LIVING TRUST – A PRIMER
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Estate planning deals with what happens to your assets after you die. Even if you are a person of modest means, you have an estate — and several strategies to choose from to make sure that your assets are distributed as you wish and in a timely way. The right strategies depend on your individual circumstances. That is, what is best for your neighbor might not make the most sense for you.

For most people, a living trust can be a useful and practical tool in the estate planning process. But for others, it can be a waste of money and time. Questions that many persons pose are: What is a living trust and how does it differ from a will? What are the advantages and disadvantages of using a living trust versus using just a will?

LIVING TRUST OR A WILL?

A living trust, created while you're alive, lets you control the distribution of your estate. You (the "grantor" or "settlor") transfer ownership of your assets into the trust to be held and administered for your benefit by one or more "trustees" pursuant to the terms of a written trust agreement. You can name anyone, including yourself, to serve as the trustee or you can select a person or an institution to be the trustee. If you're the trustee, you will have to name a successor trustee to distribute the assets at your death or should you become disabled or unwilling to continue serving as trustee. Property must be transferred into the trust during your lifetime to provide for its management by the trustee and its distribution following your death. After the trust has been established, all transactions involving trust property are conducted in the name of the trustee.

A will is a legal document that dictates how to distribute your property after your death. If you don't have a will, you die intestate, and the law of your state determines what happens to your estate and your minor children. The probate court governs this process – which usually involves filing a deceased person's will with the local probate court, taking an inventory and getting appraisals of the deceased's property, paying all legal debts, and eventually distributing the remaining assets and property. This process can be costly and time-consuming. Many states, such as Arkansas, have simplified probate for estates below a certain amount ($100,000 in Arkansas), but that amount varies among states. If an estate meets the state's requirements for "expedited" or "unsupervised" probate, the process is faster and less costly.

ADVANTAGES AND DISADVANTAGES

Continuity of Management at Death. A living trust provides for the continuing management of property upon the death or disability of the settlor and generally allows property to be more quickly distributed upon the settlor's death. This is because a successor trustee can act almost immediately without the necessity of notice or court approval. However, a simple will is also needed to "pour over" to the trust any property that was not transferred to the trust during life. Upon your death, the trust property (including property added to the trust by the will) passes to individuals or charity, either outright or in trust, as directed by the terms of your living trust.

Avoidance of Guardianship. A living trust also protects against non-management or mismanagement of assets during physical or mental incapacity. If you become incompetent, a successor trustee can take over management of the trust without a court proceeding and without interruption. A "durable power of attorney" may also be used to avoid a court proceeding for incompetency, but does not have the flexibility of a living trust for this purpose.

Avoidance of Probate. Avoidance of probate usually reduces attorneys' fees, although it is impossible to estimate accurately the savings to your heirs. Probate attorneys' fees are based on a statutory fee schedule. These fees are based only on the value of assets passing through probate (not on insurance, employee benefits, joint tenancy assets and a surviving spouse's interest in community property). However, even if all of your assets have been placed in a living trust and probate is completely avoided, an attorney and an accountant are usually required to assist with distribution of the trust assets upon death and to prepare death tax returns.

Cost and Complexity of a Living Trust. Using a living trust to carry out your estate plan requires many changes during your lifetime: stocks must be re-registered, trust accounts must be established and title to promissory notes, real estate, partnership interests, mineral interests and all other assets for which you wish to avoid probate must be transferred into the name of the trustee of the trust. Decisions must be made as to which assets are community property and which are separate property (where applicable). This process is called "funding the trust" and requires some time, effort and expense. After funding is completed, it should only be occasionally necessary to consult an attorney with respect to operation of the trust. The cost of operating a living trust during life will exceed the lifetime cost of using a will, but the cost and nuisance should be relatively minor. (No change in lifetime management is involved with a will since it does not become effective until death).

SUMMARY

Whether to use a will or a living trust (with a "pour-over" will) to implement your estate plan is not a simple choice. The decision should be made in light of your assets and your estate plan. Out-of-state property, the possibility of a contest after death, the size of your probate estate, the complexity of your business affairs, your situation with creditors or potential creditors and other factors unique to you must be considered in making your choice. In effect, the living trust causes you to do some of the things now that might otherwise await the probate process at your death. This can give you the satisfaction of knowing you are beginning to "put your house in order" or it can be an unnecessary nuisance.

ABOUT THE AUTHOR

Charles C. Owen is a shareholder and the senior tax member in Gill Elrod Ragon Owen & Sherman, P.A., Attorneys, Little Rock, Arkansas. A graduate from the University of Arkansas Schools of Business and Law in Fayetteville, Charlie has been a tax practitioner for over 46 years and is well-versed in all aspects of taxation.

Also a Certified Public Accountant, Charlie's practice focuses primarily in Wealth Preservation Planning. This discipline entails the coupling of traditional estate planning law with the use of Alaskan trusts, family limited partnerships, and limited liability companies to significantly reduce or confiscatory estate taxes and to protect clients' assets in the event of the occurrence of catastrophic litigation claims. Charlie is a co-author of two manuals regarding this subject.

Charlie speaks and writes nationally on a variety of legal and tax topics including elder representation, wealth preservation planning, legal ethics, and tax-exempt organizations. Excelling at turning complicated tax laws into understandable, practical applications, Charlie is a two-time recipient of the Arkansas Society of CPAs **Outstanding Discussion Leader** annual award and a seven-time recipient of the Arkansas Bar Association's **The Best of CLE** annual award. In 2000, he was the first recipient of the Arkansas Bar Association's **The Best of The Best CLE**.

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