When You Should Consider a Standalone Retirement Trust

By: Jason Page

Although IRAs and 401Ks were meant to pay for retirement, many people with large retirement accounts do not spend all of their retirement savings before death. People who leave large retirement accounts at their death can continue the tax-deferred growth, minimize taxes and protect their hard-earned savings from their beneficiaries' creditors by using a standalone retirement trust ("SRT").

Naming a SRT as beneficiary of your retirement accounts will provide you with more control and more protections of your retirement savings. Because trusts must meet stringent requirements in order to protect tax-deferred growth, it is usually best that the retirement accounts be left to a SRT rather than a sub-trust formed under a Will or a revocable living trust. However, SRTs are not for everyone. You should consider a SRT if any of the following applies to you:

- You and your spouse have combined retirement plans of $200,000 or more. At that level, it makes economic sense to use a SRT. The amount alone is not the only issue, and sometimes it makes sense for someone with a smaller retirement plan to use a SRT.
- You are concerned that your beneficiaries would not make good choices regarding distribution. If you would be concerned about giving your beneficiaries the amount in your retirement accounts with no instructions or oversight, you should consider a SRT.

- You are concerned that a beneficiary could lose part of the inherited IRA in a divorce, bankruptcy, or lawsuit. This is especially true if one of your beneficiaries does not live in North Carolina.

- One of your beneficiaries is a minor, is incapacitated, or may become incapacitated. One year's worth of guardianship fees alone will likely cost more than the cost of establishing an SRT.

- One of your beneficiaries receives or may qualify for a need-based governmental assistance program. Inheriting the IRA may cause them to lose those governmental benefits. This is not just for elderly or incompetent beneficiaries. It may include things like school loans, scholarships, and grants.

- You are in a second marriage and have children from a prior marriage. Your spouse could intentionally or unintentionally disinherit your children from the IRA after his or her death. You can name the trust with the spouse being a lifetime beneficiary, then leave it to your children.

Treating Your Beneficiaries Fairly

Most parents want to treat their children fairly. Many believe that this means that their children should inherit equally. But fair does not necessarily mean equal.

I often represent clients with one child who struggles to support his family and another who

is financially successful and has no children. I also see cases in which one child devotes a significant part or his or her time to care for aging parents while other children have moved away. Often, one child joins the family business and others do not. In these situations, providing for children equally is not necessarily fair.

When establishing your estate plan, you must decide both how much a child should receive and how a child should receive his or her inheritance. This may be different for different children. Outright distributions may be appropriate in some instances while establishing a continuing trust may be better in others. You should consider factors such as your child's ability to handle money, marital situation, current needs, and likelihood of future lawsuits or financial problems. Assets that stay in a trust can be protected from irresponsible spending, lawsuits, creditors and bad decisions. If one daughter is a neurosurgeon with a rocky marriage and tendency to waste money, you may wish to provide her with more protection than another daughter who is a teacher and who has been happily married for 25 years. The teacher may also need more access to funds than the surgeon. Your estate plan can be tailored to fit the needs of each child.

There are also times when both parents and children would benefit more from lifetime gifts than an inheritance. Helping a child buy a home, start a business, or send his or her children to college may be more helpful than receiving a larger inheritance later. In some cases, a gifting plan can also reduce estate taxes. Gifts to one child can also be taken into consideration when planning for different children.

Estate plans should involve more than changing the name on a form. Your estate plan should be based on your desires and the specific needs of each of your beneficiaries. You don't have to equalize gifts to your children. Instead, you think through what it means to treat them fairly.

Accessing Landlocked Property

Many landowners face the problem of owning property with no access to a public road. Being a good neighbor often solves this problem. However, disputes over the right to access property are common. This is particularly true when an adjoining property is sold or inherited and the new owner gates existing paths. There are several legal theories that landlocked landowners may be able to use to establish an access to their property. A brief summary of each is below. The outcome of each case is often dependent on the specific facts.

Easements Implied by Necessity. Easements implied by necessity do not appear whenever there is a need for access. A way of necessity arises only when a buyer has no access to the land except over either the seller's other land or the land of a stranger. In such cases, the law implies a right-of-way to the landlocked land over the seller's land. If at any time a landowner with road frontage conveyed away a part of his property with no road frontage, there may be an easement implied by necessity. The allowed use of an easement implied by necessity is whatever is reasonably necessary for the benefit of the landlocked tract. The proposed land use is a key factor when determining the scope of the easement. Harvesting timber may be reasonable when residential development is not.

Easements Implied by Prior Use. Easements implied by prior use are similar to easements implied by necessity. Again, there must have been common ownership of the tract with access and the tract that needs access, and a transfer must have separated the

ownership. However, in this case, the person seeking the easement must show 1) that before the transfer the prior owner used the portion of the tract with road frontage to benefit the portion without access; 2) that the use was apparent, continuous and permanent, and 3) that the claimed easement is necessary to the use and enjoyment of the new owner's land.

Easements by Prescription. There are several requirements for easements by prescription. First, there must be continued and uninterrupted use for 20 years. Second, the use must be so open that the owners of the land across which the easement is claimed probably had notice of it. The third element is that there must be a "substantial identity of the easement claimed." The problem most landowners face is that they have not met the fourth element: the use of the easement must be hostile or adverse. This means that the use of the easement is such that it gives notice that it is being made under a claim of right. There is a presumption that the use was permissive. If the use was by permission, there can be no easement by prescription. Evidence that the person claiming the easement has not helped maintain the road may be used to show that the use was not under a claim of right. In one case in which a landowner was successful in establishing an easement by prescription, the N.C. Court of Appeals said that where the evidence showed that "permission to use the lane had been neither given nor sought, that the plaintiffs performed maintenance required to keep the road passable, and that the plaintiffs used the road for over 20 years as if they had a right to it, the evidence [was] sufficient to rebut the presumption of permissive use and establish that the use was hostile and under a claim of right."

Cartways. Land is often divided in a manner that leaves some portion of it without any way to establish a right of way to a public road. To ensure that this land does not remain unproductive, North Carolina has had a cartway law since 1798. The person whose land will be burdened by the cartway is entitled to reasonable compensation paid by the petitioner. In effect, a cartway statute delegates the right to use the State's power of eminent domain to a private person or entity. There are only certain uses for which a cartway can be acquired. It is significant that agriculture and forestry are permissible uses and residential development is not. To be entitled to a cartway, a landowner must show three things: 1) that the easement is necessary for cultivating land, cutting timber, quarrying, industrial development, or a cemetery; 2) that there is no public road; and 3) that the cartway is necessary, reasonable and just. If the Clerk of Court is satisfied that the petitioner has met these requirements, the Clerk will appoint three disinterested landowners to lay off the cartway and determine the compensation that the petitioner must pay the respondent for the easement. Any party can then appeal to Superior Court.

For more information that may assist you, follow me on twitter @jpagelaw, like my Facebook page, or check out www.jpagelaw.com.