

Midgett & Preti PC

Attorneys Counselors

When To Use A Will

Much has been written about the advantages and disadvantages of Revocable Living Trusts over Wills.

The purpose of this article is to provide some general guidelines as to when a Trust may (or may not) be a preferred estate planning document over a Will. This article is meant to supplement and not replace competent legal advice.

There are many kinds of Trusts. The Trust referred to in this article is a fully-funded Revocable Living Trust under which you would serve as the Trustee and to which you would transfer your assets. You may, but do NOT have to have a bank as a Trustee. Having a bank serve as Trustee can be attractive to some people, and a requirement for some family situations, but most people prefer to have themselves (and then family members upon their death) serve as Trustee.

There are two basic steps in establishing a Revocable Living Trust. First, you meet with an experienced and competent estate-planning attorney who will draft your Trust and other related documents. After signing your Trust, you transfer all or most of your assets to your Trust or name your Trust as beneficiary on insurance policies and the like.

Because you are the Trustee, you haven't lost any control over your property and no new tax returns are required. You continue to report the income from the Trust property on your Form 1040 just like you always have done. Your home is still eligible for the exclusion on capital gains in the amount of \$250,000 (\$500,000 for married couples), as well as other tax breaks available to homeowners.

It may be helpful to think of a Revocable Living Trust as your own private company in which you (or you and your spouse) are the president, chairman of the board, sole shareholder, and sole employee. You are the only one involved. Your company (the Trust) owns your assets. So when you die or become incapacitated, you don't own any assets, your Trust owns them.

Your Trust has specific instructions of how to manage and distribute your assets in the event of your disability or death. Thus, assets owned by your Trust avoid the need for a conservatorship (if you are disabled) and for probate (upon your death).

Probate is the process of winding up the affairs of one who has died and transferring the decedent's property to the proper persons. Probate may involve having to prove a Will, notifying all potential

heirs, and resolving conflicts (sometimes called contests). Probate is generally required only when you die owning property in your name without a surviving joint tenant or named beneficiary. Interestingly, many people believe that if they have a Will, they will avoid probate. That simply isn't true. For a Will to have any legal effect, it must be submitted for probate. The term "probate" literally means "to prove a will".

Virginia has a fairly user-friendly set of probate laws which in many cases have simplified probate, thus reducing its cost. The executor fees are quoted on a percentage of the estate size, and the percentage decreases as the size of the estate increases. The attorney for the estate is entitled to receive reasonable compensation based on the amount of time spent and the difficulty of the work.

Many observers feel that average probate costs may run 5% of the estate; but even 2% of a \$500,000 estate (your home and other property) estate amounts to \$10,000. You can avoid these costs with a properly drafted and funded Revocable Living Trust simply because upon your death you do not own your property; your Trust does.

Probate can be both time consuming and frustrating. Probate in Virginia usually takes between six (6) months and two (2) years, depending on the complexity of the facts or situations presented. If you want your family to have immediate access to your property upon your death, you don't want probate.

Probate may be required to be opened in every state where you own real estate. Sometimes this real estate is abandoned by heirs because the cost of probate may exceed the value of the property. Property owned by your Trust will generally avoid probate in all 50 states.

If you become mentally incapacitated (disabled), your property is essentially frozen until the court appoints a conservator to manage your financial affairs. For instance, upon your disability your home and your investments generally cannot be sold, even if owned in joint tenancy, until a conservator is appointed, and the court grants the conservator power and authority to sell. Conservatorship, or living probate, usually involves filing fees, attorneys fees, accounting fees, bonding premiums and court orders, all designed to "protect" the disabled person. While this protection may be desired in some cases, many people feel that these are family matters and they simply don't want or need the "protection" of the courts and the attorneys. Property owned by your Trust avoids the need for a conservator; your designated successor Trustee can manage your financial affairs in the event that you are unable to do so.

It should be noted that in Virginia, and most states, the Revocable Living Trust offers very little creditor protection for its Grantor (trust creator), but can provide excellent creditor protection for the Grantor's beneficiaries. A Will can also create a Trust (called a "testamentary trust") to provide the same type of protection, such as for minor children. Property passing pursuant to either a Will or a Trust is eligible for step-up in basis, which reduces taxable gains to an heir who sells your property after your death.

Federal estate taxes can be reduced for married couples with proper drafting in either a Will or a Revocable Living Trust. Keep in mind, however, that to obtain the tax savings features of a Will, probate must be incurred on both deaths.

The Revocable Living Trust can avoid probate on both deaths. All too often those who attempt to minimize estate taxes with a Will continue to hold their property in joint tenancy, thus avoiding not only probate, but also the tax saving trusts created by the Will. Because of such devastating errors in titling property, many attorneys feel that a funded Revocable Living Trust is more likely to achieve the desired tax savings. Probate is a matter of public record. It is a legal proceeding initiated and paid for by your family. An inventory of your assets, the names and addresses of your heirs, and any family disputes may all become a matter of public record. For various reasons, many people do not want their family affairs a matter of public record.

Wills are easy to contest; a simple writing to the court can tie up assets for months or longer. Disgruntled heirs can use the threat of a Will contest to attempt to receive more than they were left in the Will.

A Trust is generally a private document. No notice is required to be sent to disinherited heirs; no inventory, not even a copy of your Trust, is required to be filed with the court. Trusts are generally viewed as being far more difficult to challenge.

The disadvantages of a Trust involve largely business decisions. A Trust generally costs more than a Will. The cost and quality of any legal document will vary from attorney to attorney. In this age of specialization, an attorney who limits his or her practice to estate planning may provide a more comprehensive estate plan at a lower cost than a general practice attorney. You will want an experienced attorney who believes in Trust planning to draft your estate plan.

Can you draft your own documents? Yes, but estate planning is not like a do-it-yourself home plumbing job. If you don't perform the plumbing job correctly, you can call a plumber to fix it. If you don't perform your estate plan correctly, the errors probably won't be discovered until your death, when it is too late to fix or too costly.

A poorly-drafted estate plan is often worse than no estate plan at all. Usually it costs much less to do the job right than it will cost to fix a plan that has problems or omits important provisions. Your family and your money are too important not to seek competent and experienced professional assistance.

Many of the reported disadvantages of a Trust are of questionable validity. No annual fees are required if you serve as your own Trustee; similarly no control is lost. It may be time consuming for you to transfer your property to your Trust, but it is still far simpler for you to make these transfers than for your heirs to transfer your property after you are gone.

There are additional relatively insignificant differences between Trusts and Wills which are not discussed here. For a more thorough discussion of those issues, there are a number of books and publications, such as *The Living Trust Revolution* by Robert Esperti and Renno Peterson. Many can be found in most public libraries.

Now that you know the major advantages and disadvantages of Trusts over Wills, let's equate these to specific situations.

For a young person or a couple, without children, or whose situation is very simple, a Will is often the most cost effective choice for an estate plan. But as they grow older and become more concerned about disability, probate avoidance, estate tax minimization, and making things easier for their families, then the Trust becomes far more desirable than the Will. It is important for you to understand at least some of the advantages of Trust planning over Will planning before you can effectively evaluate the added cost of the Trust in light of the added benefits the Trust may provide. Unfortunately, there are few simple answers in this complex world, but for many, deciding in favor of the Trust is an easy decision.

The chart on the next page should help you determine which type of estate plan would be most appropriate for you.

Any One of the Following Factors Could Cause You To Prefer a Trust Over a Will:

USE A WILL

FACTORS TO CONSIDER

USE A TRUST

<---Young/Under 35-----Age-----Older/Over 50-->

<---Good Health-----Concern about Incapacity/Probate-----Poor Health-->

<---Simple-----Family Situation-----Complex-->

<---Low-----Desire for Privacy-----High-->

<---Small-----Size of Estate-----Taxable or nearly so-->

<---None-----Out of State Real Estate-----Any-->

<---Up-to-Date Will-----Current Status-----Simple Will or None-->

<---None Needed-----Desire to Protect Family-----Strong Desire-->

<---Little or None-----Likelihood of Contest-----Some Chance-->

Conclusion:

Many factors should be considered when deciding whether you should use a Trust or a Will as your basic estate plan. The anticipated value and timing of those benefits must be weighed against the additional cost. Regardless of whether you choose a Will or a Trust, you now have a framework from which to make your decision. Perhaps you will now better understand why the Living Trust is replacing the Will as America's estate plan of choice.

For a consultation to discuss whether a will or a trust is the appropriate estate planning vehicle for you, call us at (757) 687-8888.

This article was prepared by Midgett & Preti PC and is intended to provide general advice only. For answers relating to a specific situation, you should consult a competent estate-planning lawyer.