

Client Information



Is a Living Trust for You?

Prepared by the Estates and Probate Section

WHAT IS A LIVING TRUST?

Very simply, a living trust can be described as follows:

- It is a document in which a person states how assets are to be managed during his or her own life, and after death, and designates a successor to continue to manage or to distribute those assets in the event of his or her own incapacity or death.
- Typically, the document is *revocable*, meaning that the individual reserves the right to change its terms or cancel it while he or she is living and able to do so.
- It is important to understand that the document governs the lifetime management and disposition of only the assets the person actually registers or transfers into the name of the trust.

IS A LIVING TRUST THE SAME AS A LIVING WILL?

No! They are not remotely related to each other and serve entirely different purposes. A living will is a separate document dealing with whether an individual desires artificial life support systems under certain circumstances (terminal illness or permanent unconsciousness).

WHAT IS THE DIFFERENCE BETWEEN A LIVING TRUST AND A TESTAMENTARY TRUST?

A testamentary trust is a trust set up in a person's will and does not take effect until the individual who makes the will dies. A testamentary trust is subject to probate court oversight.

HOW IS A LIVING TRUST ESTABLISHED?

A living trust is a written document commonly called a Trust Agreement or Declaration of Trust which describes the terms of the trust. These terms typically name the parties to the trust, the purpose of the trust, and govern the use and disposition of assets in the trust, both during the lifetime of the individual setting up the trust and after the individual's death.

WHO ARE THE PARTIES TO A LIVING TRUST?

The person who establishes the trust is known as the settlor, donor, or grantor. The trustee is the person or institution named to manage the trust assets in accordance only with the instructions contained in the trust for the benefit of the beneficiaries. The beneficiaries are those people or entities who are entitled to use or receive the trust assets and income. In a typical revocable living trust, the settlor (the person who sets up the trust) may choose to be a trustee and one of the beneficiaries.

IS A LAWYER NECESSARY?

There is no legal requirement that a living trust be written by a lawyer. However, the publicity about what a living trust can and can't do is often misleading, and the wording of the trust must be carefully drafted if the trust is to accomplish its purposes. Lawyers have the training and experience to advise a person on the proper uses of living trusts and to create a trust which addresses the person's particular needs, concerns, and wishes. Only lawyers are licensed to advise others on the legal requirements and uses of living trusts. Using "do-it-yourself" forms is unwise. They are normally generic documents written for use on a national basis and do not take into account individual state laws or personal capabilities, needs, and wishes. Additionally, not only must trust documents be properly drawn but assets must be transferred into the trust if it is to carry out its purposes. Asset transfers often require legal assistance to insure they are completed properly and to determine what assets may best be transferred without possible adverse tax or estate planning consequences.

WHAT CAN A LIVING TRUST ACCOMPLISH?

A living trust can provide for lifetime management of the assets transferred into it. It can also be the recipient of additional assets upon the settlor's death. The settlor of the trust can be his or her own trustee, or another person or entity can be appointed as trustee or co-trustee. The settlor also can and should name a successor or co-trustee, thus providing for continuity of management of the trust assets. A living trust can provide for distribution of the trust assets at the settlor's death either by keeping the assets in trust for a period of time or by outright distribution of the assets to the beneficiaries. When properly drafted, it may also be used to save estate taxes in a manner similar to a will. A living trust may provide confidentiality and privacy as it usually does not have to be filed in the probate court, nor are the assets usually disclosed. However, parties who have a legitimate interest in the trust may be entitled to information. A living trust can also avoid ancillary probate proceedings for out-of-state property.

WILL A LIVING TRUST AVOID PROBATE?

Yes, but not entirely. Title to the assets transferred into a living trust are held in the name of the trustee and not in the settlor's individual name. Thus, to the extent assets are properly placed in the trust before death, the living trust avoids probate in the sense that probate proceedings are not necessary to pass title to the trust assets on death. To accomplish this result one must be vigilant in placing and keeping assets in the trust. If this is accomplished, the use and enjoyment of the assets do pass on to the beneficiaries after the settlor's death. The Connecticut Succession Tax Return, however, must be filed through the probate court. Thus, although the succession tax is currently being phased out, complete avoidance of the probate court is not currently possible. Avoiding the jurisdiction of the probate court may not be desirable if the settlor wanted the probate court to oversee the administration of the trust and to protect the beneficiaries from possible abuse by the successor trustee. Traditionally, the probate court serves as a watchdog to oversee the activities of the trustee, including the

amount charged as trustee fees and the expenditure of any unreasonable or unnecessary expenses. Probate fees are relatively modest and are set by the state legislature. Thus the probate fee "to be avoided" should be balanced against the cost of creating and administering a living trust which has no similar oversight protection.

WHAT CAN'T A REVOCABLE LIVING TRUST ACCOMPLISH?

A revocable living trust does not in and of itself save taxes. The settlor reserves certain rights over the trust and its property so that income, estate, and succession taxes are determined as if the trust did not exist. The trust can be drafted in a number of ways to save estate taxes, but tax savings can also be achieved through the use of a will. Currently in Connecticut, a living trust does not save probate court fees. These fees are the same whether or not a trust is used. Nor does a living trust generally protect trust assets from the settlor's creditors. Legal fees for probate administration may be reduced, but professional assistance may still be necessary to deal with tax and other issues which exist at death whether or not a living trust is used. Legal fees are usually incurred when the trust is established, and trustee fees can easily match or exceed executor's fees. Legal challenges to the validity of living trusts are increasingly common, and trustees of living trusts can be called upon to account for their stewardship in the probate court. In some states, such as Florida, problems with living trusts have led to requirements that most trusts be registered with the court.

IS A LIVING TRUST A SUBSTITUTE FOR A WILL?

It is always a good idea to have at least a simple will even if you have a living trust. Remember, the trust can dispose of only those assets that are properly transferred to it. Very often, by design, omission, or lack of attention, not every asset is placed in the trust, thus necessitating probate for any assets not in the trust. The will may state that all probate assets are to be transferred to the trust or may contain other dispositive provisions.

IS A DURABLE POWER OF ATTORNEY COMPARABLE TO A LIVING TRUST?

A durable power of attorney, like a living trust, can provide for the management of assets while a person is incapacitated. However, financial institutions are sometimes reluctant to accept a durable power of attorney, whereas the authority of a trustee to act is widely accepted. In addition, a living trust provides written instructions covering the trustee's authority to invest and distribute assets; a durable power of attorney usually provides only broad generalized authority to manage the incapacitated person's assets.

IS A CONSERVATORSHIP COMPARABLE TO A LIVING TRUST?

A conservatorship requires the involvement of the probate court to appoint a conservator (a person similar to a trustee) and to periodically review the conservator's activities. In addition, the conservator's authority to act without court approval is limited; the trustee of a living trust can be appointed and act without probate court involvement.

ARE TRUST ASSETS PROTECTED FROM THE COSTS OF LONG-TERM CARE?

Many elderly individuals are legitimately concerned with the costs of long-term health care such as nursing homes. Under current state and federal law, assets held in a revocable living trust are considered available to the settlor. Therefore, those assets are not shielded and must be used before applying for various governmental programs. Potential settlors should seek counsel in the area of elder law before using a living trust if asset preservation is a significant concern.

CONCLUSION

With proper advice, guidance, and drafting, a living trust can be an important part of an estate plan and can provide an individual and his or her family with various planning advantages. Keep in mind, however, that each individual's needs and wishes vary and that there are things a living trust does not accomplish. Many of the claims asserted by mass marketers of living trusts are overstated or simply not true. One-size-fits-all trust documents are often oversold. Only a properly trained professional can help you decide whether a living revocable trust is right for you.

