

DO YOU NEED A REVOCABLE LIVING TRUST?

By Charles K. Toole

A revocable living trust is a popular estate planning device.

A revocable living trust (or "living trust") is a popular estate planning instrument that can be an effective alternative to probate for transferring property when you die. Living trusts are being heavily promoted throughout the country and unfortunately some of the advertising claims are misrepresenting the actual benefits of using a living trust. This article will give you a better understanding of the living trust estate plan and when it is appropriate. I will begin by describing the legal relationship created when a living trust is established. I will then discuss when a living trust estate plan should be used. I will conclude with a review of the advantages and disadvantages of using living trusts.

What is a revocable living trust and how does it work?

A living trust is a legal arrangement which can be used to manage your property during your lifetime and to distribute your property after your death. Living trusts are established by a written agreement or declaration which appoints a "trustee" to administer the trust property, and which gives detailed instructions on how the trust property is to be managed and eventually distributed. The "grantor" or "settlor" is the person that sets up the trust. In most cases the settlor also serves as the initial trustee of the living trust. The living trust agreement names a successor trustee or trustees to take over the management of the trust assets if the initial trustee resigns or is unable to continue acting as trustee due to incapacity or death. In most cases, no legal proceedings (such as conservatorship or probate) are needed for the successor trustee or trustees to take over the management of the trust assets when the initial trustee is no longer able to serve.

A living trust is created during the settlor's lifetime and is sometimes referred to as a "revocable living trust." The term "revocable" means that the settlor can amend or cancel the trust during his or her lifetime. An "irrevocable trust" generally cannot be changed or cancelled.

A "testamentary trust" is a trust established under the terms of a person's Will. A testamentary trust does not take effect until the person dies and until his or her Will is admitted to probate. In the case of a testamentary trust, the terms and conditions specifying the duties and responsibilities of the trustee are contained in the decedent's Will.

Who can establish a revocable living trust?

Any competent adult can establish a living trust.

Who can be the trustee?

Any competent adult can be the trustee of a living trust, including the person setting up the trust (the settlor). A bank or trust company can also serve as trustee.

The settlor can appoint more than one trustee, can delegate different duties to each trustee, and can retain the power to remove the trustee and appoint a new one. If the settlor is the initial trustee, the trust will designate a successor trustee to administer the trust after the settlor dies or becomes incapacitated.

How is a living trust established?

A living trust is established by executing a written trust agreement which sets out detailed instructions for the management of the trust assets during the settlor's lifetime and disposition of the trust assets upon the settlor's death. After the trust agreement is executed the settlor should transfer his or her assets to the trust. Not all assets need to be transferred to the trust. However, the settlor should generally transfer to the trust all assets that would otherwise require the settlor's estate to be probated. Most assets are "transferred" by changing the registration or title to the assets so that they are registered or titled in the name of the trust. Assets not transferred to the trust will not be considered part of the trust and might still be subject to probate.

Even if you establish a living trust, you still need a Will. A Will that accompanies a living trust is often referred to as a "pourover Will." At the settlor's death, the pourover Will "pours over" to the settlor's living trust assets that were not transferred to the settlor's living trust during the settlor's lifetime. If all assets that would otherwise have to be probated in the settlor's estate are transferred to the settlor's living trust during his or her lifetime, the settlor's pourover Will does not need to be used and probate will be avoided.

The following is an example of how trust assets should be registered: "Jane Doe, trustee, or successor trustee(s), of the Jane Doe Trust dated January 1, 1997." This designation can be used for deeds, bank accounts, brokerage accounts, and stocks and bonds.

What is probate, and how does a living trust avoid it?

Probate is a legal proceeding for transferring a decedent's property at his or her death to his or her beneficiaries. A court supervises the probate proceeding. Probate usually involves the following:

1. Validation of the decedent's Will.
2. Appointment of a personal representative.
3. Collection of the decedent's assets.

4. Notification to creditors and payment of debts.
5. Transferring the decedent's assets to his or her beneficiaries.

If a living trust is established during lifetime and all of the settlor's assets that would otherwise require a probate are transferred to the living trust, there will be no need for a probate. This is because the successor trustee has authority to deal with the trust assets without court authority or supervision.

If a person dies owning real property located outside the state of Oregon, a court proceeding might be required in each state where real property is located. A properly established and funded living trust can avoid these extra court proceedings.

A living trust is often the best estate planning device to avoid the probate process. However, there are other ways to avoid probate. Joint tenancy ownership of specific assets, with the right of survivorship, can be a cost effective way to avoid probate on the death of the first joint owner. There are several ways to pass bank accounts at death without probate, including joint accounts with right of survivorship, trust bank accounts, and so-called "payable on death" accounts. Most pension plans and life insurance policies pass under beneficiary designations, which avoid probate without the use of a living trust. If a person has a modest amount of property, one or more of these nonprobate devices could be a less expensive way to avoid probate.

What is a conservatorship and how does a living trust avoid it?

Conservatorship is a legal proceeding for the management of your assets and financial affairs when you become disabled or incapacitated. It is a court supervised proceeding that usually involves a formal determination that you can no longer handle your own affairs; the appointment of a conservator to manage your assets; the listing of your assets in the court file; court-reviewed management of your assets; and the preparation and filing of periodic reports and accountings. If you properly establish and fund a living trust, there should be no need for a conservatorship.

Does a living trust save taxes?

Provisions for saving federal estate taxes and state inheritance taxes (death taxes) can be included in a living trust or in a Will. A decedent's estate is required to file state and federal death tax returns if the estate exceeds the applicable death tax exemption amounts in the year of the decedent's death. The death tax returns must be filed even if the decedent's assets are held in a living trust at the time of the decedent's death. Saving taxes is generally not a reason to use a living trust instead of a Will.

What does it cost to set up a living trust?

The exact cost of a living trust depends on how complicated your assets and your estate planning goals are, how many assets must be transferred to the trustee, and whether tax planning is needed. Before you hire an attorney to set up a living trust for you, ask for an estimate of how much it will cost. You should also ask about the cost of doing a Will instead of a living trust and for an estimate of the cost to probate your estate.

The living trust estate plan should include a living trust agreement, the documents needed to transfer your assets to the living trust, and a pour over Will. The plan should also include "incapacity documents" such as a durable power of attorney and an advance directive. In a durable power of attorney you name an agent to take care of your financial affairs if you are unable to do so because of incapacity. In an advance directive you name a health care representative to make health care decisions for you if you are incapacitated and unable to make your own decisions.

What are the advantages of a living trust?

- Assets held in a living trust are not subject to probate administration. This can save executor's fees and attorney's fees.
- The living trust assures your privacy. Probate court records are public, whereas a living trust is not.
- The living trust can avoid the expense and delay of a conservatorship proceeding if the settlor becomes incapacitated.
- Annual court accountings are not required – this saves time and expense.
- A living trust may be located in a state whose laws are favorable.
- The necessity of multiple probates can be avoided should real property be owned in more than one state.
- When used in conjunction with a "pour over" Will, the trust serves as a receptacle for all estate assets.

What are the disadvantages of a living trust?

- A living trust plan is usually more expensive to establish and maintain than a Will plan.

- Many of the advantages of using a living trust will not be realized if the trust is unfunded. In order to avoid probate, the settlor's assets that would otherwise have to be probated must be in the trust at the time of the settlor's death.

Living trusts are not do-it-yourself projects.

You should not try to establish and fund a living trust on your own. If a living trust is to accomplish your estate planning objectives it needs to be properly established and funded. You should always seek the assistance of an estate planning attorney to make sure that everything is done correctly. Many do-it-yourself living trust kits will turn out to be a waste of your time and money.

What should I do if I am interested in setting up a living trust?

A living trust can be an excellent estate planning device when properly established and funded, however, they are not for everyone. Whether one is appropriate for you depends upon your particular circumstances and your estate planning objectives. If you are interested in setting up a living trust you should consult with an estate planning attorney who can advise you in these matters.

CHARLES K. TOOLE, J.D. LL.M. (Taxation)
ATTORNEY AT LAW
Dunn, Toole, Carter & Coats, LLP
112 W 4th Street
The Dalles, Oregon 97058
541-296-5424