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TRUSTS – ARE THEY RIGHT FOR ME?

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WHAT HAPPENS TO MY ASSETS WHEN I DIE?

What happens to your assets when you die depends upon how those assets are titled while you are alive.

1. **Assets held in Joint Tenancy** If you hold real estate or bank accounts or any other property as joint tenants with another person, say a spouse or child, the property automatically carries with it a right of survivorship to the surviving joint tenant(s). Most married couples will own everything (*even cars*) as joint tenants or designate the spouse as beneficiary (see below) so that there is little disruption at the passing of the first spouse. A simple death certificate presented to the bank or town hall will automatically remove the deceased joint tenant from the asset. The surviving joint tenant(s) is in complete control of that asset immediately upon the passing of the deceased joint tenant.

2. **Designation of Beneficiaries.** If you own an asset in your name alone, like a life insurance policy, an IRA, 401K, annuity or other similar account, you may designate individuals as beneficiaries on these accounts. The designations mean that the assets will automatically pass to your named beneficiary at your death. Always remember to have *contingent* beneficiaries on any pre-tax accounts like traditional IRA's. It is always better for individuals to pay income tax on these accounts, in case anything happens to your primary beneficiary.

3. **T.O.D./P.O.D.** If you own an asset in your name alone, like a bank account, the bank account will allow you to name a beneficiary on that account. Banks call it "Pay on Death" and investment products like stocks and mutual funds accounts call it "Transfer on Death." A joint bank account or stock account could designate children as the P.O.D./T.O.D. beneficiary of the account. As with joint tenancy and beneficiary designations the POD/TOD beneficiary will automatically inherit your assets upon your passing.

4. **Real Property Transfer on Death Deeds.** Under the new probate code, Maine now allows a real estate deed to designate beneficiaries, the same way you would on a bank or stock account. The advantage of the new deed is that the beneficiaries will have absolutely no rights to

the real estate and the owner can change the deed at any time before you die, without notice to the beneficiary. This deed will minimize the need for Trusts, especially out-of-state residents with Maine real estate who want to very simply by-pass Maine probate when they die. It will

also potentially eliminate probate for Maine residents who have beneficiary designations for all their assets (life insurance, IRA, bank accounts) except the house.

WHAT HAPPENS TO ASSETS THAT ARE IN YOUR NAME ALONE WITH NO SURVIVING JOINT TENANT OR BENEFICIARY

If you die with assets in your name alone and there is no surviving joint tenant or beneficiary then the only person who has control over that asset is your Personal Representative.

1. If you have a Will (you die Testate), your Will names your Personal Representative.
2. If you do not have a Will (you die Intestate), the State of Maine (if that is where you are residing and pay taxes when you die) will dictate who that person is through the laws of intestacy.

Remember, though, your Personal Representative does not have any power over your assets UNTIL your estate (will or no will) is probated and that Personal Representative is officially appointed. The process of appointing a Personal Representative is called PROBATE (see below).

WHAT IS THE DIFFERENCE BETWEEN A WILL AND A TRUST?

The best way to think of a Trust is as a Will substitute. A Trust accomplishes most of the same things a Will does:

- A Trust tells the world who will inherit whatever is in your Trust when you die (i.e., your spouse, kids, charity, etc.).
- A Trust tells the world who will be in charge of the assets in your Trust when you die (the "Trustee").

Unlike a Will, which only has significance when you die, a Trust exists the minute you form it and place items in it (house, bank accounts, etc.). As a result, your Successor Trustee does not have to "probate" your estate when you die.

WHAT IS PROBATE – SHOULD IT BE AVOIDED?

Probably the number one reason Trusts are widely used is to avoid probate. Probate is the process of having your will accepted by the Probate Court in the county where you reside when you die.

Will	Trust
You name your Personal Representative in your Will, and the court appoints him or her after you die to settle your estate per the terms of your Will.	You name your Trustee in your Trust to settle your estate after you die. The court does not get involved, unless there is a dispute.

Why Probate Should Sometimes Be Avoided

In states like Maine, probate is a fast, easy and inexpensive process. Most Personal Representatives (the person you name to be in charge of your Estate) are appointed within one to two weeks of application to the court. The fees paid to court are based on the value of your assets, and are very reasonable. Some states, like New Hampshire, still have a formal probate process, and the costs associated are far more expensive and time-consuming. States like New York, Connecticut and California are notorious for having difficult probate systems. The probate courts in Massachusetts, which fairly recently adopted probate laws similar to Maine's, are so overwhelmed they can be slow to process paperwork. For many, the guiding question as to whether you should avoid probate is, what state do I plan to die in?

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“Which state do I plan to die in?”

Other Reasons to Avoid Probate

- Do you own real property in more than one state? A probate process must happen in every state that you own real estate, which can get expensive.

Will Example: *If you are a resident of Maine, but own property in Vermont and Massachusetts which is in your name, your Personal Representative will need to open probate in three states in order to transfer all your property when you pass.*

Trust Example: *If these additional properties are all in a Trust, there would be no probate in the additional states.*

- Contentious family that you know will argue when you pass.
- Children that are estranged from you.
- Privacy concerns (your Will becomes available to the public online on the probate court website when you die through the probate process).

Things to remember:

There are no estate tax savings to avoiding probate.

Many people mistakenly believe that a Trust will mean that they will avoid estate taxes when they die. However, whether your assets are in a Trust or in a Will, they are all included in your net taxable estate. The exemption equivalent for federal estate taxes for the year 2022 is \$12.06 Million (\$24.12 Million for a married couple). The 2022 Maine rate is currently \$6.01 Million plus an annual adjustment for inflation, but this amount may increase to match the federal rate. It is unknown at this time.

Clients interested in a Trust must have "constant vigilance" to maintain the Trust by making sure to title current and after-acquired assets in the name of their Trust. Many clients tell me all their assets are in their Trust, yet nothing in fact is in the Trust. People sell houses, buy new ones and then forget to put the new home in the Trust. They open new accounts at the bank

and forget about the Trust again. This means anything left outside the Trust will go through probate. So, in many cases, all that effort to avoid probate by forming the Trust is wasted.

A Good Rule of Thumb:

IF A PERSON SAYS:

“My mom had a Trust, it worked great and things went quite smoothly.”

They are familiar with the language and how a Trust operates.

They understand the importance of funding the Trust.

This person is a good candidate for a Trust.



IF A PERSON SAYS:

“Trusts confuse me. I really don't understand them.

I plan to die in Maine and I like to keep things very simple.”

This person probably does not need to bother with a Trust.

SUMMARY

Will Advantages

- Lower cost than Trust preparation.
- Simple and inexpensive in probate friendly states.

Trust advantages

- Avoids probate if assets are properly titled.
- Privacy.
- Trustee is immediately authorized to act upon your death.

NEXT STEP

Now that you have decided whether you want a Trust or not, the next question is, what kind of Trust? There are many kinds of Trusts, but they fall in to two basic categories: Revocable and Irrevocable.

Revocable

Revocable Trusts are used solely to avoid probate for the reasons outlined above. Revocable Trusts can be changed at any time. If your assets are in a Revocable Trust you can borrow money and do all the same things you would otherwise. Your Social Security Number is the Trust tax ID number. Your mortgage interest is still deductible and you may keep your homestead tax exemption if you put your primary residence in a Revocable Trust. Because it is considered to be in your full control, there is no asset protection to a Revocable Trust. Creditors will be able to attach assets in a Revocable Trust.

Placing your assets in a Revocable Trust does not provide asset protection from Maine Care or liens from other creditors.

Irrevocable Trusts and Asset Protection

If you are interested in a Trust to protect your assets from nursing home or Maine Care (Medicaid) liens, then you would be interested in an Irrevocable Trust. Unlike Revocable Trusts, Irrevocable Trusts are rigid and constraining. In order to ensure ultimate protection, any asset placed in such a Trust will then be completely out of your control. You will not be the Trustee, you will not be able to mortgage the assets, you will not be able to sell the assets without your Trustee's permission.

What kind of assets work best in an Irrevocable Trust?

Are you a candidate for an Irrevocable Trust?

Assets that work best when placed in an Irrevocable Trust are assets that you own outright and never intend to sell (like a family cottage, sometimes a home).

Things to remember:

If you have a mortgage on your home, then you are not ready for an Irrevocable Trust.

If you have so few cash reserves that you would need access to a home equity line of credit to fix the roof or a boiler, then you are not a candidate for an Irrevocable Trust.

If you want to remain in your home as you age and may need to use a reverse mortgage to finance your care, you are not a candidate for an Irrevocable Trust.

If your family does not get along or do not communicate well, you are not a good candidate for an Irrevocable Trust.

If you are still interested in an Irrevocable Trust, please read the handout, "Maine Care & Deed Transfer Options"

Updated 8/23/2022