



Do You Need A Living Trust?

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Many clients wonder whether they need a living trust, which is also called an inter vivos trust, revocable trust, or management trust. Living trusts are useful in many situations, but not everyone needs one. I want to share some of the main reasons a living trust might be useful, as well as where a Will alone may be just fine.

TRUSTS

A person establishes a living trust during his or her lifetime, as opposed to a testamentary trust which is established after death when the Will is admitted to probate. The person establishing the trust (who is called the Grantor) may fund the trust during life, or it may remain on stand-by waiting for assets from the Grantor's estate, life insurance policies and other sources to flow into the trust at death. Because the Grantor may serve as his or her own Trustee and is also the beneficiary of the trust during lifetime, most persons find no difference between managing the trust and managing their own money outside of the trust. The Grantor retains full rights to revoke or amend the trust and to buy, sell or give trust property away during life. At the Grantor's death, the trust provides how to divide and administer the trust property for the remainder beneficiaries.

A person's unique personal situation and assets should be analyzed to determine whether a trust is right for him. Key factors that signal a living trust might be useful include ownership of out-of-state property, significant amounts of life insurance, a desire to disinherit a family member, or planning for easy management of assets and financial matters as a person gets older.

BENEFITS OF A REVOCABLE LIVING TRUST

A Trust Avoids Probate.

When the trust is funded during the Grantor's lifetime with property and assets and is named as beneficiary of life insurance proceeds and other assets that would otherwise pay to an estate, it may often be possible to avoid probate. Advertisements people see on flyers and receive by mail may claim that probate costs are excessive (up to 20%), and can

be avoided with a living trust. Probate costs in Alabama, however, are generally not anywhere near the claims in the advertisements. The complexity of the estate, whether administered through a probate proceeding or under a fully funded trust, determines the administration costs.

There are times when avoiding probate is beneficial. For example, if a child or other descendant is being disinherited, it may be preferable to have a fully funded trust so that probate is avoided. With probate, all next-of-kin within a certain degree have to be notified of the submission of the Will to probate before it is accepted by the Court. This can be difficult when a relative's whereabouts are unknown, and uncomfortable if the relative is being treated differently than others in the Will.

Receipt of Life Insurance Proceeds.

Living trusts may be helpful when a person has a significant amount of life insurance and wants to protect it from creditor claims or distribute it among various beneficiaries at death, some of whom might be minor children. If a spouse is named as outright primary beneficiary of life insurance, then the trust can be named as contingent beneficiary. Sometimes, perhaps in a second marriage or for tax planning purposes, a person might prefer that life insurance be held in trust for the lifetime of the spouse and then flow to the children. Or, insurance may need to be divided among various parties in ways that a simple life insurance beneficiary form cannot provide. Leaving life insurance outright to a person often works fine, but in some cases a trust is needed to protect the estate plan of the insured.

Avoids Conservatorship/Helps With Asset Management.

Planning for incapacity is something that no one likes to think about. Nevertheless, if a person has a disability or becomes unable to handle business affairs and money, a living trust can be a blessing. A Power of Attorney can authorize the person's assets to be transferred into the trust so they can be managed by the Trustee. Over a long period of time, this is much easier than using a Power of Attorney for asset management.

Estate Planning Advantage

The trust can contain specific instructions on how to determine whether the successor Trustee should take over. This planning may help avoid administratively burdensome guardianship or conservatorship proceedings. People who plan to live abroad for a long period of time (for example, deployed military personnel or missionaries) also like the idea of a funded living trust so that a Trustee can manage their assets while they are away.

Out-of-State Property.

A person who owns real estate in more than one state may benefit greatly from a living trust. When the trust owns the out-of-state property, as opposed to the individual holding title in his or her individual name, a costly probate in the other state can be avoided. This works well for a person with a beach condo in Florida or a cottage in the mountains of North Carolina, as well as for owners of time-shares in Cabo San Lucas or Branson, Missouri. Transferring mineral interests that exist in other states also becomes easier when owned by a trust.

Desire for Privacy.

Wills must be admitted to probate to be valid, making them part of the Court's public record, whereas a trust is more private. Trusts are generally not put on the public record.

COMMON MISCONCEPTIONS ABOUT LIVING TRUSTS

Living trusts are often misunderstood. People may think that an estate needs to be large to incorporate a trust. In recent decades, trusts have been associated with avoiding estate tax, causing some people to think if they do not have an estate tax problem, they do not need a trust. Estate tax minimization planning can be done through a living trust, but it can also just as easily be accomplished by creating a trust under a Will.

Does the Trust Mean I Lose Control of My Assets?

A living trust is usually drafted as revocable so that the Grantor retains full control of the trust assets until death or incapacity. The Grantor may also amend the trust in any way during his or her lifetime, as long as he or she has mental capacity. Because the trust continues to use the Grantor's Social Security number while he or she is Trustee, the trust does not need to file a separate tax return. Assets will need to be retitled into the name of the trust, but no other changes are required until the Grantor's death or incapacity.

If my Assets are Joint, I am Already Protected from Probate, Right?

Joint tenancy usually allows probate to be avoided at the first death of a joint owner because the property (such as joint bank accounts and joint property deeds with rights of survivorship) automatically passes to the surviving party. However, at the death of the survivor, or if both parties die together, probate will be needed since the asset no longer has a joint owner. Many people add a child's name to bank accounts or property for convenience after a spouse has passed away. Bear in mind, however, that this exposes those assets to the creditors of the child, such as in a divorce or bankruptcy proceeding.

WHAT A LIVING TRUST WILL NOT DO

Living trusts do not solve every problem. While a trust can do many good things to simplify transfers of assets at death and management of assets during life, it is important to understand what a trust will not do.

A Living Trust Does Not Mean that You No Longer Need a Will.

If you have minor or adult children who need a guardian, a Will is needed to make those appointments. Similarly, no one can be assured of the exact items that he or she will own at death. A Will is necessary to pick up any items that may have been forgotten about or not added to trust during the Grantor's life. In some cases, probate of a Will can be avoided, but there is no assurance that will happen one hundred percent of the time. In conjunction with setting up and signing a living trust, a Will that "pours-over" any assets not already in the trust as the Grantor's death should be signed. The Will should make specific reference to the living trust, describing it by date and who established it.

A Trust Generally Does Not Protect Your Assets From Your Creditors During Your Lifetime.

While specific creditor protection irrevocable living trusts can be set up in some states, the revocable living trust generally used for estate planning and asset management purposes does not have this protection. The trust may have terms to provide creditor protection for beneficiaries other than the Grantor after his or her death, however.

A Trust Can Be Challenged By Heirs.

Just as in a Will contest, disappointed heirs and individuals may still challenge the legitimacy and the funding of the living trust on grounds of incompetence, undue influence, and duress regarding its creation and funding. A contest of a funded trust is more difficult, however, because more hurdles have to be cleared to be successful.

Disposition of Assets Owned by The Trust After Death is Not Always Faster Than In A Probate Proceeding.

Debts that need to be paid, assets that need to be collected and liquidated, tax returns that are required, and other typical estate matters are present in administering a fully funded living trust. Nevertheless, because probate proceedings are typically avoided, it may be more efficient.

A Living Trust Is Subject to Spouse's Elective Share In Some States.

All states have provisions to protect a surviving spouse who is left out of or inadequately provided for in a Will. These provisions are referred to as a spouse's right to take an elective share of the estate. In some states, a spouse's elective share may only be taken against assets in the formal probate estate. This rule is changing, however, as state statutes are changing to include assets in a revocable living trust of a deceased spouse to be part of the property over which an elective share may be claimed. Where a person wants or needs to leave a lesser share to a spouse than is required by state law, a prenuptial or post-nuptial agreement is still needed.

CONCLUSION

Revocable living trusts can be very beneficial in the right situations. However, a living trust is just one of many tools the estate planner can use to plan for an individual's specific situation. If you have any of the situations listed above where a trust may be helpful, please give your estate planning attorney a call to see if a living trust should be added to your plan. ■