

# Ask Questions To Decide if a Revocable ("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 revocable trust (also called a "living" trust) is one that can be amended and revoked by the person creating the trust (the "settlor"). The settlor keeps all the benefits of the property placed into the trust. The terms of the revocable trust are established in a written agreement signed by the settlor and the trustee, and spell out what happens to the trust property both during the settlor's life and following his or her death. Frequently, the settlor serves as his or her own trustee during the settlor's lifetime.

## **Q: What is the purpose of a revocable trust?**

**A:** A revocable 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 revocable trust's assets do not go through probate, but pass directly to intended beneficiaries upon the settlor's death. If a settlor's purpose in creating a revocable trust is to avoid probate, then the settlor must remember to transfer ownership and title of all assets to the revocable trust. Further, the settlor must continue to place future assets into the revocable trust as they are acquired. Normally the living trust does not own and is not the beneficiary of retirement plans such as IRAs and 401k plans because naming persons results in better income tax treatment.

## **Q: Is use of a revocable 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, revocable 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. Federal law now permits unused exemption to be transferred to a spouse without use of a trust. The Ohio estate tax is scheduled to be repealed for 2013 and thereafter. If the federal gift and estate tax exemption of \$5,120,000 for 2012 continues to increase in 2013 and thereafter (as expected), very few Ohio residents will pay any estate tax.

**Q: Will a revocable trust save income taxes?**

**A:** No. The income of the revocable trust will be taxable to the settlor as if the trust did not exist for income tax purposes. After the death of the settlor (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 revocable trust compared to probate?**

**A:**

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

\* *Control.* A trustee of a revocable 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 revocable 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 settlor's death.

\* *Avoidance of multiple probate proceedings.* If homes or other real property are owned in a number of different states, a revocable trust may be used to avoid separate probate proceedings in two or more states.

**Q: What are the disadvantages of a revocable trust compared to probate?**

**A:**

\* *Lifetime effort.* Implementing a funded revocable trust is likely to be more time consuming and tedious than drafting a will. For example, some real estate lenders require the property to be deeded from the trust to the individual to sign the mortgage, and then deeded back to the trust after the closing.

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

\* *Absence of court review.* The administration of a revocable 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 revocable trust?**

**A:** For best results, you should ask someone with good professional judgment to draft your revocable 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 law firm of Allen Yurasek Merklin & Owens-Ruff, and former chair of the Ohio State Bar Association Estate Planning, Trust & Probate Section.*



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