

TRUSTS VERSUS WILLS--WHICH IS RIGHT FOR YOU?

Probate is required in Wisconsin if you own assets in your sole name valued at more than \$50,000.00. **Not** included is property which contains a beneficiary designation (ex: life insurance, annuities, retirement accounts, etc.), jointly-owned property (ex: a house), or pay or transfer on death (POD or TOD) designations (ex: cash and mutual funds and real estate). Adding a beneficiary designation is one way to avoid probate on assets. The other way to do so is with the use of a Revocable Trust. The Trust we are examining is a Revocable Trust (as compared to an Irrevocable Trust designed to protect your assets from the reach of a nursing home). This memo is designed to assist you in understanding the difference between using a Will-based estate plan versus a Trust-based plan.

- A. **Privacy.** At the time of death, the Wisconsin Statutes provide that if a person dies with a Will, the original must be filed with the Register in Probate. If filed this is public record, but it is debatable whether many people go the courthouse to view filed Wills. If there is a probate proceeding required (see above), the Will must be mailed to all interested people (Ex: blood relatives and beneficiaries named in the document. Probate administration requires an Inventory of assets subject to the probate, valued as of the date of death, and is ultimately filed with the Probate Registrar in the county of death. The Court receives a filing fee, the dollars amount of which is determined by multiplying the value of the inventoried assets by .002. A later document, the Final Account, lists all expenses, receipts, and distributions from the estate. Probate files are public records. Alternatively, a Trust does not need to be filed anywhere and thus is not public record. All assets owned by the Trust are distributed as provided for in the document. The same steps as above are required to administer the Trust (Inventory, Accounting, and tax returns, if required) but administration is handled privately and other than the beneficiaries, no one reads the Trust. The exception to this is if a circuit court action in probate is required at some point during the trust administration, and then the Trust would be filed with the Register in Probate office.

- B. **Appointment of Personal Representative.** Most people believe if an individual is named in a Will as the "Personal Representative" (PR) (formerly, "Executor") that his or her legal authority is automatic upon death. This is completely false. A PR must be appointed by the Probate Registrar (Informal probate) or the Court (through a Judge, Formal probate) according to a statutorily defined process, after notice to interested persons. By contrast, a named Trustee performs the same functions and has the same responsibilities as a PR (inventorying the assets, paying bills, cleaning up a house, condo, or apartment, and selling it, and

ultimately distributing the assets) but does not get "appointed" by the Court. Appointment and action are automatic as outlined in the Trust document.

- C. **Income Tax.** An estate has its own income tax returns to file, both federal and state (Form 1041) which is required if income in the estate exceeds \$600.00. The 1041 tax brackets are more compressed and the rates are higher. Even if an income tax return is not required a Closing Certificate for Fiduciaries must be obtained from the Wisconsin Department of Revenue (WDOR) before the file can be officially closed with the Court. Under current law, beneficiaries do not need to report on their individual 1040 the amount of any inheritance they receive; only the amount of income they earn on a lump-sum inheritance. Personal Representative fees taken, however, **are** taxable income. Trusts are also required to file income tax returns.

- D. **Death and Inheritance Taxes.** Under current law, your estate is not subject to federal death tax unless your estate, if single, exceeds \$5.25 million dollars (double that for spouses). There is no Wisconsin or federal inheritance tax. This applies whether there is a Wills or a Trust.

- E. **Real Property Located Out of Wisconsin.** If you own real estate (timeshare or otherwise) located outside of Wisconsin and if Wisconsin is where you are domiciled at your death, an ancillary (additional) probate proceeding would be required in each state where real property is located. This is a compelling legal reason to choose a Trust based estate plan, to avoid duplicate probate proceedings and costs.

- F. **Fees for Drafting and Probate.** Fees vary with complexity but fees for drafting Wills are typically much less than fees for drafting Trusts because the latter type of estate plan consists of additional and more comprehensive documents. At death, however, there will be fees associated with settling the Probate Administration such as an Inventory filing fee (currently the amount of the assets subject to the probate administration multiplied by .002, CPA fees (if required), Attorney Fees (typically ranging between 2-4% of the inventory value of the probated assets), and a Personal Representative statutorily determined fee of 2% of the inventory value of the probated assets. By contrast, attorney fees for drafting a Trust-based estate plan are more expensive than creating a Will-based estate plan, but there is economic benefit realized when an individual dies in that there are typically minimal or no attorney costs, and no court fees, involved in the administration of the RLT after death and if there are attorney fees, they are typically much less than attorney fees in a probate administration.

- G. **Medical Assistance/Payment for Nursing Home.** Since your Will does not take effect until you die, assets in your estate prior to death are available for use for nursing home or long term care costs, unless estate preservation planning is followed. If your spouse enters an Assisted Living (AL) facility or nursing home, you should consult with an Elder Law attorney to create an appropriate estate plan and Wills if you wish to preserve some of the couple's assets after death of the survivor. A Revocable Trust **does not** protect your assets from the reach of nursing home care costs, but an Irrevocable Trust may be used for that purpose.
- H. **Funding Issues.** Once you die, your estate consists of whatever assets you own that are subject to a probate administration (see above). In order for the Trust to avoid probate, all assets should be "funded" (titled in the name of the Trust, with some exceptions, or, alternatively, the Trust should be the designated beneficiary of cash and investment assets. Your attorney should assist you with this as part of his or her fees in establishing the Trust.
- I. **Time to Settle the Estate With a Will.** Statutorily mandated time frames must be complied with in order to complete the probate process. Local courts typically request that an estate be settled within twelve (12) months from the time the Personal Representative is appointed. Wisconsin Statutes allow 18 months, with extensions for good cause. Real estate, tax issues, family fighting, or creditor problems are also at issue here as potential delays in closing the estate in a timely fashion. These issues will also delay completing a Trust administration after death. Trusts are, generally speaking, settled more quickly, as there are no forms required to be filed with the Court. However, the same issues that delay an estate closing can also delay a trust administration's completion.
- H. **Accountability/Court Supervision.** One benefit of a probate administration is that all beneficiaries are entitled to receive the estate inventory and final accounting, listing all assets (valued as of date of death), income and expenses of the estate, and must sign a final receipt indicating satisfaction with the accounting and acknowledgment of their final share. Since there are time deadlines, this forces the PR to be timely with the administration of the estate, and if he or she fails to do so, the Register in Probate office has the authority to force the PR to take a more active role in settling things.
- I. **Creditors.** Statutorily, creditors of an estate are given three months from the appointment of the PR to file a claim, or be barred from filing a claim. However, late-filed claims, if known to be valid, must still be compromised, negated, or

settled prior to closing the estate. There is no statutorily mandated time for filing claims with a Trust but all legitimate bills must be paid by the Trustee.

- J. **Contestability**. Any Will can be challenged or contested for lack of testamentary capacity (“sound mind”) or undue influence but in reality there are few lawyers who do this (and those who do require a hefty retainer fee) and proving your argument is a difficult burden to overcome. Objections must be made before the Will is submitted to the Probate Court. “Ad Terrorem” clauses are valid in Wisconsin (example: “anyone who challenges this Will shall be deleted from receiving any part of it or shall only receive \$1.00”). Trusts can also be challenged, but it is more difficult to do so.
- K. **Predictability of Process**. There is ample case and statutory law which is well established with regard to probate administration. Definite procedural guidelines and forms and documents are filed on a timely basis in order to transfer the assets from the deceased person’s name to the beneficiaries. Often people request the assistance of an attorney who practices in the probate administration area. Trusts are more "loosely" administered than an estate, and the Trust should provide time limits for distributions and payment of Trustee fees. The Trust terms govern its process and predictability.