LIVING TRUSTS: WEIGHING THE BENEFITS

ZIMMER LAW FIRM
Estate Planning & Elder Law
DELIVERING PEACE OF MIND SINCE 1993

LIVING TRUSTS:
WEIGHING THE BENEFITS

BY
BARRY H. ZIMMER
ATTORNEY AT LAW
ZIMMER LAW FIRM
9825 KENWOOD ROAD, SUITE 201
CINCINNATI, OH 45242
513.721.1513
© COPYRIGHT 2014 ALL RIGHTS RESERVED

WHY A LIVING TRUST?

Chances are, you've already heard a lot about the attributes of Living Trusts in general: avoiding probate and legal quagmires; including stipulations and conditions for receiving inheritances that may include timing; lowering estate taxes; and protecting privacy. But there is no single, universally applicable factor to test whether a Trust is best for you. Every person's circumstances are different. It is important to seek solid estate planning guidance before making final decisions, and to carefully weigh the benefits and potential drawbacks of any estate planning strategy.

However, it does not take much investigation to realize that Trusts are truly the workhorse of estate planning. The funded, Revocable Living Trust is the most popular type of Trust. It was once a tool only for the mega-wealthy. But in the last 20 years or so, it has replaced the Simple Will as the basic estate planning tool of choice. Americans of all walks of life -- from Seniors to Baby Boomers, millionaire retirees to young families – plan their estates based on the funded, Revocable Living Trust. The reason why is plain to see.

There is no other strategy that can offer as much flexibility and meet as many diverse needs and goals as the Living Trust. The purpose of this Report is to survey those benefits and examine the pros and cons of planning with the funded Revocable Living Trust compared to a Simple Will, which was the traditionally favored choice until recent times.

AVOIDING THE DRAWBACKS OF PROBATE

Among the most popular benefits of a Living Trust is the avoidance of probate. Probate is the process required when a person dies with a Will and owns assets in his personal name or payable to his estate. The Death Probate process is required in order to authorize the Executor named in the Will to carry out the directions left in the Will by the Willmaker. Until the Probate process is commenced and the Will is accepted by the Probate Court, it is a useless document.

Dying without a Will does not beat the system. If you do not have a Will, the State makes a Will for you under statutes called the Law of Intestate Succession. (The term "intestate" means "no Will.") In such a case, state law says who inherits and how much they receive,

as well as who will be in charge of the estate as the Administrator. Your personal wishes are irrelevant. The entire process is controlled by the Probate Court. It is just like a Probate under a Will, but often a bit more complex.

The general complaints about Wills is that the Probate process is lengthy, complex, and open to the public. Simple Wills, which are the most common type, are limited in functionality. They release assets outright at the conclusion of the Probate process and do not offer customized inheritance planning, stipulations, conditions, or deferred distributions. They cannot save estate or inheritance taxes.

Let's discuss these factors in a bit more depth and how a Living Trust compares.

The Living Trust takes the place of a Will in the estate plan. It specifies who inherits, how much they receive, and when they will receive it, just like a Will does. For example, a Living Trust allows a deferred inheritance or one payable on an "installment plan" basis, if desired to accomplish special goals. A common application of this feature is to hold an inheritance in Trust until a child reaches an age that he or she can complete a college education. At that time, the inheritance is released either all at once or in stages. This type of planning allows management of an inheritance by a mature, responsible adult of the Trustmaker's choice, who releases money for good purposes such as college or other needs of the beneficiary, and then gives the beneficiary the full inheritance at the pre-ordained time. A Simple Will, the traditional planning tool, does not offer such benefits.

A Living Trust can also be designed to carry out other goals and values of the Trustmaker for his or her loved ones after they are gone. This is done by establishing stipulations, conditions, or limitations on the timing, extent, or purpose of distributions to heirs. A Simple Will merely releases money and assets to the heirs at the conclusion of the probate process, with no deferrals, stipulations, or conditions that are designed to meet family circumstances and needs.

The primary purpose of Probate is to pass assets from a deceased person to the living heirs. A properly established and funded Living Trust takes the place of a Will and performs the same job, but without the baggage of Probate. The property is instead administered and distributed by the Trustee, according to the specific terms of the Trust, and in accordance with a well-established body of law called the Law of Fiduciary Responsibility. It is done privately, without the intrusion of the legal system and its resulting costs, delays and hassles. However, the courts are available to enforce the rules if needed, thus offering the best of both techniques.

Keeping an estate out of the Probate system by replacing a Simple Will with a Living Trust saves the expensive costs of Probate. Costs vary according to size of the estate and what it includes. It also varies by state and even locality. Some states have very expensive and onerous procedures, while others offer a streamlined version of Probate. A study by the American Association of Retired Persons (AARP) in 1990 estimated Probate averages 10% of an estate on a national basis. The *Wall Street Journal* once reported a 7.4% national average. Ohio law establishes a schedule for Executor fees in Probate that is often used as a guideline for paying Probate lawyer fees as well: 4% of the first $100,000 of estate

The following paragraph is required by the Internal Revenue Service on publications that include tax advice:

"This communication may not be used as a reliance opinion and is not intended or written to be used, and cannot be used, by you for the purpose of avoiding penalties that may be imposed on you by the Internal Revenue Service."

assets, 3% of the next $300,000, and 2% of the remainder.[1] These guideline fees are neither a minimum nor a maximum, but are deemed by the courts to be "reasonable" and therefore allowable. The guidelines may vary from county to county. For Ohio residents there is a short-form probate that is less costly than a full-blown Probate, but it requires very little in asset value to exceed the ceilings on the short form Probate.

Avoiding Probate with a Living Trust means not only avoiding hassle and expense, but also saving time. Probate can extend the amount of time before an heir receives an inheritance by several months or longer after an individual's death, especially if the Will is contested. Not only can this create hardship for the heirs, but the property in the estate may also suffer. Some assets must be carefully managed to preserve and enhance their value. Losses may easily occur during this interim period, especially if the decedent's assets include a business or commercial real estate such as a farm. Investment opportunities may be lost, as security of assets takes the primary focus instead of growth.

Under a Living Trust, the assets are available to the Trust beneficiaries immediately after the simple paperwork is done to formalize the Trustee's appointment. When the surviving spouse is an Initial Co-Trustee with the deceased spouse, there is no delay. When the deceased Trustor is not married, a Co-Trustee can manage and distribute assets immediately as well. If an unmarried Trustmaker does not have a Co-Trustee, there is a slight delay until assets are available to the Trustee to manage, pay bills and expenses, and distribute as required.

There is also an emotional price that comes with the Probate process. Survivors may be continually reminded of the loss of a loved one as the process continues for a long period of time. Grieving may become prolonged until the Probate is concluded. The AARP study reported that Probate takes a year on the national average even in uncomplicated cases. In Ohio, the duration is at least three months when there is a Will, because there is a three month Will Contest Period, and another three months because there is a six month period after the death of the decedent for a creditor to file a claim. If there are disputes or unusual issues, the process takes longer and can seem endless. Assets are not usually distributed until a final fiduciary account is filed and approved. Compare this to Living Trust settlement which can be completed in as little as a few weeks in simple cases or up to a few months in complex estates. During that time, partial distributions of estate assets can be made to the Trust Beneficiaries.

Probate also costs the deceased and his or her family their privacy. Wills and Probate are public matters. Standard Probate filings must report all assets, their appraised or market value, and the identity of new owners (the heirs). This information becomes available to telemarketers, media, creditors and con artists. In some counties, such as Hamilton County, Ohio, the Probate case can be reviewed online by anyone who has a computer, smart phone, or tablet computer. Living Trust assets are not a matter of public record and are not reported to the Probate Court unless there is litigation or unless elected by the Trustee. The decedent's affairs and his or her family's affairs are kept private.

---

[1] Real property not administered by the Executor is counted at 1% of value, and 1% of the taxable estate is permitted as a fee for the Ohio estate tax return. The Executor or Executrix is the fiduciary position responsible for the administration of the Will and carrying out the wishes of the decedent. In an estate of one who dies intestate (without a Will) the fiduciary is known as the Administrator/Administratrix.

If the decedent owned real property interests in more than one state, the process becomes even more complex. An ancillary administration may be required to Probate out-of-state real estate in addition to the Probate in the home state of the decedent. This means not just one Probate proceeding for the family to endure, but two or more depending on how many states are involved. As you can imagine, "Double Probate" can be more time-consuming, expensive and emotionally taxing than a Single Probate process. Anything as minor as a timeshare interest out-of-state can trigger multiple Probates. In contrast, a Living Trust can own and pass on real estate in any state in the USA without a Probate proceeding.

Probate also allows the original owner's creditors a shot at the property. Although there is still some controversy about the extent of its creditor-shielding benefits, and the law is evolving in this area, a Living Trust generally makes it much more difficult for an estate to be reduced by creditor claims. In some states, Ohio among them, a Living Trust can be used as a sort of pre-nuptial agreement because it allows one to effectively disinherit a spouse by defeating statutory rights of a surviving spouse. This cannot be done with a Will. Assets titled to the Trustee of a Living Trust under Ohio law cannot be reached by creditors with claims directly against the Decedent. But those claim holders can recover against all assets of the Probate Estate.

YOU STAY IN CONTROL

Another reason why a Revocable Living Trust is so popular is because it offers planning benefits without requiring you to give up control over your affairs. There are no lifetime drawbacks or impact on your affairs or assets.

With the most common type of Living Trust, one where you or you and your spouse declare a Trust and make yourself or yourselves the Initial Trustee(s), *nothing changes in your affairs and the way you manage them until your death or legal incapacitation*. Since the Trust is revocable, you can *change it, terminate it, add to it or take away* what you put into it. Business goes on as usual. The same applies to an unmarried person who names himself/herself as Initial Trustee.

When you serve as Trustee of your Revocable Living Trust, you manage the Trust and its assets yourself. The Trust is for your benefit, and no one else has an interest in the assets of the Trust until your death. The Trust is a "stand-by device" which means it is silent and invisible until it is needed due to your death or incapacity. That's when your hand-picked successor Trustee(s) take over for you and carry out the terms of your Trust for your own welfare or that of your dependents while you are living, and distribute your estate to your heirs when you die. If you are married, the role of successor Trustee can of course be handled by your spouse, who can also be (and typically is in fact) the beneficiary of your Trust estate upon your death. You will make a list of successor or alternate Trustees who will step in if your first choice cannot serve.

Your Trustees are required by law to carry out your wishes diligently and faithfully. Of course, since you are in control of the Trustee selections, you are in a position to choose trustworthy and responsible individuals. Popular choices are spouses, children, other

The following paragraph is required by the Internal Revenue Service on publications that include tax advice:

"This communication may not be used as a reliance opinion and is not intended or written to be used, and cannot be used, by you for the purpose of avoiding penalties that may be imposed on you by the Internal Revenue Service."

family members, trust companies, and personal friends. They can serve alone or in combination as Co-Trustees. The courts are always available to enforce the Trust or remove a negligent or ineffective Trustee.

The Trust Agreement includes and carries out your wishes and directions for your inheritance. Therefore, there is no need for Probate Court involvement in the settlement of your affairs and distribution of your assets. It is a private way to pass on your estate to your heirs compared to a Will which requires Probate from beginning to end. A Will is totally useless and meaningless until it is admitted to Probate and someone is appointed by the Probate Judge as the Executor.

There are additional practical benefits to the Living Trust. They are harder to contest than Wills. Part of the reason is that Trusts usually involve ongoing contacts with bank officials, Trustees and others who can later provide solid evidence of the owner's intentions and mental state. A Living Trust that has been in place and in regular use by the Trustmaker is less likely to be challenged than a Will as having been subjected to undue influence or fraud. A Will on the other hand is effective if the Willmaker was of sound mind and not subject to undue influence as of the moment of its signing, only; subsequent events or circumstances are immaterial to the enforceability of a Will. Further, because it is a very private document, the terms of the Trust need not be revealed to family members or outsiders, allowing less opportunity for challenges to its provisions, whereas a Will in Probate is public record.

A Living Trust also avoids the painful ordeal of "Living Probate." This is technically called a Guardianship or Conservatorship. It is often referred to as Living Probate because it's a Probate that happens to you even while you are alive. It is what occurs when a person is no longer competent to manage his or her property or financial and legal affairs due to illness or other causes. Without a Living Trust, a judge must examine whether you are in fact incompetent, if your capability to manage your affairs is called into question and you have failed to plan for this contingency. All of the embarrassing details of your impairment will be aired out in court. If the evidence shows you are incapacitated, the judge will appoint a guardian to be in charge of your affairs. The Guardian could be a stranger to you or someone you would not choose to manage your affairs. Guardians act under court supervision and must submit detailed reports, meaning that the process can become quite expensive and time consuming for the Guardian.

It has been said that Living Probate treats you like you are already dead. It is complex, costly, time consuming and aggravating, to say the least.

Having a procedure so that someone can take charge of your affairs if you are impaired is not in and of itself undesirable. It is in fact a necessity. But the benefit of a Living Trust is that a guardianship proceeding in Probate Court is not necessary. If you become incapacitated, your designated Trustee takes over management of Trust property according to your explicit instructions in the Trust document.[2] The Trust terms typically

[2] The next best option would be a Durable Power of Attorney that appoints an agent to take care of your affairs in the event you become incapacitated. Although a Power of Attorney is better than no protection at all, it is an unreliable means in and of itself to plan for incapacitation because there is no law that requires anyone to accept it. Any person, financial institution or government agency can either refuse to honor it or could impose its own requirements for a

set standards for determining whether you are incapacitated. For example, you may specify that your doctor and one other who has examined you must declare that you can no longer manage your financial and business affairs. A court proceeding is *not* required. On the other hand, if you feel "railroaded" into giving up your Trustee position you can ask for a court determination of your ability to handle your own affairs. If your incapacitation is temporary, you can easily be restored to your Trustee position. In a probate Guardianship, the process is much more difficult.

SAVING TAXES, MANAGING ASSETS

Living Trusts also provide a way for beneficiaries to receive the guidance of professional asset managers. A bank may be named as a successor Trustee or co-Trustee, allowing an experienced Trust department to manage the assets. Or your successor Trustees may hire other professionals for help such as investment advisors, lawyers or CPAs.

Eliminating or reducing taxes is an important goal of estate planning. The funded, Revocable Living Trust excels in this respect also, compared to a Simple Will. It allows for a highly flexible approach to estate taxes. Those are the taxes that apply when you leave your wealth to your loved ones upon your death. The federal estate tax is the highest tax in the land. For deaths occurring in 2014, the tax rate is 40%. Fortunately, the federal government is not totally without a heart. The first $5.34 million of an estate is free of tax. That is called the Applicable Exclusion Amount. It was referred to as the estate tax exemption for many years. It defines how much you may keep and pass on free of transfer tax (estate tax) at death.

Many states also impose death taxes. In Ohio, there is no estate tax starting in 2013. Consult your own state's law for death taxes that may apply to you.

If you are married, a Living Trust can allow you to double the amount that you can pass on free of federal estate tax after your death. Since the estate tax exemption is indexed for inflation, the amount you pass tax free may increase each year. Although the "portability" feature of the 2013 estate tax law change can allow both spouses to use all of their exemption (similar to a Living Trust), using portability does not keep up with inflation. There are other limitations as well, and an estate tax return must be filed after the death of the first spouse, even if the deceased spouse's estate is not taxable. A detailed discussion of this topic is beyond the scope of this report, but experts agree that protecting both spouses' exemptions through the use of a Living Trust is better than relying on portability alone.

The history of inflation also teaches another lesson -- good planning must address not only today's circumstances, but what the future may bring as well. Your estate may not be taxable under current law, but may incur a tax at your death simply due to the inflation and growth of your assets. Estate planning is a journey, not a destination, and growth expectations and law revisions always affect planning. While the new estate tax law

---

Power of Attorney appointment to be acceptable that you will learn of only after it is too late to comply. Those requirements could be arbitrarily changed without notice. There are other drawbacks to the power of attorney that are beyond the scope of this Report. For more information, contact The Zimmer Law Firm, LLC.
The following paragraph is required by the Internal Revenue Service on publications that include tax advice:

"This communication may not be used as a reliance opinion and is not intended or written to be used, and cannot be used, by you for the purpose of avoiding penalties that may be imposed on you by the Internal Revenue Service."

relaxes the burden of tax for many, one must still look into the future and plan for estate growth before assuming that a new law may make estate tax a non-issue.

LIVING TRUSTS ARE BEST FOR SPECIAL NEEDS

The desire to ensure that an heir is provided for is the most common reason for creating a Living Trust. In the case of minors, a Trust allows a parent or grandparent to provide for a young child without giving the child control over the property. The parent can also mandate how the property is to be distributed and for what purposes.

A Trust is also a useful tool for taking care of heirs who have mental impairments or lack investment experience. The Trust document can establish that all money is controlled by a Trustee with sound investment experience and judgment. Likewise, a Trust preserves the integrity of funds when the recipient has a history of extravagance or poor money management. It can protect the property from an heir's spendthrift nature as well as from his or her creditors and a divorce.

This is also true of persons who may feel pressure from friends, con artists, financial advisors and others who want a slice of the pie. A Living Trust can make it difficult for a recipient to direct property to one of these uses or abuses.

A "spendthrift" provision in a Living Trust can further preserve the integrity of assets. It prohibits the heir from transferring his or her interest and also bars creditors from reaching into the Trust. Living Trusts are relatively easy to update, modify or revoke in most cases.

Inheritance under a Will, in contrast, has no asset protection or protection from the creditors of the heirs. Protection in case the heir gets divorced depends on how the heir manages the money.

ARE THERE DRAWBACKS TO A LIVING TRUST?

With so much to offer, it may be asked, what are the disadvantages to a Living Trust compared to a Will? Why wouldn't everyone choose a Living Trust for their estate planning?

Criticisms of Living Trusts usually center on costs and the need for another step to make a Trust work. The truth is that a Trust may not be the best fit for all individuals and families. It may be overkill based on costs versus benefits, especially in smaller, simpler estates. It's a matter of weighing the benefits *for you and your family* of Trusts vs. Wills and Probate, or other less flexible strategies. That's where the skills and experience of a qualified estate planning attorney are invaluable.

It is also true that there is a second step to making a Living Trust work as it is intended. That is the funding of the Trust. Funding is the process of transferring titled property or financial accounts (other than retirement accounts) to ownership by the Trust to get the benefits of Probate avoidance, and to coordinate beneficiary-designated accounts or real

estate with the Trust. The best practice is for the lawyer who writes the Trust to assist in re-titling assets to the Trust and changing retirement account, life insurance and annuity beneficiaries to be coordinated with the Trust.

The reason why Trust funding is important is that property and accounts outside the Trust are part of the individual's Probate estate, and will trigger the Probate process you hoped to avoid by creating the Living Trust. Formal transfers of property into the Trust are required even when you and the Trustee are the same individual. New assets and accounts should similarly be titled or have beneficiary designations coordinated with the Trust. Assistance from the lawyer with funding takes the mystery and hassle out of the process. Some lawyers even go so far as to do the funding paperwork for their clients. When working with an attorney who offers such services, this second step will be part of the process from the beginning.

As far as costs of a Living Trust compared to a Will, it is to be expected that the legal fees for a funded Living Trust would be greater. It is more work for the lawyer, and delivers greater benefits and costs for the individual. The modest difference in up-front legal fees is minor compared to the cost savings at death or incapacitation, and the intangible benefits of a Living Trust.

It is also true that attention must be paid to keeping the Trust current. That means making sure all property is in the Trust, and adjusting it for changing circumstances; for example, after the birth of a child or the dissolution of a marriage.

If these seem like minor disadvantages, you're right. For most people, the attention and initial expense involved in a Living Trust is worth the significant benefits for family and other heirs: the avoidance of Probate, the tax advantages, and the preservation of privacy and independence. The process of Trust funding pays off with the benefits outlined in this report, and is well worth the effort.

ABOUT THE ZIMMER LAW FIRM

Zimmer Law Firm, LLC is a charter member of the American Academy of Estate Planning Attorneys. It is the only member firm in Southwestern Ohio. The Firm has been providing quality estate planning services since it was founded in 1993. The fastest growing demand for its services has been asset protection from the cost of long term nursing care. Whether you need an Elder Law attorney, an attorney for general estate planning with trusts or wills, or an attorney to help settle an estate, our team of qualified staff are here to help you and your loved ones.

In these turbulent times, access to an experienced lawyer to protect your estate and accomplish your goals is more important than ever. If you or your family would like a complimentary consultation to discuss your estate plan or how to protect your estate from depletion to pay for long term nursing care, call us today at **513-721-1513** or visit our website at **www.zimmerlawfirm.com**. Check our website for upcoming seminars, or learn more about the firm at www.avvo.com where you will also find testimonials from our clients. See why *Cincinnati Magazine* recognizes us as a Five Star Wealth Manager.

The following paragraph is required by the Internal Revenue Service on publications that include tax advice:

"This communication may not be used as a reliance opinion and is not intended or written to be used, and cannot be used, by you for the purpose of avoiding penalties that may be imposed on you by the Internal Revenue Service."

If you would like to receive email announcements for upcoming seminars, call to be added to our seminar mailing list.

A MESSAGE FROM THE FIRM FOUNDER

The goals of Zimmer Law Firm are to make asset protection and estate planning pleasant, easy, and understandable processes for clients. We believe that planning is much more than just creating legal documents. Rather it is about establishing relationships with clients and their family by providing a continuum of services through the passages of their lives. What we do makes an important difference and we take great professional pride and satisfaction in that.

If you or your loved ones would like a complimentary consultation to review your estate plan or to implement a plan, visit our website at www.zimmerlawfirm.com or call us today at 513-721-1513 (Toll-Free 1-866-799-4050) to schedule an appointment. See for yourself why *Cincinnati Magazine* has recognized the Firm as a Five Star Wealth Manager. For the latest news about estate planning or upcoming law firm events, subscribe to our blog and "like" us on Facebook. Check our website for upcoming educational events. We continue to expand our capabilities and services to meet the demands of a complex and changing estate planning world. Our experience has shown us what was a solution yesterday may no longer be adequate to fully protect our clients today.

This report reflects the opinion of the Zimmer Law Firm. It is based on our understanding of state and federal laws and is intended only as a simple overview of the planning issues. We recommend you do not base your own planning on the contents of this report alone. Review your estate planning goals with a qualified estate planning attorney.

ABOUT THE ACADEMY

AMERICAN ACADEMY | OF ESTATE PLANNING ATTORNEYS

The Academy is a national organization dedicated to promoting excellence in estate planning by providing its exclusive membership of attorneys with up-to-date research on estate and tax planning, educational materials, and other important resources to empower them to provide superior estate planning services. The Academy expects members to have at least 36 hours of legal education each year specifically in estate, tax, probate and/or elder law subjects.. The Academy has also been recognized as a consumer legal source by *Money Magazine and Consumer Reports Money Adviser,* and its Education Department has been quoted by other consumer press.

FOLLOW US ONLINE

facebook.com/ZimmerLawFirm

googleplus.com/ZimmerLaw

twitter.com/ZimmerLawFirm

blogspot.com/ZimmerLawFirm

linkedin.com/ZimmerLawFirm

youtube.com/ZimmerLawFirm

HOW TO CONTACT US

ZIMMER LAW FIRM
Estate Planning & Elder Law
DELIVERING PEACE OF MIND SINCE 1993

9825 Kenwood Road, Suite 201
Cincinnati, Ohio 45242
(513) 721-1513
(513) 287-8623 Fax
Toll-Free 1-866-799-4050
www.zimmerlawfirm.com
info@zimmerlawfirm.com

The following paragraph is required by the Internal Revenue Service on publications that include tax advice:

"This communication may not be used as a reliance opinion and is not intended or written to be used, and cannot be used, by you for the purpose of avoiding penalties that may be imposed on you by the Internal Revenue Service."