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Q. What is "probate."

The term probate refers to the Court proceedings an heir or beneficiary must go through in order to have someone appointed as the Executor or Administrator of an Estate, or to facilitate the transfer assets from the deceased person to another.

Q. Do I need a revocable living trust?

It depends on your unique situation. A living trust can be useful in many cases, but not every case. The FAQs that follow address issues that frequently arise in my client counseling sessions and will help you answer this question. Please read on.

Q. Who is the Trustee of a living trust?

Usually the person that creates the living trust is the Trustee, at least in the beginning. A married couple would be Co-Trustees. Upon the death or incapacity of the initial Trustee or Co-Trustees, a Successor Trustee you designate assumes responsibility.

Q. Who are the beneficiaries of a living trust?

Usually the person that creates the Trust is the beneficiary, until he or she dies. A married couple would both be beneficiaries, as long as either is alive. Upon the death of both beneficiaries, the trust usually terminates and is distributed to the remainder beneficiaries, although other options do exist.

_____Q. What does a living trust accomplish?

The primary objective of a living trust is to avoid probate. Also, should you become incapacitated prior to your death, a living trust will enable your chosen Successor Trustee to more easily manage your affairs while you are alive.

Q. Are you married?

If you have a joint living trust that supports both spouses, probate may be avoided on the death of both the first and second spouse. This increases the likelihood that the up-front cost of creating a living trust will outweigh the future expense of probate.

Q. Do you have a blended family?

If you are married and have children from a prior marriage or relationship, your children will be your primary intestate heirs. To avoid this result, you must have either a Will or a Trust that states your intentions. If you have a Will, it will have to be submitted to probate and your Estate will bear that expense. If you have a Trust, the Court proceedings will be avoided, assuming the Trust has been properly funded.

Q. Do you own real property outside the State of Texas?

If so, you may be forced to engage in probate proceedings in more than one jurisdiction. Owning property both inside and outside the State of Texas, means that you will likely be required to engage in probate proceedings in both states. Also, be aware that mineral interests are considered real property. A trust should avoid probate in all jurisdictions.

Q. Is it likely that you will need someone to help you manage your affairs before you die?

Your spouse or child may find it much easier to manage your property and finances when those assets are held in a living trust. The alternative is to rely on a power of attorney, but oftentimes, the agent under power of attorney will encounter difficulties using it. The living trust is more widely accepted.

Q. Who will be in charge of winding up your Estate and where does he or she live and work?

In order to probate your Will, your Executor will likely be compelled to attend Court proceedings in Texas. Your Executor may find it inconvenient to take time away from his or her family, not to mention expensive, to travel to Texas and participate in Court proceedings. A properly funded trust will eliminate the need for these proceedings.

Q. Are you willing to incur a greater up-front expense in order to make it easier for your spouse or children to wind up your Estate later on?

Creating and funding a living trust will be more costly than a Will. Trust planning requires preparation of a written trust instrument and additional documents to fund the Trust. While there are certainly advantages to a trust, it does require a greater investment of time and money to properly establish. You should engage in a cost-benefit analysis in order to decide whether or not a living trust is worthwhile for you.

Q. What factors affect the cost of creating a revocable living trust?

The cost of creating and funding a living trust will vary depending on its complexity. If you have substantial specific bequests, a great many beneficiaries, a complicated scheme of distribution, multiple parcels of real estate or significant business interests, these factors will cause the attorney to engage in more custom drafting or prepare more funding documents, which necessarily involves a greater cost to you.

Q. What assets should be placed in a revocable living trust?

Primarily real estate, including your mineral interests, as these assets would likely pass via probate, if not included in your trust. You may also want to include vehicles, although other options may exist. Financial accounts should be included, if you want your Successor Trustee to manage those assets for you, before you die; otherwise you may prefer to rely upon survivorship agreements and beneficiary designations to dispose of those accounts. Bear in mind that an IRA account cannot be placed in a trust, although the trust can be the beneficiary of such an account. Determining which assets to place in your trust requires a complex evaluation and will vary from case to case.

Q. Does a living trust have any tax consequences?

Generally, no. The IRS considers this type of trust to be "disregarded entity" for tax purposes. You will continue to file your income tax return just as you always have. Having a living trust should not affect your local property tax exemptions, either. A simple estate plan does not include planning to minimize estate taxes, so there will likewise be no effect on estate taxes, which is generally not a concern, given the substantial estate tax exemption amounts currently in effect.

Q. Is it difficult to maintain a living trust?

It should not be. Although it is important to remember that, in order to avoid probate, you must have all of your "probate" assets titled in the trust at the time of your death. Probate assets includes all property that is not disposed of via a beneficiary designation, survivorship agreement or some other non-testamentary disposition.

Q. What are the pitfalls to avoid in a living trust?

In order to avoid probate, you must have placed in the Trust all of the assets that would otherwise pass via your Will at the time of your death. If there are any titled assets, such as real estate or mineral interests standing in your name, alone, outside of the Trust, then probate may be required.. Similarly, if you have financial accounts, IRAs, life insurance policies and the like that do not have proper beneficiary designations, a probate may be required.

Q. Is a Trust the only way to avoid probate? No. Here are some of the more popular options:

Create a Joint Account with Right of Survivorship. This option applies only to financial accounts and requires that you name another person as a joint owner on the account. Be careful about this one, as the joint owner will have the same rights as you do over the account, including the right to withdraw all the funds. After your death, ownership of the remaining funds will be transferred to the surviving joint owner. Your Will or Trust will not control the disposition of these funds.

Designate a Beneficiary. This option is more widely available and may apply to financial accounts, IRAs, life insurance, annuities and motor vehicles, among others. The beneficiary will have no control over the asset while you are alive. In almost all cases, you can change the beneficiary freely, while you are alive and, upon your death, ownership will pass to the designated beneficiary. Your Will or Trust will not control the disposition of these assets.

Affidavit of Heirship. This is an affidavit that would prepared by an attorney after you die, typically to transfer real estate to those persons who would be your intestate heirs. The affidavit must be signed by at least one of the heirs and two disinterested witnesses and then filed in the deed records in the county in which the real property is located. The affidavit must contain specific details regarding the family history, so that the heirs may be determined. Title companies will generally not accept affidavits of heirship until at least one or possibly two years after the death of the Decedent.

Ladybird Deed. Sometimes referred to as a "revocable transfer on death deed," this is essentially a deed that does not take effect until you die. These deeds may be viable option in lieu of a trust if you are the sole owner of the property and you are not likely to sell the property or change your mind about who you want to inherit your property. These deeds are not fool-proof and should be used with caution as they sometime give rise to title company concerns if you later decide to sell your property or change your beneficiaries.

Q. How can I transfer a vehicle title without a Will or Trust?

There are a few ways to transfer a vehicle title without going through probate or having a trust. Prior to death, you may sign the survivorship agreement on the front of the title, if you are married and both spouses names are on the title. Also prior to death, you may utilize a Beneficiary Designation for a Motor Vehicle to designate a beneficiary. After death, your intestate heirs may sign an Affidavit of Heirship for a Motor Vehicle, but all heirs must sign the affidavit and agree on the disposition of the vehicle.

Q. I own only a home, a car and a bank account. Do I still need a Trust?

Again, it depends. You may be able to take advantage of other options to avoid probate, but you should consider all the factors mentioned above in making that decision. How will these assets pass, if you do not have a Trust? Who will receive the assets? What will it cost to accomplish the transfer? Only you can decide the best option.

Q. What is a simple estate plan?

A simple estate plan would be one that makes a disposition of "all my property" to one or more individuals in equal or stated fractional shares.

Q. What is a complex estate plan?

There are quite a few factors that can complicate an estate plan. In essence, any plan that is not a simple plan is considered to be complex. Common factors that are included in a complex plan are: multiple non-family beneficiaries, significant specific bequests of real or personal property, a trust that is to continue beyond the death of the primary beneficiaries, or a plan that seeks minimize estate taxes.

Q. Do I need an irrevocable trust?

Irrevocable trusts are used primarily to make gifts to family members while you are alive or to allow a family member or corporate trustee to manage an inheritance for the benefit of a minor child or other beneficiary who is incapacitated or otherwise unable to manage their own financial affairs. The Trustee of an irrevocable trust is often give broad discretion in making distributions. Trusts with significant assets often utilize corporate trustees.

Q. How is an irrevocable trust different from a revocable trust?

A self-funded revocable trust has no asset protection features. You are not allowed to create a trust for your own benefit and use it as a means to protect your assets from your own creditors. In contrast, an irrevocable trust may provide creditor protection for a beneficiary, other than yourself. If you create an irrevocable trust for the benefit of a family member, the assets placed in that trust will be protected both from your creditors and from the beneficiary's creditors. A revocable trust can be modified, amended or revoked. An irrevocable trust generally cannot be changed, except under limited circumstances allowed by law. A revocable trust utilizes the Trustors social security number and is not required to file a separate return. In contrast, an irrevocable trust must have its own taxpayer identification number and file its own annual income tax return.

Q. Do I need an attorney to prepare my Will or Trust?

Absolutely you should have an attorney prepare your estate planning documents! There is no substitute for the one-on-one counseling you will receive from an experienced estate planner. The attorney will inquire about your circumstances and help you design an estate plan that is right for you and only you. Texas law is unique and legal documents available on the Internet are generally not Texas-specific and require customization, in order to effectively implement your wishes. The law changes from time to time, frequently and perhaps drastically! A form that was acceptable just a few years ago may now be obsolete. Consult an attorney who you know to be an experienced estate planner and let your attorney help you determine what you need to accomplish your objectives.