WHY SHOULD I CONSIDER USING A TRUST IF I HAVE A WILL?

It's been a few years since you prepared a will, and you decide to go see your estate planning attorney to talk about drafting an updated version. You tell your attorney that you may want to add some of your favorite charities as beneficiaries under your will. You also tell your attorney that you have heard your friends talk about using a trust for estate planning, and you are curious whether you should consider one instead of a will.

Before answering your question about trusts, your attorney probably will want to make sure you understand what a will does and doesn't do for your estate plan. That conversation might go something like this:

What is a will?

A will can be thought of as your instructions to the probate court about how to deal with your estate and how to distribute your assets. As such, a will is only effective after you die, and *only* if there is a probate of your estate. A probate is really a court supervised liquidation of your estate, and is only necessary if you die with assets in your name alone. A probate provides a forum to determine any contested claims against your estate, but then cuts off all future claims. If you have given away or spent all of your assets prior to your death, there will be no need for a probate, or your will.

What is a trust?

A trust is a contractual relationship between you as the creator of the trust (you are called the *settlor*) and the person who will manage trust property and carry out your instructions (your *trustee*). Most people name themselves as the trustee for typical estate planning trusts, and also name other family members or perhaps their bank as successor trustees when they die or should they lose the ability to continue as trustee.

You can make, amend or terminate your trust so long as you have the legal capacity to make contracts under state law, and assuming that the trust you create is "revocable"; i.e., allows for amendment or termination under its terms. It is also possible to create an irrevocable trust with terms that prevent its modification or termination. Revocable trusts usually become irrevocable once the settler loses the capacity to make amendments, or if the settlor dies.

When a trust is created, the settlor transfers ownership of property to the trustee for management and disposition in accordance with the trust terms. The trustee is under a fiduciary duty to make prudent financial decisions to protect trust assets for the benefit of trust beneficiaries. The settlor can also name additional trust advisors that the trustee must consult regarding management of trust assets or how assets are to be distributed.

Why should I consider a trust?

Many people think that the main purpose of a trust is to avoid probate. While the assets held in trust would typically not be part of a probate estate, avoiding probate is not necessarily the primary reason you should consider a trust as part of your estate plan. In fact, it may be advisable under some circumstances to still plan for a probate following your death, even though you also use a trust as part of your estate plan. This allows for a final settlement of potential creditor claims against your estate. It is common to include what is called a "pour over" will as part of an estate plan that includes the use of a trust to be sure that if there is a probate, the will then transfers any probate assets to the trust.

Here are some of the benefits of using a trust as part of your estate plan:

1. With a trust, you can provide financial security for someone who has special financial or health care needs. For instance, if you have a child or other family member who requires special medical care, or someone who lacks the ability to support themselves financially, a trust can be set up during your lifetime for their benefit to provide for such needs. The advantage of a trust in such cases is that you determine who the trustee will be now and in the future, you decide what assets will be set aside for the benefit of the beneficiary, and you decide how the trustee will make decisions about distributions from trust assets for their benefit.

2. With a trust, you can provide for management of your assets during your life in the event of your own inability to do so, avoiding a costly conservatorship.

3. A trust allows you to create a family gift or charitable gift plan that will be effective during your life and after your death. You get to establish the terms of how and when assets are transferred to your beneficiaries, and can even provide for management of those assets beyond your date of death to continue your estate plan.

4. Under Oregon law, you can create a trust to provide for pet care during your lifetime and following your death.

5. A trust allows for some flexibility in your estate plan by authorizing your trustee to make certain decisions following your death. For instance, you can authorize your trustee to take into consideration circumstances such as changes in status of charitable beneficiaries, changes in the needs of special needs beneficiaries, and changes in the tax laws that may affect your estate planning goals.

Depending on your financial circumstances, and your family and charitable gift planning goals, you may find that using a trust as part of your estate plan gives you a greater degree of certainty regarding the management and disposition of your assets. Although avoiding probate is one benefit of an estate planning trust, the real advantage of a trust is management of your estate during your lifetime as well as after your death.

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