DO I NEED A LIVING TRUST?

Clients often call me or say to me when we meet, "I need a living trust." The statement is often made some slight hesitation or unconvincing confidence implying that it is more of a question: "Do I need a living trust?" Indeed, that is one of the most common questions asked by estate planning clients. I usually answer with a wry smile, "It depends." It really does! It depends upon what is to be accomplished.

Everyone (with any combination of children, assets or income) needs a will. The reasons why are not the subject of this piece. Wills and trusts are both tools are available for use in your estate planning. Understanding what a living trust does will help you understand whether it is useful right tool for you.

Understanding what a trust does starts with understanding what a trust is. My trusty *Black's Law Dictionary (Circa 1957)* says that a trust is: "a right of property, real or personal, held by one party for the benefit of another." Thus, there are always at least two people involved in a trust

A trust starts with a settlor, who is the person who creates the trust. A trust is created by a document (with some exceptions that are not necessary to describe for the purposes of this article). The document describes the terms of the trust. The terms of the trust are created by virtue of the trust document (augmented by the applicable law relating to trusts). Although there are implied trusts, resulting trusts and constructive trusts that are not created by documents, a trust for estate planning purposes is always created by a document (an "express trust" - a trust created and declared with express terms in writing).

A trust requires a trustee, who is the person authorized and directed to carry out the terms of the trust. The trustee holds title to the assets that are placed in the trust. Assets may be placed in a trust from the settlor or any other person who transfers assets into the trust. The trustee is responsible to carry out the terms of the trust for the benefit of someone named as beneficiary of the trust.

A trust must have at least one current (primary) beneficiary. A trust could have multiple primary beneficiaries. Trusts usually also have future (secondary or contingent) beneficiaries. The terms of the trust dictate the benefits and rights of the primary and secondary or contingent beneficiaries.

A trustee can be the settlor of the trust, but could also be someone other than the settlor. The trustee has an obligation to the settlor who created the trust and to the beneficiaries who are intended to benefit from the trust to carry out the terms of the trust for the benefit of the named beneficiaries (both primary and secondary). The duty of a trustee is a fiduciary one. A fiduciary duty is a duty of the highest standard in the law and includes the obligation to carry out the trust terms as defined in the trust document to fulfill the settlor's intention for the benefit of the beneficiaries.

Trusts can be revocable or irrevocable. A revocable trust can be changed by the settlor and can even be terminated by the settlor. An irrevocable trust cannot be changed by the settlor once the trust is created, though an irrevocable trust can be changed by a third-

party if named and given express authority to make amendments in the trust document. Irrevocable trusts are used primarily for tax purposes (to avoid taxes). Most trusts for general estate planning purposes are revocable.

A living trust is a trust created during the settlor's life. Living trusts continue in effect after a settlor becomes incapacitated and unable to manage his/he own affairs and also continue after the settlor's death by naming or otherwise providing for successor trustees to take over and carry out the terms of the trust when the original trustee is no longer able to act. In that way, a trust can provide a settlor a measure of control over the management and ultimate disposition of the settlor's property, even after the settlor has lost the capacity to manage and determine the distribution of property on his/her own, and after the settlor's death. This continuing character of a living trust is what makes it so useful as an estate planning tool.

The settlor, for estate planning purposes, usually makes himself the first trustee and the first beneficiary (known as a "grantor trust"). In that way, a trust is just another way of holding title to and managing assets for one's own benefit. The real advantage and ultimate purpose of a ling trust, however, is the management of the trust after the settlor has become incapacitated or dies. By naming successor trustees, the settlor can provide for continuity of the management of the assets in the trust after the settlor loses the ability to manage them directly, and the settlor can provide for the ultimate disposition of the settlor's property after death that will be carried out by the successor trustee who is named to take over when the settlor dies.

The forgoing description of the continuing nature of a trust can be summed up in the popular phrase as "avoiding probate." "Avoiding probate" seems to be the most common perception of what a trust does, and is, perhaps the most common reason for having a trust. What does that mean? You have to understand what "probate" is to consider what avoiding probate means.

"Probate" means, in general parlance, all matters of which probate courts have jurisdiction. Probate is, therefore, a court proceeding. Probate exists to handle the administration of estates of people who have become incapacitated or have died. It is a mechanism by which the affairs of a person's estate can be put in order, managed and, ultimately, passed on to the person's heirs or beneficiaries. Probate court handles guardianships, and the probate court handles the estates of persons who die leaving assets that are subject to the jurisdiction of the probate court.

Assets that are subject to the jurisdiction of the probate court are better understood by identifying assets that are not subject to the jurisdiction of the probate court. Assets that are not subject to the jurisdiction of the probate court include assets that have a built-in mechanism for transferring upon death. Assets with a built-in mechanism for transferring upon death include property in joint tenancy or tenancy by the entireties with a right of survivorship, payable-on-death accounts (Totten trusts), and assets for which beneficiary designations have been made (such as life insurance, qualified plans, annuities, etc.) and trusts. A trusts, therefore, is a non-probate asset, meaning that any assets owned in a trust are not subject to the jurisdiction of the probate court.

Obviously, trusts are not the only assets not subject to the jurisdiction of the probate court, and, therefore, are not the only means for "avoiding probate". Joint tenancy property, IRAs, and life insurance policies also avoid probate (if proper beneficiary designations are made). Other non-probate assets, however, do not provide the measure of control that a trust does. Joint tenancy automatically transfers to the surviving joint tenant. IRA assets, life insurance proceeds and payable-on-death accounts transfer outright to the beneficiaries designated, if any. (If no beneficiaries are designated, or if designated beneficiaries are already deceased, assets/proceeds for which there is no beneficiary designation become subject to probate.)

Assets that transfer upon death through mechanisms other than a trust, transfer "outright" without any conditions attached. A person who wants to impose a measure of control on the management and ultimate distribution of the assets will generally use a trust. Trusts are used not only to control the management and distribution of the assets, but to protect them. Trusts can protect the assets in it from the creditors, spouses and other third parties who may seek to claim an interest in those assets through the beneficiaries. Trusts can also protect the assets from mismanagement by the beneficiaries, themselves. Concern for the oversight and management of the assets is particularly acute when minors are involved.

Quite often, spouses own most of their property in joint tenancy and are named as beneficiaries on each other's life insurance policies, IRAs, etc. When one spouse dies, the property transfers automatically to the surviving spouse. When the second spouse dies, however, the property must go through probate before it can be distributed to the heirs or legatees (pursuant to a will), unless the property is in a trust. If the property is in a trust, it does not go through the probate process. The property in the trust is handled by the successor trustee without the cost, delay and imposition of a court process.

In considering whether a trust is right for your estate planning, you need to understand what a trust is and what a trust does. Setting up a living trust will include more work and expense for you. That is the trade off. The benefits are continuity in the management of your affairs while you are living, but at some point become unable to manage them yourself; control over your affairs both during life and after death; less work and less expense in the handling of your estate; and privacy (probate is a public process). To answer the original question, no one "needs" a trust; but trusts are useful tools that may accomplish and protect many of the things that are important to you.