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TRUSTS – THE PROBATE ALTERNATIVE

PROBATE SUMMARY

When Probate is **<u>required</u>**

Will but no Trust, OR

No Will and no Trust, AND

Cash and personal property with <u>gross</u> value of $150,000, OR

Real property with <u>gross</u> value of $50,000, or more

Even with a Trust, Probate may be necessary if the Trust is not properly funded

Distribution under Probate

With Will – designated beneficiaries

With no Will – legal heirs under CA law

Advantages of Probate

Probate court supervises administration of assets

Protection of:

(a) Deceased's heirs

(b) Deceased's creditors

(c) Federal and state taxing authorities

Disadvantages of Probate

(1) Fees and expenses:

- Attorney fees
- Executor / Administrator fees
- Probate Bond fees
- Probate Referee fees
- 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

Trusts (Revocable / Living / Inter Vivos)

History and Summary

Originally to manage large estates

Contract to protect and distribute assets

Family Company concept

TRUSTS

Roles of people involved

Trustor / Settlor / Grantor / Creator

Trustee – manager

Current beneficiaries

Future (contingent) beneficiaries

Advisors: attorney, financial planner, accountant, etc.

TRUSTS

Many types of trust; different uses and functions. Focus on family trusts

- Revocable and amendable (nor irrevocable)
- Living – during lifetime (not testamentary)
- Inter Vivos

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Advantages of Trusts:

(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

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(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

TRUSTS

(8) Forced sale of assets is less likely than in Probate; help preserve assets

(9) Annual Gifting 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

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(12) Selection of successor trustee(s): family member, family friend, professional fiduciary, or an institutional 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

TRUSTS

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) Failure to properly fund the trust can increase expense or defeat the plan

TRUSTS

- Advantages almost always out-weigh disadvantages
- 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

TRUST FUNDING

A Trust without assets is of no value

TRUST FUNDING

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

TRUST FUNDING

Role of “pour-over” Will

TRUST FUNDING

Assets that typically are NOT transferred to Trust

(1) Life Insurance

(2) Tax-Qualified Plans (IRA, 401K, 403B, TSA)

(3) Pension Plans

(4) Automobiles

Responsibilities of Successor Trustees

Trustee for Incapacitated Trustor – Medical opinion

Trustee for Deceased Trustor

Responsibilities of Successor Trustees

For 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

Responsibilities of Successor Trustees

For Incapacitated Trustor:

(5) Apply for disability or other benefits

(6) Pay Trustor’s bills and handle necessary transactions

(7) Maintain separate accounts and do not comingle personal funds

(8) Keep accurate records and provide accounting if required

Responsibilities of Successor Trustees

After death of Trustor :

(1) Review Trust and seek professional advice

(2) Accept responsibility as Trustee in writing

(3) Protect Trust assets

(4) Obtain EIN/TIN for bank and proper tax reporting

(5) Notify banks and other institutions; change titles, transfer assets

Responsibilities of Successor Trustees

After death of Trustor :

(6) Apply for any death benefits

(7) Inventory Trust assets and determine values

(8) Pay Trustor’s bills, administration expenses, sell assets as necessary, and handle all transactions

(9) Provide notice to beneficiaries and heirs; keep beneficiaries informed

Responsibilities of Successor Trustees

After death of Trustor:

(10) Maintain separate accounts; 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 per Trust

Common Trusts other than Revocable Living Trusts

(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

Common Trusts other than Revocable Living Trusts

(4) Qualified Personal Residence Trust (QPRT) for tax-beneficial gift of home

(5) Minor's Trust, usually for support

(6) Charitable Trusts: charitable gifts with tax benefits

(7) Grantor Retained Interest Trust (GRIT), Grantor Retained Annuity Trust (GRAT), to minimize taxes

Common Trusts other than Revocable Living Trusts

Possible disadvantage if Trust is ***irrevocable***:

Trust assets are not be controlled by grantor

Trust may not be changed, even if desired due to change in circumstances, whether economic, family, marital, etc.

Alternative Procedures that may Avoid Probate

a. Alternatives to use of Revocable Living Trusts
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)

Alternative Procedures that may Avoid Probate

g. Life insurance with beneficiary

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

Alternative Procedures that may Avoid Probate

l. Irrevocable Trusts

m. U.S. Treasury Savings Bonds with beneficiary designated

n. Stock brokerage accounts with beneficiary

o. Totten trusts with beneficiary

p. Uniform Gift to Minors Act accounts

Charitable Transfers

Charitable Gift Annuity

(1) "Gift" of asset to charity in exchange for annuity

(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 asset

Charitable Transfers

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

Charitable Transfers

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

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, including revocable living trusts, do not

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

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