trust?

Marina Modlin: Yes. The trust has lots of names. They're all interchangeable. Trust, living, trust, [00:03:00] revocable trust, revocable living trust, and also sometimes even revocable living family trust, same thing.

Roger Royse: And, as I understand it, in my estate plan, I'm gonna be my own trustee, right?

Marina Modlin: Yes.

Roger Royse: So I'm gonna sign all the documents and make all the decisions. So why do I even need this trust thing?

Marina Modlin: So I'll use myself as an example. I'm Marina, I own a house. tomorrow I'm dead.

Now this house that's in Marina's name no longer belongs to anyone, and that's the single fact that triggers the court's involvement, the probate court's involvement, because now there's a house that doesn't belong to anyone. So the state has to step in to figure out who this house now belongs to. When I'm Marina, I create a trust and I nominate myself as the trustee of my trust.

So trustee is basically a manager of the assets of the trust, right? So now I continue to have control over my house as the trustee, but the house legally belongs to Marina's trust. Same scenario. Tomorrow I dropped [00:04:00] dead suddenly. My house is actually not left without an owner because it belongs to the trust, and the trust didn't die.

And because now the house is not left without an owner, the court just never steps in to figure it out, and instead, we read the terms of the trust, where it will be specified, who will be the successor trustee, so the next person in charge of the asset, and who will be the beneficiary of my house, meaning the next owner of the house.

Why do we want to stay out of Probate Court in California?

Roger Royse: Why is that important to not have to get the court involved in California?

Marina Modlin: Well, I will keep my opinions to myself, but factually speaking, at this point, the court is kind of guaranteed to take at least a year. so for the asset to get from the dead Marina to Marina's beneficiaries, it will take at least a year.

It will be a lot of work for everybody involved, and maybe most importantly depends on what your priorities are, it's also gonna be obscenely expensive. So the way that probate is paid for in the state [00:05:00] of California is, there's a thing called statutory fees. So there's a statute, that says that the executor, which is the person in charge and the attorney of the executor, so two people, get paid

in probate, a flat fee percentage of the market value of the estate, disregarding mortgages.

So, for a \$2 million estate, which if you own any real estate in California, you have a \$2 million estate, usually, the fees are, I don't remember exactly, but it's about 30 to \$40,000 each to the executor and the same exact fee to the attorney. So it'd basically be about 60 to \$80,000 to transfer your one \$2 million estate, even if you have a million dollar mortgage on it to your child. whereas if you do estate planning, which is you put your house into the trust, estate [00:06:00] planning on average is maybe about, I don't know, four to \$5,000 to do. And then a standard post death administration is on average also about four to \$5,000 to the attorney. So we're talking about 10 grand of attorney's fees, versus 40.

Roger Royse: Yeah.

And it's not only your house, right? For like our startup entrepreneurs, if they have valuable stock.

Marina Modlin: Yes. And then they will also have an additional, fun problem for their estates, figuring out the actual value of all of it.

Roger Royse: Yeah.

Marina Modlin: Because the fees calculated on the total market value of the estate, disregarding mortgages.

Roger Royse: Oh man. No wonder. So expensive. Yeah. Okay. Well you've convinced me. That's why everybody in California basically has or should have a living trust to hold It's. It's the very obvious thing to do, honestly.

Power of Attorney

Roger Royse: Okay. The second thing you mentioned is a little less obvious and that's the power of attorney.

And I think you described what I learned in law school is called a durable power of attorney. Meaning that it survives in [00:07:00] capacity But not death, right. I mean, once you died.

Marina Modlin: Exactly.

Roger Royse: Okay. And, that's important because you used the example, what happens if you're in a coma and you need to make decisions, right?

So you have to nominate somebody that you trust. Right?

Marina Modlin: Right. Definitely.

Roger Royse: To deal with your pro. You don't want to give your rights to a traveling circus or something to someone that can make your decisions for you. and that's important because, that could kick in at any time.

and the kind of decisions would be, I suppose, they could go down to your bank and, spend money in your bank account. Are there any restrictions at all? What happens if, they're trustworthy today, but maybe not after I'm in a coma?

Marina Modlin: You know, obviously things happen. but what I tell my clients is, when we are doing estate planning, I don't have a magic eight ball.

So what we're doing when we're doing estate planning is we're increasing the chance that things will go according to plan. Right. and I typically, myself personally, don't really believe [00:08:00] in restrictions. Instead of, I guide my clients to really focus on picking a person that they really trust and also remembering to update their documents, should their relationship go, you know, not in the desirable direction over time before they become incapacitated.

because I just kind of generally believe in our legal. In our body of California law that, should things, go in a bad direction, there are guardrails that kind of stir us back, but we don't really do that through the planning documents.

Roger Royse: So I suppose if you did not have a power of attorney, somebody would have to go into court and get like a guardianship or conservatorship.

Marina Modlin: Conservatorship, yes. Horrible thing. Horrible thing.

Roger Royse: Is it?

Marina Modlin: Is it, yeah. It's basically like dragging your incapacitated relative to court and proving to the judge that yes, they are in fact incapacitated and you're not just trying to steal all their money and, you know, take away their agency.

Roger Royse: Early in my career, I did one guardianship proceeding. And there was this woman who had Alzheimer's had no documents at all. Yeah. And [00:09:00] her brother did and did exactly that, you know, walked her into court. she wasn't shackled, but she might as well have been. Because she was there against her will.

And she had to sit there while the judge asked her, do you know who the president is? Do you know who the mayor of Fargo is? You know, do you know what day it is? It was just such a pain.

Marina Modlin: It's heartbreaking.

Roger Royse: I still remember that as one of the worst legal experiences of my life.

That's why I don't do that kind of work and I leave it to you.

Marina Modlin: Well, funny thing, I actually don't do that kind of work either. That's a little too much excitement for me. But for my clients, I always have them do powers of attorney because when you have full capacity, they're really easy to do.

Right?

Roger Royse: Yeah.

Marina Modlin: But I also even talk to my clients about their parents, and I get a lot of calls from my clients, unfortunately, who are like, Hey, mom got dementia two years ago. We need to get a power of attorney because she's sending money to Nigeria. I'm like, well, unfortunately it's a little too late.

Basically the, the rule of thumb with estate planning is the sooner you do [00:10:00] it, the easier, faster, and cheaper and less stressful it is, and the longer you wait, the more complicated, heartbreaking, expensive, and time consuming it becomes.

Roger Royse: Right. And not, and not just on the property side, but on the capacity stuff.

Marina Modlin: A hundred percent. Yeah. Because with capacity, eventually we just hit a point when there's nothing we can do do, and the only option is conservatorship.

Roger Royse: Yeah. What a drag.

Healthcare Directives

Roger Royse: The third document you mentioned, you said, healthcare directive, and that to me is the scariest, most difficult one of all, three, because you're not just putting your property in somebody else's hands, you're putting your life in somebody else's hands.

Marina Modlin: Yes.

Roger Royse: And, I guess I'm kind of curious as to, I get the concept. I at some point will be unconscious and someone's gonna have to make decisions that the doctor's not gonna do anything without it. Or, or maybe they will, but they're gonna rely on some relative to make decisions. Is there anything I can do?

Well, what's typically done to protect myself in case, [00:11:00] I don't know, maybe my, maybe the, maybe my natural heir, who is going to have the healthcare directive. Maybe I'm a little worried they might want to pull that plug a little sooner than I'd like 'em to. Is there any protection? Can I appoint two people to have the decision?

Can they have joint powers? Can I make 'em go get a medical opinion before they make a decision? Anything like that.

Marina Modlin: So I'm Marina, I'm in charge, so long as I have capacity. Once I am declared incapacitated by two physicians, that's when my named agent for healthcare directive steps in.

And, you could theoretically nominate two. I generally try to talk clients out of nominating two people because I say like, if the issue is trust, just pick a third person whom you actually trust instead of trying to mitigate the person you trust with another person. So you could theoretically nominate two, I usually advise against that.

So once I'm declared incapacitated, meaning I'm [00:12:00] no longer in charge of myself, then my named agent steps up to make healthcare decisions. And the agent has basically free reign to make, all the medical decisions for me up until a threshold point. And the threshold point is statutory language that's spelled out in a California statutory form.

And it's basically summarized as once a person reaches a point where more care will not improve chances of recovery, that's kind of the threshold language, meaning, if there is anything that they can still do to make me better, then it's agents' decision. But once, as far as modern medicine is concerned, they run out of ideas what they could possibly do to, to make me in any way, shape, or form better that's when the pull the plug provision comes into play. And then my clients actually most of the time list in their healthcare directive whether they want [00:13:00] the plug pulled or not. And so well, so the client has three choices. They either say, yes, pull the plug, no, keep me on life support indefinitely, right?

Like Waiting for a Miracle, or three, we can remove that provision entirely. Removing that provision entirely is what puts the decision back into the hands of the agent. That's when they decide, but basically, do they keep me on life support forever waiting for a miracle or not? But most clients actually don't do that.

Most clients that I work with are very firmly in the, don't keep me on Life Support camp. So it's actually not. Like not the air that's making that decision, but it's actually the doctors, once they decide that they've run out of options, like I've reached a point where more care will not improve chances of recovery, then the client will have already made the decision to pull the plug.

Roger Royse: Gotcha. So I know every hospital has their own form of healthcare directive. But it sounds like maybe they're not all created equal. [00:14:00] what do you think about that? Should somebody personalize this ahead of time?

Marina Modlin: Obviously all law is form-based, right? Like, I'm not writing a healthcare directive from scratch. That would be crazy.

So in California there's actually kind of two basic forms. One is the lawyer created form and the other one is doctor created form. 'cause to make things more fun. Right. So my form, I'm a lawyer, I don't practice medicine, just law.

my form doesn't have a lot of, medical decision questions. And it's really more about like end of life, quality of life preferences. Like do you have religious preferences? Do you want to be buried? How do you feel about life support, the pull the plug provision, and that's mostly it. Now, when you go to a doctor, they can also offer you to fill out their healthcare directive and that one will have more medical decisions like the feeding tube stuff. I just kind of generally refer to it as the feeding tube stuff. So there is some overlap [00:15:00] between the

two forms, but they're not identical. so I just prepare a healthcare directive for everyone who does estate planning with me, but I only use the lawyer form.

And that form is definitely sufficient, but for clients who want to have like, more medical specific decisions, I generally advise them to take a look at the doctor form as well. But then the challenge there becomes, which I'm sure somebody like you wouldn't have a problem, but some people would.

The challenge becomes making sure that there's no conflict between the two forms.

Roger Royse: I was just gonna say, yeah. What if you sign both of them? Which one controls?

Marina Modlin: Without any amendment, the latest one generally would control, because, for example, mine explicitly says that this document invalidates all previous healthcare directives.

but for my clients who are super interested in this part, I usually change that to say that, you know, this form, this healthcare directive invalidates all previous ones except the one on file [00:16:00] at Kaiser. and then I also personally usually add in case of conflict, you know, this one prevails.

Because I have personally more confidence in mine than in Kaiser's. So that's just what I say, but it's basically an arbitrary choice.

Roger Royse: Got you. Well, that, that's helpful. you know, you, you mentioned something else about some of the other decisions that have to be made at this point that the heirs might disagree on, and this is kind of morbid, but I think people argue over this a lot, which is what happens with the remains, cremated, buried, I don't know. Blown up.

Marina Modlin: Some people wanna go into space. Yeah. Or plant it into trees. There's lots of options at this point , the Pacific Ocean is very popular.

Roger Royse: So you could, can you specify that?

Marina Modlin: Yes.

Roger Royse: Yeah. And that's binding?

Marina Modlin: I usually add, if possible.

Roger Royse: Okay.

Marina Modlin: Because, you know, I wouldn't want to draft a healthcare directive that mandates that the agent violates state laws or health codes. Right. So I usually [00:17:00] specify "if possible", but yeah, that's a standard part of the healthcare directive.

But usually I counsel clients that, some people like, definitely like, know what they want to happen with it remains, but if they don't, I personally think, like if it's not important to the client, I personally think it kind of makes sense to leave it up to the family because they're ultimately the ones that are dealing with it.

Roger Royse: Okay.

Handling Personal Property

Roger Royse: And then, getting back to the living trust. So you, you say get this in place early, but what happens if a week after, I sign the living trust? Well, I get a new bicycle and you know, I think my nephew should have that bicycle when I die 'cause he's an avid rider.

but I don't wanna go back and amend all my documents. Do I have any options there?

Marina Modlin: Yes. I myself am a huge fan of bicycles, so I would make an estate plan just for the bicycles personally. but legally speaking, bicycles are considered tangible personal property and there's many different ways, obviously, to handle estate [00:18:00] planning.

But the way that I believe in doing estate planning is I actually have clients divide their total estate by percentages. So we're not going like bicycle one to nephew one and bicycle two to nephew two in the trust. But we just divide the whole estate in percentages, 50% to nephew one 50% to nephew two, for example, right?

Most people at this point don't, but a lot of people, some people do want to leave specific items to specific people. I actually just send them a super basic worksheet that they can just fill out on their own. So as they acquire more bicycles, which I definitely a hundred percent encourage them to do, they could

just add their bicycles to the spreadsheet, and the trust actually has a paragraph for tangible personal property, and it says "if the client left a spreadsheet directing disposition of tangible personal property, do that." If the client didn't leave that, then the trustee will basically add the tangible personal property to the balance of the estate and divide, you know, as, as is directed.

Roger Royse: Gotcha.

Marina Modlin: And then the [00:19:00] trustee would just basically be, if, if it's the same example, you know, 50% to each nephew, then the trustee would just, you know, you would have to nominate a trustee who is, well versed in that bicycle values and they would have to value each bicycle and make sure that the nephews get, you know, equal amount of bicycles.

Roger Royse: Gotcha. Okay. Well that makes it a lot easier. And it's not just bicycles, right? It's jewelry. It's exactly personal property,

Marina Modlin: Yes, any tangible personal property. We don't write it out specifically. Basically, I know nobody wants to do their estate planning, and there's like a small window of opportunity when people are like open to it, they're usually get like freaked out by somebody suddenly dying, or they have like a vacation coming up. So they're like, okay, fine, I'll do this, right. But they're not gonna keep running to me every time they, you know, buy their wife a new ring. so I draft my estate plan so that they remain as, as, fully up to date as possible for as long as possible with minim effort from the [00:20:00] client.

Roger Royse: Gotcha. Okay.

Post-Death Administration

Roger Royse: And I guess the last thing you kind of touched on something about what happens. We have a really good plan. We've got a living trust and now somebody dies. So now we have a successor trustee that takes over, right?

Marina Modlin: Yep.

Roger Royse: And it's their job, I think you said, to divvy up the property. Is that right?

Marina Modlin: Well, so what happens after we, the general kind of umbrella term is called post death administration. Every post, post death administration is different from each other. but basically the gist of it is that whoever's in charge, has a job of collecting all the decedent's assets, collecting all the decedent's liabilities, settling the liabilities, and then distributing whatever's left over between the beneficiaries. Now, the exact process to do that, that's what varies from person to person because, the creating of the estate plan. That's step one, right? But then the step two is it actually the trust has [00:21:00] to be funded, meaning the actual assets have to be titled to the trust.

And that's where a lot of clients actually drop the ball, either initially and entirely, or sometimes over time and partially so the job of the successor is basically to locate all the decedent's assets and find out how they're titled, and then usually with attorney's help, to basically go through whatever process is necessary to get that asset to the intended beneficiary.

Roger Royse: I see. Are you, do you ever, encourage people to do letters of instructions, something like that?

Marina Modlin: Not too much. My personal, rule in how I approach my law practice, like number one rule is keep it simple, stupid. because any complication and any instruction is potentially ambiguous, is potentially in violation of some, trustee duty, for example. Um. And all of those problems, if they come [00:22:00] up, they have to be resolved by court, and court is what we're trying to stay out of. So instead I, again, just kind of guide my clients to really focus their energies on picking a person whom they trust, to not only do a good job, but also understand what their wishes would be and kind of what, what, what your vision is. And then leave the details to like the California body of law.

To, to keep the trustee in line doing what, what he or she needs to do

Roger Royse: Rather than trying to control things too much beyond the grave.

Marina Modlin: Yes. Controlling beyond the grave does not really work.

Conclusion

Roger Royse: Okay, gotcha. Alright, well I want to thank you very much for being here. This is very instructive. It's a good overview. And one last question, marina. If people want to hear more about this or need to get their estate plan in place, how do they get ahold of you?

Marina Modlin: Modlin legal.com. M-O-D-L-I-N-L-E-G-A-L? Yes. And that has a link to my calendar. You can do a free consultation. I'm happy to, help [00:23:00] anyone with any estate planning. In California only because unfortunately it's all state specific.

Roger Royse: Okay. Alright. Well thank you very much. again, Roger Royce, 10,000 Startups, and today's episode was on basic estate planning.

We'll see you next time.