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Special Needs Trusts | Elder Law | Long Term Care Planning | Medicaid | Probate | Wills & Trusts  
Incapacity Planning | Guardianship | Developmental Disabilities | Veteran's Benefits

## Wills and Trusts

### Last Will and Testament

A will is an instrument which passes title to property at death. A person who dies with a will dies “*testate*” and a person who dies without a will dies “*intestate*.” The person executing the will is a “testator.” Wills have many functions, some of which we will examine here.

When a person dies without a will, the intestacy laws of Florida determine who from among his or her family inherits the property and in what proportions. On the other hand, a person who leaves a will is free to name his or her own beneficiaries and indicate the amount passing to each beneficiary (except that the will cannot override a surviving spouse's right to an “*elective share*” presently consisting of 30% of the estate and surviving minor children are protected for some purposes too).

A will can be used to place funds “in trust” for the benefit of minors or others unable to manage property given outright after the death of the testator. This “testamentary” trust can be used, for instance, to educate children and ultimately be distributed to children at whatever age or ages the testator wishes. On the other hand, property passing by intestacy is distributed to the heir immediately or, for minor heirs, upon reaching age 18.

A will may also be used to express a desire as to who should be appointed as guardian of the testator's minor children and to distribute personal effects like household belonging, jewelry, vehicles and the like.

A will is a unique opportunity for a person, during his lifetime, to designate who will take charge of his affairs after his death. This opportunity should not be taken lightly. If not exercised by the testator, it will be exercised by a judge. The person or bank in charge of the estate is called a “*personal representative*.” The functions of a personal representative include gathering all the decedent's property, following the instructions of the will, paying taxes, claims against the estate and administration expenses, paying bequests under the will, safeguarding the interests of the beneficiaries, and closing the estate.

A will may be used to specify the source from which taxes, expenses, claims and other charges against the estate are to be paid. Finally, a will may also be used to take advantage of estate tax deductions and exclusions.

### **Revocable Trusts**

When significant assets are set to pass through a last will and testament, often other legal tools should also be explored to make the transition of the estate to the next level of beneficiaries. Trusts can be very powerful tools to accomplish various estate planning goals. Some of these goals might include: provide for an efficient method to transfer our estates upon death, minimize taxes and court costs, plan for incapacity, protect and structure the inheritance for the next generation.

Just as a will may contain provisions to utilize various tax vehicles as well as address family concerns after death of the testator, so too may a revocable (or "living") trust be useful in this regard. Irrevocable trusts can have significant creditor and tax protection advantages.

Unlike a will, which takes effect only at the death of the testator, a trust takes effect at the time of its creation (signing). A trust is a contractual document between a settlor and a trustee. The contract - or trust agreement - contains a list of instructions to the trustee concerning disposition of property transferred to the trustee. For example, the trustee may be required to pay all income to the settlor during the settlor's life, place the property in an estate tax deferred trust during the settlor's life, place the property in an estate tax deferred trust upon the settlor's death, and finally distribute the trust property to the settlor's descendants upon the death of the settlor or the settlor's spouse.

Often the initial trustee is also the settlor so control stays with the person originating the document. But then we need to name backups in the event of death or incapacity. Therefore, the trust document names "*successor trustees*" as well as *remainder* or *residual beneficiaries*.

Revocable trusts, because they take effect during life, have various advantages:

- The trust can establish a workable asset management system during the settlor's life.
- The settlor can evaluate the trustee's performance during his life so that if any replacements are needed, he can make them.
- The trust can provide for the settlor's maintenance upon incapacity of the settlor, without necessitating formal legal guardianship procedures.
- The trust need not be admitted to probate upon the death of the settlor and, as such, can be a more private method of distributing property upon a settlor's death.
- The trust can be freely changeable and revocable during the life of the settlor.
- Property transferred to the trust prior to death of the settlor is not subject to probate, and use of a trust may therefore reduce costs (such as attorneys' fees, accountants' fees and administration expenses) and delays usually encountered in the administration of a will.

Not everyone needs a trust and you need the right kinds of assets for a trust to be useful. For the right person a trust can be an excellent estate planning tool.