

WHO'S BEHIND THE WHEEL AND WHAT ARE THEY DRIVING: IMPORTANT DIFFERENCES BETWEEN WILLS AND TRUSTS

Sarah E. Williams, Esquire
840 Beach Drive N.E.
St. Petersburg, Florida 33701

(727) 898-6525

A. Common Questions and Misconceptions

1. "What is An Estate Plan?"

a. An estate plan is a plan for transporting one's wealth. Like any transportation plan, it designates a destination – the persons who will receive the property. It also can provide instructions on how the property may be used. In transportation, minimizing breakage is a goal. Likewise, in an estate plan, minimizing loss of property, to taxes or to waste, is an important goal in establishing a plan to pass property as the client wishes.

b. In order to accomplish these goals, an individual will need to formulate his or her specific objectives and desires about the disposition of his or her property, the use of trusts, and the appointment of fiduciaries. The estate planning professional must assist the individual in this process by explaining the available alternatives, and the impact of tax planning and creditor protection considerations.

2. "What is a Will?"

a. The starting point for addressing all of the client's testamentary planning objectives is a Will. Historically, it is the traditional means of disposing of one's property at death.

b. Wills tend to take one of the following three forms:

(1) A simple will that leaves the testator's property outright to one or more recipients.

(2) A complex will that uses trusts and involves tax planning.

(3) A pour-over will that disposes of the testator's tangible personal property and then directs the distribution of the balance of the testator's property to a revocable trust created by the testator during life.

c. The specific requirements for a Will are governed by state law. The common requirements are that the person signing the Will (often referred to as the testator or testatrix) must be at least 18 years of age, competent, and free of undue influence. A Will must be witnessed by two witnesses, and an oath taken by a notary public to make the process for admission of the Will easier.

3. **"I do not have a Will, therefore, I do not have an estate plan."** Incorrect. Florida law supplies an estate plan for individuals who do not have a Will. Basically, the probate estate will pass entirely to the surviving spouse. If there is no spouse, an order of decent is specified by Florida Statutes. Florida law will not honor your wishes that certain items of your property be given to specific persons unless you have a Will. Further, Florida law will not honor your wishes regarding who you would like to serve as your Personal Representative.

Preparing a Will should be considered a privilege instead of a chore. Otherwise, the State is behind the wheel.

4. **"I have a Will, therefore I have no need to probate."** Incorrect. Probate is the court supervised process that oversees the settlement of your estate in accordance with the terms of your Will. Any property held in your name at the time of your death is subject to probate.

5. **"What is a Revocable Living Trust?"**

- a. A revocable living trust is a trust created by an individual during life to hold the individual's assets and over which the individual retains complete control. It can provide several important benefits.
- b. The creator, or "settlor," of the trust usually names himself as initial trustee and reserves the right to use the trust property for whatever purposes he wishes. The settlor reserves the power to change the terms of the trust at any time.
- c. The trust designates one or more successor trustees and provides a mechanism for naming additional successor trustees if necessary. If the settlor becomes disabled, the designated successor trustee of the trust would manage the trust assets for the settlor's benefit. Without the trust, it would be necessary to have a court appoint a guardian to manage the individual's property if he became disabled. The trust, unlike a person, is immune to disability and provides continuity of management.
- d. In addition, the trust typically contains testamentary provisions to provide for the disposition of the settlor's assets after his death. Using a trust for this purpose instead of a will has several advantages.

(1) The use of a revocable trust protects the settlor's privacy. A will must be filed in the probate court after death and becomes a public document. In contrast, in most states a trust does not have to be filed with the court, so that the details of the settlor's dispositive scheme remain private.

(2) Any assets that were held in the trust at the time of the settlor's death will be disposed of in accordance with the provisions of the trust and will not be subject to probate administration and public disclosure. The expenses of administering a trust after the settlor's death may be less than the expenses of probating the estate, and the process less time-consuming.

(3) In some states, a trust is harder to challenge than a will, so the settlor's estate plan would be more secure in the event that a beneficiary was dissatisfied with the plan and attempted to challenge it in court.

(4) While revocable living trusts have all of these practical management advantages, they do not save federal income or estate tax. In addition, they are effective only as to property that the settlor actually transfers to the trust. Therefore, it is necessary to change the title to real estate, bank accounts, investment accounts, and other assets.

6. **“What’s the Difference between a Will and a Trust?** Although the two terms are often confused, wills and trusts are really very different in a few important ways. Which suits you better might come down to your personal situation and concerns.

(a) **When Each Takes Effect** A Last Will and Testament only goes into effect after the death of the testator – the individual who wrote it. A living trust goes into effect as soon as it’s signed. You can change both up until the time of your death as long as you remain mentally competent unless you create an irrevocable trust. These trusts are pretty much forever.

(b) **The Property Each Covers** A will can only govern the disposition of property owned in the testator’s sole name, including interests in property such as a tenancy in common. It cannot address assets that pass directly to a beneficiary by contract or by operation of law, such as life insurance policies or joint tenancies with rights of survivorship.

A living trust can govern and distribute any property it’s been funded with. The settlor – the person who created the trust – transfers his assets into it after it is formed. These can include life insurance policies provided that the trust, not the settlor, owns the policy, and tenancy-in-common interests.

(c) **Wills Require Probate** Property passing under the terms of a last will and testament requires probate to transfer to a living beneficiary. Property passing under the terms of a living trust avoids probate.

The trust’s terms are the mechanism by which the assets it holds can move to a new individual’s ownership. A trust can even continue to hold property for the benefit of certain beneficiaries, such as minor children who cannot legally take ownership of their own property or spendthrifts who might otherwise whip through their inheritances.

7. **"My estate is less than \$5,490,000; therefore I will not need to have a probate of my estate."** Incorrect. All estates require a probate to dispose of property titled in the decedent's name, no matter what the value of the estate. For estates under \$75,000.00, certain summary probate proceedings exist. However, for estates greater than \$75,000.00, a formal probate administration will be required. Oftentimes, individuals confuse the "probate estate", which could consist of as little as \$1.00 in assets, and the "taxable estate" for federal estate tax purposes, which currently requires greater than \$5,490,000 in assets.

8. **"How much does probate cost?"** Attorneys' fees for probating an estate may be charged on an hourly basis, flat fee, a percentage of estate, or a combination thereof. Typically, attorneys' fees average 3% of the fair market value of the estate (e.g. a \$300,000.00 estate could easily incur attorneys' fees of \$9,000 – \$10,000). In addition to attorneys' fees, other costs incurred in connection with probate are personal representative fees, appraiser’s fees and court filing fees.

9. **"The attorney who prepared my Will kept the original. Therefore my personal representative must use him to probate my Will."** Although it is not mandatory, typically, the personal representative will choose the attorney who prepared the Will to do the Probate administration. However, the personal representative can choose any attorney he or she desires.

10. **"I have created a Revocable Living Trust. Therefore I will avoid probate."** This statement is basically true. However, having created a Revocable Living Trust, it is necessary that the Settlor "fund" the Trust with all or essentially all of his or her assets. Only those assets which have been legally titled in the name of the Trust at the time of the Settlor's death will avoid probate.

Oftentimes, it is advisable to leave certain assets (e.g. automobiles) in your individual name to decrease the potential of judgment creditors against the trust. Those assets then can be distributed in a summary probate proceeding.

11. **"Now that I have a Revocable Living Trust, I have no need for a Will."** Incorrect. Even though an individual has a Revocable Living Trust, it is still necessary for him/her to create a "Pour Over Will". Basically, this Will "pours over" all assets into the Trust which the individual had in his or her name at time of death. An individual still may have property titled in his name at the time of death, either intentionally or unintentionally. Some assets which may be titled individually at the time of death are debts owed to the decedent, a wrongful death action against a person responsible for your accidental death, and bequests or devises from another individual's estate. If you have no Will, the State is behind the wheel.
 12. **"My estate is very small, therefore I do not need a Revocable Living Trust."** The size of your estate is not necessarily determinative of whether you should have a Revocable Living Trust. Other factors, such as your family structure and your health, are also important factors to consider. One of the major benefits of a trust is that your Successor Trustee can manage your financial affairs for you if you become unable to do so, without a court-appointed guardian.
 13. **"What are the disadvantages of probate other than the cost?"** Other than costs, the two (2) other principal hardships of the probate process is the delay and lack of privacy. Since the probate process involves the court system, delay obviously follows. Any estate requiring a formal administration will take a minimum of four (4) to six (6) months to finalize and, for larger or more complicated estates, often takes longer than a year. Furthermore, upon the death of an individual, his or her Will is required to be deposited with the Clerk of the Court and becomes a public document at that time. Anyone desiring to view the Will and make copies of it may do so at their pleasure. With a Revocable Living Trust, the Successor Trustee oftentimes can begin distributing assets immediately and the terms of the Trust remain confidential.
 14. **"Does my Will allow me to appoint a guardian if I should become incapacitated?"** No. A Will has no legal effect until the death of the person who created it. However, since a Revocable Living Trust becomes effective upon its date of creation, the terms of the Trust will dictate what happens to the property in the event of your incapacity. Accordingly, the necessity to appoint a guardian of your property can be avoided when a Trust is in effect.
 15. **"Now that I have a Revocable Living Trust, I will incur no federal estate tax at the time of my death."** In and of itself, a Revocable Living Trust does not remove the possibility that an individual's estate will incur estate taxes. However, a properly drafted trust has the ability to shelter approximately \$11,000,000.00 for a married couple from federal estate taxes. Don't let the IRS be behind the wheel!
 16. **"A Revocable Living Trust has no disadvantages."** Incorrect. Unlike the probate scenario, the distribution of property following the death of a Grantor of a Revocable Living Trust is not supervised by the court systems in the same manner as distribution of property following the death of a Testator of a simple Will. Accordingly, it is imperative that you have the "highest confidence" in the individual or entity selected as successor trustee of your Revocable Living Trust. Furthermore, the cost of creating a Revocable Living Trust is greater than that of a simple Will. However, when the cost of a trust is compared to the ultimate probate cost, and possible cost of a guardianship, it represents a great savings to you and your ultimate beneficiaries.
- B. **Cautionary Advice: The Duties of those Named to Serve on your Behalf**

I. **Personal Representative Under a Will.** The duties and powers of a Personal Representative commence upon appointment following your death. A Personal Representative is a fiduciary who is under a duty to settle and distribute your estate in accordance with the terms of your Will and Florida Statutes.

A. Duties. The duties of the Personal Representative include but are not limited to the following:

- 1) Protecting and preserve all assets.
- 2) Providing notice to persons who are interested in the estate, including creditors to whom you may owe money.
- 3) Inventorying including identifying, collecting, valuing and securing all assets.
- 4) Reviewing all incoming mail for potential creditors and additional assets.
- 5) Preparing a Final Accounting.
- 6) Reviewing creditor claims and making a decision regarding validity of said claims.
- 7) Arranging for preparation of all tax returns and payment for any taxes owed.
- 8) Managing all assets including selling assets, investing assets or raising cash.
- 9) Distributing assets in accordance with your wishes and discharging the estate.

B. Powers. The Personal Representative under Florida Law has very broad powers to manage the assets of the estate. These powers include but are not limited to the following:

- 1) Retaining and holding for such periods as they shall determine such property, real or personal, in the form of investment received by them.
- 2) Selling, leasing, pledging, mortgaging, transferring, exchanging converting or otherwise disposing of or granting option with respect to any and all property.
- 3) Investing and reinvesting assets of the estate and any stocks, bonds, notes or other securities or in any variety of real or personal property and changing the form of any or all investments without obtaining approval from any court.
- 4) Making any elections or exercising any options under the Internal Revenue Code and any regulations promulgated thereunder.
- 5) Distributing in cash or in kind or any combinations to beneficiaries at the termination of the administration.
- 6) Managing any and all real estate including leasing, selling and listing for sale such property during the administration (not to include Homestead property).

II. **Revocable Living Trust.** The duties and powers of a Trustee serving under a Living Trust are similar to the duties and powers of a Personal Representative serving under your Will. The primary difference between a Personal Representative and Trustee is that a Personal Representative must be formally appointed by the Probate Court and because of the Court supervision of probate, the administration of a Will is typically more formal than the administration of a Trust. A Personal Representative is only serving following your death while a

successor Trustee needs no formal appointment and may serve on your behalf during your lifetime as well as following your death.

ARE YOU SURE THAT THE AGENTS/FIDUCIARIES THAT YOU HAVE NAMED UNDER EACH OF THESE DOCUMENTS ARE CAPABLE OF AND TRUSTWORTHY ENOUGH TO PERFORM THE DUTIES AND POWERS LISTED ABOVE? IN THESE UNCERTAIN TIMES IT IS IMPORTANT TO REVIEW YOUR LEGAL DOCUMENTS AND REASSESS THE IMPORTANCE OF THE INDIVIDUALS YOU HAVE NAMED.

For further information, please do not hesitate to contact me at my office.

Fundamental Differences Between the Administration Living Trusts and Wills

	<u>Living Trusts</u>	<u>Wills</u>
Effective date	at signing	upon death
Court Governed	NO	YES
Formal Notice to Creditors	NO	YES
Creditor Period	2 years	90 days
Private	YES	NO
Need Attorney to Administer	NO (with one filing exception)	YES
Probate Required	NO	YES
Tax Returns Required	YES	YES