Which Should I Have - A Living Trust or a Will?

In some states clients are charged court costs and attorney's fees based on the worth of their probate assets. Thus, the cost of the administration of the estate increases as the value of the probate estate increases. As a result, many clients in other states wish to avoid the costs of probate to the greatest extent possible. The most common way to avoid the costs of probate in states suffering from expensive probate processes is to utilize a trust.

Fortunately, this is not the case in Texas. Typically, it is cheaper, quicker and easier to go through probate in Texas than it is in almost every other state. In Texas, we have what is known as an independent administration which means executors can handle the tasks involved in winding down an estate and distributing assets to beneficiaries with very little court involvement.

The type of trust that is most often employed to avoid probate is called an inter vivos trust. It is also known as a revocable management trust or a living trust.

Often clients will come into their attorney's office with a preconceived idea of which estate planning documents they need and whether they should use a Will or a living trust. Selecting the correct estate planning tool, however, depends on each client's unique situation. It is best to understand the advantages and disadvantages of both a Will-based plan and a living trust-based plan before making the final decision.

Although what is best for each individual client varies, here are some advantages of using a living trust in Texas:

Avoiding probate - Although cost of probate is not a valid reason for avoiding probate in Texas, there are other reasons that a client may want to avoid the public probate process, such as the concern for privacy. Historically, having a trust meant avoiding the need to file an inventory listing assets with the court during probate. However, that is no longer always required. Some estates are eligible to keep the inventory away from public view by presenting it only to beneficiaries of the estate. Thus, the decedent's assets may remain private.

Management during disability - A living trust goes into effect during one's lifetime so if the grantor of the trust becomes disabled or unable to manage his or her affairs, an alternate trustee can step in and act quickly to manage assets and pay bills without costly court supervision.

Avoiding the need for an additional probate in another state - If you own real property outside of the state of Texas at your death, then once your Will is probated in Texas, your executor has to go through the additional process of having the Will proven valid in each state in which you own real property. This can be time-consuming and expensive. If you have a living trust, then the out-of-state parcels of property can be deeded into the trust during your lifetime avoiding the need for probate in the other state. Upon your death, the trustee can handle the out-of-state property in the living trust with ease.

Ease of administration during lifetime – Even though Texas recently passed new laws making it easier for financial powers of attorney to be accepted by financial institutions, those managing assets with

powers of attorney still face difficulty having their authority recognized. Simply put, financial institutions are more likely to recognize the authority of trustees in the management of assets.

There is a misconception that having a living trust is simpler than having a Will-based plan. This is not necessarily true. The most complicated part of having a living trust is not the document, but rather the process of funding the trust. It is imperative that after the trust is established that all of your assets are transferred or retitled into the name of the trust. If an asset is controlled by beneficiary designation, then the trust must be named a beneficiary. When retirement accounts are involved, funding the trust can be complicated. If the funding does not occur properly or if assets are left out of the trust, then probate will likely be necessary. Even if only one asset is left out of the trust, probate will likely still be required. Then, unfortunately, not only would there be costs associated with the administration of the trust estate but also additional fees associated with probate.

It is true that the use of living trusts as a substitute to a Will-based plan has exploded in many states. In Texas, it should not be an automatic choice. Rather, each client's situation should be considered in determining the best estate plan for their purpose. Living trusts are good for some people but perhaps inappropriate for others. As always, you should meet with an experienced estate planning attorney to find out what is best for you.

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