



Comparison of Living Trusts and Wills

Guide G-256

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This publication is scheduled to be updated and reissued 8/10.

There is current interest in living trusts as a substitute for wills. In many respects, a living trust and a will accomplish the same objectives; however, a living trust lets you accomplish other objectives that a will cannot. But there is a cost for these advantages. Whether or not a living trust is better for you than a will depends upon whether or not the additional advantages are worth the cost. With this in mind, we will describe the basic features of a living trust, then describe advantages and disadvantages of living trusts and wills.

A living trust, sometimes referred to as a revocable trust, or inter vivos trust, is established and takes effect during your lifetime by a written document known as a trust agreement. A will is written during your lifetime, but does not take effect until after your death.

What Is a Living Trust?

A living trust (not to be confused with a living will, which authorizes withdrawal of life-sustaining procedures under certain circumstances) is a way to transfer legal ownership of assets. Assets are managed according to your instructions by a trustee for your beneficiaries. You can name yourself as trustee and as a beneficiary.

A living trust is created by you during your lifetime. As normally employed for estate planning purposes, you retain the right to alter, amend, or revoke the trust at any time before death.

After death, the trust will either be terminated and the assets distributed to your beneficiaries, or the trust can be continued for the benefit of those same beneficiaries. If both you and your spouse create a living trust, either can usually revoke the

trust and both, acting together, can amend the trust. After the death of one spouse, the trust is usually divided into separate trusts. The surviving spouse's property is allocated to a trust that can be altered or amended by the surviving spouse. Depending on the estate plan adopted, the deceased spouse's property is generally allocated to one or more irrevocable trusts for the benefit of the survivor or children.

What Is a Will?

A will is a written document, signed and witnessed in accordance with the law, that indicates how your estate will be handled and disposed of upon your death. A will is revocable and subject to amendment at any time during your lifetime; however, amendments must be made with the same formalities as the will.

Must Both Living Trusts and Wills Be Probated?

Only wills must be probated. Probate, in simple terms, makes sure debts of the deceased are paid and any remaining property is distributed to the rightful owners. Property that has been transferred to a living trust is not subject to probate. Avoiding probate, which on occasion can be costly and time consuming, is a reason many individuals use living trusts.

Because property must be transferred to a living trust before your death to avoid probate, you must transfer all or most of your assets to the trust before death. Any property still owned directly by you when you die is subject to probate, regardless of the trust. A simple will known as a "pour-over will" is

also necessary in the event property is omitted from the trust. This provides that any property owned directly by you at the time of death is to be “poured over” and distributed under the terms of the living trust.

Why Are Living Trusts Used?

Living trusts provide lifetime and after-death property management or carry out tax-related estate planning. Some persons use trusts to avoid probate. If you are serving as your own trustee, the trust instrument will provide for a successor trustee upon your death or incapacity and court intervention is not required. Living trusts are also used to manage property. If a person is disabled by accident or illness, the successor trustee will manage the trust property. As a result, the expense, publicity, and inconvenience of a court-supervised conservatorship of the estate is avoided. A living trust can also save federal estate taxes, particularly for married couples. There are no income tax savings from the use of a living trust.

Can a Will Accomplish the Same Objectives?

A will that contains a trust providing after-death management of property can be used for estate planning. This is called a testamentary trust. A will cannot provide the same pre-death management, but a general, durable power of attorney used in connection with a will can provide almost the same pre-death management functions. Basically, a general, durable power of attorney authorizes the designated person(s) to handle your financial affairs if you are incapable of handling them yourself. After death, a will can provide the identical management as a living trust. A will can also provide the same estate tax savings as a living trust. The pre- and after-death management and tax savings of a will and a living trust can be identical.

Costs

Generally, a will and power of attorney are less expensive than a living trust because a living trust is a more complex document. In addition, assets must be actually transferred to the trustee for a living trust to be effective. Living trust costs may run between two or more times the cost of a simple will. A living trust in some situations may save money by avoiding probate and, in the event you become incapacitated, conservatorship. If probate of an

estate is not necessary when assets consist only of payable-on-death accounts, transfer on death accounts, transfer on death deeds, and joint tenancy property, then little will be saved with a living trust. Furthermore, even if you become mentally incompetent, a living trust will not necessarily save money if your affairs can be handled through a durable power of attorney.

Legal and accounting fees to prepare and audit estate tax returns, as well as other tax and legal services (including sales of property) are generally the same for a living trust and for assets that are probated.

Trustees

Generally, you will serve as the initial trustee of your living trust. If husband and wife create a living trust, they serve as co-trustees. A living trust provides for successor trustees, named by you, to serve in the event of incapacity or death. A will with a testamentary trust only names trustees to serve after death because any trust contained in the will is not created until you die.

What Are the Advantages of a Living Trust?

- Lifetime management, including management during periods of incompetency, without court intervention.
- Privacy, as probate records are public.
- Probate is avoided and costs are generally lower after death. Routine probate-related legal services are avoided. Depending upon the complexity of the estate and the organization and adequacy of your records, such fees can be substantial, especially if you own property in more than one state.
- Time savings, as simple probate can take four to six months or more. Most routine work in a living trust can be accomplished in a few weeks after death.

What Are the Cautions Regarding the Preparation of Living Trusts?

- Often individuals encourage revocable living trusts to senior citizens through scare tactics. These tactics include statements that probate involves unusual attorneys fees and estate duration which are not part of the trust termination. Simple probate alternatives are available and in those

situations, the estate can be completed within a reasonably short time. Unusual situations occur in both estate and trust administration. Thus both probate of wills and trust termination can be subject to unusual expenses and time, particularly in challenging family disputes.

- Even if an attorney advertises an ability to practice law in trusts and estates, it is appropriate to inquire about the attorney's experience. The State Bar of New Mexico and its section on real property, probate, and trust (1-800-876-6227) can provide names of attorneys practicing law in trusts and estates, as well as names of those who are members of the Bar's section on real property, probate, and trust. Other resources include the American College of Trust and Estate Counsel (1-310-398-1888) and the National Academy of Elder Law Attorneys (1-520-881-4005).
- Some trust preparers have been known to charge a fee based upon the tax savings of the grantor (e.g., 1% of the potential estate tax savings). Other equally capable preparers may charge a fee based upon an hourly rate or based upon a flat-rate charge. Find out about the preparer's fee structure, and do not hesitate to compare the preparer's estimated fee, experience in trust and estate law, and service with other trust preparers.

What Are the Advantages of a Will?

- Although probate fees may be incurred at death, the cost of preparing a will is substantially less than a living trust.
- The estate may not need to be probated when an estate consists entirely of joint accounts, payable-on-death and transfer on death accounts, transfer on death deeds, and joint tenancy property.
- Probate should not be avoided in some estates. This is particularly true where claims or sizable lawsuits may be pending. Probate offers a statutory means to handle disputes among heirs and claims against an estate. It can also reduce the time for presentation of estate bills. These procedures are not available to the trustee of a living trust.
- Possible after-death income tax savings. If you are in a high income tax bracket and own assets that will continue to produce substantial income after death, probate may result in income tax savings because both the estate and any trust

created in the will are separate taxpayers and income can be split between them through proper planning.

Summary

A living trust may save money on an overall basis by avoiding probate, but costs more in legal fees at the beginning. A will is less expensive at the beginning, but may eventually cost more because of probate costs and fees. Both accomplish identical estate tax savings after death. Use of a living trust requires you to assign your assets to the trust during your lifetime through the use of assignments, new deeds, and re-registration of assets. This can become time consuming and expensive. A will avoids such lifetime assignments and associated costs, but incurs similar costs and additional probate costs at death. There is no general rule about which plan is best, and the choice turns on consideration of all the above aspects. Consultation with an attorney competent in estate planning will help you make the right decision. Further information may be obtained in New Mexico Cooperative Extension Service Guide G-255, *Do You Need a Will?*

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