20 Costly Misconceptions About Wills and Trusts

Misconception #1: A Will avoids probate. No. A Will is the primary tool of the probate system. Your Will is like a letter to the Court telling the Court how you want your property distributed. Then, you must make sure that you prove to the Court that all your property is collected and appraised, and all your bills and taxes are paid, before your property can be distributed to your heirs.

Misconception #2: A Testamentary Trust avoids probate. No. A Testamentary Trust is a Trust contained within a Will that holds property for a specific purpose. For example, one purpose would be to hold property until minor children turn 18, when they can legally own property -- or until children reach the age when you believe they are mature enough to responsibly handle the property. A Testamentary Trust is not a Revocable Living Trust. It is part of a Will and takes effect only when the Will is probated.

Misconception #3: Probate costs and the costs of administration of the estate are small. Not necessarily. Such costs can be substantial. The real problem is, no one can tell you how much the costs will be until the probate has been completed, which often can take several years. The biggest portion of the costs are the fees charged by attorneys and personal representatives for their services for the estate, in addition to filing fees, costs of publication, fees for copies of death certificates, filing and recording fees, bond premiums, appraisal and accounting fees, and more. Depending on your circumstances, you may want to avoid probate.

Misconception #4: Property can be distributed according to the terms of your Will in only a few weeks. In Maryland, the administration usually takes 3 to 6 months. During this time, the deceased person's property must be inventoried and appraised. Heirs must be notified. Estate and inheritance taxes, if any, must be paid. Contested claims, if any, must be settled. Creditors must be notified and paid. If all of this is not done before the estate is distributed to the beneficiaries of the estate, the personal representative will be personally responsible for those claims. As a result, most personal representatives won't distribute property until they are sure all claims have been settled.

Misconception #5: Your Will and your assets remain private. No. Because probate is a public legal proceeding, your estate may become a matter of public record. This means that anyone -- including nosy neighbors and salespeople -- can go to Court to find out the balance in your savings account, the value of your stocks, even the appraised value of your diamonds.

Misconception #6: A Will helps you avoid taxes. No. A simple Will does nothing to lower your taxes. A Will simply tells how you want your property distributed, and who you want to act as guardian for your minor children in case you and your spouse die in a common accident. A skilled lawyer can use a Will to plan complicated estates that require tax planning, but the cost of the complex plan will be comparable to the cost of a Revocable Living Trust plan. Plus, the Will-based plan will still have to go through

probate.

Misconception #7: Your permanent family home and your vacation home can be handled through the same probate and qualification. Yes, but only if they are in the same state. If you own property in different states, a second probate, called an ancillary administration, will need to be opened, which means your estate will need to hire another attorney. This will increase the overall estate administration expense. And if you own real estate in other states, probates will need to be opened in those states as well.

Misconception #8: A Will prevents quarrels over assets. Wrong. Wills are among the most contested legal documents in the United States. Today, it is common for unhappy relatives to challenge a Will. This results in higher attorneys' fees and even more delays. Wills actually encourage challenges over assets because a petition must be filed in Court to probate them, which is like filing a lawsuit. As a result, since a lawsuit has already been filed to probate the Will, a contesting party can simply file their claim in Court without instigating their own lawsuit.

Misconception #9: Estranged family members do not need to be notified of a probate if the Will excludes them from an inheritance. In some jurisdictions, the Court will require that all heirs be notified of the probate even if they are excluded from the Will. However, since you won't know for sure how your particular county Probate Court will handle this matter, it is safer to handle an estate with potentially disgruntled heirs through a Living Trust.

Misconception #10: A Will from one state is not legal in another state. Wrong. If the Will is legal in the state where it was prepared, it is legal in all 50 states. However, Wills do not travel well from state to state and should be reviewed by an attorney and very likely changed whenever you move to a new state. This is because the Will's language may not mean the same in other states as it did in the state where it was signed. In addition, many states require witnesses to the Will signing. If proper procedures are not followed, you may need to produce those witnesses in order to probate the Will.

Misconception #11: A Will helps you when you become physically or mentally incapacitated. No. A Will is totally ineffective until death, and, therefore, does nothing to help you through incapacity and disability. Your family or friends may have to go to Court to start costly guardianship or conservatorship proceedings.

Misconception #12: You must name your attorney as your personal representative. No. You may name anyone you choose.

Misconception #13: The cost of your estate plan is only the cost of drawing up the documents. No. The cost of your estate plan is both the cost of drafting the documents and the cost of distributing property to your heirs. Simple Wills are less expensive to set up, but potentially expensive when they go through probate and there is qualification on the estate and estate administration. Revocable Living Trusts may initially cost more than a simple Will, but the overall cost of settling your estate is often substantially less.

Misconception #14: Revocable Living Trusts are only for large estates. No. Revocable Living Trusts are for anyone who wants to avoid costly conservatorship and probate proceedings. In appropriate cases, people with small estates can benefit from a Revocable Living Trust. People with larger estates can benefit even more.

Misconception #15: A Revocable Living Trust is a public document. No. Your Revocable Living Trust can remain private because it does not have to be recorded or published in any way. The only people who will know about your Trust are the people you choose to tell. However, some professionals may need to review your Trust to confirm that your trustee is authorized to take a particular action. This review is for the protection of all beneficiaries of the Trust.

Misconception #16: A Revocable Living Trust cannot be changed. Wrong. You can change and even revoke your Revocable Living Trust any time you wish. The decision is entirely up to you.

Misconception #17: A Revocable Living Trust must have a separate tax return. No. As long as you are a trustee or co-trustee of your Revocable Living Trust, it does not need a tax return of its own. Your personal tax return, which uses your social security number, is sufficient for the IRS.

Misconception #18: When you set up a Revocable Living Trust, you lose control of your assets. No. When you set up your Revocable Living Trust, you simply name yourself and/or your spouse as Trust managers, called "trustees." In this way, you never give up control.

Misconception #19: The best way to transfer assets to your Revocable Living Trust is through a pour-over Will. No. A pour-over Will can be used to clean up the transfer of any miscellaneous assets to your Revocable Living Trust, but in order for that to take place, the Will must be probated for the assets to be transferred to the Revocable Living Trust. A better course of action is to transfer the assets to your Trust while you are still healthy and able. Not only will you get the peace of mind that comes from knowing the transfer was made properly, you will also get an accurate inventory of your estate.

Misconception #20: There are no costs associated with administering a Trust at the death of the original settlor of the Trust. Not true. While people commonly think that only the probate system costs money and takes time, they fail to understand that administering a Trust, distributing Trust assets to beneficiaries named in the Trust, and terminating the Trust can result in substantial fees and costs. Trustees charge fees for their service, and many trustees hire attorneys and accountants. These costs are paid by the Trust before beneficiaries receive their inheritances.