



TRUSTS – ARE THEY RIGHT FOR ME?

Kathryn Bedell, Esquire

Ballou & Bedell | 408 U.S. Route One, York, ME 03909
(207) 363-5300 | kathryn@balloubedell.com

The best way to think of a Trust is as a Will substitute. A Trust accomplishes most of the same things a Will does:

- A Trust tells the world who will inherit whatever is in your Trust when you die (i.e., your spouse, kids, charity, etc.).
- A Trust tells the world who will be in charge of the assets in your Trust when you die (the “Trustee”).

Unlike a Will, which only has significance when you die, a Trust exists the minute you form it and place items in it (house, bank accounts, etc.). As a result, your Successor Trustee does not have to “probate” your estate when you die.

WHAT IS PROBATE – SHOULD IT BE AVOIDED?

Probably the number one reason Trusts are widely used is to avoid probate. Probate is the process of having your will accepted by the Probate Court in the county where you reside when you die.

Will	Trust
You name your Personal Representative in your Will, and the court appoints him or her after you die to settle your estate per the terms of your Will.	You name your Trustee in your Trust to settle your estate after you die. The court does not get involved, unless there is a dispute.

Why Probate Should Sometimes Be Avoided

In states like Maine, probate is a fast, easy and inexpensive process. Most Personal Representatives (the person you name to be in charge of your Estate) are appointed within one to two weeks of application to the court. The fees paid to court are based on the value of your assets, and are very reasonable. Some states, like New Hampshire, still have a formal probate process, and the costs associated are far more expensive and time-consuming. States like New York, Connecticut and California are notorious for having difficult probate systems. The probate courts in Massachusetts, which fairly recently adopted probate laws similar to Maine's, are so overwhelmed they can be slow to process paperwork. For many, the guiding question as to whether you should avoid probate is, what state do I plan to die in?

**For many, the guiding question as to whether you
should avoid probate is,
“Which state do I plan to die in?”**

Other Reasons to Avoid Probate

- Do you own real property in more than one state? A probate process must happen in every state that you own real estate, which can get expensive.

Will Example: *If you are a resident of Maine, but own property in Vermont and Massachusetts which is in your name, your Personal Representative will need to open probate in three states in order to transfer all your property when you pass.*

Trust Example: *If these additional properties are all in a Trust, there would be no probate in the additional states.*

- Contentious family that you know will argue when you pass.
- Children that you are estranged from you.
- Privacy concerns (your Will becomes available to the public online on the probate court website when you die through the probate process).

Things to remember:

There are no estate tax savings to avoiding probate.

Many people mistakenly believe that a Trust will mean that they will avoid estate taxes when they die. However, whether your assets are in a Trust or in a Will, they are all included in your net taxable estate. The Maine exemption for 2018 is \$5.6 million (same as federal – which is doubled federally if you are married).

Clients interested in a Trust must have "constant vigilance" to maintain the Trust by making sure to title current and new assets in the name of their Trust. Many clients tell me all their assets are in their Trust, yet nothing in fact is in the Trust. People sell houses, buy new ones and then forget to put the new home in the Trust. They open new accounts at the bank and forget

about the Trust again. This means anything left outside the Trust will go through probate. So, in many cases, all that effort to avoid probate by forming the Trust is wasted.

A Good Rule of Thumb:

If a person says:

"My mom had a Trust, it worked great and things went really smoothly"

This person is a good candidate to have for a Trust. They are familiar with the language and how a Trust operates.

If a person says:

"Trusts confuse me. I really don't understand them. I like to keep things really simple. "

This person is not a good candidate for a Trust.

SUMMARY

Will Advantages

- Lower cost than Trust preparation.
- Simple and inexpensive in probate friendly states.

Trust advantages

- Avoids probate if assets are properly titled.
- Privacy.
- Trustee is immediately authorized to act upon your death.

NEXT STEP

Now that you have decided whether you want a Trust or not, the next question is, what kind of Trust? There are many kinds of Trusts, but they fall in to two basic categories: Revocable and Irrevocable.

Revocable

Revocable Trusts are used solely to avoid probate for the reasons outlined above. Revocable Trusts can be changed at any time. If your assets are in a Revocable Trust you can borrow money and do all the same things you would otherwise. Your Social Security Number is the Trust tax ID number. Your mortgage interest is still deductible and you may keep your homestead tax exemption if you put your primary residence in a Revocable Trust. Because it is considered to be in your full control, there is no asset protection to a Revocable Trust. Creditors will be able to attach assets in a Revocable Trust.

Placing your assets in a Revocable Trust does not provide asset protection from Maine Care or liens from other creditors

Irrevocable Trusts and Asset Protection

If you are interested in a Trust to protect your assets from nursing home or Maine Care (Medicaid) liens, then you would be interested in an Irrevocable Trust. Unlike Revocable Trusts, Irrevocable Trusts are rigid and constraining. In order to ensure ultimate protection, any asset placed in such a Trust will then be completely out of your control. You will not be the Trustee, you will not be able to mortgage the assets, you will not be able to sell the assets without your Trustee's permission.

What kind of assets work best in an Irrevocable Trust?

Are you a candidate for an Irrevocable Trust?

Assets that work best when placed in an Irrevocable Trust are assets that you own outright and never intend to sell (like a family cottage, sometimes a home).

Things to remember:

If you have a mortgage on your home, then you are not ready for an Irrevocable Trust.

If you have so few cash reserves that you would need access to a home equity line of credit to fix the roof or a boiler, then you are not a candidate for an Irrevocable Trust.

If you want to remain in your home as you age and may need to use a reverse mortgage to finance your care, you are not a candidate for an Irrevocable Trust.

If your family does not get along or do not communicate well, you are not a good candidate for an Irrevocable Trust.

If you are still interested in an Irrevocable Trust, please read the handout, "Maine Care & Deed Transfer Options"

Updated 4/13/18