

Foulston Siefkin Estate Planning: REVOCABLE LIVING TRUST OR WILL?

THE REVOCABLE LIVING TRUST — IS IT FOR YOU?

The revocable living trust affords another option for the transfer of assets upon death. There are several pros and cons to using living trusts versus wills as your primary estate planning document. A living trust can act as a will substitute and in many cases avoid the need for probating your estate. Much has been written recently on the use of living trusts to avoid probate. Further, banks, brokers and other financial institutions aggressively promote living trusts. What is a living trust? Is a living trust right for you?

A living trust is essentially an agreement between you, sometimes called the “grantor,” “trustor,” or “settlor,” and one or more other persons called the “trustee(s).”

CONSIDERATIONS

1. Probate avoidance.

The primary reason given for the use of living trusts is to save the cost of probate. The attorney time in this regard is generally the most significant probate cost and can be avoided by eliminating the court’s involvement in the transfer of your assets. By using a living trust, a trustee holds or receives title to all of your property at the time of your death, thereby obviating the need for a court to assist in the transfer of property governed by a will.

2. Trust preparation and funding.

Of course, there is some additional expense involved in the preparation of the trust document and the transfer of all of your property to the living trust. Actual deeds, assignments, transfer documents, etc. should be prepared to give the trustee title to all of the assets prior to your death. In addition, living trusts require some on-going maintenance to ensure that all future assets are transferred to the trust. If an asset is overlooked, e.g., not owned by the trustee and fails to name the trustee as beneficiary, a probate proceeding still may be required. It is this risk that causes careful practitioners to recommend a “pour-over” will to complement the trust. A pour-over will provides for any assets passing through probate to be distributed or “poured over” into the trust for ultimate disposition.

3. Preparation and filing of death tax returns.

Although the expense involved in dealing with the court can be reduced or eliminated, the living trust does not avoid the obligation to file a federal estate tax return and any required state death tax returns. The cost involved in preparing and filing these returns represents, in many cases, the greatest cost in the resolution of an estate. As discussed below, the executor or trustee must identify all of the assets owned by the decedent, including real or personal property (such as cars, stock, bank accounts, certificates of deposit, etc.), however owned, on the tax returns using their fair market values as of the decedent’s date of death (or in some cases, as of six months after death). In many cases, appraisals are required to establish these values. If there is no executor appointed, the trustee of the living trust must see that the necessary tax returns are timely prepared and filed. A trustee of a living trust may have an advantage over an executor in this process since the trustee presumably already holds title to all of the decedent’s property, thereby being in a better position to know the decedent’s property and their values.

4. Delay in distributions to beneficiaries.

The living trust can also avoid some of the delay involved in the probate process attributable to the more cumbersome involvement of court administration. The average estate takes 12-16 months to fully administer. However, where a federal estate tax return is required, the living trust may offer no advantage to a will in accelerating the settlement of an estate since the trustee will want to (and indeed should) wait to make substantial distributions until the IRS has issued a final closing letter indicating that the proper amount of tax has been paid and that any lien of the IRS on the decedent's assets is released.

5. Privacy.

Another advantage to using a living trust rather than a will is it avoids the public disclosure of the amount, value, and disposition of your property. Probate and administration is a matter of public record, meaning that any person is free to examine all of the papers filed with the court and attend the hearings held at the various stages of the probate process. Of course, if a living trust is contested, this veil of secrecy will be lost in the ongoing judicial proceeding.

6. Disability.

Perhaps, one of the most practical reasons for having a living trust is to provide for the possibility of your disability. If all of your property is held in a living trust and you become disabled, a successor trustee (whom you have named to be appointed in the trust document) can step in and manage your property for your benefit in accordance with the terms of your trust. This avoids, in most cases, the need to have a conservator appointed by the court to manage your affairs. While most states provide for durable powers of attorney, a much less costly alternative to a living trust used for this purpose, many title companies, banks, and other institutions are reluctant to accept durable powers of attorney, especially those that only become effective upon the person's disability. Unlike the living trust, the durable power of attorney generally ceases to be effective upon your death. Again, many practitioners recommend a durable power of attorney even if a living trust is used. The power of attorney is much broader in its application since the trustee of the living trust is limited in authority to the assets held in the trust. For example, your trustee would not be able to file personal income tax returns for you (as living trusts are not required to file a separate tax return during the grantor's lifetime), settle claims not involving trust assets, etc.

7. Probate in multiple states.

If there is property in numerous states that would otherwise be subject to probate, the living trust's probate avoidance benefits are magnified. For instance, if you were to own real estate in several states, there would generally need to be some type of court proceeding in each state. If the property is transferred to a living trust, the necessity for probate in these multiple jurisdictions is avoided.

CONCLUSION

The living trust should be considered to provide for coordination of your affairs if you should become disabled and following death. Although there are circumstances when their use is not warranted or desired, they have become the preferred estate planning instrument among a high percentage of estate planning attorneys and their clients.

Important Note: In all situations when there are asset transfers during lifetime designed to afford asset protection, the opinion of knowledgeable legal counsel should be obtained to ensure that any such transfers or conveyances do not constitute "fraudulent conveyances" which violate applicable state or federal law and are therefore not only legally voidable by creditors and bankruptcy trustees, but also which could preclude the debts of the transferor from being discharged in bankruptcy.

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