

Do You Really Need that Living Trust?

If you have received previous issues, you will notice that I decided to stop calling this little newsletter “Elder Law Today.” Elder law remains a large part of my practice, but as I planned out future issues it became obvious that most of the topics we will be discussing should be of interest to families of all ages. This month’s topic is a good example.

Many new clients come to me assuming that they need a “living trust.” They may have read a book on the subject or been told by a friend or relative (who probably knew very little about their circumstances) that it was essential. Sometimes, they have received some ominously official looking junk mail proclaiming that “LAWS HAVE CHANGED – ACT NOW” or some other such nonsense urging them to save their estates from being lost to horrific costs of probate.

If anyone tries to sell you on a living trust to avoid the cost of probate, you should be very skeptical of their motives. Ask yourself what are they are really trying to sell you, particularly if that person isn’t a lawyer. I would be willing to bet that the cost of that living trust will probably meet and possibly exceed the combined costs of *drafting and probating* a good will in Texas. For more information on the unscrupulous marketing of living trusts, check out the Texas Young Lawyers Association’s pamphlet “Living Trust Scams” available at www.tyla.org.

Now, if you lived in California, Ohio or a few other states with more costly probate systems, then a living trust might be absolutely essential. But if you have a good Texas will that makes your executor independent of probate court supervision, probate in this state can be very cost-effective.

That being said, you should also know that trusts are wonderful tools that can serve address any number of legitimate needs. A “living” trust is simply a trust that takes effect while you’re alive. (In law school we learned to call them *inter vivos* trusts, but we lawyers are hard enough to understand without throwing Latin at you.) A “testamentary” trust is established in your will and takes effect when you die. I’ll list a few situations where a living trust might be very useful:

Privacy: Some people simply do not want their will or an inventory of their estate made public after they are gone. Properly managed, the living trust will indeed allow your family to avoid probate and the terms of your living trust can remain strictly private.

Avoiding Ancillary Probate: If you also own real estate in another state, your will may have to be probated in that state in order to properly transfer title. Putting that property in a living trust can avoid the necessity.

Mobility. If you move frequently or maintain a second residence, placing property in a trust controlled by Texas law can maintain the character of your property as community or separate, and avoids the necessity of constantly revising your estate planning documents when you move to another jurisdiction.

Continuous Management. A trust allows you to provide for successor trustees who can quickly take over management of your important assets if you die or become disabled. You may even wish to provide for a corporate trustee with specialized expertise.

Easy Changes. Revocable trusts are easier to change than wills. At least, you don’t need two witnesses or a notary and you can freely add or withdraw property from the trust.

If you have a living trust, bear in mind that *you still need a will*, called a pour-over will, to “pour over” any assets you failed to transfer to the trust while alive. Transferring your residence to a living trust does not lose the homestead exemption for property tax purposes, but there is an open question as to whether you lose the homestead exemption from creditor’s claims. The better legal analysis is that it should remain protected, but no Texas court case has definitively answered the question yet.

Just remember to be wary of anyone selling trusts or any other form of estate planning as if it was a “one-size-fits all” business.