

WILLS VS. LIVING TRUSTS

Many people believe that they should have a revocable living trust rather than a will to dispose of their property upon death. If they do not yet believe that, they have at least heard that from their friends. There are excellent reasons for Texans to have a revocable living trust instead of a will as the main estate planning instrument, but for the vast majority of Texans, the difference will not be compelling enough to pay the additional cost required for a revocable living trust.

Useful Terms

Settlor. The person who establishes the trust, and for a revocable living trust the settlor is usually also the initial trustee and beneficiary. Sometimes also called a *grantor* or *trustor*.

Beneficiary. The person who receives benefits under the trust.

Trustee. The person who invests the trust property and decides what distributions to the beneficiaries are appropriate or are required under the trust agreement.

Trust agreement. The document that sets forth the terms of the trust. Sometimes called a *trust indenture* when the settlors and the initial trustee are the same.

Living trust. A trust established during the settlor's life. *An inter vivos trust is the same thing.*

Testamentary trust. A trust established in a will. It becomes effective on the date of death of the testator.

Revocable trust. A regular trust whose terms can be amended or revoked by the settlor.

Irrevocable trust. A trust that cannot be amended or revoked by the settlor.

Let's consider some of the commonly thought reasons for having a living trust that are actually not true.

A living trust provides protection from creditors. Assets placed in a Texas living trust of which the settlor is also the beneficiary (sometimes called *self-settled trusts*), does not provide any protection at all from the settlor's creditors. Only when a trust is irrevocable and the beneficiary is not the settlor can a living trust give protection from creditors, at least in Texas. Some other states and off-shore jurisdictions have self-settled asset protection trusts.

A living trust provides estate tax savings. In fact, no additional estate tax savings come from a living trust compared to a will. A tax-planned will that creates testamentary trusts can provide the exact same estate tax savings as does a living trust that is tax planned.

A living trust can reduce or avoid income taxes. A living trust does not give any income tax savings compared to not having a living trust. Income earned by a living trust is reported on your personal income tax return the same way the income was reported before transfer to the trust.

A living trust avoids probate, which is an expensive and time consuming procedure. A living trust may avoid probate but, in Texas, that is usually not necessary. The Texas probate system is not an expensive, time consuming, and complicated procedure as are the probate systems of many other states. The vast majority of Texans, including those with thoughtful planning by an estate planning expert, use a will rather than a revocable living trust.

A revocable living trust avoids probate only if it is “funded.” A living trust is funded by changing the title on property to the name of the trustee of the living trust. There are several ways to fund a living trust.

1. Property can be transferred into the trust by the settlor, during life, changing the title on each item of property to the trustee of the trust. This can become an expensive and time consuming procedure and is the chief reason that revocable living trusts are usually more expensive than wills.

2. During settlor’s life, the trust can be funded by transfers by an agent appointed by the settlor under a durable power of attorney with specific authority to transfer the settlor’s property to the living trust upon disability of the settlor.

3. A “pour-over” will, which transfers to the trust upon the settlor’s death all probate property of the settlor, is usually signed in all cases. Property that did not get transferred during life, and almost always there is some, goes through probate before funding into the living trust. Obviously, this method does not avoid probate.

While not every Texan is a prime candidate to have a revocable living trust instead of a will, there are some Texans who should give serious consideration to having a revocable living trust rather than a will as the main estate planning document.

Texans who anticipate a will contest should have a revocable living trust. If you anticipate a will contest, a revocable living trust is preferable because it is harder to break than a will. Also, the successor trustee under a revocable living trust will be able to use trust assets to litigate any contest regarding the revocable living trust, whereas the person named as executor under a will may not be able to expend estate assets to defend the will. Texans with contentious family members should consider a revocable living trust.

Texans who reasonably anticipate a period of disability prior to death should have a revocable living trust. Third parties such as banks and brokerage firms are more comfortable dealing with

the trustee of a trust than with an agent under a durable power of attorney. Texas probate proceedings for living persons who are incapacitated, called “guardianship,” should be avoided and a funded revocable living trust accomplishes this. But, for most Texans a durable power of attorney is effective to avoid guardianship during relatively short periods of incapacity and is much less expensive to put in place than a revocable living trust.

Texans with real property in a state other than Texas should have a revocable living trust. Real property in another state requires an ancillary probate proceeding upon death. By transferring out of state property to a revocable living trust, multiple probate proceedings are avoided. Many states other than Texas have expensive and time consuming probate procedures that should be avoided.

Texans who desire secrecy as to their estate beneficiaries or assets should have a revocable living trust. Upon death when the will is offered for probate it becomes a public document that anyone can review at the courthouse. A revocable living trust is not filed of public record, and its contents are given only to the individuals who are named as beneficiaries in the trust. When property goes through probate, it must be listed on an inventory filed of public record. Property funded into a revocable living trust prior to death is not subject to any public reporting.

Is a revocable living trust for you? That depends upon your own personal situation. If you would like to further discuss a revocable living trust or a will, please contact the Yale Law Firm PC at 210.736.2222.

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