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THE DIFFERENCE BETWEEN WILLS AND TRUSTS

By Katya Sverdlov, Esq



Many people believe that all they need to complete their planning is a Will. There are plenty of misconceptions that Trusts are unnecessary, expensive and should only be used by billionaires. Please read below to learn more.



What is a Will?

Definition: A Will is a legal document serving a variety of essential purposes. In your Will you can appoint an executor, designate guardians for your minor children and leave instructions about when and how you want your assets distributed.

Control: A Will is limited in the disposition of property: it controls the property owned solely in an individual's name at the time of death, where there are no listed beneficiaries. A Will can also govern interests in some properties, such as those owned by a tenancy in common. However, it does not control assets that have a direct beneficiary listed, such as life insurance or retirement accounts. It also does not control properties that are owned through joint tenancies with survivorship rights.



The Difference Between Wills and Trusts

Probate: Before assets get distributed, a Will has to pass through a Probate court, known as Surrogate's Court in New York. A judge will ensure that the Will was validly executed, that the correct heirs have been properly identified and contacted (even though they may not be receiving money under the Will), and that the Executor has the legal right to administer your estate. If anyone contests the Will, a hearing will ensue, with witnesses, affidavits and appeals.

- This probate process can take anywhere between 3 months to 10 years, depending on the complexity of the family and the estate. During that time, all of the money governed by the Will is frozen.
- This probate process can cost anywhere between \$2K and \$100K, for court fees, attorney fees, accountant fees, and genealogist fees.



No Will: If you die intestate (without a Will), it may take even longer to settle your estate, and it may cost your estate more money. The New York State intestacy succession laws will determine who inherits your assets.

A **Revocable Trust** is the most commonly used tool for estate planning. The individual creating and funding the trust is the Grantor and typically also acts as the Trustee during their lifetime. The Grantor can change the terms and move property in and out of the ownership of the trust at will. As a result, the Grantor remains in control of the Trust's assets during her life and can use the money in the Trust for herself during her life.



Benefits of a Revocable Trust:

- ***Avoid Probate:*** Creating a trust and transferring some of the assets to it during life avoids expense, length and public exposure of probate process. You can name the Revocable Trust as the successor beneficiary of life insurance policies, bank accounts and retirement accounts. You can also transfer real estate and co-operative apartments to this Trust during your life.
- ***Will Substitute:*** In the Trust, you can specify your wishes, just like you would do in a will. For these reasons, for most people a revocable trust serves as a main Will substitute. A simple Will is still necessary, of course, to act as a ‘catch all’ for assets that were not transferred to the Revocable Trust during life.
- ***In the Trust, you can provide for multiple contingencies*** – such as some of your beneficiaries predeceasing you, or some of your beneficiaries receiving government benefits, or minor beneficiaries not receiving money too early.

The Difference Between Wills and Trusts

- ***Retain Control:*** During your life, you retain control of the assets transferred to this trust. You can change the provisions of the trust, take back the assets in your own name, or make the trust irrevocable.
- ***Incapacity Protection:*** A Revocable Trust provides for an easier administration of assets. While you are capable, you will be the Trustee, but in the event of your incapacity a successor Trustee may easily take over the management of the assets.



Drawbacks of a Revocable Trust:

- ***No Creditor Protection:*** Assets in the Revocable Trust are considered to be yours and do not provide protection in the event you are sued.
- ***No Estate Tax relief:*** assets in the Revocable Trust are considered to be yours and therefore will be included in your taxable estate after death.
- ***Funding:*** You need to fund the Trust once it is created. You have to either transfer your real estate into the Trust or name the Trust as a beneficiary of your accounts. Otherwise the Trust remains a useless piece of paper.

Overall: What are the Differences Between Wills and Trusts?

- **Will**

- ◇ Goes into effect only upon the death of the Testator.
- ◇ To become effective, a Will has to pass through the lengthy and expensive Probate process.
- ◇ Controls all the assets that are left in the Testator's name.



- **A Trust**

- ◇ Goes into effect when it is signed by the Grantor.
- ◇ All the assets within the Trust pass outside of court Probate process. The effective timing of distribution is cut from years to weeks.
- ◇ Controls the assets that were transferred to the Trust during Grantor's life or those assets where the Trust was named as a beneficiary.

Do I Need a Will or a Trust?

For most people, the answer is that you need both. Wills and trusts serve distinctly different purposes, and a well-rounded estate plan will usually include both. A knowledgeable attorney specializing in estate planning can help you decide if a will is sufficient for your needs or if you need to create a trust as well.

Creating an appropriate trust is advised if any of the following apply to you.

1. If you own property in more than one state, a trust can help avoid having to move through probate in multiple states.
2. If you have a special needs family member, a trust can help provide for their needs without interfering with their qualification for public support.
3. If all surviving family members are distant relatives, probating a will can become a complex process that can add costs and substantial delays to the distribution of your assets with a will. An executor will have to perform significant due diligence to prove to the court that every effort was made to contact potential heirs.



4. If you have a reason to suspect that someone will contest your will, a trust can be a valuable tool to help avoid [litigation](#). While nothing can guarantee protection from litigation, it protects your privacy and your potential heirs may not even be aware that a Trust was created.
5. A trust is not a public document, unlike a probated will. If you are concerned about your privacy or the privacy of your heirs, a trust can help keep information about the bulk of your assets private.
6. Currently, the COVID-19 pandemic has backed up Surrogate's Court, creating a tangled mass of backlogged cases. A trust can help ensure that your beneficiaries are provided for without the need to wait for a will to be probated.



The Difference Between Wills and Trusts

A well-crafted will is still necessary to handle any residuary assets not included in the trust. A will is also necessary for appointing [guardianship](#) of minor children.



Contact Sverdlov Law PLLC in New York

Sverdlov Law PLLC is located in New York City and works with clients throughout the state of New York to ensure that their estates are in order. Call (212) 709-8112 or click <https://calendly.com/katyasverdlov> to schedule a consultation about the best legal tools to meet your estate planning needs.

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