

Will Versus a Trust: What's Best For You?

12 things to consider before creating a Will or Trust

As you begin to develop your estate plan, you'll need to make some choices about what assets and values you'd like to pass on as well as who you want to pass them on to. That also means making choices about how you'll handle your affairs: either with a will, or with a trust. Each function differently, and there's different options for each which can offer more nuanced outcomes for your beneficiaries. Below we discuss twelve concerns along with what a will or a trust can or can't do to satisfy each.

The 12 Things You Need to Consider while Estate Planning

Do You Have Young Children?

While many people preparing their estate plan have adult children to consider as beneficiaries, young children need special consideration. Who will act as their guardian? How do you ensure that your assets are cared for until they're old enough to handle them? What if you want to reserve money specifically for their education? If you need to name a guardian, then you need a will. A will is also sufficient to leave property to children under the age of 18, but you'll either need to specify an adult to manage that property until they turn 18 or set up a testamentary trust (i.e., a trust that does not exist until the will is executed).

On the other hand, while a living trust cannot establish a guardian, it may be a better way to pass on property. For one thing, it will be handled by your successor trustee, the person to whom you're already entrusting most of your property after your death. The instructions and caveats related to the delivery of property held in trust are much more nuanced, as well. For example, an educational trust will not only allow you to set aside assets, but assign one or more beneficiaries and determine how the money

is distributed between each, what kind of education it will support, and even whether or not it can be used toward particular types of classes (e.g., online classes).

Do You Have a Special Needs Dependent?

This may refer to a child with special needs, but it can refer to any kind of legal dependent or relative with special needs, including elderly parents. Usually this is used to address those with disabilities or other medical issues. A will permits you to leave assets to them upon your death, of course, but they'll be subject to probate, which means they will be diminished by court fees and other debt payments and could potentially be contested. Furthermore, assets left to them in a will are going to be considered when applying for certain kinds of state or federal aid, and will more than likely make them ineligible. Utilizing a trust will not only avoid probate, but, when prepared correctly, allows you to control how the assets are used toward treatment. Most importantly, however, if you draft certain types of special needs trusts (a First-Party Special Needs Trust for example), you will not jeopardize the dependent's eligibility so long as the successor trustee understands what's required to maintain that eligibility.

Do You Have Pets?

Anyone that owns pets knows that they're as much a part of the family as blood kin, and that means you'll want to ensure that they're happy, healthy, and well cared for. Most of the time, you probably only need to use a will to achieve this by designating a guardian for them. However, it's worth mentioning that you cannot leave property to pets. If you want property or funds to be used as a part of their care, you'll need to leave that property in trust with the guardian as a beneficiary and instructions on how that property should be used.

Do You Have Health Concerns Regarding Incapacitation?

Depending on your age and health, death may not be the only thing on your mind. (Certainly, the same can be said for many parents and young professionals as well.) Different kinds of injury and illness can render you incapable of making important decisions regarding your health, work, and finances. In many cases, a living will is able to establish power of attorney; if desired, you can separate financial power of attorney from medical power of attorney. A final will cannot go into affect until your death. While you can use a living trust to seamlessly control your finances and certain other decisions because it will automatically revert to control to your successor trustee, it cannot be used to make any medical decisions on your behalf.

Are You Concerned about Medicaid?

Medicaid eligibility can be difficult to achieve, and you may need to have access to it despite the value of assets that you're intending to pass down. A will of any kind will not alter any of the financial aspects that are considered for eligibility. In fact, many trusts — especially revocable living trusts — won't alter it either, even though it's not in your name. It's possible that you may be able to participate in a specific type of trust (special purpose pooled trusts) with ways of distributing assets compliant with federal statutes. This will require more in depth conversation with one of our associates.

Do You Own Firearms?

The problem with firearms is that there are extremely strict regulations governing them. Technically, they are property that can be left to an inheritor, however, a will is incapable of protecting them from potentially violating those regulations in the process. What's more, there's transfer protocols that must be followed, including a \$200 tax and ATF forms that must be filled out correctly.

There is a specific kind of trust known as a gun trust; it can be used to safely pass down firearms and other potentially restricted weapons while avoiding the transfer procedure and protecting your loved ones. The successor trustee will be in charge of distributing assets, and you can choose someone well versed in gun laws.

Are You Wealthy?

Both the rich and poor can use either a will or a trust, but if you're particularly wealthy, you may have additional concerns about how your wealth is affected. For instance, you may want to mitigate how much will be taken for the estate tax or federal gift tax, avoid probate or conservatorship, ensure your children from a previous marriage have access to certain assets after your surviving spouse dies, or have significant real estate you want transferred to your heirs. A will isn't enough to accomplish any of these goals, however, trusts can help. For example, a QTIB Trust can ensure that in a second marriage, your current spouse is a living beneficiary that has access to income from your assets, but the assets themselves are left to you children upon your spouse's death. A Dynasty Trust can help your inheritors save on gift or estate taxes because the tax is only charged once upon the initial transfer, even though it's accessible to multiple generations.

Are You Concerned about How Your Beneficiaries May Spend Assets?

When you leave assets and property to loved ones, you may still be concerned about how they'll utilize what you've given them. What if your beneficiary gets into trouble with creditors? Are you worried they might squander your estate? A will has no power to create directives on how assets are utilized after your death. Trusts can do just that, and a property control trust — namely, a spendthrift trust — protects the trust principle and gives the beneficiary access to benefits according to the terms of the trust and the discretion of the successor trustee. Similarly, a sprinkling trust offers guidance on how to distribute trust assets, but how and how much are at the trustee's discretion according to those terms.

Are You Worried about Contestation?

Unfortunately, being family doesn't always mean getting along, especially once money and property are on the line. Whether it's because of a divorce or other interpersonal issues and estrangement, there may be kin that expects you to include them in your estate planning even if you have no intention to. Or perhaps they feel they deserve more than what you are leaving to them. How do you protect your intentions along with your assets? A last will and testament may not be as iron clad as you would like; it must go through probate, which is public, and the court decides whether it's valid and will hear contests against it. A living trust is technically subject to being contested, but it's much harder to achieve because living trusts require a measure of active involvement during your life that require you to be both sound of mind and intentional with your instructions.

Do You Want to Control What Happens to Assets after the Beneficiary Dies?

Caring for your loved ones after your death may be a priority, but it may not be the only thing you want your assets to do. This tends to come into play when individuals have more than one marriage, when you want your assets to reach beyond the current generation of beneficiaries, or when the surviving spouse is elderly and may not survive long enough to use up those assets. A will can only name beneficiaries, and while a letter of intent may express your wish for those assets to be used in a certain way, it isn't legally binding in most states. You'd have to trust your beneficiaries to pass on their inheritance in the way you asked. Trusts can handle special treatments and directives, and can distribute benefits to an initial beneficiary before being issued to a final beneficiary. You'll want to talk to an estate attorney about the careful planning necessary to ensure these trusts are properly prepared.

Do You Want to Avoid Probate?

Probate is a lengthy process during which a will is evaluated by a court. It's also a very public process, and the court usually encourages any relatives in or out of the will to contest it if it's in their interests. In addition to paying debts and taxes out of your assets, court costs will be paid for out of your assets. Unfortunately, a will must go through probate. On the other hand, living trusts are private, and the assets and property held in trust are not subject to probate, even if you also have a will. It's important to realize, however, that putting assets into a trust does not protect them from lawful debt collection even after your death. If you establish a testamentary trust, the assets will have to go through probate before they go into the trust.

If You Choose to Create a Trust, You May Still Need a Will.

Quite simply, a living trust cannot cover everything. Even aside from those times when you must use a will to accomplish something (for instance, establishing a guardian for your children), you should consider creating a pour-over will that can act as a safety net for whatever assets were either forgotten or obtained after the last time you updated your trust. It allows assets to be added into a particular trust after they've gone through probate.