



Somers Tambllyn King PLLC

Janet H. Somers ■ Sue Stepp Tambllyn ■ Jennifer L. King

WILL vs. REVOCABLE LIVING TRUST? INFORMATION FOR THE WASHINGTON STATE RESIDENT

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You may have heard from friends, or from presenters at a seminar or on television, that the “way to go” for estate planning is to have a revocable living trust¹ (also called a “living trust” or a “revocable trust”). Unfortunately, revocable living trusts are often used inappropriately in Washington. For most, these trusts are not necessary and have limited benefit. What’s worse, many who enter into revocable living trusts do not know that they will not accomplish the purposes for which the trust was recommended unless they properly transfer property into, and maintain that property in, trust ownership.

The purpose of this summary is to provide you with some general information to assist you in making an informed decision as to whether a revocable living trust is something you really need, or whether you can accomplish your estate planning goals by using a will as your primary estate planning document. Further, this summary will clarify some of the misinformation that is sometimes given regarding the virtues of a revocable living trust.

Probate Avoidance. The primary advantage touted regarding revocable living trusts is that it will avoid probate. Generally, this is true. Below I will (1) describe what probate is, so you will know what it is you may be trying to avoid; (2) explain that probably not all of your assets will be subject to probate, and why; (3) tell you how having a revocable living trust can avoid probate, and when probate avoidance is desirable; and (4) describe how you may have a revocable living trust and still not avoid probate.

What is probate? Probate is the legal process by which the title to your property will be transferred to those people whom you wish to benefit upon your death. Probate (Latin for “to prove”) is also the process by which your Last Will and Testament (and any codicils (amendments)) is submitted to the court, and those having a legally-recognized interest in your estate have the opportunity to “contest” your will if they have a legally-valid reason to do so. Probate is also the process by which your creditors must submit claims for payment, which claims must be submitted within certain time limits.

¹ A trust is a contract between the person establishing the trust (called the “Grantor,” “Settlor,” or “Trustor”) and the person charged with administering the trust, the trustee, to hold property for the benefit of one or more beneficiaries. Typically, with a revocable living trust, the person who establishes the trust is the trustee as well as the current beneficiary.

If you do not have a will, there is technically not a “probate,” but rather, the State of Washington has a statute stating how your property will pass. Since there is no will, this process is called an estate administration, but this process shares many of the statutory rules and is similar to the probate of a will.

What property is subject to probate? When you die, property titled in your name will be subject to probate administration. You most likely own property that will not be subject to probate because title to this property passes “automatically,” and generally is not controlled by the terms of your will or by the law applicable if you do not have a will. Examples of “non-probate” property include:

1. Property owned as “Joint Tenants With Rights of Survivorship,”
2. Property subject to a beneficiary designation other than your “estate”—e.g. life insurance, annuities, IRA’s, other retirement plans,
3. Property with a “Pay on Death” or “Transfer on Death” designation (usually available for bank accounts),
4. Property subject to a Community Property Agreement that specifically states that such property passes to your surviving spouse upon your death, and
5. Property titled in a revocable living trust.

How does a revocable living trust avoid probate? A revocable living trust avoids probate because there is not any property titled in your name upon your death. For example, if John Doe establishes the “John Doe Revocable Living Trust,” and transfers title to all property owned by him (e.g., real estate, bank accounts, stocks, cars) to the “John Doe Revocable Trust,” then upon John’s death, he doesn’t own any property—his trust does—and thus probate is avoided. The trust would provide for how property will pass upon John’s death.

Probate avoidance sometimes is an important goal. For example, if John Doe owned real estate in other states, his estate could be subject to probate in multiple states. Even though Washington’s probate process is very streamlined and flexible, other states have probate processes that require mandatory attorney, executor and appraisal fees and require extensive court supervision.

Further, if you are concerned about your will becoming a public document, then avoiding probate may be an important goal to you. This may be the case if you have extremely strained family relationships or if you are a person with a significant public persona.

Finally, if you are already assisting an elderly parent with his or her financial affairs, a revocable trust may be a convenient means by which to manage your parent’s assets and pass them to his or her beneficiaries upon death.

Are you really avoiding probate? Continuing with the John Doe example from above, if John failed to re-title all of his assets into the name of his trust, or if he later purchased

property in his own name instead of the name of his trust, then a probate may nonetheless be necessary.

Washington probate. Probate in Washington is a very streamlined process compared to some states. For example, in California, there are mandatory attorney and appraisal fees. Further, some states closely supervise the administration of an estate, thus adding to the cost.

Washington has what is called “non-intervention” probate, meaning that once the executor is approved by the court, and if the court grants non-intervention powers, the executor may do all that is necessary to administer the estate, usually without need to return to court for approval. This does not mean that the executor is free to do what he or she pleases. On the contrary, the executor owes special duties to the beneficiaries, and the beneficiaries may bring any questionable activities to the attention of the court.

However, assuming a normal estate administration, one in which there is a diligent executor and cooperative (or at least not unduly uncooperative) beneficiaries, probate administration in Washington is very reasonable. You will need to consider the cost of establishing and maintaining a revocable living trust as that cost is weighed against the cost of preparing and probating a will. In both cases, upon death, there are costs associated with valuing, reporting and transferring the assets. However, with a revocable living trust, there is the additional cost of initially transferring the assets to the trust to avoid probate. Further, a revocable living trust will generally be more expensive to prepare than a will.

Estate tax savings. Some people believe (or are led to believe) that establishing a revocable living trust will produce estate tax savings not available otherwise. This is simply not true. The methods available to shelter both spouse’s exemptions to federal estate and state tax may be utilized in a set of wills or in a revocable living trust.

Reasons to consider establishing a revocable living trust. If you have any of the following circumstances or concerns, a revocable living trust—either in addition to a will as your primary planning instrument or in lieu of a will as your primary planning instrument—may be right for you:

1. You own out-of-state real estate (including most interests in timeshare condominiums);
2. You are very concerned about privacy (you may be in a “non-traditional” relationship and do not want certain family members knowing the particulars of how your property is passing; you may be a public figure); or
3. One or more of your children is actively assisting you with your financial affairs.

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