

Revocable Living Trusts

The Missouri Bar

What is A Revocable Trust?

A trust is an agreement that determines how a person's property is to be managed and distributed during his or her lifetime and also upon death.

A revocable living trust normally involves three parties:

The Settlor – Also called grantor or trustor, this is the person who creates the trust, and usually the only person who provides funding for the trust. More than one person can be a settlor of a trust, such as when a husband and wife join together to create a family trust.

The Trustee – This is the person who holds title to the trust property and manages it according to the terms of the trust. The settlor often serves as trustee during his or her lifetime, and another person or a corporate trust company is named to serve as successor trustee after the settlor's death or if the settlor is unable to continue serving for any reason.

The Beneficiary – This is the person or entity that will receive the income or principal from the trust. This can be the settlor (and the settlor's spouse) during his or her lifetime and the settlor's children (or anyone else or a charity the settlor chooses to name) after the settlor's death.

A trust is classified as a "living" trust when it is established during the settlor's lifetime and as a "revocable" trust when the settlor has reserved the right to amend or revoke the trust during his or her lifetime.

How is a Revocable Living Trust Created?

There are two basic steps in creating a revocable living trust. First, an attorney prepares a legal document called a "trust agreement" or a "declaration of trust" or an "indenture of trust" which is signed by the settlor and the trustee. Secondly, the settlor transfers property to the trustee to be held for the benefit of the beneficiary named in the trust document.

Can a Revocable Living Trust be Changed or Revoked?

Yes. The settlor ordinarily reserves the right in the trust document to amend or revoke the trust at any time during his or her lifetime. This enables the settlor to revise the trust (or even terminate the trust) to take into account any change of circumstances such as marriage, divorce, death, disability or even a "change of mind." It also gives the settlor the peace of mind that he can "undo" what he has done. Upon the death of the settlor, most revocable living trusts become irrevocable and no changes are then allowed (with some exceptions) to save taxes or improve administration. Sometimes the trust becomes irrevocable after the death of a spouse if the trust was jointly created by a married couple.

Is a Revocable Living Trust an Adequate Substitute for a Will?

No! A revocable living trust may be considered the principal document in an estate plan, but a will should accompany a revocable living trust. This type of will, referred to as a “pour over” will, names the revocable living trust as the principal beneficiary. Thus, any property which the settlor failed to transfer to the trust during his or her lifetime is added to the trust upon the settlor’s death and distributed to (or held for the benefit of) the beneficiary according to the trust instructions.

The settlor may not be able to transfer all desired property to a revocable living trust during the settlor’s lifetime. For example, the probate estate of a person who dies as a result of an auto accident may be entitled to any insurance settlement proceeds. These settlement proceeds can only be transferred from the estate to the trust pursuant to the terms of a will. Without a will, the proceeds would be distributed to the heirs under the Missouri laws of descent and distribution.

Also, a parent cannot nominate a guardian for minor children in a revocable living trust. This can be accomplished only in a will.

Will a Revocable Living Trust Avoid Probate Expenses?

Property held in a revocable living trust at the time of the settlor’s death is not subject to probate administration. Thus, the value of the property is not considered when computing the statutory fee for the personal representative or the estate attorney. Also, the amount of any required bond for the personal representative will be reduced to the extent the property is held in the trust and not subject to probate administration.

Nevertheless, certain expenses associated with the death of a person are not eliminated. Trustees are paid for their work unless they waive their fees. Deeds to real estate transferring the property from the trust to the beneficiaries must be prepared. Estate tax returns must be filed when the total value of the property owned at death (including assets in a revocable living trust) exceeds a certain value. The decedent’s final income tax returns must still be filed and income tax returns for the trust must also be filed. Trustees often seek assistance and advice from attorneys who charge fees.

What Are Some of the Advantages of a Revocable Living Trust?

In addition to the savings in probate expenses, the avoidance of probate administration has other advantages. The administration of a revocable living trust at the settlor’s death is normally a private matter between the trustee and the beneficiaries. Unlike probate, there are few public records to reveal the nature or amount of assets or the identity of any beneficiary.

Property can often be distributed to the beneficiaries shortly after the settlor’s death, avoiding much of the delay encountered with probate administration. Also, probate court approval is not necessary to sell an asset in a trust, thus avoiding further delay.

In addition to the avoidance of probate administration in Missouri, “ancillary” probate administration in other states where real estate is owned can be avoided by transferring the out-of-state real estate to a revocable living trust. For those owning real estate in several states, this can be a significant advantage.

Real estate, businesses, and other assets can continue to be actively managed by a successor trustee in central administration in much the same way as a settlor would have done before the settlor died or became incapacitated. For example, a trustee can use trust assets to pay utility bills to keep the pipes from freezing, property maintenance expenses, and real estate taxes until real estate is sold or distributed. The trustee might work out property distribution issues, such as some beneficiaries wanting the real estate while others want

money.

What Are Some of the Disadvantages of a Revocable Living Trust?

Since a revocable living trust is a more complex legal document that must be funded by changing property titles while the settlor is alive, it is more costly to establish than a will, which can have higher expenses after death. Also, accounts need to be retitled, deeds and other transfer documents must be prepared transferring the settlor's assets to the trust, and beneficiary designations need to be changed to the trust— all processes which can require a substantial investment of the settlor's time. The use of a revocable living trust requires more ongoing monitoring to ensure that assets remain in the trust and that newly-purchased assets are titled in the trust. For example, a settlor who moves a certificate of deposit (perhaps to obtain a better interest rate) must remember to advise the new institution to title the new account in the trust.

After the settlor's death, some of the income tax rules applicable to a trust are not as liberal as those available to a probate estate. For example, a probate estate may elect to use a fiscal year as its tax year, while a trust is restricted to the calendar year. Trusts must pay estimated income tax payments while a probate estate is exempt from this requirement for the first two years. Trusts are also subject to other tax rules that do not apply to probate estates.

Who Can Serve as Trustee?

If the settlor becomes physically or mentally incapacitated, property held in this trust remains available to the settlor without the requirement of a court-supervised conservatorship. The successor trustee named in the trust document takes charge to manage the assets in the trust and pay the settlor's bills.

The successor trustee can be a trusted relative or friend, or can be a professional trustee such as a trust company or the trust department of a bank. Missouri law does not require an individual serving as successor trustee to be a Missouri resident. However, certain restrictions apply to banks or trust companies whose principal place of business is located outside the state of Missouri. Since the activities of the successor trustee are not ordinarily supervised by a court or other independent third party, the selection of the successor trustee should be carefully considered.

The settlor is not limited to naming only one trustee. Two or more individuals may be named to serve as co-trustees or a combination of individuals and a corporate trustee may be named. If more than one is named, care should be taken to designate who can pay the usual, ordinary expenses without having to take the time and expense of requiring more than one signature.

If an individual is to serve as successor trustee, the settlor should consider whether the trustee is to be bonded. The settlor's decision should be clearly stated in the trust document. If a bond is required, the bond premium is normally paid by the trustee from the assets in the trust.

Is a General Durable Power of Attorney or an Advance Directive Still Needed?

Although the function of a general durable power of attorney is beyond the scope of this brochure, a settlor of a revocable living trust should also consider establishing a general durable power of attorney to accomplish objectives which cannot be attained with a trust and to complement what is accomplished by a trust. An "advance directive," usually used with a durable power of attorney for health care, has an entirely different function from a revocable living trust and the two should not be confused. Whether a person has a trust ordinarily has no bearing on the decision to have (or not to have) an advance directive. Care should be taken,

however, to require the trustee to pay for medical expenses for an incapacitated settlor if necessary.

Does the Revocable Living Trust Reduce Income Taxes or Estate Taxes?

During the settlor's lifetime, the revocable living trust usually has no effect on the income tax which the settlor will owe. In fact, if the settlor is the trustee or a co-trustee, all income earned on assets held in the revocable trust is reported directly on the settlor's income tax return using the settlor's Social Security number, and the trust is not required to file a return. After the death of one or both settlors, the trust must have its own separate tax identification number and is taxed at the same rate as a probate estate.

Regarding the estate tax, proper planning can often reduce the amount of tax payable upon the settlor's death. For the most part, estate tax planning can be equally accomplished through proper drafting in a will, a revocable living trust, or through the use of other legal devices such as disclaimers. However, there are minor differences. For instance, under current tax rules, a lifetime gift of an amount over the annual exclusion amount directly from a living trust to a donee may be subject to estate tax if the settlor dies within three years of making the gift. This three-year rule does not apply to gifts made directly from an individual to a donee.

Who Can Be the Trustee?

A settlor who desires to manage his or her own financial affairs and who is physically and mentally able can (and ordinarily should) serve initially as trustee. But provisions should be made in the trust for a successor trustee to take charge if the settlor becomes unable to continue for any reason and when the settlor dies. Or, the settlor may simply desire to make someone else responsible for managing assets, whether temporarily or permanently, by resigning or naming another initial trustee.

The Trustee's Duty to Inform

The trustee of a revocable trust does not have to tell future beneficiaries about the trust, what is in it, or how it is administered.

If a trust is irrevocable or when a revocable trust becomes irrevocable, usually because the settlor dies or becomes incapacitated, beneficiaries have certain rights based upon their beneficial interests set out in the trust. The trustee of an irrevocable trust must give the current and future beneficiaries information for them to protect their interests. They must be told about the existence of the trust, the name and address of the beneficiary, and that a copy of the trust will be given to a beneficiary who requests a copy. The trustee must report the property in the trust at the time the trust became irrevocable, as well as the income and disbursements from it and the balance, at least once per year.

Who Can Advise You About a Revocable Living Trust?

You should never sign a revocable living trust document without the advice of a Missouri attorney who practices in this field of law. He or she will be able to advise if a revocable living trust is right for you.

Who Can Draft a Trust to Meet Your Needs?

Only a lawyer can write a trust that you can be sure will be legal. There are many pitfalls and, if proper technical language is not used, certain distributions or the entire trust may become unenforceable. What you put in the trust should be carefully thought out with your attorney's help because it may be too late to change it after you die or become incapacitated.

You should find a lawyer who practices estate planning law. Ask the lawyer how much the fee will be to write the trust.

If you need help finding a lawyer, The Missouri Bar offers a free Lawyer Search function, located at MissouriLawyersHelp.org. Those seeking representation can use the tool to locate lawyers by practice area, geographic location, and spoken language.

The Missouri Bar or the Office of Chief Disciplinary Counsel cannot provide legal advice or refer you to an attorney, but select local bar associations in Missouri offer assistance in finding representation. The Office of Chief Disciplinary Counsel does not screen the attorneys who are affiliated with these lawyer referral services, and OCDC does not have information on their credentials or abilities. If you would like a referral to an attorney in the St. Louis area, call (314) 621-6681. For a referral to an attorney in the Springfield or Greene County area, call (417) 831-2783.

Hiring a legal professional can be costly, but it is important to remember that you are paying for expertise. If you are unable to afford a lawyer, it might be possible to be represented at a lower rate or on a pro bono basis. In these situations, your quality of representation should not decrease, but your out-of-pocket costs will. The Missouri Bar does not match members of the public with pro bono lawyers, but it maintains a list of available discounted services, which is available at MissouriLawyersHelp.org.

Additionally, some matters, such as an uncontested divorce or traffic ticket, may not call for a lawyer at all. The Missouri Bar produces numerous brochures and blog posts – all available at MissouriLawyersHelp.org – that address general legal questions. While they are not a substitute for a hired lawyer, they are helpful for background information on matters and can help you decide if you need to seek representation.

For more information, go to MissouriLawyersHelp.org or call 573-635-4128.

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