WILLS VS. REVOCABLE LIVING TRUSTS

Endlessly debated in estate planning circles is which is the better primary estate planning document, a will or revocable living trust. As usual, it depends. Knowing the relative merits of the documents is critical to serve your clients effectively. Here are several things to consider when you are choosing whether to recommend a will or revocable living trust.

WILLS

- Wills offer a measure of simplicity. A will is one document, as opposed to a trust, which also requires a "pour-over" will—"pouring over" any assets not transferred into the trust during the grantor's life.
- Clients are usually more comfortable with a will, because clients often lack familiarity with trusts. (The corollary is the client who insists on a trust because of what he or she heard on a financial program on television.)
- Wills are typically less expensive in the planning stage because there are no costs associated with funding a will, unlike a trust.
- Wills require only a low level of testator capacity for execution.
- Wills can provide for guardians of minor children, unlike trusts.
- Wills are effective only on probate, which usually can occur only after death.
- The probate of a will is a judicial proceeding that requires notices and service of process, as well as potentially opening the details of the estate to public scrutiny. But if your state's probate code allows for some type of informal or independent administration, then the details of the estate do not necessarily become a matter of public record.
- Wills do not assist in disability planning. Separate instruments are required to plan for the disability of the testator, such as a power of attorney to manage property and a health care proxy to allow an agent to attend to the testator's personal needs.
- Wills operate only on "probate" assets or "testamentary" assets (assets either in the client's name alone or when the beneficiary predeceases the client).

REVOCABLE LIVING TRUSTS

- A trust is usually effective immediately, although funding of the trust may occur at a later time.
- A trust operates to avoid probate, but only for the assets in the trust at the time of the grantor's death. For a trust to be effective, the trust needs to be funded during the grantor's life and a "pour-over" will is used to transfer any remaining assets at death.
- A trust provides for the disability of the grantor by allowing a successor trustee to continue to manage trust assets regardless of the grantor's condition; however, a health care proxy also should be considered to attend to the grantor's personal needs. The trust is considered more effective in dealing with disability, as opposed to a power of attorney for property, which is often met with resistance by banks, brokerage companies, and others. But a power of attorney for property, including the power to transfer assets into the trust, can be critical to fully funding the trust if the grantor becomes incapacitated.
- Trusts offer a measure of privacy for the deceased grantor. If any disputes arise between the successor trustee and beneficiaries, however, it is likely that the trust terms will **become a matter of court record despite the grantor's** wishes.
- Because the trust is an agreement between the grantor and trustee, the grantor must have sufficient capacity to enter into a contract, which is typically a higher standard than that to execute a will.
- Trusts are generally more expensive in the planning stage because of the costs associated with funding the trust. Ensuring full funding of the trust may require hours of work and dozens of forms, deeds, and assignments. Arguably, the costs are offset, however, when considering the probate expenses avoided if the trust is completely funded.

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