

WHICH IS BETTER: A Will or a Trust?

A revocable living trust (sometimes called by the more formal title of an “inter-vivos trust) is a document that is sometimes used as a substitute for a detailed Last Will and Testament. If prepared properly, if your personal circumstances make it sensible, and if it is customized to your own situation by a skilled estate-planning attorney, it can be extremely helpful. A living trust is not worthwhile for everyone, however! Trusts are private documents, as opposed to Wills that become public when filed for probate. A Revocable Living Trust created during your lifetime and a properly prepared Last Will and Testament can both contain provisions to take care of the spouse in a second marriage situation, while also protecting the ultimate inheritance of your own children.

For many people, the **combination of a Durable Power of Attorney and a Last Will and Testament** (often with one or more Trusts ...such as a tax-smart “by-pass” trust built into the Will) can achieve essentially the same results as a Revocable Living Trust. **As a general rule, a Revocable Living Trust is most helpful for people who own real property (vacation homes, inherited property, etc.) in more than one state.**

A trust is simply a method of owning property (“stuff”). It does not matter if the “stuff” is real property (land with or without a house or building on it), stocks, mutual funds, cash, boats, or other types of personal property. By analogy, **think of a trust as a bucket**. When you “fund” the trust, you place some or all of your property in the name of the trust ... like placing the items in the bucket. The text of the trust is your set of detailed instructions that include such things as:

(1) Who puts stuff in the bucket?

Answer: You ... the client, referred to in the trust document as the Grantor.

(2) How does stuff get put in the bucket?

Answer: Sometimes by deed, sometimes by re-titling a bank account, sometimes by changing the beneficiary on a life insurance policy, etc.]

(3) Who manages and takes care of the stuff in the bucket?

Answer: The Trustee.

(4) Who gets to take stuff out of the bucket?

Answer: The Trustee.

(5) Who gets to keep the stuff that is taken out of the bucket?

Answer: The Beneficiaries

(6) When and How Often can the Trustee take stuff out of the bucket?

Answer: Usually once every three months, but that can be customized.

(7) What stuff can be removed from the bucket?

Answer: Usually, interest on investments, sometimes principal, etc. This can be customized also.

(8) For what reasons can stuff be taken out of the bucket?

Answer: Often, for “health, education, maintenance and support” of the Beneficiary.

Maybe you have heard somebody say that a Revocable Living Trust is the way to save estate taxes. Sometimes that is correct, but sometimes that is not! All property owned by a Living Trust is taxed exactly the same way that it would be taxed in the deceased person’s estate through his or her Will.

A Revocable Living Trust that includes special tax “by-pass” terms will save estate taxes for your children. (These very same “by-pass” tax-saving terms can also be put in your Will.) Every married couple with assets of over one million dollars (and you must include life insurance policies for which the deceased is the “owner” in this calculation of assets) should have either a Revocable Living Trust that includes the tax “by-pass” provisions or a Will that includes the tax “by-pass” provisions, if they are leaving their property to their children or grandchildren. Some clients prefer using a Will with the tax “by-pass” terms, and other clients prefer using a Revocable Living Trust with the tax “by-pass” terms. Many time, it is simply a matter of your own personal preference or comfort level.

However, **if you own real property in two or more states**, your family will be much better off if you have a Revocable Living Trust. This is because the primary probate of your estate will take place in the state of your primary residence. However, there must be an additional probate (called an Ancillary Administration) in each other state where you own real property! For example, if you live in North Carolina but have a condominium at the beach in South Carolina and have inherited a parent’s house in Georgia ... your estate upon your death will require primary probate in North Carolina plus Ancillary Administration in South Carolina and Ancillary Administration in Georgia. That can be very expensive, and this is generally enough of a reason to justify the time, effort and expense of setting up a Revocable Living Trust to own all your real property.

While you can start out as being Trustee for yourself when your attorney sets up your Trust, you will need to designate one or more persons to be successor Trustee in the event of your own incapacity or death. As a general rule, it is not a good idea to name a bank as your successor Trustee. Banks have very little flexibility. It will take much longer to get a decision for your beneficiaries if any questions arise. Just because you like your current local banker, that

person probably won't have anything to do with handling the Trust. It likely would be someone who does not know your spouse or children or grandchildren. Remember that banks are in the business of making money. Furthermore, even if you designate a bank to be your successor Trustee, the value of the assets in your trust will have to be rather large before a bank would accept. Even with high-value trusts, the nature of the assets also influences whether a bank would accept the position. If the trust assets are largely cash, the bank might accept. If it is land that must be managed, they probably would not. Sometimes qualified relatives or friends (or professionals you know and trust, such as your CPA or maybe even your attorney) make good choices to be successor Trustee.

The claims of creditors of an estate where a Will is being probated are cut off 90 days after the publication in a local newspaper of a Notice to Creditors. For a Revocable Living Trust, the 90 days cut-off does not apply to these claims ... some of which your family may not know about and might not know how to challenge. The time for creditors to submit claims in a Revocable Living Trust situation is stretched out in many cases to 3 years ... sometimes longer.

All lawyers are not experienced in the technical and critically important details of how to evaluate a person's situation and recommend a sensible estate plan. Make sure you select an attorney who is very experienced in the estate planning area of law! Just because a lawyer helped you with a deed when you bought your house or incorporated a business for you or helped your cousin with a criminal charge or traffic ticket, that does not mean that the same lawyer knows the law of estate planning! NEVER copy a form out of a book or use something you obtained on the internet! It might not be valid in the state where you live.

If you really care about taking care of your family, **consult a qualified lawyer about these important estate planning issues.**