

More Certainty as to Property Distribution at Death

By ensuring that all property is properly titled in a living trust, there is greater assurance that all of your property will be governed by its terms. Since wills only govern probate assets, assets that pass outside the probate process, such as those held in joint tenancy or under beneficiary designations, are often overlooked.

What are the disadvantages of a living trust?

Drafting Expenses

Your attorney will charge a fee to draft your trust. As living trusts contain provisions applicable during lifetime as well as at death, this fee is generally more expensive than the fee for a will. There may also be additional costs and legal expenses in titling your assets over to your living trust. There will also be charges associated with drafting a “pour-over” will. However, these wills are not as complicated as trust agreements and probably will not substantially increase drafting costs.

Administration Expenses

Should you choose a professional fiduciary during your lifetime, there will be fees for administering the trust. Should you wish to manage the trust yourself, you may serve as your own trustee and avoid these fees.

Potential Loss of Some Income Tax Advantages

Some income tax advantages after your death may be lost by using a living trust rather than having your property go through probate, such as the ability of your estate to elect a separate tax year and to use certain estate losses for income tax purposes. These income tax disadvantages, however, are usually insignificant, particularly when balanced against the increased costs of the probate process. The income tax advantages of having property go through probate would

also be lost by the use of joint tenancy and other probate avoidance devices.

Increased Paperwork

A trust may involve more paperwork than when property is owned individually. For instance, if you are not the trustee of your own trust, the trust may be required to file a separate tax return, although no additional income taxes would be owed. The trustee is usually directed to account to the grantor or beneficiaries. In addition, ordinarily extra documents must be prepared to transfer title to the trust.

Do you give up control of your property in a living trust?

As long as you are competent, you can retain as much control as you desire. You can change trustees, change the provisions of the trust, direct your trustee on investments and distributions, and even terminate a living trust if you are unhappy with the arrangement.

How do I set up a living trust?

See your attorney. A living trust is a legal document with complex property, estate, and tax consequences and should not be entered into without consideration of your overall estate planning objectives. People are sometimes encouraged to set up trusts without advice from their attorney, but this is not advisable. Your loved ones may not be properly protected and you may lose the opportunity for tax planning and other advantages if the trust document is not appropriately drafted. An attorney experienced in estate planning is the person best equipped to analyze your estate and discuss all appropriate estate planning devices. If a living trust is appropriate, your attorney will be able to prepare a trust document that addresses your situation. For many, a living trust is the best estate-planning vehicle.

This pamphlet is based on Kansas law and is published to provide general public information, not specific legal advice. The facts involved in a specific case determine the application of the law.

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IS A LIVING TRUST FOR YOU?

What is a trust?
What kinds of living trusts are there?
Does a living trust replace a will?
How do I set up a living trust?

Prepared & issued as a public service by



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What is a trust?

A trust is an agreement between you (the settlor) and another individual or entity (the trustee) who holds legal title to property and manages it for the benefit of one or more individuals or organizations named in the trust (the beneficiaries). A trust can be created in your will (a testamentary trust) or can be created during your lifetime (a living trust). The terms of a living trust, which can be very flexible, are set out in a trust agreement.

This pamphlet addresses only living trusts.

What kinds of living trusts are there?

A living trust can be either revocable or irrevocable. A revocable trust can be changed or terminated by the one setting up the trust at any time before the person's death or incapacity. An irrevocable trust is permanent, can seldom be changed or terminated, and has special tax treatment. Absent unusual circumstances, most living trusts used as one's primary estate planning document are revocable. A living trust can be established and all of your assets transferred into its ownership immediately or can be established as a "standby trust," ready to receive assets if the settlor becomes incapacitated. In such cases, someone needs authority to transfer the assets, usually as agent under a special or general durable power of attorney.

Does a living trust replace a will?

Not completely. If all your property is either titled in your living trust at the time of your death or has your trust named as the beneficiary, none of your property would go through the probate process. However, it is easy to overlook an asset that you intend to put in a trust, and you may acquire additional property prior to your death, such as an inheritance. You might not have time to transfer that additional property to your trust. Your trust might also have been terminated, either voluntarily or involuntarily, before your death. Without a will, any of such overlooked property would pass through probate under the laws of the state rather than to the loved ones or charities of your choice. Therefore,

a will that "pours over" such probate property to your trust is recommended, no matter how carefully you have transferred your assets in trust.

Can you do the same things in a living trust as you can in your will?

Yes. You can instruct your trustee to pay your bills at death, leave burial instructions, sell your property, and designate a guardian and conservator for your minor children, just as you would instruct an executor under a will. You can also provide for longer-term trusts for the care of loved ones or to benefit charities without leaving property outright to them at your death.

Do you have to be wealthy to set up a trust?

No. You should consider the complexity of your estate, your need for investment management, the availability of a reliable initial or successor trustee, and your family situation rather than wealth when you compare the advantages of a trust against a traditional will. As with any estate planning decision, you should get specific advice tailored to your needs and other circumstances unique to you and your family.

Who should be your trustee, and how much will it cost?

Naming a trustee requires careful thought. Most people will be trustees of their own living trusts, but a successor will have to be named for continuation after the death or disability of the settlor or if you decide you no longer want to manage your assets.

You might prefer to name another person, family member, or a professional trustee, such as a bank, attorney, or trust company, as a co-trustee or sole trustee. If you name a family member as the trustee, you may create a taxable situation you had not anticipated if there are no limitations on their trust powers. In all events, a properly drafted living trust would require the trustee to defer to your wishes

as to the investments and distribution from the trust for as long as you are competent.

Whether an individual or a professional trustee is desirable depends entirely on the circumstances. A professional trustee is often able to offset a significant portion of its fees through increased yield. Further, most professional fiduciaries are bonded, are experienced in the complexities of trust management, and offer greater financial security, objectivity, and continuity of management. On the other hand, an individual may be more familiar with your family situation and may be less expensive.

Trustee's fees vary depending on services performed, the value of the trust, the nature of trust assets, and the party performing the services. Your attorney is able to counsel you regarding this decision.

What are the advantages of a living trust?

Probate Avoidance

Assets transferred to the trust are not subject to probate. You can save expenses and fees because the trust contains special instructions for distribution of your assets after

your death without court proceedings. This feature is particularly attractive when the trust owns real estate in more than one state or jurisdiction because it avoids multiple probate proceedings.

Flexibility During Incapacity

A revocable living trust is also advantageous during your lifetime. If you become incapacitated, you may not change your will. However, during incapacity, your agent under a general durable power of attorney can be given the power to change your trust. This can be important if tax laws or other laws affecting trusts and estates change after you become incapacitated.

Financial Management During Incapacity

A trustee can collect income and pay expenses in the event of incapacity. Without a trust or power of attorney, an individual may be subject to court proceedings to determine if he or she is competent, and may have someone not personally known named as conservator. If a conservatorship were needed, all further financial dealings would be subject to court (and therefore public) scrutiny.

Financial Management During Your Lifetime

Even if you are not incapacitated, your named trustee can manage assets, pay your bills, run a business for you, or take care of personal needs – whatever you direct in your trust agreement.

Protection for Beneficiaries

Although a revocable living trust cannot shield your assets from your own creditors, you can set up a trust to protect your loved ones from their creditors, spouses, or inexperience.

Privacy

The terms of a living trust and the value of your estate are not subject to public scrutiny.

