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PROBATE AND ESTATE PLANNING SECTION



ESTATE PLANNING
WITH LIVING TRUSTS

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The Need for Planning

By using a trust as part of your estate plan, you can arrange for the management of your assets in the way that you intend after death or in the event that you become incapacitated. A trust also alleviates the burden on your loved ones of dealing with complex administrative, legal, and investment issues during already difficult times. A trust has several other advantages, including avoiding the delays and expense of probate, maintaining privacy, saving estate taxes, and ensuring that your assets continue to be managed properly.

What is a Trust?

A trust is a legal arrangement in which assets are transferred to a trustee to be used for the benefit of one or more beneficiaries, such as yourself and your family members. The person who establishes the trust is called the settlor, grantor, creator, or trustor. Upon accepting the assets as trustee, the trustee undertakes the obligation to use the assets in accordance with the settlor's directions. Generally, these directions are set forth in writing along with the other terms of the trust. When the settlor appoints another person as trustee, the document is called a Trust Agreement. When the settlor appoints himself or herself as trustee, it can be called a Declaration of Trust.

What is a Living Trust?

A living trust is a trust created during the settlor's lifetime. A living trust may also be referred to as an inter-vivos trust (Latin for "during life"). There are many other types of trusts. For example, a testamentary trust is created through a will and funded after the individual's death. A living trust is usually created for the settlor's benefit during his or her life; after the settlor's death, the trust assets are distributed to or managed for the benefit of family members or other designated beneficiaries.

Can a Living Trust be Changed?

A living trust may be revocable or irrevocable depending on your objectives. A living trust that you create for your own benefit is usually revocable, contains safeguards in the event of illness or incapacity, and may continue after your death for the benefit of others. As conditions in your life change, you can alter or terminate a revocable trust at any time during your lifetime. After your death, the trust usually becomes irrevocable.

A trust can also be drafted to be irrevocable, meaning that it cannot be changed or revoked once it has been established. Unlike revocable trusts, irrevocable trusts can be arranged so that trust assets are not subject to estate taxes at the settlor's death. Because of this attribute, life insurance is often placed in an irrevocable trust in a manner that will remove the policy proceeds from the insured's estate for federal estate tax purposes.

Irrevocable trusts are also used to hold property for individuals who are unable to manage their own investments. While there are advantages to this type of trust, careful consideration should be given to its lasting effects before creating such a trust.

Can I Serve as Trustee of My Living Trust?

The self-trusted living trust is a popular variation of a revocable living trust. You serve as the trustee of your trust while you are alive and have capacity and name a successor trustee to act in the event of your death or incapacity. Assets previously held in your sole name are transferred in your name as trustee of the trust. If you become incapacitated, the successor trustee continues the administration of the assets for the benefit of you or your beneficiaries; after your death, the trust can continue for the benefit of others, such as your family members. All of the advantages of a living trust described below apply to a self-trusted living trust.

What Are the Advantages of a Living Trust?

Probate Avoidance

Probate is the process by which title to assets owned in your name alone are transferred after your death. Probate may be expensive and time-consuming depending on the value and type of assets in your estate. Many assets do not go through probate. Life insurance and retirement assets transfer to named beneficiaries, and property owned in joint tenancy passes automatically to the surviving joint tenant. Placing assets in a living trust is another method by which you can avoid the expense and delays sometimes associated with probate proceedings.

Even more costly and time-consuming than probate proceedings for decedents are guardianship and conservator proceedings for people who have become incapacitated. Through a living trust, you can plan for the management of your financial affairs should you become incapacitated and

avoid court proceedings and court-supervised management of your assets and financial affairs.

Privacy

When your estate goes through probate, your will and other documents become public record. A living trust provides you with a greater degree of privacy because the trust provisions and the assets in your trust are not subject to public disclosure.

Estate Tax Savings

If the value of your estate is more than the amount excluded from federal estate tax (in 2007, the amount is \$2 million, and it is scheduled to increase to \$3.5 million in 2009, be eliminated in 2010, and return to \$1 million in 2011), it could be subject to estate tax when you die. A trust may enable you to reduce or eliminate estate tax through the latest tax-saving techniques and ensure that more of your estate goes to the people or charities that you choose.

Proper Management of Assets

A living trust may also reduce the risk of inexperienced and unskilled management of property by allowing you to select the successor trustee who would act in the future. Should you die or become incapacitated, the successor trustee takes over management of the trust assets. In addition, the trust assets can be maintained in the trust after your death instead of being distributed outright to beneficiaries who may be unable to personally handle the management of the assets because of their age or other factors.

If I Have a Living Trust, Do I Still Need a Will?

Yes, a “pour-over” will is used in combination with a living trust to achieve flexibility in a total estate plan. A pour-over will directs that assets owned in the individual’s name outside of a trust be distributed (or “poured over”) into the living trust established during the individual’s lifetime. Through a pour-over will, an individual may add securities and other property to a spouse’s or family member’s living trust. A pour-over will serves as a safety net to capture and transfer to your living trust only assets that were not or could not be transferred into your living trust before death. During the period of trust administration, all of the property is managed as a cohesive unit.

Placing Assets in the Living Trust

To achieve full benefit from a living trust, it is important that appropriate action be taken to transfer assets into trustee ownership before your death. This process is often referred to as “funding” the trust. Funding a living trust consists of re-titling your bank accounts, bonds, stocks, real estate, and other assets so that the trustee of the living trust is the owner of the assets. Assets that are owned by a trustee will avoid probate. Assets remaining in your sole name at your death will not avoid probate, unless the assets pass by beneficiary designation (such as a life insurance contract or a retirement account).

Proper funding of a trust during your lifetime can also ensure that estate tax savings are attained. For a married couple with assets totaling more than the estate tax exclusion amount, tax savings can be accomplished only if each spouse has a share of the couple’s total assets set aside in his or her own estate. Failing to divide the assets will likely lead to all assets being included in the surviving spouse’s estate and may result in substantial estate tax having to be paid.

How Do I Select My Trustee?

The trustee is responsible for ensuring that the trust is administered according to the trust agreement. A trustee, who may act after your death or incapacity, should be able to handle all aspects of managing your assets and be willing to act for an extended period of time.

The duty of being a trustee can be a challenging one. The trustee should be skilled in investment management or consult with experts in that area. He or she must keep abreast of all aspects of the job, including the financial markets and changes in tax laws. A trustee acting after your death or incapacity must be able to anticipate and recognize potential problems and deal fairly and impartially with your beneficiaries.

A family member, friend, professional, or a bank can serve as a trustee during your life, after your death, or during your incapacity. A trustee is usually not subject to court supervision, and a trustee bond is only rarely required. As a result of the varied challenges associated with this duty and the tremendous power a trustee is given, choosing a trustee requires careful consideration.

What is the Best Approach to Creating a Living Trust?

Just as important as selecting a good trustee is choosing a good estate-planning attorney. Well-chosen words can ensure that your unique intentions and planning objectives are met. It is advisable to contact an attorney experienced in estate planning. Your life insurance agent, financial planner, trust officer, and accountant can also assist you in the planning process. Together, this team of experts can help you create the best estate plan for you and your family.



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