

Wills v. Revocable Trusts

Langdon T. Owen, Jr.
Cohne Kinghorn, P.C.
(801) 363-4300
lowen@cohnekinghorn.com

Wills	Revocable Trusts
1. Cost and problems to create.	1. Costs and problems to create.
a. Usually lower dollar cost up front.	a. Often costs more to draft and fund.
i. Often takes less time to draft; but may contain complex provisions eliminating cost savings.	i. May be more complex.
ii. Generally no asset transfers needed.	ii. Need to transfer property into trust; may be a lot of transfers if trust is to contain all assets.
b. Less time and effort for the client.	b. Often takes considerable client time and effort to fund and maintain; may result in better organization of estate.
c. Avoids certain dangers.	c. Need to take steps to avoid some dangers.
i. No need lender consent under due on sale clause.	i. May need lender approval to transfer into trust.
ii. Avoid greenbelt tax questions.	ii. May need to apply for greenbelt treatment.
iii. Usually no special other consents.	iii. Consents from partners, LLC members, shareholders under buy-sell agreement, etc., may be needed to make transfer.
iv. Not usually a problem with professional corporation or LLC interests.	iv. May be difficult to transfer professional corporation or LLC interest.
d. Must execute with required formality and witnesses.	d. Fewer execution formalities.
2. Lifetime operation.	2. Lifetime operation.
a. Very easy; nothing special required.	a. Need to keep separate and operate as a trust.
b. No income tax consequences.	b. If grantor is a trustee, do not need separate tax identification number or separate tax return, otherwise need to file trust tax return and special trust tax rules may apply.
c. No gift tax consequences.	c. Not a completed gift for gift tax purposes.
d. Does not speak until death. No management provided.	d. Immediately operates on assets contributed to it. May provide management if independent trustee is used.
[00273909]	
e. Will does not protect against the effects of incapacity, but a durable power of attorney may be used to accomplish such protection.	e. Trusts, to the extent funded, are quite helpful in protecting against the effects of incapacity. A durable power of attorney to transfer assets into the trust should also be used.

Wills v. Revocable Trusts

f. No protection against creditors.	f. No protection against creditors.
g. Discretionary special needs trust established by will should not disqualify spouse from medicaid benefits.	g. Discretionary special needs trust established during lifetime may well disqualify spouse from medicaid benefits.
h. Old revoked wills generally irrelevant and prior dispositions and changes may not be known to beneficiaries.	h. Prior amendments to trust are relevant to trust, and prior changes to benefits may be discovered by beneficiaries.
3. Operation at death.	3. Operation at death.
a. Probate usually will be required.	a. Probate may or may not be required.
<p>i. Some court costs and attorney fees involved, but postponed until death.</p>	<p>i. A probate may be needed if not all assets placed in trust, buy-sell agreement requires payment to estate, need a personal representative to sue on decedent's cause of action, need to appoint a guardian, there is a family dispute, the trustee desires the protection of a court order, want to elect to treat trust as part of estate for income tax rules. If needed, will cost about same as for will without a trust.</p>
<p>ii. Can cut off creditors claims with short claims period. UCA § 75-3-803 <i>et seq.</i> This may be important to professionals and others with possible contingent liabilities.</p>	<p>ii. Shorter limitations may apply to trust, as well. UCA § 75-7-508, <i>et seq.</i> The trust notice to creditors of the settlor may not cut off direct obligations incurred by the trust itself.</p>
<p>iii. Probate assets available for creditors (assets passing outside estate or trust by joint tenancy or beneficiary designation have separate considerations like those noted for trusts).</p>	<p>iii. A trust might not help shelter certain benefits or life insurance proceeds not otherwise exempt from creditors at death. <u>See</u> UCA §§ 75-6-201(2) (transfer at death by insurance or other contract); 78B-5-505(1)(a)(xii) (exempts only some life insurance proceeds from creditors - policy over 1 year and payable to spouse or children); 75-6-106 and 107 (multiparty accounts available if other assets insufficient); 75-2-205(1)(d) (insurance proceeds limited for elective share); 75-6-310(2) (securities in beneficiary form); 75-7-505(1)(c) (revocable trust assets available if other assets insufficient).</p>
<p>iv. Will becomes public record.</p>	<p>iv. If no court action brought, trust may be kept private. May need to show the trust, or provisions of it, to broker or bankers, to record conveyances, etc.</p>
<p>v. If assets are in more than one state, multiple probates may be necessary.</p>	<p>v. Trusts are useful in avoiding multiple probates.</p>

Wills v. Revocable Trusts

vi. May change life insurance beneficiary designations by will. UCA §§ 31A-22-413(1)(b) and 75-6-201(1)(c) (query: does this bring proceeds into estate?)	vi. No provision for changing beneficiaries by trust instrument.
b. Probate not so bad or expensive as some think.	b. Trust costs may be equal or higher, overall.
i. Utah exempts estates without real estate and under \$100,000; use small estate affidavit. Four titled vehicles can pass, too.	i. Many costs people think of as "probate" costs relates to matters needed to settle estate in any event, with or without trust.
ii. Only get the formality needed by the family; informal opening, unsupervised administration, and informal closing by affidavit available.	ii. Inventories, tax returns, accountings, etc. should be done for trust, too.
iii. May prevent frauds or transfers under undue influence.	iii. Trusts can allow perpetrators of fraud to collect and abscond more easily.
iv. Delays in distribution generally not excessive and are mostly related to creditors and taxes.	iv. Ability to make immediate distributions illusory where there are creditors or taxes.
v. The costs to make transfers postponed earlier will need to be spent.	v. Transfer costs often come earlier with trusts.
c. A will may contain trust provisions. (e.g., for minors, unified credit disclaimer, protective trusts, etc.).	c. A will is necessary with a trust, at least as a backup; name guardians, tangible property separate writing provision.
d. Personal representative has fiduciary duties and entitled to fees.	d. Trustees have fiduciary duties and are entitled to fees.
4. Some Tax Differences	4. Some Tax Differences
a. Can hold S-Corporation stock more than 2 years, for up to a reasonable actual period of administration.	a. Trusts must dispose of S-Corporation Stock in 2 years.
i. For testamentary trust or testamentary transfers into trust, the 2 years for trust to hold stock starts on day transferred from estate to trust unless is a QSST or ESBT. IRC § 1361(b)(1)(B).	i. Then must distribute or elect and qualify as either a QSST Qualified Subchapter S Trust or an ESBT Electing Small Business Trust.
b. Deduction of \$25,000 per year on passive real estate investment is not lost for 2 years. IRC § 469.	b. This special tax rule is not available to trusts. May be best not to put these passive activity assets into a trust not ignored for tax purposes.
c. Estates can recognize loss on depreciated assets in a circumstance where trusts cannot.	c. These special tax rules generally are not available to trusts. (See g. below.)
i. Election to recognize gain or loss on distribution available. IRC § 643(e)(3).	i. Trust or estate gets election to treat distribution as sale. IRC § 643(e)(3).
ii. Satisfaction of pecuniary gift in kind can take loss. IRC § 267(b)(13).	ii. Not available for a trust.

Wills v. Revocable Trusts

d. Estates don't need to make estimated tax payments for first 2 years.	d. Trusts generally must make estimated tax payments, but may get the 2 year exemption if will pours over residue of estate into trust or trust is primarily responsible to pay taxes, debts, and administrative expenses (no will probated).
e. No throwback rule for accumulation distributions.	e. Throwback rule may apply IRC § 666(a).
f. Other tax differences may be important sometimes. For example:	f. Are other tax differences:
i. Tax year selection flexibility under IRC § 662(c).	i. Trusts adopt calendar year. IRC § 645.
ii. Estates receive \$600 personal exclusion.	ii. Trusts get \$100 or \$300 personal exclusion.
iii. Charitable set aside available. IRC § 642(c).	iii. No charitable set aside, only deductible as paid.
iv. EE savings bond election to be taxed currently rather than on redemption. IRC § 454(a).	iv. EE bond election not available.
v. Estates may be partners (or LLC members) qualifying for small partnership tax audit procedure. IRC § 6221(b) (2018).	v. Not even an otherwise ignored grantor taxed trust can qualify for small partnership tax audit procedure. <i>Pimco Management Co. v. Com'r</i> , T.C. Memo 1997-332.
g. Estate and revocable trust together may irrevocably elect to have trust treated as part of the estate for income tax purposes. IRC § 645. Some key features concerning making the election include:	g. The joint election of the estate and trust to have trust assets treated as part of estate may ameliorate some of the tax disadvantages of trusts in immediate postdeath administration. For example, these things may become available with the election:
i. The election is effective for tax years ending within 2 years of death, or	i. Charitable set aside;
ii. If estate tax return, the election is effective for tax years ending before 6 months after final determination of estate tax liability.	ii. Loss on satisfaction of pecuniary bequest in kind;
iii. Need reasonable allocations of tax liability or may be treated as gifts.	iii. 2 years waiver of active participation under passive loss rules. IRC § 469(i)(4).
iv. Not change administrative rules of subtitle F of IRC; trusts are still separate taxpayers.	iv. Use of estate's fiscal year for income tax purposes.
v. Personal representative with court letters of appointment (if any) needs to consent to election. Regs. § 1.645-1(b)(4).	v. Trustee may make election if no personal representative yet appointed., subject, however, to the later agreement by the appointed personal representative. Regs. § 1.645-1(g)(1).

Wills v. Revocable Trusts

<p>h. Personal representative generally is not personally liable for estate tax unless pays others before the U.S. <u>See</u> IRC § 2002, and 31 USC § 3713(b).</p>	<p>h. The trustee, as the holder of nonprobate assets (i.e., a transferee), is personally liable for estate taxes. <u>See</u> IRC § 6324; <i>Englert v. Comm'r 32 TC 1008</i> (1959). The trustee may also be a statutory executor and may be liable under 31 USC § 3713(b) if pays others before the U.S. On a transfer through security interest or purchase by the first transferee (the trustee) of a property subject to the estate tax lien, the lien on the property would be divested from that property but the lien automatically shifts to all of that transferring first transferee's other property. IRC § 6324(a)(2).</p>
<p>i. Personal representative may request discharge from personal liability for various taxes, such as income, gift, generation-skipping, and estate taxes. IRC §§ 6905, 2661, and 2204.</p>	<p>i. The trustee does not have the right to request discharge from personal liability under these provisions as to taxes other than estate tax (under IRC § 2204(b)); income, gift, and generation-skipping tax arising during decedent's life are not covered. <u>See</u> IRC §§ 6905 and 2661.</p>
<p>5. Other</p>	<p>5. Other</p>
<p>a. Wills can be flexible; but cannot always meet certain special goals that trusts can. Wills may include testamentary trusts.</p>	<p>a. Other uses of trusts include flexibility in tax and family and charitable planning, providing single management for assets owned by a number of people, segregating assets for special purposes. Self-settled irrevocable trusts may provide protection against creditors in some circumstances. UCA § 25-6-502(9).</p>
<p>b. Virtual representation in proceedings may apply. UCA § 75-1-403(3).</p>	<p>b. Virtual representation in proceedings may apply. UCA §§ 75-1-301 through 305.</p>
<p>c. Broad jurisdictional grant. UCA § 75-1-301, <i>et seq.</i></p>	<p>c. Broad jurisdictional grant. UCA §§ 75-7-301, <i>et seq.</i></p>
<p>d. Utah Uniform Probate Code (or a version of it) has been in effect since 1977.</p>	<p>d. Prior to the addition of the Uniform Trust Code to the Utah Probate Code in 2004, the law of trusts was much less clear. Trust Code applies to most aspects of preexisting trusts. UCA § 75-7-1103.</p>
<p>e. An assignment of an interest in a decedent's estate for security is automatically perfected on attachment. UCA § 70A-9a-309(13).</p>	<p>e. A security interest in a trust beneficial interest must be perfected by filing a financing statement. UCA § 70A-9a-310(1).</p>