

LAW OFFICES OF MICHAEL E. GRAHAM

10343 HIGH STREET, SUITE ONE
TRUCKEE, CALIFORNIA 96161-0116

TELEPHONE 530.587.1177 ■ FACSIMILE 530.587.0707

MICHAEL E. GRAHAM †

michael@meglaw.com

REVOCABLE LIVING TRUSTS

A revocable living Trust is akin to creating a basket in which you hold your various assets. You can put any assets you own, with value, into the basket at any time, and likewise, you can remove them from the basket at any time. The person creating the Trust is referred to as the “Trustor”, “Grantor” or “Settlor.” These terms are used interchangeably.

During your lifetime, the revocable living Trust, of which you serve as the Trustee, and retain the right to amend or revoke, can serve as a useful management tool. It is desirable to transfer all of your assets to the Trust, at the same time as you create the Trust, for easy management.

California institutions such as banks, lenders, and title companies have become so accustomed to dealing with trusts that the administration of a revocable trust during the Trustor's lifetime is relatively easy. Formerly, banks and other institutions were wary of dealing with trusts because of uncertainty over the powers of the trustees. California, however, has established a statutory form of Certification of Trust that provides protection for any institution relying on the certification. See California Probate Code §18100.5. The statutory form is widely accepted and has led to standardization even among institutions that retain their own Certification of Trust forms. The Certification of Trust provides a financial institution with documentation of the Trustee's powers. It also preserves the confidentiality of the dispositive terms of the trust that need not be disclosed in the Certification. A Certification of Trust that relates to an interest in real property may be recorded in the office of the county recorder in the county in which the property is located. A successor Trustee may execute and record an Affidavit of Change of Trustee if title to an interest in property is affected by the change of Trustee. The recordation establishes a presumption concerning the identity of the successor Trustee. See California Probate Code §§18105, 18108.

The primary advantage of a revocable trust is that assets transferred to the revocable trust, before the Trustor's death, are not subject to the provisions of the Trustor's Will and are therefore not subject to a Court Probate proceeding. California retains a more formal probate procedure with greater monetary and time costs than the procedure used by Courts in the mid-west and eastern U.S., which is encouraged by the Uniform Probate Code. In general, probate proceedings require notices (*e.g.*, for initial petition, petitions for instructions, and petition for final distribution) and court hearings that increase attorney time and costs. Sales of property and the handling of creditor claims are examples of such proceedings. Probate fees in California can be substantial, and include statutory fees as well as extraordinary fees that are commonly granted by the probate court.

Avoiding probate:

- May save significant administrative costs.
- Allows the trustee to act more quickly than an executor can to administer and distribute

the estate independent of probate court supervision. The initial petition to administer the estate, a petition to confirm sales of property, petitions for instructions, and the petition for final distribution all have required notice periods that contribute to the time delays of a typical probate. Except for the filing of the estate tax return, a typical trust often can be administered in a few months, whereas a typical California probate estate lasts a minimum of a year to 18 months.

There is a common misconception that little or no post-death administration is required if the living trust is fully funded. Obviously, administration of a living trust involves many of the same tasks that are required in a probate proceeding, *e.g.*, collecting information, valuing assets, selling assets, settling debts and claims, preparing and filing tax returns, paying taxes, and transferring assets, albeit without the requirement of filing court forms and trying to satisfy Court personnel with respect to formalities in the Court system.

Other good reasons for using a revocable living Trust are some of the following:

- **PRIVACY** Maintains greater (but not complete) confidentiality of the Trustor's estate plan and the family's privacy. Because of the notice requirements of California Probate Code §16061.7, the trust loses some of the confidentiality a Trustor may desire, as family members and others named in the Trust are entitled to see the provisions upon the death of the Trustor. Even if a Trustor wishes to keep the terms of the trust private, he or she is not allowed to do so under this Probate Code section.
- **CONTROL** With a revocable living Trust, in which you serve as your own Trustee, you retain full and complete control over your assets titled in the name of the Trust.
- **FLEXIBILITY FOR CHANGE** A revocable living Trust contains provisions which allows to change the terms of the Trust, by amendment, or if you desire, to completely terminate the existence of the Trust, with all assets being restored to your individual name.
- **MULTI-STATE FLEXIBILITY** May eliminate the need for multiple probate proceedings if assets are located in other states. Additionally, your successor Trustee may reside in other states and still serve as the Trustee of the Trust, however, there may be certain tax effects, which may be adverse, depending upon each state's applicable law.
- **AVOIDS CONSERVATORSHIPS** If you become unable to manage your own affairs, in the event of your lifetime disability or incapacity, the successor Trustee of your Trust may manage the assets within the Trust, which avoids the costs and inconvenience of a formal conservatorship proceeding in a Court.
- **CONTINUITY** After your death, the Trust continues in effect if you decide to retain the assets in Trust for children, or other beneficiaries, and will not terminate until their death, or for a term of years, or upon the occurrence of an event (like remarriage) at which time the Trust would be distributed or continue in effect and provide benefits for others.

- **TAX SAVINGS** In the area of Estate Tax and Generation Skipping Transfer Taxes, it is necessary to use trusts in order to avoid future Estate and Gift tax. For instance, we can establish trusts for the benefit of a surviving spouse with ultimate disposition of the assets to trusts for the children that can utilize the Marital deduction so there are no Estate taxes on the death of the first spouse and also be Generation Skipping Transfer Tax exempt to avoid Estate tax on the death of a child.
- **CREDITOR PROTECTION** Also the Trust can avoid or discourage creditor claims, protect inherited property from marital claims on dissolution of marriage, and avoid unwanted disposition on remarriage after death of a spouse to protect the children's interests.
- **PROFESSIONAL MANAGEMENT** At some point in life, you may want to turn the management of the Trust, and the assets within, over to professional managers such as a Trust Company or an Independent Fiduciary. They are bound by fiduciary duties in the management of the Trust which provides you with protection from mismanagement.
- **PEACE OF MIND** As with all forms of estate planning, having a completed and funded revocable living Trust can provide you with peace of mind, knowing that your affairs are arranged in a manner to be cost effective and designed to be clear directions of how your assets are to pass to others, to avoid intra-family tensions and disputes.