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REVOCABLE TRUSTS – PANACEA OR PROPAGANDA?

What is a Revocable Living Trust?

Revocable “Living” Trusts (“RLT”) have become a common topic of discussion among seniors these days. Books – seminars - mailings, some say it is the “only way to go” (no pun intended). Others wonder if this is mostly a lawyer-led marketing ploy. What is the common sense truth about this whole topic? Is it possible to objectively discuss this issue? In an effort to inject some sense in this discussion, let me explain some of the basics for us to understand.

How Does a Revocable Living Trust Differ From a Last Will or Other Probate Proceeding?

The basic purpose of a Last Will is to transfer the remaining assets of the deceased person to the beneficiaries named in the Will. In this regard, RLTs accomplish the same purpose but in a different manner. A Will is administered via district court proceedings and supervision through the direction of the personal representative (sometimes called an executor, or administrator with Will annexed). The personal representative must follow statutory procedures in carrying out the terms of the Will, including some or all of the following:

1. Filing the Will with a Petition and requesting a hearing to prove death, prove the Last Will (if there is one), and seek the appointment of a personal representative;
2. Filing a bond to protect the estate from the personal representative's wrongdoing (unless bond is waived in the Last Will);
3. Filing an inventory of the estate (after securing court appointment of appraisers), unless the inventory is waived by the Court;
4. Publishing notice to all creditors and mailing of notice to all known or reasonably ascertainable creditors;

5. **Preparing and filing state inheritance tax returns (not required in Oklahoma), and possibly federal estate, and the decedent's final income tax returns;**
6. **Selling/disposing of real and personal property if required by the Will or the circumstances of the estate, and filing appropriate proceedings in court to secure approval of such sale(s);**
7. **Settling claims with creditors and debts of the estate;**
8. **Filing annual/final accounting with the Court (unless waived by the heirs or beneficiaries), seeking final approval of all work performed by the Personal Representative, and seeking authority to distribute all remaining assets to beneficiaries; and**
9. **Securing receipts from beneficiaries and, upon proof of distribution, securing a discharge from the district court.**

In some cases, some of the procedures set forth above can be waived; however, the general procedure requires several months to complete and can even extend into several years. A RLT on the other hand seldom requires any district court involvement or supervision. None of the procedures required for personal representatives are normally required of trustees of a RLT, with the exception of filing of inheritance/estate tax returns, and possibly payment of valid creditor claims. Of course, a particular RLT might require in the document certain actions be taken by the trustee (such as payment of funeral, medical bills or other debts) but, even in such cases, seldom is the court involved at all. Thus, because many hours are saved via a RLT, very significant savings in attorney fees, court costs, and personal representative fees can be achieved.

Does a Revocable Living Trust Save Income or Death Taxes?

Generally, no more so than does a properly prepared Will. In other words, RLTs do not generally have any impact on your personal income taxes, and the IRS virtually ignores them and treats the trustor of the trust as the absolute owner of the assets just as if he had never established the RLT. Additionally, there are certain types of death-tax savings provisions that can be included in a RLT, but these same devices can also be incorporated in a properly prepared Will. Thus, promotional literature for RLTs overstate the case when they imply that RLTs save death taxes and nothing else does.

Does a RLT Avoid the Requirement of a Guardian or Conservator If I Become Disabled or Mentally Incompetent?

Yes and no. A guardian may be appointed over the person and/or property of an incompetent person (ward). A RLT, via the co- or successor trustee, has authority to

manage property only and has no authority over the person of the trustor. Thus, if a guardian of the person is required, a RLT will not solve this problem. However, if the trustor had, prior to incompetency or disability, signed a durable power of attorney, then possibly even the guardianship of the person could be avoided. A conservator is similar to a guardian of the estate (property) of the ward (conservatee), but no demonstration to the court of mental incompetency is required. A RLT should avoid the requirement of a conservator. Guardianship and conservatorship proceedings are cumbersome and expensive (court costs, legal fees, bonds, etc.), and should be avoided if possible.

What If I Have Property in Another State?

Another major advantage of a RLT over a Will is the avoidance of multiple estate administration proceedings in each state in which you own real property. If such out-of-state real property is conveyed to the trustee(s) of the RLT prior to the death of the trustor, the trustee manages and disposes/distributes the property independently of any court proceeding in the sister state. This can result in a savings of hundreds to even thousands of dollars.

What Are Some Other Advantages to a RLT?

Some additional “advantages” to a RLT are:

1. **Avoid publicity associated with probate administration via district court;**
2. **Avoid court costs, executor or personal representative fees, and probate legal fees;**
3. **Usually enables more prompt transfer of assets to beneficiaries than probate proceedings;**
4. **Possibly avoids guardianship (of property) or conservatorship proceedings if the trustor later becomes mentally or physically incapacitated;**
5. **Allows estate tax savings provisions to be implemented (but this can also be arranged through a properly planned Last Will);**
6. **Allows the trustor to view the trust in operation and to make changes as experience and changed circumstances suggest;**
7. **May serve as a receptacle for estate assets and for death benefits from qualified employee benefit plans and insurance on the life the Trustor (though receiving IRA or other retirement plan benefits may have undesirable income tax consequences);**
8. **Relieves the trustor of burdens of investment management, if desired by the Trustor; and**

9. May make it more difficult for a creditor of a deceased Trustor to collect on an open account (e.g. credit card, doctor bill, etc.) than is generally the case in a probate proceeding.

Can the Grantor or Trustor be Trustee During His/Her Lifetime?

Yes, but it is not required. It is common for the trustor to act as trustee as long as (s)he is able and desires to do so. Thereafter, another family member, friend, professional or corporate trust company, or bank (having trust powers) may be appointed by the trustor to serve as the co- or successor trustee.

Are There Risks, Disadvantages or Negatives to a RLT?

Some might say yes. In order for a RLT to work properly, and to avoid estate administration costs, etc., it is necessary that all of the property/assets that would otherwise require probate administration be actually transferred to the trustee(s) of the RLT. For example, real estate must be deeded to the trustee; stocks/bonds, etc., must be titled in the name of the trustee; bank accounts must be changed and possibly life insurance beneficiary designations, etc. Some people find this process frustrating, confusing and somewhat threatening. Patience and a little time is required to complete the transfer process. Some might say you are "pre-probating" your own estate by going through this process of asset transfer.

A traditional RLT does not by itself automatically provide protection from the Trustor's creditors (much to the surprise of many people who have created them). A RLT has no effect on increasing the likelihood of being able to qualify for Medicaid/long-term care while attempting to protect your assets for your children, and may even interfere with attempts to engage in so-called "Medicaid planning."

A RLT may have some post-death expenses, such as trustee fees (especially if a professional is used), some attorney, accountant, broker, or other professional fees, for document and/or tax return preparation.

Without proper follow through, a RLT will fail to accomplish the purpose for which it was designed and may trigger post-death expenses which might have been avoided. You can therefore see that a RLT has many benefits and a few burdens. It is therefore neither a panacea nor is the discussion of RLTs all hype or propaganda. However, a Revocable Living Trust is a very useful foundational tool upon which to build your overall estate plan.

In May, 2004, the Governor of Oklahoma signed into law "The Family Wealth Preservation Trust Act." The statute authorizes an individual to create a trust appointing an Oklahoma based bank (trust company or bank chartered or located in

Oklahoma) as sole trustee or as co-trustee to manage assets up to \$1 Million owned by the individual. The statute requires that the beneficiary be a spouse and/or children, or charities, and that the assets held therein must be qualified as an “Oklahoma asset,” namely: Oklahoma stocks; bonds issued by an Oklahoma based company; a bond issued by the State of Oklahoma, or an Oklahoma government agency, or municipal government; bank accounts located in Oklahoma; or real property located in Oklahoma. The purpose of this new law is to allow the assets contained in the trust to be protected from the creditors of the person creating the trust. The trust may be either revocable or irrevocable. For some individuals, this type of trust may be a suitable form of revocable trust, or an additional trust alongside their other estate planning documents. However, since there are no court cases interpreting this statute, there may be some uncertainty as to its success as an asset protection device.

Conclusion

Wise estate planning requires a careful analysis of your overall personal, financial, business, and family situation. Seldom is no planning the best plan. Many people wait too late in their lives before properly establishing a suitable estate plan. As we get older we find less desire in ourselves to deal with the details and sometimes hard choices that must be made to properly plan our estates. Before long we may find ourselves mentally unable to plan wisely and carefully, thus creating problems and frustrations for our loved ones and beneficiaries. Good intentions must be accompanied by good initiative. Since every personal and family situation has unique characteristics, proper estate planning requires a review of your situation by qualified professionals.

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