

WILLS vs. REVOCABLE LIVING TRUSTS

Is a will or revocable living trust the better primary estate planning document? Here are several things to consider when choosing a will or revocable living trust.

Wills

- Wills offer a measure of simplicity. A will is one document, as opposed to a trust, which also requires a “pour-over” will - “pouring over” any assets not transferred into the trust during the grantor’s life.
- You may be more comfortable with a will, because of no familiarity with trusts.
- Wills are typically less expensive in the planning stage because there are no costs associated with funding a will, unlike a trust.
- Wills require only a low level of testator capacity of execution.
- Wills can provide for guardians of minor children, unlike trusts.
- Wills are effective only on probate, which usually can occur only after death.
- The probate of a will is a judicial proceeding that requires notices and service of process, as well as potentially opening the details of the estate to public scrutiny. However, Minnesota and Wisconsin have informal administration, which may minimize the amount of detail that becomes a matter of public record.
- Wills do not assist in disability planning. Separate instruments are required to plan for disability including a financial power of attorney to manage property and a health care power of attorney to allow an agent to attend to your personal needs.
- Wills operate only on “probate” assets or “testamentary” assets (assets either in the client’s name alone or when the beneficiary predeceases the client).

Revocable Living Trusts

- A trust is usually effective immediately, although funding of the trust may occur at a later time.
- A trust operates to avoid probate, but only for the assets in the trust at the time of death. For a trust to be effective, the trust needs to be funded during life, and a “pour-over” will is used to transfer any remaining assets at death.

- A trust provides for disability by allowing a successor trustee to continue to manage trust assets. However, a health care power of attorney also should be considered to attend to personal needs. The trust is considered more effective in dealing with disability, as opposed to a financial power of attorney which is often met with resistance by banks, brokerage companies, and others. But a financial power of attorney, which includes the power to transfer assets into the trust, can be critical to fully funding the trust if you become incapacitated.
- Trusts offer a measure of privacy. If any disputes arise between the successor trustee and beneficiaries, however, it is likely that the trust terms will become a matter of court record despite the grantor's wishes.
- Because the trust is an agreement between the grantor and trustee, the grantor must have sufficient capacity to enter into a contract, which is typically a higher standard than that to execute a will.
- Trusts are generally more expensive in the planning state because of the costs associated with funding the trust. Ensuring full funding of the trust may require hours of work and dozens of forms, deeds, and assignments. Arguably, the costs are offset, however, when considering the probate expenses avoided if the trust is completely funded.