A Will Does Not Avoid Probate!

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In our practice, one of the most common statements we hear is, "I have a Will, so my estate won't need to go to probate when I die." Although having a Will in place is a great idea, it does not serve to avoid probate. However, another commonly used estate planning document, a Living or Revocable Trust, is a document that is commonly used to pass one's assets at death and avoid probate.

Last Will and Testament

Most people have a general understanding of what a Will does and the importance of having one in place. A Will is a document executed during one's lifetime which directs how his or her real and personal property will be distributed upon his or her death and who will "handle" the estate. After you pass away, your Will must be submitted to the Probate Court for the town or city in which you lived when you passed away (in Massachusetts the Probate Courts have jurisdiction by County, not by town as it is in Rhode Island). In a sense, the Court acts as a check system, to ensure that the proper party is named as Executor or Executrix and that your assets pass in the way you intended. Also, the probate process can be somewhat slow (in Rhode Island you must keep the estate open for six months to allow for creditor claims) and, generally, it can cost more than a proper estate plan that is designed to avoid probate, if that is one's desire. If there are no disagreements between the surviving heirs and beneficiaries, a probate can be a smooth process. However, there are reasons other than the potential expense for avoiding probate. For example, probate is a public procedure whereby anyone can access the information contained therein, and, probate can delay the estate administration process, at least more so than a Trust, which is discussed in more detail below.

Living Trust

Another common estate planning tool to be considered is a Living or Revocable Trust. A Trust is a document in which one party (usually called the Grantor or the Settlor) transfers legal title to another party (the Trustee) for the benefit of a third party (the Beneficiary). In most Living or Revocable Trusts used for estate planning purposes, the Grantor is typically also the Trustee and the Beneficiary during his or her lifetime. This allows the Grantor to continue to control the Trust assets while he or she is still living. Upon the passing of the Grantor, the Trustee is charged with the responsibility of paying the Grantor's final expenses and distributing the Trust property, or perhaps holding it in further trust, in accordance with the Grantor's instructions. A Trust avoids the probate process, which makes it ideal for those who want an efficient estate administration process that is kept from the public eye. A Trust also gives the Grantor the ability to be more creative with the manner in which he or she distributes his or her property. A typical Trust that we might draft usually includes Rhode Island or Massachusetts estate tax planning language, but can also provide for assets to be held for the Grantor's children and grandchildren for distribution at a future date, perhaps to ensure that there are funds available for the beneficiary's education. In some circumstances, a Trust is necessary if the intended beneficiary receives State benefits or has a financial history which would indicate that an outright distribution of money would not be a good idea.

Space does not allow for a detailed discussion of all of the differences and uses of Wills and Trusts; but if you have any questions about either of these estate planning documents, or estate planning concerns in general, please do not hesitate to contact our office to schedule an appointment to discuss an appropriate estate plan for your needs.

Also, stay tuned, as we plan to discuss specific types of Trusts, such as special needs trusts and special needs planning, generally, as well as Trusts used for estate tax planning in future publications.

"I have had the pleasure of using the services of Scott & Handwerger, and would recommend them, without any reservations, as they handled my family's matters with an uncommon degree of caring, sensitivity and professionalism."
-Frank P., Providence, RI