WILLS OR TRUSTS?

The Case For Living Trusts.
How To Eliminate The Hassles Of:

Probate, Lawyers, Delays
And The Legal System.

Table of Contents

TERMS YOU SHOULD KNOW....... 4

TRANSFERS....... 6

TRUSTEES....... 8

WILLS....... 9

ESTATES....... 11

OTHER TYPES OF TRUSTS....... 12

TAKING INVENTORY....... 13

SUMMARY....... 14

INTRODUCTION TO LIVING TRUSTS

Simply put, living trusts are an expedient way to transfer property at your death. A living trust is a legal document that controls the transfer of property in the trust when you die.

Generally, living trusts are established during an individual's lifetime and can be modified or changed while that person is still alive. Circumstances do change and the option to make alterations in the trust is important.

For this reason, a living trust is set up on a "revocable" basis. Revocable means you can modify or change the trust's provisions. Your other option would be to create an irrevocable trust. Once put in place, you are unable to change the terms of the trust regardless of the circumstances.

As you will see, living trusts speed up the process by which your property moves to your designated beneficiaries after you die. Today, and into the foreseeable future, this is vitally important as the United States is experiencing an unprecedented wealth transfer.

It is estimated, according to "Fortune" magazine, that some $6.8 trillion worth of assets will soon pass from parents to children, grandchildren, friends, charities and others. The questions remains: how will this wealth be transferred? Will it be the traditional methods of wills and probate or the new revolution of estate planning that has incorporated living trusts? Many legal experts believe that living trusts are the future of wealth transfers.

The concept of living trusts has created controversy simply because the legal profession seems evenly split on the issue. Estate planners seem to favor living trusts but there are enough opposed to the concept to avoid a clear majority decision.

Living trusts are also called "inter vivos" trusts, a Latin term preferred by attorneys. The Internal Revenue Service calls them "grantor" trusts. All mean the same thing.

The Internal Revenue Service, however, recognizes the living trust as a valid estate-planning tool and exhibits no prejudice against it. There are specific provisions in the tax laws that deal with living or grantor trusts.

The revocable provision means that while you live, you still effectively own all of the property that has been transferred into the trust. You can sell it, spend it, give it away; in short, do anything you wish since the property is still yours. The trust itself is merely a document in your lifetime that truly doesn't begin to function until you die.

Then, the trust operates to transfer your property privately, outside of the reach of probate, to the specific individuals or organizations to whom you wish to leave your worldly possessions.

What is probate? Why do people try to avoid it?

Technically speaking, probate is the process by which one proves the validity of a will in court. If there is no one contesting the will, this should not take long. If there are complications, probate can take years.

Probate has come to mean not just proving the validity of the will but the entire administrative sequence involving the passing of an owner's title to property after the owner's death. The deceased's property is inventoried and creditors are identified and paid after the payment is made to the estate's attorney, executor and tax entities.

The term "probate" also identifies the court which has jurisdiction over the estate probate and administration. Probate court also has jurisdiction over the guardianship of minors and mentally incompetent adults. All wills go through probate.

The average length of the probate process is twelve to eighteen months. Any estate transactions in that time must be approved by the probate court.

This can create havoc for beneficiaries. Since a living trust replaces a will and doesn't need validation from the probate court, considerable time and hassle can be saved.

This, then, is the purpose behind living trusts. The trust is simple to establish and, when carried out, makes it easy to transfer property. The trust is a matter of explicit instructions as to who gets what property after the owner dies. Like a will, the trust should cover all expected and unexpected events that might occur. The details tell the designated trustee how to use the money and property in the trust.

A living trust is a capable substitute for a will and a document that more and more people, disillusioned with the probate system, are turning to in their estate planning.

TERMS YOU SHOULD KNOW

Before proceeding further, it might be helpful to define a few terms for you. These terms will occur often during this text and in the actual living trust process, so it's important to familiarize yourself with their definitions.

A/B TRUST: Common term for a "marital life estate trust”, generally used by couples whose estates are valued at more than $1,500,000.

ACCUMULATION TRUST: A trust that does not pay out all of its income until certain circumstances occur.

ADMINISTRATION: Court-supervised distribution of the probate estate of the deceased. The person who manages this distribution is called the EXECUTOR if there is a will or an ADMINISTRATOR if there is not.

BENEFICIARY: The person or organization legally entitled to receive gifts made under the provisions of a legal document such as a will or trust.

CODICIL: An amendment to a will. It is a separate legal document, properly witnessed and executed.

CORPUS: Property owned by the trust, commonly referred to as "corpus of the trust".

DEATH TAXES: Amounts levied on the property of the deceased called estate taxes (federal) and inheritance (state) taxes.

DURABLE POWER OF ATTORNEY: A general power of attorney that will continue to be valid after its maker becomes incapacitated or incompetent.

DURABLE HEALTH CARE POWER OF ATTORNEY: A special power of attorney in which the maker gives another person authority to make health care decisions when the maker is unable to do so, due to injury or sickness.

ESTATE: In general, all of the property you own when you die.

ESTATE PLANNING: The legal maneuvering by which one dies with the smallest taxable and probate estate possible, with the ability of passing on your property to your beneficiaries with the least amount of hassle and expense.

INTESTATE: To die without a will or other valid estate transfer device. Estate will go through probate and be passed to heirs who are specified in the applicable state's laws.

IRREVOCABLE TRUST: A trust that cannot be changed, once established, except by court action in a proceeding referred to as REFORMATION.

JOINT TENANCY: A form of property ownership by two or more people where the death of one owner causes the transfer of that individual's share to go directly to the remaining owner(s). A will has no power to change the joint tenant's right of survivorship. This is another common tool used to avoid probate, although there may be gift tax consequences.

LIVING TRUST: Trust established while the maker is alive and which becomes immediately effective. It remains under the control of the maker until death. It allows property to pass to beneficiaries free of probate.

LIVING WILL: A document that provides instructions to physicians, health care providers, family and courts as to what life-prolonging procedures are desired if a person should become terminally ill or be in a persistent vegetative state and unable to communicate.

PERSONAL PROPERTY: All property other than land, buildings attached to the land, and certain oil, gas and mineral interests.

PER STIRPES: A legal term meaning that if a person dies, the inheritance will pass to heirs in equal shares. It means "by right of representation".

POUR OVER WILL: A will that transfers the decedent's assets that are subject to the will to a trust that was already in effect prior to the decedent's death.

POWER OF ATTORNEY: A legal document whereby, a person authorize someone else to act for them.

PROBATE: Court proceeding in which the authenticity of a will is established, an executor or administrator is appointed, debts and taxes are paid, heirs are identified, and property in the probated estate is distributed according to the dictates of the will.

QUALIFIED TERMINABLE INTEREST PROPERTY TRUST: Also referred to as a "Q-Tip" trust, it allows a surviving spouse to postpone, until his or her own death, payment of estate taxes that were assessed upon the death of the first spouse. The surviving spouse is still entitled to all of the income from the property.

REVOCABLE TRUST: A trust that can be changed by the trust maker at any time. Living trusts are revocable trusts.

SETTLOR: Another name for a maker of the trust, also called "trustor", "grantor" or "creator".

TENANCY IN COMMON: A form of joint ownership of property. Each owner is able to sell or give a way his or her share of property, as well as pass it along separately at death. There is no right of survivorship.

TESTACY: Dying with a valid will in place. All property controlled by the will passes through probate.

TESTAMENTARY TRUST: A trust created by a valid will.

TRUST: A legal arrangement under which one person or institution controls property given by another person for the benefit of a third party.

TRUSTEE: The person who, or institution which, manages the trust and its property under specific instruction.

WILL: A legal document that is used to pass property to heirs following a person's death. A will only becomes effective at the death of its maker.

TRANSFERS

The purpose of the living trust, as mentioned, is to be able to transfer property to a designated beneficiary(ies) without the usual hassles associated with wills and probates. However, your living trust can't transfer property it doesn't own.

Therefore, the first step in making the trust effective is to transfer ownership, or title, of a property to the trust's name. It's safer to transfer the title to the trust's name rather than to the name of the trustee since it is more likely the trust name will continue even if you change trustees.

For the purposes of transferring title into a trust's name, there are two classifications of property: that which has an ownership document and that which doesn't.

Property without ownership documents include the following:

household possessions and furnishings;
clothing and furs
jewelry
tools and most equipment
antiques

artwork
electronic and computer equipment
cash
precious metals
bearer bonds

These items are transferred to a trust simply by listing them on a trust schedule.
That's it! Pretty simple, right?

Property that has ownership documents requires a re-registration of ownership into the trust's name. Once the trust document has been established, signed and notarized, this process should begin. The document of the title must clearly show that the trust is the legal owner of the property or the trustee will not be able to legally transfer any of that property.

The type of property owned by the trust, which requires this re-registration of ownership, includes the following:

real estate
bank accounts
stocks and stock accounts
money market accounts
mutual funds
most bonds, including U.S. Government Securities
safety deposit boxes
corporations, partnerships and limited partnerships
cars, boats, motor homes and airplanes

If you set up a trust and fail to re-register ownership of a specific property, it will remain outside the trust after you die. If you do not have a will, property will pass through intestacy and your state's succession law. The chances of leaving it to the person you wanted it to go to are reduced, and you will not avoid probate of the property— which is the purpose of a living will! Do not fail to re-register property that has a title. You prepare a new title document for each piece of property, transferring ownership into your trust's name. With real estate, for example, you must prepare and sign a deed listing the trust as the new owner. Then have the deed must be notarized and properly recorded. For bank accounts, ask your bank for the proper form. You can usually accomplish this in one trip.

TRUSTEES

When you establish a living trust, you must name a trustee. In fact, you should name both an initial trustee and a successor trustee in the event the initial trustee becomes incapacitated and cannot serve.

The trustee is the individual who or institution which actually manages the trust assets that you transfer in, according to the specific instructions you've given. The appointment is important, as this person or entity will have the responsibility of honoring your wishes your after death.

The initial trustee is, most often, YOU! That's why it's called a living trust. Since it's revocable, you can change assets in the trust as circumstances dictate. While you're alive, the trust can conform to your specific wishes.

It is important to understand this: a living trust does not take the control of your property from you— until you die. You handle it while you're alive. It's merely tucked away in a convenient legal vehicle that takes over immediately after you die and passes the property along to the people you designate without publicity and without the potential lengthy delay and costs of probate.

If you've set up a marital living trust, usually both spouses are co-trustees. When one spouse dies, the other spouse continues as the initial trustee.

It is possible to name someone else other than you and/or your spouse to be the initial trustee. It is uncommon and unnecessarily complicates your trust arrangements, as you must keep separate records of the trust. You should work with your attorney to select a capable trustee if you wish.

Because something could happen to the initial trustee, it's vital to name a successor trustee. This is the individual who will be distributing your assets according to your wishes after you die, or if you become unable to manage the trust due to injury or illness. For property not held in the living trust, creation of a durable power of attorney and a health care durable power of attorney can designate someone else to carry on with the non-trust assets.

If your trust were a marital one, the successor trustee would not take over until after the second spouse dies.

The successor trustee could also die or become incapacitated, so it's imperative that you name an alternative trustee, too, to take over as successor in that circumstance.

What does the successor trustee do? If your instructions are explicit as to how you want property transferred at your death, then the job is somewhat easier. However are still things you must do:

Obtain copies of the death certificate of the initial trustee

Present death certificate, copy of the living trust and proof of successor trustee's identity to the various financial institutions or organizations that have the property/assets

Prepare documents of title transfer from the trust to the beneficiary(ies) as appropriate.

Supervise distribution of trust assets where no title is involved.

If necessary, the successor trustee may manage a child's trust if the beneficiary is a child who has not reached the age at which the initial trustee designated the property to be transferred. The successor manages the property for that individual until he or she reaches the specific age outlined in the original living trust. This may be the only task the successor trustee is actually paid to do. If required, the successor trustee might also file federal and/or state death tax returns.

It is important to name a successor trustee; preferably one whom you feel will diligently carry out your wishes. It may even be someone who is also a beneficiary of the trust assets. If there is any question about whom you should name, consult with an attorney for suggestions.

WILLS

A will is a written document detailing instructions as to how you want your assets divided up after your death. You might also include information as to a child's guardianship, how (or if) you are to be buried and the appointment of an executor of your will.

The two main types of wills are:

attested
holographic

The attested will is the most common. It is usually prepared by a lawyer in typewritten form and signed in front of several witnesses who have no benefit in the will whatsoever.

The holographic will is made without a lawyer, written on plain paper in your own handwriting, dated and signed. If your wishes are clear, this should be as effective as the attested will. It will more likely be disputed than an attested will and be subject to the interpretation of the courts, where anything could happen. Attested wills are safer for carrying out your final instructions.

Most people think they should have a will. Many people do, however, do not have a will because estate planning is generally not a high priority to many people nationwide. There are many fine estate planners around the country who work with individuals, but the average person doesn't put much thought, time or effort into addressing this important financial task of preparing for asset distribution after death.

Attorneys will be glad to help you do an attested will and may not charge much to do so. They'll get paid later— when the will goes through probate court. The payors will be your beneficiaries, who will see assets drain as a result of legal fees and court costs.

Probate can be lengthy, especially if the will and estate is a complex one. Not only does a will diminish the value of the property, it may also slow down the time it takes to actually transfer it to the designated beneficiary.

A will does let you choose your heirs, but the advantages stops there. You will not avoid probate, estate taxes (if any), death income taxes, privacy of transfers or incapacitation. These are the primary reasons one should set up a living trust INSTEAD of a will.

There is a will that is important when establishing a living trust. It's called the pour-over will. This document puts any assets you failed to place in your living trust during your lifetime into the trust after your death. In effect, it "pours over" assets from the will to the trust. This document may also name the guardian for minor or incapacitated children.

The pour-over will is a "fail-safe" device to ensure that any property left out of the trust will be placed there. It is also a back-up to the living trust in case it's invalidated for any reason. The pour-over will can substantiate the trust simply by reaffirming its terms. It would be difficult for one or more heirs to challenge successfully both a living trust and a pour-over will if their conditions and instructions are similar.

ESTATES

What is an estate? Exactly what are we trying to protect with a living trust?

An estate is essentially all the property you own (your assets) minus anything that you owe (liabilities). This calculation, assets minus liabilities, will yield a net worth for you. This is the value of your estate at the time it is calculated.

The size of your estate is important. More important is the value of your taxable estate. This will equal, roughly, the value of your estate less property left to your surviving spouse or to charity.

The other estate calculation of note is the probate estate. This is the portion of your estate that must go through probate before it can be distributed. Leaving your assets via a will puts them through probate.

The difference between the taxable estate and the probate estate should be considerable if you plan your estate properly. For example, let's say your estate calculation is $400,000. By transferring the title of your house, valued at $250,000 and your Chrysler stocks, valued at $75,000, to a living trust, you have reduced your PROBATE estate by $325,000 to $75,000. Your goal should be to try and reduce the probate estate to zero if possible.

Living trusts will save probate costs. They do not avoid death income taxes. There are other things you can do, planning-wise, to reduce your taxable estate, but a living trust is not one of those. You can and should, however, reduce or even eliminate your probate costs.

Proper estate planning, in general, can accomplish all of the following:

select your heirs
choose amount and time of distribution of inheritance to heirs
avoid probate
eliminate or reduce federal estate taxes
eliminate death income taxes
maintain control over your assets
maintain both privacy and flexibility
leave directions and the power to act if you are incapacitated
leave funeral instructions
leave organ transplant instructions
make the administration of your estate as simple and quick to execute as possible.

These are important goals. A living trust is one example of addressing these goals in your estate planning. It is by no means the only thing you should do, but it is a document that can help you and your heirs immensely.

OTHER TYPES OF TRUSTS

By now, you should understand the meaning and main purpose of a living trust. There are, however, other types of trusts that should be mentioned that assist in estate planning goals.

Living trusts are only truly functional when the creator of the trust passes away. It avoids probate costs. Other types of trusts help you to avoid taxes.

MARITAL ESTATE LIFE TRUST: Commonly referred to as the A-B Trust, this trust is set up for couples whose combined estate is in excess of $1.5 million. $1.5 million is the amount of your estate which is exempt from federal estate taxes. The marital life estate trust lets BOTH spouses take full advantage of the $1.5 million estate tax exemption.

When a spouse dies, property is left for the use of the surviving spouse during the balance of his or her lifetime. However, the survivor never becomes the legal owner of the property. If legal ownership is never bestowed, then the property is not included in the survivor's estate and thus avoids being counted for tax purposes.

The trust is complex and has important ramifications for the surviving spouse, which should be understood before putting this type of trust into effect.

Q-TIP TRUST: Short for Qualified Terminal Interest Property, it is a type of marital life estate trust that is intended to postpone payment of estate taxes when the first spouse dies. It only postpones them until the death of the second spouse and the taxes could be higher then since the amounts would be calculated on the then-current estate, but it saves the survivor a substantial amount of money while alive.

GENERATION-SKIPPING TRUST: You may have heard of this type of trust where the bulk of assets are left to the grandchildren, but the

income derived from them is utilized by the trustor's own children. In essence, the estate "skips" the children, going directly to the grandchildren, but the use of the income is still there for the direct heirs; the use of the property is not.

Current laws impose a tax on all generation-skipping transfers in excess of whatever the current limit is. If an estate is worth more than that, the children may want to get this excess property directly since they will have no access other than to income from the property that was transferred to the grandchildren.

It all depends on the size and type of estate. These are examples of other trusts. This isn't meant to say you should attempt to set up every conceivable type of trust. The key is what your estate and heirs "picture" looks like—this will govern the estate planning devices you will utilize.

TAKING INVENTORY

To value your estate from both a net worth and living trust planning standpoint, you must inventory your assets and calculate your liabilities first.

Assets: This is the first calculation. You should list each item and describe it, indicating whether you own the property outright or the percentage of your ownership if not. Then list the actual value of the portion you own.

Begin with your liquid assets:

cash
savings
checking accounts
money market accounts
CDs
precious metals

Next, list other personal property:

stocks
mutual funds
bonds

other securities
automobiles
jewelry
furs
art works
antiques
tools
collectibles
life insurance

Then, list your real estate holdings including your own home(s), condominiums, mobile homes, land, etc.

Finally, list any business personal property including partnership interests, copyrights, patents, trademarks, stock options, etc.

Add these up and you will have the total amount of your assets.

Then, list your liabilities by name and the amount you owe, including:

personal loans (credit cards, bank)
mortgage loan(s)
taxes due, current or past
life insurance loans
other personal debts

Add all of these numbers up to arrive at your total liabilities. Subtract your liabilities from your assets to arrive at your net worth.

This allows you to place a value on your estate. You can inventory property that has to be itemized for the living trust anyway. You can separate property by titled ownership and non-titled property.

SUMMARY

Knowing where you are in valuing your estate is an excellent start to your estate-planning program. The use of a living trust is a clear example of using estate planning to help you (and your heirs) save money and to avoid the hassles of court and lawyers.

For information on Estate Planning, Living Trusts and Wills, visit us at……. www.FreeBusinessForms.com