WILL VS. TRUST

RONALD ZACK LAW
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One of the most common questions I am asked by a client in a consultation is, "Should we get a will or a trust?"

I will usually say that trust-based estate planning, with a Revocable Living Trust, is the most flexible, most functional, and often the best way to plan, but not for everyone. Trust-based plans are more expensive up-front, require effort to maintain, and sometimes are more costly and inconvenient to administer after death. There are a few situations in which I strongly recommend creating a trust over a will. A Revocable Living Trust, if well-thought-out, drafted properly, and maintained diligently, can provide an incredibly efficient and useful plan. But, as I said, not for everybody and not absolutely necessary to achieve the goals many people have.

So, what is a trust? A trust is a legal entity that holds property. A Revocable Living Trust is an entity someone (I call Trustmaker) creates during their lifetime to hold ownership of certain properties. That property is still considered the Trustmaker's property. The terms of the trust are basically instructions of how to deal with the property during the Trustmaker's incapacity or after his death. A revocable living trust does not provide any asset protection for the Trustmaker. Those assets are just as vulnerable to creditors and predators as if still in the Trustmaker's name.

The trust, as a legal entity has three parties:

1. The Trustmaker, who creates the document and puts his or her property into the name of the trust.
2. The Trustee, who has control over the assets in a trust.
3. The beneficiary – the person(s) for whose benefits the assets can be used.

Usually, with a Revocable Living Trust, all three parties are the same person or people.

The trust makes it very easy for the person named as successor to the original trustee to take over managing the assets and at the death of the Trustmaker to distribute the assets. The structure of the trust document makes it very easy to create additional subtrusts for the ultimate beneficiaries (after the death of the original Trustmaker/Trustee/Beneficiary) that can protect assets from creditors, predators, spouses, boyfriends and girlfriends, ex-spouses, etc. The trust can provide for saving on taxes and can offer many benefits for the protection of a surviving spouse, including some degree of asset protection. Trusts are particularly useful for people with out-of-state real estate, blended families, and special needs children.

A will-based plan, on the other hand, provides a set of instructions that are to be implemented for the management and distribution of assets after death. The will is only effective after death. While a will is designed to go through probate, the court-supervised administration provided for estates, it is easy to avoid probate (even with a will). And subtrusts for beneficiaries can be created in a will, but that is often costly and inconvenient.

Trusts are often sold with the promise of avoiding probate. And yes, a trust should avoid probate. But it doesn't always. And trusts frequently end up in court because of other types of disputes. The key is that for a trust to work, it must be appropriately drafted and it must be cared for over the years. A trust that goes bad can be a far worse nightmare than a will going through the probate process.

A will can simplify administration, even if there is probate through the courts. The process does not have to be expensive and time-consuming if done correctly. Wills can work well for many people.

The decision of whether to have a will or a trust must be made carefully. Does the additional cost and effort of doing the trust correctly justify the benefit? Will the Trustmaker(s) be likely to follow-through in maintaining and updating the trust? What are the types of assets and what is the family situation? All of these questions, and more need to be considered in making the decision.

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