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Should I Use a Will or a Revocable Living Trust? Separating Facts From Fiction

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You (or someone you know) may have heard that a Revocable Living Trust (often referred to simply as a "Living Trust") is necessary for everyone. Revocable Living Trusts are often said to provide income tax or estate tax benefits, to ensure that one's assets won't be tied up in prolonged and expensive court probate proceedings after one's death, or to protect one's assets from one's own creditors. Many people have been led to believe that a Will-based estate plan is much inferior to a Revocable Living Trust based plan, for these and other reasons. In this newsletter, we would like to set the record straight with regard to both Revocable Living Trusts and Wills, and give you some information regarding when a Will-based estate plan is sufficient or when a Revocable Living Trust based estate plan may provide additional, desirable benefits.

What is the difference between a Will and a Revocable Living Trust? A Will (often called a Last Will & Testament) is a document in which you state what you want to happen with your assets which pass into your probate estate at your death. The Will should, at a minimum, appoint an Executor to administer the estate and provide for the distribution of your remaining assets to your desired beneficiaries. A Will only actually takes effect at your death, and it must be formally acknowledged as valid by an appropriate court before it will be allowed to take effect. The process of having the Will acknowledged as valid is the actual "probate" process - the process of dealing with the estate's assets is actually the estate administration process, not the probate process.

A Revocable Living Trust ("RLT") is a document in which you name a Trustee (often, you will serve as your own Trustee initially) to manage any assets which you actually transfer to the RLT during your lifetime. The RLT generally provides that any assets it owns are to be used for your benefit during your lifetime. The RLT takes effect as soon as it is signed, although assets must actually be transferred to it before it will control them. Upon your death, any assets already owned by the RLT can be dealt with immediately, by the successor Trustee named in the RLT document. There is no formal acknowledgment process required for an RLT as there is with a Will. However, if you failed to ensure that all of your assets were either transferred to the RLT during your lifetime, subject to a beneficiary designation, or owned jointly with rights of survivorship, then assets may still end up in your probate estate. In that case, your Will is still needed to be admitted to probate, so that the probate estate assets can be legally transferred to the RLT for eventual distribution. An RLT does not replace a Will, rather it should be used in conjunction with one to ensure that the overall plan is carried out.

Now, let's cover the mis-information you may have learned in a seminar or on the internet:

1. **Can an RLT avoid the probate process?** Maybe, as it depends on the steps taken before death. Just creating an RLT does not magically allow you to avoid probate. In addition, even if you have gone out of your way to fully fund your RLT during your life, some assets you were not aware of could still end up passing to your estate and requiring the Executor to probate your Will. Fully

funding an RLT means that you have transferred all of your assets (other than IRAs and other assets passing by beneficiary designation) to your RLT during your life.

2. **If you use a Will-based plan, will your assets be tied up in prolonged and expensive probate court proceedings after your death, which could have been avoided by utilizing a fully funded RLT-based plan?** Not normally, assuming (a) you do not live in a bad probate state, (2) no post-death disputes occur among your loved ones, and (3) you have a properly drafted and executed Will document. Georgia is not a bad probate state, but states such as Florida, among others, are often referred to as bad probate states because of their time consuming and expensive probate related processes. As discussed below, a higher than normal risk of a post death dispute is a good reason to use a fully funded RLT-based plan. In addition, with a properly drafted Will and where plenty of assets exist to pay any estate debts, the Executor has the ability to make partial distributions early on in the process to prevent asset accessibility timing issues and concerns.

3. **Does an RLT have any independent income tax effects during your lifetime?** No, in fact, the RLT is effectively invisible for income tax purposes during your life.

4. **Does an RLT provide any wealth transfer tax (gift, estate or GST tax) benefits that you cannot otherwise obtain in a Will?** No.

5. **Does an RLT provide any protection for your assets from your creditors, either during your lifetime or at your death?** The general answer is no. However, two possible exceptions exist, with one being practical and one being technical. First, from a practical perspective, it is somewhat more of a hassle for the estate's creditors to collect from an RLT, which may give the Trustee some limited leverage in negotiating a reduced payoff amount. Second, from a technical perspective, the RLT may provide some protection from a creditor that you did not owe money to during your life but who became a creditor of your estate based on facts occurring after your death.

6. **Can an RLT-based estate plan be somewhat more hassle than a Will-based estate plan?** Yes. An RLT adds some expense and complication to your estate plan, especially if the goal is to fully fund your RLT to ensure that probate can be avoided, since this requires ensuring that most or all of your assets are transferred to and owned in your RLT during your lifetime, rather than owning your assets in your own name.

Why might you want to use an RLT instead of a Will as your primary estate planning document? As just discussed, using an RLT can increase both the expense and hassles of implementing your estate plan. Why might you want to do this? The answer lies in the potential benefits an RLT-based plan can provide and whether these benefits are valuable to you based on your particular situation and concerns. Here are some of the benefits of an RLT-based estate plan.

1. **If you are concerned that you may become incapacitated on a long-term basis in the future, or that you may simply want or need assistance in managing your assets on a long-term**

basis. For temporary asset management situations, a financial Power of Attorney document is often sufficient. However, if you end up needing someone to manage your assets (or help you do so) for a longer period of time, an RLT (in conjunction with a Power of Attorney) often proves superior to having only a Power of Attorney. This is because an agent under a Power of Attorney is merely authorized to deal with assets you own, while a Trustee of an RLT (even a successor Trustee) is the actual legal owner of the assets (even though the assets are held for your benefit). Financial institutions, government agencies, and other third parties are often reluctant to honor Powers of Attorney, especially older ones, as they are afraid that the Power of Attorney may no longer be valid, or that the agent may not actually have the authority to undertake a given transaction. This reluctance does not usually arise when a Trustee is attempting to act under an RLT. Many people who fear that they have a higher than normal chance of becoming incapacitated or disabled for an extended period decide to use an RLT-based estate plan for this reason.

2. **An RLT-based estate plan is the most powerful way to protect yourself from your own possible destructive actions and from others who may wish to take advantage of you in the future if you ever begin to suffer from a weakened mental state.** As people age, the chance that they will suffer a decline in mental or physical function increases. The transition from being fully competent and independent to becoming mentally or physically incapacitated is rarely quick, however. This means that many people go through a period, often of several years, where they may not be fully incapacitated, but their condition has still declined significantly. During this transition period, individuals may make increasingly poor decisions. Predatory people, either family members or outsiders, may also try to take advantage of people who are in a weakened state. Having an RLT-based estate plan can offer people who are in a declining state a way to protect themselves from their own poor decisions, as well as from predatory persons. With an RLT in place, either the person in decline or his or her Power of Attorney agent can transfer the person's assets to the RLT and allow a successor Trustee or Co-Trustee to take over the person's financial affairs. This allows the Trustee to protect the declining person by refusing to allow the person to engage in transactions that may be harmful or otherwise ill-advised. This protection does depend heavily on the successor Trustee, so it is critical to be very careful when selecting someone to act in this role.

3. **If you own real estate outside of your primary state of residence**. If you own real estate outside your state of residence, owning this out-of-state real estate in an RLT can avoid the need for a second, "ancillary" probate process in the other state. In general, a Will must be probated in each state where you own real estate at your death, in addition to a probate process in the state where you maintain your primary residence. However, if the out-of-state real estate is owned by an RLT, there is generally no need to probate your Will in the other state since the real estate owner (the RLT) did not die upon your death. This can allow the Trustee of the RLT to transfer title to the intended beneficiaries more quickly and with fewer administrative costs.

4. **If you are concerned about post-death disputes**. If you intend to treat family members unequally, disinherit a family member, or benefit people who are not legally considered family members, or if for some other reason you believe that there may be a dispute following your death, you should strongly consider creating an RLT-based estate plan. Since assets owned by an RLT at

your death do not have to be dealt with through a formal probate process, there are far fewer opportunities available for disgruntled family members to cause trouble. In addition, it can be more difficult to successfully challenge a trust than to challenge a Will. Therefore, owning your assets in an RLT is one of the best and most powerful ways to avoid post death disputes and help ensure that your desired estate plan will be carried out as intended. A fully funded RLT-based estate plan can be especially helpful in a blended family situation, where one's family includes both a current spouse and children from a prior relationship.

5. **If you want to help avoid the disruption to your estate plan which can occur if your surviving spouse elects to take Year's Support (in Georgia) or a forced (or "elective") share (in other states)**. Georgia allows a surviving spouse to claim a "Year's Support" from a decedent's probate estate. In addition, many other states provide for a minimum "forced share" amount which a surviving spouse can claim after a decedent's death. In Georgia, and in some other states, assets which are owned by an RLT at a person's death do not become subject to a potential Year's Support or forced share claim. (Please note: some states have expanded the reach of their forced share laws so that trusts such as an RLT no longer work to avoid these claims.) This can be especially helpful in a blended family situation, where the decedent's surviving spouse may not be the parent of all of the decedent's children, and where the decedent is not having all of his or her assets benefit the surviving spouse.

6. **If someone is concerned about keeping his or her estate plan private**. Wills must be filed with the Probate Court of the county where a decedent maintained his or her primary residence, in addition to any possible ancillary probate courts. The requirement to file any original Will in one's possession after the decedent dies applies in Georgia even if all assets actually pass outside the probate estate and no formal probate is required. RLTs are private documents that are not normally required to be filed with any court, so they do not generally become public records.

7. **If someone is concerned about an expensive and onerous probate process in a bad probate state**. In Georgia, with a well-drafted Will, the probate process is generally neither expensive nor onerous. However, in a number of other states, probate can be much more expensive and difficult. Having a properly-implemented, RLT-based estate plan can help reduce your exposure to probate in those states.

8. **If someone wants to be able to provide for specific bequests of money or other property, and to change such bequests without having to formally amend his or her Will for every change.** Under a Will, Georgia law permits you to use a list of specific bequests which is not part of the actual Will, but such lists can be used only for bequests of tangible personal property (jewelry, furniture, clothing, etc) and such bequests are <u>not</u> legally binding. Under an RLT, you can use a provision which allows you to make a separate list of specific bequests, including bequests of money, real estate, and other assets in addition to bequests of tangible personal property, and the list can be made legally binding. Using this type of provision in an RLT can allow you to change your

mind more often about such bequests, and to make such changes either without the help of any attorney, or with a reduced level of assistance.

9. **If you do not have a good choice to select as your agent under your Power of Attorney, and you would like to use a corporate fiduciary (such as the trust department of a bank or brokerage house or an independent trust company) in this role.** While corporate fiduciaries are normally not willing to serve as an agent under your Power of Attorney, many are willing to do so if they are also named as the successor Trustee under your RLT. If you end up incapable of handling your financial affairs, the corporate fiduciary would use its power under the Power of Attorney to transfer most or all of your assets to your RLT where it will then serve as your successor Trustee. Because you can not normally change the ownership of tax-deferred retirement savings accounts such as an IRA or 401(k) account to an RLT during your lifetime without generating negative income tax consequences, the corporate fiduciary will likely still need to use your Power of Attorney to manage these assets.

Choosing between a Will-based estate plan or an RLT-based estate plan is based on your personal preferences and the various factors that apply to your particular situation. There is no one-size-fits-all advice that we can give in this regard. If you or someone you know has questions about what type of estate plan would be best for them, please call us at (678) 720-0750 or e-mail Karrah Hammock at khammock@morgandisalvo.com to schedule a consultation.