Debunking the Trust Myth

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As an elder law and estate planning attorney, I can't tell you how many times I have had new clients come to me with the preconceived notion that they need a trust. When I sit down with them and explore their objectives, in nine out of ten cases, I conclude that a trust is not the most expedient estate planning device for them and that a simple will would serve them just as well at a fraction of the cost. I know that I have lost clients because of this, in spite of the fact that my advice would have resulted in saving upwards of a thousand dollars. Seeing a pattern emerging, I decided to start polling clients as to how they determined that a trust was a must. In almost every case, Suze Orman's name emerged. If you don't already know, Suze Orman is the wildly popular financial planning guru and media darling with her own nationally syndicated television show and at least three do-it-yourself financial planning books with New York Times best seller list acclaim. Don't get me wrong - Suze has loads of down to earth practical advice and has taken much of the mystery out of financial planning. However, I believe that she has created a widespread and misguided mythology that if you don't have a trust, you're on the road to financial doom. In her book, "You've Earned It, Don't Lose It!" she poses the question, "Who should have a trust?" and follows it with the answer, "almost everyone should have a trust."

In this article, I hope to help debunk that myth. Before starting, however, here is quick primer on the definition of a trust. A trust is a financial arrangement in which a person (trustee) is given management authority of assets to be used for the benefit of a person (beneficiary). The assets used to fund the trust usually come from the person forming the trust (grantor), who may or may not be the same person as the trustee and the beneficiary. There are many types of trusts, but the type of trust touted in Suze's books is referred to as a living trust, which simply means that it was created by the grantor during the grantor's life, as opposed to upon the grantor's death. A living trust may be revocable (something the grantor can revoke) or irrevocable (more or less written in stone). Once assets are placed in the trust, the trust owns the assets, and disbursements of trust funds must be made in accordance with instructions contained in the trust document (the trust).

Suze has a laundry list of reasons why trusts are needed by "almost everyone," however, her primary point is that having a living trust avoids probate, and consequently, huge amounts of money. What this ignores is that the probate process is not the same in every state, and in fact, has been greatly streamlined in Maine with the adoption of the Uniform Probate Code in 1979. Some states, (California, New York and Florida, to name a few), set out generous fee schedules for the executor of an estate and the attorney based percentages of the estate. Maine does not allow this, and the attorney for the estate and the personal representative (executor) may only charge a reasonable fee based on the amount of time spent and expertise. As to court fees, they are minimal. A personal representative can usually be appointed within weeks of death giving the personal representative immediate access to the estate assets, and estates are commonly closed within a year of death under an informal process that involves no court appearances.

Suze Orman instructs her readers to be very dubious of any attorney who advises against setting up a trust and suggests that the only motivation for such advice is that the attorney will make a whole lot more money probating the estate than setting up a trust. (Reading this makes me think I should start a tally of all the money I could have made drafting unnecessary trusts for clients who have asked for them!) This theory rests on a couple of wild assumptions; first, that the attorney will be around when the client dies and second, that the heirs would choose that particular attorney to probate the estate. It is ironic that while she cautions her readers to be wary of attorneys suggesting simpler and less expensive means of attaining their estate planning goals, her publicity on this issue has helped spawn a huge industry of unscrupulous trust mills. Capitalizing on the message that everyone needs a trust, and spinning it into a veritable fear factor, there are now many outfits that sell people a slickly packaged, boiler-plate set of form documents for very hefty fees ($2 - 3,000 is not uncommon). These trusts are typically sold by non-lawyers and they rarely address the individual needs of the clients. Moreover, many such trusts turn out to be worth no more than the paper they are printed on, because the client was never instructed or helped with the process of transferring every single asset or piece of property they own to the trust. This leads to another big mistake I think Suze makes in her advice with regard to trusts.

When asked, What's the point of a will?" She answers,"There really isn't much point. You can prepare a will as a backup in order to pass on items such as jewelry and furniture that don't have a legal title and to express your wishes regarding the disposition of your remains and memorial services." This may be true in an ideal world, however, I have seen all too many cases in which people have set up living trusts, but never get around to transferring all of their assets to the trust. It can come as a huge shock after the expenditure of thousands of dollars to avoid probate to find that probate is necessary, anyway. The problem would only be further exacerbated if the decedent left no will, in which case the asset could well end up going to persons other than the decedent wished. Thus, even if an estate plan centers on a living trust, there should also be a will to properly dispose of assets that were inadvertently left out of the trust, and most estate plans with living trusts have a pour-over will to ensure that such assets become part of the trust.

Suze instructs her readers to grill the lawyer advising against a trust about the cost of the setting up a trust versus the cost of probating the estate. This is certainly a legitimate question and one that I typically raise when broaching the trust versus simple will quandary with clients. In Maine, because we don't have statutory fees, the cost of probate is probably very close to the cost of having a trust properly drafted, executed and funded. So the question becomes, do you want to pay on the front end by setting up and funding a trust or have your heirs deal with it and pay on the back end. Add to this the high degree of likelihood that the trust will eventually need to be reworked or abandoned altogether. In short, if probate avoidance is the main objective, there will typically be little savings by properly setting up and funding a trust.

People are often surprised to discover that living trusts DO NOT work as a device to protect assets from nursing home expenses. The assets in a living trust are considered available to the grantor of the trust, and must be spent down to the requisite limits before the owner of the trust will receive Medicaid benefits. Putting one's home in a trust also causes it to lose its exempt status as an asset in Maine. Suze dismisses these concerns, however, with her curt statement, "Remember, Medicaid is assistance for the needy. That generally indicates financial hardship, which we are trying to help you avoid! So the answer to our question [Who shouldn't have a trust?] is that very, very few people should not have a trust." Aside from the rather insulting insinuation you need a trust unless you are poor, this statement is also oblivious to the fact that

Medicaid for nursing home care is not necessarily an impoverishment program. The spouse of one going into a nursing home may keep $113,560 while the spouse seeking assistance may keep $10,000. This in addition to an automobile of unlimited value, the house and other exempt assets. I see clients on a regular basis who have estates of $200,000 - $300,000 who can quickly qualify for Medicaid, however, if their assets were in a living trust, the trust would have to be undone to accomplish this purpose. So, when are trusts needed? Trusts are certainly needed by couples whose assets exceed the amount that is excluded from federal estate tax which is currently $5,000,000 or the Maine estate tax exlusion of $2,000,000. Maybe Suze lives in a neighborhood where everyone has plenty of money to pay for their own nursing home expenses and taxable estates, but she obviously isn't targeting the average Mainer when she proclaims that everyone needs a trust.

Trusts are also useful for passing the management of one's assets on to someone else in a smooth manner in the event of incapacity and good vehicles for planning for disabled persons and for managing a piece of family real estate such as a camp for the use of subsequent generations. In limited circumstances, they can be set up via one's will for a spouse in such a way that the assets will be protected from nursing home care expenses. These are but a few of the many circumstances in which trusts can be very useful planning devices. That said, they are complicated, they are not one-size-fits-all, and if probate avoidance is the primary objective and your property is all in Maine, please think twice. If you still decide you need a trust, then it should be drafted by a lawyer with specific experience and knowledge in trusts and estates.