



## A WILL OR A TRUST - THAT IS THE QUESTION

When a couple with young children approach estate planning for the first time, the first hurdle in the planning process is to determine what type of estate plan to use: one that is based on a Will or one that is based on a Revocable Living Trust. As the centerpiece of the estate plan, the Will or the Revocable Living Trust will be responsible for directing the distribution of a decedent's assets at the time of his or her death.

One of the important differences between a Will and a Revocable Living Trust is the fact that a Will does not speak until one dies. In other words, even though a person prepares and signs a Will today, it does not come into effect until that person dies. At that time, the person or company indentified as the 'Executor' distributes the property pursuant to the instructions of the Will.

A Revocable Living Trust, on the other hand, is as the name implies; a living document that is up and running on the date you sign it. In this way, a Revocable Living Trust can work for the Trustmaker in the event of *incapacity* (the term '*Trustmaker*' refers to the person or persons establishing the trust, typically the husband and wife in the case of a family with young children). A Will cannot do this because it does not speak until there is a death.

At death, a Will and Revocable Living Trust have the same basic goal. That goal is to distribute assets pursuant to the wishes of the decedent. However, the process of distribution is quite different. Assets passing by a Will must necessarily pass through Probate. Probate has its origins in the middle ages of England. Most authorities agree that probate is a relatively expensive and time consuming process that is best avoided in most cases. In California, an estate with assets having a value of greater than \$100,000 must proceed through the formal probate process if the assets are passing by Will.

On the other hand, a Revocable Living Trust names a Successor Trustee to distribute assets at death. The Successor Trustee has a role similar to that of an Executor of a Will: distribute assets pursuant to the wishes of the decedent. Because the assets pass through the mechanism of the Revocable Living Trust to a Successor Trustee and then to the beneficiaries of the Revocable Living Trust, Probate is avoided with the use of a Revocable Living Trust.

So which type of estate plan is best for you? Well, this attorney's answer is, "It depends." Some of the arguments in favor of a Revocable Living Trust are that a trust provides for incapacity planning and probate avoidance and also allows for more efficient estate tax planning. On the other hand, a Revocable Living Trust needs to be 'funded' with appropriate assets. That is, appropriate assets must be retitled in the name of the Trustee of the Revocable

Living Trust. There is more counseling and greater options available through Revocable Living Trust based planning. All of this makes Revocable Living Trust planning more expensive.

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Things to consider when deciding whether to proceed with a will or trust based plan include the following:

1. Are you still in the planning stages for your first child?
2. Are you still some time away from having your financial situation established? Are you are still going to school, are you planning to buy a home in the near future, does your current financial situation have little in the way of assets (home, savings, retirement plans and the like)?
3. Are you planning to relocate outside of California in the next year or two?

If your answer to any of the above questions is yes, then you may want to consider a 'stop-gap' type estate plan that would provide a you with a simple, Will based plan that would be relatively inexpensive to set up. On the other hand, if your family situation includes at least one child or you have accumulated a fair amount of assets and/or a home, then an estate plan which is based on a Revocable Living Trust may be appropriate for you so long as you are not planning to relocate out of the state in the next couple of years.

Whether you proceed with an estate plan with is based on a Revocable Living Trust or a Will, you will want to be sure your estate plan provides for your children. We will begin that discussion next time with an overview of guardianships.