

## **SWEET & MAIER, S.C.**

### **REVOCABLE LIVING TRUST DECLARATIONS**

One of the most flexible estate planning tools available today is the revocable living trust. Although this is a very useful and beneficial document, it is often misunderstood. Consequently, we would like to take this opportunity to explain the basic concepts and advantages of the revocable living trust.

A revocable living trust with yourself as Trustee is called a "Declaration of Trust". It can simply be described as protection for you and your family. You will retain complete control of investments, and management of your assets during your lifetime, while you are competent. At your death, or upon your incompetence, a "successor trustee" takes over the management and control of you assets, without the necessity of court intervention.

For the substantial estate, the services of a bank or trust company, as a successor trustee, may be desirable. For the estate that is not large enough to warrant this expense, or where there is special expertise or aptitude in the family, a competent individual or individuals may be able and willing to assume this responsibility.

Essential to this type of trust is the transfer of one's assets to the trust. Without such a transfer, a trust instrument, drawn by even the most skillful draftsman, is meaningless. Normally, the assets to be transferred to the trust will be comprised of stocks, bonds and cash, though you will usually reserve a certain amount of cash or a checking account in your own name, as you may wish to pay your own living expense while you are able to do so. Whether or not to transfer a residence, or other real estate will depend upon the circumstances of each case, and your desires.

Since the trust is revocable, no tax savings will result from its creation. All taxable income will be taxed to you, whether or not distributed to you, and the trust assets will be included in your estate for federal estate tax purposes upon your death. Normally all income will be distributed to you and you will reserve the unrestricted right to withdraw all (or any part of) the principal and to revoke or amend the trust during your lifetime.

Should all of your assets be transferred to a Declaration of Trust, there will likely never be any necessity for appointment of a financial guardian. A guardian is a person appointed by a court to manage all you own such as your real estate, stocks, and bank accounts if you become physically or mentally incompetent. Use of the trust also avoids the stigma of an incompetency proceeding. The potential financial savings, should it be necessary to appoint a person to manage your property, are well worth the expense of setting up a revocable living trust.

The trust agreement will also provide for disposition of you estate after your death, in the same way as you would provide by your will, by directing payment of taxes and other obligations, specifying direct distribution of the residue, or continuing the trust for the benefit of designated persons (like your spouse and children). This would occur privately, without the necessity of probate.

Another advantage of the living trust over a will is the ability of the trust to successfully withstand an attack brought by a disappointed heir. Although either instrument is subject to attack on the grounds that it was procured by undue influence or that the creator lacked the requisite mental capacity, the trust will not fail because of lack of formalities of execution such as the failure of a witness to a will to sign in the presence of the maker.

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Perhaps the greatest difference between the trust and the will, from the standpoint of a contest, is the right of a contestant to a jury trial in a will contest. No such right exists in a suit to set aside a trust, the action being tried before a judge alone. Reliance on the sympathy of a jury to rewrite a will that departs from a jury's ideas frequently gives a contestant in a will contest an advantage that he would not enjoy, were he to attempt to upset the revocable trust.

The obvious advantage of the Declaration of Trust over the will is the simplicity of its execution. Needing no witnesses, it is subject neither to the vagaries of the proof required to admit a will to probate, nor the delay frequently incidental thereto.

The mechanics of setting up a Declaration of Trust are simple. You sign a trust agreement. You turn over to yourself as trustee the securities or other properties to be held in trust. Then the trust is in operation. The legal title to property is transferred to you as trustee.

After your death, the trust can carry on just like a will. The income can be paid to your spouse or your children or any others, and eventually the principal will be disposed of as the trust agreement may direct. Such a trust may also be used to eliminate estate taxes at the death of the next income beneficiary, and certain expenses of estate administration may also be eliminated or reduced. One of the advantages of a Declaration of Trust, as contrasted to a will, is that there is no interruption of the management of assets, or of the collection and payment of income, as there is in the settlement of estates by will. Without recourse to any court, and normally without publicity, the Declaration of Trust carries on for the benefit of those next in line.

Because of the possibility that there may be a part of your assets not transferred to the trust during your lifetime, a "pour-over" will leaving any of your estate that is not in the trust to a trustee under the trust is usually advisable.

This then, is the Declaration of Trust. Its advantages are:

- A. Your care is assured and your funds are available to you and your spouse.
- B. Avoidance of probate (but this does not avoid the expense of preparing and filing the necessary income, gift, estate and inheritance tax returns).
- C. Simple to change.
- D. Flexible
- E. No stigma or a court finding you incompetent due to accident or illness.
- F. Avoidance of high expenses of conservatorship, or problems attempting to utilize joint tenancies or powers of attorney.
- G. Provides confidentiality.
- H. Quick disposition and distribution of your estate at death.

We hope you find this helpful. After you have had a chance to digest this information, please give us a call with any questions you might have.

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