



WILLS VS. REVOCABLE LIVING TRUSTS

By Theresa M. Wade

Clients frequently ask questions regarding the difference between a will and a revocable living trust, the benefits of both and the downsides to each. This article is intended as a brief summary of the relative merits of these two primary estate planning documents.

WILLS

- Wills offer a measure of simplicity. A will is one document, as opposed to a trust that also requires a “pourover” will, “picking up” any assets not transferred into the trust during the person’s lifetime and transferring those assets to the trustee of the trust.
- Clients may lack familiarity with trusts, and feel more comfortable with wills.
- Wills are typically less expensive in the planning stage because there are no costs associated with funding a will, as there are with trusts.
- Wills require a minimal level of “testamentary capacity” for signing the will – knowing and being able to identify family members, the nature and extent of your assets, and the effect of a will in transferring those assets.
- Wills can provide for guardians of minor children, typically not included in trusts.
- Wills are effective only upon death and require a probate.
- Probate of a will is a judicial proceeding that requires notices and service of process, publication of information in a newspaper of general circulation, and the availability of the terms of the will for public inspection.
- Wills do not assist in planning for incapacity during lifetime. Separate documents are required, including a Durable Power of Attorney to manage assets and business activities, an Advance Directive relating to end-of-life healthcare decisions, and other documents as may be required depending upon the type of assets held by an individual.
- Wills are effective only on those assets passing through probate. Wills do not affect the disposition or distribution of assets that have designated beneficiaries (such as life insurance policies, retirement accounts, or annuities), nor do they affect the disposition and distribution of assets held jointly with another (such as joint bank accounts, real property held jointly with rights of survivorship, vehicles held jointly with rights of survivorship, etc.).

REVOCABLE LIVING TRUSTS

- A revocable living trust is typically effective upon signing. Funding may occur on or after signing, and may continue throughout the lifetime of the individual creating the trust (called the “settlor” or “grantor”).
- A trust avoids probate for all assets held in the trust. For a trust to be effective, the trust must be funded during the settlor’s lifetime, and a “pourover” will is used to transfer any assets remaining at death. Thus, a trust that has not been completely funded will *not* avoid probate for those assets that had not been



transferred into the trust before the settlor's death.

- A trust provides for the disability of the settlor by allowing a successor trustee to continue to manage trust assets regardless of the settlor's condition, and controls the disposition and use of all assets held within the trust. However, assets that are not held within the trust, or issues that are unaffected by the trust, will continue to require a Durable Power of Attorney. These issues may include dealing with the Internal Revenue Service, Social Security Administration, life insurance companies or retirement plan managers when the benefits are not owned or payable into the trust, etc.
- Trusts offer privacy for the settlor. Trusts do not need to be filed with the county or the court, unless a dispute arises among the beneficiaries or with the trustee.
- Because the trust is an agreement between the settlor and the trustee, the settlor must have sufficient capacity to enter into a contract, which is typically a higher standard than that needed to execute a will.
- Trusts are typically more expensive in the planning stage because of the costs associated with funding the trust. Ensuring full funding of the trust may require hours of work and dozens of forms, deeds and assignments. Arguably, the costs are offset if the trust is fully funded at death, through the avoidance of probate.
- Typically, the settlor serves as the initial trustee of his or her trust, and continues to manage the property as he or she has always done, prior to the creation of the trust. In the event the settlor loses capacity (becomes unable to manage his or her financial affairs), the settlor's designated successor will step in, immediately, to begin managing the assets for the benefit of the settlor.

This article is intended to give you a brief summary of the differences between the use of a will and a revocable living trust. If you have additional questions, or would like to explore the use of one of these documents in your estate plan, please contact Theresa Wade at Garrett Hemann Robertson PC, at (503) 581-1501 or twade@ghrlawyers.com.

