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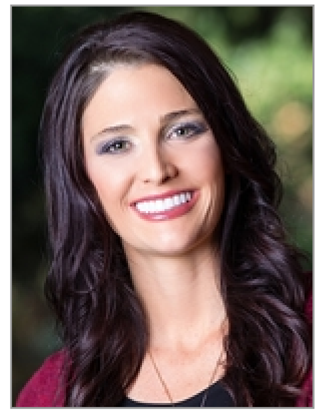
How To Avoid Creating A Worthless Trust



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Law360, New York (June 21, 2016, 11:48 AM ET) -- Has anyone ever suggested that estate planning is a waste of money? The benefits of estate planning are well known and include probate avoidance, keeping your affairs private after your death, ensuring that your wishes are carried out, and, in the case of a married couple, avoiding estate taxes following the death of the first spouse.

However, estate planning can sometimes be a waste of time and money.

In its most simplified form, estate planning should be considered a three-step process. The first step includes establishing the appropriate documents. In most cases this means establishing a trust and ancillary documents.

Many clients stop after step one, thinking that they have organized their affairs. Unfortunately, without step two, step one is inadequate at best. In step two, called "funding the trust;" the client and/or the attorney must transfer title to all appropriate assets into the name of the trust.

This means that, for any and all real property, bank accounts, investment accounts, stocks, bonds, etc., the title needs to be transferred from the name of the individual or married couple to him, her or them as trustee(s) of the revocable living trust.

Step three involves "administering the trust." This is the phase that follows the death of the grantor (the person or persons establishing the trust). Many people believe that since a trust was established, nothing else needs to be done after that. This is incorrect. The trust must be both established and funded during the life of the grantor, *and* administered in accordance with its terms after the grantor's death.

Most people have various goals and objectives in establishing a revocable trust. They want to organize their affairs during their lifetime in order to simplify the process after they pass. They want to avoid probate and enjoy the privacy that revocable trusts offer. They want to minimize costs associated with administering their estate and maximize tax savings. They want to ensure that their wishes are carried out and that the process is as easy as possible for their heirs.

Unfortunately, clients often think that once they have established a trust, they have accomplished the above goals and objectives. It is essential that every client clearly understand that establishing a trust is not enough. The funding process can be as simple as filling out a beneficiary designation or change of ownership form with your bank, insurance company or broker. However, certain assets (such as your home or other real estate) are more complicated to transfer, and require the assistance of an attorney to prepare a deed or other document transferring the asset to the trust.

As an estate planning attorney, one of the biggest mistakes that I see consistently is that a trust will be only partially funded. This means that title was transferred for some of the assets but not all of the assets.

Consider the case of a client I'll call Tom, who was in his mid-60s. He had established a revocable trust many years earlier, but it needed to be updated. Tom contacted me to see about amending and restating his trust. He owned a successful business, three pieces of property in California and four pieces of property in Arizona. He had a handful of bank accounts and other investment accounts.

As part of amending and restating his trust, I pulled the current title deeds for all of his real property. His properties in California had been transferred into the name of the trust, but the properties in Arizona were still in his name as an individual. I explained to Tom that if the title to these properties was not transferred into the name of his revocable trust, they could be subject to out-of-state probate. This means that his heirs would have to hire an attorney in Arizona in order to clear title to the properties. This would largely defeat his purpose in establishing his revocable trust.

Another commonly missed asset in the trust funding process is shares of corporate stock and LLC membership interests. People often overlook the fact that the actual shares of company stock need to be canceled and reissued in the name of the newly established trust. LLC membership interests need to be assigned to the owners as trustees of their revocable trust. If the corporate stock shares and LLC membership interests, as well as any other appropriate assets, are not transferred into the trust, the terms of the trust will not apply with regards to those assets.

A revocable trust that is not funded will not accomplish the client's objectives. In is only by establishing a trust and funding said trust that a client's goals can be achieved and the client can truly have peace of mind.

Furthermore, the client should understand that after they pass, the trustee should contact an attorney to ensure that the trust is administered properly. It is often during the administration phase that most mistakes are made, as the trustee does not adequately understand what they should be doing in order to carry out the wishes of the grantor or grantors. It is only through complying with the terms of the trust document that the grantor's wishes are carried out. Furthermore, there can be numerous opportunities for tax savings if the appropriate decisions are made, or dramatic tax consequences if the wrong decisions are made.

So when you think about estate planning, think about steps one, two and three. Step one is establishing a trust. This is only the starting point. Step two is funding the trust, i.e., making sure all appropriate assets are titled in the name of the trust, and step three is administering the trust. This third step must be completed to make sure the trustee is carrying out the grantor's intention, while also maximizing the tax planning and benefit that can accompany estate planning. It is only by successfully completing each step that estate planning is a worthwhile investment and not a waste of money.

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