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Living Trusts Not Always Better Than Wills

by Andra J. Hedrick

A living trust, which is also sometimes called a "revocable trust" or a "revocable (living) trust," is often touted these days as a good alternative to a will. Before you jump at creating a living trust, consider the pros and cons.

A living trust is a type of trust you establish for yourself during your lifetime. So long as you are alive and mentally competent, you have the right to revoke or amend your living trust in any respect. You are the sole beneficiary of your living trust while you are alive.

Typically, you are also either the sole trustee or a co-trustee of your living trust as long as you are mentally competent and desire to serve as a trustee. The trustee is the person in charge of managing the living trust. The trustee makes decisions about how to invest the property of the living trust and makes distributions from the living trust.

The trustee has a duty to follow the written instructions in your living trust, including those concerning how the trust property is to be handled after your death. There are many options for distribution of property after your death, all of which can be carried out through a living trust or through a will.

Some people choose to distribute their property at death through a living trust rather than a will based on claims that a living trust can (a) avoid probate, (b) save death taxes, (c) protect privacy, (d) protect from creditors, and (e) save probate expenses. While these claims are generally true, they can often be misleading and their importance can be overemphasized. Let's examine each claim.

- **Probate Avoidance.** A court-supervised probate is usually not required in order to deal with property after death. This is true only if the property is owned at death by your living trust or made payable at death directly to your living trust by separate beneficiary designation.

  Here's the challenge. People with living trusts often own at least some property that is not owned by or payable directly to their living trusts at death. Therefore, the law requires a probate, despite their efforts to avoid it.

  Luckily, Tennessee is a relatively "probate friendly" state. Tennessee probate laws and procedures are not nearly as burdensome, costly, and time consuming as in many other states. If your estate is subject to administration only in Tennessee (because you are a Tennessee resident and do not own any real estate in other states), probate avoidance should be less of a factor in choosing whether to dispose of your property at death through a living trust or a will. If you are a Tennessee resident but own real estate in one or more other states, establishing a living trust for ownership of the out-of-state property may be a good idea because you could potentially avoid a probate administration in those states as well as in Tennessee.

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- **Death Taxes.** Living trusts of married persons can contain special provisions designed to minimize or, in some cases, even eliminate the federal estate tax and/or Tennessee inheritance tax that are due after death.

  However, those same tax-saving provisions can be included in a will and lead to the same result. It is important to understand that property owned by a living trust at death is counted when calculating the estate and inheritance tax due, just as it would be if owned in your own name at the time of your death.

  The issue of tax savings is really a neutral one and should not be the driving force behind a person's choice between a living trust and a will.

- **Privacy.** A living trust is a private document which usually is not filed with any court or other public office or made a public record. A will, on the other hand, is not private after your death, if probate is required. It is filed with the probate court and does become a public record for all the world to see.

  The issue of privacy can be an important factor to celebrities, politicians, or others who are in the public eye. Privacy can also be important to nonpublic persons who include in their estate planning documents detailed information about their assets or beneficiaries.

  But, for most of us, our estate planning documents do not contain any information that we would mind others seeing. The information in wills is usually not shocking, embarrassing or surprising. Wills normally describe property in general terms rather than identifying the particular assets owned or the values of those assets. They usually leave property to a spouse, children, or other close family members, as would be expected.

  Most wills waive the requirement that the executor file an inventory or accountings of the estate property. If these requirements are waived, the public records at the probate court typically include minimal, if any, information about the deceased person's property or net worth.

  The importance of privacy as a factor in choosing between a living trust and a will varies greatly depending on the particular situation. If privacy is a primary concern, a living trust may be the best option. Otherwise, a will may be sufficient for carrying out your wishes.

- **Creditor Protection.** Assets owned by your living trust typically are not protected from your own creditors. This is true during your lifetime and after your death.

  However, they may be protected from the creditors of others after your death if certain provisions are included in the living trust. Those provisions require the trustee to continue holding the property in trust after your death and contain special "spendthrift trust" language that gives the desired creditor protection. The creditor protection applies only while the property remains owned by the spendthrift trust. Property distributed by the trustee to others becomes subject to the claims of their creditors.

  Spendthrift trusts can be created after your death by use of a living trust or a will. If credit protection is desired, both are equally good options.

- **Cost.** A final factor that should be considered when choosing between a will and a living trust is the cost involved. On the front end, living trusts are usually more costly than wills because more time and effort are required in establishing and funding them.

  However, on the back end, use of a living trust rather than a will can save some expense. If complete avoidance of probate is achieved because all of your property is owned by or payable directly to your living trust by separate beneficiary designation, your estate is not required to pay fees charged by the probate court. For an estate administration in Tennessee, the probate court fees are usually only a few hundred dollars, an amount which is much less than in other states where the laws are not so "probate friendly." Most other estate administration expenses are the same, regardless of whether the estate plan is carried out using a will or living trust.

In the end, the costs involved are usually not much different. If you prefer to pay a bit more now and hope that your estate will pay a bit less when you die, a living trust may be the best option for you. Or, if you prefer to pay a bit less now, with the understanding that your estate may pay a bit more when you die, you may want to stick with a will.

Wills and living trusts are both excellent estate planning tools. One is not always better than the other. It is important to work with a qualified estate planner to help you determine which option fits best with your particular circumstances and goals.

If you have general questions or need additional information regarding the contents of this article, please contact Andra Hedrick or another member of the firm's Estate Planning & Probate Section at 615.244.4994. More information can be found at gsrm.com.

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