

Estate Planning --

It's Not About Documents -- It's About Results

By

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For about a decade there has been considerable debate among estate planning professionals whether a will or revocable trust is the "better" estate planning document. Unfortunately, this debate has served as a "smokescreen" obscuring the real issue -- why too many estate plans ultimately fail to meet the client's objections.

When discussing their goals, most clients make clear that retaining control -- both over their assets and their "person" in the event of a health crisis -- is of paramount importance. When counseled on the critical issues, clients often want an estate plan that (i) will protect their assets for their children in the event the client were to predecease his or her spouse and the spouse were to remarry, (ii) will protect the assets for a child in the event the child were to divorce, (iii) will protect all their loved one's from attacks of creditors, (iv) will minimize estate taxes and (v) will if possible, avoid probate.

Meeting these client goals requires far more than deciding whether to use a will or revocable trust as the central estate planning document. To ensure control and protection of the assets for the client's loved ones, a will or a trust must provide that assets will be retained in "protective trusts" for the benefit of family members after the client's death. Modern trust planning can provide virtually unlimited access by the beneficiary to the assets in their trust share, but the assets will be protected from the beneficiary's creditors, *including the beneficiary's spouse in the event of a divorce.*

A will or revocable trust can each create protective trusts for the client's loved ones; assets passing through a will, however, will have to go through probate before passing into a protect trust. In either case, to provide the valuable protections afforded by protective trusts the client must change ownership on virtually all of their assets, and must use customized beneficiary designations for their IRA's, 401k's and life insurance policies naming as a beneficiary one or more trusts created under the client's revocable trust or a testamentary trust created under the will.

How clients typically own their assets, however, defeats even the best language contained in a will or trust. For married couples, assets such as homes, bank accounts, stocks and mutual funds are typically owned jointly with rights of survivorship. IRA's, 401k's and life insurance typically names the spouse as beneficiary. At the client's death, all of these assets will pass *directly* to the surviving spouse, thereby affording no ability to protect the assets (a) if the surviving spouse were to remarry, and (b) from the creditors of the client's surviving spouse and children. In addition, for married couples with assets in excess of \$1 million (including life insurance proceeds), the failure to reallocate assets between spouses may cause the incursion of *additional* estate taxes upon the second spouse's death of up to \$555,000 (based on the Federal estate tax rates for deaths in 2004 and 2005).

This article touches upon only a few of the critical considerations for effective estate planning. For persons interested in completing an estate plan that will meet all of their planning goals, it is advised that they consult with an attorney who concentrates his or her practice in estate planning and related topics such as elder law and business succession planning.

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