Do You Need A Will or a Trust? 11 Questions to Ask Yourself

A **Suze Orman** exclusive

I know this isn't going to win me any awards for being Suze Sunshine, but we need to talk about death. Yours. more to the point:, I want to talk to you about what you need to do now so that when you die your family and friends have an easy time making sure your wishes are carried out. And if you follow my advice, you will also have a document that can take care of you if you become ill.

My guess is that right now many of you are assuming you already possess the document I am talking about. Not so fast. If you think the Will you may have locked away in the safe deposit box is all you need, I am here to tell you that you could be seriously wrong.

Today, a plain old Will is simply not the way to go in most cases. I believe just about everyone would be better off with a Trust - a Revocable Living Trust, to be specific - rather than a Will. I know, I know. You hear the word "trust" and you think, "Hey Suze, what are you smoking? I'm no Bill Gates or Oprah Winfrey, so why do I need a trust?"

My friends, revocable trusts aren't just for folks with oodles of zeros on their net worth statement. Check out my Should You Be Trusted? questionnaire at the end of this article. Anyone who answers YES to even one question should seriously consider getting a revocable trust. Before I explain how useful and smart a revocable trust is for you and your beneficiaries, I first want to make it abundantly clear why a Will alone could be an expensive pain in the derriere.

A Will is a legal document that states how you intend your assets to be distributed when you die; it identifies to whom you wish to leave your money and property (your estate).

So let's say your mom owns a home in Arizona. The home is worth $200,000 and has a mortgage on it of about $190,000. (Yeah, I know; anyone living in Arizona these days would already be dead, from shock, if they found a decent home for $200,000 (Actually not after what has happened over the last couple of years). But just humor me for the sake of a simple example.) And let's say you moved in with Mom after your high-tech job disappeared; she loves your company and makes plans to leave you the house in her Will. She got a Will because when she asked her attorney about whether a trust would make sense, he told her there was no need. Besides, all her friends told her they had Wills, so Mom figured that was best.

Next, Mom dies. You have the Will declaring the house is yours. The only problem is that the deed to the house, the legal document that states who the owner is, is still in your mom's name. The only way for you to get the title into your name is to go to court. Yup, you have to go through court to get Mom's clear and express wishes carried out. This court process is known as probate.

It is not fun. First, the probate judge authenticates the Will and makes sure that you are indeed entitled to your mom's house. Then the judge will sign the deed over to you. Sounds simple, except that it can take forever. In Arizona, that simple process can take nineteen months to two years. And if you live in a state like Arizona, be prepared to pay statutory probate fees. That word "statutory" means that the fees are set by the state. What's nutty is in the case I just described you would have to pay about $10,300 to the executor and lawyer who handled the probate. That's because the probate fees are based on the value of the home, not the equity the owner has built up. So even if you only have a measly $10,000 in equity and a $190,000 mortgage to carry, the probate fee is based on the $200,000 home value - making the fee to secure your rightful asset more than the asset itself!

The rules on how probate is handled vary from state to state. In states where there is no statutory fee structure, lawyers may be free to set their own rates. The bottom line is that if you rely on a Will you are going to require your family to spend time and money to get your estate settled. Catch my drift? At a time when they are grieving your loss, you will have inadvertently added more stress and work for them by your use of a Will.

If You Love Your Family, Trust'em

That brings us to option #2: a revocable trust.

Let's define a few of the terms you should know to understand how a revocable trust works. "Trust" is the name of the document. "Revocable" means you can make changes at any time. And here's how it can make life easier. If Mom had set up a trust rather than just a Will, she could have taken the steps while she was alive to transfer the title of her home from her individual name into the name of the trust. So rather than Mom Yahoo on the deed, it would read Mom Yahoo, trustee for the Mom Yahoo Trust. She is the "trustor" or "settlor," the one who created the trust. She is also the "trustee," the person who makes all the decisions over the trust. While she is alive everything in the trust - in this case, the house - is completely under her control. She can sell the house, refinance, take out a reverse mortgage, or change who is to inherit the home. She is free to do anything she wants with that house while she is alive. But the great thing is that when she dies there's no need to schlep off to court and go through probate. Control of the contents of the trust automatically passes to the beneficiary,

without any court action or public financial disclosure. All that is required is a death certificate and a trust document that runs through which beneficiary is to receive which asset.

No Kidding Around

Revocable trusts are especially important if you have young children. The revocable trust gives you more flexibility in determining how your children will inherit your assets. Don't tell me you don't know someone who inherited a lot of money when they were young and ran threw it quicker than a New York minute. And if you are a single parent with young kids, a trust is twice as important. If something happens to you, how can you be sure the person designated in your will as the custodian of your young child's money is capable of doing that?

Then there's all the court hassles. If all you have is a will and life insurance, and your five-year-old child is the sole beneficiary, the insurance company won't release the money without a court guardianship being created. That can cost as much as $10,000. It also gives the court the right to decide how the money is used. Oftentimes the court will deny the guardian the use of these funds to support the child if other funds, like social security for orphans, are available. The court will order the life insurance proceeds to be kept in a blocked account that can't be touched until the child is 18. Then when the child is 18, they get all the money. Yikes. That is surely not your intention. You want your child to be raised on social security and then be free to blow the insurance payout when they are 18?

A revocable trust sidesteps all these issues. There is no need for probate guardianship.

Don't Fall for the Lawyer's Will Power

Now I can bet the following is going to happen to a lot of you: After reading this article you'll head off to an estate attorney and tell her I convinced you to get a revocable trust. And then the lawyer will look at you like you're crazy and tell you all the money you can save by simply creating a will.

Stop her right there. Ask for a piece of stationery - with the company letterhead. Have the lawyer write down the fee for writing the will as well as an estimate of all the legal and probate fees that would be charged to settle the will if you were to die today. Then have the lawyer write down the cost of writing and funding the living revocable trust. Compare those costs, my friends, and then you make the decision. If you do decide to go with the will, I suggest you let the lawyer know you intend to share this piece of paper with your beneficiaries - and that you expect the actual fees to be consistent with these estimates as long as there are no great changes in the value of your estate.

But the best advice in most cases is to be firm and stick with the revocable trust. Yes, if you opt for the trust it can cost more than the fee for writing a will, but do you want to save money for yourself now and then end up costing your family thousands of dollars in fees after you pass?

An estate attorney should be able to draw up a revocable trust document for about $1,000 to $2,500. Or you might consider using a software program that helps you write the document yourself, then have a lawyer merely review the document for $200 or so. But either way make sure you work with someone who specializes in trusts. You want a specialist, not a hack who doesn't know the ins and outs of trust law.

The real value of a person who drafts the Living Trust is not in the creation of the trust, it's in the time and expertise they share with you to explain the document.

A Will is Useless Until You Die

Okay, I realize there are some of you out there who don't care to worry about what the family has to go through after you die; all you know is that you don't want to spend your good money today to create the more expensive trust.

But let's leave your heirs out of it for a moment. I want you to think a little about what you may be doing to yourself. A will only kicks into action after you die. If you get sick or are in an accident and can no longer take care of yourself financially, a Will does you absolutely no good. But with a trust, you can make sure your financial affairs are taken care of if you suddenly become too ill to handle things on your own.

Now don't tell me could never be too sick to take care of your family's financial life. Like you've never heard of anyone having a car wreck, or even a bike or rollerblading accident, and ending up with brain damage. Or what about a stroke, a coma, Alzheimer's, Parkinsons? Sorry to be so dark, but you can't tell me that any of those are outside the realm of possibility.

And if an incapacitating illness or disease does strike, how are you going to take care of your finances? Who is going to look after your money and make important financial decisions on your behalf?

A revocable trust can solve this problem. All you need to do is make sure when your revocable trust is drawn up it includes what is known as an incapacity clause. That clause will designate someone you pick as a "successor trustee," who can step in for you if you become unable to handle things on your own. Just make sure your successor trustee is someone you know and love who can truly act on your behalf. I am not a fan of boilerplate trust documents that say that your

wishes will be carried out when two doctors are in agreement about your situation. Come on. Don't you want someone who knows you to have the final say, not two doctors who are probably going to have a hard time agreeing anyway?

And don't think that a power of attorney (where you give the right for someone to sign for your financial affairs) is a way to do an end-run around the problem. Most powers of attorney become null and void when you become incapacitated. Besides, getting financial institutions to honor these documents can be a major hassle. If you want to maintain true power over your money, a good revocable trust with an incapacity clause is the way to go.

Just Say No to JTWROS

Now, I want to anticipate one argument you might hear which goes something like this: You don't need a trust. Just get a will and then make sure you own your property in Joint Tenancy with Right of Survivorship (JTWROS). I have seen this mentioned in a national magazine and it is stupid, stupid, stupid.

Yes, it is indeed true that if you own a piece of property in JTWROS when you die the house doesn't have to go through probate; it automatically transfers to whoever is on the title to the house.

But things can get quite thorny. With a JTWROS, for instance, you don't have full control over how your share in the house is handed down to your heirs. Let's say you're in a second marriage and you and your new spouse are living in the house from your first marriage. When you die, you want your new husband to be able to stay in the house, but when he dies or the house is sold, you want the house or the money to pass on to your kids. Even if your Will clearly spells all this out, if the house is owned in JTWROS with your new husband, upon your death he will become the sole owner of the house. JTWROS overrides the wishes of any Will. He could leave the house to his kids instead of yours. With a revocable trust where the house is held in your trust name alone, you can clearly designate what happens with the house when you pass.

Or what if you are a single parent and you want to make sure your kids inherit the house? To avoid probate you own the home with them in JTWROS. Watch out. Let's say your 20-year-old has too much fun one night and on the way home has a wreck where he badly injures someone. The lawyer for the injured party does his homework and hits the mother lode when he scours the public real-estate record: your home! Because your child is listed as a joint owner, when the injured party sues for damages you could very well be forced into selling the house to make the payment.

Or what if you own a home in JTWROS with your spouse or life partner, and they end up in a coma after a bad rollerblading fall? (Are you getting the sense I have had a few bad rollerblading falls lately?) You have to sell the house because you can't make the mortgage on your salary alone. Since you own it in JTWROS you would need your partner's signature. But that's not possible. So guess what? Off to court you go, for the gut-wrenching experience of having your partner declared incompetent - a process that can cost a few thousand dollars, to boot. Only then can you sell the house. If the house was instead owned in a revocable trust, with an incapacity clause allowing you both to sign for each other, you would avoid all of this ugliness.

Coming Full Circle: Add the Trust, But Keep that Will!

Okay, now that I have convinced you that a revocable trust is the way to go, I have to toss you a bit of a curveball. In addition to the revocable trust, you still need a Will. You read that right. No, I am not contradicting myself. Here's the deal. The revocable trust will handle the ownership and disbursement of every asset you put in that trust. But you want to have a "back-up" or "pour-over" Will for any asset you may have forgotten to put in the estate. Perhaps you didn't get around to updating the trust to include a new asset you acquired a few years after funding the trust. That's where the will comes in handy; you are ensuring that any extra assets will be "poured over" into your estate upon your death.

And finally, as a practical matter, a Will is quite useful for laying out your wishes on a funeral and the disposition of your remains. So please trust me (you knew that was coming, didn't you?) on this. A revocable trust with a pour-over Will is the best way to go.

When you go to see a lawyer, this is how they should charge you and what they should do for you.

1. Your lawyer should quote you an upfront fee to create all your documents. Do not let them charge you on an hourly basis. This upfront fee should run around $1,500 to $2,500, depending on the complexity of your situation.
2. After the document is created, the lawyer should sit down with you for two to four hours to go over every word of that revocable trust and make sure you understand it.
3. Your lawyer's fee should include the funding of the trust, which is an essential step. This is where the lawyer has the titles to all your assets - bank accounts, real estate, brokerage accounts, etc. - changed from your individual name to the name of the trust. If this isn't done then your trust is not funded, and your assets will be governed by your Will and not your trust. In other words, without funding you've got a worthless document. The legal term is empty trust. You can do the funding yourself, but when

you are paying a lawyer to create the trust, they should do it for you. The more assets you have that require title changes, the more the lawyer is going to charge.

4. The fee should also cover the creation of a pour-over Will. As we discussed earlier, this document will take care of all the assets that are not in trust.
5. Lastly, your trust documents should include the creation of a durable power of attorney for Finances and Health care, to protect you in case of a life-threatening illness.

If you answer Yes to any of the questions, then you should seriously consider establishing a trust.

1. Do you have a financial interest in a home or business?
2. Do you have beneficiaries under the age of 25?
3. Do you have children with special needs, meaning they will never be able to financially support themselves due to a physical or mental disability?
4. Are you in a second or third marriage?
5. Are you on bad terms with any of your heirs?
6. Are any family members physically ill?
7. Is any family member developmentally disabled?
8. Is any family member in need of creditor protection?
9. Is any family member bad at managing money?
10. Do you own real estate of any value in more than one state?
11. Is your estate worth over $100,000?