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WHEN TO USE A WILL
WHEN TO USE A TRUST

A considerable amount of literature 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 Living Trust may, or may not, be a preferred estate planning document over a Will. This memo is meant to supplement and not replace competent legal advice.

There are many kinds of trusts. The trust referred to in this article is a fully funded, Revocable Living Trust under which you would serve as the Trustee and to which you would transfer your assets.

You do NOT have to have a bank as a Trustee. Having a bank serve as trustee may be attractive to some people, but most people prefer themselves and, subsequently, family members (upon their death) to serve as Trustees.

There are two basic steps in establishing a revocable Living Trust. First, you meet with an attorney who will draft your Trust and other related documents. After signing your Trust, you would transfer all, or most, of your assets to your Trust, or name your Trust as a beneficiary on insurance policies and other assets. Your attorney will advise you regarding IRAs and similar tax-deferred assets.

As Trustee, you do not lose any control over your assets and no new tax returns are required. You continue to report the income from your trust property on your Form 1040 just like you always have done. Your home is still eligible for the $250,000 (for each spouse) exclusion on capital gains as well as other tax breaks available to homeowners.

It may be helpful to think of a revocable Living Trust as your own private company in which you (or you and your spouse) are the president, chairman of the board, sole shareholder, and sole employee. You are the only one involved. Your company (the Trust) owns your assets. So, when you die or become incapacitated, you don't own any assets, your Trust owns them.

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

Probate is the legal process of settling the affairs of one who has died and transferring the decedent's property to the proper persons. Probate may involve having to prove a Will, notifying creditors and all potential heirs, and resolving conflicts (sometimes called will contests). Probate is generally required only when you die owning property in your name without a surviving joint tenant or named beneficiary.

Many people believe that, if they have a Will, they'll avoid probate. That simply isn't true. For a Will to have any legal effect, probate must be opened, and the Will must be submitted to the Probate Court. In simple terms, a Will is a set of instructions for the Probate Court to use in settling the estate of the decedent.

In 1974 Colorado passed a version of the Uniform Probate Code which has simplified probate, thus reducing its cost. Probate fees are no longer quoted on a percentage of the estate size. Instead, the executor and the attorney are entitled to receive reasonable compensation based on the amount of time spent and the difficulty of the work.

Many observers feel that average probate costs may run 3% to 5% of the estate; but even 2% of a $300,000 (your home and other property) estate amounts to $6,000. You can avoid these costs with a properly drafted and funded Revocable Living Trust, because, upon your death, your Trust owns all your assets.

Probate is time consuming and frustrating. Probate in Colorado usually takes between six months and two years, depending on the complexity. If you want your family to have immediate access to your property upon your death, you don't want probate.

Probate may be required to be opened in every state where real estate is owned by the decedent. Sometimes, such real estate is abandoned by heirs because the cost of probate may exceed the value of the property. Property owned by your Trust will generally avoid probate in all 50 states.

If you become mentally incapacitated (disabled), your property is essentially frozen until the probate court appoints a conservator to manage your financial affairs. For instance, upon your disability, your home and your investments generally cannot be sold, even if owned in joint tenancy, until a conservator is appointed.

This usually involves filing fees, attorney fees, accounting fees, 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 don't want or need the "protection" of the courts and the attorneys. Property owned by your Trust avoids the need for a conservatorship; your designated successor trustee can manage your financial affairs in the event you are unable to do so.

It should be noted that the Revocable Living Trust offers very little creditor protection for its Trustmaker, but it can provide excellent creditor protection for the Trustmaker'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 Trust is eligible for a step-up in basis, which reduces taxable gains to an heir who sells your property after your 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 will necessarily be incurred on both deaths. The new higher estate tax exemption, combined with a new tax concept called "portability" generally makes estate tax planning less important for most married couples, as the survivor can have an exemption in excess of $23 million (2020).

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 estate tax saving trusts created by the Will. Because of such devastating errors in titling property, many attorneys feel that a funded Revocable Living Trust is more likely to achieve the desired tax savings, as well as avoiding probate on the second death. Joint tenancy generally avoids probate on the first death only. If probate is worth avoiding on the first death, why isn't it worth avoiding on the second death?

Probate is a matter of public record. It is a legal proceeding initiated and paid for by your family. An inventory of all 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 letter to the judge 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 any court or elsewhere. Trusts are generally viewed as being far more difficult to challenge. Moreover, Colorado has a statute which, if followed, limits the contestability period to 120 days.

You are probably thinking that this memo sounds like a sales job for the Trust. It is not intended as such, but it is important for you to understand at least some of the advantages of Trust planning over Will planning before you can effectively evaluate the added cost of the Trust in light of the added benefits the Trust may provide. Unfortunately, there are few simple answers in this complex world, but, for many, deciding in favor of the Trust is an easy decision.

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. In this age of specialization, an attorney who limits his or her practice to estate planning may provide a more comprehensive estate plan at a lower cost than a generalist. You will want an experienced attorney who believes in Living Trust planning to draft your estate plan.

Can you draft your own documents? Yes, but estate planning is not like a do-it-yourself home plumbing job. If you botch the plumbing job, you can call a plumber to fix it. If you botch your estate plan, it probably won't be discovered until your death when it is too late to fix. A poorly drafted estate plan is often worse than no estate plan at all. We are talking about two of the most important things in your life: your family and your money. Such matters are too important not to seek professional assistance.

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 over any of your assets. It may be time consuming for you to transfer your property to your Trust, but it is still far simpler for you to make these transfers than for your heirs to transfer your property out of your probate estate after you are gone.

There are additional, relatively insignificant, differences (i.e. advantages and disadvantages) between Trusts and Wills which are not discussed here. For a more thorough discussion of those issues, see "The Living Trust Revolution" by Robert Esperti and Renno Peterson.

Now that you know the major advantages and disadvantages of Trusts over Wills, let's equate these to specific situations. For a young person or a couple whose situation is very simple, a Will is often the most cost-effective choice for an estate plan. But as they grow older, have more assets, and become more concerned about disability, probate avoidance, estate tax minimization and generally making things easier for their families, then Living Trust planning becomes far more desirable than planning with a Will. The chart below should help you determine which type of estate plan would be most appropriate for you.

USE A WILL	FACTORS TO CONSIDER	USE A TRUST
<— Young/Under 40	Age	Older/Over 55 — >
<— Little Concern	Concern About Incapacity/Probate	Much Concern — >
<— Simple	Family Situation	Complex— >
<— Low	Desire for Privacy	High — >
<— Small	Size of Estate	Taxable or nearly so — >
<— None	Out-of-State Real Estate	Any — >
<— Up-to-Date Will	Current Status	Simple Will or None — >
<— None Needed	Desire to Protect Family	Strong Desire — >
<— Little to None	Likelihood of Contest	Some Chance — >

Conclusion: Many factors should be considered when deciding whether you should use a Trust or a Will as your basic estate planning document. The anticipated value and timing of those benefits must be weighed against the additional cost. Regardless of whether you choose a Will or a Trust, you now have a framework for which to make your decision.