The Truth About Trusts

There is hardly a financial planner on the radio, or in print media, who does not push the idea that every person's estate plan needs a trust. They usually refer to them as "living trusts." For people living in Georgia that "ain't necessarily so." In this column I am going to address the situations where having a living trust is worthwhile.

First, what is a living trust? Simply put, it is a written agreement under which one living person, the "grantor," gives legal ownership of certain property to another living person, the "trustee," who holds it in accordance with the terms of the agreement. Although the grantor and trustee are two separate roles, they can be performed by the same person if the grantor so desires. The term "living trust" is a poor translation of the Latin phrase "inter vivos trust," which really means a trust between the living. This distinguishes it from a "testamentary trust" which is created by a person's last will and testament and does not take effect until after that person's death, when the executor of the will transfers specified property to the person appointed in the will to serve as trustee. That trustee then administers the trust portion of the will in the same fashion as he would with a living trust that had the same provisions.

A trust agreement is either revocable or irrevocable. Unless a power to revoke or modify is reserved by the grantor (which is usually done), a trust is deemed irrevocable. A revocable trust can be the best vehicle for handling a complex set of assets. For example, a Georgia resident owning real estate in North Carolina would face a separate probate there at his or her death. Ownership of the land in a trust would avoid that second probate proceeding.

Another use might be to manage financial investments that are outside of a retirement account. This could be a hedge against a disabling illness (including senility) or injury where the grantor wants to designate a specific person to be a successor trustee who can provide continuity of management in the event of disability or death. In this time of "blended families" and prenuptial agreements, a revocable trust also might be a method of allocating some or all of the trust's assets to one set of beneficiaries, while all other assets pass to the remaining beneficiaries through a will, beneficiary designation or a right of survivorship on jointly titled property.

A living trust can be a good "will substitute" for situations where a person's legal heirs consist of distant relatives who have not been heard from in decades. With a will the Probate Code requires that the executor attempt to notify all those legal heirs (e.g. grand-nieces, second cousins, et al.) of the petition to probate the will. If practically all of that person's wealth is in a living trust, the probate proceedings will be less important and the trustee can take care of the designated beneficiaries instead of worrying about locating the distant relatives.

Families with a permanently disabled child might benefit from a living trust because they can allocate certain assets for the benefit of the disabled child and put "supplemental needs" provisions into the trust document to preserve the child's eligibility for government benefits such as SSI and Medicare. Using an "off the shelf" living trust for an estate plan that benefited such a disabled child could be a catastrophic mistake. A supplemental needs trust does not have to be funded when it is established, but can be in a stand-by mode until the death of one or both of the parents. Then a life insurance policy, of which it was

the beneficiary, can pour money into the trust. Such a supplemental needs ("living") trust can have the additional advantage of being available to receive gifts or bequests from grandparents or other relatives of the disabled child.

How to choose a trustee and/or a successor trustee could take up an entire column. Briefly put, it is essential to pick someone who is completely honest and has good judgment and organizational skills. Don't forget that corporate trustees are available with all those skills in one organization. A trust with a million dollars or more of assets can support the cost of a bank serving as trustee. In some family situations the corporate fiduciary could be the best solution because no family member has the skill set, or the time, to properly administer the trust.

There is one school of thought that, if a corporate trustee is used, the investment management powers for the trust should be given to another trustee and not to the corporate fiduciary, even if that other trustee must retain a separate investment advisor. Any trust agreement can be "tailor made" to address those concerns.

This has been a brief overview of living trusts. Beware of anyone who argues that everyone needs a living trust. It is one tool that may belong in an estate plan you devise with your attorney's advice, but only after considering all of the alternatives. Plan carefully and you will rest easy.

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