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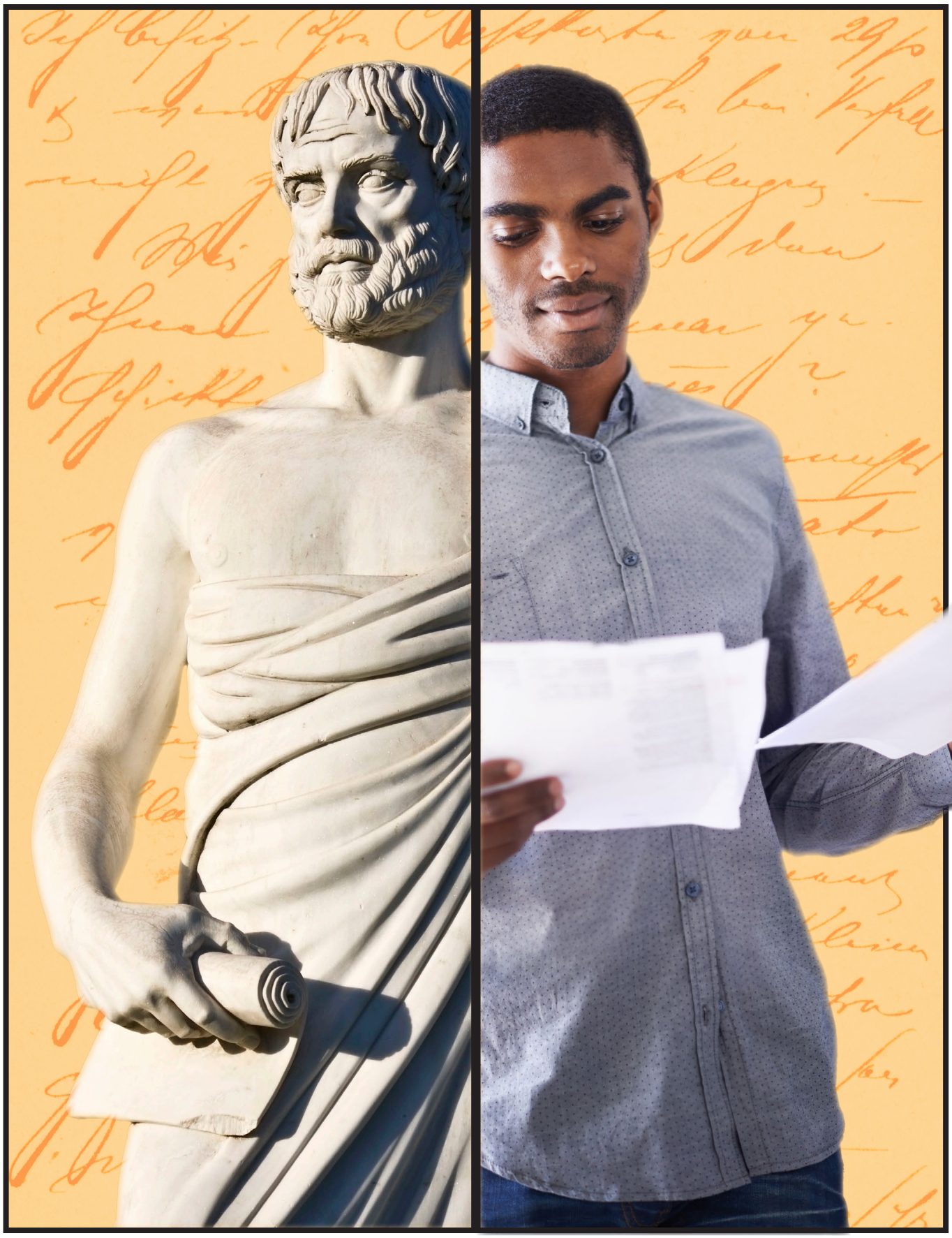

Aristotle Had a Will and You Probably Should, Too: The Synergetic Benefits and Disadvantages of Wills and Trusts

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The topic of wills and trusts can evoke uncomfortable emotions. It shouldn't. Wills and trusts, when used properly and in tandem, can protect your assets and strengthen your legacy. Apprehension of mortality aside, effective estate planning can alleviate anxiety. It can offer the comforting knowledge that, when the inevitable happens, loved ones will be taken care of and affairs will be in order.

Wills and trusts are the tools the American legal system has developed to do this. A will is a document that distributes property, through a public probate process, after the willmaker's death. A trust can manage and distribute assets while the trustmaker is still alive, protect the trustmaker during times of incapacity, and avoid probate when distributing what's left. The trust can also protect the estate from taxes and from creditors of its beneficiaries, and may define under what circumstances beneficiaries can use assets. This can protect minor children, children with special needs, and beneficiaries with other issues, such as addiction.

Understanding how wills and trusts work individually, and then, synergistically, can help anyone create a plan that adequately provides for loved ones' needs and wants. But as explained below, these tools can also do so much more. This article explores what happens when a person dies without a will, the will's role in an estate plan, and the role of a trust in protecting the estate from taxes, from the creditors of beneficiaries, and even from beneficiaries themselves.

What Happens if a Person Dies Without a Will?

When a person dies without a will, a probate court will invoke the relevant state's intestate statute. This is essentially the state's best guess at how most people would want their assets divided. For example, in Florida, the spouse generally receives the entirety of the estate, unless the spouse has children from a separate marriage, in which case the spouse gets half (Florida Interstate Succession Statute, 2022a). If there is no spouse, it goes to the decedent's children

(the "decedent" is the person who died). If there are no children, it goes to the parents. If there are no parents, then it goes to the siblings. If there are no siblings, then half goes to the maternal survivors (the mother's parents) and half to the paternal survivors (the father's parents). The statute continues with this pattern until an unknown distant cousin inherits—this is the mythical "laughing heir." Eventually, as an absolute last resort, it eschews to the State of Florida.

Under this method, the estate becomes a matter of public record. If the estate is large enough, this default method can be deleteriously expensive and invasive to the detriment of the decedent's heirs. ("Heirs" are the people who inherit by law after a person dies, whereas people who inherent through a will or trust are called "beneficiaries").

This is the government plan. If a person does not want the government plan and all its associated assumptions and expenses, then that person needs a will—and probably also a trust to remedy a will's deficiencies.

What Is a Will?

A will is a legally valid expression of the willmaker's wishes and instructions for managing and distributing their estate after death. It achieves this by the appointment of an executor or personal representative who administers and manages the estate, the designation of beneficiaries (loved ones, charities, trusts) of the estate, and provisions for what, and in some cases how, the beneficiaries inherit. A will may suggest a guardian for the willmaker's children, but those provisions merely make the willmaker's wishes known—ultimately, a judge decides a child's custody. All wills are subject to the probate process and are therefore public documents.

Making a Will Legally Valid

States differ as to how to make a will valid. In most cases:

- It must be in writing.
- It must be signed by the willmaker.
- The willmaker must be at least 18, mentally competent, and not under duress.
- It must be witnessed.
- It must be notarized.
- It must explicitly revoke all other wills.

A very few states allow for oral wills under narrow and unusual circumstances. Other states allow for unwitnessed holographic (handwritten by the testator) wills. In Florida, it requires a notarized signed written document with signatures from two witnesses.

What a Will Can and Cannot Do

A will can choose who inherits, what they inherit, and, through "conditional bequests," make inheritances contingent.

Which choices and conditions are legally permissible, however, varies from state to state. In Florida, for example, a person cannot disinherit their spouse (Florida Interstate Succession Statute, 2022b). Moreover, a spouse's inheritance must include the right to live in (though not necessarily sell) the family home.

Generally, a will's instructions will be followed unless disallowed by statute or public policy (Gould, 1955). For example, in some states it is possible to disinherit a spouse, in others this is prohibited by statute. Sometimes spousal support can be conditioned on a spouse not remarrying, but often this has been determined to violate public policy, which allows for the freedom to marry. (Though a thoughtful pre-or postnuptial agreement may be able to get around this.) A will can require a benchmark to be reached—such as a certain age—before an heir inherits. But a will probably cannot insist, for instance, that an heir marry someone of a specified ethnicity. Other contracts, such as premarital agreements, may override the provisions of a will.

A will can suggest a legal guardian, but no matter how strongly worded, it is almost certainly not legally binding. Guardianships are court managed. A will can also create a "testamentary trust" that takes effect after the willmaker dies, but for compelling reasons discussed further in this article, such trusts are likely not advisable. There are also "pour-over wills," the purpose of which are discussed further below.

What Is a Living Will?

A "living will" is not a "will" at all. A living will is a written advance directive that allows a person to decide which medical treatments they want or do not want if they are dying, clinically dead, or in a vegetative state. It can be revoked by its maker at any time, including on their deathbed. One's will (meaning their desire) to be allowed to die when there is no reasonable medical hope of meaningful recovery is considered a constitutionally protected privacy right, and it has nothing to do with a "will" in the estate planning context.

What Is a Trust?

While wills are often straightforward, trusts are not known for embodying that quality. According to the

God of estate planning sources, the IRS, "[a] trust is a fiduciary relationship in which one party, known as a trustor, gives another party, the trustee, the right to hold title to property or assets for the benefit of a third party, the beneficiary" (n.d.). For purposes of simplicity, this article will refer to a trustor as a "trustmaker," since that is the party gifting the property or asset. The trustee is the "trust administrator," who manages the trust property and assets, for the benefit of those designated in the trust. The assets or property held within the trust are the "trust corpus" (body of the trust).

There are dozens of varieties of trusts, but they can be grouped into two families: the revocable (sometimes called "living") trust, and the irrevocable trust.

What Is a Revocable Trust?

A revocable trust is a trust that can be modified or terminated by the trustmaker, provided that the trustmaker isn't legally incapacitated. The trustmaker may also replace the trust administrator and change the trust's beneficiaries. This type of trust manages trust assets during the trustmaker's life, and then distributes what's left once the trustmaker dies. The trustmaker, the trust administrator, and the trust beneficiary can all be the same person. In this scenario, typically the trustmaker will put all assets of significant value into their revocable trust (or, often, says they will and then forgets to do so).

One type of trust that never receives any tangible assets while the person who makes it is alive is the "testamentary trust."

Testamentary trusts, which are trusts created by wills, are a type of revocable trust (because the will itself is revocable) that only activates when probate has been completed, making it an irrevocable trust (discussed below) by the time it is ever administered. Because a testamentary trust is created by a will, some refer to the wills that create them as "testamentary wills."

Testamentary trusts do not provide protection for the willmaker's incapacity (instead requiring a network of separate advance directives), avoid probate, or protect the estate's privacy. Otherwise, these trusts can do most of what other trusts can do once the willmaker dies, albeit more expensively and in a way that's easier to challenge. There are only a few benefits of a testamentary trust over a revocable living trust. It's cheaper upfront, doesn't require transfer of title to a trust, and shifts the probate burden to their beneficiaries.

Contrary to popular myth, there are no tax or creditor-protection benefits to having a revocable trust. This is the rule to remember: Anything under the trustmaker's control is not protected from creditors. Since the trustmaker maintains control over a revocable trust, though a trust is an entity separate from the trustmaker, it is still effectively an extension of the trustmaker. The trust, and its assets, are the property of the trustmaker. Therefore, it will be taxed and subject to creditor liability as if there were no trust. Similarly, the income produced from a revocable trust's assets are taxed as part of the trustmaker's income.

When the trustmaker dies, this revocable trust becomes an irrevocable trust.

What Is an Irrevocable Trust?

An irrevocable trust is any trust that a trustmaker cannot control—except if that lack of control is due to legal incapacity. The trustmaker or the trustmaker's power of attorney (someone legally able to act on behalf of another as if they were that other person) cannot amend the trust; they cannot terminate the trust; they cannot swap trust administrators; and the beneficiaries are permanent. The rule above is then applied conversely: Since a trustmaker has no control over the trust, it is both legally and effectively a different entity. Therefore, assets within an irrevocable trust cannot be reached by the trustmaker's creditors. An irrevocable trust is also taxed separately from the trustmaker.

While it's good to know that it is possible to create an irrevocable trust while alive, for reasons requiring an article of their own, very few people make a "living" irrevocable trust—unless it's being used qualify the trustmaker for Medicaid by shielding access to assets above the Medicaid threshold. It is a cumbersome and tax-expensive asset protection stratagem. There are even whispers around the office that some people use this high-risk strategy for less than pious purposes.

Because a revocable trust becomes an irrevocable trust upon the person's death, irrevocable trusts are better known for their postmortem abilities. Most people may know that a trust is needed to keep their estate private and out of probate. But trusts that become irrevocable upon death, when written at their best, can also:

- Protect a trustmaker's best interests if they become incapacitated.
- Create an optimal estate tax structure.
- Provide for a special needs beneficiary without risking the loss of necessary government benefits and assistance.
- Keep the inheritance from the reach of a beneficiary's creditors or a mysterious new friend. (Part One of a "spendthrift trust.")
- Ensure that beneficiaries cannot gamble, drink, or shop their inheritance away. (Part Two of a "spendthrift trust.")
- Isolate the inheritance from a beneficiary's bankruptcy or divorce. (Part Three of a "spendthrift trust.")
- Design an inheritance structure that distributes upon achieving a benchmark, such as age, earning a college degree, buying a house, or even quitting a job to write that book or start that business your child had always dreamed about.

There are more possibilities, but if otherwise permissible, trusts are preferable for anyone with children or anyone who values flexibility in distribution.

Should a Person Have Both a Will and a Trust?

Yes. To maximize an estate plan's full potential, there is a structure of interrelated trusts, a simple pour-over will, and a portfolio of automatic asset transfers including shared accounts, insurance policies, and property jointly owned with a right of survivorship. Please note that a will cannot supersede the provisions of a premarital agreement.

In all cases, a pour-over will is necessary. This type of will distributes any residual property into the trust corpus when the willmaker dies. That residual does get probated, but as most assets should already be included in the trust corpus, this should be a comparatively small percentage of the estate.

Contemporaneously, the trust protects the trustmaker during incapacitation, causes the bulk of an estate to escape probate and public information requests, and distributes all assets in the efficient, precise, and complex way the deceased thought best.

Table 1 summarizes the pros and cons of having a will as opposed to no will, and the benefits and burdens of supplementing a will with a trust.

The Benefits of Wills and Trusts

There are drawbacks. The government plan is free. Wills are inexpensive compared to trusts, but wills are far less flexible, lack incapacity protections, and must be publicly probated. A testamentary trust only kicks in after probate and can be acquired for a similar cost to what a superior revocable trust can provide. Trusts can be expensive to create and administer, but if you contemplate the possibility of incapacity or require safeguards for your beneficiaries, it becomes clear that not having one could be even more expensive. The absence of a trust can lead to tragic results for loved ones whose inheritances are eaten by their creditors, avarice, divorce settlements, the government, legal fees, and medical and mental health bills that could have all been avoided.

Even small estates should be distributed by a will, and only if a trust is not attainable, a testamentary trust. Realistically, with all the variables involved in estate planning, unless the willmaker has never been married, has no children, has a small estate (defining what constitutes "small" is a challenge), and magically knows they'll never become incapacitated, a person should defend their assets proactively with both a pour-over will and a structure of revocable living trusts with other legal instruments.

TABLE 1: THE BENEFITS OF WILLS AND TRUSTS

BENEFIT	NO WILL	WILL	TESTAMENTARY TRUST	WILLS & TRUSTS
Government Tax & Distribution Plan	YES	NO	NO	NO
Customized Tax & Distribution Plan	NO	YES	YES	YES
Avoids Probate	NO	NO	NO	YES
Preserves Privacy of the Estate	NO	NO	NO	YES
Incapacity Provisions	NO	NO	NO	YES
Difficult to Challenge	NO	NO	NO	YES
Spendthrift Provisions	NO	NO	YES	YES
Addiction Plans	NO	NO	YES	YES
Protects Special Needs Beneficiaries	NO	NO	YES	YES
Choose Child's Guardian	NO	NO	NO	YES

Can Smart People Do This Themselves Over the Internet?

No. While saving that topic for another article, I will illustrate my point with this final example.

A will is a device so fundamental and ancient that even Aristotle had one (Chroust, 1970). He screwed it up. Running afoul of Athenian law, his failure to draft an effective choice of law clause probably cost his adopted son every benefit Aristotle wanted to gift him.

My point is this: Aristotle had a will, and you probably should, too. Just get a lawyer; it'll be cheaper (for your loved ones) in the end. •CSA

Richard Junnier has more than 15 years of legal experience and is the managing attorney for Junnier Law & Research P.A. (www.JunnierLaw.com). His firm focuses on Florida and the international components of estate planning, family law, and criminal justice. He has served on the editorial boards of the FSU Law Review and the Florida Bar Journal. Though often working around the world as a human rights activist, he can always be reached at rjunnier@JunnierLaw.com.

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