



Wills and Living Trusts

Wills and living trusts are the foundation of estate planning. That being said, it is often useful to understand what they accomplish and what they cannot do. It is always helpful to have an understanding of their characteristics and attributes.

Historical Perspective

Wills and living trusts have both been around for hundreds of years. For most of our country's history, very few people did living trusts. The vast majority of people either prepared their own will (often a holographic will) or went to attorney to have one prepared. The attorney would frequently retain the original will, and upon the individual's death, there would often have to be a probate.

Living trusts are similar to wills, in that they allow you to plan for the disposition of your estate, but if properly funded they avoid the probate process.

What happens if you do not have a Will or Living Trust?

If you die without having done any estate planning, all individually own assets that do not contain a beneficiary or are not in joint tenancy will pass according to the laws of intestacy of the state in which you reside. If you are a California resident and the total of those assets exceeds \$100,000, probate will be required.

Assets that are in joint tenancy will automatically pass to the surviving joint tenant. This is generally all right at the death of the first spouse, but what happens after that? Sometimes the surviving individual adds a child or children, but that causes problems including a loss of step-up in basis; loss of control; and potential that the child's creditors become your partner in the property.

In the event that you die without having done either a will (or a living trust), your assets will be distributed according to the laws of intestacy instead of your wishes and regardless of the age of your heirs. Therefore, it is extremely important to do some planning.

The Drawbacks of Will Based Estate Planning

Many people are under the impression that having a Will causes an estate to avoid probate. For people in California with assets that total in excess of \$100,000 that are not in trust, joint tenancy or with beneficiaries listed, there will be a probate.

Another negative of a Will is that if you own real estate in more than one state, there will have to be some sort of probate proceeding in each state. Probating an estate takes time. In California, it is required to take at least 7 months and frequently takes longer.

Because probate requires much time, it does cost more than the administration of a Living Trust. In addition to attorneys fees, there are court filing fees, fee for publication, an appraisal fee, and possibly a bonding fee.

Finally, when a probate is filed, it is a matter of public record. Anyone can go to court to view the probate file and read the decedent's will and know about his/her finances.

The Benefits of a Living Trust

As indicated previously living trusts are similar to wills, but provided they are funded, they cause your estate to avoid probate.

A living trust is effective upon signing. For those assets that are transferred to the trust, it holds the assets for the benefit of your beneficiaries which can be yourself as well as any person or entity you designate. In the trust, you appoint a trustee (often yourself) to manage the assets according to your guidelines or instructions. Assuming you have appointed yourself as trustee, you will also appoint a successor trustee who will manage the trust at your death or incapacity

Living trusts are revocable. They can also be amended. Thus, if you want to change your beneficiaries or your trustees, you can do so.

In a living trust you indicate how you wish your assets to be allocated or distributed upon your death. You may provide that the trustee shall continue to manage the assets for a specified period of time for certain beneficiaries. This frequently happens if the beneficiary is a minor or is not good with money.

When our office prepares living trusts, we also prepare a pour-over will. The will works hand-in-hand with the living trust and it is for those assets that were not transferred into the living trust. These also may include those items found in your home including jewelry. The pour-over will provides that those individually owned assets are poured over into your trust at death.

Funding Your Living Trust

It is not enough to simply have a living trust prepared. I like to compare a living trust to an automobile without any gasoline. The automobile may look great, but its job is to transport people. It needs gasoline. Similarly, a living trust needs to be funded or else

there is a serious risk of it not avoiding probate. It is extremely important that your living trust is funded which generally means that assets have been retitled in the name of the trust.

Consult with an Estate Planning Attorney

For most people, seeking legal counsel to plan the distribution of their estate makes sense. Poorly done estate planning will cost your heirs both time and money. For those people who already have a living trust, you may want to have a review. It is really no different than going to a doctor for a check-up. In the event that you want to learn more about Living Trusts, please contact us and ask for our special report entitled “Checklist on Living Trusts.”