

Are Living Trusts the Best Choice? (Part II)

Special points of interest:

- **The administration of a will is similar to a living trust**
- **A living trust may offer little advantage when compared to a will**
- **The use of wills and trusts should be examined on a case-by-case basis**

Introduction

The purpose of estate planning is to deliver assets to heirs in an organized and efficient manner. There are two basic documents that most people use to accomplish this goal: a living trust (*trust*) or a last will and testament (*will*). Both types of documents may contain instructions regarding how to distribute property to beneficiaries. In fact, both documents may contain *exactly the same* instructions.

Since a will or trust might serve the same function, I am frequently asked, "Which one is better?" In this series of articles we are exploring the benefits of living trusts to determine if they are the best choice for most people. After all, trusts are relatively expensive when compared to a will, so a person should get something *extra* for his or her money.

By now, most people know that trusts are used to distribute property without probate. On the other hand, a will must be "admitted" by a probate court before the instructions in the document can be carried out. I spend a great deal of time explaining the probate process because it is one of the fundamental differences between wills and trusts.

Most people believe that the probate process is a slow and expensive ordeal that should be avoided. In the

first article of this series (Part I), we examined the *cost* of probate to determine whether the higher fees for drafting a living trust (and avoiding probate) is worth the extra money. Please read Part I for the answer to that question.

In this article (Part II), we are going to compare how wills and trusts are used during the *post-death* administration process. Our objective is to see whether administering a trust is more *convenient* than going through probate with a will.

Estate Administration

A person's assets must be distributed after they die. An *estate* refers to all of the property that a person owned at the time of death. *Estate administration* is the term applied to all forms of post-death distribution of property, regardless of whether the deceased person has a will, trust, or no documents at all.

Estate administration usually follows the same step-by-step pattern: 1) appointment; 2) publication; 3) inventory; 4) payment of expenses and claims; 5) distribution of assets; and 6) accounting. These six steps must be followed to properly administer an estate regardless of whether a person has a will or a trust. We'll review each of these steps to compare how a will or trust is adminis-

tered after someone dies.

I. Appointment

The person appointed to administer a will is called a *Personal Representative* (referred to as a "PR"). A PR was formerly called an *executor*, and some old wills still contain that term. The person who administers a trust is called the *Trustee*.

The *appointment* of a PR or Trustee is the first step in the estate administration process. A PR or Trustee must be properly appointed before they can take control of the estate assets and distribute the assets to the beneficiaries of a deceased person. The legal requirements for appointment are different for wills and trusts.

Will: A person can nominate a PR in a will, but only a probate court can appoint a PR. A PR is appointed by filing an *application* for probate, and paying the required filing fee, with the probate court. Once the proper documents are filed, the probate court will usually appoint the PR without a hearing. The court then issues "letters of authority" to the PR. The letters of authority are an official court document that allows the PR to carry out his or her duties on behalf of the estate.

Trust: A trust is a contract between the person who creates a trust (the *Grantor*), and the person who administers the trust (the *Trustee*). The Trustee is appointed in the trust document. However, since the trust is a contract, the Trustee must agree in writing to act as the Trustee. Sometimes the Trustee signs the trust document itself. More often, the Trustee does not sign the original trust document. In that case, he or she may sign an "Acceptance of Trust" to accept the appointment to act as the Trustee.

Comparison: It is easier for a person to assume the duty of a Trustee than a PR because no court appointment is necessary for a trust. On the other hand, most Trustees are family members of the decedent, and they are not familiar with the duties of a Trustee. Therefore, many Trustees seek out the services of an attorney to assist them with trust administration.

II. Publication

The PR or Trustee of an estate is required by statute to publish notice of a deceased person's death in a widely circulated newspaper. The notice must contain certain information required by court rule. This process is referred to as *publication*. An obituary notice does not satisfy the requirements for publication.

The purpose of publication is to provide the creditors of a deceased person with an opportunity to file claims against the estate for unpaid debts. The benefit of publication is to limit the liability of the PR or Trustee for failure to pay claims. The creditors of a decedent's estate must file a claim against the estate within 4 months of the date of publication, or their claims will be forever barred. If notice of death is not properly published by the PR or Trustee, then creditors have up to 3 years to file claims against the estate.

Comparison: The requirements for publication are the same for wills and trusts.

III. Inventory

Inventory refers to the process of listing the assets owned by a decedent's estate, and providing the list of assets to the beneficiaries. The inventory must list each item owned by the estate and its fair market value as of the date of the decedent's death. The purpose of the inventory is to inform the beneficiaries of the assets owned by the estate.

Will: The PR is required to provide an inventory of assets to the beneficiaries within 91 days of his or her appointment. In addition, an inventory fee must be paid to the probate court.

Trust: Most trusts require the Trustee to provide a *statement of account* to the beneficiaries. The statement of account must list the trust assets, their market values, the trust liabilities, receipts, and disbursements, and the amount of the trustee's compensation. If the trust does not contain any instructions concerning an inventory or accounting, then the Trustee must provide a statement of account to each current trust beneficiary, and keep them informed of the progress of administration.

In addition to the annual accounting, within 28 days after acceptance of appointment, a Trustee must inform each beneficiary in writing of the trust's existence, the trustee's name and address, and the beneficiary's right to receive a copy of the trust and information about the trust property.

Comparison: In most cases, the requirement to provide an inventory of assets to the beneficiaries is the same for wills and trusts. However, an inventory fee must be paid to the probate court when a will is administered.

IV. Claims and Expenses

Claims against the estate and the expenses of administration must be paid before assets are distributed to the beneficiaries. A revocable living trust does not provide any effective protection from creditors' claims against the decedent.

Comparison: If there are enough assets to do so, then the statutory duty to pay estate claims and expenses is the same for wills and trusts.

V. Distribution of Assets

The objective of every will or trust is to establish a plan for distribution of assets to specified beneficiaries. Therefore, distribution of estate assets is the most important duty of the PR or Trustee.

Comparison: Both the PR and the Trustee have a similar duty to distribute the estate assets in accordance with a will or trust, and to handle the assets for the benefit of the beneficiaries. A PR or Trustee can be held personally liable for his or her failure to properly distribute the estate assets.

VI. Accounting

A statement of account must be prepared by a PR or Trustee. The statement of account must list assets, liabilities, receipts, disbursements, and the amount of the PR or Trustee compensation. All of the beneficiaries must receive a copy of the accounting.

Comparison: The requirements for an accounting are the same for wills and trusts, unless the trust expressly limits the duty of the Trustee

to provide an account. Such limitations are rarely used.

Summary

In the first article of this series (Part I), we examined whether the higher cost of drafting a living trust was justified in order to avoid probate. We concluded that many families will not realize any savings by avoiding probate.

Now, we have seen that administrative requirements for wills and trusts are nearly identical. A will must be administered using probate procedures. Living trusts are commonly used to avoid probate, but the Trustee still has certain statutory duties that must be fulfilled to administer the trust. Therefore, very little may be gained by using a living trust to avoid probate.

However, when probate avoidance is an estate planning goal, we can suggest options to do so without using a living trust, and reduce the overall cost of transferring property to beneficiaries. Again, the viability of this option must be evaluated on a case-by-case basis.

Although using a living trust to avoid probate may not be desirable in every case, there are many circumstances in which a living trust does provide substantial benefits. In the last article of this series (Part III), we are going to examine some of the situations in which a living trust is the best choice for estate planning. JPT



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Estate Planning for Families
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