

Ask Questions To Decide if a Living Trust is Right for You

Trusts can be useful for protecting and transferring your assets. The key is understanding when a trust is appropriate for your individual situation, and then to find a reputable person to prepare the documents.

If you are considering a trust, consult an attorney who knows about probate, estate planning and tax matters. After assessing the nature and value of your assets and liabilities, and discussing your goals for your property's use during your lifetime and following your death, your attorney can advise you in advance of the consultation costs and estimate the legal and other expenses associated with drafting and implementing a trust.

Q.: What is a "living" trust?

A.: A trust is a legal document that is funded with assets, and a "living" trust is one that can be amended and revoked by the person creating the trust (the "grantor"). The grantor keeps all the benefits of the property placed into the trust. The terms of the living trust are established in a written agreement signed by the grantor and the trustee, and spell out what happens to the trust property both during the grantor's life and following his or her death. Frequently, the grantor serves as his or her own trustee during the grantor's lifetime.

Q.: What is the purpose of a living trust?

A.: A living trust may have many purposes. One common goal is to avoid "probate" (a court proceeding to determine the value of a deceased person's assets and how they will be distributed to heirs). A living trust's assets do not go through probate, but pass directly to intended beneficiaries upon the grantor's death. If a grantor's purpose in creating a living trust is to avoid probate, then the grantor must remember to transfer ownership and title of all assets to the living trust. Further, the grantor must continue to place future assets into the living trust as they are acquired.

Q.: Is use of a living trust the only way to avoid probate?

A.: No. Assets that are owned jointly with rights of survivorship (such as a house or car), or assets that name beneficiaries (such as life insurance, annuities, POD and TOD accounts), also will pass upon death to the survivor or beneficiary, and will not be probate assets.

Q.: Will I save estate taxes by avoiding probate?

A.: No. It is a common misconception that avoiding probate avoids estate taxes. Nevertheless, living trusts or other trusts are frequently used to *reduce* estate taxes. In many cases, this tax reduction is only available if trusts are made when both spouses are living, so that two tax exemption amounts can be used rather than one.

Q.: Will a living trust save income taxes?

A.: No. The income of the living trust will be taxable to the grantor as if the trust did not exist for income tax purposes. After the death of the grantor (trust owner), the trust could be taxed at rates that are higher than individual rates, but this is usually avoided by transferring income to the beneficiaries during the taxable year.

Q.: What are the advantages of a living trust compared to probate?

A.:

* *Privacy.* The terms of a living trust are contained in a private document, while the terms of a will, including beneficiary designations, become a matter of public record after the grantor's death, and after the will has been filed with the probate court.

* *Control.* A trustee of a living trust has more independence and control than an executor of a will because, unlike an executor, the trustee is not required to file a will or any other reports with a court.

* *Lower costs.* A living trust avoids the costs of the probate process, which typically include court costs, appraisal fees, executor's commissions and attorney fees.

* *Speed of transfer.* A trustee could begin making distributions of assets to beneficiaries soon after the grantor's death.

* *Avoidance of multiple probate proceedings.* If homes or other real property

are owned in a number of different states, a living trust may be used to avoid separate probate proceedings in two or more states.

Q.: What are the disadvantages of a living trust compared to probate?

A.:

* *Lifetime effort.* Implementing a funded living trust is likely to be more time consuming and tedious than drafting a will.

* *Lifetime Costs.* The cost of making and maintaining a living trust during an individual's lifetime generally costs more than a will.

* *Absence of court review.* The administration of a living trust will not be supervised by any court, increasing the possibility of incorrect administration by the trustee, whether intentional or unintentional.

* *Longer statute of limitations.* A challenge to a will must be made within three months of its probate as compared to two years for a trust.

Q.: Who should prepare my living trust?

A.: For best results, you should ask someone with good professional judgment to draft your living trust. A lawyer skilled in probate, estate planning and tax matters can help you avoid the pitfalls and help you choose the legal instruments and plan best suited for your situation. If you do not have an attorney, ask someone you trust for a recommendation or contact your local bar association for a referral. Be wary of creating a trust document without consulting *directly* with legal counsel.

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Law You Can Use is a weekly consumer legal information column provided by the Ohio State Bar Association (OSBA). This article was prepared by David F. Allen, partner in the Marysville, Ohio law firm of Allen Yurasek & Merklin, and former chair of the Ohio State Bar Association Estate Planning, Trust & Probate Section.

Articles appearing in this column are intended to provide broad, general information about the law. Before applying this information to a specific legal

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