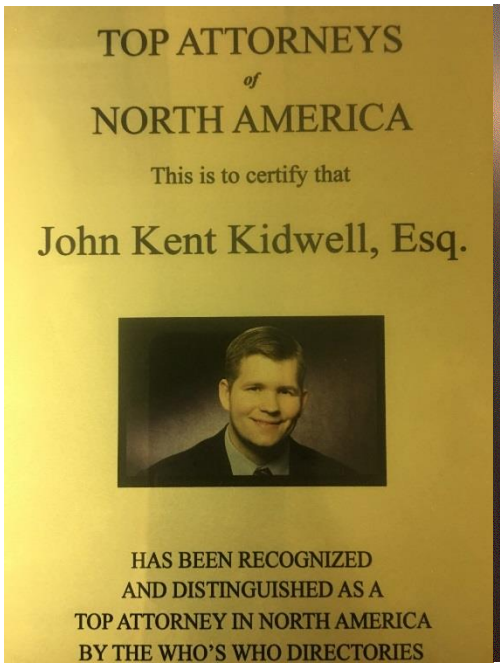
CHARITY AND YOUR ESTATE PLAN

BY

JOHN KENT KIDWELL,Esq.

ABOUT THE AUTHOR



John Kidwell is the Owner and Managing Partner of the Law Firm of Kidwell & Kent, with offices in Fairfax, Virginia, and Rockville, Maryland. Mr. Kidwell also owns and operates his in-firm commercial and residential real estate title company, Old Dominion Title Services, Inc. He is also a licensed Financial Advisor.

In 2013 John Kidwell was selected by the Registry of Who's Who as a pillar of the community for his work as an attorney and continued dedication to charitable contributions.

In 2014 John Kidwell was inducted as a member of Trial Masters, an elite national organization composed of lawyers with significant courtroom experience. Membership is an indication of a strong commitment to taking clients' cases all the way to the courthouse when warranted. Fewer than 1/2 of 1% of the attorneys in the United States are members.

In 2015, Mr. Kidwell was peer nominated and awarded through the Heritage Foundation as a TOP ATTORNEY IN THE NATION.

In 2016, the Expert Network certified Mr. Kidwell in the TOP 3% of attorneys in America.

In 2017 Mr. Kidwell obtained his Life Health and Annuities, Series 7 and Series 66 Financial Planning Licenses to provide individual and business financial planning services to his clients.

In 2018 Mr. Kidwell was peer nominated and awarded as a top Estate Planning Attorney in America by Lawyers of Distinction and his firm was awarded as a Top Ten Estate Planning Law Firm in Virginia.

Mr. Kidwell is a published author on the topics of law and politics. His books, "Leading by Example: Renovating the American Dream", and "25 Articles on the Law", and others, can be found on Amazon and are available for download. Mr. Kidwell also writes a periodical newspaper column on Real Estate Law for the "Times Community Newspapers" published in Northern Virginia, and teaches courses in real estate law and Wills, Trusts, estate and financial planning throughout the area.

The Law Firm of Kidwell & Kent is a general practice law firm with many areas of legal concentration. Mr. Kidwell has over 16 years of experience in real estate litigation and transactions, Wills, Trusts, and estate planning, business representation, domestic relations, civil litigation, and financial planning. By being able to provide these services, Kidwell & Kent is a law firm designed for the American Family.

John received his bachelor of arts in political science from the University of Mary Washington in 2002 and his juris doctorate from the George Mason University School of Law in 2005.

Mr. Kidwell always keeps philanthropy at the forefront of his endeavors. In 2006 John founded Alternative Fuels for America, a 501(C)(3) charitable organization dedicated to raising funds for the National Renewable Energy Laboratory in order to fund the advancement of clean fuel technologies, specifically alternative fuel sources for automobiles.

In 2011, Mr. Kidwell was a Man of the Year candidate for the Leukemia & Lymphoma Society where he raised tens of thousands of dollars in 10 weeks to fund a cure for cancer.

Mr. Kidwell regularly conducts free legal clinics for Wills for Heroes, the Veterans Administration, local churches and assisted living facilities.

John was also appointed by the Fairfax County Board of Supervisors to the Information Technology Policy Advisory Committee, tasked with advising local government on the implementation and management of information technology services and platforms. Mr. Kidwell served on the Information Policy Advisory Committee from 2011-2013.

TABLE OF CONTENTS

CHAPTER ONE: THE IMPORTANCE OF PLANNING IN GIVING

CHAPTER TWO: OUTRIGHT “INTER VIVOS” GIFTS

CHAPTER THREE: GIFTS THROUGH YOUR LAST WILL & TESTAMENT

CHAPTER FOUR: GIFTS THROUGH A TRUST

CHAPTER FIVE: THE CHARITABLE REMAINDER TRUST

FINAL THOUGHTS

CHAPTER ONE:

THE IMPORTANCE OF PLANNING IN GIVING

The act of giving is perhaps the noblest of all. Charity is a goal innate to the soul of a good and moral person. I truly believe this to be a truth in all of human nature. A given of the human condition.

Reality, however, affords all of us different abilities and stations in life from which to give. There are, of course, many forms of charity, to be sure. These include the simple spending of time and effort; aka sweat equity. The giving of one's loving time and attention is perhaps the most priceless form of charity. Especially if you are an attorney who charges at an hourly rate ☺

Here, however, my aim is to speak directly to those who wish to leave money or other assets to their children, nieces or nephews, as well as to tithe to their church or gift sums to a charity of choice, now, or in the future, to include after death.

For some of us, there is a deep calling to give back to the family community, however we personally define it. The first, and most crucial step to achieving a charitable goal of giving, to any recipient, is to plan. Planning is the foundation of any charity.

First, yes, of course you must choose your beneficiary for your charity. This could be as flippant a choice as to decide to dump your money out of a suitcase on an overpass. But for most, this requires designation of individual beneficiaries and institutions.

Yet, even before you choose any beneficiary to receive your gift, you must have something to give. As such, planning is key, especially if you desire your legacy to be ongoing.

A comprehensive financial plan, which considers a percentage of your unallocated income for charitable gifting, is an excellent way to ensure that you have the ability to be charitable while on the planet, and certainly after. And in this plan, your advisor should be looking at the most tax efficient means to gift in any given year, taking into consideration the size of your overall estate, your income, and applicable charitable deductions.

Dependent upon your level of wealth, these considerations should subordinate themselves to the overall desire for pure charity, but in the meantime, careful planning is necessary to achieve the end of continuous gifting, while not sacrificing the needs of the giver.

Because, as I mentioned, there's no need to plan for gifting to charity if you haven't planned for the accumulation of your wealth.

A comprehensive financial plan can help you decide how much to give, when, and to whom. Next, it is essential that one's estate plan, that is, the plan for the disposition of one's assets at death, be married to that comprehensive financial plan. This ensures the charitable goals are carried through efficiently, maximizing the legacy, while minimizing taxes to the estate.

The remaining chapters delve into the main ways that individuals and families make charitable gifts, while alive and through their estate plan. Usually, gifts take the form of outright gifts, gifts pursuant to a Last Will and Testament, or gifts via one of many different types of Trusts.

CHAPTER TWO:

OUTRIGHT "INTER VIVOS" GIFTS

The simplest way to gift to any individual, family, church or charity is through an outright gift. In an outright gift, the giver makes a direct charitable contribution to the receiver of the gift.

A gift is a voluntary transfer of property to another without compensation, and in order for a gift to be considered made outright, it must be made *inter vivos* (Latin for "between the living"). Therefore a gift of property made during one donor's lifetime and delivered to the donee with the intention of irrevocably surrendering control over the property is an inter vivos gift.

The biggest appeal in inter vivos gifting is that it is present tense, so the gift is made now and you can delight in the beneficiary's enjoyment and utilization of that gift contemporaneously. However, there are some very real considerations in the making of such gifts.

As alluded to in Chapter One, planning is the essential first step in being able to make gifts on an ongoing basis. If your goal is to just give a small sum of money once, when you're say, 65 and retired, or perhaps when you die, then you're probably not even reading this book. However, if your goal is to be able to gift moneys to charities and/or to your children or other beneficiaries throughout your life, and when you die, then a plan for giving is most necessary.

From a financial planning perspective, gift taxes and deduction laws are key to advising a client as to how much is appropriate to give, when, and to whom. Necessarily, gifting comes from discretionary spending and unallocated income, so first it is important to budget accordingly. Once the budget is in place, and the goal of charity identified, it is vital that you understand the parameters of inter vivos gift taxation.

If you give away money or property during your life, those transfers may be subject to federal gift and estate tax, and perhaps state gift tax, dependent upon in which state you reside. The money and property you own when you die (aka, your estate) may also be subject to federal gift and estate taxes, as well as some form of state death tax, which we Will discuss later. These property transfers may also be subject to generation-skipping transfer taxes, which we Will also discuss in later chapters.

The Economic Growth and Tax Relief Reconciliation Act of 2001 (the 2001 Tax Act), the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 (the 2010 Tax Act), the American Taxpayer Relief Act of 2012 (the 2012 Tax Act), and the most recent Tax Cuts and Jobs Act of 2017, all contain several gift and estate tax changes that make planning for charity in your estate much easier – if you understand how to apply them.

First, let's begin with the many gifts that can still be made tax free.

If your spouse is a US Citizen, you can give an infinite amount of money with no tax consequence whatsoever, both during your life, and at death, via a testamentary document, or otherwise. This is often referred to as the "marital deduction".

If your spouse is not a US Citizen, you may give up to $152,000, in any given year, tax free.

Gifts to qualified charities are tax free in any amount, as are mounts paid on behalf of any individual as tuition directly to an educational organization or to any person who provides medical care for an individual.

But what about gifts to your children, grandchildren, or a friend? Gifts to any one person or entity that is not a qualified charity, such as a church or 501(c)(3), are limited to $15,000 per person, per year. For the average person, it is this tax limitation that requires the most in consideration for planning to give.

A little further digging is required, though, to understand how the gift tax truly works, in all its "glorious" layers.

If I give my son $15,000 in 2018 (he wishes ☺) then I Will not have to pay any gift tax, because the amount I gave him does not exceed the annual gift tax exclusion. If my wife and I each give him $15,000 ($30,000 total), there is still no tax, because the exclusion is $15,000 per person.

But, what if I want to sign the deed to my house over to my son, which is worth much more than $15,000? How does that work? What tax Will be due, if any?

To understand what happens if you exceed $15,000 in gifts to a person or entity in any given year, you must take into account the lifetime gift tax.

The Tax Cut and Jobs Act of December 2017 increased the amount that a U.S. citizen or resident can transfer to another individual free of estate, gift or Generation-Skipping Transfer taxes (collectively, the "transfer taxes").

Pursuant to the law, the lifetime exemption amount for all three transfer taxes is computed with reference to a base amount of $10,000,000 per taxpayer, plus an annual inflation adjustment. The inflation adjustment is determined yearly by the Internal Revenue Service. On March 2, 2018, the IRS announced that the 2018 transfer tax exemption amount is $11,180,000.

In particular reference to inter vivos gifts, this does not mean that you necessarily actually pay any tax should you exceed the $15,000 annual gift tax exemption. Back to me signing the deed to my house over to my son:

Assume my home is worth $1million (I wish ☺) and my wife and I sign the deed over to my son. We just gave him well more than our combined $30,000 annual gift tax exclusion. What Will we have to do?

In the year in which we made such a generous gift, we Will have to file a gift tax return along with our income tax return, notifying the IRS that we have made such a gift. No tax, however, Will be do. Instead, our lifetime gift tax exclusion of $11.18 million Will be reduced by the amount we each exceed our personal gift tax exclusion of $15,000.

So, for me, in this example, I gave my son $500,000 (half the house). I therefore exceeded my annual gift tax exclusion by $485,000, thereby reducing my lifetime exemption to $10,695,000, from $11.18 million.

Once I exceed my lifetime exclusion of $11.18 million, Uncle Sam is taxing at a rate of 40% of everything over and above that threshold given. This is a very hefty tax, and one that plays a larger role in one's estate planning through Wills or Trusts, discussed in the next chapters, more so than it does the inter vivos gift.

One strategy commonly employed, especially for those that are at the threshold of $11.18million, and therefore in a place to be able to do so, is to make part of their financial and estate plan, a strategy of gifting up to the annual gift tax exclusion, on an annual basis, to children for instance, so as to reduce the size of the overall estate to below the estate tax exemption ($11.18 million), prior to death. The advantage in this strategy is double; 1: you get to enjoy the fruits of your gifts in the now; and 2: your estate tax is eliminated or reduced, so you can leave a larger legacy when you pass on.

For the average person, the good news is that the act of giving is not heavily taxed in America. Most people aren't worried about leaving over $11.18 to their family, much less gifting more than that while alive. It is in this way that America, thankfully, has for long been, and now even more so than ever, can be the most giving, charitable nation on the planet.

This is not to say that careful planning is not required. Tax optimization is only one side of the coin to the other, which is, can you afford to give? If you want to make systematic gifts into a 529 Education Plan, for instance, what are the tax incentives, and what are the limitations as they relate to your overall financial plan? For instance, the Virginia 529 Plan provides for up to a $4,000 deduction per person, per account.

There are many different types of gifts other than cash and tangible personal property such as cars, jewelry, furniture, etc. Some gifts carry a charitable donation deduction, and this can be a fun and integral part of your gifting strategy. Typically gifts to a church or 501(c)(3) charitable organization qualify for the tax deduction. These deductions are designed by the legislature to incentivize gifting to charity, outside the family.

However, it is important to note that charitable contributions are only deductible as an itemized deduction. In order to itemize, taxpayers need combined itemized expenses for the tax year to be greater than their standard deduction amount ($12,000 for an individual or $24,000 for a married couple for 2018). Understanding one's itemized deductions in order to see if gifts are advisable from a tax efficiency standpoint is therefore central to the consideration of how much, and to whom one should give in any particular year.

First, keep track of your charitable contributions throughout the year, and consider any additional applicable deductions. Generally taxpayers use the larger deduction, standard or itemized, when it's time to file taxes. Often, it is good to incorporate, as part of a gifting strategy, a year end gifting plan, based upon your other itemized deductions, to see if gifting can be tax advantageous for charitable deductions.

For instance, if my itemized deductions for mortgage interest, state and local tax, medical and dental expenses add up to $10,000 and I have only $1,000 to give to my church, I won't be able to take the charitable deduction, as it Will be more tax advantageous to use the standard $12,000 deduction. However, in the scenario where my itemized deductions are at our near $12,000, I may decide to give more than $1,000, because I know I can get a deduction on my taxes on the back end, making all things "equal".

In general, contributions to charitable organizations may be deducted up to 50 percent of adjusted gross income computed without regard to net operating loss carrybacks. Contributions to certain private foundations, veterans organizations, fraternal societies, and cemetery organizations are limited to 30 percent adjusted gross income.

Assume again you are making a charitable gift of $1,000. One strategy to enhance the gift would be to increase it by the amount of any income taxes you save with the charitable deduction for the gift. With a 28% tax rate, you might be able to give $1,389 to charity ($1,389 x 28% = $389 taxes saved). The net, is only $1,000 out of your pocket, but more given to charity. On the other hand, with a 35% tax rate, you might be able to give $1,538 to charity ($1,538 x 35% = $538 taxes saved).

With all giving, make sure you retain proper substantiation of your charitable contribution for your deduction. In order to claim a charitable deduction for any contribution of cash, a check, or other monetary gift, you must maintain a record of such contributions through a bank record (such as a cancelled check, a bank or credit union statement, or a credit card statement) or a written communication (such as a receipt or letter) from the charity showing the name of the charity, the date of the contribution, and the amount of the contribution. If you claim a charitable deduction for any contribution of $250 or more, you must substantiate the contribution with a contemporaneous written acknowledgment of the contribution from the charity.

Gift planning is particularly suited, as I mentioned before, to year-end tax planning. Typically, you have a certain amount of control over the timing of income and expenses. You generally want to time your recognition of income so that it Will be taxed at the lowest rate possible, and time your deductible expenses so they can be claimed in years when you are in a higher tax bracket.

For example, if you expect that you Will be in a higher tax bracket next year, it may make sense to wait and make the charitable contribution in January, rather than for Christmas, so that you can take the deduction next year when the deduction results in a greater tax benefit. Or you might

shift the charitable contribution, along with other deductions, into a year when your itemized deductions are at or near standard deduction amount.

One last thought on inter vivos gifts, and it comes from a question I get from a lot of my clients. What does the sunset provision of the Tax Cuts and Jobs Act mean?

The Tax Cuts and Jobs Act provided that the higher exemption levels are effective through 2025, and revert to prior law (with the exception of retaining the formula for computing the inflation adjustment) on January 1, 2026.

Unless the tax law changes between now and then, the exemption amount per taxpayer Will be back to $5,000,000, plus the inflation adjustment, on January 1, 2026.

There is a very real chance Congress Will be revisiting all of these tax laws as part of the ongoing battle on Capitol Hill. Therefore, and I can't say this enough, you should continuously re-visit your estate and financial plan in order to make they are tax optimized and efficient.

CHAPTER THREE:

GIFTS THROUGH YOUR LAST WILL AND TESTAMENT

There are two ways to make a gift to charity after you have passed away: 1. A gift through a Last Will and Testament; and 2. A gift via a Trust (see the next chapter).

Once dead, it is either a Last Will and Testament ("Will") or a Trust that can speak for your desires as to the disposition of your assets. If you were to die intestate, that is, without at least having a Will, then your state's statutes of descent and distribution do provide for the passage of your estate to family, generally, but that does not assist in the gifting of money or assets to a charity, church, or friend, so I don't count that as a "way to gift".

My aim here is not to delve into the pros and cons of a Will vs. Trust, but it is prudent to take into consideration which testamentary document serves you and your estate better. To learn more on that subject, please check out my book titled, "Will vs. Trust," available on Amazon.

Here, my aim is to walk you through the mechanics of how one utilizes a Will to give to charity and how the giving Will be accomplished. The same aim follows in the subsequent chapters.

To understand how giving is accomplished through a Will, it is necessary to understand exactly what a Will is. Most people understand a Will to be a document that designates where your assets go upon your death. And while that is correct, there is much more to a Will than that simple understanding.

In the particular context of giving pursuant to a Will, we are innately concerned with property and how to leave it to an individual or charity. But what property does a Will govern? Does it govern all of your assets at death? Or just some?

All Wills contain within them a section commonly referred to as the residuary clause. The residuary clause is what I like to call the catch net of your estate. It reads something like this:

"I hereby give devise and bequeath the rest, residue, and remainder of my estate, of whatsoever nature and wheresoever situate unto…"

Well what the heck does that mean? Pretty ethereal right? Wheresoever situate? Whatsoever nature?

The question that presents itself is- what does this catch all, residuary clause govern? What constitutes the rest, residue, and remainder of an estate?

An estate is everything you owned at death. Clothes, furniture, cars, real estate, life insurance, checking, savings and investment accounts. All of these assets comprise your estate when you die, and the purpose of any estate plan is to pass your assets to your loved ones and charities.

Yet, the rest, residue and remainder of your estate does not necessarily include all of these assets. The residuary clause governs only those of your assets that do not pass by title or contract.

No matter who you are, all of your assets Will pass in one of four different ways at death. And they are in this following order of precedence:

First, your assets Will pass by title. Then by contract. Then via a Will or Trust. Whichever catch net you've set up for yourself. And lastly, if you've set up no catch net, your assets Will pass pursuant to

the statutes of decent and distribution, as abovementioned.

Assets pass by title when they are titled jointly between two parties. In particular, the asset must be jointly titled with common law right of survivorship. This means that if one owner dies, the other joint owner automatically owns the entirety of the asset by dint of surviving. Think of the husband and wife with joint checking accounts and a deed to their house.

But what happens when an asset isn't jointly titled, or when the surviving spouse has everything solely titled? In that scenario, how do you pass assets to charity?

The second way property can be passed at death is via contract. The passage of assets from each financial institution in which you hold assets can be designated and controlled by a contract you sign and record with each respective financial institution. Pursuant to these contracts, upon proof of your death, and proof of a designated recipient's identity, the financial institution is required to deliver the assets over.

These contracts are commonly referred to as beneficiary designations. A word of caution. There are basically two types of accounts in America. Qualified, and non-qualified accounts. Qualified accounts are accounts such as 401(k)'s and IRA's, which, pursuant to the Internal Revenue Code, qualify for special tax treatment, such as income tax deferral. The Internal Revenue Code requires that these qualifying accounts be accompanied by beneficiary designations.

Non-qualified accounts, on the other hand, such as checking and savings accounts, which don't qualify for any special tax treatment under the law, aren't required to be accompanied by a beneficiary designation form.

Yet you can enter into a contract with these banking institutions that govern, above your Will or Trust, where those assets Will go upon proof of your death. On checking, savings, and investment accounts they often refer to the contracts as "payable on death designations", or as "transfer on death designations".

They mean the same thing as beneficiary designations and are just another confusing play on words. Think of it; the definition of a beneficiary is someone to whom you pay, or transfer assets unto at death of the donor.

It is in these contracts that you have the first opportunity to gift your assets to a charity. All you need to do is simply name the charity, church or individual as the designated beneficiary, payee, or transfer on death designee.

Adults with no children often name their siblings or parents as their beneficiaries, but may wish to designate a percentage to go to their charity of charities of choice.

Most often, though, people name their immediate family as the designated beneficiaries, leaving a Will to govern the "what if scenarios" of their death. For instance: what if your child

predeceases you with no grandchildren born or surviving them. Often you can't dig that far down the rabbit hole, which is where a Will or a Trust would come into play.

The best way to think of a Last Will and Testament is as the catch-net of your estate.

A Last Will & Testament is just that, the "Last" line of defense, to make sure nothing slips through the cracks. That being said, even though everyone needs a Will, I never want a Will to catch anything in anybody's estate. Why? Probate.

Probate is the Latin word for prove. It means to prove your Will. That is the easy part, because of the way Wills are executed. They almost always are accompanied by a self-proving affidavit, which states that the Will was signed by the testator in the presence of two witnesses, who in turn signed in the presence of a notary public. This means that the Executor (the person named in a Will to "execute" the terms of the Will) does not have to track down witnesses who are long gone and may themselves be dead.

But when people say "avoid probate" what they really mean is: avoid the administration of your estate through the court system.

If an asset is caught in the catch-net of your estate, your Will, then your Executor must administer the estate through the probate division of the circuit court of the county in which you lived at the time of your death.

In a nutshell, the probate process is as follows:

- ✓ The Executor must appear before the probate clerk with your original Will, original death certificate, proof of their identity and a check. The check is for the probate court fee, which is based upon a published table of value of assets passing through the estate.
- ✓ The Executor must qualify before the court to receive letters testamentary and a certificate of qualification, and then post a bond and/or surety for the faithful performance of their duties.
- ✓ Within 30 days, the Executor must notify all heirs at law that they have qualified as Executor, and file an affidavit with the probate clerk, affirming they have sent said notifications. A fee is assessed by the probate clerk at this juncture.
- ✓ Within 4 months of qualification as Executor, the Executor must prepare an inventory of assets with proof of value as the date of death of the decedent, and file the inventory with the Commissioner of Accounts Office. The COA assesses a fee for intake and review of the estate inventory.
- ✓ The Will becomes a matter of public record.
- ✓ The Executor pays the Commissioner of Accounts Office to hold a debts and demands hearing and send a notice in the classified section of a newspaper of common circulation in the area, notifying all potential creditors that should they have any claim, they must

come to the COA's office on the stated hearing date, or forever hold their peace. The Commission of Accounts Office and the newspaper assess fees for this service.

- ✓ Within 16 months of qualifying as Executor, the Executor must file an Accounting with the Commissioner of Accounts office, hopefully showing the disbursements to beneficiaries, receipts, account statements, debits, credits, and a zero balance. The COA assesses yet another fee, but, if the COA approves the account, and it is the final account, the estate is finally closed.
- ✓ The sunken cost to an estate passing through the courts, via a Last Will and Testament, is are often $10,000 - $30,000, dependent upon the size of the estate.

✖ Will	✔ Living Trust
Costs up to $30,000 in Probate Fees	Skips Probate & Saves $30,000
Takes up to 2 Years	Quick: Settled in Days, not Years
Every Private Family Detail is Made Public	Private Family Matters Stay Private

For the reasons above delineated, the administration of any estate through the court system, aka "probate" should be avoided like the bubonic plague.

However, a Will does serve its purposes, and for many estates, it is more than sufficient to meet the needs of the maker.

If a client can be coached to update all of their beneficiary designations on all financial assets, none of their beneficiaries are minors, they have no reservations about leaving lump sums to their beneficiaries, with no strings attached, and the client does not own real estate in multiple states, or own an interest in a closely held business, such as an LLC, a Last Will and Testament is probably more than sufficient for their estate planning needs. In short, I create a Will for the client, with the hopes that it Will never need to be used.

To understand this, it is incumbent upon me to explain further how a Will works.

Most people, when thinking of a Will, understand what it is, generically. A Will is a document in which you state where you want your assets to go when you die. And while that is correct, there is more to it than that.

You might be thinking, okay, in my Will, I need to specifically state that I want my real estate located at 525 make believe avenue to go to my wife, and my account with bank account #xx5 shall go to… The truth is, no, not really. While you can provide for specific bequests in a Will, it is not advisable, and the function of a Will, being the catch-net of your estate, means that Wills are actually more generic than you might think.

Instead, Wills state, via the abovementioned residuary clause, that you "do hereby give, devise and bequeath the rest residue and remainder of your estate, of whatsoever nature, and

wheresoever situate, unto…" This residuary clause of your Will is generic because we don't know what assets you Will have in 1 year, let alone 20 years from now.

People move, they change accounts, and they don't want to have to change their estate plan every time they open an account. As such, a Will is designed as the catch-net of your estate.

The question that then presents itself is, okay, then what constitutes the rest residue and remainder of my estate? What does the residuary clause of my Will govern?

The Answer: The residue of your estate is any asset that has not been designated to pass by title or by contract (beneficiary designation).

Therefore, it is my opinion that a Will is not the best legal document/vehicle through which to make gifts. Why? Time and cost efficiencies.

If your assets or even just cash pass through the Will, for the purposes of the Executor handing the cash over to your named charity, the probate process must first be endured. This results in the aforementioned waste to your estate.

A Will that has charity at its heart, would say something along these lines:

"I hereby give, devise and bequeath, the rest residue and remainder of my estate as follows:

(a) 90% of my estate unto my children, equally, share and share alike.
(b) 10% of my estate unto Wills for Heroes."

Here's the issue. 10% of what? Your residuary estate. Which would be any asset you did not already designate pass by beneficiary designation, or by title transfer. Sometimes there may be 10% of nothing, which means Wills for Heroes, in this scenario, gets nothing, because the Will was never filled with any assets.

The pro of the Will not being filled with any assets is that there would be no probate. The con is that Wills for Heroes would get nothing.

Alternatively, if assets do pass through the Will, and there is 10% of something to be had from the estate, the Will must now go through probate and the costs and waste ensue.

CHAPTER FOUR:

GIFTS THROUGH A TRUST

Gifting via a Trust is very similar to gifting through a Last Will and Testament, as discussed in the previous chapter. However, there are many different types of Trusts, and myriad strategies for funding these vastly different types of Trusts, all centered on a goal of charity now, in the future, at death, or all of the above.

First, let's start with what a Trust is and why you might consider it in addition to a Last Will and Testament when planning for your estate.

We just delved into how gifting works via a Will. Well, a Trust is very similar. It even reads quite similarly. A Trust is a contract. Think of it as a bucket. In this bucket, you pour in your personal, financial and real estate assets, otherwise known as your estate. Whether they take the form of your home, your cars and personal property, your bank accounts or your life insurance, you pour these assets into the Trust bucket and then, in terms clearly spelled out in the Trust Agreement, the contract, you direct to whom your assets Will go upon your incapacity and death.

With Trusts, the goal is often to avoid probate, which is to say, the legal administration of your estate through the court system, and/or to mitigate against taxes and protect assets from creditors. A Trust, ultimately, is a mechanism to maintain oversight and control over your assets, and as I always like to joke – a way to govern from the grave.

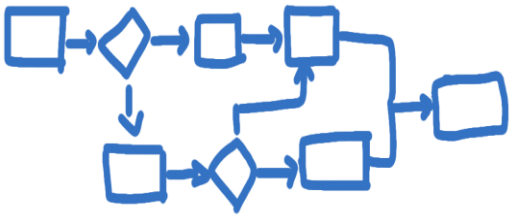
The very real differences that arise in the different types of Trusts are born from the terms of the contract; or more particularly, to whom, when, and under what terms the assets poured into this bucket are going to be paid out of the Trust, and how is the Trust to be funded.

The Probate Avoidance Trust is the most often utilized Trust, and is the foundation of any efficient estate plan. It is also a good Trust to discuss in order to build your foundational knowledge of what Trusts are ultimately designed to do, and how to utilize a Trust to achieve your charitable goals.

First let's address the elephant in the room. What is probate? And why do you want to avoid probate?

Probate is the Latin word for "prove". In practical terms, probate, is the proving of your Last Will and Testament before the clerk of the court in the county in which you lived at the time of your death, and then…and here's the part we desperately want to avoid- the administration of your estate through the court system.

My aim here isn't to delve into the ins-and-outs of the probate process, so I won't bore you with all those details. But, for now, understand that the administration of your estate through the court via probate requires various court proceedings for your Executor, the person you name to execute your Will, to qualify, record and make public your Will, file notices, inventories and accountings before the county commissioner of accounts, hold debts and demand hearings, etc.



On average, your Executor, on the heels of your death, is doing the last thing they'd want to be doing. They are spending two years in court, hearings, and accountant's offices, essentially litigating the passage of your assets. All of this can be extremely costly, often to the tune of tens of thousands of dollars drained from your estate. Meanwhile, for these years of probate limbo, your assets aren't being properly invested or, more importantly, utilized for the benefit of your beneficiaries.

Shameless plug time: For a more in depth dive into the considerations surrounding whether to use a Will or a Trust in your estate plan, please check out my book, "*Will vs. Trust*", which is available on Amazon or download from my law firm's website: www.kidwellkent.com.

The core purpose of any properly formulated estate plan is the efficient transfer of your assets. A probate avoidance Trust is often the best way to do so for anyone who has a minor child or grandchildren as beneficiaries.

If you own real estate, especially if you own a vacation or investment home in a state other than your primary residence, a probate avoidance Trust is often advisable, so as to avoid probate, not only in your home state, but also in the state where the other real estate is located. This second probate is commonly referred to as ancillary administration. And yes, start adding to the probate fees.

If you own an interest in a business, such as an LLC, a probate avoidance Trust is also advantageous to grant your Successor Trustee the right to continue the ongoing concern of the business to wind it down or otherwise carry it on and transfer it to the benefit of a beneficiary.

A probate avoidance Trust can be formed either as a Single Grantor Trust or Husband and Wife, as both Grantors and Trustees, and with the Trust becoming irrevocable at the death of the irst spouse.

The Trust, reading as a contract, Will state something to the following effect:

"…..upon the death of both Grantors (husband and wife), the rest residue and remainder of the Trust, together with all interest and income accumulated thereon, shall pass equally unto our children, (insert names). In the event that at the time of our deaths, a child has not attained the age of twenty-five (25) years, then their share shall be held by Aunt Susie, as Successor Trustee, in Trust as follows…"

Reads very much like a Will, doesn't it? That's because a Trust, much like a Will, is a testamentary document; to-wit: a document where you say, "when I die, my assets go to blah, blah, blah…"

Here's the key. A Trust, any type of Trust, is just a stack of papers eloquently written by an attorney such as myself. It is an ethereal entity. It is nothing. A Trust can state all live long day where your assets are to go upon the event of your incapacity or death, but it doesn't matter unless the Trust owns those assets. In common parlance, we say that you must fund the Trust.

Remember back to the bucket analogy. A Trust is a bucket.

We have to pour your assets into the bucket. This funds the Trust with your financial assets, real estate, and personal property. Unless you fund the Trust, your Trust is a worthless stack of papers.

But, if you do fund a Trust, and the Trust controls where your assets go upon your death, you have successfully avoided probate as well as the costs and time-drains associated with the administration of your estate through the court system.

The questions that presents itself, then, is what are you going to pour into the Trust? What assets do you have to deposit into the Trust? Are you funding the Trust estate with life insurance or an annuity, perhaps real estate? All of these considerations determine if the Trust most advisable for you is one more exotic than the probate avoidance Trust. For larger estates, tax considerations come into play, making advanced strategies such the Charitable Remainder Trust or Irrevocable Life Insurance Trust advisable.

We Will discuss some of the more exotic Trusts later, but for now, let's assume that you have a probate avoidance Trust. In that Trust, you can make specific gifts of items tangible personal property and money in specified dollar amount or as a percentage of your overall estate value, to any person or any legal entity.

For the Husband and Wife, for instance, they may want to leave 90% of their Trust estate to their children, equally, and the remaining 10% to their church. Or they could leave a specified, $100,000 for instance, directly to the church.

Furthermore, once amounts or percentage have been designated, a Trust can afford you more oversight and control over the manner in which those gifts are being transferred to your beneficiaries and charities. For example, a Trust can direct that the 10% earmarked for the church can be paid out in installments, whether over months, or years. Perhaps $1,000 per year or month.

Often times the amount that is set aside for charity is a relatively large amount. This is where legacy planning within your Trust becomes an important consideration.

You may desire that the Trust fund an annual $5,000 scholarship at a particular university, based upon certain eligibility criteria. The Trust Will spell out the criteria by which one could qualify for the scholarship and to whom and in what manner the beneficiary Will be paid. More planning, however, is requisite.

You also must consider that costs of maintaining a Trust as this may play a role into how long the Trust Will operate, and how much can be given to your family and charity.

Trusts are taxed at the highest marginal tax rate, currently 37%. Therefore, absent a need or strong desire to maintain the Trust for a period of years, such as for a special needs dependent child, a Trust should be designed to live for as short a period as time. There are certain strategies, such as the K-1 pass through, to minimize Trust taxation, but that is outside the scope of this discussion, and still, the general goal of Trusts not being an ongoing concerns rings true.

Let's say your Trust says that you Will leave 10% of your estate, in Trust, for the benefit of the University of Mary Washington, as follows:

"Trustee shall deposit 10% of the Trust estate into an Investment Advisory Account with a medium to aggressive growth portfolio, and gift, on an annual basis, all interest and income accumulated on the corpus of the Trust estate, to the Dean of Admissions of the University of Mary Washington, beginning on December 25th of the year after my death, and on December 25th every year thereafter."

Let's further assume that your estate is $1million when you die. 10% is $100,000 being set aside in Trust for the University of Mary Washington. Let's assume that the Investment Advisory Account earns, net of fees or other internal account costs, 5% per year. $5,000 would be given to the university at the end of the year.

The issue arises in the fact that the Trust must also pay a 37% tax on the 5% income earned by the Trust investment advisory account. This means that a tax Will be due in the amount of $1,850. This Will eat away at the Trust corpus, whereas it might be more advantageous to simply leave a lump sum to the university and forego all those taxes, in addition to the fees your Trustee and their accountant Will rack up managing the Trust.

The Irrevocable Life Insurance Trust (ILIT) is a Trust designed to remove life insurance death benefits from the estate of a deceased, insured individual, and is a great way to make charitable contributions through your estate, leaving a large insurance pot for your children, tax free.

Individuals who have an estate value near, at, or above the individual estate tax exemption amount (currently $11.18 million in 2018), Will purchase life insurance and place it inside this Irrevocable Trust, removing incidents of ownership from themselves, so that the IRS Will not count the death benefit from the policy as part of their estate. The life insurance proceeds can then be utilized to pay costs of the funeral, as well as to benefit children, or to leave a legacy, without the hefty estate tax rearing its ugly head. Further, in estates where there is going to be an estate tax, the death benefit from the life insurance policy held in an ILIT can be utilized to pay the estate tax.

The ILIT is also often referred to as the "Crummey Trust". The ILIT was termed a such after a 1968 decision by the Ninth Circuit Court of Appeals, *Crummey v. Commissioner*, 397 F.2d 82

(9th Cir. 1968). In this case, the Ninth Circuit was grappling with the question of whether a gift to a Trust, rather than an outright gift to an individual, qualified as a gift for gift tax exemption purposes. Therefore, in the cannon of gift law, the ILIT holds a very prominent standing.

As previously discussed, a gift qualifies for the annual gift tax exclusion ($15,000 for 2018) only if the transfer is of a *present interest in the property*. The gift must be inter vivos. A present interest is defined as an unrestricted right to the immediate use, possession, or enjoyment of the property or the income from it.

In Letter Ruling 199912016, the IRS considered four factors in determining whether a beneficiary's withdrawal (*Crummey*) right qualified gifts to a Trust as present interest gifts:

1. The Trust is required to give the beneficiary reasonable notice in which to exercise the withdrawal right;
2. The beneficiary is given adequate time following notice in which to exercise the withdrawal right;
3. Upon exercising the withdrawal right, the beneficiary Will have the immediate and unrestricted right to an amount equal to the amount contributed to the Trust; and
4. There is no understanding or agreement, expressed or implied, that the withdrawal Will not be exercised.

In the typical ILIT/*Crummey* Trust, a periodic contribution of assets, usually in the form of premiums on a first-to-die or second-to-die life insurance policy, is gifted into the Trust, accompanied by an immediate withdrawal power that gives the beneficiary the right to withdraw the contribution for a limited time. However, the expectation of the donor is that the power to withdraw Will not be exercised. The beneficiary's limited withdrawal right, known as their Crummey Power, renders the gift to the Trust a gift of a present interest that can be sheltered by the annual gift tax exclusion.

The Trust's beneficiary must be given actual notice of the withdrawal right along with a reasonable period to exercise it, usually 30 days. This notice takes the form of what is commonly referred to as a Crummey Letter, which is sent the beneficiary. The IRS has privately ruled that without a current notice that a gift is being transferred to the Trust, it is not possible for a donee to have the real and immediate benefit of the gift. As a result, many ILIT's are drafted to limit the beneficiaries' withdrawal right to the amount of the annual gift tax exclusion or the fair market value of the property contributed to the Trust, whichever is less.

Common features of an ILIT:

- ✓ Remainder to children
- ✓ Can draft as a PERPETUITY TRUST so remainder goes to charity.

- ✓ Removes the life insurance proceeds from the Grantor/Insured Individual's Estate by irrevocably transferring "incidents of ownership" to the ILIT.
- ✓ It is often said that an ILIT is "A PRESENT GIFT OF A FUTURE INTEREST."
- ✓ The ILIT must provide that the beneficiaries have a present right to withdraw in the year the gift is made, the lesser of the amount of the gift, or the annual gift tax exclusion ($15,000 currently).
- ✓ "Crummey Letter" Notices are sent 30 days before premium for ILIT Insurance Policy are due.
- ✓ The Trustee (CAN'T BE THE GRANTOR) is the owner of the life insurance policy on the Grantor's life.
- ✓ Grantor makes a gift each year to the Trust of an amount of money necessary to pay the premiums on the insurance and Trustee fees. Upon lapse of the right to withdraw the gift is made, the Trustee pays the premiums on the life insurance policy.
- ✓ When the Grantor dies, the life insurance proceeds are paid to children and/or charity.

CHAPTER FIVE:

THE CHARITABLE REMAINDER TRUST

One of the greatest feelings for many is that feeling that comes with giving to a charity of your choosing. The Charitable Remainder Trust is a phenomenal estate planning tool to leverage assets for many tax advantages and to leave a legacy to virtually any church or charitable organization.

A Charitable Remainder Trust is an Irrevocable Trust for the life of the Grantor or Grantors, or for a term of years, not to exceed twenty years. Primarily, there are two types of Charitable

Remainder Trusts, dependent upon the form of assets used to fund the Trust. These are the Charitable Remainder UniTrust, which is funded with real estate, and the Charitable Remainder Annuity Trust, which is funded through the purchase of an annuity or similar vehicle within the Trust.

CHARITABLE REMAINDER UNITRUST (CRUT):

- ✓ Irrevocable Trust for the benefit of a charity
- ✓ Income to Grantor and Spouse for life, using Real Estate
- ✓ Remainder to charity(s).

CHARITABLE REMAINDER ANNUITY TRUST (CRAT):

- ✓ Irrevocable Charitable Trust for the benefit of charity(s)
- ✓ Stated annuity income to Grantor(s) for life
- ✓ Remainder to charity

Whenever someone wishes to give to the community, but receive an income stream from their hard-earned assets, the Charitable Remainder Trust accomplishes just that, as well as provides quite significant tax advantages.

In the instance of someone who has real estate that, when sold, Will result in a large capital gains tax, a Donor, as Grantor to a Charitable Remainder UniTrust, can eliminate both estate and present capital gains tax on the sale of the real estate by transferring the real estate into the Trust.

In the instance of someone with non-qualified assets, such as stocks held in a mutual fund or other investment account, with holdings that Will result in substantial short or long-term capital gains, a Donor, as Grantor to a Charitable Remainder Annuity Trust can transfer the account to the Trust to purchase an annuity within the Trust. This transfer of the assets into an annuity within the CRAT eliminates estate and present capital gains tax on the sale of the stocks.

To be eligible as a Charitable Remainder Trust, the Trust must be irrevocable, naming income beneficiaries (usually the Grantor/Donor) to receive not less than 5%, and not greater than 50% of the Trust asset value, on an annual basis. The value of the remainder interest (the amount to go to charity or charities) must be at least 10% of the initial net fair market value of all property placed into the Trust.

If the above criteria are met, no capital gains tax results in the sale of assets placed in a Charitable Remainder Trust. The Trust income paid to the Grantor for life Will be taxed at the Grantor/Donor's individual income tax rates. However, another attractive tax incentive for Charitable Remainder Trusts is the fact that taxes on the Donor's income can be offset by a charitable deduction up to the appraised amount of the transfer multiplied by an interpolated life remainder factor, with the option to carry the deduction forward for up to 5 years.

Lastly, because the property in the Trust reverts to a charity at the death of the Grantor/Donor, there is no estate tax consequence.

FINAL THOUGHTS:

The advice given in this book is not meant to serve as legal advice and should not be relied upon without consideration of your own fact pattern. All estates should be scrutinized individually, and no estate planning practitioner should approach a client with a cookie-cutter approach to an estate. I advise that everyone seek legal counsel when planning for their estate and a financial advisor to marry their estate and financial plans in order to achieve their charity goals in the most tax optimized and efficient manner possible.

In this age of the internet, it is very easy to get lost in the world of google searches. You Will find that there are countless different types of Trusts, with different names and purposes, and your head may spin. It is very easy to get lost and think you understand a core estate planning principle regarding a particular type of Trust when in fact, you are misguided or misinformed altogether.

My thought is this: you have worked tirelessly throughout your entire life to build up your financial wealth- Why try and save a few hundred dollars and prepare a Will or Trust from an internet form and risk, literally, all that you have gained, to taxes, and legal proceedings?

And in particular regards to Trusts, certain codified, specific and very detailed language must be present for the Trust to accomplish its intended purpose, whether it be for asset protection, probate avoidance, or otherwise. Don't risk your assets and your legacy to misinformation and my best advice is to always consult an attorney regarding your estate plan, especially if you think a Trust may be beneficial for you.

That being said, it is better to have something in place, rather than nothing. In fact, that is the purpose of a Will, as previously discussed. A Will is meant to serve as the catch-net for your estate, and make sure that nothing slips through the cracks into the land of intestacy and court appointed administration of your estate.

Lastly, I always joke with my clients: "A Will or Trust can always be amended, because your estate plan is not etched into stone until you are."

If you should have any questions or topics that you would like to discuss with me or see me write about, please contact me through my law firm's website: www.kidwellkent.com or call me at 703-764-0600. I look forward to working with you.