MANAGING YOUR ASSETS: WHEN SHOULD YOU CONSIDER A TRUST?

By Terry Arthur

Over the past few years, "living" trusts (those prepared during a person's lifetime, rather than established by an instrument, such as a will, upon death) have become a popular tool in estate planning. Much interest has been expressed by our clients arising from various seminars or articles in the popular press advocating trust use. Although we frequently recommend and prepare trusts in a variety of situations, each situation should be individually assessed before deciding on an approach. How does one know when a trust should be considered as an alternative or supplement to a will?

We are often asked "How big does my estate have to be before a trust should be considered?" Our answer to that question is that the use of a living trust does not depend as much on the size of the estate as on the assets that make up the estate and the goals of the individual. Often, however, we use the rule of thumb that an estate generally should exceed $100,000 before a living trust is more likely to be more beneficial than other forms of estate planning.

Two reasons are often given for using a living trust. The first is to avoid probate administration upon death. The second is to provide a method of management of a person's property in the event of that person's incapacity.

Avoidance of the probate process is the most commonly heard argument for setting up a living trust. Probate administration (the transfer of assets after death through court supervised proceedings) can be a time-consuming and expensive process and, in most cases, a living trust can both decrease that expense and speed the distribution of assets to heirs. In appropriate cases, we sometimes recommend use of other non-probate transfer methods, such as joint tenancy ownership, beneficiary designation on pensions, annuities and life insurance, or transfer of assets with a retained life estate. One or more of these are often used in conjunction with living trusts, to tailor a plan to individual needs and circumstances.

As a probate avoidance tool, the living trust works well with those assets over which the client wishes to retain full control during his or her lifetime, with transfer of ownership to beneficiaries to occur only at death. Assets such as real estate, stocks, bonds, mutual funds, certificates of deposit, partnership interests and other titled assets can work well in the trust structure. Probate administration of trust assets is avoided by transferring ownership from the client to the trust during the client's lifetime, with the trust terms directing the action to be taken on death. The successor trustee causes the necessary tax returns to be prepared and then immediately may distribute assets as directed by the trust, without court supervision.

A living trust also provides a means for managing property in the event the client becomes incapacitated. The naming of a successor trustee in the trust allows for uninterrupted control of assets, with the successor trustee able to manage the property, invest assets, pay expenses of the trust grantor and handle affairs previously handled by the grantor before incapacity. Although a properly prepared power of attorney can authorize similar succession of authority, a trust is often a better method of providing for this continuity.

In dealing with estate and inheritance taxes, living trusts provide opportunities for estate planning that are comparable to other tools. For example, significant savings in federal estate taxes can be made by dividing assets between two spouses in two "revocable" living trusts, one for each spouse. The property is not transferred to the surviving spouse, but that spouse can enjoy the income and certain other benefits of the deceased spouse's trust, while maximizing the use of the federal estate tax exemption.

There is no "one size fits all" answer to estate planning, and a living trust may not be the correct tool for all clients, or may be correct if used in combination with other estate planning devices. Each person's assets and needs are different, and an estate plan is best developed after consultation and evaluation of those needs. If a client has no estate plan, or has not had it reviewed within the past four or five years, we recommend a conference to find the most appropriate approach for that person's current needs.