

Living Trust Overview

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WHAT IS PROBATE AND WHY DO YOU WANT TO AVOID IT?

Probate is the court process that requires:

- Notifying the Court of a person's death
- An inventory and appraisal of the deceased person's property
- Paying the deceased person's debts and taxes
- Establishing the validity of the decedent's Last Will and Testament
- Waiting to distribute the remainder of the deceased person's property

Having a Last Will and Testament does not spare anyone of having to go through the process outlined above. The result of a death will be that all of these probate steps will occur; with the exception being that if a deceased person does not have a Last Will and Testament, his or her property will be distributed, after probate, to his or her family according to state law.

People often feel having a Last Will and Testament is important for estate planning purposes. While it does serve the purpose of stating who will receive the deceased person's property upon his or her death, it will cause the estate of the deceased person to incur probate fees and go through the time-consuming probate process. All of this can be avoided by replacing your Last Will and Testament with a Living Trust. A Living Trust can provide probate avoidance and greater flexibility in managing your assets during your lifetime.

THE HIGH COST OF DYING

Probate can be a long, expensive process, a process that simply need not occur. Death is a difficult time for everyone concerned and the family should not have to be forced through the unnecessary agony of probate.

To effectively carry out the requirements of probate so that a deceased person's property may be distributed, probate may require the services of an executor (also known as a "personal representative") and an attorney. In probate, both the executor and the attorney are entitled to substantial fees for their services, and these fees are paid out before any proceeds are distributed to the decedent's family. Some additional fees beyond those paid to the executor and attorney include court costs, appraisers' fees, filing fees, etc.

For example, where an estate has a gross value of \$400,000, an attorney that is entitled to “reasonable” attorney fees, the fees will typically run in the area of \$10,000, but could go much higher. You might have heard the story about Marilyn Monroe’s probate. Her estate took nearly 20 years to complete the probate process. At the conclusion of the probate, her fees exceeded one million dollars, leaving \$101,229 as the final estate to be distributed to the beneficiaries.

A REVOCABLE LIVING TRUST ELIMINATES PROBATE

A Living Trust can also be called by its common name, a “revocable living trust.”

It is called “revocable” because you can alter your trust or estate plan at anytime during your lifetime and even revoke the entire trust if you choose.

It is described as “living” because the Living Trust operates during your lifetime AND survives you at death to distribute your assets per your request. This is in contrast to a Last Will and Testament, which only has legal effect upon your death.

It is a “trust” because it creates an entity into which assets can be placed for normal use during your lifetime and then be available for distribution to anyone you select after your death.

To avoid probate, a person or a married couple can place assets in “trust” while keeping full control over their property. The trust has actual ownership of the property although you own the trust and control the assets in the trust throughout your lifetime.

HOW A LIVING TRUST WORKS

Although it may sound complicated at first, the person who purchases a Living Trust wears three hats:

1. Settlor
2. Initial Trustee
3. Lifetime Beneficiary

As noted above, you are the settlor of the trust—meaning simply that the trust belongs to you.

You also manage the assets which are placed into the trust. Thus, the settlor is also called the trustee of the Living Trust. After your death, your “successor trustee” takes over the management of the trust assets.

Finally, the settlor and the trustee (who are the same person) is also named as the beneficiary of the trust. The beneficiary is a person who will benefit from the trust during his or her lifetime. Since you have created the trust, manage its assets, and benefit from the trust, you are called the settlor, trustee and lifetime beneficiary of the trust.

The Successor Trustee

The settlor is able to designate the person(s) who will administer the trust after he or she dies. Called the “successor trustee,” this is the person with whom the settlor places the responsibility for managing and distributing the assets placed in the Living Trust.

Beneficiaries

The settlor will designate in the Living Trust how he or she wants his or her estate to be divided. The person(s) named by the settlor to receive the assets after death are called the “contingent beneficiaries.” When the settlor dies, the contingent beneficiaries are entitled to receive the settlor’s assets according to the wishes of the settlor.

Remember, the settlor is entitled to make any kinds of changes to the trust during his or her life. This can include adding new beneficiaries, removing existing beneficiaries, changing the distribution of assets or even selling the assets and revoking the trust.

In the example below, Bob Smith established a Living Trust. He will pay no probate fees and his estate will not go through probate at all because he created a Living Trust during his lifetime.

<u>During Bob’s Life</u>		<u>After Bob Dies</u>	
Settlor	Bob Smith	Settlor	None
Trustee	Bob Smith	Successor Trustee	Jane Smith
Beneficiary	Bob Smith	Beneficiary	Jane Smith

When Bob dies, his wife, Jane, takes over the administration of his trust because Bob designated Jane to be his “successor trustee.” Bob also designated Jane to receive his assets after his death. As the example illustrates, Jane is a “contingent beneficiary” of Bob Smith’s Living Trust.

During his lifetime, Bob Smith is the only person who benefits from the trust. At Bob's death, the designated successor trustee takes over and distributes Bob's assets according to his wishes.

The Result

Establishing a Living Trust enables an individual or family to transfer property to the trust without giving up management or control. Unlike an "irrevocable" trust (which can't be changed), the Living Trust gives you all the benefits of a trust instrument, but does not take away your control over the assets or ability to benefit from those assets.

A Living Trust avoids probate because, unlike a Last Will and Testament, it is a fully effective document which exists now, during your lifetime. Equally important, your Living Trust continues to exist after death as a separate entity. Since there is no probate, there are no fees to be paid to attorneys, executors, appraisers, Courts, etc. Everything you leave goes directly to whomever you have chosen.

REVOCABLE LIVING TRUSTS AND INCOME TAX

Once you establish your Living Trust, maintaining the trust is relatively simple. It is always a wise idea to discuss with your accountant the tax advantages of your trust.

Advantage of the Trust Over Joint Tenancy

Capital gain taxes can be reduced, through a Living Trust, when a husband and wife own a home in joint tenancy.

If your home is transferred to a Living Trust as "community property," joint tenancy is eliminated. As a result of holding the home in the Living Trust as community property, a stepped-up basis can be taken on the entire home (rather than just ½, as is the case with joint tenancy) after the first spouse dies.

Since the home is in your Living Trust and characterized as community property, the provisions of the Internal Revenue Code allowing a stepped-up basis on the death of the first spouse will automatically apply to the entire home and not just the ½ owned by the deceased spouse.

With a higher stepped-up basis on the home, the resulting capital gain is significantly reduced

and any taxes due on a subsequent sale of the home are likewise reduced. When the basis on real property goes up, the taxes owed on the sale of the real property go down.

The above example may not necessarily apply to your circumstances. Always seek the advice of a professional regarding your tax advantages. The main benefit of a Living Trust is to avoid probate. Tax considerations are important, and some savings can be gained by a Living Trust, but the main purpose is what has already been stated: avoiding probate.

DEATH TAXES AND REVOCABLE LIVING TRUSTS

Death taxes are also referred to as “estate taxes” and the terms can be used interchangeably.

The issue of death or estate taxes is relatively unimportant for the vast majority of American families. They usually do not have enough money at their death to require payment of death or estate taxes.

As a rule, a Living Trust will not affect or reduce estate taxes. However, in a case where a married couple has in excess of \$2,000,000, a different kind of trust may be used to reduce the surviving spouse’s exposure to estate taxes. But a trust, in itself, simply cannot completely eliminate all taxes.

REVOCABLE LIVING TRUSTS AND MARRIED COUPLES

Trusts are important for single persons, widows and divorced individuals; however, they are especially important for married couples.

The example of Bob and Jane Smith above illustrates a typical “mutual trust” also known as a Joint A trust. The husband is the first spouse to die (called the “deceased spouse”), and the wife survives (called the “surviving spouse”).

During their life together, they establish a Living Trust and transfer their property to their Living Trust.

After the husband dies, his remaining separate property is transferred to the trust and the trust, in turn, becomes the property of the wife. At this time of the wife’s death, the

designated successor trustee continues to manage the trust and/or distributes the assets according to the specific instructions contained with the trust.

There is another type of joint revocable living trust, also known as a Joint AB trust. In a Joint AB trust, two types of trusts are formed upon the death of the first spouse to die - an irrevocable A trust (for the deceased spouse) and a B trust (for the surviving spouse). The surviving spouse has certain rights to the assets in the deceased spouse's A trust during his or her life (known as a "life beneficiary") and serves as trustee for the trust, but does not have control to change or withdraw from the A trust. The surviving spouse retains full control, however, over his or her B trust for the remainder of his or her life.

The purpose of the Joint AB trust is to take advantage of the marital exemption to the estate tax. For estates that exceed exemption amount (by way of example only, estates under \$1 million in 2011 are exempt from federal estate tax), the marital exemption places as much of the trust estate as possible into the deceased spouse's A trust, preserving the marital exemption so that the trust estate of the surviving spouse is deemed to only include what remains in the surviving spouse's B trust.

Sound confusing? It is! Joint AB trusts are useful if the value of what a married couple puts into the joint trust exceeds what is the federally allowable estate tax exemption in place at the time of the second death. If you feel your trust estate might exceed the exemption level that might be in place at the death of the surviving spouse, a Joint AB trust could be a good choice for you.

LIVING TRUSTS AND MEDI-CAL

When a Medi-Cal recipient has received benefits at age 55 or older and passes away, the state can make a claim for reimbursement, or "recovery", from the recipient's estate. Beginning in 2017 under SB 833, however, the "estate" from which the state can recover Medi-Cal benefits paid on behalf of a recipient was limited to a person's *probate* estate. As described earlier in this overview, property placed into a living trust are considered non-probate assets and are thus exempt from Medi-Cal recovery. While SB 833 also disallows Medi-Cal recovery from a surviving spouse's estate, property in a joint trust will remain in the trust – and thus continue to be a non-probate asset exempt from Medi-Cal recovery – until the surviving spouse passes away.

LIVING TRUST PACKAGE

1. THE REVOCABLE LIVING TRUST creates the trust entity and is tailored to meet the unique needs of your family and circumstances.

2. THE POUR OVER WILL automatically transfers any remaining assets or property not previously transferred into the trust.

3. THE DURABLE POWER OF ATTORNEY gives you peace of mind to know the person whom you designate will manage your affairs during periods of incapacity.

4. THE ADVANCE HEALTH CARE DIRECTIVE allows you to appoint a person to make important decisions about your medical care including your right to withhold certain medical treatments in certain circumstances.

EXECUTING AND FUNDING YOUR LIVING TRUST

The Living Trust is a set of documents including a Declaration of Trust, a Pour Over Will, a Durable Power of Attorney, a Power of Attorney for Health Care and related documents personalized for the individual(s).

The Settlor(s) must sign each document provided in numerous places and have several of the signatures notarized.

Signing each document is called “executing” the document. The Document People are happy to provide the Notary functions for you at no additional charge above our stated fee for document preparation.

Three steps are required after you receive your Living Trust document package:

1. Sign the documents.
2. Notarize your signature
3. Transfer assets to the trust (fund the trust)

Transferring assets to the trust is called “funding” the trust. A funded Living Trust is one in which you, the settlor, have transferred ownership of your major assets to the trust. The trust will not be effective until it is funded.

FREQUENTLY ASKED QUESTIONS

What is a Trust?

A trust is a document which declares your intention to have someone hold your property as a “trustee of your trust.” Technically, you no longer own the property, your trust now owns it. You, or someone you designate, are called the “trustee,” and the trustee has the ability to buy property, borrow against the property or sell the property.

How are a “will” and a “trust” different?

Both a will and a trust provide the means for you to distribute your property to the persons you choose when you pass away. The most significant difference is that a will must be proven in Court through a costly and time-consuming process called “probate.” A trust does not require the involvement of the Court and does not incur probate or attorney fees.

Will my disability affect my Living Trust?

Included in your Living Trust package are two important documents: (1) the Durable Power of Attorney and (2) the Designation for Health Care Agent. These documents allow you to select an individual of your choice to act during your absence or physical incapacity. Should you become disabled, your agent can make decisions on your behalf including the management of your trust.

Will I need an attorney to advise me concerning my Living Trust?

Attorneys provide important services and advice concerning the law. An attorney is not needed to set up your Living Trust.

Will I have to rewrite my Living Trust if I change my mind or wish to amend my trust?

Included in your Living Trust package are “special trust instructions,” which are used to instruct your successor trustees concerning specific wishes. In instances where modifications are needed, The Document People will amend your Living Trust for a nominal cost.

If I set up a trust, is a Will also required?

Yes, a Pour Over Will is drafted along with your Living Trust. It acts as a safety net. If you forgot to put certain assets into the trust, the Pour Over Will would pick up those assets at the time of your death and transfer them into the trust.

Is it necessary to put personal property into the trust?

Household items of nominal value need not be put into the trust. They will be handled by the Pour Over Will.

Must I transfer all of my assets into the trust?

No, but to avoid probate and achieve your objectives, you will want to transfer all of your large assets into the trust. Only those assets placed into the trust avoid probate. Normally, personal checking accounts and automobiles are not transferred into the trust.

Does a Living Trust make sense for a single person?

Yes, a trust is just as effective for a single person as it is for a married individual. This includes widows,

widowers, single men and women.

Does a trust make sense for an estate less than \$1,000,000?

Yes, an individual can still avoid the problems of probate. On an estate valued at \$300,000, probate fees can be as high as \$18,000 or more. Trusts can be set up for any size estate.

Is the Living Trust a recent idea?

No, it has been in existence for hundreds of years.

Does the Living Trust prevent you from borrowing on assets within the trust?

No, the trust does not restrict your rights to borrow in any way; although, the lenders will want to examine a copy of the trust documents.

Does the Living Trust protect me against my creditors?

No, the Living Trust does not act as a shield to protect you from your creditors.

Why didn't my attorney tell me about the Living Trust?

Most attorneys are not knowledgeable about Living Trusts. You also may have told your attorney that you were interested in a "will," a less expensive instrument.

Revocable or Irrevocable?

A Living Trust can either be revocable or irrevocable. Revocable means you can cancel or change its terms. Irrevocable means it cannot be changed.

Why doesn't everyone have a Living Trust?

The majority of people don't have the knowledge or information about Living Trusts. People often don't plan for the future and hesitate to discuss what happens at death.

Must a special income tax return be filed?

No special income tax forms are required as long as a married couple or one individual alone is receiving all the income from the trust.

What rights does the surviving spouse have in trust assets?

If the surviving spouse is the trustee, he or she has the right to sell, buy or transfer any of the trust's assets. The surviving spouse has the freedom to do whatever he or she sees fit.

Does my Will prevent probate?

No, the Will does not prevent or avoid probate. All the assets passing through the Will, over a certain dollar amount, also passes through probate. As previously emphasized, probate is expensive, time consuming and open to the public's viewing. The majority of people choose to avoid it. You can avoid the problems of probate with a revocable Living Trust.

GLOSSARY OF ESTATE PLANNING TERMS

Administration of Estate: Supervision of a decedent's estate by an executor or administrator.

Administrator: One given the authority to settle the estate of the decedent.

Beneficiary: One entitled to profit, benefit or advantage from a contract or estate.

Codicil: A written document or amendment to a Will.

Conservator: A person appointed to act on behalf of another person.

Conservatorship: A formal proceeding in which the Court appoints a person to act on behalf of another in business and/or personal matters.

Contingent Beneficiary: One entitled to profit from a contract or estate only upon the occurrence of a specific event; usually one who receives assets at the death of the primary or lifetime beneficiary.

Corpus: Principal assets which may earn income.

Crummey Powers: The power of a beneficiary of a life insurance trust to demand immediate ownership of a policy, thus qualifying the gift as a present interest which may be excluded from gift taxes.

Decedent: A deceased person.

Descendants: Persons who follow decedent in line of descent.

Escheat: The right of the State to succeed to property (real or personal) where there is no heir.

Estate: The assets and liabilities, real and personal property left the descendants.

Estate Tax: Inheritance tax.

Failure to Issue: To die without lineal descendants.

Gift Tax: Tax levied on gifts of property to supplement estate and inheritance tax

Heir: One who inherits property.

Heir Apparent: One who is sure to succeed to the estate if he/she survives the ancestor.

Heir Testamentary: One to whom property is left by Will.

Heredity Succession: Title by descent.

Inchoate Interest: An interest which has not vested, an expectancy to receive an interest in an estate at some future time.

Income: Value earned by principal assets.

Intervivos: Between the living.

Issue: Lineal descendants.

Joint Tenancy: A holding of property by several persons in such a way that any one of them can act as owner of the whole and take the property by survivorship.

Kin: Related by blood.

Last Will and Testament: An instrument whereby one makes a disposition of his property to take effect after his/her death.

Lawful Heirs: Those designated by law to take by descent.

Lawful Issue: Descendants.

Legal Heirs: Next of kin.

Legatee: One to whom property is left by Will.

Letter of Attorney: Power of Attorney.

Letters of Testamentary: Letters issued by a Court empowering an executor of a Will to act.

Life Estate: An interest in property whose duration is measured by the life of a person.

Life Interest: An interest in property which is to terminate upon the death of the holder of the interest or some other designated person.

Lineal Decedents: Individuals related by blood following a line of descent from generation to generation.

Living Will: A documents which formally expresses your wishes to forgo extraordinary medical treatment when you become terminally ill.

Marital Deductions: Exempts from the estate tax all property passing from one spouse to the other by reason of gift of death.

Perfect Trust: Executed trust, signed by the settlor(s).

Pour Over Will: Instrument which provides that property not previously transferred into a trust is to be transferred at the death of the settlor.

Powers of Appointment: Power vested in an individual to make decisions affecting disposition and distribution of assets.

Principal: Assets of value which earn income; corpus.

Probate: The process of proving the Will.

Probate Court: Court established for the administration of the estate of decedents and the control of the adoption and guardianship of minors.

Real Property: Land.

Remainder: Property which remains after the initial distribution of an estate.

Remainderman: Persons designated to receive property following the initial distribution of the estate.

Revocable Trust: A trust in which a contingent interest is given to another and in which the settlor retains a present interest, ownership and control.

Sensitive Trustee: A trustee or successor trustee who is also a beneficiary.

Settlor: Trustor, one who creates a trust.

Sprinkling Power: The power vested in a trustee to distribute income to others in a discretionary manner.

Succession: The taking of property by inheritance or Will or by operation of law.

Successor Trustee: Individual who succeeds to the power to manage trust assets.

Tenancy in Common: Ownership by more than one person in such a way that each owns an Individual share.

Trustor: One who creates the trust, the grantor, settlor.

Testator: A man who dies leaving a valid Will.

Trust: A right of property (real or personal) held by one party for the benefit of another.

Trustee: One appointed to manage a trust.

Unified Credit: The total credit provided by law which is free of estate taxation.

Vested: An unconditional right to or interest in property.

Will: Statement of person indicating his/her desires as to the distribution of wealth following one's death.

HOW TO FUND YOUR TRUST

Having received your Living Trust documents, your trust will not take effect until you have executed it by signing all the necessary papers and obtaining witness signatures and notarization. However, your trust will remain “unfunded” until you transfer your assets into it. Transferring your assets into your trust is actually quite simple. With a deed, for example, you transfer your real property from your “current ownership” into your new “trust.” The law does not consider such a transfer to be a sale for the purpose of reassessing your property for tax reasons. You also simply contact your bank or other institution where you hold assets to rename your assets and accounts as now belonging to your trust.

INSTRUCTIONS FOR FUNDING YOUR TRUST CDs, Savings Accounts and Checking Accounts

Go to your bank with your trust documents and tell the customer service representative that you have created a trust and you need to change the name on your accounts to reflect the trust name. The representative will have the proper forms for you to fill out.

Stock or Mutual Funds

Your account executive will give you the papers needed to transfer your current name to your trust name.

Real Estate

You will need to fill out a Quit Claim Deed transferring title to your trust name. Be sure to have your exact property description. It needs to be witnessed and notarized. The Quit Claim Deed is then taken to the County Recorder in the county where the property is located and filed. You will further need a “transfer of property form” which can be picked up at the Recorder’s office. In filling out this form, you will need the “parcel identification number” which can be found on your insurance papers or tax papers.

Mobile Homes

You will need to change the title on your mobile home from your name to the name of the trust. This is done at the Bureau of Motor Vehicles in the county where the mobile home is located. There is a small fee for this to be accomplished.