

USING A LIVING TRUST AS A WILL SUBSTITUTE

Much has been written about the living trust as a means of passing assets to your loved ones upon your death in place of a Will. The treatment of this subject, however, has still left many of you unsure whether a living trust, as a Will substitute, is an appropriate estate planning tool. The purpose of this article is to explain what a Living Trust and Will each accomplish and to discuss the benefits and drawbacks of using a Living Trust in place of a Will.

What a Will Accomplishes: The main purpose of a Will is to identify the persons or organizations (known as "beneficiaries") to whom you wish to leave your property and effects upon death. The Will also designates the personal representative, commonly referred to as the "executor," of your estate who will assume responsibility for the collection of the assets of your estate, the distribution of the assets in accordance with the terms of your Will, and the discharge of your estate's debts and liabilities, including estate and death taxes. The Will which you sign becomes operative upon your death. While still living, you can make a Will, revoke it and/or amend it as frequently as you choose.

If you die leaving a Will, it will be necessary for the executor you appoint under your Will to participate in the probate process. Probate is the legal procedure by which your Will is presented to the local county office (known as the Register of Wills in Pennsylvania) for authentication and for receipt by the executor of authorization to act on behalf of your estate to undertake his or her duties as described above. Until the probate process is completed, the executor cannot distribute your property to your family members or others whom you name under your Will.

What a Living Trust Accomplishes: A Living Trust is an arrangement set forth in a written agreement by which your property is transferred to a person or to a bank or trust company (known as the "trustee") and held for the benefit of the persons or organizations (known as "beneficiaries") whom you designate under the trust agreement. Like a Will, a Living Trust can be revoked or amended by you at any time prior to your death. Unlike a Will, however, a Living Trust (as its name suggests) becomes operative while you, as the creator or "settlor" are still living and as soon as property is transferred into the trust. A Living Trust often provides for the payment to you, as the settlor, of income and sometimes principal from the assets held in trust and, upon your death, specifies how the trust assets are to be distributed among the beneficiaries. Typically, as the settlor, you will serve as a trustee of the trust, although a co-trustee can be appointed to serve with you and/or a successor trustee can be designated in the event you or a co-trustee is unable to serve.

THE ADVANTAGES OF USING A LIVING TRUST

There are several important reasons why you should consider using a Living Trust rather than relying upon the traditional Will to dispose of your property upon death. They are as follows:

Managing Your Assets Upon Incapacity.

A major advantage of a Living Trust is that it facilitates the management of your assets upon your incapacity, whether by reason of illness (such as Alzheimer's Disease) or injury. If you should become incapacitated and unable to manage your property, the co-trustee or the successor trustee whom you designate in your Living Trust can assume responsibility for managing your assets. Because a Will only becomes operative upon your death, it can not address the management of your assets if you become incapacitated.

If you become incapacitated and lack a Living Trust, your family may be faced with the unpleasant, and sometimes expensive and time consuming, task of asking a judge to appoint a guardian to oversee your assets while you remain incapacitated. The only other means of addressing the management of assets during your incapacity is the use of a Power of Attorney, which grants to a third party authority to act on your behalf with respect to your property and affairs. While the authority granted under a Power of Attorney is generally recognized, banks and other financial institutions may more readily accept the authority of a trustee acting under a Living Trust.

Avoiding Probate.

As noted above, if you rely upon a Will to transfer your property upon death, your estate will be subject to the probate process. Unfortunately, probate, in certain situations, can be a protracted process causing a number of problems. If probate is delayed, your family members or other beneficiaries will be unable to receive their inheritances until the probate is completed, possibly causing them financial and emotional distress. Also, if a delay in probate results, your executor will be unable to gain control over the assets of your estate until his or her appointment is confirmed with the Register of Wills, and in the intervening time the executor will be unable to monitor and preserve the value of such assets. If you own real estate outside the state in which you reside at your death, a supplemental probate process may need to be conducted in the state in which the real estate is located, thereby delaying the distribution of this real estate and adding expense to the process.

The probate process can be avoided if you place all of your assets into a Living Trust. Because the assets of such a Trust are not considered a part of the probate estate upon your death, your assets will be distributed according to the terms of the Trust rather than according to the terms of a Will. It should be noted, however, that in a number of states, including Pennsylvania,

the probate procedure generally is completed very quickly, and the difficulties associated with probate which I described above are not regularly encountered.

Protecting Your Privacy.

If your assets pass under a Will and through probate, your executor will be required to file with the Register of Wills an inventory listing the assets which you own, and the market value of such property, at the time of your death. This inventory, together with the Will, will become a matter of public record. Therefore any reporter, creditor or member of the public will be free to review, copy and publish the information contained in your inventory and/or your Will.

If you are seeking to preserve the privacy of your property holdings and dispositions, a Living Trust arrangement is desirable. Because it is not subject to probate, any assets held in a Living Trust are not subject to public examination.

Reducing Administrative Expenses.

Certain expenses associated with the probate process may be reduced or eliminated if your assets are transferred under a Living Trust. For example, during probate, the Register of Wills charges a fee for its services. If you use a Living Trust and avoid probate, this fee can be eliminated altogether. Also, the fee which an attorney charges for representing an estate often is based upon a percentage of the value of the assets subject to probate. If you use a Living Trust as a Will substitute, there is no probate estate upon which a lawyer can base his or her fees, and the legal fees associated with an estate subject to a Living Trust may be lower than for an estate subject to probate.

THE DISADVANTAGES OF USING A LIVING TRUST

Although the preceding discussion highlights the major benefits to you of using a Living Trust for the transmission of assets upon death, the traditional Will may still be preferable after you consider the following:

Probate is Required for Assets Not Transferred to a Living Trust.

In order to avoid probate, you must make sure to transfer all of your assets into the Living Trust, including all stocks, bonds, bank accounts, real estate and business interests. If any of your assets, at the time of your death, are not held by the Living Trust, those assets will be subject to the probate process. Many individuals who have Living Trusts neglect to make all of the necessary asset transfers, and therefore their assets remain subject to the probate process which the Living Trust was established to avoid.

Expenses of Creating and Maintaining a Living Trust.

The legal expenses you incur in creating the Living Trust document may be greater than those you would incur in preparing a Will. Also, if you own real estate, a deed will need to be prepared and recorded transferring the property from your name into the name of the Living Trust. Apart from the expenses of preparing and recording the deed, Philadelphia real estate and, in certain more limited circumstances, Pennsylvania real estate located outside of Philadelphia, may be subject to realty transfer tax upon such a transfer to a Living Trust.

If you name another person to serve as a co-trustee of the Living Trust with you, he or she can claim annual fees or commissions for serving as trustee. Finally, if you choose not to serve as a trustee of your Living Trust, the trust may be treated by the Internal Revenue Service as a separate taxpayer and will have to file separate tax returns each year.

Special Responsibilities Imposed Upon Trusts.

When you create a Living Trust, certain responsibilities arise by reason of the trust relationship which do not otherwise apply if you control your assets outside of a Living Trust. The trustee(s) of your Living Trust, including yourself if you are a trustee, have the legal responsibility to maintain and preserve the assets held in the Living Trust for the benefit of the trust beneficiaries. If your trustee(s) invest assets in an imprudent or reckless manner, they may be held personally liable to trust beneficiaries for any loss of value in such assets. As an additional obligation, your trustees must keep accurate records as to the assets maintained in your trust, the expenses paid and incurred by your trust and the distributions made to the beneficiaries. At the request of one or more beneficiaries, the trustees may be required to furnish a detailed written accounting of all trust transactions, the preparation of which may involve a significant amount of time and expense.

Estate Tax Considerations.

Advertisements for financial seminars and other promotional materials often recite that you will reduce your Federal estate tax by using a Living Trust. This statement is highly misleading because it implies that if you use a Will, your estate will have a larger Federal estate tax liability. In fact, when you die, the assets which you own, whether passing under a Will or through a Living Trust, should be subject to the same amount of Federal estate tax provided that certain estate planning techniques are employed which are available for use with Wills and Living Trusts. Accordingly, you should not choose to create a Living Trust as a substitute for a Will solely out of a concern for reducing your Federal estate tax liability.

CONCLUSION

There are many good reasons for you to consider establishing a Living Trust as a substitute for a Will. However, the Living Trust is not an appropriate planning device in all cases. Therefore, you should weigh the various advantages and disadvantages of a Living Trust, as outlined in this article, in the context of your own personal circumstances, to decide whether the use of a Living Trust is a sensible choice. You should also consider reviewing your assets and personal circumstances with an attorney experienced in trust and estate matters who may be able to assist you in making the right decision.