

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

This is the fourth post in the Trust Series. In the third post, I discussed the difference between a Revocable Trust-based Estate Plan and a Will-based Estate Plan regarding the amount of control you wish to retain during lifetime. You can [click here](#) to access the third 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.

The focus of this post is on how a Revocable Trust-based Estate Plan and a Will-based Estate Plan differ when it comes to the level of protection you want during any period of incapacity.

### Protecting Your Assets

If you have a Revocable Trust-based Estate Plan and you are serving as sole Trustee, a successor Trustee whom you have named in the Trust Agreement will assume the role of Trustee upon your incapacity. Generally, this is a smooth transition, particularly if you have transferred all of your assets to your Trust prior to the onset of any disability. The successor Trustee continues to administer the Trust according to the terms of the Trust Agreement. There is no need for court involvement in the transition. If you were serving as a co-Trustee, then the co-Trustee can continue in that role, again without any disruption to the administration of the Trust.

A Will does not provide for lifetime management of assets during incapacity. If you have a Will-based estate plan, the way you protect your assets during incapacity is through a general durable financial power of attorney.

### Authority and Duties

Both state law and the Trust Agreement define the authority of, and impose duties and responsibilities on, a Trustee of a Revocable Trust. Similar, but not identical powers, duties and responsibilities apply in the case of an agent serving under a general durable power of attorney.

The Revocable Trust Agreement is a comprehensive instrument. It will contain all of the terms and provisions for the management of the Trust property. For example, the Trust Agreement will include provisions detailing: (1) how Trust property is to be invested; (2) distribution of Trust property (both during your lifetime and after death); (3) who you want to designate to serve as the initial and successor Trustee; (4) the terms under which the Trustee serves, including when a Trustee can be removed and replaced; (5) the procedures for accounting for income and other transactions of the Trust property; (6) the location of the Trust and its movement to another state; and (7) overall administration of the Trust.

When incapacity strikes and the named successor assumes the role of Trustee, various duties and responsibilities are triggered. For example, the Trustee has the duty of loyalty to the Trust beneficiaries (including you as the settlor) and must avoid deriving any personal benefit from the Trust (but can be paid reasonable compensation) while serving as Trustee. The Trustee must act impartially with respect to all Trust beneficiaries and deal in good faith and fairly with all of the Trust beneficiaries. All transactions involving Trust property must be accounted for and Trust

beneficiaries are entitled to receive such written accountings. The Trustee has investment duties and must invest Trust property prudently. Some of these duties and responsibilities may be modified in the Trust Agreement.

A general durable power of attorney is a flexible tool by which you can describe in great detail all of the powers, duties, rights and other terms of your relationship with your agent. For example, you can describe the level of authority your agent has regarding your real estate, retirement plans, securities, bank accounts, household items and personal effects and insurance policies. You can authorize your agent to collect and open your mail, have access to passwords and user names for e-commerce and other “online” accounts and take possession of your personal papers. Your agent would be able to file tax returns and pay your tax obligations. You can also direct your agent to use your property not only for your benefit, but for the benefit of your spouse and family members.

With a general durable power of attorney, you can give your agent broad, sweeping powers to “walk in your shoes” and manage your property and financial affairs with all of the “owner” rights that you could exercise if you were not incapacitated. Your agent does not become the owner of your property; rather your agent is charged with the responsibility to manage your property on your behalf.

You can also set limits on what your agent can do with your property. For example, you might want to limit or restrict your agent’s authority to make gifts of your property. You might not want your agent to alter the disposition of your property at death; in that situation you could prohibit your agent from changing the beneficiaries you have designated for your life insurance and retirement accounts.

Thus, like a Revocable Trust Agreement, a general durable power of attorney can be tailored to your specific circumstances and preferences. In addition, if you become incapacitated, your agent does not need to obtain court approval to act on your behalf.

At a minimum, your agent is required by Colorado law to act within the scope of authority granted by the terms of the written instrument, in accordance with your “reasonable expectations,” to the extent your expectations are known by the agent and if not known, in your “best interests” and finally, in good faith. Your agent’s duties to act on your behalf are couched in terms of your “reasonable expectations” in order to protect your rights to self-determination. These duties cannot be altered by the written instrument.

Additional duties are imposed on the agent, including: (1) a duty of loyalty to act in your best interest; (2) a duty to avoid a conflict of interest that impairs the agent’s ability to act impartially and in your best interest; (3) a duty to act with due care, competence and diligence ordinarily exercised by agents in similar circumstances; (4) a duty to keep a record (without a duty to disclose information) of all receipts, disbursements, and transactions involving your property; (5) a duty to cooperate with the person who is authorized to make health care decisions for you; and (6) a duty to attempt to preserve your estate plan. These duties can be modified in the written instrument and additional duties can also be imposed on the agent.

On balance, concerning the factor of the level of financial protection afforded during incapacity, here are some observations:

- a Revocable Trust might be viewed as a more formal arrangement with well-settled law regarding the interpretation of the authority and duties of a Trustee; and
- a General Durable Power of Attorney might be viewed as a more informal, perhaps more flexible arrangement, enabling the agent to respond to changing circumstances.

All of these points (and more) are “design” features that you will want to discuss with your estate planning lawyer. The level of importance you assign to these factors will be critical in designing an estate plan that achieves your objectives. Stay tuned for the next post where I’ll discuss other factors that play a role in comparing and contrasting a Revocable Trust-based Estate Plan with a Will-based Estate Plan, coupled with a General Durable Power of Attorney.

***Working to Preserve Your Wealth and Protect Your Future in a Constantly Changing World.***

This post has been brought to you by the Law Office of Barbara Ann Dalvano. This information is provided for educational purposes only and to generate ideas, provoke thought and facilitate conversation. It is not intended to create an attorney-client relationship. Each person’s situation is different and this information should not and cannot be relied upon as legal, tax, accounting or investment advice.

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).