

LIVING TRUSTS

A Living Trust is established during the lifetime of the client [a/k/a the "Settlor" or "Grantor"]. It is fully revocable by the client at any time, and from time to time without the consent of the trustee or any beneficiary. The Living Trust must be written, and there are requirements for its execution and acknowledgment. Where the Grantor is unmarried, s/he would usually be the sole and initial Trustee with a trusted individual named as successor. Where the Grantor is a married couple, the spouses generally are named as co-Trustees on each other's trusts.

The execution of a "Pour Over" Will allows the Testator's assets to "pour over" to the Living Trust and be distributed by the Trustee in accordance with the terms of that Living Trust. A Living Trust can provide many benefits to a client's estate planning, estate administration and disability planning, including:

1. AVOIDING THE NEED TO OBTAIN JURISDICTION OVER HEIRS: By avoiding probate, one can avoid the requirement of obtaining "jurisdiction" over the decedent's intestate heirs, a requirement to ensure that any Order of the probate court would be legally binding on all parties who might have an interest in the decedent's estate. This is important because, when a Will is probated, the exacting statutory requirements for obtaining such jurisdiction and proper service of process upon all interested parties can, in some cases, create significant expense and delay of

probating the estate, especially where there is a possible interested party with a legal disability who would require the appointment of a guardian ad litem (at the estate's expense) to protect their interests, such as a minor or a mentally disabled individual.

2. AVOIDING THE NEED FOR ANCILLARY PROBATE:

Where the decedent's assets include out-of-state real estate, ancillary probate in the state in which the real estate lies, would be required, but not until after the NYS probate matter is completed. The avoidance of ancillary probate means that any transfer or sale of that out-of-state real estate can be completed without the possibly substantial expense and delay of not one, but two, probate processes.

3. DECREASING THE RISK OF A WILL CONTEST:

The statutory requirements of obtaining jurisdiction over the decedent's intestate heirs in probate proceedings has the inconvenient effect of increasing the likelihood of an interested party contesting the Will. Will contests are time consuming and expensive, with much of the cost being borne by the estate itself. A Will contest will delay both the probate of the estate and the distribution of the assets. Further, a Will contest frequently results in a settlement compromise, wherein the assets are not distributed as the decedent had desired.

By establishing a fully funded Living Trust, there will be no assets of significant value left in the decedent's name, no need to probate the Will, and therefore

no requirement to follow the statutory requirements of obtaining jurisdiction over interested parties. The assets quietly pass outside of probate in accordance with the terms of the Trust, without undue delay and without the need for notifying any distributees. The Trustee can then make any needed transfers of assets without seeking court approval. Any distributee who wishes to contest the Living Will now has to shoulder the burden and expense of initiating an inquiry or action on his/her own, which tends to dissuade most disappointed distributees from commencing any action at all.

4. EASE OF ASSET MANAGEMENT IN THE EVENT OF INCAPACITY: A fully funded Living Trust ensures that all of the Trust's assets are titled in the names of the Trustees. As a result, the Trustees have immediate control over the Trust's assets and will be able to manage those assets and pay the Grantor's expenses in the unfortunate event of the Grantor's incapacity. Where the Trustee is a trusted individual or corporate Trustee, or where the Grantor and another are co-Trustees, the transfer of control is quick and painless. If a durable power of attorney is used instead, the process of taking control requires paperwork, and is more complicated and time consuming. A durable power of attorney, to be sure, has its uses; however, it is not a replacement for a fully funded Living Trust.

Of course, a Living Trust may not be right for everyone, as there are some disadvantages:

1. A Living Trust must be fully funded during the Grantor's lifetime, which requires the transfer and re-titling of the Grantor's assets to the Trust.
2. Although a Living Trust can provide a vehicle for estate tax planning, the same can be provided by a properly drafted Will.
3. A Living Trust established during the life of the Grantor does not provide any asset protection benefits to the Grantor due to the fact that the Living Trust is fully revocable. Therefore, the assets contained in that Living Trust are accessible by the Grantor's creditors.
4. For clients who own co-operative apartments, transfer to a Living Trust may be either prohibited or prohibitively expensive. Further inquiry would be needed to determine if a Living Trust makes financial sense.
5. When a client has a Living Trust, any revisions to his/her estate plan tend to be more complicated and costly than simply adding a codicil to a Will.

Estate planning is important for everyone. However, there is no single estate planning vehicle which is right for everyone. An attorney who is well versed with estate planning techniques can best advise you, after examination of your asset portfolio, which vehicle is right for you and your beneficiaries.

Robert Bichoupan, P.C.

175 East Shore Road, Ste. 270, Great Neck, NY 11023

(516) 482-1186

Robert@Bichoupan.com

www.Bichoupan.com