MORGAN AND DiSALVO, P.C.
attorneys at law

RICHARD M. MORGAN, Esq.
rmm@morgandisalvo.com

LORAINE M. DiSALVO, Esq.
ldisalvo@morgandisalvo.com

OF COUNSEL
MICHAEL A. PENN, Esq.
mpenn@morgandisalvo.com

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

by Loraine M. DiSalvo

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 a person states what she wants to happen with regard to the assets which pass into her probate estate at her death. The Will should, at a minimum, appoint an Executor to administer the estate and provide for the distribution of the person's remaining assets to her desired beneficiaries. A Will only actually takes effect at the person's 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 (also called an "RLT") is a document in which a person names a Trustee (often, the person will serve as his own Trustee initially) to manage any assets which are actually placed in the RLT during the person's lifetime. The RLT generally provides that any assets it holds are to be used for the benefit of the person who created it as long as he is still living. The RLT takes effect as soon as it is signed, although assets must actually be transferred to it before it will control them. Upon the death of the person who created the RLT, any assets already owned by the RLT can be dealt with immediately, by the successor Trustee named in the document. There is no formal acknowledgment process required as there is with a Will. However, if the person who created the RLT failed to ensure that all of his assets were either transferred to the RLT during his lifetime or subject to a beneficiary designation, then assets may still end up in his probate estate. In that case, the person's Will will still need to be admitted to probate, so that the probate estate assets can be placed in the RLT for eventual distribution. An RLT does not replace a Will, in other words; instead, it should be used with one to ensure that the overall plan is carried out.

In order for an RLT to successfully allow the creator to avoid the need for a Will probate, the creator needs to take a lot of additional steps beyond just creating the RLT. In other words, just creating an RLT does not magically allow you to avoid probate. An RLT does not have any income tax effects during the lifetime of the person who created it; in fact, the RLT is effectively invisible for income tax purposes during the creator's life. The RLT does not protect your assets from your creditors,

either during your lifetime or at your death. The RLT can contain estate tax or generation-skipping transfer ("GST") tax planning provisions, but these provisions are no different from the same sorts of provisions used in a Will, and there is no added benefit from using an RLT to do this type of planning. Using an RLT adds expense and complications to the creator's estate planning, and can complicate the creator's daily life, especially if the goal is to ensure that probate can be avoided, since that requires ensuring that most or all of your assets are transferred to and kept in your trust during your lifetime, rather than owning your assets in your own name.

Why would I use an RLT instead of just a Will in my estate planning? In spite of the potential drawbacks to using an RLT, using an RLT-based estate plan, instead of a Will-based estate plan, can still make sense for some people.

- **If someone is concerned about possible long-term incapacity or if he or she may need help managing assets on a long-term basis**. For temporary asset management situations, a financial Power of Attorney document is often sufficient. However, if a third party needs to manage someone's assets for a long period of time, an RLT often proves superior to the Power of Attorney. The reason for this is because a Power of Attorney agent is merely authorized to deal with the assets owned by the Power of Attorney creator, while a Trustee of an RLT (even a successor Trustee) is the actual legal owner of the assets, which are held for the benefit of the RLT's creator. This is one reason that many elderly persons (and persons who believe their chance of suffering a long-term or permanent disability is fairly high) often favor using an RLT over a Will as their primary estate planning document.

- **If someone owns real estate outside of his or her primary state of residence**. For someone who owns real estate which is not located in the same state as his or her primary residence, using an RLT can help his or her beneficiaries 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 in the state where you maintain your primary residence. However, if real estate is owned by an RLT, there is generally no need to probate the creator's Will in the state where that RLT-owned real estate is located, since the RLT does not cease to exist at its creator's death. This can allow the Trustee of the RLT to transfer title to the intended beneficiaries much more quickly and with fewer administrative costs.

- **If someone is concerned about post-death disputes**. If someone intends 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 he or she believes that there may be a dispute following his or her death, he or she 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 for intended beneficiaries. 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. These can be especially helpful in a blended family situation, where one's family includes both a current spouse and children from a prior relationship.

- **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 filing requirement applies to Wills 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.

- **If someone wants 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. 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.

- **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.

- **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 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.

If you or someone you know has questions about whether a Will or an RLT would be best for them, questions about an existing estate plan, or other questions, please have them call us at (678) 720-0750 to schedule a consultation.