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Using Revocable "Living Trusts"

Much has been written over the past thirty years regarding the use of "living trusts" as a solution for a wide variety of problems associated with estate planning. While the use of such trusts can often add flexibility and efficiency to the estate plan, it is clear that their value has been somewhat overstated in many cases. The following brief summary is intended to provide a framework of basic knowledge regarding "living trusts" in general, in order that you might determine whether you should further pursue a discussion of this technique with your attorney.

The term "living trust" is generally used to describe a trust (a) which you create during your lifetime, and (b) which you can revoke or amend whenever you wish to do so. In fact, you can also create an "irrevocable" living trust, but that is almost exclusively done to produce certain tax results and is beyond the scope of this summary.

A "living trust" is legally in existence during your life, has a trustee who is currently serving, and owns legal title to property which (generally) you have transferred to it during your life. While you are living, the trustee (who may be you) is generally responsible for managing the property as you direct for your benefit. Upon your death, the trustee (who may be a successor designated to take charge only after your death) is generally directed to either distribute the trust property to your beneficiaries, or to continue to hold it and manage it for the benefit of your beneficiaries. Like a Will, then, a living trust can provide for the distribution of property upon your death. Unlike a Will, it can also (a) provide you with a vehicle for managing your property during your life, (b) provide a receptacle to hold specific assets separate from your other property (such as property owned before marriage which is not intended to become "marital property"), and (c) authorize the trustee to manage the property and use it for your benefit (and for your family) if you should become incapacitated, thereby avoiding the appointment of a guardian for that purpose.

Avoiding Probate. The living trust is most often praised as a vehicle that allows one to "avoid probate" upon death. While it is true that the property passing under the terms of a living trust upon the death of the maker of the trust will "avoid probate," it should be noted that there may or may not be actual value in that result. In Georgia, a properly drafted Will can avoid almost all of the red tape and expense usually associated with the "probate" process, and the legal fees associated with probate are generally minimal. Therefore, if all of your property is within the State of Georgia and there is no reason to avoid probate other than minimizing costs, there may be little to gain. However, the avoidance of probate may be valuable if:

a. you own real estate which is located outside of Georgia and the other state's "ancillary probate" proceedings may be costly; or

b. you are subject to moving from one state to another and would prefer to have a vehicle which does not need to be completely revised each time you change domicile.

Protecting Assets from Creditor Claims After Death. If your estate might be subject to claims from unsecured creditors, litigants, or other claimants who would legally pursue their claims against your "probate estate," a living trust has traditionally been an effective vehicle for segregating assets which can be protected for your family outside the reach of creditors following death. For example, if you are a personal guarantor of debt which may not be fully paid promptly following your death, then the assets of your estate could be tied up and not available to your family until that possible claim has been resolved. In the past, we have frequently used living trusts to hold assets such as the family's residence, as well as personal savings and investment accounts, to protect them for the family. In 2010, however, the Georgia Legislature enacted a new Trust Code which subjects the property of a revocable trust to all the claims which might be asserted against your probate estate. Therefore, if this is an important factor in your consideration of using such a trust, then you should seek advice regarding the use of other vehicles to protect assets from such claims, or the establishment of such a trust in another state which will offer greater protection of the trust property.

Avoiding Challenges to Your Will. Living trusts are often promoted as a tool for avoiding a challenge to one's Will upon death as a part of the probate process. It is true that the probate of a Will provides an easier opportunity for disappointed family members to challenge the validity of that Will. As part of the "probate" procedure, all interested parties are specifically notified of their right to object to the Will in the Probate Court within a specified time period. With a living trust, however, there is no comparable procedure and an objecting party must take the initiative to file an action in the Superior Court to challenge the validity of the trust.

However, a challenge to a decedent's Will can only be mounted upon some evidence of a specific legal deficiency, such as the decedent's alleged lack of mental capacity at the time the Will was signed, or the decedent's having been "unduly influenced" by a third party in the making of the Will. If one has reason to be concerned about such allegations, they are generally manageable by a knowledgeable attorney in the process of executing the Will. Where the maker of the Will has the requisite mental capacity, it is extremely rare that a Will challenge is successful when the supervising attorney was aware of the potential for problems.

On the other hand, one is actually required to have greater legal capacity to form a trust and convey property to it than the mental capacity required to make a valid Will. Consequently, if there is a genuine question of the mental condition of the maker, it will certainly be more likely that his or her Will can stand such scrutiny than is the case with a challenge to the formation of a trust.

Maintaining Privacy. The living trust is frequently recommended as a vehicle which is kept private, while your Will is technically a matter of public record following the probate process. While that is mostly true, it may be only an issue of the level of privacy needed. For instance, it is not common for a Will to contain such information as would disclose the value of the estate or the assets comprising the estate. The Will generally refers only to "groups" of assets, such as your "personal effects", your "homeplace", and "all the rest and residue" of your estate. In Georgia, the Will can exempt the estate from having to file an inventory of the estate with the court, so no such list of assets will generally be available in any event. On the other hand, a living trust instrument is not required to be filed with any court in order to be effective, so even the general disposition of the assets is not disclosed on the record. If your estate plan includes a detailed disposition of specific assets, which information should remain private, then a living trust can provide an enhanced level of security. Note, however, that if the trust is to be a vehicle for distributing real estate, or if the trust is a party to any legal proceedings in any court, it could become necessary to record a copy of the trust instrument on the records of some court, which could make the trust a matter of public record.

Tax Savings. Living trusts are sometimes incorrectly characterized as being entitled to uniquely attractive tax treatment. As a general rule, your living trust is ignored for income tax purposes and you will be treated as the owner of all the trust's property while you are living, because you have retained the unrestricted power to revoke the trust and take the trust property back whenever you wish. Therefore, the living trust will provide no favorable income tax benefits which you cannot otherwise obtain for yourself. Similarly, for gift and estate tax purposes, your retained power over the trust assets will cause them to be treated as part of your estate for determining any gift tax or estate tax due, just as if you owned the trust property personally. While it is true that we can draft a living trust to take optimum advantage of the deductions and credits available in minimizing estate tax costs, those same benefits are available through a properly drafted Will. In fact, although they are not generally of great value, there are some tax benefits available to your probate estate which cannot be duplicated in the living trust. Therefore, while effective tax planning may be important in accomplishing your overall objectives, there is no unique benefit to a living trust in your accomplishing that goal.

Reducing Legal Fees and Administration Costs. Whether a living trust will effectively reduce the costs of settling your estate is a question which must be addressed in each individual case. To the extent that administration costs are determined as a percentage of the "probate" estate, it is clear that the living trust can reduce costs. Therefore, if you plan to designate a professional executor (such as a bank or trust company), or use a friend or family member who will charge the fee provided by law, that cost may be lessened by using a living trust. On the other hand, the trustee of the living trust is also entitled to compensation, so it is important to consider whether there will be any actual net savings between the estate and the trust. The costs involved in assembling the

necessary tax information and preparing the estate tax return will be unaffected by the living trust because, as noted above, the trust assets are fully included in the estate for these tax purposes. Most lawyers today compute their fees primarily from the time and work required by a matter, rather than as a percentage of the estate assets, so those fees are not likely to be significantly reduced unless the use of the living trust can actually reduce the work required. As noted above, if the trust can be used to avoid legal proceedings respecting property located in another state, or avoid legal battles over creditors' claims which cannot be pursued against the trust, it may have a beneficial effect on avoiding or lessening the costs which would otherwise be associated with those matters. On the other hand, in order to be effective for these purposes, it is necessary that you create the trust and transfer legal ownership of those assets to the trust while you are living, and there will be some current cost associated with accomplishing those tasks.

Providing a Management Vehicle. Because the living trust is a separate entity, it can provide a separate vehicle for the management of assets. That might be particularly attractive if (a) you are considering using a professional trustee and want to see how they perform while you are still here to judge for yourself, or (b) you want to maintain the assets separate from your other property because you intend them to pass to some specific beneficiary at your death, separate and apart from the rest of your estate, or (c) you need to keep the assets readily identifiable as your own separate property under a pre-marital agreement or other arrangement so they do not become commingled with the property of your spouse.

In Case of Incapacity. Statistics tell us that many of us will suffer some period of incapacity due to advancing age, illness, or injury before we die. During that time, your Will is of no effect because you are still living. However, you may be legally incapable of managing your own property and making rational financial and business decisions. While some of these problems may be addressed by a properly executed power of attorney, it has become increasingly unreliable to provide for the management of property through that vehicle. In the absence of another solution, it will frequently be necessary to ask the probate court to appoint a legal guardian for the management of your property. That procedure (a) is cumbersome and expensive, (b) requires your guardian to file complete reports of your assets, liabilities, receipts and disbursements with the court, (c) requires that a bond be purchased from an insurance company, and (d) prevents the guardian from doing any but the most routine tasks without petitioning the Court for approval. The costs and burdens of a guardianship may be much greater than those which you have otherwise attempted to minimize in your estate planning. With a living trust, however, a trustee and successor trustees (of your own choosing) can simply be authorized to continue the management of your property in the case of your disability, and to use it as needed to provide for your support and maintenance. This can all be accomplished without court involvement and without the costs associated with a guardianship. This protection is one of the unique advantages of the living trust and should be considered carefully.

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and

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