



Will vs. Trust: What's the Difference?

I am often asked about the differences between wills and trusts or whether someone needs a trust. I have found that there are a lot of myths and misinformation out there on this topic, and your barber or the cashier at Publix, while very nice people, may not be the best source for answers to this question. In this newsletter I will describe the differences between these estate planning tools in my attempt to answer this common question. For purposes of this newsletter, all references to "trusts" are to revocable living trusts.

In order to understand whether you and your family would benefit from a revocable living trust, it is necessary to understand some basics about the probate system in Florida. Probate is a court process for collecting assets, paying liabilities, and distributing assets of a deceased person. Probate is required when a person dies owning assets in his or her individual name without a beneficiary designation or right of survivorship in favor of another person. Basically, if you own a home, investment account, or bank account and there is no co-owner or beneficiary named, that asset will likely have to go through the probate system. Even assets with a co-owner may have to go through probate if the co-owner does not have a right of survivorship.

A last will and testament may be filed as part of the probate administration to provide further instruction, name a personal representative, and name beneficiaries. A last will may instruct the court as to who should receive items of your property through the probate process. As part of the probate process the bills and claims of the deceased person will be paid and final tax returns should be filed and taxes paid. Florida has limitations on who may serve as your personal representative or executor; certain non-relative, non-resident persons are not able to serve.

A revocable living trust has many things in common with a last will and testament. Both documents distribute property after you pass away and name someone who is in charge of seeing that your wishes are followed. In fact, trusts have been referred to as "will substitutes" in some contexts due to their similarities with last wills.

To best understand the differences between a trust and a last will and testament it is a good idea to know the origin of trusts. The trusts we know today originated



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in medieval England in response to a prohibition against members of certain religious groups owning property. Instead of giving property directly to the members of the religion, those wishing to benefit them would instead give property to friends of the religion in trust for the members. This separation between the legal ownership and the beneficial use and enjoyment of property is the fundamental concept behind trusts.

Trusts have become common estate planning tools. A trust may hold real property, investments, bank accounts, and other assets. The trust names a successor trustee so that if the client is incapacitated or passes away there is someone who may follow their wishes on their behalf. Because the trustee is the legal owner of property conveyed to the trust we are not required to seek approval from the probate court, and assets owned in the trust may be administered without court oversight.

There are several advantages to revocable trusts. In general, there is a smoother transition when a trust is involved which may be important for assets such as a family business. A trust is not filed with the court or recorded in the public records so the terms and the beneficiaries remain private. The statutory fee for an attorney assisting with the administration of a trust is lower than for probate estates and there is no filing fee for a trust where no probate is required. In many cases the duration of trust administration is shorter than the probate court administration of a similar last will and testament. A trust may cause less of a burden on your family, maintain privacy over who is receiving your property, and save time and money. In some cases, a properly drafted trust may defer, limit, or even avoid the imposition of federal estate taxes.

I have found that many people generally know what a trust is, but most people do not have a good understanding of what a trust can do. Trusts can be complex estate planning tools, and this article merely brushes the surface of the various issues that should be considered. If you have questions about trusts or wonder if a trust might be a good fit, you should talk with an experienced estate planning attorney.

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