CHAPTER THREE

A Comparison: Trusts and Wills

Okay, so what is the truth? Is a will the best choice because it's cheaper? Is it cheaper?

At an estate planning seminar recently, I discussed trusts versus wills with another attorney. He was of the opinion that there was no cost-saving at all in having a trust instead of a will, even if probate was avoided. Therefore, his advice to all but the rich was to use a will. I was very interested in how he arrived at that conclusion.

His reasoning was as follows: He charged a lot of money for the will up-front (so he was not talking about a $250 simple will). His estate plan package using a will plus the durable power of attorney and medical directives was approaching $1,500. He then charged a lot for probate (with his fees at $300 per hour over a year or two of probate for a modest estate, the total would easily cost $5,000 to $10,000).

So does that support my argument for avoiding probate and using a trust? Well, no. He also charged a lot for a trust—typically $2,500 to $3,500. Then he charged a lot for what he called "trust settlement"—again at $300 per hour—and it took a long time to complete the process since his office did virtually everything to carry out the trust terms, many of which were not legal services. So using this lawyer saved no money or time at all. He was creating a huge fee no matter how the estate was handled. In his case, he was right: there was no advantage to the trust.

More on avoiding this kind of lawyer in chapter 5.

A very nice trust that will meet nearly everyone's needs can be had for a very reasonable price—much less than Mr. Lawyer was charging in the previous paragraph. You have to do your homework, interview lawyers, get referrals, go to seminars—all the techniques for finding the right lawyer I outline in chapter 5. If you do that, you will find that the initial cost of setting up the trust is practically the only legal fee you will ever pay for your estate plan. The reason is that trust settlement is not legal work. It is mostly clerical work. You do not need to pay $300 an hour to a lawyer to settle a trust if you know what to do.

Trust settlement is the process of carrying out the instructions in the trust as to who gets what and when. The typical chores must be done of identifying what debts have to be paid, publishing notice in the newspaper, getting an IRS number to open a bank account, selling assets, filing claims for life insurance, and so forth, but these are not legal work and do not require a lawyer.

What you need are instructions to the trustee upon death of the trust owner. Most lawyers are not going to give these instructions to you. They keep this process a secret. But I am going to tell you how to do it step by step in this book's final chapter. In fact, in every trust-based estate plan I have done, there is a section on trustee instructions, which, if followed, allow a quick and easy settlement of the trust with no legal costs at all. Am I shooting myself in the foot? True, I don't charge for trust settlement very often, but I have plenty to do creating trusts by referral from satisfied clients.

Using a will and probating it, however, is definitely legal work; plus, it is time consuming and therefore expensive. Most people cannot do their own probate. True, much of it is computerized, using software packages and fill-in-the-blank forms, but only lawyers have these or know how to use them. The probate system and probate laws are also geared toward making it take a long time. Completing a standard probate case in less than six months is nearly impossible because of the way the system is set up with its waiting periods, notice and publication requirements, and oftentimes court hearings that may be required.

Probate is an attorney's bread and butter—kind of like the slot machines that pay the rent in Vegas.

In fact, if you live in a state like California or Florida, the laws do not even allow you to do probate without a lawyer. They say that every personal representative (think executor) must be represented by a lawyer. So you

couldn’t do it yourself, even if you wanted to. Most everybody subject to probate in those states should have a trust.

It used to be, and still is in some states, true that probate had one advantage that trusts did not: a short statute of limitations. This means that by publishing a notice in the local newspaper to potential creditors of the deceased, you can limit how long any creditor has to present a claim against the probate estate to four, six, or nine months, depending on state law.

Years ago, other attorneys and I would intentionally put parts of certain estates through probate just to get this short statute of limitations. For example, say I represented the estate of a deceased surgeon. We would not want the estate held open and subject to possible lawsuits for malpractice until the normal negligence statute of limitations expired in maybe a year or two. By having part of his estate probated, we could shut the door on any possible claims that might be out there and get the estate finalized. The rest of the estate would be handled by the trust.

I don’t worry about that anymore. In 2010, Michigan joined many other states in adopting a form of the Uniform Trust Act, which gives trusts the same sort of protection wills have always enjoyed. So now we never probate estates for statute of limitation reasons. Included in my set of instructions to the trustee in the last chapter is a fill-in-the-blank publication notice that the trustee runs one time in the newspaper to get the four-month statute of limitations for the trust, thereby canceling the only advantage of probate over trusts. You might want to use this even if your state does not officially recognize the validity of the trust notice publication as a way of identifying unknown creditors.

The availability of publication to shorten the statute of limitations may not exist in your state. If you are like most people, the danger of having a claim presented after the trust is settled is slim to none. Most of us know what the debts are. However, if you are in a high-risk occupation or have been involved in numerous business dealings that might or could lead to litigation, and you are in a state where the trust notice doesn’t have a statute of limitations protection, having one small part of your estate probated will give you that protection. The rest of your assets can pass through the trust.

Sometimes there are problems in trusts that require a judge to sort them out, but not often. It is very rare for a trust to end up in court; however, if a trustee needs the assistance of the court for some reason, the probate court has the authority to administer and oversee trusts on request of an interested

party.

REAL ESTATE IN MORE THAN ONE STATE

It is not unusual to see people who own real estate in multiple states, such as a winter home in Florida and a summer home in the north. With a will, probate would be necessary in both states. No state has the authority to probate real estate located in another state. Without a trust, probate would have to be done in each state where real estate was located. So we have for a New York resident what is called “ancillary probate” in Florida, which is basically a companion probate. It then effectively doubles the cost of probate. I had a client with real estate in five different states—big trouble without a trust. And ancillary probate can be expensive. The attorney handling it had no relationship with the family, was not likely to see any of their business again, and therefore charged the maximum going rate for the probate.

With a trust, all the real estate from every state can be put into one trust ownership using a quitclaim deed and there is no probate in any state. The trustee merely hires an attorney in the companion state to do a deed from the trust to the beneficiaries, or the trustee sells the property in the other state through the trust. No probate and no expenses other than realtor and closing fees.

Huge savings in time, trouble, and money. Those of you with real estate in more than one state need a trust.

FAMILY HARMONY

Wills can cause family trouble. There are two reasons for this. First, probate takes a long time to complete, from several months to several years depending upon what problems arise. Because of this time delay, heirs become suspicious of the executor and the attorney for the estate. I have heirs come to see me who think they should have their own lawyer in the probate just to protect their interests. They ask me, “How do I know for sure that the executor is doing the right things without somebody on my side?”

When you get two or more lawyers involved, the costs begin to go up. You are paying a lawyer for results. They want to appear to be doing something for you, so they bill hours, write letters, do research, and make telephone calls. Law is a game of adversaries with each lawyer fighting for his or her client. It causes trouble, expense, and hard feelings. Your lawyer is not doing his job unless he can point to something he accomplished. It may be that all

he has to do is monitor the proceedings, but that is not the way it usually works out.

Second, wills are fairly easy to contest. When a probate case is opened, a court file number is given to it, a judge is assigned to the case, and easy-to-use court forms are made available for filing motions and setting up hearings. Attorney fees are what the court calls priority claims. In other words, the lawyers get paid first, so there is a pot of money out of which attorneys can collect their fees. Attorneys do not expect a big up-front retainer in a will contest.

Contesting a trust is a different matter, however. Attorneys will expect a retainer fee and bill against that at their normal hourly rates, win or lose. Having to come up with a lot of cash is a disincentive to contesting a trust.

This ease of contesting a will leads to will contest extortion. Executors often settle a specious claim against a will just because it is often cheaper and quicker than trying to fight over it. There are some—not many, but some—lawyers who engage in this blackmail game and are rarely called on it. There are court rules that are supposed to prevent this from happening, but they are not often enforced.

Remember that the cost of probate is not what lawyers would lead you to believe. It is not the state, the court system, taxes, or “court costs” that run up the cost of probate. It is almost entirely attorney fees.

On the other hand, trust settlement without an attorney can be done quickly and with no legal costs. Because everything is wrapped up so fast, there is not much time for heirs to worry about the process. You basically gather together the assets, pay the bills, publish notice, file the last year’s income tax return, and distribute the assets to the heirs—that’s it. No papers to file with a court or the state, and no fees to pay.

No-contest clauses and arbitration clauses also limit challenges to trusts. A no-contest clause is a paragraph or two that says that anyone who challenges the trust, even if they are successful, would get only one dollar as their inheritance. While this clause is not a bar to challenging a trust on the basis that the maker of the trust was senile or otherwise incompetent when they made the trust, the fact that the provision is there stops a lot of trust contests. It’s kind of like the sign in the parking garage that says they are not responsible for loss or damage to your car. The sign itself discourages people from suing even if the garage might actually be legally responsible.

Similarly, an arbitration provision can slow down contests. This provision

says that if someone wants to challenge the trust or any part of it, they must first submit to arbitration to settle their claim and if unsuccessful must pay for the arbitration fees of both sides. That one is a real stopper. Arbitration is like a mini-trial of all the issues. It can cost a lot, it can take a lot of time, and the outcome is uncertain. Plus there is the no-contest provision that may be enforceable, so even if the other side wins, they may get nothing. Personally, I like this arbitration provision.

To contest a trust, the one contesting must hire and pay for a lawyer out of her own pocket. There is no probate court priority for attorney fees, and it can be difficult to find a lawyer willing to take on a trust contest on a contingency fee basis (getting their attorney fees out of the winnings). Trusts are a more certain way of seeing that your intentions and instructions are carried out at death and are not thwarted by litigation.

PRIVACY

Probate files are public record. Many people are not aware of this, but anyone can go to the courthouse, look at any court file, and find out who inherited what and how much they got. I heard of a car dealer years ago who gleaned the names of heirs from probate files so he could try to sell them cars. “I hear you came into some money. I have a heck of a deal on a new Cadillac for you.” Seems sleazy, but it is perfectly legal.

A trust is private. No one other than the heirs knows what anyone inherited, what restrictions there might be, or even the size of the estate. Most of us want this information private, and a trust keeps it that way. (Although if, in that one-in-a-hundred case, the trust gets filed with the court, then it can be made public record too.)

The privacy aspect also makes it harder to contest because only the named heirs involved can get a look at the paperwork.