

YOUR LAW

How Living Trusts Work



Tom Backhaus

A **living trust** (also called an **inter vivos** trust) is an arrangement under which you transfer ownership of all or part of your property to a **trustee** during your lifetime. As the person establishing the trust, you name the trustee, who manages the property according to the terms of your written trust document. You may state in the trust agreement exactly what you want the trustee to do, how you want your assets managed, and how much discretion you want to give your trustee. The trustee may be an individual or an institution or yourself.

The trust is for the benefit of one or more persons (including yourself if you wish),

called the **beneficiaries**. A living trust is effective during your lifetime, although it may be written to continue beyond your lifetime.

Living trusts have lots of advantages. They enable you to avoid probate for the assets that are in the trust, are easy to create and change, and protect your privacy. In addition, trusts are more flexible than wills in that you don't have to give money and other property outright to your beneficiaries. For example, a trust can administer any assets given to minor children or grandchildren until they are old enough to manage them for themselves and administer assets for disabled relatives

until their deaths. Moreover, trusts don't require active court supervision—you don't have to get a court's permission to buy or sell property, make distributions and so on.

Another advantage living trusts have over wills springs from the fact that they enable you to put property in trust while you are alive. This provides a simple and easy way for the property to be managed in the event that you are incapacitated. Thus a living trust may avoid the need to appoint a guardian of your estate if you should become disabled—your successor trustee can administer the property for you with no break in continuity and no need for expensive legal proceedings. You should designate in the trust document how the determination of your incapacity should be made—by examination and certification by your primary physician, or perhaps by examination by a larger number of physicians, including specialists, who must agree that you are incapacitated.

In this article, we take a quick look at the mechanics of setting up and administering a trust. Deciding whether a living trust

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Damages in Personal Injury Cases

Every personal injury claim has two basic issues—liability and damages. If you can prove that the defendant is liable for the damages you sustained, then our system of justice will award you monetary compensation for your loss.

However, even after liability is established, the parties in a lawsuit may argue strenuously over the proper amount of damages. Some types of damages, such as lost wages and medical bills, are easy to calculate. But reasonable minds can differ on other kinds of damages, like a person's expected future earnings and how to quantify "pain and suffering."

Damages can be complex, so you should talk to your lawyer if you have specific questions.

Compensation for Economic Loss

Compensation for economic loss is compensation to the injured party for damage that can be quantified in monetary terms. This includes actual out-of-pocket expenses for medical care, and income lost because of the accident through time spent unable to work or undergoing treatment for injuries. It also includes a figure calculated for future medical care, future loss of wages, and future loss of earning capacity if the injury is permanent and you may not be able to work in some fields.

Compensation for Non-economic Loss

It is much more difficult to assign an exact monetary figure to compensate for



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damages that really have no economic value. These kind of damages include compensation for:

- Pain and suffering
- Loss of enjoyment of life
- Permanent physical disability or disfigurement
- Loss of family, social and educational experiences, including missed school or training, vacations, or special events
- Emotional damages, such as stress, depression or strains on family relationships—for example, the inability to take care of children or interference with sexual relations.

Some formulas are useful in calculating the amount of these damages. Using such a formula, you might add up all the medical expenses, and then multiply that base figure. If the injuries are relatively minor, the base figure might be multiplied by 1.5 or 2;

if the damages are more severe, permanent, or painful then the base figure might be multiplied by 6 or 7.

Of course, this kind of adjustment is an uncertain art, and the defendant usually comes up with a figure at the bottom of the range, while the plaintiff calculates a figure at the top of the range. To settle the case, lawyers will negotiate until they reach a compromise that they can agree on. If the case goes to court, the judge or the jury may take the calculations of both sides into account and consider the testimony of expert witnesses when making a decision on the appropriate amount of damages.

Damages Caps

A damages cap often limits the amount of money a jury may award for punitive damages (see sidebar) and non-economic damages such as pain and suffering. Some states do not cap damages at all; other states cap damages relating to particular types of personal injury cases, for example, medical malpractice or product liability.

Some states do not allow lawyers or judges to tell jurors that there is a damages cap. That way, jurors will not be tempted to change their decision about compensation for the victim because of the cap. For instance, let's say you live in a state where the cap in a particular kind of case is \$100,000. The jury knows about the cap and decides that you suffered a minor injury. The jury may start with the \$100,000 and decide that you deserve a quarter of that because your injury was minor. That leaves you with \$25,000. If the jury had not known about the cap, they might have started with a figure of \$500,000 and awarded you a quarter of that, which is \$125,000. Because of the cap, you will only receive \$100,000 of that award, but it is still much more than the \$25,000 you would have gotten if the jury knew of the cap.

Punitive Damages

Personal injury cases are civil disputes, and defendants in civil actions do not receive jail terms or stiff fines as punishment. However, there is a form of punishment under personal injury law. In certain rare kinds of cases juries and courts can award punitive damages. The civil justice system uses punitive damages to punish defendants who have behaved maliciously, intentionally or recklessly, and to send a signal to the community that similar conduct will not be tolerated. Courts also hope that ordering the payment of punitive damages will deter the defendants from engaging in the same kind of harmful behavior in the future. Note that unlike fines, which go to the government, punitive damages are paid to the plaintiff.

Copyright: Digital Dos and Don'ts

Copying software and downloading music and videos from the internet is as easy as double-clicking a mouse. Ease, however, does not make these activities legal.

Federal copyright law protects everything from books by best-selling authors to drawings by your four-year-old child that you put on your refrigerator. So it should be no mystery that the law also protects words, pictures, music and software that you find online. Internet users must be aware that software, music and videos are often licensed or copyrighted to companies willing to go to court to protect what they own. Breaking federal copyright law will probably not land you in prison—though the criminal penalties for copyright law violations are increasingly being applied—but it could lead to a lawsuit from the person or company that owns the copyright.

If you or your company want to know more about how to protect your intellectual property online, your lawyer can provide guidance. In this article, we look at this area of law from the standpoint of what consumers need to know.

Q. Why is software copyrighted?

A. Software is a product that costs money to produce, just like literary works (such as books, poems, and articles), movies, records, and TV shows. Illegally copying software is no more legitimate than copying videotapes or books. The fact that there is no direct cost to the producer if someone makes an illegal copy of the software does not change this legal and moral fact.

Q. How is copyright protected on the internet?

A. The basic copyright laws providing protection for traditional kinds of intellectual



property also apply to products on the internet. The federal 1998 **Digital Millennium Copyright Act** also addresses some issues specific to the internet, such as circumvention of copyright protection systems, digital fair use, and Internet Service Provider (ISP) liability when subscribers post copyrighted content illegally.

Q. May I download music and videos from the internet?

A. Probably not. Entertainment companies hold copyright protection for their music and videos and will safeguard these works from unauthorized reproduction. A good rule of thumb is that if you are download-

ing or copying something from the internet as a way to avoid paying retail price, you are probably doing something you should not.

Q. Can I copy music or software if I have permission?

A. It is safe to copy information from the internet when you have the permission of the copyright holder. But remember that the creator of the work may not be the one who owns the copyright. The publishing company or record company may own the copyright, and you may have to get their permission to make a copy.

Q. What if I use peer-to-peer services to share music with my friends?

A. If the music being shared is protected by federal copyright (which it very likely is), you might be running afoul of the Digital Millennium Copyright Act. Since June 2003, the Recording Industry Association of America has commenced hundreds of lawsuits against individuals who have shared MP3 files across peer-to-peer networks.

Q. What is fair use?

A. You may copy material that is copyright protected if your purpose is a "fair use." That means you are able to copy protected material if you are using it as part of a criticism, comment, news report or valid educational or research tool. For example, you can make a copy of an artwork for an article that discusses or criticizes the work, but you can't copy the same artwork to make a poster. In general, teachers may be permitted to make copies of small portions of otherwise copyright-protected material if it is intended solely for classroom use.

The copyright law specifies that fair use shall be determined on a case-by-case basis, weighing the following four factors:

1. the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2. the nature of the copyrighted work;
3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. the effect of the use upon the potential market for or value of the copyrighted work.

Shareware and Freeware

Besides software that you purchase, two legitimate sources of sophisticated programming can be copied with the company's permission.

Shareware is protected by copyright, but the copyright holder permits free copying and distribution. The new user is usually requested, on the honor system, to remit a relatively small payment for costs and to register as a user.

Freeware is what it sounds like: free as the air. Programmers make it available through online bulletin boards and user groups. You may not have the right to copy it for others, however, because the programmer might want it to keep tabs on where it goes.

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is right for you depends on the size of your estate, what kinds of assets it contains, and what plans you have for yourself and your family. Your lawyer can advise you as to whether a living trust is best in your particular circumstances.

Setting up the Trust

When you set up a trust, you are called the **grantor** or **settlor**. Requirements for setting up a living trust vary with each state. In general, you need to execute a document saying that you're creating a trust to hold property for the benefit of yourself and your family, or whomever you want it to benefit. The property can be any kind of real or personal property—money, real estate, stocks, bonds, collections, business interests, personal possessions and automobiles. Some trust declarations list the major assets (home, investments) that you're putting in trust. Others refer to another document (a **schedule**) in which you list the exact property that will begin the trust.

In either case, you can add and subtract property whenever you want. You will have to change the ownership registration on whatever property you put into the trust—deeds, brokerage accounts, bank accounts, etc.—from your own name to the name of the trustee. If you make yourself the trustee, as most people do in setting up a living trust, you will have to transfer ownership from yourself as an individual to yourself as trustee. And you'll have to remember to sign yourself in transactions as "John A. Smith, Trustee," instead of using only your name.

The trustee has **legal title** to the trust property. But trustees are not the full owners of the property. Trustees have a legal duty to use the property as provided in the trust agreement and permitted by law. The beneficiaries retain what is known as

equitable title or **beneficial title**, the right to benefit from the property as specified in the trust.

You can make anyone you want the trustee. You can also name an **alternative trustee** (sometimes known as the **successor trustee**) to take over in the event of the original trustee's death or incapacity.

Administering the Trust

Unless taxes are a worry—and they won't be in the vast majority of estates—you should be sure to retain the right to revoke or amend your trust whenever you wish. Have your lawyer create a revocable trust agreement, which allows you to change the terms or trustee or just end the trust altogether if it turns out to be too much trouble.

When you put property into a revocable living trust, the trustee becomes its owner, which is why you must transfer title to the property from your own name to that of the trustee. But whether you're the trustee or not, you retain the right to use and enjoy the property, and because you do, in the eyes of the tax authorities, the property in the trust belongs to you, the grantor, for tax purposes. If you receive income from the assets, you must still report the income from the trust directly on your income tax return. The trust itself often files a separate income tax statement as well, though the IRS doesn't require the trust to file separately if the grantor and trustee are the same person.

In a revocable living trust, you keep the right to manage your property whether you're the trustee or not, since you have a right to change the terms of the trust, the trustee, and the property in the trust at any time. When you die, your alternative trustee distributes the property according to the terms of the trust. Usually, your alternative trustee is your surviving spouse or an adult child, but you can name a bank or trust company if you are willing to pay their fees.

Living Trusts as Will Substitutes

It can be a bother to set up and fund the living trust, but the payoff for your family comes when you die. If Ilsa wanted her property to go to her friend, Rick, for example, she would put it in a trust and name him co-trustee or successor trustee.

Living Trust Scams

Although living trusts can certainly be an effective estate-planning tool, marketing living trusts has become a common consumer scam. Official-sounding companies promote living trusts as a surefire way to save thousands of dollars in lawyers' fees, taxes, and probate costs, and to protect privacy and avoid court delays. These scams use misrepresentations, scare tactics, and high-pressure techniques to persuade elders to purchase prepackaged living trusts at inflated prices. Watch out for tactics like fake affiliation claims (for example, that the product is endorsed by the AARP), exaggerated benefits, package deals, time limits, and other high-pressure sales tactics.

Then, when she dies, he becomes sole trustee, and acting in that capacity, transfers the trust property to the beneficiary—himself. The property does not have to go through probate, which will probably save both time and money.

Living trusts give you wide flexibility in distributing your property. For example, the trust agreement could say "at my death, my trustee is to give my car to my son Cain, my coat to my son Jacob" and so on. Your instructions can tell the trustee to continue managing assets for the benefit of someone else, distribute them to any beneficiaries you choose, or perform some combination of these actions.

If beneficiaries of your living trust die before you do, what happens to the property depends on the terms of the trust and state law. For example, the property might revert to you or go to the deceased beneficiary's estate. To avoid confusion, make sure your trust clearly states what will happen under these circumstances, by naming one or more contingent beneficiaries for each gift.

A living trust can contain other, separate trusts, which gives you a nice flexibility. For example, if you plan to leave some of your property to your minor children in trust, you could specify in your trust that the children's property goes into a separate irrevocable children's trust. You can design separate trusts for several beneficiaries, all funded (usually at your death) by the assets in your living trust.

They Can Live a Long Time

Living trusts can extend long after you die. If you want the trust to benefit your infant grandchildren, for example, you might specify that the trustee make distributions to them or provide for their care until they are fully grown.

