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Trusts, Probate and Financial Planning

1. **Probate**
   a. When Probate is **required**:
      (1) Deceased owned real property with gross value of $50,000, or more, OR
      (2) Deceased owned cash and personal property with gross value of $150,000, or more, AND
      (3) Deceased had a Will but no Trust, OR
      (4) Deceased had no Will and no Trust
      (5) If no Will, laws of intestacy apply – assets go to legal heirs
   b. Even with a Trust, Probate may be necessary if the Trust is not properly funded
   c. Advantages of Probate:
      (1) Probate court supervises administration of assets
      (2) Protection of:
         (a) Deceased's heirs
         (b) Deceased's creditors
         (c) Federal and state taxing authorities
   c. Disadvantages of Probate:
      (1) Fees and expenses
         (a) Attorney fees
         (b) Executor / Administrator fees
         (c) Probate Bond fees
         (d) Probate Referee fees
         (e) Court fees
      (2) Delays in distribution and lack of availability of assets to heirs
      (3) Concern about assets being wasted; possible forced sale of assets
      (4) Inconvenience of dealing with the court and bureaucratic rules
      (5) Probate proceedings are open to the public; not private

2. **Trusts (Revocable / Living / Inter Vivos).**
   a. History and Summary
      (1) Originally to manage large estates
      (2) Contract to protect and distribute assets
      (3) Family Company concept
      (4) Roles of people involved
         (a) Trustor / Settlor / Grantor / Creator
         (b) Trustee – manager
         (c) Current beneficiaries
         (d) Future (contingent) beneficiaries

(e) Advisors: attorney, financial planner, accountant, etc.

(5) Many types of trust; different uses and functions. Focus on family trusts
   (a) Revocable and amendable (nor irrevocable)
   (b) Living – during lifetime (not testamentary)
   (c) Inter Vivos

b. Advantages:
   (1) Allows easy asset management during Trustor's lifetime; personal control
   (2) Cost savings: Eliminates probate costs; reduced costs of administration
   (3) Trust assets are usually more rapidly available to beneficiaries
   (4) Trusts can be used to reduce or eliminate **estate taxes** by allocating assets to 2 separate (A-B) trusts, or to multiple trusts
   (5) Trustor selects beneficiaries and directs desired distribution of assets (e.g., by age, sobriety/drugs, creditor protection, life estate in real property, pay for education, provide $$ to purchase home)
   (6) Reduces legal contest on dispositive (distribution) provisions
   (7) Continuation of a family-owned business is much easier
   (8) Forced sale of assets is less likely than in Probate; help preserve assets
   (9) Annual Gifting exclusion may be used even if Trustor is incapacitated
   (10) Qualified Domestic Trust (QDOT) extends tax benefits to non-citizen spouse
   (11) No government involvement, but Court supervision available for disputes and for instructions to trustee
   (12) Selection of successor trustee(s), including a professional fiduciary or an institution as trustee
   (13) Should help avoid Court Conservatorship for assets of person who becomes incapacitated - successor trustee steps in during Trustor's lifetime
   (14) Shields family finances from public disclosure

c. Disadvantages:
   (1) Start-up cost
   (2) Tax filings if trust becomes partially or totally irrevocable and has income
   (3) Expense of trustee if trustee is an institutional or professional trustee
   (4) Asset segregation and avoidance of commingling will be required
   (5) Failure to properly fund the trust can increase expense or defeat the plan

d. Advantages almost always out-weigh disadvantages

e. Revocable Living Trust is usually the foundation of an estate plan for individuals and married persons who own any real property or have assets of $150,000 or more

3. **<u>Trust Funding</u>**

a. A Trust without assets is of no value

b. Procedures to fund a Trust:
   (1) Real property – deed
   (2) Corporate stock – change stock title or assign ownership
   (3) Bank and financial institution accounts – change title with institution
   (4) Individual investment accounts & annuities - change title with institution
   (5) Partnership, LLC, REIT, tenants in common – change title or assign

c. Common funding problems

d. Role of "pour-over" Will

e. Assets that typically are NOT transferred to Trust

(1) Life Insurance
(2) Tax-Qualified Plans (IRA, 401K, 403B, TSA)
(3) Pension Plans
(4) Automobiles

4. **<u>Responsibilities of Successor Trustees</u>**

a. Incapacitated Trustor:
   (1) Review Trust and seek professional advice as needed
   (2) Accept responsibility as Trustee in writing
   (3) Protect Trust assets
   (4) Notify banks and other institutions as needed
   (4) Apply for disability or other benefits
   (5) Pay Trustor's bills and handle necessary transactions
   (6) Maintain separate accounts and do not comingle personal funds
   (7) Keep accurate records and provide accounting if required

b. Deceased Trustor:
   (1) Review Trust and seek professional advice as needed
   (2) Accept responsibility as Trustee in writing
   (3) Protect Trust assets
   (4) Obtain EIN/TIN for proper tax reporting
   (5) Notify banks and other institutions and change titles, or transfer assets
   (6) Apply for any death benefits
   (7) Inventory Trust assets and determine values
   (8) Pay Trustor's bills, administration expenses, and handle necessary transactions
   (9) Provide notice to beneficiaries and heirs, and keep beneficiaries informed
   (10) Maintain separate accounts and do not comingle personal funds
   (11) Keep accurate records and provide accounting to beneficiaries
   (12) Sell assets as necessary
   (13) Prepare any necessary tax returns
   (14) Distribute assets to beneficiaries as instructed in Trust

5. **<u>Common Trusts other than Revocable Living Trusts</u>**

a. Types:
   (1) Irrevocable Life Insurance Trust (ILIT), frequently to provide fund separate from estate, especially for payment of estate taxes.
   (2) Special Needs Trust (SNT), to preserve government benefits for disabled beneficiary
   (3) Separate Property Trusts
   (4) Qualified Personal Residence Trust (QPRT) for tax-beneficial gift of home
   (5) Minor's Trust, usually for support
   (6) Charitable Trusts, for charitable gifts and tax benefits
   (7) Grantor Retained Interest Trust (GRIT), Grantor Retained Annuity Trust (GRAT), to minimize taxes

b. Possible disadvantage if Trust is ***irrevocable***: Trust assets cannot be controlled by grantor even if desired due to change in circumstances, whether economic, family, marital, etc.

6. **Procedures Available to Avoid Probate - Summary**
   a. Revocable Living Trusts (see above)
   b. Joint tenancy property left to surviving joint tenant
   c. Community property, to spouse, with right of survivorship
   d. Transfer on Death Deed
   e. Employee benefit plans, including pension plans
   f. Individual Retirement Account (IRA)
   g. Life insurance
   h. Private Annuities and commercial annuities
   i. Financial accounts with TOD / POD beneficiary designated
   j. Powers of appointment, exercised through Will or Trust
   k. Lifetime Gifts to charity or to individuals
   l. Irrevocable Trusts
   m. U.S. Treasury Savings Bonds with beneficiary designated
   n. Stock brokerage accounts
   o. Totten trusts
   p. Uniform Gift to Minors Act account

7. **Charitable Transfers**
   a. Charitable Gift Annuity
      (1) "Gift" of asset to charity in exchange for annuity payments for life
      (2) Asset may be cash, stocks, real estate
      (3) Provides donor with immediate charitable income tax deduction
      (4) Provides partially tax-free payments, usually with higher payment amounts
      (5) Capital gains tax avoided on appreciated assets
   b. Charitable Remainder Trust
      (1) "Gift" of asset to charity (remainder interest to charity)
      (2) Lifetime income options (variable state date, payment percentages, term)
      (3) Benefits: Bypass capital gain, increased income, tax deduction, flexibility
   c. Charitable Lead Trust
      (1) "Gift" of asset to charity reverts back to donor (or family) after term
      (2) Income from asset during term goes to the charity
      (3) Benefits: charitable tax deduction and/or estate tax deduction

8. **Asset Protection from Creditors**
   a. Certain assets are exempt from judgments (e.g., employment benefits, tax-qualified retirement plans, life insurance)
   b. Use of business entities (corporations and LLCs) to manage and protect assets
   c. Some types of trusts provide asset protection, but most do not

9. **Avoiding a Conservatorship**
   a. Conservatorship – Court Order; Court supervised process to control:
      (1) Person – living arrangements, medical care
      (2) Estate – property and assets owned by the Conservatee.
   b. Avoid Conservatorship of Person: Advance Health Care Directive
   c. Avoid Conservatorship of Estate: Power of Attorney, and Living Trust