

Elder Law Guys: Do I Need a Trust?

Probably the most frequent initial comment made by new clients is, “I think I need a new will.”

For someone who has never done an estate plan or whose lifestyle has changed significantly due to new circumstances or the passage of time, this comment may be accurate. However, the next question is typically: “Do I need a trust” or “Do I have enough money to warrant the use of a trust?”

The answer requires a bit more investigation.

The use of trusts in estate planning goes back to ancient Rome (and they got by without cell phones). To understand whether you need a trust requires a basic understanding of what a trust is and how it works. While there are many books written on this subject, in its simplest definition a trust is a three-party fiduciary (a person or organization that owes the duties of good faith and trust to another) relationship created by the “Settlor” (or “Trustor,” the one who creates the trust) who delegates authority to handle trust assets to a “Trustee” for the benefit of a third party, known as a Beneficiary.

A trust is created by the careful drafting of a trust document. The trust can take effect during the Settlor’s lifetime (inter vivos) or after death (testamentary). The document can be revocable or irrevocable (or can change from one to the other upon occurrence of an event or time period).

Practically speaking, the use of a trust is not directly tied to your level of wealth. Many people create trusts regardless of wealth level for the following reasons:

1. Consolidation of assets during lifetime and efficiency of management upon the individual’s disability or death.
2. Avoidance of probate proceedings in court so that heirs can avoid the courthouse and quickly transfer assets of a decedent with privacy and reduced cost.
3. Protection of a beneficiary who has cognitive or physical disabilities.
4. Setting forth the rules for the use and enjoyment of a family vacation home for future generations (as well as the funding of such home’s maintenance). In addition, if the vacation home is in another state, a trust is frequently used to avoid a second probate proceeding in that state.
5. Tax planning reasons (especially with IRA’s in excess of \$250,000 being transferred at death to the next generation.)
6. And our favorite acronym “D3B2”, which stands for “Death, Disability, Divorce, Bankruptcy and Bad decisions” — and here we’re talking about future generations who will benefit monetarily upon the Settlor’s death.

Now, to debunk a few myths. Here are some of our favorites:

1. “If I create a trust, I will lose control of all of my assets and some large bank will take over my money.”

Actually, the overwhelming majority of trusts created in basic estate planning do not involve a bank or trust company acting as trustee. Most people who create a trust during their lifetimes will act as their own trustees and in their trust document they will name one or more of their children as successor trustees to take over immediately upon the settlor’s death or inability to act.

2. “If I create an irrevocable trust, I can’t change anything for the rest of my life.”

Even with an irrevocable trust, the settlor typically reserves many powerful options to control the trust assets during her/his lifetime.

Some of these powers include: the right to receive distributions of principal and income; the right to distribute money from the trust out to third parties at any time; the right to buy and sell real estate owned by the trust; the ability to change any investment within the trust or the investment adviser; the power to change the beneficiaries of the trust or remove any beneficiaries.

In fact, in Pennsylvania, it is possible to change an irrevocable trust under certain circumstances (leave it to lawyers to figure out how to undue something that’s irrevocable!)

3. “I don’t have enough assets to create a trust.”

As described above, the need for a trust is not generally tied to wealth (although affluent clients are more predisposed to needing a trust for a variety of reasons.). The need is more generational. Whereas many people from prior generations had modest savings and a pension that ended at death, today’s clients are owning more assets that have more complex tax issues. Couple that with the fact that life has generally become more complicated (and remember all those pensions that have gone away in favor of IRA’s that should never, never go through your will).

So, you don’t have to be a descendant of Caesar or other royalty to need a trust. You just need to have factors in your life that require more proactive planning than Ye Olde Last Will and Testament (and, most of us have those factors)!

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