SHOULD YOUR ESTATE PLAN INCLUDE

A REVOCABLE LIVING TRUST?

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A revocable living trust is a trust that you create to hold your property while you are alive and to distribute it among your beneficiaries on your death.

The three main reasons for using a living trust (rather than a will) as the central feature of your estate plan are to

(1) avoid probate,

(2) provide for property management, especially if you become incapacitated, and

(3) keep your estate plan private.

I. HOW A REVOCABLE LIVING TRUST WORKS

Creating the Trust. To establish a living trust, you sign a trust document and have your signature notarized. The typical living trust document:

- Names you as the trustee with the power to manage and access trust assets as you deem necessary.
- Names a successor trustee to take over management of the trust property for your benefit on your incapacity and to turn the trust property over to the beneficiaries after your death.
- Names the beneficiaries who are to receive the trust property on your death and specifies what specific assets or shares of the trust property they get.
- Provides that you can revoke or amend the trust at any time until your death, at which time the trust becomes irrevocable.

Funding the Trust. To complete the creation of the trust, you must transfer your property into it. If the property is real estate, you must execute a new deed in which you hold the property as trustee of the trust. Similarly, if the trust property has title documents (e.g., securities, bank accounts, vehicles), you must change the name on the title. Assets without title documents (e.g., jewelry, antiques, equipment) can be listed on a schedule that accompanies the trust document or you can sign a document transferring the ownership of specified assets to the trustee.

Managing the Trust Assets. During your life, you have complete control over the trust assets, just as though the trust did not exist. You can use the trust property and any income generated by it as you please. If you want to sell or refinance trust property, you can do so in your capacity as trustee of the trust or you can transfer the property from the trust back to your own name, whichever the buyer, financial institution, or title company prefers.

Amending or Revoking the Trust. During your life you can change the terms of the trust as you see fit or revoke it entirely in a signed notarized document. For example, you may need to amend your trust to change your successor trustee or to add or remove beneficiaries or change what or how much you want to leave them.

If You Become Incapacitated. Your successor trustee takes over the management of the trust assets and makes sure that your bills are paid and you are taken care of without the need for court intervention.

At Your Death. The successor trustee pays your taxes and debts and distributes the trust property to the beneficiaries in accordance with the terms of the trust. With a properly drafted and funded living trust, your estate will not need to go through probate. If no assets are in your name when you die, no probate will be needed to transfer title to your heirs. Even if some probate assets have not been transferred into the trust, your estate may qualify for simplified probate procedures available for small estates.

II. ADVANTAGES AND DISADVANTAGES OF A REVOCABLE LIVING TRUST

The two main estate planning documents are the will and the revocable living trust. Choosing which to make the cornerstone of your estate plan can be a difficult decision. Each has its own benefits and drawbacks, costs and anticipated savings. In the end, you'll need to balance the advantages and disadvantages and make your decision. Your estate planning attorney can offer you invaluable advice on the actual costs and likely savings available with each, as well as advising you on state laws that make one or the other more attractive.

ADVANTAGES

Avoids the expense and delay of probate. In some states, probate can be expensive and time consuming. Your executor will typically need to hire an attorney. The attorney may be entitled to a fee of several percent of the value of your estate or whatever the probate court deems reasonable.
With a living trust, the successor trustee transfers the assets to your beneficiaries on your death pursuant to the instructions you provided in the trust document. No probate is necessary for any assets in the trust.

Avoids multiple probate proceedings in other states. If you own real estate in more than one state, a living trust can eliminate the need for multiple probate proceedings in each state in which the property is located.

Enables you to plan for your incapacity. A living trust can provide for a successor trustee to take over management of the trust assets if you become unable to do so. The trust instrument can specify how it is to be determined that you are incapacitated. For example, the trust instrument could provide that the successor will take over when two physicians sign a statement that you no longer have the capacity to manage your affairs. No expensive court proceeding to appoint and oversee a guardian should be necessary. Unlike the holder of a power of attorney, a successor trustee under a funded trust has legal title to the assets, so his authority to transfer real estate and write checks is more likely to be recognized by title companies and financial institutions.

However, qualified retirement plans and IRAs cannot be transferred to a revocable trust without triggering income tax on the balance. The only ways to manage these assets during your incapacity are with a power of attorney or a guardianship.

Keeps your estate plan private. A living trust, unlike a will, is not required to be filed in court and made a public record. Most of the time, the provisions of a trust are private and the trust operates without any court involvement. You can keep private the value of your estate and how you have decided to distribute it. Probate proceedings, on the other hand,

are public. Anyone will be able to read your will and look at the inventory of your estate that is filed with the court.

Allows you to have your estate administered by an out-of-state trustee. State law may require that the executor you appoint in your will be a resident of your state. If you have a trust, you can name a trustee who does not live in your home state. For example, you may want to appoint an adult child who has moved away as your successor trustee.

Is easier to amend than a will. Typically you can amend a living trust with a simple notarized document. Unlike changes to a will, no witnesses are required.

DISADVANTAGES

Requires more effort than a will to maintain. Unlike a will, which remains dormant until you die, a living trust comes into existence when you sign the trust document. It must then be funded and administered, both of which cost time and money. As the trustee, you must keep additional records because you owe fiduciary duties to the remainder beneficiaries. You must also ensure that all newly-acquired assets are titled in the name of the trust if your goal is to avoid probate.

Can be burdensome to own assets through a trust. Title companies sometimes refuse to title new real estate purchases in a trust, thus requiring you to contact your attorney after closing to arrange a second transfer. Third parties may be reluctant to accept checks drawn on a trust checking account. Automobile loans may have to be paid off before the car can be transferred to the trust and insurers may be hesitant to insure an automobile held in trust.

Provides less oversight of estate administration. Without probate, there is no court oversight to ensure that the successor trustee adheres to the terms of the trust after you die. Real estate transfers could incur extra expenses or jeopardize other legal benefits. While not true everywhere, in some places transferring real estate to a living trust could trigger transfer fees and taxes or could cause the property to be reassessed for property tax purposes. Placing your home in a living trust could also jeopardize your homestead exemption (which protects your home from creditors' claims) and your eligibility for Medicaid benefits.

Cost. A living trust will typically cost more to create, fund, and administer than a will, but could eventually save more in probate fees depending on the extent of your estate and how expensive the probate process typically is where you live.

III. COMMON MISCONCEPTIONS ABOUT WHAT A REVOCABLE LIVING TRUST CAN DO

Despite its many benefits as an estate planning tool, a revocable living trust **DOES NOT** do any of the following.

Provide tax benefits. People often think that a revocable living trust provides some special tax benefits not available with a will. This is **NOT TRUE**. A revocable living trust offers no special tax benefits. Any tax planning that can be done with a living trust can also be done with a will. Although property that passes by your trust is not part of your "probate estate," it is part of your estate for estate tax purposes. While certain trusts that come into existence on your death may minimize estate taxes, these trusts can be set up either in a will or living trust.

Make a will unnecessary. Even if you have a living trust, you still need a will. The living trust affects only property that you have transferred to it. When you die, you could own property that you have not transferred to the trust. You might have acquired the property shortly before your death or simply overlooked it. Your estate could even acquire property after your die, such a tax refund or payment of a debt. You can have a "pour-over will" that provides that the property is transferred to your trust to be distributed in accordance with its terms or a back-up will that directly provides who is to get your property. If you have minor children, you'll likely need a will to name a guardian for them.

Prevent a contest. A living trust doesn't prevent disappointed relatives from contesting your choices of beneficiaries. Living trusts, just like wills, can be contested on the basis that you lacked mental capacity, were unduly influenced, or a victim of fraud. Trust contests are more difficult to succeed at. By setting up your trust a while before your death and managing your own assets as the trustee, you will provide strong evidence that you were competent. As in a will, you can discourage a trust contest by including a no contest clause providing that anyone who brings an unsuccessful contest receives nothing from the trust.

Protect assets from claims of your creditors. You cannot shield your assets from creditors simply by placing them in a revocable living trust. Creditors can reach the assets in a living trust both during your life and after your death. In fact, probating a will offers more protections from creditors. During probate, creditors must submit their claims in a certain format and by a certain deadline. If the creditors miss the deadline or otherwise fail to follow the rules, the debt can be eliminated. If the assets pass to beneficiaries outside of probate, creditors can still come after them and may have a longer time to do so.

Help you qualify for public assistance. Placing your assets in a living trust will not help you qualify for Medicaid benefits or other public assistance because you still have complete access to and use of the assets. In fact, placing your home in a living trust can jeopardize your eligibility for Medicaid nursing home benefits, as a home owned in a trust is not an exempt asset, while one owned outright is. Although you can transfer your home out of the trust to become eligible, the delay could cost you some benefits.

IV. WHAT PROPERTY SHOULD YOU TRANSFER INTO YOUR REVOCABLE LIVING TRUST?

What property you transfer to the trust depends on why you have created it. Your estate planning attorney will review your assets and advise you what is best for your particular situation and goals.

Here are some general rules.

Avoiding probate. If you created the living trust to avoid probate, you must transfer to the trust all assets that otherwise would need to pass through probate. These are assets not already subject to a probate avoidance device, such as joint tenancy with right of survivorship, payable on death accounts, or assets with beneficiary designations. The possible exception is tangible personal property that does not require a title document (e.g., furniture and clothing), if you believe your family will be able to divide it without argument. Additionally, although you keep some non-probate assets (such as life insurance and retirement plans), in your own name, you may name the successor trustee as the beneficiary to receive the proceeds at your death and distribute them in accordance with the trust.

Disability planning. If you are using the trust primarily to prepare for your disability, rather than to avoid probate, you may prefer to leave the trust unfunded. You can execute a durable power of attorney naming the successor trustee. You can then let the successor trustee transfer your assets into it using the power of attorney if and when you become incapacitated.

Avoiding probate in other states. If you created the trust because you own real estate in more than one state and want to avoid multiple probates in other states, you could choose to transfer only the out-of-state real estate to the trust, and keep your other assets in your name.

V. FEDERAL TAXES AND YOUR REVOCABLE LIVING TRUST

Income Tax. Because you retain the right to revoke your living trust, the trust is ignored for federal tax purposes during your life. The trust's income is directly taxable to you and you are entitled to take any deductions available to the trust (e.g., the home mortgage interest deductions available with respect to the home that is titled in the name of the trust and the mortgage payments that you make as the trustee). You don't have to file a separate return as the trustee or obtain a taxpayer identification number for the trust.

Estate and Gift Tax. The trust's assets are included in your estate at fair market value, as if they were owned in your name. However, you won't owe any estate taxes unless the value of your estate exceeds your lifetime exclusion ($5.48 million in 2017). Transferring your property to the trust does not constitute a completed taxable gift to any of the beneficiaries

because you have the power to remove the property from the trust and cancel the gift.

VI. REASONS WHY A RE VOCABLE LIVING TRUST MAY NOT BE RIGHT FOR YOU

Although an excellent estate planning tool with many benefits, a revocable living trust isn't the right choice for everybody. You may decide against a living trust if you fit into any of these categories.

You live in a state where probate is streamlined and relatively inexpensive. Avoiding probate is generally a good plan. However, in some states probate is less complicated and expensive than in others. If you live in one of these states, you may find that the costs of setting up and maintaining a living trust equal or exceed the costs of probate. After all, probate does not need to be paid for until death, but a trust must be paid for upfront, and then must be maintained until death. If you bring your estate planning attorney an inventory of your assets and liabilities, he or she can advise you whether a living trust will save money in the long run.

Your estate qualifies for simplified or expedited procedures for small estates. Virtually all states have some type of expedited or simplified probate procedure for "small estates." One such procedure allows the inheritor to claim an asset with a simple affidavit. The inheritor simply signs an affidavit stating under oath that he or she is entitled to the asset under a will or state law and presents the affidavit with a death certificate to the person or institution (a bank, for example) holding the asset. NOTE: What constitutes a "small estate" varies widely from state to state.

Other probate avoidance devices are adequate for your estate. Joint tenancy with right of survivorship, pay on death bank accounts, and beneficiary designations for insurance and retirement plans can be used to pass property outside of probate. These can be simpler and less expensive, but are not available for all assets. Joint tenancy may raise tax concerns and have other drawbacks. For example, you can't change your mind and revoke the joint tenancy. Conflicts may develop between you and your co-tenant regarding the sale or use of the property.

You are young and in good health. You may decide it's premature to worry about avoiding probate. For example, if you are in your thirties with minor children and a modest estate, you may decide to use a will and life insurance for the time being. Later, when you have accumulated more property, you can always revise your estate plan to include a living trust.

You have debt problems. Probate may be an advantage if you have many creditors. When an estate is probated, creditors have a deadline by which they must file claims against the estate. If a creditor misses the deadline, the debt is extinguished. Valid claims must be paid before your estate is administered. Your heirs or beneficiaries get their inheritance without worrying about creditors appearing to claim some or all of it.