The Trust

What is a Trust? In its simplest form, a trust is an agreement that provides for the management of property. A trust involves at least three parties:

- The ***Trustmaker,*** sometimes referred to as the settlor or grantor, is the person who creates the terms or rules of the trust;
- The ***Trustee*** is the person who agrees to accept the Trustmaker's property and manage it as the trust directs, and;
- The ***Beneficiary*** is the person who receives the benefit of the property held in the trust. Typically this is the Trustmaker during his lifetime and the children of the Trustmaker when the trust terminates.

The Revocable Living Trust Document

A revocable living trust is a trust document created during the Trustmaker's lifetime. A revocable living trust is often referred to as an *inter vivos* trust, which means *during life*. The trust is revocable due to the Trustmaker's ability to terminate or amend the trust.

The Trustmaker generally names himself as the Trustee and the beneficiary of the trust during his lifetime. The Trustmaker also names disability Trustees to act for his benefit in the event of his disability and death Trustees to manage the assets of the trust following the Trustmaker's death. The death Trustee is typically charged with the responsibility of settling the obligations of the trust and distribution to the beneficiaries.

After a Trustmaker has executed a revocable living trust, the Trustmaker then needs to fund his trust. Funding is the process through which the individually owned assets of the Trustmaker are re-titled and transferred into the trust. Once the revocable living trust has been funded, the Trustee will control all of the assets in the Trust's name. Inversely, a Trustee can not control assets not titled in the name of the Trust.

Wisconsin is a marital property state, and generally, married couples in Wisconsin create a joint revocable living trust. The married couple will then retitle their property into the name of their trust, which creates a funded trust.

Re-titling is performed in different fashions for different assets. For example, a checking account held in the name of John and Mary Sample will be funded into the Sample's Revocable Living Trust by re-titling the account in the name of John Sample and Mary Sample, Trustees of the Sample Living Trust dated (the date the trust is signed).

A similar action will be taken in regard to all of their other assets, such as real estate, automobiles, boats, investment accounts, securities, and any other asset with a title. Assets that do not have titles will be transferred into the trust by an assignment of personal property. An assignment of personal property is merely a document, which memoralizes the Trustmaker's act of transferring all of his property without title into his revocable living trust.

A well drafted revocable living trust will not only include direction on how to manage property, but also give instructions for how the Trustmaker or the Trustmaker's family and loved ones are to receive the benefits of the trust. The trust also makes provisions for how the Trustmaker is to be cared for in the case of the Trustmaker's disability and/or death.

A well-written living trust document will outline the Trustmaker's financial and personal intentions, be clear in its directives and be protectively locked within the law.

What may a Trust do?

Trusts can be tailored to achieve a variety of objectives. Trusts can provide property management for yourself, your spouse and children, and others that may be dependent upon you. A trust is also an excellent devise for management of property for the benefit of a beneficiary for whom outright property ownership is inappropriate, burdensome, or impossible. Trusts also are established to give lifetime use of property to a person (or a group) while ensuring that others eventually will inherit the remainder of the property. This can be particularly effective if the Trustmaker has the goal of avoiding estate taxes in subsequent generations, as well as, in second marriage situations. A fully funded Trust will avoid probate, which should reduce or eliminate the delay and costs of distributing property upon death normally associated with Probate.

Revocable living trusts can sometimes be difficult to conceptualize, especially for people who have not read or seen one actually work. An analogy of "baby-sitter instructions" can be used to describe a living trust. When parents leave their minor children with a baby-sitter for a getaway weekend, the baby-sitter typically receives several minutes of verbal instruction accompanied by written notes detailing all sorts of matters that need thought, attention, and action. Even after leaving, it is not uncommon for parents to stay close to a telephone and frequently check in to add to add instructions and confirm that all is right with their children and household?

A well-drafted living trust is like a set of baby-sitter instructions for the care of loved ones. The instructions tell the Trustee, *the baby-sitter*, how to care for the beneficiaries. The instructions are as detailed as possible to cover all of the expected and unexpected events that might occur. Not only do these instructions tell the Trustee how to use the money and property to care for the beneficiaries, but will frequently explain to the Trustee why the Trustmaker has left those instructions.

When you think of baby-sitter instructions, you might think that they would only apply to loved ones. On the contrary, one of the most important features of a Revocable Living Trust is its ability to provide instructions for the care of the Trustmaker. A Revocable Living Trust is valid and operational the day it is signed. If the Trustmaker becomes ill or incapacitated, the living trust controls the Trustmaker's property for his benefit or for the benefit of others without the intervention of the court. By contrast, a will can only function after the death of its maker and is unfortunately subject to probate; a Revocable Living Trust cares for its Trustmaker immediately and avoids both a living and death probate.

Avoiding Living and Death Probate through a Revocable Living Trust

A fully funded and properly executed revocable living trust avoids both living and death probate. It is generally accepted that avoiding probate is beneficial to the family. Most of our clients who have been involved in the probate process with their own parents want to avoid the necessity of having their children deal with the court system, and its inherent costs and delays.

Death probate is a legal proceeding designed to provide court imposed supervision over the property of a deceased person. This is done so that creditors may be paid, property may be protected for the benefit of disabled parties, and/or distributed to the heirs of the deceased. Probate is necessary due to the fact that the deceased party no longer has the ability to give his assets to his heirs, to pay his debts, or to guard an asset for a disabled loved one. After a person has died, the court must then carry out these duties pursuant to the decedent's will or the intestacy statute. If a person dies without owning property, such as when it has been previously re-titled into a trust, there is no need for probate.

Trusts, unlike Trustmakers, are immortal. For this reason, assets placed in a revocable living trust never need pass through a probate process. A revocable living trust avoids probate by providing a means for paying a deceased party's creditors, protecting assets for disabled loved ones, and distributing assets to the heirs. The successor Trustee is given instructions on how to handle the above mentioned tasks. In summary, a Trustmaker has entered into an agreement with the successor Trustee to perform the tasks performed by probate court, and therefore, no probate court proceeding is necessary. The probate process is eliminated in its entirety, including its time delays, court appearances, and administrative costs.

A living probate occurs when a person can no longer handle his own affairs. Upon incapacity, an interested party can petition the court to authorize a guardian to take control of the person's property. The court then appoints a guardian to make decisions about the person's well being and to guard their property. Unfortunately, we frequently see arguments among family mem-

bers as to who should be the guardian, and lengthy court battles ensue. Even when the family agrees that the parent is incapacitated and the person who will serve as guardian, it is a costly and time-consuming process to have a guardianship created.

A revocable living trust also eliminates the need for a living probate. If a Trustmaker is found to be incompetent (as defined by the Trustmaker), the disability Trustee steps in to act in his stead. This relieves the probate court of any need to name a guardian to make decisions for the disabled party or guard the disabled party's property. Unlike with a guardianship, the disability Trustee does not have to provide annual reports to the court, which greatly reduces his burden.

Additionally, clients that utilize a revocable living trust do not have to file their trust documents in a public forum. All probate files are public records and subject to public scrutiny. Parties that utilize a will or die intestate (without a will) must file a formal inventory with the court which includes a description and valuation of all of their assets, a list of their debts and creditors, and to whom all of their property is to be distributed. Clients with a fully funded revocable living trust, however, may keep all this information private, as no court filings are required.

We also find that our clients, who create and fund revocable living trusts, are forced to organize and document their estates while they are living and able. This information and organization is greatly appreciated by their successor Trustees who must carry out the direction of the trust. Often times in a probate proceeding, the greatest challenge for the personal representative and attorney is to track down the deceased person's property and debts. As you may imagine, this process is quite difficult when the owner of the property is no longer available to answer questions about what he owns and whom he owes.

What Is the After-Death Cost of a Living Trust-Centered Estate Plan?

Some living trust critics argue falsely that the after-death costs of administering a trust are equivalent to the average probate costs. The results of extensive research published in Esperti and Peterson's, *The Living Trust Revolution,* indicates just the opposite. The authors' research revealed that a properly funded revocable living trust with assets of less than $650,000 incurred after death costs of less than one-half of one percent. Their research also revealed that estates of the same size incurred a cost of 5-6% due to the probate process.

In our experience, the after-death costs for larger estates that utilize a fully funded living trust plan are nearly always less than one percent. Not only does all of the evidence show that a living trust-centered plan is far superior to will planning/probate, it conclusively proves that fully funded revocable living trusts cost significantly less than will planning/probate!

Considerations In Using A Trust

Why consider creating a Trust?

Everyone who wishes to accomplish complete estate planning objectives should consider and implement a living trust-centered plan. A living trust-centered plan is the only type of estate planning that can meet all of the elements of "our definition" of effective estate planning.

Here is our "definition" of effective estate planning

I want to control my property while I am alive.
I want to take care of myself and my loved ones if I become disabled.
I want to give what I have to whom I want, the way I want, and when I want.
If I can, I want to save every last tax dollar, professional fee, and court cost possible.

Reason One: Control

The most important element of our definition of estate planning is ***control***. The most important step you need to take to gain control of your assets is to create an effective estate plan. If you do not write your own plan, the state will write it for you.

If you die without an estate plan, you are deemed to have died *intestate*. In this case, state laws direct how your assets are to be inventoried, valued and distributed. If you should become incapacitated without affecting formal planning for that event, there is another set of state laws that directs what will happen to you and your property.

State laws also control other aspects of a person's life and property. For example, joint tenancy property may be tied up in the courts if one of the joint tenants becomes incapacitated or if there are creditor problems.

To maximize estate-planning control, you must take responsible action to implement and use your own estate plan to dictate your wishes, rather than leaving it to the State.

Reason Two: Incapacity

After control the definition of estate planning addresses incapacity. Statistics show that the odds of suffering a debilitating mental or physical disability within the next year are about six times greater than the odds of dying. Due to the great risk of incapacity it is imperative to plan for such a life-changing event.

Through proper and effective planning you can control how you are cared for during incapacity. Additionally, you may purchase long-term health care and/or disability insurance or implement savings plans to guarantee the availability of resources at your time of need.

Estate plans can clearly direct how property and money should be used for the incapacitated and your loved ones, thereby overruling the state's own dictates. In order to exercise this control, one must do so while you are still competent.

Reason Three: Giving Your Property to Whom You Want

After you have taken control of your property while you are alive, and planned for your incapacity, it is then time to create your plan for the distribution of your property.

Please remember the Trustmaker is able to transfer property during life as well as at death through the use of an effective trust plan. Our laws allow a Trustmaker to control his property, and to distribute it in any manner he chooses with amazing latitude and flexibility. Of course, one must initiate the process while one is still able.

Reason Four: Planning for Taxes and Expenses

The final part of our definition of estate planning addresses taxes, fees, and costs. One of the most famous quotations about taxes comes from Judge Learned Hand who wrote:

> *Anyone may so arrange his affairs that his taxes shall be as low as possible; he is not bound to choose that pattern which will best pay the Treasury; there is not even a patriotic duty to increase one's taxes.*
> (Gregory v. Helvering, 69 -F.2d 809)

The same is true for paying professional fees and court costs. If you arrange your affairs to reduce or eliminate administrative expenses, a greater portion of your estate will pass to your heirs. Proper planning eliminates all unnecessary expenses and costs.

While saving on taxes and expenses is an important aspect of effective estate planning, please be assured that we will not recommend actions that would compromise the goal of maintaining control. The secret of good planning is to reduce taxes and costs while retaining control.

The Trustee

Who may be a Trustee?

Because each trust is different, there is no simple answer as to who should be chosen to act as Trustee. The selection of a Trustee is an important matter and should be discussed with the Trustmaker's estate planning attorney when drafting the trust.

A corporate Trustee (a bank trust department) is sometimes chosen when a trust's assets are fairly liquid and is large enough to warrant paying the fees charged by corporate Trustees. Trustmakers should review a corporate Trustee's fee schedule and compensation agreement before asking it to act as Trustee. Corporate Trustees are occasionally appointed when there are no individual Trustees available.

Most often individual Trustees are chosen because of their relationship to the Trustmakers. Individual Trustees often do not charge fees while also receiving the benefits of the trust as beneficiaries. Usually individuals are a better choice when there are unique assets such as a closely held family business or a farm.

The Trustee, as the name suggests, must be someone in whom the Trustmaker has great faith and trust. The Trustmaker must be comfortable leaving the Trustee in charge of his property. A Trustmaker may name his spouse, children, grandchildren, nieces, nephews, or friends, to be Trustees.

What is the Trustee's responsibility?

When you agree to act as Trustee you become a fiduciary. You have a duty, created by accepting the job of Trustee, to carry out the terms of the trust. You are responsible for managing and holding the property within the trust for the beneficiaries.

As Trustee, you have the powers and duties provided in the trust document, as well as those provided in your state's statutes. The statutory powers include the power to sell, mortgage or lease property in the trust and the power to vote stock that is part of the trust.

What should I do when I become a Trustee?

Read the Trust Agreement from beginning to end. Concentrate on the powers and administrative duties of the Trustee. If in doubt about your powers, discuss it with your Trust Attorney.

Your first actions as Trustee should be to:

1. Sign the "Successor Trustee Affidavit. This will be provided to our R-Way members at no charge. The original signed and notarized form should be placed in the Trust Portfolio.

2. Make sure all property is titled in the name of the Trust. If not, consult your trust attorney for further direction.

3. Obtain an inventory and appraisal of Trust property.

4. Obtain a copy of the Affidavit of Trust to use in management of assets.

5. Ask your Trust Attorney to prepare an application for a federal identification number from the IRS. This number commonly is called an employer identification number. For the trust, it is the equivalent of your personal Social Security number. It is used as your Trust identification number on all future tax returns and by corporate stock transfer agents. While the Trustmaker acts as co-Trustee, his Social Security number may be used for the trust.

6. Open checking account in the name of the trust at a bank or credit union where deposits are federally insured.

7. Open a set of accounting records to record the trust's assets, cash received, checks disbursed and other transactions such as the purchase or sale of assets. Sample accounting records are found in the Appendix. If the transactions become many and complicated, you should not hesitate to retain professional accounting assistance. The expense of the accountant can be paid from the trust assets.

8. Trustmakers often provide that more property can be put into the trust after its creation. You should consult with your Trust Attorney about these transfers. Transfer documents may be required.

9. Keep copies originals of all documents you sign as trustee.

May I hire people to assist me?

Yes. You should get the help you need to carry out your duties as Trustee. For instance, if there are many trust assets, it is common to hire an investment advisor or even make arrangements with a trust department to manage the investments through a custodial account. You should get legal and accounting advice as needed. The reasonable costs of these services are expenses of the trust and can be paid from the trust assets.

When may I distribute property after the death of the creator of the trust?

Do not distribute or sell trust assets without your professional advisor's approval. There can be tax and other serious problems if property is sold or distributed too soon. Your advisor can advise you as to when it is appropriate to make a distribution. The Trustee should obtain receipts from beneficiaries who receive property from the trust.

What fees may I charge for my services?

You can charge reasonable fees for your services, unless the trust document specifies otherwise.

In deciding what is reasonable, you should consider:

- what the customary fees are for such services;
- any unusual skill or experience you have that you are using as Trustee for the benefit of the trust;
- the amount of risk and responsibilities you have assumed as Trustee;
- the amount of time spent by you as Trustee;
- the character of the trust work, whether routine or involving skill and judgment; and
- any fee estimate you gave in advance.

Your Trustee fees are reportable on your income tax returns and can be deducted by the trust as an expense. If there is a dispute about your fees, a court may decide what is fair compensation. The court can reduce or deny fees to you if you don't carry out your duties following the law and the terms of the trust.

You are not required to take fees and can waive fees that are established in the trust agreement.

How must I act as a Trustee?

You must act in the highest good faith toward the beneficiary of the trust. "Good faith" means not taking advantage of another, even through technicalities of law. You must follow the instructions of the Trust Agreement and use ordinary care and diligence even if you are not receiving any compensation for your trustee services. You must invest the funds of the trust properly to preserve the principle and earn a reasonable rate of return. Get advice from your Trust Attorney and investment advisor as to what investments are prudent for this trust. Remember foremost, that you are carrying out the wishes of the Trustmaker throughout the process.

The Trustee may be required to provide all beneficiaries with interim reports

during the term of the trust, and a final report if the assets are distributed and the trust is terminated after the death of the decedent. The trust agreement may also require regular reports to the beneficiaries by the Trustee if irrevocable trusts are established after the death.

Are there things I must not do?

Yes. There are several things you must not do.

1. You may not deal with the trust property for your own benefit or for any purpose not connected with the trust's purpose. This means, unless the trust specifically says you can, you cannot buy property from the trust or make loans, gifts or donations to yourself, your friends or your relatives. This includes gifts or donations to churches or other charities.

2. You cannot do anything that would give you an advantage over a beneficiary or take part in any transaction against a beneficiary unless the beneficiary gives you permission after knowing all the facts.

3. You cannot mix your property or money with the trust property or money. In other words there should not be any of your money in the trust checking account. Property should be clearly identified so that there is no question whether it belongs to the trust or to you.

Other Legal Documents

Pour-Over Will

For every living trust-centered plan there should be a short, single-purpose, "fail-safe" will. This special kind of will, called a "Pour-Over" Will, must be signed so that any property not put in the trust name will end up in the trust after Trustmaker's death.

A Pourover Will simply says:

I leave any property owned by me at my death, and not already in my trust, to my trust.

Property in an individual's name at death is subject to probate. If there is no will leaving this property to someone, it passes to a person's heirs as directed by the state law. It is best if all assets are titled in the name of the trust so that the revocable living trust instructions control all property of the decedent after death.

Durable Special Powers of Attorney for Funding

A Durable Special Power of Attorney for Funding is an integral part of every well designed living trust-centered plan. It grants an agent the power to transfer property into the trust if the Trustmaker becomes disabled and is unable to do it himself. This power is considered durable because it survives disability. For example, if a Trustmaker has a stroke that totally incapacitates him, and he has not transferred all his property into his trust, those people to whom he has given such a power can transfer his property into his trust.

We believe that a Durable Special Power of Attorney for Funding must be "special." "Special" means that whoever is named in the Durable Special Power of Attorney for Funding can only transfer property into the trust; that person cannot sell, take, use, or give the Trustmaker's property to anyone else. Once property is in the trust, it is administered pursuant to the Trustmaker's specific instructions.

Additional Documents Helpful to the Trustee

Living Trust-Centered planning is the term we use to describe an estate plan in which a living trust is used as the foundation. But the living trust is only a foundation. A total estate plan requires additional documentation to make it effective for purposes of meeting the definition of estate planning. A living

trust-centered plan must have, at an absolute minimum, the following important legal documents and information:

- The revocable living trust document
- A "Pour Over" Will
- Durable Special Power of Attorney for Funding
- A Health Care Power of Attorney
- A Living Will
- A Memorandum of Personal Property or some other mechanism to dispose of special personal effects
- An anatomical gift form, if applicable
- Burial and memorial instructions
- Information about all Trustmaker's property
- The location of all your important papers and financial information
- Lists of all advisors and those people or institutions that should be contacted at your disability or death
- Listing of all Life Insurance
- Listing of all Retirement Plans (qualified and non-qualified)
- Marital Property Agreement

If this looks like a pretty comprehensive list, it is supposed to. A living trust-centered estate plan is comprehensive.

All of these documents and information are vital to the Trustee's ability to effectively manage the Trust property.

Summary

As you can see, there is a great deal of similarity between probating an estate under a Will and settling your Living Trust. The major difference is that a Trust settlement takes place outside of the court system. This makes it faster and is less expensive.

When someone dies, and they have a Living Trust, the Trustee is required to do a number of things to properly administer the Trust. Trust administration or termination is not automatic. We do not recommend you attempt to do this yourself, without the assistance of professionals. Generally, the services of an Trust Attorney and CPA will be required. If you would like us to complete the Trust termination for you, please give our office a call and we will be happy to take care of the legal work quickly and efficiently.

This is only a convenient guide. It is general in nature and should not be relied upon as a substitute for professional tax and legal advice.

Backup Trustees

Instructions for Back-up Trustees

If you have been named as back-up Trustee for someone, you are probably wondering what you should do when that person dies or becomes incapacitated.

At Disability

- Check the trust document for specific instructions regarding:
  - How to determine disability
  - Any special directions for type of care (in-home care, assisted living)
  - Who should benefit from trust funds during disability? (Trustmaker only? Spouse? Kids? Other family members?)
  - Any stipends to be paid to family members who provide care?
- Contact the attorney who prepared the trust document to be sure there were no amendments or other documents (property powers of attorney, for example, to cover unfunded property) you do not have in your possession.
- Obtain written certification of disability from a treating physician pursuant to trust direction.
- Notify banks, brokerage firms, investment advisors, etc., that you are now the Trustee for this person. Documents which you may be required to produce may include:
  - Two statements of incapacity from physicians
  - An affidavit of successor Trustee, which should include articles of the trust that name you as successor trustee, and describe all the Trustee's powers and duties
  - A legal form of personal identification
- Secure and inventory any property, especially real estate. Make sure you have keys and take care of any utilities.
- Make sure assets are funded into the trust, especially if the disability is severe, long term, or terminal:
  - Look for and USE any durable power of attorney for property which the disabled person may have signed

- Make sure auto and homeowners insurance is in effect and up to date
- Transact any necessary business for the incapacitated person. You can apply for disability benefits, receive and deposit funds, pay bills, maintain investment accounts and, in general, use the person's assets to take care of him/her until recovery or death.
- Keep a ledger of bills paid and any income received.

At Death

Be aware that THERE IS TIME to consult with an attorney, accountant, and other advisors. Take first things first:

- A surviving spouse is often not in the best frame of mind to address the necessary financial issues immediately after a death.
- Inform the family of your position and assist them as needed: funeral arrangements, flowers, cemetery marker, announcement in paper, special wishes for service, notifying friends, relatives, employer, etc.
- Order at least 5 certified death certificates (you can usually get these from the funeral home). You will need these to transfer titles, etc.
- Notify the bank so you can start writing checks. The bank will probably want to see a certified death certificate, an affidavit of successor Trustee (similar to the affidavit used for disability) and some form of personal identification.
- Notify Social Security, pension funds, and any other associations who may provide a death benefit.
- Make claim for life insurance proceeds payable to the trust.
- Secure and inventory property, especially real estate. Make sure you have keys, make arrangements to keep the utilities on (or turn them off), insurance is in force, mortgage is paid, etc.
- Make a list of all assets, and their approximate date of death values.
- Make a list of all liabilities.
- Start a ledger of accounts payable and income received.

Now you are ready to meet with your attorney, your financial planner, and/or accountant for advice and guidance for:

- Preparation of the necessary forms 1040, 1041, and 706.

- A final income tax return (1040) is due by April 15 of the year following the Trustmaker's death. (It covers January 1 to the day of death)

- A fiduciary return (1041) MAY also be required. This return reports any income earned by the trust between the time of the Trustmaker's death and **PRIOR to the distribution** of property to the beneficiaries

- A federal estate tax return (706) must be filed 9 months of the date of a Trustmaker's death if the total gross estate exceeds the unified credit amount (currently $650,000). Payment of any federal estate tax owing is due at that time

Special Note: Property must be distributed in this order (make sure you get a receipt signed by each beneficiary stating that he/she has received the property):

1. Specific bequests; specific property given to one person.

2. Remaining personal property

3. Residue: Divide cash and transfer titles of property according to trust instructions.

Notes: