

Do I Really Need a Trust?

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Living in the information age entails a constant barrage of information delivered via the mail, internet, television, telephone, magazines, among other media. Much of it is useful, but much of it is designed to sell products, and one of the burdens of modern life is the necessity of sorting and filtering this daily onslaught and deciphering the helpful from the unwanted, the informative from the downright misleading. The need to have a trust has become a common theme of a recent marketing schemes. There are several national entities, sometimes referred to as trust mills, which aim to convince everyone that they need a trust, painting probate as a fate worse than purgatory or warning that the state will consume your estate if you don't have one. These entities charge a handsome fee for their forms, sometimes in the thousands of dollars, and the documents are often not even prepared by an attorney.

Exactly What is a Trust, Anyway? Part of the problem is that people often just don't understand what a trust is. A trust is a legal entity, like a person in a sense, in that it owns property. The person making the trust, the grantor, must designate a person to manage the trust, the trustee, who may or may not be the same person as the grantor. Most trusts are memorialized in a trust document, although it is possible to have a trust without documentation. The other necessary person or persons to complete a trust is the beneficiary or beneficiaries - the person or persons who will reap the benefit of the trust fund. It is possible to have a trust which is not funded, with the idea that it will be funded at a later date, such as upon the death of the grantor. Funding the trust requires changing the title to the asset which is to become part of the trust. With a bank account, this is done by opening up an account in the name of the trust, giving the signatory rights to the trustee. With real estate, the grantor must sign a deed granting title of the property to the trustee to be held in the name of the trust.

Shouldn't Probate be Avoided at All Costs? Trusts can be used to avoid probate. In short, if all of ones assets are transferred to the trust prior to death, the trustee will manage and dispose of the property as set out under the terms of the trust. One frequent problems with trusts sold by some trust mills is that nobody takes the time to guide the client to fund the trust. Without properly funding a trust, it is worth no more than the paper on which it is written. Any asset left in the name of a decedent will have to be probated, even if other assets had been placed in the trust.

Contrary to the marketing pitches of trust mills, probate in Maine is not an onerous process.

In the early nineteen-eighties, Maine adopted the Uniform Probate Code which greatly streamlined the probate process. Consequently, probate will not unreasonably tie up the assets of the estate indefinitely and heirs will be able to access needed funds relatively quickly. In fact, the assets of an estate can be accessed within weeks of date of death. This is not to say that all of the estate assets can immediately be distributed. There is a four month period during which any creditor of the decedent is allowed to bring its claim against the estate, and therefore, it is prudent to hold a portion of estate assets at least until the end of this period to ensure that there will be a means of paying all legitimate claims. Partial distributions may be made to heirs, however, pending this period. Once the creditor claim period has expired, an inventory has been prepared and a plan of distribution has been sent to the heirs, the estate may be fully distributed and closed. Thus, it is possible that an estate can be fully distributed through the probate process in Maine within months of date of death. Probate in Maine is a simple process and avoiding probate here is rarely a sufficient reason to form a trust.

Another misguided reason to establish a trust is the notion that the government will get more of your money if your estate is probated. There are several misconceptions which lend to this belief. One probably stems from the notion that estate taxation can be avoided by placing everything in trust. If one is married and the estate exceeds \$2 million, trusts are an estate planning vehicle which should be considered as a means of ensuring that both the individual and the individual's spouse are able to effectively utilize their credits against estate taxation, which would raise their combined exempt assets to \$2 million (this takes into account Maine's estate tax exemption of \$2 million, effective January 1, 2013). Notably, these tax-related trusts can be written into a will and are not part of the typical "living trust" marketed by trust mills. Estates of less than \$2 million, however, wouldn't be subject to estate tax either way, and so the issue is irrelevant.

If the decedent received Medicaid while over the age of 55 years old, the State will assert a claim against the estate. This is one good reason to try to avoid probate, however, a trust is probably not a good means of doing so. With the passage of the Omnibus Reconciliation Act of 1993, the federal government greatly limited how trusts could be effectively used in Medicaid planning. Where trusts once could be used as a vehicle for sheltering assets from nursing home expense, placing assets into trust can now have disastrous consequences by way of creating lengthy periods of ineligibility for Medicaid benefits.

Finally, many people have been led to believe that probate is very expensive, and that establishing a trust is the way to avoid such expense. In reality, the fees involved in probating an estate can be considerably less than the fees involved establishing a trust, particularly when the trust is prepared by one of these large trust mills. Not only was the probate process streamlined in Maine with the adoption of the Uniform Probate Code, but this legislation also placed restrictions on how attorneys handling probate cases could charge for their services. In the past, it was traditional for attorneys to charge a percentage of the estate for their services. This is no longer allowed, and now most attorneys charge their hourly rate for such services. Since probate is a relatively simple process now, the attorneys fees involved are typically not large, and in most cases, would probably be no more than the cost of setting up and funding a trust. As to the court costs, these are nominal. The court charges a filing fee based on the value of the estate which is in the vicinity of \$25 - \$500 and small fees for notices. Thus, the relative expense should not be a factor in deciding whether or not a trust is in order.

When Is a Trust Appropriate. There are, indeed, many circumstances which call out for the formation of a trust. Saving estate taxes as outlined above can be a very important one, and using bypass trusts to utilize both spouse's unified credit against estate taxation is just one example. There are other types of trusts which can be useful, such as charitable trusts and life insurance trusts. In any event, people with estates of less than \$2 million are not subject to estate tax and need not be concerned about this type of planning. Another situation that warrants formation of a trust is when a person wants to place someone in charge of assets but wants control over how the assets are to be managed and for whose benefit and under what circumstances they are to be distributed. Anyone concerned about not being able to adequately manage their own funds as they face old age can utilize trusts to these ends. Trusts are also warranted in situations in which minor children or incompetent persons have funds that need management or to protect funds from creditors. There are also circumstances under which a person who needs nursing care can transfer sums of money into trust for a disabled individual and save the assets from being consumed by their nursing home expense. These are perhaps some of the most common reasons for establishing a trust, but by no means, not an exhaustive list.

In sum, if establishing a trust has been on your mind, be sure that the means justifies the ends. Identify the reason you believe you need to have a trust and get competent legal advice to analyze whether a trust will in fact attain your goals.

This article appeared in the Senior Living Section of the Lewiston Sun Journal on May 13, 2002 - Updated March 2013