

Where there's a will there's a way, but trusts are generally preferred

By ALAN J. ORTBALS

In estate planning, trusts are preferred over wills - and you don't have to be wealthy for it to make sense.

"Probably 95 percent of estate planning these days is done with trusts and not wills," said Gary Reuter, a shareholder in the law firm of Greensfelder, Hemker & Gale PC. "I can accomplish what I need to accomplish both from a tax standpoint and from a proper disposition of a person's assets standpoint with either a will or a trust. However, trusts are used extensively and predominantly now because they provide a quick way to distribute assets... and I've even done trusts for people of modest means. In Illinois, if you own any real estate - or, in the alternative, if you have assets collectively in your own name exceeding \$100,000 - you're subject to probate. Simple trusts for people of modest means avoid all that. It is the predominant estate planning tool," he added.

There are multiple reasons to avoid probate, according to Bhavik Patel, a shareholder in the law firm of Sandberg Phoenix & von Gontard PC. You have the time and expense of going to court. It's a public process, so everyone has access to all of the details of your estate. There are other costs involved like executor fees. There are a variety of notices and publications that have to be given to creditors and others. And, it's time consuming - anywhere from six months to years.

"You could do it in as little as a few months," Patel said. "However, sometimes we attorneys advise not to do it that quickly because there may be creditors out there and if the assets are all distributed out to the final beneficiaries, it can

expose the executor to personal liability. The attorney technically represents the personal representative who is in charge of the estate, so we often advise our executors not to distribute the money - at least not all of it - until they know for sure that no one is going to come after any of it. Creditors come out of the woodwork all the time. So that's why prudent practice would dictate that it's probably going to be six months to a year before you really complete probate," he added.

By contrast, a trust agreement makes the whole process simpler and quicker, according to Joe O'Keefe, a shareholder with the law firm of Mathis, Marifian & Richter Ltd. O'Keefe says a lot of people think that you need to be a millionaire to set up a trust, but that's not the case. It can be helpful for people even of modest means.

"One example," O'Keefe said, "would be a person who dies in St. Clair County but owns a piece of property in Missouri. If he owns that in a revocable trust, his trustee takes care of it no matter what state that real estate is located in. But, if he dies with just a will, then there's going to be a probate estate in St. Clair County, Illinois and there's going to be a probate estate in Missouri and in each additional state where he owns a piece of real estate."

Trusts are also useful tools while a person is alive, says O'Keefe. A trust also avoids what's called a living probate or guardianship - in the event that a person is incapacitated, his trustee can take over and pay his bills and handle his affairs without needing to go to probate court to be declared his guardian.

A trust isn't the only way to avoid probate, according to Patel. Jointly titled

property with one's spouse will avoid probate because when one spouse dies, everything automatically passes to the other spouse.

"If you can title your property in a way to where you help yourself avoid probate, that may be acceptable to a particular client for their estate plan," Patel said. "Others, however, want more security, more protection, more flexibility, less court involvement and more estate tax planning. 'That's when you start falling clearly into the camp of a trust over a will.'"

For business owners, estate planning is particularly important. For most small business owners, the interest in the business accounts for most of their wealth, says O'Keefe. A revocable trust is a beginning step to set up some controls as to how the business is going to pass at death or incapacity and who controls it to make certain decisions.

"A lot of business owners think about succession issues, but it's put in their 'to do' pile," O'Keefe said. "They're busy running their business on a day to day basis and, if it's not screaming at them, they want to focus on that business. A lot of clients do start out that way but I always remind them that you don't have to do everything at once. It sure makes sense to at least get a foundation of a will, revocable trust and powers of attorney. At that point, if there's additional planning options to take care of, you can do it as you go, but you certainly want to have a basic safety net."

Patel says that business owners have a particular reason to avoid probate. When you have assets that have to go through probate, you have to value all

of the property - including the business - and business valuations can be very expensive. The judge will also be involved in questions regarding the succession of the ownership or the liquidation of the business, something most owners would certainly like to stay away from. A trust, on the other hand, can potentially avoid all of that.

But business owners really need to take it one step further, according to Patel. "Business owners really need to have active discussions with other family members or business partners as to the succession planning of the company," Patel said. "They need to work out how to best structure and set up the succession of the business from one generation to the next if it's a family-owned business, or from one partner to the surviving partner if one dies and the other doesn't want to get into business with the deceased partner's family. Businesses should really address those situations," he added, "because I see so many times companies fail because those issues were not addressed before the fact."

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Point: Congress and The Estate Tax

Why America needs a strong estate tax

America is a tremendous nation that faces huge challenges over the coming years. Millions have lost their jobs and homes during this economic crisis, and our nation's long-term budget is on an unsustainable path.

Despite these facts, there are still some who want to end the estate tax, which would amount to yet another irresponsible tax break for the wealthy. Sadly, for some of our elected leaders, like Senators Kyl and Lincoln, passing new tax cuts for wealthy trust fund heirs is a higher priority than revitalizing our economy or balancing our budget.

Why do we need an estate tax? Our government plays a vital role in promoting individual opportunity and national prosperity. Simply put, taxes are the price we pay to live in a stable, secure and thriving society with a decent quality of life. The estate tax generates

billions in revenue from those most able to pay. The wealthiest Americans have benefitted the most from the investments that our country has made in an educated workforce, reliable transportation, technology and a legal system that makes commerce possible.

Middle class Americans are finding fewer opportunities for success because education and other paths to advancement are increasingly out of reach. The estate tax helps to even the playing field by slowing the concentration of power in the hands of those born into great wealth. As investor Warren Buffett said, "Dynastic wealth, the enemy of a meritocracy, is on the rise. Equality of opportunity has been on the decline. A progressive and meaningful estate tax is needed to curb the movement of a democracy toward plutocracy."

President Bush repeatedly slashed the estate tax. Since 2004, only millionaires paid the estate tax. At its weakest in 2009, estate tax law exempted the first \$7 million for a couple (\$3.5 million for an individual), so only 0.25 percent of the people who died - two in a thousand - paid any tax. That means in 2009, two

children of a wealthy couple could each inherit more, tax free, than the average American earns in two lifetimes. But unlike the lucky heirs who won the genetic lottery, these Main Street workers will be paying taxes on all of their earnings.

Our country has had an estate tax since 1916, but there is no estate tax in 2010, and then it returns in 2011. What caused this crazy situation? The anti-estate tax campaign has been funded by a few super-wealthy families who own giant companies like Mars Candy, Gallo Wines and Wal-Mart. Their lobbyists joined President Bush to push for the nonsensical law that eliminates the estate tax in 2010, then brings it back in 2011. They're still calling for repeal or reduction of the tax, saying it hurts farmers and small business owners.

According to the Congressional Budget Office. The Tax Policy Center found only 110 small business and farm estates in the nation would owe any estate tax in 2011 under the 2009 estate tax rules, and virtually all would have enough cash assets to pay the tax.

Some conservatives claim ending the estate tax will create jobs, referring to

a paper by Douglas Holtz-Eakin. The politically-moderate Tax Policy Center sharply criticized the report, stating it "relies on back-of-the-envelope analysis rather than empirical data [and] gets the economics all wrong. ... The estate tax can't have much effect on hiring by small business because hardly any owners ever face the estate tax. Most small businesses are worth far less than the exemption level. ... With no tax on estates, the lost revenue will have to be made up elsewhere. ... Depending on how this other revenue is generated, ... estate tax repeal could depress future economic growth."

Small business owners and farmers are tired of falsely being used as poster children for the super-wealthy. In fact, many small business owners and farmers, including the 200,000-member National Farmers Union, actively support the estate tax.

So what should we do about the estate tax? Most Americans think that the wealthy are not paying their fair share of taxes. A recent Quinnipiac University poll found that 60 percent of Americans from both major political parties think raising income taxes on households making more than \$250,000 should be a main policy for reducing the deficit. Another poll found a majority of the American public supports the estate tax, with 57 percent saying they prefer leaving the estate tax as is, or reforming it.

Under current law, the estate tax in 2011 will exempt \$2 million per couple, and the top tax rate on amounts over that will be 55 percent; less than 1 percent of estates would pay any tax. The cost of continuing the weakened 2009 estate tax rules (\$7 million exemption per couple, 45 percent rate) would be large: \$253 billion over the next decade. Far worse, the proposal by Senators Kyl and Lincoln for a \$10 million exemption per couple and a lower 35 percent rate would cost yet another \$60 billion to \$80 billion.

Those costs are why United for a Fair Economy is working with a broad coalition called Americans for a Fair Estate Tax to re-establish a strong estate tax. We support an estate tax similar to H.R. 2032, the bill proposed by Rep. McDermott, which would cost about \$200 billion. It would set the exemption level at \$2 million per spouse, and establish progressive tax rates starting at 45 percent for smaller estates and returning to the pre-Bush rate of 55 percent for estates above \$10 million - all indexed for inflation.

Congress is facing important choices on taxes this year. The middle class works hard, plays by the rules and pays their fair share in taxes. Now it's time for Congress to ensure the wealthy pay their fair share, and restore a strong estate tax.

Lee Farris is Estate Tax Policy Coordinator at United for a Fair Economy. She is co-author of the report, *Spending Millions to Save Billions, The Campaign of the Super-Wealthy to Kill the Estate Tax*. UFE is online at <http://www.faireconomy.org>.



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