

## Should I Have a Trust – Revocable Trust vs. Will – Third in the Trust Series

This is the third post in the Trust Series. In the second post, I described some of the characteristics of revocable *inter vivos* Trusts (here referred to as “Revocable Trusts”). You can [click here](#) to access the second post in the Trust Series. In this and subsequent posts, I will discuss the distinctions between having a Revocable Trust or a Will as the anchor of your foundational Estate Plan.

There are many factors that an Estate Planning lawyer reviews in deciding whether to recommend a Revocable Trust-based Estate Plan or a Will-based Estate Plan. Some of these factors include: (1) the amount of control you wish to retain during lifetime; (2) the level of protection you want during any period of incapacity; (3) the nature, value and appreciation potential of the assets that you own; (4) your relationship with family members; and (5) your age and health.

The focus of this post is on the first factor -- lifetime control.

### Maintaining Control

A Will springs into operation only at the time of death. Thus, there is no lifetime transfer of your property. You maintain full control and ownership of your assets during lifetime. However, you can delegate the responsibility for some or all of the aspects of asset management to another person with a general durable power of attorney.

A general durable power of attorney is a legally enforceable written instrument by which you, as the “principal,” appoint one or more “agents” to manage your property and financial affairs. You can make the general durable power of attorney effective immediately upon signing it so that your agent has the legal authority to act for you. If you are not incapacitated at that time, you do not lose your rights to manage your property. You can direct how you and your agent will cooperate and work together when your general durable power of attorney is written to be effective upon signing.

If you create a Revocable Trust, you can decide to “fund” the Trust during your lifetime by transferring legal title to your property to the Trust. You can also retain legal title to your property and “fund” the Revocable Trust (fully or partially) during life at any time after you signed the Trust Agreement or ultimately, at the time of death through your Will directing distribution of probate assets to the Trust. You will also need a durable power of attorney that grants authority to your agent to transfer legal title to your property to the Trust in the event you become incapacitated before all of your assets are transferred to your Trust.

Typically you are the sole Trustee (or co-Trustee with your spouse) of your Revocable Trust so that you maintain control, in your capacity as Trustee, over the property that is transferred to the Trust. Prior to any incapacity, the principal (corpus) and income earned on the property held in your Revocable Trust is invested, managed and distributed as you direct.

In either the Revocable Trust-based Estate Plan or the Will-based Estate Plan that relies on a general durable power of attorney for lifetime asset management, you can retain as much or as little control as desired.

With a Revocable Trust, there is no legal requirement that you serve as initial Trustee. You can appoint another individual or a professional Trustee, such as a trust company or bank, to serve as Trustee. Likewise, with a durable general power of attorney, you can delegate your asset management tasks to your “agent” without being incapacitated.

Either arrangement would have appeal if, for example, you plan to travel away from home for an extended period or when you simply want to be relieved of the responsibility of managing your property for some time.

The next post will discuss the second factor in differentiating between a Revocable Trust-based Estate Plan and a Will-based Estate Plan - the level of protection you want during any period of incapacity.

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Barbara Ann Dalvano, Esq.  
Phone and Text Message: (719) 963-2933  
Email Address: [barbaradalvano@yahoo.com](mailto:barbaradalvano@yahoo.com)

Feel free to visit our website at [www.attorneybarbaradalvano.weebly.com](http://www.attorneybarbaradalvano.weebly.com).