A Matter of TRUST

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For many people, the process of estate planning begins with the question: “Do I need a Trust?”

In the remainder of this article, a question and answer approach will be used to help the reader understand what a “Trust” is, and what considerations go into deciding whether having a Trust would be beneficial in their situation.

What is a Trust?

A Trust is an agreement. In fact the term “Trust” is shorthand for “Trust Agreement.”

The agreement is between the person who creates the Trust (the “Settlor,” sometimes also known as “Grantor”) and the person who receives the property from the Settlor, the “Trustee.” The Trust is the document that spells out the manner in which the Trustee will handle any property that the Settlor transfers to the Trustee.

So, for instance, a Trust could say that if the Settlor gives the Trustee money, the Trustee agrees to use that money to pay the housing costs of the Settlor. This would be a Trust Agreement, and the Trustee would be obligated to use the money it receives from the Settlor to pay the housing costs of the Settlor. If the Trustee received money and refused to pay the housing costs of the Settlor, the Trustee would be violating the terms of their Trust Agreement and the Settlor could sue the Trustee.

What is a Living Trust?

A “living” Trust (or what lawyers call an “inter vivos” Trust Agreement) is a Trust that a Settlor creates while they are alive. This would be as opposed to a “testamentary trust” that is stated in a person’s Will and only becomes effective after their death.

What is a Revocable Trust?

A revocable Trust is a Trust Agreement that the Settlor can change or revoke while they are alive, as opposed to an “irrevocable Trust” which the Settlor would not be able to change or revoke. Almost all Trusts created for estate planning purposes are revocable. The uses of irrevocable Trusts, while important, are limited to very special situations.

How does a Trust compare to other types of estate planning options?

There are many ways that assets pass at death.

Some assets are distributed to survivors on the death of the person owning the asset when that person dies, under the terms of a beneficiary designation. Beneficiary designations (sometimes called “transfer on death” or “payable on death” arrangements) can be used to control the distribution of many types of assets, including life insurance, retirement accounts, bank accounts, annuities, and in some cases, even real estate.

Some assets pass at death under joint ownership arrangements. Most assets can be owned jointly by two or more people. Under some types of joint ownership arrangements, when one of the owners dies, the ownership interest of that deceased person terminates and the surviving owners continue to own the asset free of the rights of the deceased former owner.

If they do not have a Will, the laws of “intestate succession” would control who gets the property.

Some assets can be owned in “life estate” arrangements, whereby the ownership rights in the asset are split between a person who owns the property during their life (the life estate owner), and the person who owns the property when the life estate owner dies (the “remainderman”). A true life estate arrangement is different than a beneficiary designation because once created it cannot be altered by the life estate beneficiary, and the life estate beneficiary gives up the right to sell or convey the asset during their life without the participation of the remainderman.

Assets can also pass at death through the probate process. The probate process applies to assets that do not pass through any other means. So, for instance, if someone owned a bank account in their name alone (with no joint owner and no beneficiary designation on that account), when they die, someone would have to petition the probate court to be appointed personal representative of their estate (sometimes called “executor”), so that they could arrange for ownership of the account to pass to someone else. If that person had a Will, the Will would direct where the property goes. If they do not have a Will, the laws of “intestate succession” would control who gets the property.
Assets that are titled in a Trust when the Settlor dies do not pass through probate, but pass instead under the terms of the Trust.

Why do some people say that everyone needs a Trust?

Estate planning is permeated with bad information. With respect to the need for Trusts, most of that bad information can be traced back to years of marketing by so-called “Trust Mills.”

When you receive an invitation to an “educational seminar,” typically offering a free meal, it is more likely than not that the people putting on the program are running a Trust Mill. These operations go from town to town inviting senior citizens to “learn” about estate planning. Once they have a captured audience, they use scare tactics and high pressure sales techniques to convince people that if they don’t have a Trust, very bad things will happen when they die (these programs often also involve the sale of annuities and other high commission financial products). The information given at these programs is incomplete and misleading, at best. Their objective is to sign people up to have Trusts prepared for them. Once the sale is made, the Trusts are pumped out of a word-processing program using a one-size-fits-all approach. The quality of the Trust Agreements generated by these operators is notoriously poor, and the costs notoriously high.

Because Trust Mills have been operating for years (decades really), the misinformation they have generated about laws, taxes, and the probate process have become accepted as true by many people who are not otherwise informed. For instance, I often meet with clients who tell me that they need a Trust because they have to “avoid probate.” But these same clients cannot tell me what probate is.

Does a Trust “protect” assets?

One of the most common misperceptions about Trusts is that by creating a Trust, you have somehow protected your assets from creditors, the government, or future health care costs. At least with respect to a revocable living Trust, none of that is true. A Trust-based estate plan provides no greater protection from creditors or care costs than a Will-based plan. And for the most part, the same is true of taxes.

If I have a Trust, do I need a Will?

Yes. Even if you decide to have a Trust-based estate plan, you need a Will. In the case of a Trust-based estate plan, the Will is referred to as a “pour over Will.” This is because the Will says if there are assets you have that have not been titled in the Trust before your death, you want them transferred to (i.e., poured over to) the Trustee at your death.

So what are the benefits of having a Trust and who really needs one?

Generally, the more complex your objectives and the more diverse the assets you own, the more likely it is that a Trust may be the best way to go. Following are some general guidelines:

What is your family situation?

The simplest estate planning situation is if you are a single person with one responsible adult child, and your objective is that when you die everything goes to that child outright.

In that case, simply naming that child as the beneficiary (and in some cases, perhaps, joint owner) on all your assets may be all you need to do. A Trust would provide no benefit.

The further you go from this simple family situation and objective, the more reasons there may be to have a Trust.

When you receive an invitation to an “educational seminar,” typically offering a free meal, it is more likely than not that the people putting on the program are running a Trust Mill.

What types of assets do you have?

Because simple distributive objectives for many types of assets can be achieved with other types of planning tools, such as beneficiary designations and joint ownership, as discussed above, one important step in whether a Trust-based estate plan would be beneficial is to review the types of assets you own.

For instance, if you are a single person with four adult children
and your primary asset is a retirement account, and if your objective is to leave the account to your children in equal shares, a simple beneficiary designation may be sufficient. If, however, you are involved in a second marriage and you want part of the retirement account to provide for your surviving spouse, and part to go to grandchildren, but only after they become responsible adults, a Trust would be necessary.

**Will the costs of probate administration be so high as to justify the costs and additional complexities of creating a Trust?**

There are expenses associated with the probate administration process, including inventory and filing fees. Although those fees are not nearly so high as are claimed at the programs put on by Trust Mill operators, if you have assets that are not sufficiently provided for through other means, and which would become probate assets at your death if you do not have a Trust, it may be simply cheaper to create and fund a Trust than to subject them to the expenses of probate administration.

Also, if you own real estate in more than one state, the costs of having probate in multiple states would need to be considered in making this assessment.

**Is privacy important?**

In order to initiate the probate process, your Will must be filed with the probate Court.

When that happens, it becomes a document that your nosy neighbor (or anyone else) could go look at. For some people the idea that someone could go read their Will (no matter how unlikely it is that someone would want to do so) is in itself a reason to have a Trust-based plan. Similarly, some people want their Trustee to be able to manage the settlement of their affairs privately, and without having to interact with a Court (even, though in the vast majority of cases, probate administration never involves a Court hearing). For those people a Trust-based plan may be best (although should disputes arise in administration of your Trust, the case would be heard in probate Court).

**Who are the beneficiaries, and what are their circumstances?**

Often the best reason to have a Trust is because you are leaving assets to people who are either too young, too irresponsible, or who, for other reasons, need to have assistance in managing their inheritance. In all of those situations, a Trust can provide protections that are not available through any other process.

Trusts can delay distributions to beneficiaries who are young, withhold distributions for beneficiaries who are irresponsible, and protect property from the creditors (bankruptcies, divorces, child support obligations, etc.) for beneficiaries in situations such as these.

**Management of assets during periods of incapacity**

Trusts can also provide for management of assets while the Settlor is alive but not able to manage their own affairs. This is a feature of Trusts that Wills, beneficiary designations, and other arrangements cannot provide. However, for people who do not have Trusts, a well-drafted durable power of attorney may be able to serve the same purpose.

**What types of Trusts are there?**

Revocable living Trusts as discussed in this article are by far the most common types of Trust Agreements, and are what most people think of and mean when they talk about having a “Trust.” But for lawyers, the term “Trust” is a much broader concept that can be used to accomplish very specific objectives in any number of unique estate planning, Medicaid planning, and other situations. This article is not intended to be a discussion of these other uses.

**Conclusion**

Every case is different. To answer the question “Do I need a Trust?,” you need to understand some basic concepts about Trusts, and to consider your own unique situation, preferences and objectives. As always, the best way to decide is to review your situation with an experienced attorney who practices in this area of the law.

**ATTORNEY DOUGLAS G. CHALGIAN is the only lawyer in Michigan who is both certified in elder law by the National Elder Law Foundation, as well as a Fellow with the American College of Trust and Estate Counsel. Mr. Chalgian is the current Chair of the Probate and Estate Planning Section of the Michigan State Bar, and former Chair of the Elder Law and Disability Rights Section. Mr. Chalgian was one of about a dozen attorneys on the Michigan Trust Code Drafting Committee, and has been selected twice as one of the top 100 lawyers in Michigan by Super Lawyers Magazine. Mr. Chalgian writes and speaks regularly on the topics of estate planning, elder law, and probate court litigation.**