Which Is Better-
A Will or Revocable Trust?

A common decision when creating an estate plan is whether to use a will or a revocable living trust. There is a lot of confusion about when one should be used over the other. The answer is heavily dependent on which state you live in and what type of assets you own. In other words, as is common in legal parlance, “It depends.”

Wills and revocable living trusts generally perform the same function: they determine who will receive your assets after you pass away. [1] There are, however, several differences between the two options that can make a material impact on the timing, cost and way assets are transferred to your heirs.

Date of Implementation

Both wills and revocable living trusts (hereinafter referred to as “revocable trusts”) are valid upon proper execution and are both fully revocable, meaning they can be changed. There is, however, a major difference in their implementation.

Wills become effective at death. While the will’s creator is alive, they continue to hold assets in their individual name. If an individual becomes incapacitated, they will need a legal document called a power of attorney to allow family members or friends to handle their financial affairs. Or, if no power of attorney exists, the court will appoint a conservator to handle the incapacitated individual’s affairs. Conservatorships are cumbersome and can be expensive due to court oversight. At the death of the will’s creator, a personal representative (sometimes referred to as an “executor”) is appointed to administer the decedent’s estate according to the provisions of the decedent’s will.

Revocable trusts become effective while the trust creator is alive. That means assets owned by the trust are held in the name of the revocable trust (e.g., John Doe, Trustee of the John Doe Revocable Living Trust) rather than in the trust creator’s individual name (e.g., John Doe). The trustee appointed by the revocable trust manages the trust assets. The trust creator generally serves as trustee of the revocable trust while they are alive, and a successor trustee is named to act at the creator’s death or upon the creator’s incapacitation.

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[1] This discussion focuses on revocable living trusts. Lifetime irrevocable trusts are used to benefit someone else during the trust creator’s life. Lifetime irrevocable trusts are generally used for estate tax planning purposes and are an advanced estate planning technique. Revocable living trusts are standard estate planning documents that are used for basic estate planning and sometimes estate tax planning, even in situations in which lifetime irrevocable trusts are also used for estate tax planning purposes. Testamentary trusts are created by the will of a decedent, so they only come into effect after a person has passed.

Probate

Probate is the court-supervised process of transferring a decedent's assets to heirs. Wills are subject to probate while revocable trusts are not. Historically, when probate was required, attorneys charged a percentage of the total value of a decedent's estate as a fee for handling probate (referred to as a "percentage fee"). Court oversight and attorney percentage fees made probate a lengthy and expensive process. In response, there was an increased use of revocable trusts to avoid probate. Currently, many states now provide for streamlined probate in uncontested probate cases, which reduces complexity. Also, many states now require attorney fees to reflect the actual time and effort expended on probate matters rather than simply allowing a percentage fee to be charged. This has reduced the cost of probate in many instances. That means, in many states, the benefit of using revocable trusts due to the expectation that it will reduce the cost of probate has been significantly diminished. Of course, probate remains relatively expensive in some states [2] so the use of revocable trusts, solely for cost reduction, may still be advisable, depending on your state of residence or if assets are located in multiple states (e.g., vacation home in another state).

In order to avoid probate, revocable trusts must be properly funded. Some clients mistakenly believe that by simply signing their revocable trust, they have funded it. That is not the case. In order to fund a revocable trust, the assets must be retitled in the name of the trust. That means ownership of bank accounts, investment accounts, real estate and business assets must be changed to the name of the revocable trust. If that does not happen, the trust will be an empty shell and probate will still be required following the death of the decedent.

Privacy

A will becomes public at death. When someone dies, their will is required to be filed with the court to open a probate proceeding. This makes the will a public document. An inventory of assets is also generally required to be filed with the court and accountings may also be required. This results in public disclosure of the decedent's personal assets and potentially public disclosure of the distribution of specific assets.

Revocable trusts allow for privacy because they are not required to be filed with the court, do not require court oversight at death, and no public disclosure of personal information occurs. For this reason, revocable trusts are preferred by persons seeking privacy.

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[2] Commonly cited examples are Florida and California. Consultation with a local attorney is always recommended.

Four Common Misperceptions

1. Revocable trusts always provide estate tax benefits.

Reality: Revocable trusts can provide estate tax benefits, but they must use special language beyond the standard probate avoidance and asset-transfer purpose of the trust. Wills can also create testamentary trusts that accomplish similar estate tax reduction benefits.

2. You do not need a will if you have a revocable trust.

Reality: It is always recommended that clients creating revocable trusts also create a pour-over will. The pour-over will "pours over" any individually owned assets into the trust at the decedent's death via the probate process. Without a pour-over will, assets not owned by the revocable trust at death will be distributed according to state law, not the terms of the trust document.

3. Revocable trusts are not subject to creditor claims.

Reality: Wills are subject to claims of the decedent's creditors in probate. It is not uncommon for people to believe revocable trusts are not subject to creditor claims. Although beneficiaries of an irrevocable trust are often shielded from creditor claims, the assets of a revocable trust are subject to creditor claims against the trust creator, during the creator's life and for a period of time after death.

Probate provides for a fixed period of time in which creditor claims must be submitted or else they are extinguished. The probate period for creditor claim submission is usually shorter than the statutory time that creditors can pursue claims against a decedent's revocable trust after death. For example, if creditor claims are required to be filed within 90 days from publication of notice of probate but the statutory time period for filing claims against a decedent's revocable trust is one year from the date of death, it might make sense to open a probate proceeding for the purpose of extinguishing creditor claims as soon as possible. This can occur even if no assets pass through probate because a revocable trust was used.

Four Common Misperceptions Cont.

4. **"Personal representative" (or "executor") and "trustee" are interchangeable terms.**

Reality: A personal representative administers a will after a person dies. They have no authority over assets while the will creator is alive. If the will creator is alive and becomes incapacitated, an agent named in the incapacitated person's power of attorney will be eligible to handle their financial affairs or, if no power of attorney exists, the court will appoint a conservator. Successor trustees are named in a revocable trust to handle trust assets if the incapacitated person can no longer act as trustee. No court intervention is required when a successor trustee is authorized to act. Neither a personal representative nor an agent named in a power of attorney has authority over trust assets.

Summary

The decision whether to use a will or revocable trust varies according to the person doing the planning and their unique goals and circumstances. The important thing is to realize the differences between the choices and how those differences can impact your estate plan. A chart highlighting some of the major differences between wills and revocable trusts is included as Exhibit A to this commentary. Please contact the Estate Planning Services team at Cerity Partners if you need any assistance in determining which option to pursue.

Exhibit A
Comparison Chart

	Will	RevocableTrust
Effective while creator is alive	No	Yes
Allows for management upon creator's incapacity	No	Yes
Less expensive to create	Yes	No
Avoids probate	No	Yes
Requires court involvement	Yes	No
Requires assets to be retitled during life	No	Yes
Remains private	No	Yes
Names guardians for minor children	Yes	No
Can manage assets for children after death	Yes*	Yes

*Through use of a testamentary trust

Important Disclosures