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## TOP 5 ESTATE PLANNING QUESTIONS: WILLS & TRUSTS

### 1. What's the difference between a Will and a Trust?

Let's start with what they have in common. Both a Will and a Trust pass your assets to named beneficiaries upon your death. In both, you appoint an agent to administer your estate and distribute your assets. Both can be revoked and rewritten by you. Otherwise, significant differences exist.

A **Will** is a testamentary instrument, which means it becomes effective upon your death. Any assets you own individually at death, other than those with designated pay-on-death beneficiaries (such as life insurance and retirement accounts), will pass according to your Will and are subject to probate.

A **Living Trust** is a contract which is effective during life and after death. In this contract, often called a Trust Agreement or Declaration of Trust, the Settlor (you) agrees to transfer assets to the Trustee (also you) to be held by the Trust for your benefit during your lifetime. You then must transfer your assets into the legal name of your Trust. All assets owned by your Trust when you die will pass according to your Trust Agreement and will not be subject to probate.

A **Testamentary Trust** is similar to a Living Trust, but it is not effective until your death. The Trustee is someone other than you, and this Trust is designed to hold and protect assets that you pass to one or more beneficiaries through your Will or your Living Trust. Testamentary Trusts are most commonly used to hold children's inheritances until they reach a certain age, but until then, the Trustee can provide funds for health, education, maintenance, and support of your child under the guidelines you provide.

### 2. If I have a Living Trust, do I need a Will?

**Yes.** You need what is known as a Pour Over Will, which serves as a backup to ensure your estate passes to your beneficiaries as you intended. The Pour Over Will has only one beneficiary: your Trust. This means that any assets you neglected to transfer into your Trust during your lifetime will "pour into" into your Trust, and then pass according to the distribution plan you set up in your Trust. Otherwise, those assets would be distributed according to state law, which may be very different than what you had in mind. It is important to note that a Pour Over Will does not avoid probate, so it is best to place your assets into your Trust during your lifetime.

### 3. What is probate and when is it required?

Probate is a state-mandated legal process for passing a deceased person's estate to his or her beneficiaries or heirs. The formal probate process is court-supervised and very structured, typically taking a year or more to complete. If there is a valid Will, the court will ensure the terms of the Will are followed and it has authority over all estate actions. If there is no valid Will, the court will impose the state's "intestacy" laws, which dictate how the estate will pass to your heirs. After an initial hearing, a personal representative for the estate will be appointed by

the court (if there's a Will, this will be your executor) and given the authority to act. The personal representative is responsible for gathering and inventorying your assets, notifying creditors, and administering your estate in compliance with probate laws.

In California, if the value of assets subject to probate is \$150,000 or more (as of 2016), a formal probate is required. Assets subject to probate generally include all real and personal property owned by the deceased person unless: (1) it is community property; (2) it is owned in joint tenancy with another; (3) it has a designated beneficiary who is still living; or (4) it is held in a valid Trust. Assets that do not fall into one of these categories are subject to formal probate unless their combined value is less than \$150,000, in which case informal probate procedures may be followed instead. These procedures are much simpler and mostly involve sworn affidavits.

#### **4. Why do so many people want to avoid Probate?**

In short, to avoid the cost, delay, and public nature of the probate process.

**Cost.** Probate fees to attorneys and executors are set by the state, and can add up quickly because they are based on the gross value of the estate, not the net value, as of the date of death. For example, if your probate estate is worth \$500,000 (before mortgages or loans are deducted), the statutory attorney and executor fees would be \$26,000, not including court filing fees or any other third party costs. If there are any legal challenges or extra services provided such as a real property sale through probate, the cost may be significantly higher. Since probate costs reduce the amount of inheritance your beneficiaries will receive, this is a common incentive to avoiding probate by creating a Living Trust.

**Delay.** The average probate in California lasts from 9 months to 2 years, and in Humboldt County it usually takes more than one year to complete. During this time, estate assets are tied up and cannot be distributed, even partially, without permission from the court. Many people who have endured this process for a deceased relative or friend know all too well how frustrating and time-consuming it can be, and do not want their own family to go through the same experience. By comparison, administration of a trust estate typically takes 3-6 months unless there are unusual circumstances.

**Publicity.** Probate is a public process, meaning not only are the hearings open to the public, but your Will, inventory of assets, bank balances, etc. all become public record. Anyone can go to the court clerk's window during open hours and have them pull your entire probate file and review it on-site, or request copies of its contents for a nominal fee. In contrast, assets held by a Trust are administered privately by your successor Trustee, typically with some assistance from a knowledgeable estate planning attorney.

#### **5. If I buy property after creating my Trust, do I have to amend my Trust documents?**

**No.** A properly drafted Trust Agreement provides that when you acquire additional titled assets such as real property or bank accounts, stocks, etc., all you need to do is put the asset into your name as Trustee of the Trust, rather than in your name as an individual. Here is one convenient

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exception regarding titled assets: in California, the DMV treats most vehicles as part of your Trust even if titled in your individual name, as long as your Trust is valid and verifiable at death. And non-titled assets such as furnishings and artwork automatically become part of your Trust estate, so long as your Trust has a valid assignment of personal property included.

*All information herein is for general information only and should not be construed as legal advice or legal opinion. You are urged to consult with your own attorney on any specific legal questions you may have.*

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