

## *A Will versus a Trust, (or maybe both)*

A will is an important component of an estate plan, but it is by no means the only document that most people need. A will can control several issues in addition to the obvious disposition of property. In a will, a testator appoints the Guardian of his/her minor child(ren). It is critical for every person with a minor child to have a valid will. Without one, a probate court judge will determine the Guardian of your minor child(ren). In most cases, a parent is in a better position to determine who should take care of his/her child(ren) if he/she dies than a judge (no offense your Honor).

In addition to the appointment of a Guardian, in a valid will, a testator can appoint an Executor whose responsibility it is to administer the estate. The administration of an estate requires the Executor to marshal the decedent's property, pay the debts and expenses and dispose of the property. This leads to the most obvious purpose of a will, the disposition of property.

One who dies without a valid will is said to have died "intestate" and the "intestacy" statutes of the jurisdiction of the decedent's domicile determine the disposition of the decedent's property. In Massachusetts, the spouse of a married decedent with children is not likely to get all of the decedent's property which may contradict the decedent's intent. Thus, it is necessary to have a will to dispose of property in a manner inconsistent with the applicable intestacy statute.

A will can dispose of a decedent's property pretty much however the decedent sees fit. There are limitations on one's ability to disinherit one's spouse (but not one's children). The most severe limitation of a will is that it can only control who gets property. Unlike a trust which can control who gets property, when they get property and how they get property.

A trust is a separate legal entity much like a corporation with which people tend to be more familiar. The business of a trust, the investment of the trust property, is managed by the Trustees as the business of a corporation is run by the officers. The Trustees of a trust operate the trust for the benefit of the beneficiaries as the officers of a corporation run the business for the benefit of the shareholders. A beneficiary may be a Trustee just as a shareholder may be an officer.

State property laws govern trusts. If a trust owns property on one day and the creator of that trust dies, the trust does not terminate (unless of course the trust terms provide that it does). The trust is a separate legal entity from the decedent who may have had the right to terminate the trust and the right to the trust income. The continuation of the trust beyond the death of the creator of the trust is the means by which the trust can control the disposition of property in a manner superior to that of a will.

A trust can control not only who gets property but how and when they get property. Many trusts provide that following the death of the creator of the trust, the trust continues for the surviving spouse and children of the decedent and that the income and

principal of the trust are distributable to the beneficiaries in the discretion of the trustees. A will cannot do this.

Because a trust is a far superior vehicle for the disposition of property, many people prefer to have a trust dispose of their property; however, they still need a valid will that appoints a Guardian and Executor. With the minor exception of the decedent's tangible personal property, the will "pours over" all of the decedent's property to a trust. However, an estate plan should not end with the appointment of appropriate parties to serve at death and the disposition of one's property. In next month's issue, I will address various other documents that I strongly recommend for a complete estate plan. As always, if you need assistance, you should contact an attorney who practices in your jurisdiction.

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