

# *legal* links

## **REVOCABLE LIVING TRUSTS**

*This pamphlet was produced and  
distributed by the Oregon State Bar  
courtesy of Oregon's lawyers*

know your rights  
know your rights  
know your rights

PROTECT YOUR  
FREEDOM

understand the  
constitution

OREGON LAW  
YOUR LAW

Revocable living trusts are often promoted as an effective alternative to probate for transferring property when you die. Even though Oregon's probate system is among the simplest and least expensive in the nation, many citizens are attracted by the possibility of even quicker and easier asset transfers.

But revocable living trusts have some drawbacks. Here, to help you decide if a revocable living trust is right for you, are answers to some of the most frequently asked questions about these trusts.

## What is a revocable living trust?

A revocable living trust is a legal device that can be used to manage your property during your lifetime and to distribute your property after your death.

A revocable living trust is established by a written agreement or declaration which appoints a "trustee" to administer the property transferred to the trust, and which gives detailed instructions on how the property is to be managed and eventually distributed. If you want your trust to substitute for a probate proceeding (court administration of property after death), you must give the trustee detailed instructions about how to handle these situations, and you should legally transfer substantially all of your property to the trustee. A revocable living trust agreement or declaration is usually longer and more complicated than a will, and transfer of assets to the trustee can be time-consuming and expensive. Any competent adult can establish a revocable living trust.

## Who can be the trustee?

In Oregon, any competent adult can be the trustee, including the person setting up the trust. An Oregon bank or trust company can also act as trustee. You can appoint more than one trustee, can delegate different duties to each trustee, and can retain the power to remove the trustee and appoint a new one. Appointing a successor trustee is essential if you are the first trustee and the trust will carry on after you die or become incapacitated.

## How is a revocable living trust established?

If a revocable living trust is appropriate for you, you will need a written agreement or declaration of trust, which sets out your plan for management and distribution of your assets. Then, you must legally transfer all trust assets to the trustee. Deeds, stock transfers, new bank accounts, and other legal documents may be necessary. Assets not formally transferred to the trustee will not be considered part of the trust and might still be subject to probate.

You must also have a will to ensure that any property not properly placed in your trust before death can be transferred to it after death.

At your death your will can transfer up to \$50,000 of personal property and \$90,000 in real property to your trust through an affidavit filed with the court. Your will can transfer assets of greater value to your trust through the probate process. You can also have life insurance and certain pension accounts paid directly to the trust.

Here is an example of how trust assets should be registered: "John Doe, Trustee Under the Marty Smith Trust Agreement Dated January 1, 1990." The trustee should not hold trust assets individually, as "John Doe" without the additional information. The trustee must keep separate records for trust assets and might have to file separate income tax returns for the trust. If the trustee does not obey these rules, the trust may not avoid probate.

## Probate and revocable living trusts

Probate is a legal process for transferring your property when you die. It is supervised by a court. Probate usually involves validation of your will, appointment of a personal representative, collection of your assets, notification of and payment to your creditors, and transfer of your property to the beneficiaries under your will.

A revocable living trust avoids the probate process because you collect your assets and transfer them to the trustee before you die. The trustee then transfers your assets to your beneficiaries after your death. If you establish a trust but fail to transfer your assets to your trustee, you will not avoid probate.

If you die owning real estate outside Oregon, a court proceeding might be required in each state where real estate is located. A revocable living trust can avoid these extra court proceedings only if that property is transferred to your trust.

Sometimes it is not a good idea to avoid probate. For instance, in a probate proceeding, your personal representative has special powers to deal with your creditors and can force them to file claims with the court or lose their claims. The trustee of a revocable living trust now has similar, optional powers to deal with creditors; however, using these powers may require some additional expense and delay, as in probate.

Even if you want to avoid probate, there may be better ways to do it. Joint tenancy ownership of specific assets, with the right of survivorship, can be a cost effective way to avoid probate on the death of the first joint owner. There are several ways to pass bank accounts at death without probate, including joint accounts with right of survivorship, trust bank accounts, and so-called “payable on death” accounts. Most pension plans and life insurance policy proceeds pass under beneficiary designations that avoid probate without use of a revocable living trust. Depending on the nature and amount of property, one or more of these nonprobate devices could be a less expensive way for you to avoid probate.

## What is a conservatorship?

Conservatorship is the legal process for management of your property and providing for your financial needs when you become “incapacitated.” If a court determines you can no longer handle your financial affairs, a conservator is appointed. The conservator must list your assets in the court file, manage your property under court supervision and file periodic accountings with the court.

If you transfer all of your assets to a revocable living trust and give your trustee detailed instructions on how to handle your assets if you become disabled, there should be no need for a conservatorship. Your written agreement or declaration can specifically authorize your trustee to rely on a letter from your physician as proof of your incapacity.

A conservator can establish, or fund, a revocable living trust if (1) the trust would be a more efficient way to administer the property of the incapacitated person and (2) use of the trust would be consistent with the person’s overall estate plan. A special court order is needed to do this, however.

## Durable power of attorney

A durable power of attorney is a simple and inexpensive way to avoid conservatorship. This brief document appoints another person as your “attorney in fact,” to handle your assets. It is less detailed than a revocable living trust agreement, and it is less expensive because it is so short and involves no transfers of assets.

However, durable powers of attorney frequently give no direction to your attorney in fact regarding your plans for investments, money management, or distribution. They generally contain no written restrictions on their use.

With a revocable living trust, it is possible not to transfer all assets to the trustee immediately, but specifically to authorize the attorney in fact to finish funding the trust if you become incapacitated. This approach will not avoid probate, however, if the trust funding is not completed before you die, because the power of attorney dies with you.

## Does a revocable living trust avoid taxes?

By itself, a revocable living trust does not avoid income, estate or gift taxes. Provisions for saving estate and gift taxes can be included in a revocable living trust or in a will. Whether your assets are held in a trust or not, a federal estate tax return must be filed after you die, if your property exceeds \$1,000,000 in value for the years 2002 and 2003. You should not set up a revocable living trust just to save taxes.

## What does a revocable living trust cost?

The exact cost of a revocable living trust depends on how complicated your assets and your estate planning goals are, how many assets must be transferred to the trustee, and whether tax planning is needed. Before you direct an attorney to set up a trust for you, ask for estimates of how much it will cost, how much writing a will would cost, and how much probating your estate would cost.

If you do not plan to serve as your own trustee, you should consider any fees you might want to pay the trustee and whether those fees would replace fees that you are already paying to manage your assets.

A revocable living trust plan should include the trust document, the transfer of assets to the trust, a “pour over” will to add any other assets to the trust and a

urable power of attorney. It also might include related legal documents, such as an advance directive regarding medical decisions and a certification of trust, which summarizes important trust terms and information.

## Advantages of a revocable living trust

- Avoidance of probate – In particular, avoidance of expensive multiple probate proceedings when you own real estate in several different states.
- Avoidance of conservatorship – A revocable trust can avoid the additional cost of a conservatorship in the event of your incapacity.
- Efficient distribution – A revocable trust can provide a reduction of delays in distribution of your property after you die, although delays caused by filing an estate tax return cannot be avoided.
- Confidentiality – Generally the terms of your living trust are confidential with only your named beneficiaries and trustee having access to that information.
- Continuity – A trust can provide continuity of management of your property after your death or incapacity.

## Disadvantages of a revocable living trust

- Expenses of planning – It is more complicated than a will to draft and asset transfers can take time and can result in additional costs.
- Expenses of administration – If you appoint a bank or trust company as trustee, you will have fees to pay (though these may take the place of investment advisory fees and other fees you are already paying). Setting up a revocable living trust will not eliminate the need for professional services of attorneys and accountants in the future.
- Inconvenience – Once the trust is established, you must be sure that trust books are maintained and that all assets continue to be registered to the trustee. Persons dealing with the trustee (such as banks and title insurance companies) may want to review the trust instrument to check on the trustee's powers and duties.
- Unforeseen problems – Revocable living trusts can raise a variety of new problems regarding title insurance coverage, real estate in other countries, Subchapter S stock, certain pension distributions and many other issues. Only a skilled attorney familiar with estate planning can tell you whether, on the whole, a revocable living trust is right for you, your family, and your assets.

## Estate Planning Topics on Tel-Law

The bar's Tel-Law Program provides a collection of free, general legal information recordings accessible to the public by phone 24 hours a day. To access Tel-Law recordings, call 503-620-3000 in Portland or 800-452-4776 elsewhere in Oregon. Tel-Law scripts are also available on the bar's web site:

**[www.osbar.org](http://www.osbar.org)**

The following is a list of estate planning topics you can find on Tel-Law:

- 1116 Your will
- 1117 What is probate?
- 1118 What taxes have to be paid if someone dies?
- 1119 What is a trust?
- 1120 What is a living will?
- 1121 Estate planning for parents of the disabled
- 1122 Powers of attorney and other decision-making tools

For more information  
contact us at

**[www.osbar.org](http://www.osbar.org)**

or P.O. Box 1689

Lake Oswego, Oregon 97035-0889



## Resources

**Lawyer Referral Service** (\$35 office consultation)

**Modest Means Program** (application required)

9:00 to 5:00 p.m. on weekdays. Spanish available.

Portland: 503-684-3763

Elsewhere in Oregon: 800-452-7636

### **Tel-Law**

Free, general legal information recordings. Some recordings are offered in Spanish, Russian and Vietnamese.

Portland: 503-620-3000

Elsewhere in Oregon: 800-452-4776

For a list of Tel-Law topics, write: Tel-Law, P.O. Box 1689, Lake Oswego, OR 97035-0889.

### **Legal Information Pamphlets**

Legal information pamphlets cover a variety of general legal topics. To order pamphlets, call the Oregon State Bar Order Desk.

Portland: 503-620-0222, ext. 413

Elsewhere in Oregon: 800-452-8260, ext. 413.

### **Legal Aid**

Free legal assistance may be provided for low income clients with non-criminal cases. Legal Aid services depend on location, community legal needs, and availability of Legal Aid lawyers. Your local Legal Aid office phone number is available in the Community Service pages of the local phone book.

### **Oregon Senior and Disabled Services Division (SDSD)**

Human Resources Building

500 Summer St. NE - 2nd Floor N

Salem, OR 97310

General Information: 503-945-5811

or 800-232-3020

Web site: [www.sdsd.hr.state.or.us](http://www.sdsd.hr.state.or.us)

**For more information on these or other legal resources, visit our web site at**

[www.osbar.org](http://www.osbar.org)