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THE TRUTH ABOUT LIVING TRUSTS

By Neil A. Derman, Esquire

As my years of experience as an estate planner have grown, so to has the number of clients who have asked me to institute a living trust in their estate plan. One would conclude that this was the new “penicillin” of the estate planning epidemic. However, when you really analyze the situation, a majority of New Jersey and Pennsylvania residents will find that a living trust is an unnecessary expense in their estate planning process. Many myths have been spread about the effects of a living trust on ones estate. This article is intended to set the record straight explaining the true benefits and detriments of a living trust.

Myth 1: Living Trust allows me to control my assets while removing it from my estate

Living Trusts do have their benefits. It allows the grantor (creator of the trust) to maintain control over their assets during their lifetime. Usually the grantor/creator of the living trust is also the trustee and can manage the trust assets for their own benefit. They have all the powers vested in the assets and can change or revoke the trust at any time.

However, when you analyze the effect of a living trust, one can conclude that nothing really has changed. It’s as if you took the money out of the left pocket of your pants and placed it in the right. For estate tax purposes the grantor/creator of the trust will be seen as still owning all the assets when they die. This is because the IRS views the trust as a grantor trust.

For a trust to be excluded from ones estate, simply put, one must remove all incidents of ownership and control over the assets transferred. Because a living trust allows the creator/grantor to still control and manage the assets – they will not, for estate tax purposes, be seen as removed from the grantor/creators estate. Hence it is deemed a grantor trust and remains in the estate of the grantor/creator. To circumvent this, one must remove incidents of ownership, i.e. take the property out of your left pocket and put it in someone else’s pocket. That way, the IRS cannot say the grantor retained any rights in the trust. This is an effective tax savings device and can be set up by any estate planning professional. If done correctly, this can save the grantor/creator thousands of dollars in estate taxes at death.

Myth 2: If I want my estate to be private, the only way I can do this is to set up a living trust

The second benefit to a living trust is the level of privacy it creates in ones estate. A will is a public document. When an individual dies testate (with a valid will), once the will is probated, it becomes a public document. Therefore, anyone is entitled to view your bequests: who you chose to benefit and who you did not.

If your sole intention is to keep your assets private a living trust is a useful device, although it offers no estate tax savings benefits. Other tax savings vehicles may be a better fit and also will offer the additional benefit of keeping your estate private. Others reason, correctly so, that they wish to include a living trust to avoid probate.

There are alternate ways to avoid probate that may offer a simpler or more tax beneficial outcome. For married couples, probate can be avoided through joint ownership with rights of survivorship. All assets held solely in the name of the decedent are subject to probate as they pass through the terms of the will. Contractual ownership, such as property held as joint tenants with rights of survivorship is a non-probate asset that passes outside the realms of the will. Therefore, a good tax strategy for certain married couples is to own most assets as joint tenants with rights of survivorship. When the first spouse dies, the assets will not be subject to probate proceedings and therefore remain concealed from the public.

But most importantly, most clients are worried about cost. However, probate in New Jersey, and in some respects in Pennsylvania as well, is relatively inexpensive. The cost of probating a will is virtually the least expensive of all the states and a relatively simple process. Unlike states such as Florida, attorney fees and probate costs do not run high enough to necessitate the incorporation of an expensive trust in ones estate plan. The court and/or probate fees are relatively modest and the executor fees, if taken, are set by statute. Attorney fees although not outlined statutorily like executor fees must be reasonable and should be explained and agreed upon in advance.

Not all is lost when it comes to a living trust. The most unfortunate aspect of the numerous myths involving a living trust is the beneficial purposes of a living trust are often overlooked.

The most important reason for using a living trust is for the individual who owns property in multiple states. Estate settlement proceedings will have to be conducted in both states upon the passing of the owner. This can become both expensive and cumbersome. A living trust can avoid this dilemma by removing ownership of the assets from one of the states.

For example, if a client owned property in both New Jersey and Florida and passed away with title to both assets in their name alone, they would have to probate their will in both New Jersey and Florida. New Jersey a relatively inexpensive and easy state to probate in would not be too much of a burden on the executor. Florida on the other hand is one of the most expensive states to probate a will in and will be quite a daunting task for the inexperienced executor. If the property in Florida was placed in a living trust, during their life the decedent would have full control over the property. However when the individual passed away, although still included in their estate for estate tax purposes, for probate purposes Florida would see the property as being owned by the trust not the decedent. Therefore probate proceedings would not be necessary in Florida, thereby avoiding a rather large expense.

A Living trust also offers many other benefits. They can be used to manage ones assets should you become disabled or incapacitated, or for an individual who needs current management of their wealth because they have no experience handling money or lack the time to manage their money. Finally a living trust, is beneficial in situations were a will contest is likely to appear. Most importantly, a qualified estate planner would be best to decide whether a living will is a needed estate planning tool when planning for your death. But be aware, a majority of individuals will not likely need a living trust. So, next time you're watching television or reading the newspaper and see an article or advertisement espousing the benefits of a living trust, realize you may not fall into the small minority whom this estate planning technique will benefit. But if you have doubts, it is best to call your attorney and ask them what they recommend.



Begley & Bookbinder, P.C. is a law firm that specializes in Elder & Disabilities Law. We are based in Moorestown, NJ, with offices in Stone Harbor & Lawrenceville.

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