

**FREQUENTLY ASKED QUESTIONS ABOUT LIVING TRUSTS**

**WHAT IS A LIVING TRUST?**

A Trust is relationship in which a person, known as the Settlor, vests the legal title to his or her properties or assets in another, called the Trustee, on the terms that the Trustee shall hold the legal title on behalf of other persons known as the Beneficiaries.

The Trust vests the Beneficiaries with equitable interest in the trust property, while the legal interest is vested in the Trustee(s)[[1]](#footnote-1).

While most Trusts are created by Will[[2]](#footnote-2) and become operative on the demise of the Settlor, Trusts can also be created during the life-time[[3]](#footnote-3) of the Settlor, in which case it is regarded as a living trust or trust intervivos.

**WHO CAN CREATE AND BENEFIT FROM A LIVING TRUST?**

Any person having legal capacity to hold any property or asset[[4]](#footnote-4) may create a Trust of such property. A person cannot create a Trust of property which he has no legal title to. Similarly, a person who, under the law, lacks the legal capacity to own a property, cannot also be appointed as a Trustee of any property as it would be impossible to vest such property in him[[5]](#footnote-5).

Statutory bodies and Incorporated companies may also create Trusts if the power to do so is provided in their enabling law or memorandum of association[[6]](#footnote-6).

Any person may be Beneficiary of a Trust.

**WHICH ASSESTS CAN BE INCLUDED IN A LIVING TRUST?**

Any property or asset capable of legal ownership may be subject of a Living Trust[[7]](#footnote-7). However, the nature of the property may determine the procedure for creating the Living Trust in each circumstance.

**WHAT ARE THE FORMALITIES REQUIRED FOR CREATING A LIVING TRUST?**

There is generally no formality required for the creation of Living Trusts when the Trust property relates to personal property alone, hence it may be created expressly by oral or written declaration of Trust. A Living Trust may also be implied by law as long as there is a clear intention to create a Trust on the part of the Settlor[[8]](#footnote-8).

However, when the Trust property is land or interest in land (i.e. Realty or Real estate), the law requires the Trust to be created in writing, usually by a duly executed Trust Deed[[9]](#footnote-9).

It also prudent to note the provisions of the Stamp Duties Act and ensure that Living Trust Deeds are duly stamped.

**WHAT LAWS REGULATE THE CREATION OF A LIVING TRUST IN NIGERIA?**

Nigerian Law of Trusts essentially comprises of English Common-Law, principles of equity and Case Laws.

To create a valid Trust, the procedures for perfection of title required to properly vest the legal title in the Trustee must be complied with. Therefore, the relevant laws regulating vesting of title in the property which is subject of Trust would apply to regulate the procedure. For instance, where the Trust property is land or

an interest in land, the Land Use Act and other land regulation laws would be applicable.

**DO I LOSE THE RIGHT TO MY PROPERTY WHEN I CREATE A LIVING TRUST?**

A revocable Living Trust allows the Settlor to maintain complete control over ownership and interest in the Trust property and assets during the Settlor’s lifetime.

The Settlor can decide how the Trust Property and assets will be used when they are living and how the assets are to be distributed when they are deceased.

**CAN I CREATE A TRUST ON PROPERTY WHEN THERE ARE UNPAID DEBTS ON IT?**

Yes. However, the Trustee will become responsible for the debt when vested with the property.

**DO I NEED A LAWYER TO CREATE A LIVING TRUST?**

A Living Trust may be created by proper settlement of the Trust property and assets even without a lawyer. However, legal advice is always recommended.

**WHAT ARE THE ADVANTAGES OF LIVING TRUSTS?**

Some of the advantages of Living Trusts are:

* a Living Trust is a cost-efficient tool for asset distribution while avoiding the delay and publicity of probate procedure of Wills[[10]](#footnote-10);
* the terms of Living Trusts can be amended during the life time of the donor/settlor. This gives flexibility to the settlor of a living trust, giving him a right of control in absence of legal right of ownership;
* Living Trusts allow the Settlor impose conditions on how their assets should be distributed after they pass on;
* Living Trusts provide a good way to employ the expertise and knowledge of Trustees for the management of your property. If you have a business but do not have the expertise you may consider appointing a Trustee with relevant knowledge by revocable Trust;
* Living Trusts are a veritable tool for the avoidance of estate duties;
* protects assets from unreliable business partners, ex- spouses and others after the Settlor passes on;
* Living Trusts are not public and do not go through probate, this implies that the details of the Settlors assets are kept confidential.

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1. The implication of a legal title is that the Trustee is the owner of the property and has the right to deal with the property as such. On the other hand, an equitable title merely gives the Beneficiary the power to hold the Trustee accountable for the mismanagement of the property. The Settlor may also be a beneficiary in his trust. [↑](#footnote-ref-1)
2. This form of Trust is generally referred to as a Testamentary Trust and governed by the Laws applicable to testamentary disposition of assets. [↑](#footnote-ref-2)
3. Trust created during the life time of the Settlor is referred to as a Living or inter-vivos Trust. [↑](#footnote-ref-3)
4. A person who lacks legal capacity to hold any form of property cannot create a trust of such property, hence, a minor cannot create a . A minor in this regard means a person below the age of 21 years. See Elias v. Elias (2001)9 NWLR Pt. 718 @ p. 429. [↑](#footnote-ref-4)
5. Such person may however be appointed as a Successor Trustee under the Trust instrument, provided his succession cannot come into effect until such legal disability ceases to exist. [↑](#footnote-ref-5)
6. Section 38(1) of the Companies and Allied Matters Act. [↑](#footnote-ref-6)
7. Properties are usually classified as real (land and interests in land) or personal (other tangible or intangible assets apart from land). [↑](#footnote-ref-7)
8. See *Paul v.Constance* [1977] WLR 521. Mere intention to benefit an imprecise person willnot be sufficient. See *Jones v. Lock* (1865) L.R. 1 Ch. App. 25. [↑](#footnote-ref-8)
9. By Section 7 Statutes of Fraud 1677 non-compliance with the requirement of writing renders a trust created for realty unenforceable but not necessarily void. See. Gardner v. Rowe (1828) 5 Russell 258. Section 78(1) (b) of the Property and Conveyancing Law. Formality of writing is further required in respect of a disposition of an equitable interest in both personalty and realty under a trust by the beneficiary. Failure to do so renders the disposition void. See Section 9 Statuteof Frauds and Section 78(1)(C) of Property and Conveyancing Law. [↑](#footnote-ref-9)
10. In Nigeria for instance, Ten per cent (10%) Estate Fee is charged on a deceased person's Estate when the Administrators or Executors of that Estate apply for Letters of Administration, with or without a Will. This does not however portend that taxes are not payable on Trusts. [↑](#footnote-ref-10)