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What you should know about.....



Living Trusts

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What is a living trust?

A *trust* exists when one person (often called the *grantor* or the *settlor*) gives property to another person (called the *trustee*) to hold and manage for one or more other persons (called the *beneficiaries*). Although no statute or regulation defines the phrase "living trust," it generally describes a trust that the grantor can amend (change) or revoke (cancel) during his or her lifetime. Through the terms of the living trust, the grantor keeps all the benefits of any property placed into it for the rest of his or her life. The grantor also can be the trustee, but the grantor's spouse or a trust company also often serves as trustee. A living trust can be funded with any property such as bank and brokerage accounts, stocks and bonds, a home and other real estate. Some living trusts may not be funded initially, but rather at a later time or at the grantor's death. An attorney can help advise when a trust should be funded and with what property. The terms of a trust are described in writing in a document often called the *declaration of trust* or *trust agreement*. This document is signed by both the grantor and the trustee.

Why should I consider incorporating a living trust into my estate plan?

You may wish to create a living trust to accomplish one or more purposes. First, you may wish to fund a living trust in order to *avoid probate*. If you, acting as grantor, register your property in the name of the trustee of a living trust, that property generally is neither probate property nor subject to the jurisdiction of the probate court after you die. Second, a trust can provide estate management for your family after your death. Finally, you may wish to create a trust to reduce or defer estate taxes. Before adopting a living trust, you should consult with an attorney.

What is probate?

When an Ohio resident dies owning probate property, a legal proceeding is begun (1) to determine the last valid will of the decedent, if any; (2) to determine the nature, extent and value of the decedent's assets that are subject to probate; (3) to establish the valid debts of the decedent; and (4) to establish the method of distribution of the assets to the heirs or beneficiaries of the decedent after payment of applicable debts, taxes and expenses. This proceeding is known as *probate*. A more detailed explanation of the probate process is available in the publication, "What you should know about . . . Probate," published by the Ohio State Bar Association.

Is use of a living trust the only way to avoid probate?

No. There are several other ways to avoid probate. For example, if you own assets jointly with one or more others who have rights of survivorship, those assets will pass by law to the survivor(s) when you die, and not be subject to probate. However, you should be careful before creating a joint account, because the joint tenant will have rights in the joint property as soon as you create the account. Payable-on-death (POD) bank accounts and any assets that are payable to beneficiaries according to a contract (such as proceeds from life insurance policies or pension benefits) will avoid probate, as will transfer-on-death (TOD) deeds for real estate or transfer-on-death registrations for securities and motor vehicles. You would be wise to consult with an attorney before structuring your property to avoid probate, because avoiding probate may not always be in your best interests.

Will I save estate taxes with a living trust, compared with a will?

Estate taxes are not based on the way in which assets are passed down to beneficiaries. Rather, they are based upon the value of the assets included in your estate, and to whom the assets pass. Generally, avoiding probate does not decrease the estate taxes that must be paid. Depending upon the terms of your living trust, will, or through the use of certain probate-avoidance techniques, estate taxes may be increased, decreased or deferred. You may save substantial tax dollars for your family's benefit by getting advice about how to use these documents and techniques.

Will having a living trust avoid challenges by my beneficiaries or heirs?

Disgruntled heirs or beneficiaries can challenge the validity of a living trust on legal grounds similar to those available for challenging a will. It may be alleged that a living trust is invalid because the grantor was incompetent at the time of establishing the trust or was unduly influenced by some person to establish the trust in a particular manner. Further, although the period for challenging the validity of a will can be limited to three months, a longer time period (usually two years) is allowed for challenging the validity of a living trust. The cost of defending the validity of a will, where the executor acts in good faith, is payable from the probate estate. Similarly, the cost of defending the validity of a trust would be paid from the trust assets.

What are the advantages of a living trust compared to probate?

Compared to probate, there are many differences, but also some similarities in the manner in which property is administered in a living trust following the death of a grantor. Among the characteristics of administration of a living trust that a person may find desirable are:

Privacy. The terms of a living trust are contained in a private document, while the terms of a will, including the names of the beneficiaries, become a matter of public record once the will has been filed with the probate court. In addition, other information filed with the court during the probate process, such as the inventory of assets and the

written account of all receipts and disbursements of the estate, also become matters of public record. The administration of a living trust generally is not made public.

Control. The absence of any requirements to file a will or any other reports with a court increases the independence and control of the trustee, relative to an executor.

Lower costs. Some publications make extravagant claims about the extent of the costs of the probate process. The typical components of cost in the probate process are:

- court costs;
- appraisal fees;
- executors' commissions; and
- attorney fees.

While court costs will vary with the activity in the estate, presently a typical cost range will be \$200-\$250. A living trust would not bear these costs.

Appraisal fees typically will be incurred in probate for real property, and may be incurred for property such as expensive artwork and interests in private companies. A living trust may or may not incur these costs. In Ohio, if a decedent's gross estate exceeds \$338,333, the estate must file an estate tax return. In order to accurately complete the estate tax returns, it will be necessary to appraise the value of the estate's assets. Appraisals also can establish the basis of estate property for federal income tax purposes.

Executors' commissions are set by state law and are based, generally, on a percentage of the value of the assets of the estate. At present, the commission varies between one and four percent of the value of the assets (combined with the income on those assets) depending on the nature, amount and title of the assets at death. However, spouses and other family members often act as executors and often waive any commissions. A trustee of a living trust also is entitled to a "reasonable" fee appropriate to the circumstances. Again, spouses and other family members who act as trustees often waive any such fees.

An executor may hire an attorney to assist in the administration of a probate estate. Similarly, a trustee may hire an attorney to assist in the administration of a living trust following the death of the grantor. If the terms of the living trust do not require the preparation of an inventory or the preparation of accounts, as typically they do not, the attorney fees generally will be lower for services to the trustee because time related to probate filings will not be incurred. However, the cost of attorney advice and services with regard to income tax and estate tax issues is likely to be equivalent whether provided to the executor of a will or to a trustee.

Speed of transfer. A trustee could begin making distributions of assets to beneficiaries moments after the death of the grantor. An executor cannot make distributions until he or she is appointed by the court after the will is admitted to probate, but this appointment generally occurs within days after death and, once appointed, the executor is legally empowered to distribute all the probate assets to the beneficiaries. However, it is not necessarily prudent for either a trustee or an executor to immediately distribute assets.

An executor may be personally liable for the claims of creditors left unpaid by the estate as well as any unpaid federal and Ohio estate taxes. Consequently, the executor generally will not make final distribution to the beneficiaries until the executor is satisfied that all valid claims have been paid and all estate taxes have been finally determined and paid. The trustee of a living trust also may be held personally liable for unpaid estate taxes and, in some circumstances, unpaid creditors.

Avoidance of multiple probate proceedings. Finally, if homes or other real property are owned in a number of different states, a living trust may be especially useful for avoiding separate probate proceedings in two or more states.

What are the disadvantages of a living trust compared to probate?

Lifetime effort. Implementation of a living trust is often more time consuming than establishing a will. The mere signing of a living trust agreement will not effectively avoid probate UNLESS the grantor's assets are re-registered, re-titled or otherwise validly transferred to the trustee of the living trust during the grantor's lifetime. Any assets acquired AFTER the living trust is created also must be transferred to the trustee. Otherwise, these after-acquired assets may be subject to the probate process.

Lifetime Costs. While a living trust may have cost advantages relative to probate following death, a will generally has cost advantages relative to a living trust during an individual's lifetime. The costs associated with creating a living trust generally are more than those for creating a will. The execution of a living trust does not replace the need for a will. A will generally names an executor to administer assets that were not transferred to the trust during the grantor's lifetime. Further, the will is the appropriate document to name guardians for minor children. In addition, there are costs incurred in properly transferring assets to the living trust during lifetime. If the trustee is not the grantor or a member of the grantor's family, periodic trustee fees usually will be incurred if the living trust is funded.

Absence of court review. Generally, the administration of a living trust will not be supervised by any probate court except in very unusual circumstances. While this avoids the paperwork burden and expense imposed by the probate process, persons creating a living trust should consider that the trustee they appoint will not be accountable to a judge for the honest and accurate distribution of assets unless a beneficiary were to bring a lawsuit.

Taxation disadvantages. The Internal Revenue Code has some provisions that are more beneficial to estates than to trusts, but living trusts can elect to be taxed like an estate for a limited period to eliminate these tax differences.

Will a living trust help me while I am living?

A living trust may provide a structure for the management of a person's assets. This structure could be particularly useful if the trustee has investment expertise, such as a trust company, or the trustee retains investment counsel. The asset management function of a living trust can become particularly important if the grantor becomes incompetent or is otherwise incapable of handling financial affairs. If a living trust is in place, it may not be necessary to have the court appoint a guardian for the grantor's estate. Even if this becomes necessary, the trustee of the living trust, rather than the court-appointed guardian, would continue to have authority over property owned by the trust. One way to help reduce the need for a court-appointed guardian is for the grantor to have a *durable financial power of attorney*. Through such a document, an individual (called the *principal*) gives another individual (the *attorney-in-fact* or *agent*) the power to manage his or her assets. For more information about financial powers of attorney, see the Ohio State Bar Association's publication, "What you should know about...Financial Powers of Attorney."

Will my living trust save income taxes while I'm alive?

No. For all income tax purposes, you, as the grantor of the living trust, will have to pay taxes on the income earned by the assets transferred to the living trust. In most cases, the trustee of a living trust uses the grantor's Social Security number for income tax reporting and need not obtain a separate tax identification number. Generally, the trustee of a living trust does not file annual tax returns during the grantor's lifetime.

Will a living trust protect my assets against creditors?

Creditors are entitled to reach the assets of a living trust during the grantor's lifetime. Creditors generally may reach the assets of any trust to the extent that the grantor can enforce his or her own rights to trust assets. Upon the death of the grantor, it is uncertain under Ohio law whether creditors of the grantor may enforce claims against a living trust. A surviving spouse may not have elective share (*forced inheritance*) rights against a living trust as would be available against probate assets.

Can I preserve assets in a living trust and still qualify for Medicaid?

No. The assets in a living trust are *countable resources* for purposes of Medicaid qualification. The assets in the living trust are treated just the same as if they were owned by the grantor.

If I decide a living trust may be right for me, how should I set one up?

If you believe that a living trust may be right for you or if you are not sure if a living trust is right for you, consult with an attorney who is knowledgeable in probate, estate planning and taxation. After gaining information about you, your family, and your

assets, and listening to your goals, your attorney will be able to discuss with you the best ways of achieving your goals and help you decide whether a living trust is best for you. To achieve the best results, the drafting of a trust agreement requires professional judgment.

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The information contained in this pamphlet is general and should not be applied to specific legal problems without first consulting your own attorney.

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