

## ***SPECIAL REPORT: DO I NEED A WILL OR A TRUST?***

For most of us, the main goal we have in estate planning is passing property and personal effects to our loved ones with the least possible time, expense, confusion and emotionality. We want to maintain family harmony, not destroy it. In working to achieve these goals, there are two major tools used by estate planners -- wills and living trusts. A frequently asked question is whether to use a will, a living trust, or both. To answer this question, let's first look at each of these instruments. Next we'll evaluate their advantages and disadvantages. To finish, I'll provide some guidelines for deciding between the two.

A will is a person's formal expression of his or her desires in passing property upon death and as respects the personal and financial care of minor children or incapacitated adult children. Properly drafted, it is enforceable by the court. To be valid, a will must be in writing, signed by a willmaker of sound mind, and witnessed by two individuals. The document should be published by the willmaker stating to the witnesses that it is indeed his or her will. And it should be notarized to attest to the truthfulness of the signatures on it.

A living trust, also called a "revocable" trust, is a legal document that provides for the management and passage of property. It is more than an expression of the trust maker's, or "trustor's", intent to pass property and see to the care of loved ones. It is the actual act of beginning such passage and care. A living trust sets these things in motion at the time it is executed. The key players are the trustor (the person setting up the trust whose property funds it), the trustee (the one who manages the property under the terms of the trust), and the beneficiary (those benefiting from its property passage, income distribution, or management terms).

Before looking at the pros and cons of wills and living trusts, let's spend a moment talking about what many consider to be a four letter word -- probate. The word "probate" derives from a Latin root meaning "to prove the will". Thus when a willmaker dies, the will is filed with the court, which will supervise the estate's administration. The executor, or personal representative, will then marshal all of the assets and liabilities of the estate and file an inventory with the court. Next, creditors and beneficiaries are notified and given a chance to object or file claims against the estate. Eventually, the court will approve the probate and order the personal representative to retitle and actually pass the assets to the intended beneficiaries. This process can take anywhere from 90 days or so on up to two years, or longer if the will is hotly contested.

Wills and living trusts each have distinct advantages and disadvantages. With wills, a key advantage is the ease and cost of preparing them. The legal fees involved in setting them up are generally less than a living trust. In addition, no work needs to be done to transfer assets because that will only take place upon death. Finally, once a will has been probated, all creditor and beneficiary claims are terminated, unlike with a living trust where the claims terminate later on expiration of the statutes of limitations.

The disadvantages of a will center on probate. As noted, it can take many months or years to accomplish, depending on the degree of complexity of the estate and the cooperation of the personal representative and beneficiaries. Attorney and personal representative fees can easily measure in the thousands, or tens of thousands, of dollars, so cost is another potential disadvantage. Also, probate is a public proceeding. So all of the decedent's assets, liabilities and beneficiaries -- including such things as "secret" children better left out of the public eye -- are openly disclosed in the court's public records for the whole world to see.

The advantages of a living trust include the flip-side of the disadvantages of a will. A properly drafted and funded living trust will completely avoid probate because the asset transfers are provided for and set in motion during the life of the giver. Hence there will be little if any cost or delay in making things happen. Living trusts are private in that they are not filed with the court. So no one need learn of the widow's new found wealth for example, or of the fact that the decedent died penniless as another example. Living trusts can also provide for management of the trustor's assets upon death or in the event of physical or mental disability.

Disadvantages of living trusts are primarily two-fold. First, they cost more than wills to prepare. In my experience they run about twice the cost of wills. Generally this extra expense is eventually made up many times over through probate avoidance on death. The second disadvantage is that living trusts involve more work up-front. The trustor's assets need to be moved into the trust by retitling them in the trust's name. If assets are accidentally left out of the trust, a probate will be triggered for such assets. Here again the trust will save far more labor in the long run. Also, note that a pourover will can be used to catch such "missed" assets and redirect them into the living trust.

There is some overlap between wills and living trusts. For example, they are of equal effect when it comes to planning for estate taxes. Whatever can be done to save them with a will can be done with a trust, and visa versa. Also, both approaches can produce testamentary trusts that "spring" into existence upon death to provide for loved ones into the future. Finally, both can designate specific recipients of special or sentimental gifts.

Deciding between a will and a living trust is not always easy, but I generally consider several factors in making a recommendation. The benefits of avoiding probate are usually greater for larger or more complex estates than for smaller ones. On the other hand, people who do not want to deal with retitling assets during their lifetime should probably consider wills. For people with out-of-state property, a living trust will avoid the multiple probates that may be required to pass such property. If privacy is an issue, either to avoid creditor hounding or to maintain family secrets, the living trust approach is attractive.

In the end, the decision to go with a will versus a living trust is one that only you can make. My job as counsel is to inform you of the choices and of the pros and cons of each. After that, you will be in a position to make the best possible decision based on a knowledge of the consequences. Ultimately, a good estate plan is an unselfish act of caring. It is a statement to your loved ones that you were willing to make an effort to leave them with a minimum of time, expense and hassle at a time of grieving. Most people agree that the rewards are well worth the effort.