



GEOFFREY W. WHITE  
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ESTATE & CHARITY LAW

# Planning *Points*

## Probate Avoidance Trusts

### "Avoid challenges to your Will"

#### Why should I consider this strategy?

Your estate can avoid the probate process that involves potential legal challenges under the Wills Variation Act and probate fees.

#### How does it work?

You transfer your assets from being owned by you to being owned by a trust. You control the trust during your lifetime. Upon your death, the trust owns everything; you own nothing. The trust contains instructions that tell the new trustee how to distribute your assets among your beneficiaries. There is no need to use your Will to distribute any assets. Therefore, the probate process is avoided.

#### What is a trust?

A trust is created when one person (called a settlor) gives property to a person (called a trustee) for them to hold and use for the benefit of another person (called a beneficiary). In this case, you are the settlor, trustee, and beneficiary during your lifetime. However, in the trust document, you appoint a trusted person to take over as the new trustee upon your death or incapacity. You also identify who will become a beneficiary after your death.

#### Why should I worry about the Wills Variation Act?

This Act allows a spouse or child to challenge a Will if they believe that it has been unfair to them. (The definition of spouse includes a common law spouse. The definition

of child includes adult children.) In traditional family situations, this law may not create a problem. However, if you wish to provide anything other than equal divisions, it could lead to expensive litigation. It is also particularly difficult to balance entitlements in non-traditional families. (For example, what is the appropriate division between second spouses and children from prior relationships? Either party may claim that they should be receiving more.) This trust strategy will keep assets outside of the probate process and therefore your wishes will not be challenged under the Wills Variation Act.

#### Why should I avoid the probate fee?

The 1.4% probate fee is charged on the gross value of all assets that go through the probate process. The fee is more significant for estate values over \$1 million. Avoidance of the probate fee is often just a side benefit to the larger benefit of avoiding challenges.

#### Will I save income taxes?

In most cases, no. This strategy only saves probate fees and expenses. You are taxed on all of the income as if you still owned the assets. (There are some potential savings for those who earn well above \$100,000.) *Ask about Testamentary Trusts for tax ideas.*

#### Will it "tie" up my assets?

No. The trust is discretionary and you will be the trustee. This means that any amount of the trust can be used by you for you at any time.

#### Who can create a trust?

Anyone. However, if you are under 65 and your assets have capital gains (that are not exempted) then careful planning is needed as there may be tax effects. New tax rules allow anyone over 65 to avoid these tax effects by using special trusts (called alter ego or joint spousal trusts).

#### Bonus: Incapacity

The trust can also be designed to protect you during your lifetime if you become incapacitated. This protection is even better than an Enduring Power of Attorney.

#### Who should use trust strategy?

You -- if you have a second spouse and children from another relationship; if you wish to make unequal divisions; or, if you are concerned about probate fees.

#### Why Bother?

A well-planned trust can avoid legal challenges and save probate fees.

#### We can help

Our depth of experience and unique heritage offices create a comfortable environment for exploring your goals and needs. Together, we will fine-tune a strategy that gives you a valuable return on your investment and, most importantly, peace of mind.

We look forward to meeting you