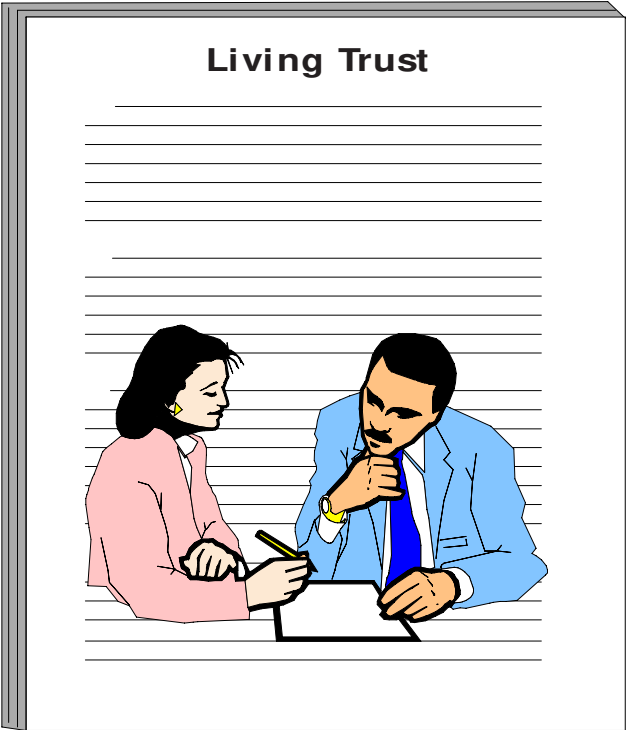


# Living Trusts

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Trusts and wills are two means of passing property upon your death. There are other purposes for trusts. This brochure discusses trusts and compares the use of a trust to the use of a will. There can be advantages to using a trust. There can also be disadvantages to using a trust.

## What is a trust?

A trust is an agreement between you and the trustee. In the trust agreement you tell the trustee to manage and distribute the trust assets. You can think of a trust as a box which holds assets. For example, you can put cash, stocks, bonds, real estate or other assets into the box. The box comes with its own set of instructions. The instructions (the trust agreement) tell the trustee what to do with the trust assets that are in the box. The instructions only apply to the assets which are placed into the box.

## What are the requirements for a trust?

1. A person to set up the trust (the "Trustor," "Grantor" or "Settlor").
2. A trustee. A trustee is the person who operates the trust. The trustee can be yourself, another individual or a licensed bank or trust company.
3. A trust agreement containing your instructions.
4. Beneficiaries who are the people who receive the benefits of the trust. For example, the beneficiary may be entitled to receive a distribution upon the death of the Grantor.

## What is a living trust?

A living trust is simply a trust created during your lifetime. It may also be called a "Grantor Trust," a "Revocable Trust" or an "Intervivos Trust."

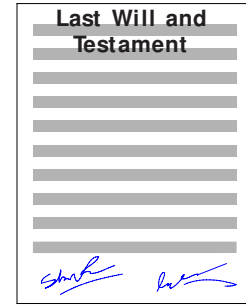
## Can I change my trust?

A revocable trust means you can change your mind. You can revoke the trust or amend it. This means you can cancel the trust and get your property back. You can also change the instructions contained in the trust agreement.

You can also make an irrevocable trust. An irrevocable trust is one in which you can not change your mind. Once you set up an irrevocable trust, you can never change it. If you are the Grantor of an irrevocable trust, you can not cancel the trust, nor can you change the instructions.

## What are the advantages of a living trust over a will?

1. *Privacy.* A living trust is not usually filed in court to become a public record. However, in many cases an inventory must be filed with a court upon death. The inventory will at least show the size of the trust and may be required to list the assets. The inventory is used for the inheritance tax determination. The inventory is a public record. The amounts received by each beneficiary may also be a public record.
2. *Avoid Probate.* Assets in a living trust usually avoid probate at death. However, Nebraska has the Uniform Probate Code which considerably simplifies probate. Remember the assets must have been transferred into the living trust to avoid probate.
3. *Disability.* A trustee can continue to manage living trust assets (those actually transferred into the trust) if you become disabled without the court appointment of a conservator. However, a durable power of attorney may provide the same benefits.
4. *Asset Management.* If the trustee is an expert, professional management of the living trust assets may be available for a fee.



## What are the disadvantages of a living trust as compared to a will?

1. *Initial Cost.* The initial cost of setting up and funding a living trust may be more than a simple will.
2. *Deeds & Title Changes.* Deeds and other transfer documents (e.g. bills of sale, assignments and stock powers) must be prepared and in many cases filed to put assets into the living trust.
3. *Paperwork.* The living trust may require additional paperwork while it exists because of sales, new purchases, tax reporting and other transactions.
4. *Wills Still Necessary.* If the ownership of all of the property is not transferred to your living trust, it remains subject to the normal rules for transfer of property at death and might pass through a probate. There may be assets which can not be, should not be or were not owned by a trust. A will is needed to cover these and other possibilities.
5. *Taxes.* By themselves, living trusts do not save any income, gift or death taxes. An inheritance tax determination may still be required in County Court even if a trust is used.

## What happens to property I do not place into my living trust?

If the ownership of all of your property is not transferred to your living trust, it remains subject to the normal rules for transfer of property at death and might be subject to probate.

## Can I put a trust into my will?

Yes, a trust can be created by your will. This is called a testamentary trust.

## Can a living trust be beneficiary under my will, my life insurance policy, my annuity or my pensions?

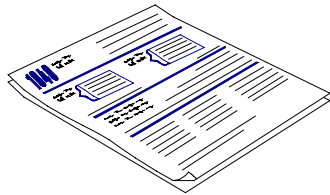
A living trust may be named as a beneficiary of your will. In most states, a living trust can be a beneficiary of your life insurance policy or annuity. A living trust can also be the beneficiary of your pension plan or other employee benefit plan if your spouse dies before you do. If your spouse is living at your death, federal law requires your spouse to be the beneficiary of your pension plan or any other employee retirement plan, unless your spouse agrees in writing on a special notarized form.

## Can a trust be contested?

Yes, it is possible to contest a trust. With a trust, the court may require all of the beneficiaries to be each named as parties to the lawsuit.

## Will a living trust save on taxes?

Using a living trust instead of a will does not necessarily save any taxes. It is not whether a will or a trust is used which saves taxes, but rather how the will or trust is used which may save taxes.



In a situation in which federal estate taxes may be due, it is common to use a trust as a part of an estate plan. The particular use of the trust, when properly designed, may save taxes.

You must also be careful of gifts. Under IRS rulings, a gift from a revocable trust can be brought back into your estate for federal estate tax purposes if you die within three years of the gift.

Are there certain types of property which can cause problems if transferred into a trust?

Yes. A subchapter S corporation can only be owned by certain types of trusts which must be carefully drafted. Stock in a Nebraska profes-

sional corporation can only be owned by an individual who is licensed in the profession.



## Can my family farm be placed into a trust?

This depends upon the type of trust and the trustee. If the trustee is a corporate trustee such as the bank, the farm can not be held by the bank as trustee. Under Initiative 300, corporations are prohibited from holding title to family farms. A bank trustee is a corporation and could not hold title to the family farm. An individual trustee would have to be appointed to hold title to the family farm. In addition there are certain restrictions under Nebraska law that require living trusts to qualify as either a "family trust" or an "authorized trust" before the trustee may own farm real estate.

## Does a living trust affect my income taxes?

It may affect your income taxes. Under certain circumstances, a living trust may be required to file its own tax return and to apply for its own new federal identification number during your lifetime. This would be in addition to your tax return.

There are some income tax rules which are more restrictive for trusts than for estates.

Federal income tax law has a category called "passive activity losses." The federal income tax treatment of "passive activity losses" may be different when a probate estate (a will) is used as compared to when a trust is used.

Assets which depreciate may have a different federal income tax result in a trust. If a trust distributes property with a fair market value which is less than the remaining basis (or "tax cost"), then the loss may be disallowed as an income tax deduction and the recipient may be required to use the lower value when he or she depreciates that asset. This part of the Internal Revenue Code does not apply to a distribution between an estate (a probate) and its beneficiaries.

## What happens to a will or living trust if my spouse and I later are divorced?

If Nebraska law applies, then any gifts made in your will to the person who is now your ex-spouse are automatically canceled by

the dissolution, divorce or annulment. A legal separation does not cancel the will.

A gift in your living trust made to the person who is now your ex-spouse is *not* canceled by the divorce. You will have to remember to change the living trust. If the trust is irrevocable, it can not be changed by the divorce unless the trust has a divorce clause.

### **Are living trusts good or bad?**

Neither. At times living trusts are good. At times they are the wrong choice. Living trusts can be an excellent estate planning tool when properly used in the right circumstances.

If we think of the living trust as a box into which assets are placed and which comes with its own instructions, there may be certain things which do not fit in the box. If the item does not fit into the box, it could be like trying to pound a round peg into a square hole. No one choice in estate planning is right in all circumstances.

### **Who should draft a living trust?**

Your lawyer should draft your trust. In making a living trust, you need to consider state trust law, state probate law and federal and state tax laws. Developing a full estate plan under these various laws involves making decisions using professional skills. A living trust should be tailored to fit your situation.

Although you can write your own trust or use an advertised form or kit, a "do-it-yourself" trust could mean lawsuits or title problems. A mistake could cost your family.

*This pamphlet, which is issued to inform, not to advise, has been prepared and published by the Nebraska State Bar Association. It is distributed by those who want to help you obtain your rights under the law.*



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