

Misconceptions of Will and Trusts

There is a major misconception today regarding Wills and Trusts. Many people think if they prepare a Will their estate will be easily settled upon death, and that Trusts are only for the wealthy. Neither of these commonly held beliefs is accurate.

When you die your assets will be distributed by the probate court. If you write a Will your assets will be distributed as you decide. However, if you die without leaving a will your assets will be distributed according to state laws. A Will allows you to dictate how your property will be divided and who will be in charge of distributing it; however, the Will must first be approved by the probate court.

Probate is the process of determining how a decedent's property is transferred to the rightful beneficiaries, which can be a lengthy and costly procedure. A probated estate must remain open for a minimum of six months to allow creditors to file their claims against the estate. During that time period, assets and funds are not accessible by beneficiaries without petitioning the court. The cost of probating an estate is generally between 2%-8% of the total estate, however if the Will is contested, attorney's fees may be much more. An alternative to writing a Will is to create a Living Trust through Estate Planning.

Estate Planning is the process by which an individual or family arranges the transfer of their assets in anticipation of death or incapacity. An estate is the total property, real and personal, owned by an individual upon their death. If all of these assets are transferred to a Living Trust, of which you are the Trustee during your lifetime, your beneficiaries may avoid the hassle and expense of probate court upon your death.

Another benefit of creating an Estate Plan is the ability to protect yourself and your family in case of incapacity. A Power of Attorney for both property and health care are very important documents if you or your spouse should become unable to manage finances or make decisions regarding medical care. Without these documents in place, the court will determine who should make some of your most important life decisions; often times the court does not appoint the representative you would have chosen.

Avoiding probate court and planning for incapacity are not the only benefits of Estate Planning. Married couples may experience significant estate tax savings by placing their assets in a Living Trust. Married couples who create a Living Trust are able to use both spouses' estate tax credits upon the death of the second to die. This planning technique may prevent up to 2 million dollars worth of assets from being subject to the 45% estate tax.

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Estate Planning can also provide tax benefits for couples if one spouse is not a US citizen. In a situation where the non-citizen spouse outlives the citizen spouse, generally the assets of the deceased do not qualify for the marital deduction when passing to the non-citizen spouse. Through Estate Planning your Attorney can create a special type of trust that will allow the citizen spouse's estate to qualify for the marital deduction and be taxed only upon the death of the non-citizen spouse. Ultimately, creating this type of trust will provide additional resources for the surviving spouse during the remainder of their lifetime.

There are a variety of different strategies that can be utilized to minimize estate tax consequences and eliminate the costs and hassle of probate court. For consultation with an Estate Planning Attorney, contact Hiten R. Gardi, of Gardi & Haught, Ltd., at (847) 944-9400 or e-mail at hgardi@gardilaw.com.

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