

*Keeping Our Clients Informed on Tax and Estate Planning Issues*

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## Wills and Trusts – What's the Difference?

One of the first issues we discuss with all of our estate planning clients is the differences between using a Will and a Trust (specifically, a Revocable Living Trust) in their estate plan. Many of our clients are surprised to find out that much of what they have heard about Trusts is simply untrue. As such, we have provided below a summary of the main differences between Wills and Trusts, as well as some information dispelling the more common misconceptions regarding Trusts.

### Probate

The most significant difference between Wills and Trusts is probate. Wills must go through probate, whereas Trusts do not. Probate is a court proceeding where a judge verifies the authenticity of the Will, determines the identity of the heirs, and ensures that the assets of the estate are transferred to the proper individuals (i.e. those named by the Will). Historically, probate was a burdensome process involving numerous court appearances. Today, however, estates can often be completed outside the supervision of the probate court and, in general, only require two (2) court appearances: one to open the estate and one to close the estate.

Although Trusts do not need to be probated, we often tell our clients that, when using a Trust, the client must "probate" their assets during their lifetime. A Trust's provisions only apply to the assets that it owns. As such, when using a Trust, an individual must make sure to "fund" the Trust by transferring most assets to the Trust during the individual's life. This transfer of assets is very similar to the transfers that are completed after one's passing during probate. The difference is that while your family or friend will be probating your Will after your death, you will be funding your Trust during your life.

### Timing of Distributions

Another difference between Wills and Trusts is that when using a Will,

the executor must generally wait six (6) months before making any distributions. This waiting period is part of the probate process, and it is required by law so that creditors of the estate have an opportunity to make claims against the estate. Although there are some emergency steps that can be taken to accelerate the distributions, they add costs to the administration of the estate. A Trust, however, can generally make partial distributions to the beneficiaries within a short time period after your passing. Once the Trust administration is complete, the trustee will then make final distributions.

### Claims

When a Will is probated, the estate is protected from any creditor claims after the six (6) month claims period has passed. A Trust, however, is subject to creditor claims for two (2) years from one's passing.

### Privacy

A Will must be filed with the clerk of court of the county in which the decedent died. As such, it is a matter of public record for anyone to view. A Trust, however, has no similar requirement. As such, Trusts offer much greater privacy, which may be desirable for some individuals.

### Common Misconceptions

#### **"I need a Trust because of the value of my assets"**

Although there are some specialty trusts that achieve results that cannot be obtained through the use of a Will, most of these strategies are not necessary for individuals

with assets under approximately \$5 million (\$10 million for couples). For everyone else, the value of your assets is generally not a factor when choosing between a Will or a Trust.

#### **"I need a Trust so I do not have to pay taxes"**

Some people are under the impression that putting their assets into a Trust will mean they will not have to pay estate or income taxes. Although this is every estate planner's dream, it is just not true. You will still be subject to estate and income taxes even if you use a Trust.

Both Wills and Trusts, however, can take advantage of the same basic estate tax planning strategies, which work to help lower estate tax exposure. There are some more complex tax strategies that can only be used by specialty Trusts, but these are unique strategies that are tailored to the specific client's situation, and they are generally implemented in addition to the use of a Will or a Revocable Living Trust.

#### **"I need a Trust because I do not want to leave money outright to my children"**

Many people are uncomfortable with the thought of leaving their assets outright to their children or other beneficiaries. As such, they want to hold that money in a Trust for the benefit of their children to ensure that the funds are spent wisely. These Trusts are called Testamentary Trusts, because they are created upon your death. Fortunately, Testamentary Trusts can be created by the terms of a Will or a Trust. In fact, when it comes to stating *who* receives your assets and

*when* they receive your assets, there is generally no difference between a Will and a Trust.

### **"I need a Trust to protect me from creditors"**

Generally, a Revocable Living Trust does not protect your assets from your creditors. This misconception commonly arises because most Testamentary Trusts are effective at protecting your assets from the creditors of your beneficiaries. Unfortunately, that creditor protection does not extend to you. Some states have adopted laws that provide creditor protection for Asset Protection Trusts, but Illinois is not one of those states. Asset Protection Trusts created under the laws of another state are a unique strategy that may be appropriate for some individuals in Illinois, but it is important to know that choosing a Revocable Living Trust over a Will does not afford you any additional creditor protection.

### **What is Right for You?**

As you can see, while there are many differences between Will and Trusts, there is no one-size-fits-all estate plan. Many factors play a part in deciding whether to use a Will or a Trust. While some factors, such as owning out of state property or significant retirement accounts may mean a Trust is better suited for you, there is no one determining factor. The best estate plan is the one that meets your situation and goals as a whole. If you have any questions or concerns regarding your existing estate plan, obtaining a new estate plan, or just something someone told you, please let us know.