

ESTATE PLANNING 101: WHAT IS A TRUST?



A trust is a legal instrument that transfers title to designated property from the owner, called the donor or grantor, to a trustee, who holds the property for the beneficiaries of the trust. The grantor can also serve as the trustee, thereby enhancing control over the trust during the life of the grantor. In such a case, a successor trustee is usually named in case the grantor dies or is incapacitated. Depending on the size or complexity of the trust, the trustee, or cotrustee, might be an institution, so as to bring more expertise to the position.

Testamentary Trust

A testamentary trust, created in a will, takes effect when the grantor dies. It names the beneficiaries and gives directions for payment of the income from the trust and for disposition of the assets. The testamentary trust has the advantage of increasing the odds that an inheritance is used prudently. The trustee can manage the assets of the trust until such time as the beneficiaries are prepared to do so, as opposed to an immediate transfer of assets to the beneficiaries.

Living Trust

The second category of trusts is the living, or inter vivos, trust, which is created during the grantor's lifetime. An important decision for a living trust is whether the trust will be revocable by the grantor or irrevocable. In either case, the assets are retitled in the name of the trust. As the name suggests, a revocable trust may be dissolved entirely by the grantor. But short of that, the grantor may also change beneficiaries, replace the trustee, or change the composition of the assets in the trust. Revocable trusts do not remove assets from the grantor's estate. The trust pays

taxes on its income, and if any assets remain in the trust at the death of the grantor, they are part of his estate and at least potentially taxable as such. A revocable trust has few tax advantages.

An irrevocable trust permanently takes assets out of the grantor's estate and puts them into the trust. While tax savings can be realized with an irrevocable trust, this type of trust is not to be entered into lightly, as it will take action by a court to alter it later. For tax purposes, the trust becomes a separate entity. Assets in the trust generally are not subject to estate taxes on the death of the grantor, but the transfer of assets into the trust may be subject to gift taxes.

When the grantor for a living trust dies, the trust assets pass directly to the beneficiaries. This is a distinct advantage over having to go through probate, the often costly and time consuming process of administering a will. A living trust also maintains the privacy of the estate, because bypassing probate also means that no public record is created, as occurs with probated wills.

Effective use of trusts in estate planning requires not only awareness of these trust basics, but familiarity with specialized trusts that might be a good fit for particular cases, such as those involving life insurance policies and charities. To decide on and implement the best option, use the services of qualified professionals. ■

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Doing business on
the Web—Clickwrap
Agreements



Real Estate
Law Update



Estate Planning
101: What is a
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HUTCHISON & STEFFEN
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Legal Matters

Summer/Fall 2007

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Hutchison & Steffen Attorneys is proud to welcome the 10 attorneys who have joined the Firm over the past several months. We continuously seek to expand the quality and range of legal services offered to our clients. With the addition of these team members, who bring expanded diversity in legal experience, the Firm is poised to continue exceeding clients' expectations in legal matters.

The Firm's attorneys service our clients out of offices in Las Vegas, Reno, Phoenix, and Salt Lake City. ■



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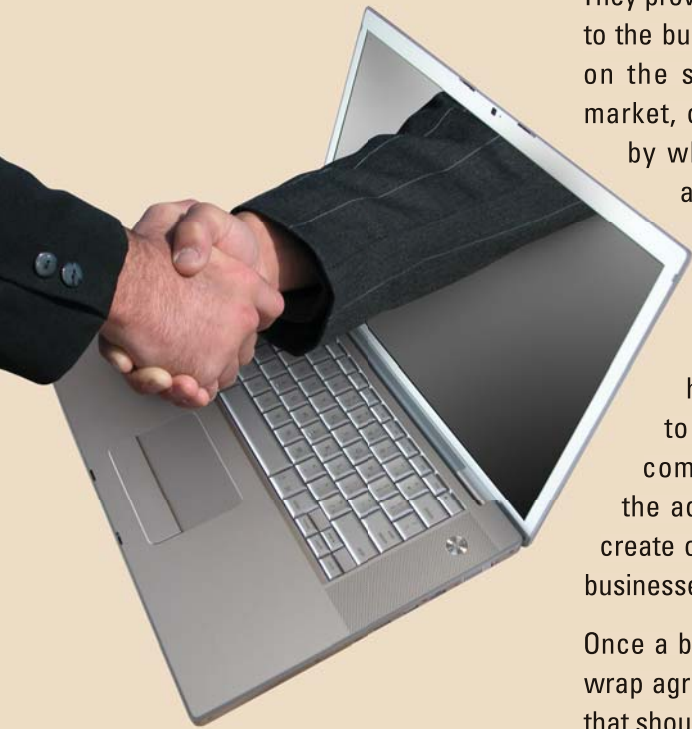
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DOING BUSINESS ON THE WEB — CLICKWRAP AGREEMENTS

Every day, more and more business transactions are conducted over the Internet. Many of these transactions begin with a “clickwrap agreement.”



with their paper predecessors, clickwraps are easier and quicker for a customer to accept, and more difficult for the customer to attempt to change. They provide a measure of control that is to the business’s advantage. Depending on the size of the business and its market, clickwraps can be the means by which countless relationships are formed and deals are struck, so it is vital for any business using them to get all of the details correct. To ensure enforceability and to head off later legal problems to the greatest extent possible, companies should seek and use the advice of legal counsel as they create clickwraps tailored to particular businesses.

Once a business decides to use a clickwrap agreement, there are certain traits that should be considered:

- **Put the steps in the right order.** Before a customer is expected to pay for the product or service, or is allowed to receive it, he should be given the chance to review the entire clickwrap agreement and the option to accept or reject all of its terms and conditions.

- **Identify the user.** If the party who comes to a company’s clickwrap represents another company, it is especially important to get identifying information that will show that the user is authorized to bind his company to the agreement. To this end, the clickwrap should have places for the user’s name, the company’s name, the user’s title, and both e-mail and physical addresses. Of course, aside from its value for such verification purposes, the identifying information can be useful in other ways.

Clickwrap agreements are variations on “shrinkwrap” agreements, those printed terms and conditions usually found in the packaging for software. Clickwraps basically work the same way, but the user agrees to the terms by clicking a button on his computer, instead of by opening the package and using the product. While clickwrap agreements are still widely associated with software licensing, their use has spread to a wide range of business settings, such as advertising services, telecommunications, and banking, to name only a few.

Given that clickwraps have become ubiquitous, it is prudent for businesses to consider their advantages and to be informed as to the desirable characteristics that any clickwrap agreement should have. As compared

- **Do not make the user hunt.** The clickwrap should be readily apparent to a user, and the “install” or “download” button should appear only after the clickwrap is set out in its entirety. In the same vein, a checkbox indicating that the user has agreed to the terms of the clickwrap makes good sense. The idea is to prevent anyone from claiming in a later dispute that there were parts of the agreement that he could not have easily seen, and to which he did not give his assent. As for any terms that are weighted in favor of the business, making them hard to find is an especially bad idea. On the contrary, these terms should stand out, maybe even with their own “I agree” checkbox.

- **Drop the legalese.** As is true for any contract, a clickwrap should use clear, plain English. It is well settled in law that a court will construe ambiguous terms against whoever wrote them, that is, the business whose clickwrap is being deciphered.

- **Make the clickwrap control.** If there are any other dealings with the user, whether oral or written, that conceivably could be said to constitute a separate agreement, they all should explicitly defer to the clickwrap agreement. Likewise, the clickwrap itself should have language

indicating that its terms override any conflicting terms in other agreements relating to the transaction.

- **Keep the final word for your business.** What if a user navigates successfully and accepts the clickwrap agreement, but your business determines for some reason that it wants no business relationship with that user? The business should provide itself with an escape hatch, with language in the agreement to the effect that the business must confirm the agreement before it becomes enforceable, or that the business can cancel the agreement at will.

Clickwrap agreements have gained acceptance as valid, enforceable contracts, albeit in an unconventional format. This point is illustrated by a recent federal court decision. In a breach of contract dispute between two software companies concerning the use of licensed software, the court hardly paused at the question of whether a clickwrap agreement constituted a valid contract. In answering “yes,” the court also relied on an extensive list of prior court decisions that had reached the same conclusion. The clickwrap agreement has become a permanent part of the legal landscape for businesses and individuals alike. ■

REAL ESTATE LAW UPDATE

RENTALS ALLOWED UNDER RESTRICTIVE COVENANT

After a couple bought property in a subdivision, they were surprised to learn that several homes near theirs were going to be offered as vacation rental property. Strangers on vacation were not the neighbors the couple had in mind. All of the properties in the subdivision were subject to a set of restrictive covenants, one of which required that lots be used

for “single family residential purposes only.” The couple sued to get a court to declare that renting a home, even to one family, violated that restriction, but the couple came out on the losing end of the litigation.

In the plaintiffs’ view, to derive rentals from a home was to convert the property from single family residential use to a prohibited commercial or business use. The court disagreed. Citing statistics



showing that in most states over 30% of homes are rented rather than owned by the families living in them, the court reasoned that an owner’s receipt of rental income does not detract from or change the “residential” use of the property.

The plaintiffs’ position was undercut by a separate covenant that permitted delegation of certain owner rights to “tenants,” thus obviously contemplating the rental of property. The plaintiffs argued that only long term rentals were allowed, not short term vacation rentals, but they could point to no language supporting such a distinction.

SELLER’S DUTY TO DISCLOSE

Before building a home on property it owned, a developer obtained a study of the soil conditions in the area that included the lot for the home. The study was prompted by the fact that a church that formerly owned adjoining land had abandoned plans to build a church structure on that land because of its own study indicating that there was too much collapsible soil to support the building. After receiving the soil study

of the neighboring land, the developer dug out some soil on the lot for the home, reducing its grade by about six feet, and built the new house.

That there were any concerns over soil suitability came as news to the buyers of the new home when, not long after the purchase, cracks appeared in the foundation, doors would not open or close, and, as the court later put it, “[e]vidence of excessive settling abounded.”

The developer had not disclosed the contents of the soil study to the buyers. A state supreme court ruled that the buyers’ lawsuit for fraud should go to a jury. The court reasoned that a developer/builder may owe his buyer a duty to disclose information known to him concerning real property, including property not being conveyed to the buyer, when that information is material to the condition of the property being purchased. To be material, the information must be “important.” Importance, in turn, is measured by the degree to which the information could be expected to influence the judgment of a person buying property.

In the case before it, the court found that a jury could well conclude that the buyers would have wanted to know about collapsible soil on adjacent land before they bought their home. In the court’s view, a property boundary should not be considered a perimeter outside of which, as a matter of law, nothing is material to a prospective buyer. ■

Actual resolution of legal issues depends upon many factors, including variations of fact and state laws. This newsletter is not intended to provide legal advice on specific subjects, but rather to provide insight into legal developments and issues. The reader should always consult with legal counsel before taking any action on matters covered by this newsletter. Nothing herein should be construed to create or offer the existence of an attorney-client relationship.