

commissions. A trustee of a revocable trust also is entitled to payment for services, but the law does not set the amount of such payment. A trustee is entitled to a “reasonable” fee appropriate to the circumstances. Again, spouses and other family members who act as trustees often waive the trustee’s fees.

An executor may hire an attorney to assist in the administration of a probate estate. Similarly, a trustee may hire an attorney to assist in the administration of a revocable trust following the death of the grantor. The terms of the revocable trust typically do not require the preparation of an inventory or the preparation of accounts. Therefore, the attorney fees are often lower for services to the trustee because the attorney does not need to spend time preparing probate filings. However, the cost of attorney advice and services with regard to income tax and any estate tax issues is likely to be similar regardless of whether the advice is provided to the executor of the estate or to the trustee.

**Speed of transfer.** A trustee may begin making distributions of assets to beneficiaries moments after the death of the grantor. An executor may not distribute assets until after he or she is appointed by the probate court after the will is admitted to probate. Appointment generally occurs within one to two weeks after death. Once appointed, the executor is legally empowered to distribute all the probate assets to the beneficiaries. However, usually it is not prudent for either a trustee or an executor to immediately distribute assets.

An executor may be personally liable for the claims of creditors left unpaid by the estate as well as any unpaid federal and Ohio estate taxes. Consequently, the executor generally will not make final distribution to the beneficiaries until the executor is satisfied that all valid claims have been paid and all estate taxes have been finally determined and paid. The trustee of a revocable trust also may be held personally liable for unpaid estate taxes and, in some circumstances, unpaid creditors.

**Avoidance of multiple probate proceedings.**

If homes or other real property are owned in a number of different states, a revocable trust may be especially useful for avoiding separate probate proceedings in two or more states.



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**EMAIL:** [clerkhelpcenter@mcoho.org](mailto:clerkhelpcenter@mcoho.org)

**WEBSITE:** [www.courthouse toyou.com](http://www.courthouse toyou.com)

# REVOCABLE TRUSTS



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## WHAT IS A REVOCABLE TRUST?

A trust exists when one person (often called the grantor or settlor) gives property to another person (called the trustee) to hold and manage for one or more other persons (called the beneficiaries). Under the Ohio Trust Code, a revocable trust (sometimes also known as a “living trust”) is a trust that the grantor can amend (change) or revoke (cancel) during his or her lifetime. Through the terms of the revocable trust, the grantor keeps all the benefits of any property placed into it for the rest of his or her life. The grantor also can be the trustee. The grantor’s spouse or a trust company also often serves as trustee. A revocable trust can be funded with any property such as checking accounts, savings accounts, brokerage accounts, stocks and bonds, a home and other real estate. Some revocable trusts may not be funded initially, but rather at a later time or at the grantor’s death. An attorney can help advise when a trust should be funded and with what property. The terms of a trust are described in writing in a document often called the declaration of trust or trust agreement. This document is signed by both the grantor and the trustee.

## WHY SHOULD I CONSIDER INCORPORATING A REVOCABLE TRUST INTO MY ESTATE PLAN?

You may wish to create a revocable trust to accomplish one or more purposes. First, you may wish to fund a revocable trust in order to avoid probate. If you, acting as a grantor, re-title your property in the name of the trustee of a revocable trust, that property generally is not subject to the jurisdiction of the probate court after you die. Second, a trust can provide estate management for your family after your death. Finally, you may wish to create a trust to reduce or defer estate taxes. Before adopting a revocable trust, you should consult with an attorney.

## WHAT IS PROBATE?

When an Ohio resident dies owning probate property, a legal proceeding is begun (1) to determine the last valid will of the decedent, if any; (2) to determine the nature, extent and value of the decedent’s assets that are subject to probate; (3) to establish the valid debts of the decedent; and (4) to establish the method of distribution of the assets to the heirs or beneficiaries of the decedent after payment of applicable debts, taxes and expenses. This proceeding is known as probate. A more detailed explanation of the probate process

is available in the publication, “What you should know about Probate,” published by the Ohio State Bar Association.

## IS USE OF A REVOCABLE TRUST THE ONLY WAY I CAN AVOID PROBATE?

No. There are several other ways to avoid probate. For example, if you own assets jointly with one or more others who have rights of survivorship, those assets will pass bylaw to the survivor(s) when you die, and not be subject to probate. However, you should be careful before creating a joint account, because the joint tenant will have rights in the joint property as soon as you create the account. Payable-on-death (POD) bank accounts and certain assets that are payable to designated beneficiaries such as proceeds from life insurance policies or pension benefits will avoid probate. Transfer-on-death (TOD) designations for real estate, securities and motor vehicles also avoid probate. You should consult with an attorney before structuring your property to avoid probate, because each method of avoiding probate described above has advantages and disadvantages.

## WILL HAVING A REVOCABLE TRUST AVOID CHALLENGES BY MY BENEFICIARIES OR HEIRS?

Disgruntled heirs or beneficiaries can challenge the validity of a revocable trust on the same legal grounds as those available for challenging a will. It may be alleged that a revocable trust is invalid because the grantor was incompetent at the time of establishing the trust or was unduly influenced by another person to establish the trust in a particular manner. Although the period for challenging the validity of a will can be limited to three months, a longer period (usually two years) is allowed for challenging the validity of a revocable trust. The cost of defending the validity of a will, where the executor acts in good faith, is payable from the probate estate. Similarly, the cost of defending the validity of a trust would be paid from the trust assets.



## WHAT ARE THE ADVANTAGES OF REVOCABLE TRUST COMPARED TO PROBATE?

The characteristics of administration of a revocable trust that a person may find desirable are:

**Privacy.** The terms of a revocable trust are contained in a private document, while the terms of a will, including the names of the beneficiaries, become a matter of public record once the will has been filed with the probate court. In addition, other information filed with the court during the probate process, such as the inventory of assets and the written account of all receipts and disbursements of the estate, also become matters of public record. The administration of a revocable trust generally is not made public.

**Control.** The absence of any requirements to file a will or any other reports with a court increases the independence and control of the trustee, relative to an executor.

**Lower costs.** Some publications make extravagant claims about the extent of the costs of the probate process. The typical components of cost in the probate process are:

- Court costs
- Appraisal fees
- Executors’ commissions
- Attorney fees

While court costs will vary with the activity in the estate, they often average \$200-\$250.

Appraisal fees might be incurred to determine the value of real estate for estate tax purposes, if estate tax is applicable. Appraisal fees may also be incurred for property such as artwork, jewelry, collections, and interests in private companies. A revocable trust also may incur these appraisal costs. If estate tax applies, the estate or trust must file an estate tax return. In order to accurately complete any estate tax returns, it will be necessary to appraise the value of the estate’s assets. Ohio’s estate tax has been repealed for decedents dying after December 31, 2012. Appraisals also can establish the basis of estate property for federal income tax purposes.

Executors’ commissions are set by state law and are based, generally, on a percentage of the value of the assets of the estate. At present, the commission varies between one and four percent of the value of the assets (combined with the income on those assets) depending on the nature, amount and title of the assets at death. However, spouses and other family members often act as executors and often waive any