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# Comparison between Will and Trust: A Conceptual Review

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#### **ABSTRACT**

The growth of unclaimed inheritance in Malaysia is an issue since the independence of Malaysia. Inheritance planning or Estate planning can be defined as the process of determining how one's property should be distributed to meet the deceased' wish. There are two popular estate planning instruments namely will and trust. This conceptual study aims to explore the importance and concept of will and trust. This study also identified the comparison between will and trust as well as barries occured in these estate planning instruments. This study will provide more insights to people for better-informed decision in their estate-planning arrangements by understanding the key differences between these two estate planning instruments.

Keywords: Estate Planning, Will, Trust, comparison, barriers, Malaysia

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## INTRODUCTION

Estate planning is a process of determining how a person's property should be distributed after death and taking the necessary steps to ensure that the decision made is based on deceased's wish (Gaffney-Rhys & Jones, 2013). There are few objectives and purpose to execute a well estate planning. The most important objective is determining the heir entitled to receive the assets as beneficiaries, followed by protecting the assets in the estate from creditors in the event of bankruptcy, and providing adequate income to the beneficiaries for their maintenance, education, and medical expenses during their dependent years.

There are different types of estate planning in Malaysia, such as will, trust, insurance, hibah and power of attorney. Will and trust are most popular among various estate planning tools. Will is a legal instrument where the deceased states his/her wishes to distribute the assets to his/ her named beneficiaries. Meanwhile, trust is the instrument to appoint a trustee (can be individual or trust company) to hold assets for the enjoyment of the beneficiaries. More than 90 percent of Malaysian has not made a will or trust as estate planning is not widely practiced (Islamic, Hashim, Kamis, Harun & Samad, 2013). Many people still believe only rich people need to write a will for their wealth distribution. It is alarming that a staggering amount up to RM8.75 billion unclaimed assets are frozen in legal procedure in Malaysia as shown in Table 1, including unclaimed money in the banks, EPF monies, life insurance monies without proper nomination. In fact, because of the unfamiliarity of wealth distribution process has caused many people to ignore the importance of estate planning.

Table 1. Statistic Number of Unclaimed Assets in Malaysia

Year	Unclaimed Assets	
2016	+RM5.6 billion	
2017	+RM5.78 billion	
2018	+RM5.96 billion	
2019	+RM7 billion	
2020	+RM8.75 billion	

(Source: Account General's Department of Malaysia, 2021)

Moreover, COVID-19 pandemic recently not only impacted many lives and livelihoods but also brought greater awareness to the society to prepare for unforeseen or unexpected circumstances. However, despite the higher awareness, the demand of will and trust has decreased due to the difficulties in its operation management process during these several movement control orders.

This conceptual study aims to explore the importance and concept of will and trust. This study also identified the comparison between will and trust as well as barriers occurred in these estate planning instruments. Hence, this conceptual idea aims to enhance nation's awareness of the estate planning in Malaysia mainly on will and trust. Most of the previous studies (Abdullah, Fariddudin, Muhamad, & Awang, 2021: Rahim, Bakar, & Nor. 2021: Ghul, Yahva, & Abdullah, 2015) were focused on Islamic estate planning instruments mainly focus on the concept, awareness, comparison among types of Islamic estate planning instruments. Limited studies focused on conventional will as well as trust. Thus, this conceptual study carried out to be a novelty toward contribution of public knowledge enhancement of the

importance, concept of estate planning, comparison between will and trust, and barriers of estate planning in Malaysia.

## IMPORTANCE OF ESTATE PLANNING

It is believed that an effective way to increase estate planning undertaking among Malaysians is by creating the awareness and understanding on the importance of it. There are various estate planning tools which can be selected from, such as will, trust, power of attorney, buy-sell agreement, family foundation, etc. However, despite the different tools, they all share the same objective and importance.

First, a proper estate planning is important because it enables individuals to plan a well-designed distribution of his property after death to avoid unsatisfactory distribution (Ahmad 2021). Without any formal estate planning, the estate would by default be distributed according to the order established by state's law (Bowden, 2003). Thus, estate planning helps safeguard the assets in a way that it meets the financial need and personal goals of the property owner and heirs (Markowsky-Lidsay et al., 2017; Catanzaro et al., 2014). Basically, it can effectively benefit the decedents and respective survivors not only economically, but also socially and emotionally (Poppe, 2019). As highlighted by Ab. Aziz (2012), estate planning helps to alleviate stress and provide reassurance to the households during the bereavement period.

Second, it is equally important for the estate owner to properly prepare his estate planning for the convenience of the beneficiaries – in a way that minimises cost and saves time. This is because even with a certain tool such as will, survivors still need to incur some legal expenses for the arrangement of the estate affairs such as the court costs and other administrative fees. On the contrary, without a will, the estate would be distributed only based on the laws of descent and distribution which may conflict with owner's wishes and creates several problems for survivors (McElyea, 1970). In addition, the process may end up becoming more complicated, hence higher costs.

Third, estate planning is also important to preserve the value of the estate. Failure to devise a good estate planning could lead to depleting value of the estate attributable to the costly estate taxes, probates, and other incidental costs. It is noteworthy that in some countries, all assets that the decedent had an interest at the time of his death is subject to estate tax as imposed by the federal government (Rinaldi & Shin, 2006). The exact amount of death tax-imposed is dependent upon the value of all transferred assets (such as real estate, securities, interest in business, cash, artwork and other tangible personal property, life insurance and retirement plans) and the way the estate is distributed (McElyea, 1970). When the property is transferred to beneficiaries, this estate tax liability may affect the sum amount that should be received by beneficiaries. If the estate planning is appropriately drafted, it helps reduce cost on tax payment for the surviving family members or beneficiaries.

Fourth, the mounting unclaimed assets which resulted from the poor estate planning has become an opportunity cost to the nation for being counterproductive (Abdul Wahab et al.,



2021). It is conjectured that the adoption of best practices in estate management could help to overcome this problem, and subsequently lead to productive investments which is good for the economy.

In a nutshell, estate planning is important to achieve the desired usage of assets after one's death, to minimize transfer taxes, to provide for the management of property after death for beneficiary, and to prevent family conflicts after one's death (Hayenga & Wilson, 2009). Regardless of the estate size, creating basic estate plan would be a relatively easy process to ensure that it will be well-distributed to loved ones with lower tax, administrative expenses, conflicts, and delays (Zwerling, 2013).

This paper focuses on the two popular estate planning instruments, i.e. will and trust. Further details on these instruments are discussed in next section.

Fishbein introduced Theory of Reasoned Action (TRA) in 1967 that suggests user intention in comprise of two components namely attitude and norms; the others internal or external variables are mediated by these two factors. As extension of TRA, Fishbein & and Aizen (1975, 1980) proposed Theory of Planned Behaviour (TPB) that is widely used in research related to behavioural intention. TPB stated that individual is controlling their own social relevant behaviours and this as pushing factor to their intention to engage to it. New components added under TPB is perceived behavioural control which the authors argue that individual may not have enough volitional control over certain behaviours. TPB is relevant to applied in any research comprising behaviours, behavioural intentions, attitude, and beliefs (Ajzen, 1985). According to (Sicilia, Saenz-Alvarez, Gonzalez-Cutre, & Ferriz, 2015), TPB represents the process individual develop their intention based on behaviour that is consistent with selfdetermined motives. Self-determination theory (SDT) is initiated by Deci and Ryan (1985) and is a theory of motivation, emotion and personality in social context assess on intentional behaviour (Deci & Ryan, 2000). Motivation includes intrinsic and extrinsic motivation is one of the keys in assessing the behavioural intention to use (Riva, 2001). SDT is an approach concern on human motivation and personality where user make decision without any external motivation and/or influence. The behaviour is based on users' psychological desires as their internal motivation to make decisions (Hew & Kadir, 2016). There are three principal of psychological needs like autonomy, relatedness, and competence to ensure user satisfactory is achieved.

The intention for having will or trust writing can be explained based on Theory of Planned Behavior (TPB). Ajzen (1991) defined intention as an encouraging factor that lead to a behaviour. It denotes the individual level of effort to perform the behaviour. TPB conceptualized that behavioral intention were fostered by three components namely attitude, subjective norms and perceived behavioural control. These three components have been suggested by Kamarudin et al. (2019) as determinants to perform estate planning. Couple with that, Said et al., (2020) employed the three components as variables that influence intention to give hibah. Attitude to write a will or trust relies on the users' expectation towards the

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effect of having such will and trust. Azjen (1991) denotes subjective norm as the role of perceived social pressure in influencing an individual's decision to react to a certain behaviour. In addition, Azjen (1991) refers perceived behavioural control as the ability of an individual in acting a certain behaviour. Bouteraa and Al-Aidaros (2020) empirically proven that attitude have significant influence on the intention to have Islamic will while Said et al., (2020) demonstrated that attitude, subjective norms and perceived behaviour controls are statistically significant on the intention to give hibah

## **CONCEPT OF WILL AND TRUST**

Will and trust are the instruments used for estate planning. Many of us might get confused on the concept of these instruments. A will simply means a document of a person's intentions on the distribution of his or her assets to the beneficiary upon death. According to the will Act 1959 (Revised 1988), Section 2 stated a will as "a declaration intended to have legal effect of the intentions of a testator with respect to his property or other matters which he desires to be carried into effect after his death and includes a testament, a codicil and an appointment by will or by writing in the nature of a will in exercise of a power and also a disposition by will or testament of the guardianship, custody and tuition of any child." If a person has some assets, it is advisable to write a will. It is to ensure that the assets will still be manageable by children, or heirs upon a person's death. The plus point to have a will enable a person to appoint beneficiaries legally to manage the assets. On the other hand, this will reduce the tendency of family members dispute over property/ assets upon a person death.

In order to make a legally valid will, a person should achieve the criteria of contractual capacity namely above 18 years old, sound mind, signature of the person who makes the will and the will should be endorsed by another two witnesses in presence of each other. Once the will is executed, it will be valid until it is replaced by new will in case there are additional assets/ property need to be added into the will. Additionally, in the event of any of the followings, the existing will shall no longer be valid, and new will shall be executed: a change of marital status, religion conversion to Islam, birth or adoption of children, and death of beneficiary, executor or trustee.

The will writing involves an executor and the executor will also take a role of trustee which appointed by the client. The client can appoint one to four adults of 18 years old and above as the executor and trustee among friends' relatives and even beneficiary. Furthermore, the client can also appoint a trust company/ lawyer firm to act as executor and trustee. The executor will ensure that the client's wishes in the will are fulfilled. The executor in charge of locating the client will, applying to court for grant of probate, paying off client's liabilities, calling in client's assets, distributing client's assets according to the will and finally prepare a statement of account. On the other hand, the executor could also be the trustee under Trustee Act 1949; take charge of the client's assets by holding client's assets on trust for the client's beneficiaries until the assets are fully distributed.

Next, the content of a will shall include all the valuable assets held in Malaysia as well as abroad such as real property (house, shop lots, land, factory), personal property (cash, bank balances, shares, vehicles, jewellery), trust property (property which is being held by a trustee on trust for a person benefit). However, the beneficiary under any insurance policy and Employees Provident Fund (EPF) is not under will as it will be paid to the person nominated under the policy or nomination registered with EPF (Mah & Gan, 2020).

Meanwhile, a trust refers to another alternative of estate transfer in which a client grants a party an authority to handle the assets for benefit of client's beneficiaries. There are two categories of trusts namely living trust and testamentary trust. Living trust can be created under revocable living trust by the trustor for estate transfer and it may subject to change by the trustor while trustor (a person writes a trust) is alive. The trust will be executed at the trustor's death outside of probate court. Thus, trustor's property will be handover immediately to the beneficiaries. Another category of trust is testamentary trust which tend to be more expensive than will. A trustee's name will be stated on the trust to handle the distribution of assets to the beneficiary according to the trustor's wishes as stated in the trust.

## **COMPARISON BETWEEN WILL AND TRUST**

Most of the individuals demonstrated weak understanding on the process of estate planning because it is perceived as less important (Tan, Hoe, & Hung, 2011). Simultaneously, it is also possible that individuals perceive it as less important due to the lack of knowledge (Tan, 2018). Therefore, both the awareness and knowledge are important drivers in the initiative to inculcate the estate planning practice among the society. Being two of the popular estate planning tools, it is important for people to know the key differences between will and trust in order for them to make the best choice which is tailored to their planning needs. In particular, this section presents the comparison between will and trust from six perspectives, i.e., coverage, objective, probate, revocation, costs, and privacy.

First, in terms of coverage, a will contains the statement of the testator regarding how he intends to manage and distribute all of his personal estate. In other words, the coverage is comprehensive. Meanwhile, that is not the case in a trust because a trust deed authorizes a trustee to manage only a specific asset, as stipulated in the deed, for the sake of the beneficiary. Noted that a will is legally effective upon the demise of the testator, while a trust is effective at the time when that specific asset is transferred to the trustee for its management

Second, it is also noteworthy that a will is mainly used for asset distribution upon the demise of the testator. Meanwhile, a trust is mainly used for preservation of assets and wealth. A trust is especially more effective in cases where the beneficiaries are minors. In general, trust is a more long-term and forward-looking tool in estate planning.

Third, the requirement for probate period. This is likely to be a strong factor when one decides between a will and a trust. The implementation process of a will requires for all assets to go through a probate period. This could eventually take years for everything to be settled and confirmed by the court; causing

the family members to feel anxious throughout the period. This is especially true if the family is in need of cash from those assets to manage its financial needs. On the other hand, a trust does not need to go through probate. This makes the process much easier and faster to be executed and thus preferred.

Fourth, from the perspective of document revocation. A will can be revoked any time before the death of the testator. Meanwhile, the revocation of a trust deed is allowed, depending on the type of trust.

Fifth, the costs borne by the testator is also significantly different between a will and a trust. The latter costs higher than the former. Hiring a third party to write a will may just cost from a few hundred up to a few thousand. In fact, with the abundance of free "DIY-will" samples that are available online, one could even draw up a will for free. However, to set up a trust to administer the estate, one could expect the costs to be significantly higher than that of a will.

Sixth, in terms of privacy, the information in a will is publicised upon the death of the testator. This is because a will has to be probated, which involves court procedures. In the process, the will becomes a public record. On the other hand, the information in a trust is kept private because it does not go on public record. Therefore, compared to a will, a trust provides privacy.

## **BARRIERS IN ESTATE PLANNING**

The estate planning either will or trust is necessary to ensure the assets that are left by individuals upon their death are inherited by the designated heirs. Nevertheless, several issues arise and become the barriers in practising the will and trust. Individual and community perception is the biggest challenge in practising the will and trust. Will is perceived as superstitious and taboo as it is related to premature death (Ghul, Yahya, & Abdullah, 2014). People fear to face their own mortality and this mindset led to the reluctant in practising the will. Even if they are willing to write the will, another concern is on the families' perception towards them. In certain circumstances, the equality in making decision to whom and how the assets should be allocated was being questioned by the families' members. The situation will be more difficult for the complicated families with many siblings, niece or remarried family members with stepchildren surrounded with greed and prejudice. In addition, the potential abuse of trust should be addressed.

In the same vein, individual and community perceived that practising the will and trust is not a serious and urgent matter. They do the planning verbally with the agreements of appropriate party, yet no written agreement was prepared which leads to conflicts (Abdul Wahab, Maamor, Zainol, & Hashim, 2021). The verbal agreement can be manipulated and wrongly interpreted. On the other hand, many individuals do not consider will writing as urgent matter as they think that they are "too young to think about death" (Gaffney-Rhys & Jones, 2013). This perception will hinder them from writing a will or trust.



Another barrier in writing a will is due to lack of awareness and knowledge. Specifically, Noordin et al., (2016) viewed that the community are not alert on the importance of estate planning. This fact is also empirically proven with a study by Gaffney-Rhys and Jones (2013) who found that vague, lack awareness, and inaccurate knowledge are the reasons for not making a will. Therefore, education background does affect the estate planning process. Knowing where the estate is, how much is the estate worth, and understanding how to handle it is very crucial in estate planning process. Family members also should be informed on the will that has been written and the administrator of the will. Unclear of the right institution to attend will result in delay of distribution of the estate to the rightful beneficiaries (Nasrul, Salim, Said & Manap, 2017).

From legal point of view, an individual is required to understand the nature and impact of his decision (Purser, & Sullivan, 2019). Complexity of law and long legal process may become the challenges for community in making a will or trust. Thus, gaining professional advice is important to avoid any future disputes and unclaimed inheritance.

#### CONCLUSION

Estate planning becomes a necessity in our life as we accumulate unprecedented levels of wealth, and as we get older. Among several estate planning instruments that are available in the market, will and trust are the two popular estate planning instruments. There are differences between will and trust despite sharing the same ultimate objective of estate administration. A will is a written document expressing a deceased person's wishes, but the trust become active on the day we create it, and a grantor will list the distribution of assets before their death, unlike a will. Second, all will must go through a legal process called probate (authorized court); this process can be lengthy and potentially contentious if family members contest the will. However, trusts are not required to go through the process of probate and contest can be avoided.

This study will help people to make a better-informed decision in doing their estate-planning arrangements by understanding the key differences between these two tools. However, public awareness on estate planning in Malaysia is still considered low, compared to other developed countries such as United Kingdom and Australia, with more than 40% of adult population have a will. This creates research gaps for future research to further explore public intention to use various tools of estate planning, and how to increase the awareness or to educate public on estate planning in Malaysia.

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