

The Law and You

A Simple Will May be Better Than a Trust

At one time or another most of us have seen inserts in local newspapers that exhort the virtues and benefits of trusts. We may also have received postcards or other legal notices in the mail.

Too often, “fear mongers” attempt to create a fear of Probate as a way of pushing the public into buying costly trust documents. Common headlines are, “Avoid Probate,” or “A Living Trust to Protect Your Assets.”

But why should you avoid probate? Does it take too long or is it too costly? Generally the answer is NO! Whether you have a simple or a complex will, your estate can be probated in an “informal” manner. Most wills are uncontested. Your attorney simply files an application for informal probate of your will and the appointment of your personal representative. The term “Personal Representative” (or “PR”) has replaced the terms “Executor” and “Executrix.”

Presently, the Probate Court fee for probating your will is only \$140. Attorney fees, mostly billed by the hour, should be no greater than \$1,200-\$1,500. These amounts are paid after your passing.

Within two weeks after filing an application, the court issues to your PR Letters Testamentary. With such Letters, your PR can efficiently and expeditiously transfer real property and administer your entire estate. If notice is waived, the entire process can be completed in one day!

Upon appointment of your PR, your attorney can request publication of a Notice to Creditors. Ninety days after the first publication, this Notice has the effect of cutting off claims against your estate. This means that your PR can safely distribute your estate without fear that a creditor is still lurking out there somewhere. Otherwise, creditors could collect against your heirs after

distribution of your estate!

On the other hand, a trust requires no application to the Probate Court nor any filing fee. But a trust does not enjoy the protection of a Notice to Creditors.

The initial cost to create a trust is generally more than a will. A simple will usually costs about \$500-\$600, depending on how simple it is. A trust likely ranges from \$1,500-\$2,000 and more.

There are additional costs to transfer your assets into the trust, especially real property. If your attorney assists in making these transfers, the costs of a trust can easily exceed \$2,000. This amount must be paid at the time the trust is created, not after your passing.

In addition, holding all of your assets in the name of the trust can be a substantial inconvenience. When opening an account, financial institutions require a copy of the entire trust document. This is also true when you refinance your mortgage or when you desire to take out a home equity loan.

If you inadvertently leave some assets out of your trust and the value of those assets exceeds \$25,000, your PR must probate your will. This leaves part of your total estate in your probate estate and part in your trust estate. This requires probating part of your total estate—defeating the very purpose of having a trust.

Besides the avoidance of Probate, there are generally two primary reasons to have a trust. The first is to avoid taxes. The federal lifetime exclusion is \$1,000,000 (increasing to \$1,500,000 in 2004). With a trust, a married couple may be able to avoid federal estate taxes.

Second, a trust may help control the distribution of your estate to children from a prior marriage following the death of your surviving spouse. A will is not a fail-safe

mechanism to accomplish this.

While it is not always clear which is best, a simple will meets the needs of most individuals. For those who require a trust for reasons other than avoidance of taxes, a trust should be simplified. That is, most trusts contain similar provisions regardless of particular circumstances. A trust should be customized to eliminate lengthy and difficult to understand provisions. This permits easier reading and ensures greater likelihood that the trust provisions will be followed upon the passing of the first spouse.

Deciding whether a simple will is sufficient, requires a detailed analysis of your particular situation. For most of us, a trust is usually not needed nor does it provide any meaningful benefit. A simple will most often satisfies our requirements and is far less costly to create, to maintain, and to modify over time.

To help decide this confusing question, consult an Elder Law Attorney. Check the National Academy of Elder Law Attorneys at (520) 881-4005, or the Yellow Pages under the heading of "Elder Law."