LIVING TRUSTS

Calculating the Benefits

AMERICAN ACADEMY | OF ESTATE PLANNING ATTORNEYS

LIVING TRUSTS: CALCULATING THE BENEFITS

Chances are you've already heard a lot about the attributes of Living Trusts: avoiding probate and legal quagmires, sometimes lowering estate and/or income taxes, and protecting privacy. Yet it's also important to receive solid estate planning guidance before making final decisions, and to carefully weigh the benefits and potential drawbacks.

WHY CHOOSE A LIVING TRUST?

The desire to ensure that an heir is provided for materially is the most common reason for creating a Living Trust. In the case of minors, a trust allows a parent to provide for a child without giving the child control over the property. The parent can also mandate how the property is to be distributed and for what purposes.

A trust is also a useful tool for taking care of heirs who have mental impairments or lack investment experience. The trust document can establish that all money is controlled by a trustee with sound investment experience and judgment. Likewise, a trust preserves the integrity of funds when the recipient has a history of extravagance. It can protect the property from an heir's spendthrift nature as well as from his or her creditors.

This is also true of persons who may feel pressure from friends, con artists, financial advisors, and others who want a slice of the pie. A Living Trust can make it extremely difficult for a recipient to direct property to one of these uses.

A "spendthrift" provision in a Living Trust is often used to further preserve the integrity of assets. It prohibits the heir from transferring his or her interest and also bars creditors from reaching into the trust. Living Trusts are relatively easy to update, modify, or revoke in most cases. A will, however, is difficult to change, and establishing one requires many formalities.

SHORT-CIRCUITING THE ORDEAL OF PROBATE

Among the most popular benefits of a Living Trust is the avoidance of probate. Because property in the trust is not considered part of an estate, it does not have to undergo this sometimes lengthy process. The property is instead administered and distributed by the trustee, according to the specific terms of the trust.

Probate expenses can be significant. Costs vary according to the size of the estate and what it includes. It also varies by state. Some have very expensive and onerous procedures, while others offer a streamlined version of probate.

Avoiding probate means not only avoiding hassle and expense, but also saving time. Probate can extend the amount of time before an heir receives an inheritance by months, years – even longer if the will is contested. Not only can this create hardship among the heirs, but the property in the estate may also suffer. Many assets must be carefully managed to preserve and enhance their value. Losses may easily occur during this interim period.

There is an emotional price to pay, too. Survivors may be continually reminded of the loss of a loved one as the process drags on.

Probate can also lead to loss of privacy. Wills and probate are public matters, whereas a Living Trust keeps the estate private. Typical probate documents list all assets, appraised value, and names of new owners. This information becomes available to marketers, media, creditors, and con artists.

If the estate includes real property in more than one state, the process becomes even more complex. An ancillary administration is required to probate out-of-state real estate. As you can imagine, "double probate" is even more time-consuming, expensive, and emotionally taxing than a single probate process.

Probate also allows the original owner's creditors a shot at the property. Although there is still some controversy about the extent of its creditor-shielding benefits, a Living Trust generally makes it much more difficult for an estate to be consumed by creditor claims.

MAINTAINING CONTROL

Living Trusts are harder to contest than wills. Part of the reason is that trusts usually involve ongoing contacts with bank officials, trustees, and others who can later provide solid evidence of the owner's intentions and mental state. A Living Trust that has been in place a long period of time is less likely to be challenged as having been subjected to undue influence or fraud. And because it is a very private document, the terms of the trust might not even be revealed to family members, allowing less opportunity for challenges to its provisions.

A Living Trust also avoids the painful ordeal of "living probate." That's what happens when a person is no longer competent to manage property, whether because of illness or other causes. Without a Living Trust, a judge must examine whether you are in fact incompetent, and all of the embarrassing details of your incompetence will be dragged out in court. The

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judge will appoint a guardian – perhaps someone you would not want to manage your affairs. Guardians act under court supervision and often must submit detailed reports, meaning that the process can become quite expensive.

With a Living Trust, your designated trustee takes over management of trust property and must manage it according to your explicit instructions in the trust document. The terms typically set standards for determining whether you are incompetent or not. For example, you may specify that your doctor must declare you can no longer manage your financial and business affairs.

MANAGING ASSETS, EASING TAX BURDENS

Living Trusts also provide a way for beneficiaries to receive the guidance of professional asset managers. A bank may be named as a Successor Trustee or Co-Trustee, allowing an experienced trust department to manage the assets.

Of course, eliminating or reducing taxes is one of the primary goals of estate planning. Trusts allow for a highly flexible approach to taxes. Income taxes can be slashed by transferring income-producing assets to a recipient in a lower tax bracket. Through the use of trusts, the state and federal government's estate tax exclusions can be doubled, without the filing of an estate tax return unless the decedent had more than the respective state or federal applicable exclusion. The permanent federal exclusion is $5 million adjusted for inflation (temporarily doubled for 2018-2025), though it may be much lower for the state. And some trusts are a prudent destination for annual gifts that fall within the government's tax-free gift allowance ($18,000 per year for individuals, $36,000 a year for couples, with this amount indexed to inflation).

ARE THERE DISADVANTAGES TO A LIVING TRUST?

A trust may not be needed by all individuals and families. Depending on the terms, trusts can result in some loss of control.

Also, it is important to transfer all titled property into the trust on a regular basis to keep it current. Property outside the trust is part of the individual's estate and will trigger the probate process you hoped to avoid by creating the Living Trust. Formal transfers of property into the trust are required even when you and the trustee are the same individual.

A Living Trust costs more than a Will to create, although it saves large amounts later through its probate-avoidance feature. Deeds will be necessary for transferring real

property into the trust, and that will also involve some additional expense. Also, attention must be paid to keeping the trust current. That means making sure all property is in the trust, and adjusting it for changed circumstances; for example, after the birth of a child or the dissolution of a marriage.

If these seem like minor disadvantages, you're right. For most people, the attention and initial expense involved in a Living Trust is worth the significant benefits for family and other heirs: the avoidance of probate, the tax advantages, and the preservation of privacy and independence.

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