

Understanding Living Trusts

Estate Planning is something that people always put off, whether it is because there are more important things going on in their life, they think that they have plenty of time to worry about it, or they just don't want to think about the possibility of dying. Failure to address estate plans can be a serious problem with serious consequences, both from a time and money standpoint, and a tax stand point.

People have a number of different ideas about how to handle their estate. Some of these are:

- Giving away assets
- Joint ownership
- Beneficiary Trust
- Do Nothing and let the state handle it
- Prepare a will
- Prepare a Living Trust

Giving away assets is not the best method of transferring your assets to your heirs. When you deed your home to your child, for example, you lose control of your asset, and your child inherits your tax basis as well as the property. If they were to sell it, they could be responsible for significant capital gains taxes. When someone dies, the basis of the property "steps up" to the current value of the property. The same holds true in joint ownership, such as joint tenancy or tenants in common.

A beneficiary trust creates situations where the court can become involved, such as if the person making the trust become incapacitated, the beneficiary is a minor or both die at the same time.

Of course, doing nothing is not the answer ... then you are depending on the state to divide your property according to intestate succession, as designated by state statute. Furthermore, the estate will need to go through the probate process.

Isn't a Will Enough?

A will tells the executor or administrator of the estate what the person wants to do with their assets. The problem is that the will must go through the probate process. Probate is a public forum in the Superior Court in the county in which the decedent resided at the time of death. It is the only way to change title to property, such as real estate. The problem with probate is that it is public, time consuming (minimum 6 months) and expensive. The fees for probating a \$1 million estate is at least \$20,000, and could be even higher.

What is a Living Trust?

A Living Trust takes the place of a will. I like to explain a living trust by saying it is like a corporation. A corporation is a legal entity that will never die, unless according to its terms. A Living Trust is also a legal entity that will not die, even if the person or persons who established the trust does die. The person or persons who establish the trust are known as the “Settlers” of the trust, and are usually the original “Trustees”. You can equate that to the president of the corporation. When the president of the corporation dies, the company does not stop doing business. A new president is named, and the business keeps running.

With a trust, the settlors name their own successor trustees to carry out the terms of the trust according to the wishes of the settlors. Even though there is some expense in administering the trust, it is much less than probate, and can be done much faster and without any court interference. Of course, the named trustee should be someone who can be trusted to carry out the terms of the trust. Failure to do so is a breach of the trustee’s fiduciary duty, and could cause the trustee to be personally liable to the beneficiaries.

Sometimes, the settlors will name a corporation, such as a banks trust department or a law firm to act as trustee of the trust. This will often prevent hard feelings between family members, when one is named as the trustee and another thinks they are being cheated. Remember, “Were there’s a Will, there’s a relative”.

Who should have a trust and estate plan? Just about everyone. If someone owns a house, they should establish a trust. Even if the house is worth \$500,000, and the decedent owes \$400,000 on it, the estate in probate will be considered to by a \$500,000 estate, and the fees for probate would be more than \$13,000. When you sell a home to a client, you would be doing them a favor by telling them that they should seriously consider establishing a Living Trust. The piece of mind for them will be priceless, and because you care enough to think about them, it might prompt them to think about you and provide you with referral business.

Ken Koenen is a tax, Estate planning and real estate attorney at Koenen & Tokunaga, P.C., and a licensed real estate broker in Pleasanton. Their firm can do seminars for your clients on this and other topics. He can be reached by phone at 925-924-0100 or email at ken@ktpclaw.com

© 2007, Ken Koenen, Koenen & Tokunaga, P.C.