

QUESTIONS AND ANSWERS

How much should I own before it's worth it for me to have a living trust?

It's really not a matter of how much you own. Whether you are married or single, old or young, have a modest or substantial estate, just about everyone can benefit from a living trust.

A properly drafted, fully-funded living trust eliminates probate costs and depending on the size of your estate, it can also reduce federal estate taxes. So the larger your estate, the more money a living trust can save your family. Additionally, a smaller estate will usually lose a greater percentage of its value of your estate – it's slow, your family has neither privacy nor control, and it can easily be contested.

And many people are just as interested in protecting themselves against probate while they are still alive. Becoming physically or mentally incapacitated and losing control of their lives is a real concern of millions of older Americans – and of those who will care for them. Having a living trust prevents a court conservatorship if this happens. And that's usually reason enough for many people to have a living trust regardless of the size of their estate.

Are all Living Trust documents the same?

No. Although, in concept, all living trusts generally work the same way and contain the same basic provisions, the actual trust documents will vary from attorney to attorney. Although there are standardized trust forms, most attorneys use these only as a starting point to write his or her own.

When I get a living trust, have I finished my estate planning?

Not necessarily. Depending on the size of your estate, your family and financial situation, you need to review your plan periodically. If you have selected a qualified estate planning attorney to do your living trust, he or she should review your plan with you whenever important changes occur and recommend some options for you to consider.

You should change your living trust any time it no longer is what you want. Any major change in your family – such as marriage, divorce, death, adoption, birth, etc. – should cause you to think about your trust. If one of your Successor trustees or guardians for your minor children can no longer fulfill.

His or her responsibilities (because of a move away, become ill or die, or change his or her mind), you should replace them. It is a good idea to review your living trust at least every year.

When you do need to change something in your trust document, *do not write on the original document*. Once you have signed the trust document and it has been notarized, it must not be altered. Your attorney will need to prepare an amendment to your trust that will be signed by you and notarized.

Do I lose control of my property if I put it in a trust?

No. You keep full control over your property. You can do everything you could do before – buy and sell property as Trustee, make changes, even cancel your trust at any time. Even if you name someone else as trustee, you can replace them at any time (as long as you are alive and legally competent).

Will putting my real property into a living trust cause a reassessment of the property?

In most states, Illinois being one of them, changing the title of your property into the name of your trust will not cause it to be reassessed or disturb the current mortgage in any way. This is because you are not selling the property, you are merely correcting or amending the title.

What do I do with my IRA and other retirement plans?

Your trust can not be the owner of your IRA (because that would disturb its tax-deferred status), but it can be the beneficiary. However, if you are married, there may be valid tax reasons for you to name your spouse as primary beneficiary and your living trust as contingent beneficiary. This idea also applies to other tax-deferred savings you may have, such as a 401(k) plan, Keogh plan, and other savings/retirement plans provided by your employer.

Here is why. Because these are tax-deferred plans, you did not pay income tax on this money when it was deposited. The income taxes are deferred until you withdraw the money at a later time—ideally, at your retirement when your income (and therefore your tax bracket) is lower. So, sooner or later, these income taxes will have to be paid.

If your spouse is the beneficiary, when you die, he or she will have several options on how to receive this money. If, for example, the distribution is to be received in a “lump sum,” your spouse can “roll over” the proceeds into his or her own IRA, further delaying payment of taxes until age 70 ½. But with this option, you risk probate if your spouse is disabled when you die...or if you both should die at the same time.

If on the other hand, your trust is the secondary or contingent beneficiary, you do not run the risk of having these proceeds probated. But the income taxes must be paid when the proceeds are paid to your trust (upon your death). However, proceeds paid from a “qualified” plan (such as Keogh or company sponsored retirement plan), may qualify for special tax treatment known as five-year or ten-year averaging, which can reduce your tax liability.

Some people prefer that this money be available for the surviving spouse immediately upon the death of the first, and decide to make their trust the primary beneficiary, even though the income taxes will have to be paid at that time instead of later. If you decide to name your spouse as primary beneficiary, you should name your trust as secondary beneficiary. Of course, this is something you and your spouse should discuss together and with your personal tax advisor.

Who transfers the property into my living trust?

Our office will prepare a deed to transfer the title of your home to your living trust as part of the basic fee. Usually, for an additional fee, the attorney will change other titles for you. If your attorney does not provide this service, he or she should, at least, provide you with instructions and assistance when needed. In any event, you are responsible for making sure all titles and appropriate beneficiary designations are changed to your living trust.

When I put my home in a living trust, do I lose the one time \$225,000/\$500,000 capital gains exemption?

No. It does not matter whether you or your trust owns your home – you are still qualified for the onetime capital gains tax exemption when you sell your home.

When I transfer my bank and savings accounts to a living trust are they still insured?

Yes. Any account you have at an institution which is insured by the FSIC will continue to be insured when you change the title to your living trust.

Do I have to have my attorney amend my trust if I buy and sell property?

No. If you sell any property that is in your trust’s name, you just need to sign the deed as the trustee of your trust. If you buy any new property, you just need to title the property in the name of the trust.

What if I buy property in another state?

Before you buy property in another state (especially real estate), check to make sure it can be titled the same way as your trust property in your home state. A bank or title insurance company in the state where the property is located can usually tell you if the title you want to use is acceptable in that state.

Do I need to give a copy of my trust to anyone?

No. If you want to, you can give a copy to each of your successor trustees so he or she will be familiar with the document. (Make sure you tell them where the original documents are located). But you do not need to give a copy to anyone or file it anywhere for it to be effective. Your banker or investment broker may, however, ask to see a copy of your trust when you change titles on your accounts.

What about adding another person on my account of deeds after I set up my trust?

NEVER add another person (including your parents or children) on the titles of your property or accounts – unless, of course, this person is your co-trustee – without first checking with your attorney. It could cause you and your family some very serious problems – possibly even defeating the purpose of your trust, or exposing you to a lawsuit.

Who decides if I am physically or mentally incapacitated enough for my backup trustee to take over?

Actually, you do, when you set up your trust. Your trust will specify how many and what kind of doctors need to examine you and verify your capacity to manage your business affairs. This can be as stringent or as lenient as you want to make it. For, example, you may require only a statement from your family doctor, additional concurring statements from one or more specialists; or an objective second or third opinion from an M.D. You can also list the doctors by name (this prevents any kind of “conspiracy” by relatives to have you declared incompetent by doctors who do not know you).

Does a living trust protect my assets from my creditors?

No, a living trust does not shield your assets from creditors.

I am a professional and, since I could be sued for malpractice, I have heard I should have a Will instead of a living trust. Is this true?

No, you can and should have a living trust. You probably heard you should have a Will because the probate limits the time a creditor has to present a claim against an estate. In some states now, a living trust can also do this. If this isn't the case where you live, the trustee of your trust can also do this. But if this is not the case where you live, the trustee of your trust can simply open a probate file when you die to see if any creditors have claims to present. If they do, then your trustee would transfer out of our living trust just enough assets to satisfy the claim – the remainder of your assets would stay in your living trust and be protected from probate.

My tax accountant says I have to use a separate tax identification number and file a separate income tax return for my living trust. Is this true?

No, not for a living trust while it remains revocable.

A living trust is a trust that is created while you are living. And there are two kinds of living trusts – a revocable living trust (which can be changed or canceled at any time) and an irrevocable living trust (which cannot be changed once the document has been signed, such as a life insurance trust or a charitable remainder trust).

Because the IRS considers an irrevocable living trust to be a separate entity from the person who sets up the trust, it does require a separate tax identification number and a separate tax return. However, because a revocable living trust can be changed or canceled by the grantor at any time, it does not have to meet the same requirements as an irrevocable trust.

If you are married, as long as you and your spouse are the grantors of your revocable living trust, at least one of you is a trustee or co-trustee, and you file a joint income tax return, you do not need to file a separate tax return or have a separate tax identification number. You simply continue to use your social security number as the tax identification number (just as you have in the past) and you continue to file your regular joint income tax return. If you have a A-B (or an A-B-C) living trust, when one spouse dies Trust B (and Trust C) become irrevocable. So, then a separate tax identification number and tax return will be required for that irrevocable Trust.

How do I know Congress will not eliminate Living Trust?

It is possible, but not likely. Remember, living trusts have been around, in one form or another, for hundreds of years. Neither the state nor the federal governments receive income from probate, so there is no incentive for either to eliminate living trusts and make people go through probate. In fact, the states have every reason to encourage living trusts as a way to reduce the already overloaded probate court dockets.

However, estate taxes are a source of revenue for the federal government, so it is more likely that Congress will change the amount of the federal tax exemption. That would be unfortunate, but would make living trusts even more popular because more people with smaller estates would benefit from federal estate tax planning with an A-B living trust.