

## ARE YOU APPOINTED TRUSTEE OVER A REVOCABLE TRUST?

*How to answer the question: What about the Will?*

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A trust is a relationship between a person forming the trust (“Settlor” or “Trustor”), the person holding the trust assets under the terms of the trust (“Trustee”) and the person or persons entitled to the benefits of the trust (“Beneficiary”).

A revocable trust is a widely recognized estate planning tool with unique characteristics that distinguish it from other types of trust relationships. Importantly, by contrast with other types of trusts, the revocable trust is fully revocable and amendable by the Settlor for so long as the Settlor is living and is legally and financially competent. Very frequently, the assets are held in the revocable trust by the Settlor serving as his or her own Trustee. During the Settlor’s lifetime, the Settlor is also the only Beneficiary with rights to the assets of the trust.

You may have been named by a Settlor as a Trustee, or as a successor or co-trustee of a revocable trust. During the Settlor’s lifetime, as long as the Settlor is competent to do so, the Settlor can remove or replace you. For a living Settlor who is legally and financially competent, the revocable trust is a legal fiction. Although there are three roles, Settlor, Trustee and Beneficiary, the Settlor is the only party in interest. If you are a Trustee named by a Settlor, during the Settlor’s lifetime you serve at the pleasure of the Settlor.

One purpose of a revocable trust is as a disability planning tool. The Settlor may appoint someone else to serve as the Trustee, co-Trustee or successor Trustee. In that case, without missing a beat, another person can control or help control the assets held in the revocable trust for the Settlor if they become legally and financially incapable of managing the Trust themselves, or for any other reason.

(Continued on reverse.)



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Another purpose of the revocable trust is as a substitute for a last will and testament (“Will”). A “testator” is a person who has executed a Will. During a testator’s lifetime, no one named in a Will has any rights to the property of the testator. A person can and frequently does change his or her Will many times during their lifetime. Beneficiaries may have a wish for or expectation of inheritance, but they have no right to the testator’s assets during the testator’s lifetime. In exactly the same fashion, only the Settlor has rights to the assets in a revocable trust during his or her lifetime. After a Settlor dies, the Settlor’s revocable trust becomes irrevocable. In the same fashion as with a Will, the persons named as the Settlor’s successor beneficiaries in their revocable trust have rights of inheritance that did not exist during the Settlor’s lifetime.

Clients and family will often ask about the decedent’s Will. When a decedent’s primary testamentary document is a revocable trust, their Will may play a far smaller role or no role at all. This depends in part on whether or not the decedent fully funded their revocable trust with all their probate assets and kept their trust funding current. As a general rule, ownership of property or any asset is identified by who holds title to the asset. If a person named as the “Trustee,” under a revocable trust holds title to the asset, even if the Trustee has died or resigned, that asset is “in title” to the Trustee. If an asset is in title to the Trustee on the Settlor’s death, that asset is a trust asset that is funded to the revocable trust on the decedent’s death. The same is true of liabilities of a decedent titled to the Trustee.

If the decedent’s revocable trust is fully funded with all their probate assets, there will be no probate of the decedent’s Will. One hallmark of the probate administration process is the court appointment of a person to be the “Executor” or “Personal Representative” of the probate estate. Probate is a legal process whereby a court oversees the distribution of certain classes of assets in accordance with a deceased person’s Will, or in accordance with state law if they died without a Will. Most important in this context, property which is properly titled to the Trustee of a revocable trust is excluded from probate. As a result, if the property of the decedent is properly titled to the Trustee, the property does not pass in accordance with the decedent’s Will. Instead, it passes without the need for court intervention in accordance with the terms of the decedent’s trust. Probate assets also generally do not include other assets that pass by operation of law, such as life insurance proceeds, transfer on death (TOD), pay on death (POD) and retirement accounts (unless the beneficiary designation requires distribution to the deceased person’s “estate”) as well as property passing to a survivor with rights of survivorship.

If there are no probate assets, then the decedent’s Will is not administered at all. In that instance, in your role as Trustee, you will be responsible for managing the administration of the decedent’s estate in accordance with the terms of the trust and state and federal tax laws.