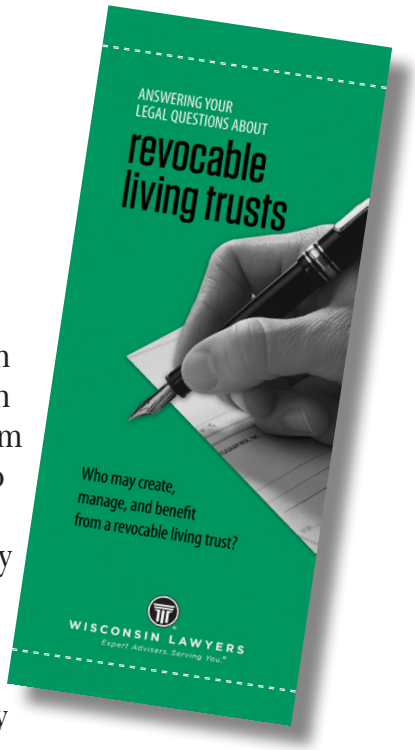
Answering your legal questions about revocable living trusts



Who may create, manage, and benefit from a revocable living trust?

If you were to die or become disabled, you'd want your dependents to be financially secure. And you'd want someone to manage or distribute your assets just as you would yourself, if you could. The only way to assure these outcomes is to do estate planning.

A revocable living trust is one of several estate-planning tools. You can read about others in the State Bar of Wisconsin's pamphlet, "Wills/Estate Planning: Answering Your Legal Questions."

Should a revocable living trust be part of your estate plan? No simple guidelines exist to answer that question. People with various levels of wealth and in different circumstances may, or may not, find a revocable living trust useful.

Your legal or financial adviser can help you decide whether this option is right for you. This pamphlet answers several questions to provide you basic information.

This pamphlet, which is based on Wisconsin law, is issued to inform and not to advise. No person should ever apply or interpret any law without the aid of a trained expert who knows the facts, because the facts may change the application of the law. Last revised: 10/2014

What is a revocable living trust?

A trust is a written document that names someone to be responsible for managing property for the benefit of others. A revocable living trust (also called a "living trust" or "revocable trust") is one type of trust.

It's a "living" trust because you create it while you're alive. It's "revocable" because, as long as you're mentally competent, you can change or end the trust at any time, for any reason. You need no one's permission to do so unless you have created a joint trust with your spouse. In Wisconsin, a trust is revocable unless it specifically states it is irrevocable in the trust document. Usually a living revocable trust becomes irrevocable (not open to changes) when you die.

A trust involves three parties:

- The *settlor* or *grantor* is you, the person who creates the trust.
- The *trustee* is the person who agrees to accept your property and manage it as the trust agreement directs. You can name more than one trustee, thus creating co-trustees who must act together. Usually you are the trustee during your lifetime.
- The *beneficiaries* are those who will receive the income from the property in the trust and, with your direction, the property itself.

Who can be the trustee?

Any competent adult may be a trustee. Usually, you name yourself, or you and your spouse, as the trustee because you want full control of the property while you're alive. Some people, however, select a friend, relative, or qualified corporation (one to which the state has given trust powers) to serve as trustee.

If you choose one individual as a trustee, you also should name a *successor trustee* (a second person or a corporate trustee). This party can act if the first trustee dies or is unable or unwilling to continue as trustee.

Anyone you select as trustee should have the proper training and qualifications to carry out the trustee duties. These include managing the property, paying out income from the trust to beneficiaries, filing state and federal tax returns, and distributing property to beneficiaries after you die.

Who can be a beneficiary?

When you set up a revocable living trust, you usually name yourself as the first beneficiary. If you're married, you might decide to name both you and your spouse as first beneficiaries. The trust also must specify who will receive your property after you die. This makes it clear to the trustee how you want your property distributed.

How and when do I fund a revocable living trust?

You need not put anything substantial into the trust when you set it up. Some people put only a small dollar amount (say $10) into a trust initially. This is known as an "unfunded" trust. It's intended for future use, such as during old age or in case of disability. Until then the trust remains essentially empty, but it is in place if you wish to add more to it. You might use an unfunded trust as an alternative to a future guardianship or conservatorship.

When you decide to add substantial property to your trust, it becomes funded. From then on, the trustee has duties to perform. Some people put all or most of their property into the trust in the beginning. Others put in some property at first and add more from time to time – for instance, when a certificate of deposit matures. Still others set up a trust so that much of their property gets transferred only after they die. To accomplish this, you'd use a simple will called a *pour-over will*. It funds the trust with any property you didn't put into the trust during your lifetime. To avoid probate, most people fund the trust during their lifetime or designate the trust as the beneficiary of their assets.

How does a revocable living trust differ from a will and a living will?

Both a *will* and a *living trust* enable you to provide for your beneficiaries and direct how your property will be distributed after you die. A will is a probate document, while a trust is a nonprobate vehicle. With a living trust, you turn over some or all of your property to the trustee to manage while you're alive. With a will, you keep your property and manage it yourself while you're alive. A living trust also lets you do something a will can't do: Spell out how you want your property managed if you become disabled during your lifetime. Finally, a *living will* is a completely different type of document. In it you state your preferences about life-prolonging medical treatment and procedures.

What can a revocable living trust do?

It can:

• **provide financial management of your property** – You may act as trustee at first and later decide you no longer wish to do so. A trustee or successor trustee you've selected can take over the day-to-day property management. Expect to pay this person a reasonable fee.

• **provide property management if you can't manage your affairs** – If you become too ill or disabled to manage your property, your trustee or successor trustee will do this for you. With no trust in place, you may need a guardianship or conservatorship if you also do not have powers of attorney. You avoid the trouble and expense of setting up such arrangements if you have a properly funded living trust. If your trust is unfunded when you become disabled, you'll need to have given someone a durable power of attorney to enable that person to transfer your property into the trust (more on this later).

• **provide for minor children when you die** – In a living trust, you can make all the provisions for your spouse and children that you can in a will, except naming guardians for minor children.

• **avoid probate** – Property in your revocable living trust doesn't go through probate after your death. (See the State Bar of Wisconsin's pamphlet, "Probate: Answering Your Legal Questions.") If, however, you die leaving property that never got transferred to the trust, probate usually will be required. Also, if you own land in another state, probate may be necessary in that state to transfer the land to your heirs. But putting that land in the trust may avoid probate in the other state, too.

One advantage of avoiding probate is confidentiality. A living trust doesn't become part of the public record, unless a trustee or beneficiary insists on court approval of accounts. Probate records, on the other hand, are open to the public. A living trust also avoids the probate filing fee.

• **shorten or eliminate delays in distributing your property to beneficiaries** – This is another advantage of avoiding probate. The probate process may delay property distribution. With a trust, your trustee may be able to distribute property to your beneficiaries sooner. This is because, unlike probate, a living trust operates without court supervsion – unless someone requests such supervision. Still, even with a living trust, outstanding taxes or claims that you owe money could delay property distribution.

What can't a revocable living trust do?

A revocable living trust:

• **can't save you income taxes** – Because you can end a revocable living trust at any time, the state and federal governments view any income the trust earns as your income. Usually the trustee pays you all the income, as well as any amount of principal necessary to provide for your needs. If you become disabled, the trustee pays necessary amounts of income and principal for your benefit.

• **won't reduce estate and other death taxes more than any other estate-planning tool** – Property in your trust at the time of your death will be part of your taxable estate. Your estate may need to pay some taxes if, at the time of your death, you held property ownership interest with a net value above a certain amount. For the federal estate tax for 2014, that amount is $5.34 million per person and is indexed to inflation. You may be able to reduce or avoid these taxes through some type of trust or a will.

• **won't completely eliminate costs associated with probate** – You have to pay the trustee or someone to prepare documents, file tax returns, transfer property, and so on, unless you have a savvy family member or friend who will serve as trustee at no cost. These costs are similar to

what a personal representative would have in managing the probate of your estate, not including the probate filing fee.

• **doesn't protect against creditors' claims after you die** – One advantage of probate is that creditors' claim periods expire a short time after your death. To be able to collect, a creditor must make a claim within four months after probate begins. This guarantees beneficiaries they'll get the property, with no worry that later they'll have to pay creditors for old bills. If you use a trust and your estate thus avoids probate, your beneficiaries will have no such protection unless they publish an appropriate notice.

• **doesn't eliminate the need for a will** – You may have property that never got transferred to your trust. You'd need a will to transfer that property to your trust after your death (the pour-over will mentioned earlier). Also, your estate might receive money after your death, such as a settlement from a wrongful death action. You'd need a will to transfer this money to your trust. You also need a will to appoint a guardian for minor children.

• **doesn't eliminate the possible need for a durable power of attorney** – You may become unable to manage your property before you've transferred all of it into your trust. If so, the person you appointed with a durable power of attorney – your agent – could do this for you. The trustee, however, can make decisions only about property already in the trust. Your agent also can take care of taxes, health benefits, living expenses, and other matters. If you haven't used a durable power of attorney to name an agent, the court appoints a guardian to make these decisions. (To learn more, see the State Bar of Wisconsin's pamphlet, "Wills/Estate Planning: Answering Your Legal Questions.")

• **won't help you avoid nursing home costs** – The property in a living trust still belongs to you because you can take it back anytime. Thus, it will be included in calculations of your eligibility for Medicaid, which helps pay for nursing home care and provides other benefits.

Can there be court supervision of a revocable living trust?

Yes. Usually people prefer the informality of operating the trust without court supervision. But a trustee or beneficiary can ask a court to get involved. The court could review the trustee's decisions or supervise the trustee in accounting matters, property management, or general fairness issues.

Should I have an attorney prepare my trust?

Both an experienced attorney and a financial adviser can offer personalized advice; however, a financial advisor is not allowed to draft the trust. An attorney is able to draft the legal documents necessary to accomplish your wishes and goals. Do-it-yourself kits and formbooks are available, but these tend to take a one-size-fits-all approach, rather than meeting your unique needs, and do not address Wisconsin-specific issues such as marital property concerns.

The do-it-yourself materials are cheaper than hiring an attorney. But if the trust isn't tailored to your needs or if the documents are poorly prepared, major problems and big costs may arise later. Often you'll come out ahead by paying more to have it done right in the first place.

What about "special offers" I see advertised?

Proceed with caution. Scam artists try to take advantage of vulnerable people's fears about what will happen to their estates. Some unscrupulous businesses sell revocable living trusts, even if unneeded, to gain access to your private financial information. Then they try to sell you other financial products.

Beware of anyone who calls to offer an in-home appointment to explain why a living trust is right for you. Immediately walk away from anyone who tries to pressure you into buying a trust. Take your time to be certain you're getting what you want and need.

If you have questions or complaints about a trust you purchased or were asked to purchase, contact the State Bar Unauthorized Practice of Law Committee.

This is one in a series of consumer information pamphlets published by the State Bar of Wisconsin. Bulk print copies and display racks also are available, for a charge, by contacting the State Bar of Wisconsin.

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