

## Trusts vs. Wills – Differences and Costs

### What's the difference between a Will and a Trust?

A **Will** is a legal document containing your specific instructions for the disposition of your assets after your death and the names of persons you prefer to be in charge of implementing those instructions when that time arrives. These are the basic contents of a Will, but they may be far more detailed and complex as needed. Wills can include trusts to be established upon your death, which is a common feature added when you have young beneficiaries or beneficiaries who are receiving public benefits for their support and medical care and need someone to manage their finances.

You can change your Will any time you are competent to do so. Changes may be in the form of amendments to your Will, which are called "Codicils." You also may replace your entire Will with a new one that revokes (cancels) your present Will and replaces it with the new one will take its place.

Because your Will becomes effective only upon your death, we want to make sure we have your "last" Will as of that time to work from.

It is easy to make a Will and easy to change or replace it. You would want to do that, for example, when your personal circumstances or preferences change.

### ***If making a Will is so easy, why make a living Trust?***

The two, principal advantages to a living (revocable) trust are their ability to serve you during your lifetime and simplify the administration of your estate after death. Both of these features yield generous cost savings, and do more to preserve the privacy of your estate and family information than a simple Will. These differences are not apparent unless you know more about Wills and Trusts, so I hope the following information will allow you to see why.

A **Trust** is a legal entity that "owns" assets that you transfer to your Trustee. The Trustee holds and manages the trust assets for your benefit, guided by the directions you include in your trust document. The assets held by your Trustee "avoid" the probate court because they generally are not subject to control by the court in conservatorship or probate proceedings. At the same time, your Trust is like a Will in that you provide detailed instructions in the Trust document for how you wish your estate to be handled and distributed following your death. You can change the terms of your trust any time (except when you are incapacitated) by "amending" your Trust., provided your Trustee accepts. They will not be effective until your death, as is the case for a Will.

Most clients will name themselves as the initial Trustee of their Trust, and will serve as their own Trustee for as long as they are competent. A successor or replacement Trustee is appointed only when the client is no longer able or willing to handle this responsibility.

To ensure that your interests are best served, you will name as many persons as you wish in the order of your preference to become the successor Trustee when one is needed. (Note that a corporate fiduciary (a "trust company" or trust department of a bank") or a professional individual trustee (a "private fiduciary") may serve as your Trustee if that is what you prefer.

Your Trust is effective immediately (your Will is not). Whoever is serving as your Trustee can manage your assets and finances for you right away and without regard to your own ability to manage things by yourself.

Whoever serves as your Trustee will be the legal owner of your assets, which are owned (titled) in the name of your Trust. Because the Trustee becomes the legal owner, he or she has the greatest discretion and authority to handle your assets and finances in performing the Trustee's job. (See Powers of Attorney).

These two features of your Trust provide substantial benefits during your lifetime.

1. If, for example, you have an illness or health condition that makes it difficult, impossible or unwise for you to manage things for yourself, even temporarily, there will be no need to have anyone appointed to do this for you. If you do not have a capable spouse at the time, it is most likely that your family will have to apply to the probate court to have a Conservator appointed to take over control of your personal and financial affairs. This is not always the case, but it definitely is something to be avoided if possible because of the cost and the loss of privacy that are consequences of establishing and sustaining the conservatorship.

2. The other major difference between Wills and Trusts is a matter of how your estate will be administered after your death.

Most estates of decedents leaving only a Will are required to be administered in a court-supervised probate before the estate can be distributed to your beneficiaries. This process takes a minimum of 6 months, and often several months more. The court file for the probate is open to public inspection and will include a list of your assets and information about your family. Also, the cost of this procedure most often far exceeds the cost of doing the same things under a trust. There are many good reasons to use the probate process, but these situations are exceptional rather than the norm.

The assets held in your Trust are not required to pass through probate. Without the constraints of probate, your Trust may be administered as quickly as the affairs of your estate allow. Because your estate will be handled outside of a probate, the details of your estate and family will be kept private. Finally, the cost of administering a Trust usually is substantially less than you would spend had your estate been required to go through probate.

### ***Compare the Costs?***

1. Initial Costs. The cost of making a Trust is greater than a Will. You can see that there is more to a Trust than a Will. So, it should be no surprise that the cost of making a trust is

greater. However, there are significant cost savings in using a Trust that make the initial expense lose its significance.

Most Wills are relatively brief documents focused only on how your estate will be distributed and who you prefer to do that job. Hence, the legal cost of preparing a Will is not very great (or, it shouldn't be). In contrast, a Trust has to be far more detailed because it is going to address the immediate management of your finances as well as the administration and distribution of your estate after death. A benefit of this greater detail is that the terms of your Trust can be adapted more closely to your circumstances and preferences.

You can see that the Trust document is often several times the size of your Will. Therefore, it involves more of your attorney's time to make it right for your particular circumstances and preferences. However, compare this greater initial cost to the cost savings you and your estate will be favored with from now until your estate has been finally administered after death.

2. Hidden and Total Costs. In addition to avoiding the cost of a conservatorship during your lifetime, another significant cost savings is apparent when comparing the actual amount of work that will be performed in settling your particular estate and making distributions following your death and the cost of that work with and without a Trust. It is a fact that, although the amount of work that is done is very similar whether your estate is administered under a Will or a Trust. However, the cost of doing that work usually is dramatically different.

The typical arrangement with your trust lawyer is for him or her to charge for the services actually provided at whatever hourly rate the lawyer charges for the type of work done. In contrast, although the lawyer may provide nearly identical services in the context of a Will, the compensation arrangement is much different. The most influential factor here is the "statutory fee" for lawyers (and executors) in the context of a probate.

If your Will is the only estate document you have at the time of your death, it is almost

certain that your estate will have to be administered in a formal court-supervised probate. The cost of the probate is governed by a set of statutes in the Probate Code that give the executor and the attorney handling the estate a fixed fee for all “ordinary” work on the estate. The fee is calculated on a sliding scale against the value of the estate as follows:

- 4% of the first \$100,000
- 3% of the next \$100,000
- 2% of the next \$800,000
- 1% of the value over \$1 million, with a reduction when you get to \$5 million

If your lawyer (and executor) does things that are out of the ordinary, such as dealing with your personal income tax returns, preparing fiduciary tax returns for the estate while it is in progress, selling assets that require significant work and/or permission of the court, etc., then the lawyer and executor can claim additional fees for this work as well. These are called “extraordinary” services for which the court is inclined to compensate at the lawyer’s rate for similar services.

Finally, keep in mind that your executor will be entitled to most, if not all, of the amount of this compensation as well, whereas a Trustee would receive a fee based on his or her abilities, the nature of the work, and what a reasonable rate in the community for that service might be.

Example: You can see that the administration of a simple estate that may take 25 billable hours worth of a lawyer’s time will cost significantly more if the estate is administered through your Will as opposed to a Trust. For example (using my current rate of \$300/hr), your trust might pay about \$7,500 as a legal fee for the work needed to settle and distribute your estate through a trust. Let’s say your estate consists of your residence (say, \$500,000 in value) and an additional \$250,000 in other assets (bank accounts, personal items, cars, etc.), your estate would pay an ordinary fee of about \$18,000 plus any non-ordinary work needed to settle your estate.

It is easy to see in this case that the initial cost of the Trust is far exceeded by the overall cost of handling your estate over the long run. Finally, keep in mind that, without the Trust, if

a conservatorship is needed if you lose your capacity before your death, this cost picture will be augmented by the costs of establishing and maintaining that conservatorship throughout your incapacity. That may add up to a substantial legal cost on top of the cost of handling your estate after your death.

All of these associated costs, which are avoidable with a Trust, reduce your resources that you will use for your support, care, health and enjoyment during your lifetime, and will erode the estate you will have to benefit your family and/or other beneficiaries.

### ***Closing Thoughts***

I hope you can see that the cost and convenience of planning with a Trust has great advantages that are not apparent without knowing something about them and how they operate.

These general factors will be influenced to a greater or lesser extent by your individual situation. For example, if you are married and have children, the ongoing management of your estate beyond your death will have greater value than if you are single and have no descendants. The nature of your assets also will suggest the best planning choices. For example, if you have an ongoing business, a sizeable estate, etc., you will want something different than someone who has a home, some retirement income and an old car.

There is a abundance of well-written material on the internet covering these topics. Do not hesitate to take advantage of those sources to deepen your knowledge before settling on an estate plan strategy for yourself. Of course, I am available to consult with you and, if you choose, to prepare your individual plan.