

Living Trusts

An estate plan is comprised of a plan for disposing of assets at death along with mechanisms to deal with the possible future loss of capacity. A will is a common method of disposing of assets upon an individual's death. Another way of creating an estate plan is with a revocable trust (often termed a "revocable living trust" or simply a "living trust"). Living trusts should not be confused with living wills.

What are the advantage and disadvantages of a Living Trust?

Living trusts are popular for two main reasons. First, it is possible to avoid probate for assets held in a living trust. Before deciding whether it is worthwhile to adopt an estate plan that will avoid probate, you should visit with an attorney to learn about the costs and requirements of probate in South Dakota. Probate procedures in some states are significantly more expensive than in South Dakota.

The second advantage to living trusts relates to the secondary goal of estate planning: a plan for the possibility of your future incapacity. Living trusts – along with durable powers of attorney and living wills – can act as a method by which assets can be managed by a successor trustee if you lose the ability to do so. In this way, a more expensive conservatorship proceeding might be avoided. Living trusts are also slightly easier to amend than a will.

There are two primary disadvantages to living trusts as well. First, an estate plan which utilizes a living trust is typically more expensive than an estate plan which simply utilizes a will. Living trust estate plans cost more because (1) living trusts are typically more complicated to draft than wills; (2) a will should also be drafted to "pour over" any assets not titled in the trust prior to the decedent's death; and (3) the need to re-title certain assets in the trust. The additional complexity of a living trust is a second disadvantage. You may experience problems in transferring or selling assets or making purchases with trust checks and encounter banks, transfer agents or others who want to see the trust agreement in order to know that the trustee has certain powers and authority.

What is a Living Trust?

A living trust is a sort of agreement between two people – a “settlor” (also called a “trustor” or a “grantor”) who establishes the trust and a “trustee” who manages and administers the trust. The trustee’s duty is to follow the terms of the trust agreement and administer trust property for the benefit of any “beneficiaries” named in the document.

You can imagine a mother (as settlor) conveying property to a trusted advisor (as trustee) to manage property for her grandchildren (as beneficiaries) and pay for their college expenses. This kind of an arrangement is a trust. The trustee promises the settlor to carry out the terms of the trust and benefit the beneficiaries.

With a living trust, the same parties can be identified: settlor, trustee, and beneficiary. However – at least initially – you serve in all three roles. You are the settlor who enters into an agreement with the trustee (also you) to administer trust property to benefit the beneficiary (you as well). When you pass away, a successor trustee is identified in the trust agreement and secondary beneficiaries begin to benefit. A living trust, for example, might provide for lifetime benefits to you, and equal distributions of all the trust assets upon your death to your children. Because a living trust is revocable, you can revoke or amend it just like a will if you change your mind about who to nominate as a successor trustee or who your trust beneficiaries should be.

A living trust, also known as a revocable living trust, is an alternative way to own property. You create a revocable living trust during your lifetime by signing a trust agreement which is a legal document that directs how property transferred to the trust will be managed, when and to whom the income and principal from the trust will be paid, and to whom the trust property will be distributed when you die. You are called the settlor, grantor, or trustor of the trust, while the person to whom you transfer your property is called the trustee. The persons who will receive the income during your lifetime or who will receive the trust property after your death, are called the beneficiaries. You may be the settlor, a trustee and a beneficiary, all at the same time. The property in the trust is called the trust principal, corpus, or res. As the settlor, you may change the terms of the trust agreement or may revoke the trust and regain ownership of the trust property.

Do I need a Revocable Living Trust ("RLT")?

You may decide you need a revocable living trust, but first you should review your own situation with your lawyer to decide whether or not a trust is right for you. It could be that a will or other arrangements would better fit your situation.

What advantages does a RLT provide?

- You can have another person or “corporate trustee” (e.g., a bank with a trust department) to act as a trustee and make investment or other management decisions for you.
- You can avoid the necessity of having a conservator or guardian manage your property if you become incapacitated.
- After your death, the trustee can distribute the trust assets directly to the beneficiaries without probate. This is particularly beneficial if you own real estate in more than one state as it may avoid having to conduct a probate proceeding in each state.
- It is possible that a living trust may be kept more confidential than a will.

What are the disadvantages of a RLT?

- You will undoubtedly spend more time and money in properly creating and transferring your assets to a living trust than you would to have a will prepared.
- To effectively avoid probate, you must keep track of your assets and keep all of your property in the trust, including property acquired after you create the trust.
- Upon your disability or death, the management of your trust assets will depend upon the honesty and management ability of your successor trustee who may act without court control or involvement.
- There are no creditor protection features of a living trust.

How do I select a trustee?

You may name yourself, another individual, or a financial institution like a bank or trust company as trustee. You may name a single trustee or multiple co-trustees. You should also provide for a successor trustee to act in the event of the future disability or death of the trustee. You should carefully consider whether the trustee you select will have the power to appoint future trustees. Anyone you select as a

co-trustee or successor trustee should be capable and trustworthy. Trustees should be carefully selected depending upon your individual circumstances and their knowledge and abilities. You should also consider whether a corporate fiduciary (such as a bank) can provide services that an individual cannot. Finally, you should consider any fees or expenses that a trustee may charge to carry out your instructions and perform their duties.

What are the duties of a trustee?

The duties and responsibilities of a trustee are prescribed by law. South Dakota generally requires that the trustee act in good faith, not use trust property or their influence as trustee for their own benefit and avoid conflicts of interest. Trustees also must avoid co-mingling trust property with their own and must provide information regarding the trust's existence and its administration to certain persons.

How does trust property work?

In order to avoid probate, you must transfer the ownership of every asset to the trust. To transfer real property, a deed must be signed and recorded; transfer of publicly traded stocks and bonds will likely require the services of a broker; transfer of partnerships and closely held corporations may require the review of the governing instruments to determine whether other partners or stockholders must consent to such transfer; assets without formal legal title such as household contents and farm machinery will require a bill of sale.

Any property which you do not transfer to the trust will be subject to probate and distribution as set out in your will or the laws of South Dakota if you do not have a will. You should have a will to cover any assets that are not transferred to the trust. This may be a "pour-over will" which transfers any property which you own at the time of your death to your living trust or a will which has other provisions.

Can I change a trust after it is established?

Yes. While you are alive and competent, you are in complete control of your trust. You may change or terminate the trust at any time provided the trust document specifically gives you that right.

Does a living trust save taxes?

The grantor of a revocable living trust retains control of the trust property. Therefore, for federal income tax purposes, as long as you act as the trustee or the co-trustee and the trust uses your social security number for its taxpayer identification number, your living trust will be treated no differently than if you had not created the trust. Likewise, you will not save any death taxes (state or federal) simply because you have created a living trust since you have not irrevocably disposed of the trust assets. Although, a properly prepared living trust can save death taxes, the same savings can be achieved by a properly drafted will.

Can I use a living trust form or kit I found online?

You can use a form or kit or even prepare the trust agreement yourself, but your situation may not fit the form, or the form may have been poorly prepared and may lead to adverse tax consequences and conflicts over property distributions. Problems with the forms or kits may not surface until years later, sometimes not until after your death when you cannot change the trust and clear up the problem.

Contact an Attorney

You have taken a lifetime to accumulate your wealth. You should take great care to make certain that your estate plan properly reflects your wishes. A living trust may or may not be right for you. Competent professional help is essential to make certain that your estate plan meets your specific needs.

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