Estate Planning with Trusts: 16 Situations That May Warrant a Trust

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Limitations of the Last Will and Testament

The creator of the estate plan has a lot to consider when drafting an effective estate plan, including how the terms of the estate plan will affect the recipients of the estate's benefits, that is, the beneficiaries. In some cases, a Last Will and Testament will suffice. However, in many situations, the creator of the estate plan is well-advised to consider a trust. The "settlor" of a trust (sometimes referred to as the "grantor") is also the creator of the estate plan. The intentions of most trust settlors are: 1) to designate a person (or persons) the responsibility of carrying out their wishes; 2) to specify the disposition of significant assets; 3) to name those who will benefit from those assets; 4) to specify certain conditions when beneficiaries receive OR do not receive trust assets; 5) to protect assets from future strangers such as predators or future ex-spouses; 6) to save many types of taxes (estate tax, income tax, capital gains tax, etc.); and 7) to generally promote the future welfare of the trust's beneficiaries.

Generally speaking, the first 3 intentions above can be accomplished with a Will. The questions of who is responsible for distributing your stuff, what that stuff is, and to whom everything will pass after death may all be answered with a Will. Although you may specify certain conditions that must be satisfied (or prevented) in order for a beneficiary to receive, generally (at least for a Will) that assessment is accomplished as a snapshot in time. Conditions will always change with the passage of time; once assets are distributed under a Will, there is no viable legal mechanism for getting them back (or distributing them in an otherwise manner). A trust continues for as long as you want (with certain limits) so a trust may accomplish the other 4 intentions on a continuing basis. Also, when submitted for probate, the Will is a public document; a trust normally does not pass through the probate process and therefore is not available for public review.

Should I Have a Trust?

In 2006, billionaire Warren Buffett publicly announced his plan to give the entirety of his fortune to charity. Buffett does not believe large amounts of wealth should be allowed to pass to heirs unearned. In an interview, before announcing he was leaving all of his estate to charity, Buffet noted that "he want[ed] to give [his] kids just enough so that they could do anything, but not so much that they would feel like doing nothing." It seems Buffett plans to leave behind a legacy stronger than wealth for his children and grandchildren, a legacy built on hard work and modest living.

You may think that trusts are for the super-rich. Today, if you have total assets (real estate, life insurance, retirement accounts, business assets, etc.) valued at more than $5 million, you likely should have one or more trust documents. However, for people of more modest means, trusts are still extremely useful – and even essential. There are many situations when a trust is the best way to achieve your goals – and in some cases, the best way to avoid painful and unintended consequences. Talk to an Estate Planning attorney if you fall into one or more of the following situations:

1. You or Your Spouse Have Children from a Previous Marriage (or other relationship): Some of us are in lifetime relationships (for example, you have always been married to the same person and/or you have children together with that person). Great! Congratulations to you if you fit in this ever-decreasing demographic. But if you or your current spouse have children from a previous marriage or other relationship, you are strongly advised to consider a trust. Consider this: one of you will die first; if the survivor is not the parent of children from a previous relationship, it is very possible that those children will be disfavored and receive little or nothing from your life's work. This is especially true if the surviving spouse survives for an extended period of time. You need a trust.

2. You Are in a Long-Term Relationship but NOT Married: You likely want to provide for your significant other; but consider what happens after you are gone! If your significant other gets married after your death and after you have given away your assets, and if your significant other dies before his or her new spouse, that stranger will likely get your stuff! Consider a trust.

3. You Have a Spouse That is a Non-U.S Citizen: Current law restricts the amount of assets that may pass to a non-U.S. citizen spouse without harsh tax consequences. The federal government does not want your significant assets to "leave" the country. Consider a trust.

4. You Have Children or Other Potential Beneficiaries with a Disability: If that child or beneficiary requires special care or has special needs, they may qualify for certain public benefits. Although you may have income or assets for their care now, after you are gone, will there be enough assets for that person's lifetime of special needs? If you wish to provide continuity to their care, there is a way to provide for special needs without disqualifying that person for available significant public benefits. You need a trust.

5. You Have a Child or Beneficiary with a History of Addiction: Depending on how recent the problem is, you certainly don't want to hand over a significant amount of money to this person. Consider a trust.

6. You Have a Child or Beneficiary That Has Not Learned How to Handle Money: This person may be a minor; this person may be a college student; or this person may just need supervision for a while. Consider a trust.

7. You Want to Provide for Your Own Continuing Care (if and when you need it) While Also Specifying To Whom and How Your Assets Should Pass After Your Gone: This applies if it's possible that someday you may NOT have the capacity to understand what you have, who should get it, and how it should pass. If your family health history includes Alzheimer's or other cognitive impairment diseases, you are well-advised to consider a trust in your estate plan; and if your history includes multiple close family members with such conditions, you need a trust.

8. You Have Significant Assets in a Retirement Plan: Special planning considerations apply regarding qualified plan assets. These assets include money in a 401k or other retirement account such as an IRA. Remember, these assets will pass via a Beneficiary Designation Form – NOT as specified in your Will. The Beneficiary Form is EXTREMELY important. Caution: the beneficiary on your Beneficiary Form should NOT be "my estate." There are many reasons your "estate" is a poor option as a beneficiary (examples: accelerated required payout; lack of asset protection; requires probate court involvement).

9. You Have "High Dollar" Life Insurance Policies: Similar to retirement accounts, life insurance benefits pass via a Beneficiary Designation Form – NOT as specified in your Will. However, this is true *only if* you have completed the Beneficiary Designation Form (you should verify all beneficiary forms at least annually). Again, if you share any of the concerns or fall into any of the situations described in this article, coupled with the fact that the life insurance proceeds will pass directly to whomever is on your Beneficiary Form, you should strongly consider a trust.

Even if you don't fall within one of these situations, significant life insurance benefits may well belong in a trust – or perhaps the beneficiary of the life insurance should be a trust. Consider a trust.

10. You Own Out-of-State (or International) Real Estate: If you own real property in one state or country and reside in another, you can save a lot of time, effort and money with a trust. The out-of-state property would be conveyed to the trust to avoid the out-of-state probate process. Without a Trust in place, you (as the personal representative of a decedent's estate) would be well-advised to hire a local attorney for this out-of-state probate process (known as ancillary probate). Of course, there are costs for this legal engagement; plus, the filing fees to probate a Will, depending on the jurisdiction, may be modest, but could be high enough to warrant avoidance. For example, in New York, the fee is a sliding scale depending on the value of the estate, with a maximum of $1,250; in Florida, the fee is $401; the filing fees to probate a Will in Georgia are usually less than $300. However, in some states, the probate court fee is substantially higher. In Delaware, the fee is 1.75% of the probate assets, not counting real estate, payable at the end of the estate administration. In a state where the probate court fees would be substantial, or to avoid the local attorney's fee (which in most cases is significant), a revocable trust may avoid these costs; additionally, see #16 below on probate avoidance generally. The real property is conveyed from yourself as an individual, to yourself as Trustee of your revocable trust. This conveyance requires a new deed but does NOT involve (in most cases) transfer fees or other tax consequences. International laws vary but generally the same advice applies. You should have a trust.

11. You Have Minor Children: Many of the situations above include "minor" children with specific circumstances that may induce you to consider (or advisedly require) a Trust. The fact that you *simply* have minor children (admittedly oxymoronic) may not call for a Trust. Parents with minor children do, however, *need* (at the very least) a simple Last Will and Testament that includes provisions appointing a Guardian for minor children; in addition, this "simple" Will should include provisions for a "Minor's Trust," which provides distribution instructions for the benefit of the minor children. Depending on your specific situation, the Guardian may or may not be the same person as the Trustee of the Minor's Trust. These are very important considerations; and if not addressed, there will certainly be unintended and potentially very expensive consequences. You should consider a trust; at the very least, you should speak to an estate planner about a Will.

12. You Have Pets, Farm Animals, or other Living Things that Require Care: We love our pets; most of us have other trusted persons that would survive our passing and that would take care of these animals. If you are lucky, these "beneficiaries" will take care of the animal gratuitously. Perhaps you desire to set aside a certain amount of money for the daily care, medical care and other needs of your animal. For small pets, this is likely not a large sum of money; however, if you own a horse, for example, the amount of money for daily care, medical care, grooming, boarding, etc. can be significant. You should consider a trust.

13. You Own Firearms: The transfer of a firearm (either inside or outside the estate process) is regulated by a myriad of local, state and federal laws. A handgun, rifle or shotgun can be "gifted" by Will (generally speaking), but there are many traps to be aware of; and significant and numerous regulatory qualifiers to this planning technique exist. However, other types of weapons, known variously and synonymously as "Title II Weapons," "Class III Weapons," or "NFA Firearms" (regulated by the National Firearms Act), require very specific and rather technical planning. Examples of Title II Weapons include machine guns, short-barreled rifles or shotguns, silencers, and explosive devices. The improper transfer of a Title II Weapon, no matter how innocently intended, is a felony offense and subjects the transferor *and* the transferee to a penalty of $10,000 and 10 years in prison. Giving a Title II Weapon to another person, either *inter vivos*

(while living) or by Last Will and Testament is *improper* (and illegal). If you own a handgun, rifle or shotgun, you need legal advice and counsel; if you own a Title II Weapon, you need a Trust.

14. You Have an Heir That You Do NOT Want to be Notified of Your Death or You're Not Sure Who or Where Your Heirs-at-Law Reside or You Have an Heir-at-Law (usually a natural born or adopted child for example) and Want to Disinherit Him or Her: It is a legal axiom that, in order to probate a Will, the interested parties (your heirs-at-law) must either consent or be served notice that you have died and your estate is being administered. These interested parties include the heirs who would take in intestacy (as if you had no Will) – regardless of whether you have one or not; if any of these interested parties is a minor, the court will appoint a *guardian-ad-litem* (usually a stranger to you) who will need to submit a report to the court. In order to avoid this notice requirement, or to avoid the need for an exhaustive search for your legal heirs, or to avoid the appointment of a *guardian-ad-litem* for minors, you should consider a Trust.

15. You Own a Vacation Home That You Want to Keep in the Family: Although a trust is not the only option to facilitate a legacy transfer of a family vacation home, it is an option that may best suit your particular situation. A stand-alone Vacation Home Trust can specify how you want the property to be used, who has access to the property, how capital and carrying costs are paid for, and whether or not to allow others to use the property (for income purposes for example). In order to avoid potential conflicts among heirs regarding the use and maintenance of your vacation property, you should consider a Trust.

16. You Want to Avoid the Probate Process Entirely: Georgia law requires that you submit a Will to the Probate Court "as soon as practicable" after the testator's death. If you have a Trust, and all assets were property conveyed into the Trust (or would otherwise pass outside of the probate process – like via a Beneficiary Form for example), there is no need to "probate" the Will. In other words, the person responsible for handling the decedent's affairs would simply "file" the Will in the appropriate Probate Court, pay the required document filing fee (usually less than $30), and then proceed to administer the decedent's estate under the terms of the Trust. You (or the person handling your affairs after you pass away) may avoid the probate "process" entirely: the Probate Court is not involved; the executor need not be appointed, no inventory or accounting statements are required to be filed with the Court, and there is no requirement to post a bond. If you desire to avoid the expense of the probate process and/or the supervision of the Court, you should consider a Trust.

There are more reasons that would call for a trust. The situations above simply scratch the surface. If you have around $5 million or more in assets, you definitely should have a trust in place. Even if you do not have $5 million, if you think you may eventually be worth that much or more, you should strongly consider a trust. Note that this net worth number is *my* personal threshold to begin to emphasize the general benefits of a trust (assuming that you don't fall into one of the situations described above). This number is loosely tied to the federal estate tax exemption amount; in 2022, the federal estate tax exemption amount is $12.06 million for a single person. A married couple can effectively double that value under current tax laws. However, the *current* federal exemption amount provisions are scheduled to "sunset" in 2026 and the federal estate tax exemption amount (under current provisions) will fall back to around $6 million for an individual. If you've accrued around $5 million to this point in your life, it's reasonable to assume that you could be affected by a reduced exemption amount in 2026. And of course these statements assume Congress does not change these values in the meantime. A final note about the "amount of your assets" described above: the federal estate tax exemption amount includes the value of personal and real property, the value of any life insurance policy paid because of your death, the value of any

business interest that you own at the time of your death, and the value of any investment or retirement account; in other words, the overall value of your estate for the federal estate tax purposes, even for persons of relatively modest means, can add up quickly. Having a discussion and following through with a plan with an estate planning attorney can potentially save your beneficiaries a lot of money.

William Assheton, the Rector of Buckingham in Kent England, had this to say about Trusts in the year 1556: "If your children and relations are notoriously vicious and debauched…do not abdicate or cast them off…but make provision for them in trust in such manner and with such circumstance, as may relieve their necessities, but not their lusts." I think Warren Buffet said it much more eloquently.

If you live in Georgia or Washington State and would like additional information or desire a no-cost consultation, please call Jay Fox at 678-250-6999 for an appointment.