

Should I Get a Revocable Living Trust?

That depends. Touted as a way to transfer assets to heirs upon your death, without the expense, inconvenience and public record associated with court-supervised probate proceedings, Revocable Living Trusts have been widely sold – sometimes at great expense – to people who do not know how to properly use them during their lifetimes. The Trust thus does not achieve what it was intended to do. Oftentimes, this results in considerably more expense and the need for probate proceedings that could have been avoided with other estate planning tools.

Revocable Living Trusts are documents drafted to create a Trust into which a person can place assets during the person's lifetime, with instructions on how those assets are to be distributed upon that person's death. These Trusts are no substitute for a properly drafted Will. It is nearly impossible to assure that all of a person's assets during the person's lifetime are properly titled in the name of the Trust. There are inevitably assets that – either through oversight or timing – are never formally transferred into the Trust while the person is alive. Once the person is dead, that person can no longer transfer assets into the Trust. People with Revocable Living Trusts therefore usually also have a simple Will that "pours over" any non-Trust-titled assets upon their deaths into the Trust. An asset transfer into the Trust requires commencement of a court probate proceeding and appointment of an administrator who can do the transfer. Thus, it is rare when Revocable Living Trusts achieve the goal of avoiding probate altogether.

In addition to a person's failure to title all of that person's assets in the Trust during the person's lifetime, the main problems with Revocable Living Trusts we tend to see as lawyers are as follows:

- Revocable Living Trusts are cumbersome and expensive, both to set up and to administer. These Trusts typically costs thousands of dollars to initially set up, especially if there are a lot of assets to transfer into the Trust. People with Revocable Living Trusts must exercise a great deal of vigilance during their lifetimes to assure that each time they acquire or exchange an asset, the new asset is actually titled in the name of the trustee of the Trust. This is in contrast to a Will, which – depending on complexity – costs only a few hundred or a couple thousand of dollars to properly set up. A Will requires no further investment of time or expense over the years because – if properly drafted – it will dispose of a person's assets in accordance with that person's wishes, even though the person's asset mix may have changed over that person's lifetime. There is no need to transfer an asset each time one is acquired or exchanged, as with a Revocable Living Trust.
- For Texas residents, the probate process – with a properly drafted Texas Will – is so streamlined and inexpensive, that avoiding the cost of probate is of little concern. With a properly drafted and executed Texas Will, an independent administrator of an Estate may need to only make a single court appearance, and may be able to go about paying creditors and distributing assets without any additional court appearances or interference. Moreover, if maintaining privacy regarding the Estate assets is of concern, the administrator can file an Affidavit in Lieu of Inventory of an Estate, thereby preserving the privacy of a deceased person's assets. Because of the uniquely streamlined and relatively inexpensive probate process in Texas, the cost of probate is usually considerably less than the cost of setting up and properly administering a Revocable Living Trust during a person's lifetime.

- There are now much less expensive alternatives to avoid probate than by setting up and administering a Revocable Living Trust. We sometimes advise clients to set up a Revocable Living Trust if they own real estate in places other than the State of Texas. Real estate – in contrast to personal property – must be probated in the state in which the property is located. Virtually no other state has as streamlined and inexpensive probate process as Texas. But many of those states now have “beneficiary deeds,” which allow a person to transfer real estate without the need for the probate process. If the state(s) in which a person’s real property is located has such a beneficiary deed, the expense and administrative inconvenience of creating and titling property in a Revocable Living Trust is not warranted. Texas also now has a beneficiary deed under which Texas real estate can be transferred to designated beneficiaries, without the need for the probate process. Most bank and investment accounts, including retirement accounts, have “pay-on-death” (POD) or “transfer-on-death” (TOD) beneficiary designations that also can be used to avoid probate.

There are situations in which creation and administration of a Revocable Living Trust is warranted. An attorney familiar with the different estate planning tools can help you decide whether a Revocable Living Trust is right for you. But be wary of paying thousands of dollars for a Revocable Living Trust unless you are prepared to understand the implications of and work required to transfer every asset you own to the Trust during your lifetime. Failing to do so means that you will (1) not achieve the goal of avoiding probate, and (2) unnecessarily deplete the assets in your estate.

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