

The Truth about Trusts

We use trusts in estate planning to avoid federal estate taxes, protect our spouses, protect our children and grandchildren from themselves and others, and provide for our children and grandchildren who are disabled. All trusts should be customized to maximize the benefits based on the age of the children, the size of the estate, and the wishes of the individual.

The federal estate tax is an excise tax levied on the transfer of your property at the time of your death. You should utilize a trust if your estate is larger enough to be subject to this tax. For 2007 and 2008 your net estate must be \$2,000,000, or more to be subject to this tax. This figure will increase to \$3,500,000. in 2009.

A common estate planning technique for married couples with a larger estate, who have children, is to create two trusts within each of their wills. These trusts are sometimes referred to as credit shelter trusts. When the first spouse dies, his trusts become effective. One of these trusts is funded with his assets, which is referred to as the federal credit shelter amount. No taxes are due on this amount. In the years 2007 and 2008 this shelter amount is \$ 2,000,000.00 and in 2009 it will be \$3,500,000.00. In 2007 and 2008 any amount over \$2,000,000.00 funds the second trust. When the second spouse dies, the exclusion amount of the credit shelter trust is not taxed in the surviving spouse's estate, but passes to the children under the trust who, likewise, pay no taxes on the amount in the trust.

For example, a husband and wife have three (3) children. Each spouse will leave the other spouse certain items in full ownership, such as automobiles, boats and motors, household furniture, jewelry and miscellaneous personal effects. Additionally, each spouse gives the other one a lifetime usufruct over all of the other property possessed by the deceased spouse.

Subject to the usufruct of the surviving spouse, each person will leave all of his property to the three (3) children as income and principal beneficiaries, but in trust with a termination date as to each beneficiary's interest but in no event prior to the death of the surviving spouse. This gives the most control and protection to the surviving spouse and allows the sheltered amount to avoid being taxed.

Another estate planning tool for those with large estates is the generation skipping transfer trust in which a certain portion of the estate can be carved out for the grandchildren skipping the children. This is in addition to the amount given to your children. In effect you double the amount sheltered from taxes. You get \$2,000,000.00 exemption for the children and a \$2,000,000.00 exemption for the grandchildren for the year 2007 and 2008. In 2009 it will be an exemption of \$3,500,000.00 each.

You can easily see the value of these trusts when you have a large estate.

For an estate of any size, a testamentary trust should be considered if you have children under the age of eighteen, in order to avoid the appointment of a tutor or under tutor, to avoid the expenses of court supervised management of your minor children's inheritance and to protect your minor children's inheritance from depletion by a divorced parent and/or from a parent who does not know how to manage assets.

Likewise, a testamentary trust is an appropriate solution if you have children over the age of eighteen who are immature, completing their education, starting their work career, or getting married. In this trust you would have a more mature adult (trustee) manage their inheritance during this time. Under the trust, the distribution of the income and principal would be controlled by the trustee with the ultimate distribution of their inheritance at the ages of your choice.

If you have a mentally or physically disabled child, you may want to establish a trust in your will to appoint someone (trustee) to manage his affairs. This type of trust is sometimes referred to as a Special Needs Trust. The third party trust is created by a parent to shelter assets that the disabled child would inherit. A parent can create a testamentary trust or inter vivos trust from which a parent's assets are "poured" into the Special Needs Trust at his death and which trust limits the use of the trust assets to supplement the primary support of the governmental assistance programs such as Medicaid, Medicare, Social Security Income and Social Security Disability.

Distributions from this trust would be made to provide the disabled child with more sophisticated medical, rehabilitative or education aids in order to provide the disabled child with a better quality of life. The trust would be for the lifetime of the disabled child and is insulated from being considered as an available resource to the beneficiary by a public support provider.

If a parent fails to create a Special Needs Trust for the disabled child, that child cannot revoke his inheritance in order to maintain medicaid eligibility.

There is another type of trust being heavily promoted in our area is the Living trust. Most qualified, experienced estate planning attorneys do not recommend this type of trust. The advertising seems to play on a fear of “probate” as expensive and lengthy. In reality, Louisiana has an excellent, relatively uncomplicated probate system that is speedy and often less costly than setting up a Living Trust and transferring all assets into the trust. If you have a living trust you still need a will to transfer any assets that were not transferred to the trust prior to death. Any asset that is not titled in the trust at death will have to go through probate anyway. So you may pay now and pay later.

There appear to be several important misconceptions about what a Living Trust exclusively can do for you. Living trusts do not save estate, inheritance or income taxes. If you own a living trust, the income earned by the trust is included in the your income during your lifetime. When you die, the assets of the trust are included in your estate for federal estate tax purposes. If your living trust does not incorporate traditional methods of minimizing federal estate taxes as discussed above, you may be wasting your money. Why go through the process of establishing a Living Trust and transferring all your assets into it when you can do another type of trust that does not require you to transfer title of everything you own into it?

Living trust do not ensure privacy as to real estate. The transfer of real estate property into the trust as well as a Declaration of the basic aspects of the trust are recorded in the conveyance records of the parish where the property is located. These are public records available to anyone. That’s certainly not privacy, is it? Additionally, most banks and brokerage firms require a copy of the trust agreement in order to open an account for the trust. Consequently, living trusts do not guarantee that a person’s assets will remain free from public scrutiny.

The idea that only living trusts can be used to manage the affairs and avoid interdiction of an incapacitated person is simply not true. A durable power of attorney can do the same and is much less expensive than the living trust.

With living Trust, be aware of the disclaimers attached to many of these trusts that say they are not prepared by Louisiana attorneys. Some are not prepared by attorneys at all. Since Louisiana law is based on French law and most of the rest of the country's law is based on English law, you should always work with an experienced Louisiana attorney on something as important as protecting your family and preserving your assets for them.

In conclusion, properly drafted trusts by qualified Louisiana attorneys customized to the individual's needs are effective estate planning tools, but not everyone needs a trust.