

~Discussion Draft Only~

LIVING TRUSTS – WHAT YOU DON'T HEAR

Here is a list of points which, in my experience, the consumer hears about why they should consider a living trust. The following claims are false:

Claim: A living trust avoids “probate delays”. - False

My response: There is nothing about probate that causes delays. A Personal Representative can be appointed after five days have passed from the date of death and the estate can be “closed” in about 5 months.

But it often takes longer to close – whether it is a living trust or a probate estate. “Delays” are the result of administration realities and decisions which apply in virtually the same way to estates and to trusts. For example, it can take many months to get a final bill for medical expenses because of the time it takes to get the responsible entities to pay. It may take many months to find a buyer for the house. It may be judicious to wait until after January in order to review the 1099s that come in the mail to be sure the tax reporting and asset inventory is accurate.

However, if a probate estate or living trust has cash on hand and there is no projected need to retain that much, a partial distribution can be made if the Personal Representative or Successor Trustee feels it is safe to do so.

In short, there is work to be done after a death (particularly the death of a single person) and that work takes some time. The amount of time is the same whether you are closing out a living trust or handling a probate estate.

Claim: A living trust avoids “probate fees.” - False

My Response: What is a “probate fee”? What the consumer hears is that, somehow, the property passes from the decedent to the beneficiaries automatically without the need of professional assistance. That is simply not the case. In reality, there is the same work to be done.

A “Successor Trustee” who must administer the closing of a living

trust has the same responsibility, and potential liability, as a Personal Representative in a probate estate. That person is responsible to the taxing authorities, the beneficiaries and to creditors. If the legal bases are not properly covered, this person can have personal liability. As a result, it is rare that we find a Personal Representative or Successor Trustee that feels that he or she can administer a decedent's estate without professional help. That professional help results in fees. It is therefore disingenuous to suggest that by using a living trust you avoid "probate fees" when they are simply replaced by "trust administration fees." It is also important to understand that if the Trustee of the Successor Trustee is a financial institution there may be less outside professional fees, but the financial institution will have its own fees, including minimum fees for small estates.

If you were to examine the itemized time and expense incurred to administer and close out a living trust as compared to the time and expense incurred in administering and closing out a probate estate, you would find negligible difference. That is because the bulk of the professional time is expended in the same administration work in either case.

You should also be a little cautious of the claims about how much those fees are. I read an article in an Omaha women's magazine that claimed that "probate fees" run between 4 and 10 percent of the gross estate. That claim is false. First of all, the work to be done is virtually the same. Secondly, I have pulled files at the county court to review inheritance tax worksheets. Those worksheets show professional fees and other expenses as deductions. In most estates, professional fees, last illness, funeral and the Nebraska Inheritance Tax total around 5% and the professional fee portion of that probably averages 2%.

Claims about "probate fees" are misleading and are unfair to you because you are not being told what people are charging the trusts and you are not being told what fees the trustees are taking.

Claim: A living trust saves taxes. – False

My Response: This claim is wrong on two counts. With respect to Federal Estate Taxes, 95% (probably more) of us do not face such tax because it requires an estate of \$2,000,000 (and that amount is going up). Note that some people claim that in 2010 the amount will go down. Think about it.

Is the farm lobby going to go quiet in 2010? Whatever happens, there will still be substantial assets protected from Federal Estate Tax.

But the really irony is that even if you faced Federal Estate Tax, a living trust does not save tax. Assets held in a living trust are considered assets owned by you on death and are not shielded from tax. So the reality is that you probably don't face tax in the first place and a living trust doesn't save taxes.

With respect to Income Tax (as opposed to estate or death taxes), there is also no tax shield. Income that assets in a living trust generates is taxed to you.

To be fair, there are things that very wealthy people can do to save tax. The key has to do with ownership, titling and gifting schemes that may or may not include living trusts. Living trusts are one of several tools that can be incorporated into a tax saving plan for wealthy people.

Claim: Living trusts are private.- False

My Response: Because Nebraska has an inheritance tax, it is necessary, in the administration of a decedent's estate, to open a judicial proceeding in the county court and to file an inventory of the decedent's assets. A worksheet breaks out the beneficiaries. This is a public record and this proceeding is required of a living trust as well as in a probate estate.

Closing Comment:

In my view, a living trust is one of several tools available to me as a planner but it should not be considered to be a universal tool. It is confusing, often expensive, and often simply not properly used by the consumer. There are times that a living trust is the right tool. For most people, however, a simple will and good powers of attorney to a trusted child make more sense.

While people promoting living trusts set up "probate" as a problem, they make little or no mention of the accounting and reporting requirements imposed on successor trustees of living trusts. Both methods of administration require virtually the same work.

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