

Considerations When Choosing Between a Trust vs. Will Estate Plan



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February 2, 2024 | **TRUSTS AND ESTATES**

There are a number of considerations to make when deciding whether to proceed with a Will-based estate plan or a trust-based estate plan. First, as a general matter, there are two ways in which your estate can be distributed to your ultimate beneficiaries upon your passing: (i) by operation of law (i.e., “Non-Probate”) to joint owners or designated beneficiaries (such as retirement funds or assets held in a trust), or (ii) by an administration process overseen by the courts pursuant to the terms of a Last Will and Testament (“Probate”) or intestacy (without a Will).

Probate is the formal legal process that gives legal effect to a Will and grants the executor or personal representative authority to administer an estate and distribute the decedent’s assets to their intended beneficiaries. Under New York State law, if you do not leave a Will, certain relatives are entitled to a share of your estate. These people are your intestate beneficiaries, or distributees, who often include your spouse and children. However, if you don’t have a spouse or children, distributees can include any living parents, siblings, nieces and nephews, or even aunts, uncles, and cousins, all dictated by a statutory order. If you do have a Will, in order for your Will to be given legal effect, the Surrogate’s Court must obtain jurisdiction over your distributees by either obtaining their consent or

by properly serving a “citation,” or summons, upon nonconsenting distributees directing them to show cause before the court why the Will should not be admitted to probate. While this process is generally routine, if you are disinheriting a distributee or a distributee is unknown and/or their whereabouts are unknown, this could create delays in probate and increase the costs of administration.

As an alternative to a Will-based estate plan, a revocable living trust, or “inter-vivos trust,” is a mechanism whereby assets titled in the name of a trust during your lifetime will pass outside the probate estate by operation of law (i.e., no need to involve the courts or seek consents from your distributees). You can be the trustee, so you control the trust assets while you are alive. In short, the trust is your alter ego. Upon your passing or incapacity, your designated successor trustee distributes the trust assets according to your wishes, as outlined in the trust document (“Declaration of Trust”).

Essentially, the use of a properly funded revocable trust can ensure other assets passed by operation of the law avoid the probate process, as all assets pass to your intended beneficiaries without court intervention. Based upon an evaluation of your individual circumstances, the revocable trust could provide for the timely and cost-efficient disposition of your assets to your beneficiaries upon your death.

With respect to cost, a Will-based plan is generally less expensive to establish during your lifetime but can be equally expensive as a trust-based plan after your passing due to filing and attorney fees required to prepare the probate paperwork. Further, if there are any objections to the Will or distributees cannot be located or refuse to consent, the costs to your estate will increase. There are benefits to both a Will-based and trust-based plan, depending on the specifics of your family circumstances.

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