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Will or Trust as the Centerpiece of your Estate Plan
Key Considerations

Much has been written about the advantages and disadvantages of Revocable Living Trusts over Wills. The purpose of this article is to provide some general guidelines as to when a Trust may (or may not) be a preferred estate planning document over a Will, and to offer some guidelines that we use for drafting Wills and Trusts.

There are many kinds of Trusts. The Trust referred to in this article is a fully funded Revocable Living Trust under which the Grantor would serve as the Trustee. Having a bank serve as Trustee can be attractive to some people, and a requirement for some family situations, but many people prefer to have themselves (and then family members upon their death) serve as Trustee.

There are two basic steps in establishing a Revocable Living Trust, drafting (and execution) and funding.

Because the Grantor is the Trustee, there is no lost control over property transferred into a Revocable Living Trust and no new tax returns are required. The Grantor will continue to report the income from the Trust property on Form 1040, as the Revocable Living Trust is a Grantor Trust as defined in IRC Sections 671 through 679. The Grantor's home is still eligible for the exclusion from capital gains in the amount of $250,000 ($500,000 for married couples), as well as other tax breaks available to homeowners.

A Trust has specific instructions of how to manage and distribute assets in the event of disability or death. Thus, assets owned by the Trust avoid the need for a conservatorship (if disabled) and for probate (upon death).

Probate is the process of winding up the affairs of one who has died and transferring the decedent's property to the proper persons or entities. Probate may involve having to prove a Will, notifying all potential heirs, and resolving conflicts (and contests). Probate is generally required only when you die owning property in your name without a surviving joint tenant or named beneficiary. Interestingly, many people believe that if they have a Will, they will avoid probate. That simply is not true. For a Will to have any legal effect, it must be submitted for probate. The term "probate" literally means "to prove a Will".

2200 Wilson Boulevard
Suite 320
Arlington, VA
22201-3352
703.525.5110
703.525.5122 FAX

P.O. Box 17655
Arlington, VA
22216-7655

www.flottco.com

Many states have a fairly user-friendly set of probate laws which in many cases have simplified probate, thus reducing its cost. The executor fees are usually quoted on a percentage of the estate size, and the percentage decreases as the size of the estate increases. The attorney for the estate is entitled to receive reasonable compensation based on the amount of time spent and the difficulty of the work.

Many feel that average probate costs may run 5% of the estate, and this is generally the maximum amount that may be charged as a commission by an Executor. But even 2% of a $500,000 estate (a residence and other property) amounts to $10,000. These costs can

be avoided (or reduced) with a properly drafted and funded Revocable Living Trust simply because upon death an individual does not own your property; the Trust does, and a Trustee commission can be substantially lower than an Executor's.

Probate can be both time consuming and frustrating to many people who have no experience dealing with these matters. Probate usually takes between six (6) months and two (2) years, depending on the complexity of the facts or situations presented. Trust administration is not really that different from probate, except that court involvement is not required to administer the Trust.

Probate may be required to be opened in every state where an individual owns real estate. Sometimes this real estate is abandoned by heirs because the cost of probate may exceed the value of the property. Property owned by a Trust will generally avoid probate in all 50 states and the District of Columbia.

If a person becomes mentally incapacitated (incompetent), his or her property is essentially frozen until the court appoints a conservator to manage their financial affairs. For instance, upon disability a home and any investments generally cannot be sold, even if owned in joint tenancy, until a conservator is appointed, and the court grants the conservator power and authority to sell. Conservatorship usually involves filing fees, attorneys fees, accounting fees, bonding premiums, and court orders, all designed to protect the disabled person. While this protection may be desired in some cases, many people feel that these are family matters and they simply do not want or need the "protection" of the courts and the attorneys. Property owned by a Trust avoids the need for a conservator; as the designated successor Trustee can manage the Trust's financial affairs in the event that the Grantor is unable to do so.

It should be noted that in most states the Revocable Living Trust offers very little, if any, creditor protection for its Grantor (Trust creator), but can provide excellent creditor protection for the Grantor's beneficiaries. A Will can also create a Trust (called a "testamentary trust") to provide the same type of protection, such as for minor children. Property passing pursuant to either a Will or a Revocable Living Trust is eligible for step-up in basis, which reduces taxable gains to an heir who sells property after death.

Federal estate taxes can be reduced for married couples with proper drafting in either a Will or a Revocable Living Trust. Keep in mind, however, that to obtain the tax savings features of a Will, probate must be incurred on both deaths.

The Revocable Living Trust can avoid probate on both deaths. All too often those who attempt to minimize estate taxes with a Will continue to hold their property in joint tenancy, thus avoiding not only probate, but also the tax saving trusts created by the Will. Because such devastating errors in titling property, many attorneys feel that a funded Revocable Living Trust is more likely to achieve the desired estate tax savings.

Probate is a matter of public record. It is a legal proceeding initiated and paid for by your family. An inventory of your assets, the names and addresses of your heirs, and any

family disputes may all become a matter of public record. For various reasons, many people do not want their family affairs a matter of public record.

Wills are easy to contest; a simple writing to the court can tie up assets for months or longer. Disgruntled heirs can use the threat of a Will contest to attempt to receive more than they were left in the Will.

A Trust is generally a private document. No notice is required to be sent to disinherited heirs; no inventory, not even a copy of your Trust, is required to be filed with the court. Trusts are generally viewed as being far more difficult to challenge. Generally, Trustees will be required to notify qualified trust beneficiaries within a certain number of days of accepting trusteeship of such acceptance and to give certain personal data (such as address), and to provide a copy of the Trust, and annual reports of receipts and disbursements upon request. The Trust can waive these notice requirements.

The disadvantages of a Trust involve largely business decisions. A Trust generally costs more than a Will. The cost and quality of any legal document will vary from attorney to attorney.

Many of the reported disadvantages of a Trust are of questionable validity. No annual fees are required if you serve as your own Trustee; similarly no control is lost. It may be time consuming to transfer your property to a Trust, but it is still simpler for an individual to make these transfers than for the heirs to transfer the same property after death.

For a young person or couple, without children, or whose situation is very simple, a Will is often the most cost effective choice for an estate plan. But as they grow older and become more concerned about disability, probate avoidance, estate tax minimization, and making things easier for their families, then the Trust becomes far more desirable than the Will. It is important to understand at least some of the advantages of the Trust planning over planning with a Will before effectively evaluating the added cost of the Trust in light of the added benefits the Trust may provide.

If it is desirable to have a court oversee the administration of estate assets, such as when there is discord in the family, a Will, even one that incorporates a testamentary trust, may be the preferred vehicle. If needed the provisions may be invoked to eliminate the requirement for annual accountings for the testamentary trust.

The chart on the next page should assist you in determining which type of estate plan would be most appropriate for you.

Any One of the Following Factors Could Cause You to Prefer a Trust Over a Will:

USE A WILL	FACTORS TO CONSIDER	USE A TRUST
Young/Under 40	**Age**	Older/over 60
Good Health	**Concern about Incapacity/Probate**	Poor Health
Simple	**Family Situation**	Complex
Low	**Desire for Privacy**	High
Small nearly so	**Size of Estate**	Taxable or
None	**Out of State Real Estate**	Any
Up-to-Date Will None	**Current Status**	Simple Will or
None Needed	**Desire to Protect Family**	Strong Desire
Little or None	**Likelihood of Contest**	Some Chance