

## WHAT IS A REVOCABLE LIVING TRUST AGREEMENT?

When you have a will drawn up, you are actually creating what is called a testamentary trust. Unfortunately, when a person passes away, their will must go through the probate system.

In many cases, it may be a year or longer before the estate is divided among the beneficiaries. By that time, there's a good possibility that the lawyer(s) get a large portion of it, leaving just a percentage for everyone else. The average legal and court fees run around 5%.

The most popular trust, by far, is the *revocable living trust*. Its use as a technique for avoiding probate has become very popular during the past few years, and it is anticipated that it will continue its dramatic increase in popularity with the general public

A trust is a relationship in which one person transfers property to a second person for the benefit of a third person. The person creating the trust is called the *grantor*. The person or entity having legal title to the trust property is the *trustee*, and the person for whose benefit the trust is created is called the *beneficiary*. The same person can be grantor, trustee, and beneficiary all at the same time in some situations.

A revocable trust is an arrangement in which the grantor places property in trust, naming himself or herself or some other person as Trustee, or Co-Trustee, but reserving the right to revoke the trust so that the property can be returned to the grantor. Generally, the trust agreement provides that upon the death of the grantor, the property shall go to the named beneficiaries. This automatically avoids all probate of the property. A revocable living trust can also be used to place income producing property in trust to be managed by professional managers. However, the grantor can actively manage the trust property if it is appropriate at any time. The primary purpose is the avoidance of the ineffective, inefficient, cumbersome and expensive probate system. The use of a revocable living trust avoids the delays that are always involved in the probate courts, and prevents disruption that may occur where management of assets shifts after death. A trustee can distribute the assets of the estate immediately after the death and needs no lawyer, judges or other legal experts who are preoccupied with the make-work paper shuffling to prolong the process. Another advantage is that a probate proceedings are a matter of public record.

## ADVANTAGES OF A REVOCABLE LIVING TRUST

In the typical revocable living trust, a grantor transfers property to a trustee under a written agreement. The classic arrangement is for the agreement to provide for the trustee to pay the grantor all of the income from the trust during his or her lifetime, together with such amounts of principal as may be requested by the grantor. It also provides that the grantor can amend or revoke the trust or change the trustee at any time.

Upon the death of the grantor, the trust property is held, administered, and distributed by the trustee or successor trustee instead of passing under a will through the probate system. This method is fast, simple, easy, all without the costs and delays of probate. Indeed, it has been said that with a revocable living trust can be completely administered before a lawyer can get to the courthouse to file a will! And it is true. An entire estate can be administered and distributed in a matter of a few hours or days. The express provisions of the trust agreement which apply to the administration and distribution of the trust assets after the death of the grantor become operative and can be carried out immediately.

The revocable living trust is the answer to most of the ugly probate problems. The trustee can perform all of the necessary management of the trust assets, if needed, including the collection of income, the purchase and sale of trust assets, and the management of a closely held business or real estate. In an emergency, the trust can make payment of hospital, nursing and doctor bills, and any other expenses of the grantor. The trust can be revoked by the grantor if he or she so desires, or the grantor may actively manage the trust property while leaving the legal title in the name of the trustee. If the grantor dies, the trust property can be immediately transferred to the designated beneficiaries. To summarize, the advantages of the revocable living trust include the following:

- Avoidance of probate
- Avoidance of probate administration fees and expenses
- Avoidance of excessive legal fees associated with probate
- Avoidance of unnecessary delays
- Avoiding publicity of probate matters
- Avoiding ancillary administration
- Avoiding statutory restrictions on bequests of property
- Avoiding inheritance taxes
- Avoiding will contests
- Tax savings in some situations
- Property management
- Management uninterrupted by incapacity of grantor
- Assurance of uninterrupted income and access to principal for family beneficiaries
- Avoiding probate system that does not serve any noble purpose

## **EXAMPLES OF HOW THE REVOCABLE LIVING TRUST WORKS**

Suppose that a married couple provides in a revocable living trust agreement that all or part of their assets are declared to be held by them, as Co-Trustees, for their benefit during their lifetimes, and upon death of either spouse to go to the surviving spouse, or in the event of simultaneous deaths to go directly to designated beneficiaries. Immediately upon the death of either spouse, all legal interests in all property would automatically revert to the surviving spouse, as sole trustee, free and clear from any probate processes or other court delays. The surviving spouse would have the option to place the assets in another revocable trust with any child or other family member as Co-Trustee and avoid probate again and again.

Suppose further, as a second example, that an unmarried person provides in a revocable living trust agreement, that all or a part of his or her assets are declared to be held by the grantor and a third party, as Co-Trustees, for the grantor's benefit during his or her lifetime, and upon the death of the grantor to go to the beneficiaries designated in the agreement. Immediately upon the grantor's death, all legal interest in all property would automatically revert to the Co-Trustee, as the sole trustee, to be transferred as directed by the grantor in the agreement. If the beneficiary is an adult, he or she could be the Co-Trustee, and upon the grantor's death, he or she would automatically have title to the property for himself or herself.

## **TRUSTS TAKE PRECEDENCE OVER A WILL**

We have been discussing one of the two principle ways to pass property, upon the death of an individual, to the persons whom the individual wants to have it. The other method is by will. The transfer by will requires the probate process; a Revocable Living Trust completely avoid probate.

What happens if an individual does both—that is leaves a property to a person in a will and also leaves the same property to another person in a Revocable Living Trust. The trust takes precedence over the will! For example, if an individual has \$100,000 in stocks and first writes a valid will leaving the specific stocks to John Doe, and then later executes a revocable living trust, leaving the same stocks to Jane Doe, Jane Doe receives the stocks upon the individual's death because the trust takes precedence. Suppose further that the individual first placed the stocks in a revocable living trust for John Doe and later executed a will leaving the same stocks for Jane Doe. In this case, John Doe receives the stocks. The trust takes precedence over the will no matter whether it was executed before or after the will.

The revocable living trust takes precedence over the will in both cases because the title (ownership) of the property was transferred in each transaction when the trust agreement was executed. The title (ownership) to the stocks could not be transferred by will until the death of the owner. Even though both a trust and a will execution of the trust and a will does not.

## **TRUSTS AND TAXES**

As a general rule, a trust, as an individual, is a taxable entity. A trustee must file an income tax return for the trust and pay the tax on its taxable unless income is passed through to the beneficiaries—which is usually the case. Many times a trust is established primarily because the beneficiary is in a lower tax bracket than the grantor. The establishment of several trusts can result in tax savings on a grand scale in some circumstances. Although trusts can avoid probate they do not avoid estate or gift taxes as a general rule. Other techniques are recommended for avoiding estate and gift taxes.

## **MARITAL PROPERTY RIGHTS**

In most states, the laws give certain legal rights to a surviving spouse which cannot be defeated by a will. Some of these state laws, but not all, also give certain rights to a surviving spouse which cannot be defeated by gifts, by the revocable living trust or other transfers. These marital property rights are called community property, dower, courtesy, elective rights, statutory rights or various other terms. These rights typically gives one-half or one-third, or some other portion of the estate of the deceased to the surviving spouse.

The concept behind these laws is that with certain exceptions, property acquired during marriage belongs to both spouses. The marital property rights vary from state to state and the state laws with respect to marital property rights transferred by a living trust agreement are inconsistent and sometimes difficult to interpret. It is recommended that any married person obtain the consent of the spouse in any trust created during marriage.

The trust doctrine was not fashioned by the courts as an instrument for denying rights of a spouse. On the contrary, the trust can be used by both married and unmarried persons as an easy, simple, inexpensive way to transfer property from one generation to another without the probate process.

## **SELECTION OF TRUSTEES AND SUCCESSOR TRUSTEES**

For purposes of avoiding probate, the majority of grantors place themselves as the trustee or co-trustee. The grantor should consider a co-trustee especially if an adult beneficiary (for example, spouse or adult child) is a primary or sole beneficiary. A grantor who wants a third party trustee should consider adult children, other relatives or business associates. Having a lawyer, trust officer, bank or trust company as a trustee defeats one of the major objectives of the trust: avoiding excessive fees and expenses of probate; however, due to your situation, it may be the best option.

## REVOCATION AND AMENDMENT

The great advantage of the revocable living trust is the ability, at any time, for any reason, or for no reason, to change it or revoke it. It can be revoked or amended by a mere stroke of the pen. The revocation document simply describes the trust being revoked. Immediately upon signing the *revocation* and transmitting it to the trustee, the trust is automatically terminated and revoked as a matter of law. (If the trust agreement is recorded, the revocation must also be recorded.) No lawyers, no judges, no lengthy court proceedings are needed. The grantor is in complete control of the property and it can remain a private matter, since it is kept out of the hands of the probate lawyers.