

# Comparison of Living Trusts and Wills

Guide G-256

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Cooperative Extension Service • College of Agricultural, Consumer and Environmental Sciences

## Introduction

There is currently an interest in living trusts as a substitute for last wills (hereafter “will”). In many respects, a living trust and a will accomplish the same objectives; however, a living trust lets you accomplish other objectives that a will cannot (Table 1). But there is a cost for these advantages. Whether or not a living trust is better for you than a will depends on whether or not the additional advantages are worth the cost. With this in mind, we will describe the basic features of a living trust, then describe the advantages and disadvantages of living trusts and wills.

A living trust, sometimes referred to as a revocable trust or *inter vivos* trust, is established and takes effect during your lifetime by a written document known as a trust agreement. A will is written during your lifetime, but does not take effect until after your death.

## What Is a Living Trust?

A living trust (not to be confused with a living will, which authorizes withdrawal of life-sustaining procedures under certain circumstances) is a way to transfer legal ownership of assets by a grantor who is the owner of those assets. Assets are managed according to your instructions by a trustee for your beneficiaries. You can name yourself as trustee and as a beneficiary.

A living trust is created by you during your lifetime. Since it is normally employed for estate planning purposes, you retain the right to alter, amend, or revoke the trust at any time before your death.

After death, the trust will either be terminated and the assets distributed to your beneficiaries, or the trust can be continued for the benefit of those same beneficiaries. If both you and your spouse create a living trust, either can usually revoke the trust and both, acting together, can amend the trust. After the death of one spouse, the trust is usually divided into separate trusts. The surviving spouse's property is allocated to a trust that can be altered



or amended by the surviving spouse. Depending on the estate plan adopted, the deceased spouse's property is generally allocated to one or more irrevocable trusts for the benefit of the survivor or children.

## What Is a Will?

A will is a written document, signed and witnessed in accordance with the law, that indicates how your estate will be handled and disposed of upon your death. A will is revocable and subject to amendment at any time during your lifetime; however, amendments must be made with the same formalities as the will. If New Mexico

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**Table 1. Main Differences Between Living Trusts and Wills**

Living Trusts	Wills
<ul style="list-style-type: none"><li>• Distribute property to beneficiaries even before one's death</li><li>• Help avoid the costs and delays of probate</li><li>• Keep the details of your estate private</li><li>• May reduce certain estate taxes</li><li>• Need to be done by estate planning attorney or other qualified professionals</li><li>• Very specific on wealth management, including stipulations</li></ul>	<ul style="list-style-type: none"><li>• Distribute property to beneficiaries upon one's death</li><li>• Becomes public record as a result of probate process</li><li>• Name a guardian for minor children</li><li>• Easier to make</li></ul>

residents die without a will, their property will be inherited by their closest living relatives and not taken by the State of New Mexico.

### **Must Both Living Trusts and Wills Be Probated?**

Probate is the legal process of administering a will. Probates are not involved in living trusts. Wills are probated if they involve transferring properties that cannot be transferred by non-probate or small estate alternatives. Probate, a court-supervised process, involves appointing someone to handle will decrees, manage debt and tax payments for the deceased person's properties, and distribute the properties to heirs. This process normally takes about six months and thousands of dollars before heirs receive their inheritance. A lawyer in Albuquerque noted on his website that, "A simple probate could cost as little as \$1,000, while in a more complex case, the attorney might take a percentage of the assets recovered" (The Law Office of Larry Leshin, 2013).

Probate, in simple terms, makes sure debts of the deceased are paid and any remaining property is distributed to the rightful owners. Property that has been transferred to a living trust is not subject to probate. Probates may be avoided by gifting the assets to targeted heirs (gift tax may apply here), sharing assets with joint tenancy with right of survivorship, or having payable-on-death or beneficiary designation on your assets, such as bank accounts, retirement accounts, investments, and real estate. Avoiding probate, which on occasion can be costly and time-consuming, is a reason many individuals use living trusts.

Because property must be transferred to a living trust before your death to avoid probate, you must transfer all or most of your assets to the trust before your death. Any property still owned directly by you when you die is subject to probate, regardless of the trust. A simple will known as a "pour-over will" is also necessary in the event property is omitted from the trust. This provides that any property owned directly by you at the time of death is to be "poured over" and distributed under the

terms of the living trust. If you die without a will and you have a significant amount of wealth unassigned (more than \$30,000), your wealth will have to go through the probate process.

### **Why Are Living Trusts Used?**

Living trusts provide lifetime and after-death property management or carry out tax-related estate planning. Some persons use trusts to avoid probate. If you are serving as your own trustee, the trust instrument will provide for a successor trustee upon your death or incapacity, and court intervention is not required. Living trusts are also used to manage property. If a person is disabled by accident or illness, the successor trustee will manage the trust property. As a result, the expense, publicity, and inconvenience of a court-supervised conservatorship of the estate is avoided. A living trust can also save federal estate taxes, particularly for married couples; however, beginning in 2013, there is a \$5 million exemption that may be transferred to a survivor. This \$5 million estate tax exemption is adjusted for inflation every year. Other reasons to have trusts are having properties in more than one state and special need trusts for children and grandchildren.

### **Can a Will Accomplish the Same Objectives?**

A will that contains a trust providing after-death management of property can be used for estate planning. This is called a testamentary trust. A will cannot provide the same pre-death management, but a general, durable power of attorney used in connection with a will can provide almost the same pre-death management functions. Basically, a general, durable power of attorney authorizes the designated person(s) to handle your financial affairs if you are incapable of handling them yourself. After death, a will can provide the same management as a living trust. A will can also provide the same estate tax savings as a living trust. The pre- and after-death management and tax savings of a will and a living trust can be identical.

## Costs

Generally, a will and power of attorney are less expensive than a living trust because a living trust is a more complex document. In addition, assets must actually be transferred to the trustee for a living trust to be effective. Living trust costs may run between two or more times the cost of a simple will. In some situations, a living trust may save money by avoiding probate and, in the event you become incapacitated, conservatorship. If probate of an estate is not necessary when assets consist only of payable-on-death accounts, transfer-on-death accounts, transfer-on-death deeds, and joint-tenancy property, then little will be saved with a living trust. Furthermore, even if you become mentally incompetent, a living trust will not necessarily save money if your affairs can be handled through a durable power of attorney.

Legal and accounting fees to prepare and audit estate tax returns, as well as other tax and legal services (including sales of property), are generally the same for a living trust and for assets that are probated. Some of the typical fees involved, as mentioned by Consumer Reports (2011) and noted by New Mexico county courts, are:

- **Wills:** Writing a will (from several hundred dollars for a simple one); docket fee (\$30); per hour (e.g., \$150/hour) or flat fee.
- **Living Trust:** Writing a living trust (\$1,200 to \$2,500).

## Trustees

Generally, you will serve as the initial trustee of your living trust. If husband and wife create a living trust, they serve as co-trustees. A living trust provides for successor trustees, named by you, to serve in the event of your incapacity or death. A will with a testamentary trust only names trustees to serve after your death because any trust contained in the will is not created until you die.

## What Are the Advantages of a Living Trust?

- Lifetime management of your assets, including management during periods of incompetency, without court intervention.
- Privacy, since probate records are public.
- Probate is avoided and costs are generally lower after death. Routine probate-related legal services are avoided. Depending upon the complexity of the estate and the organization and adequacy of your records, such fees can be substantial, especially if you own property in more than one state.
- Time savings, since simple probate can take four to six months or more. Most routine work in a living trust can be accomplished in a few weeks after death.

## What Precautions Should Be Taken When Preparing Living Trusts?

- Often, senior citizens are encouraged through scare tactics to create revocable living trusts. These tactics include stating that probate involves unusual attorney fees and estate duration, which in fact are not part of the trust termination. Simple probate alternatives are available, and in those situations the estate can be completed within a reasonably short time. However, unusual situations can occur in both estate and trust administration, and both probate of wills and trust termination can be subject to unusual expenses and time, particularly in challenging family disputes.
- Even if an attorney advertises an ability to practice law in trusts and estates, it is appropriate to inquire about the attorney's experience. The State Bar of New Mexico and its section on real property, probate, and trust (1-800-876-6227) can provide names of attorneys practicing law in trusts and estates, as well as names of those who are members of the Bar's section on real property, probate, and trust. Other resources include the American College of Trust and Estate Counsel (1-310-398-1888) and the National Academy of Elder Law Attorneys (1-520-881-4005).
- Some trust preparers have been known to charge a fee based on the tax savings of the grantor (e.g., 1% of the potential estate tax savings). Other equally capable preparers may charge a fee based on an hourly rate or a flat-rate charge. Find out about the preparer's fee structure, and do not hesitate to compare the preparer's estimated fee, experience in trust and estate law, and service with other trust preparers.

## What Are the Advantages of a Will?

- Although probate fees may be incurred at death, the cost of preparing a will is substantially less than a living trust.
- The estate may not need to be probated when an estate consists entirely of joint accounts, payable-on-death and transfer-on-death accounts, transfer-on-death deeds, and joint-tenancy property.
- Probate should not be avoided in some estates. This is particularly true where claims or sizable lawsuits may be pending. Probate offers a statutory means to handle disputes among heirs and claims against an estate. It can also reduce the time for presentation of estate bills. These procedures are not available to the trustee of a living trust.
- Possible after-death income tax savings. If you are in a high-income tax bracket and own assets that will continue to produce substantial income after death, probate may result in income tax savings because

both the estate and any trust created in the will are separate taxpayers, and income can be split between them through proper planning.

### Can I Have Living Trusts or Wills Without Using Lawyers?

Although any sound adult can make their own will, we discourage this practice, especially for individuals with potentially complicated situations. Requirements of a valid will in New Mexico are being written by a sound adult, being signed by two witnesses or notarized, and having your signature and date on the will. Living trusts and wills can get complicated in cases where you expect to owe estate tax when you or your spouse passes away, you have disabled children, you have a large amount of assets, and/or you have been married more than once. Although trusts should always be done by professionals, there are many trust-building software programs and on-line sites. A misunderstanding of one question is enough to result in wrong forms and a problematic trust.

There are various websites that provide living trust and will templates for a small fee and some that are free, such as Nolo.com, SuzeOrmanWillAndTrust.com, legacywriter.com, buildawill.com, and legalzoom.com. If you decide to use these low-cost resources, it is highly recommended to have a lawyer read through your living trust and will drafts.

### Summary

A living trust may save money on an overall basis by avoiding probate, but it costs more in legal fees at the beginning. A will is less expensive at the beginning, but may eventually cost more because of probate costs and fees. Both accomplish identical estate tax savings after death. A living trust requires that you assign your assets to the trust during your lifetime through the use of

assignments, new deeds, and re-registration of assets. This can become time-consuming and expensive. A will avoids such lifetime assignments and associated costs, but incurs similar costs and additional probate costs at death. There is no general rule about which plan is best, and the choice turns on consideration of all of these aspects. Consultation with an attorney competent in estate planning will help you make the right decision. Further information may be obtained in New Mexico Cooperative Extension Service Guide G-255, *Do You Need a Will?* ([http://aces.nmsu.edu/pubs/\\_g/G255.pdf](http://aces.nmsu.edu/pubs/_g/G255.pdf)).

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