

# *30 Frequently Asked Questions About Estate Planning*

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## **1) I have a will. Why would I want a living trust?**

Contrary to what you've probably heard, a will may not be the best plan for you and your family primarily because a will does not avoid probate when you die. The probate court must verify a will before it enforcing it.

In addition, because a will can only go into effect after you die, it provides no protection if you become physically or mentally incapacitated. Therefore, the court could easily take control of your assets before you die--a concern of millions of older Americans and their families.

Fortunately, there is a simple and proven alternative to a will--the revocable living trust. It avoids probate, and lets you keep control of your assets while you are living--even if you become incapacitated and after you die.

## **2) What is probate?**

Probate is the legal process through which the court sees that, when you die, your debts are paid and your assets are distributed according to your will. If you do not have a valid will your assets are distributed according to state law.

## **3) What is so bad about probate?**

It can be expensive. Legal/executor fees and other costs must be paid before your assets can be fully distributed to your heirs. If you own property in other states, your family could face multiple probates, each one according to the laws in that state. Because these costs can vary widely, be sure to get an estimate.

It takes time, usually 9 months to 2 years. During part of this time, assets are usually frozen so an accurate inventory can be taken. Nothing can be distributed or sold without court and/or executor approval. If your family needs money to live on, they must request a living allowance, which may be denied.

Your family has no privacy. Probate is a public process, so any "interested party" can see what you owned and who you owed. The process "invites" disgruntled heirs to contest your will and can expose your family to unscrupulous solicitors.

Your family has no control. The probate process determines how much it will cost, how long it will take, and what information is made public.

## **4) Does joint ownership avoid probate?**

Not really – it usually just postpones it. With most jointly owned assets, when one owner dies, full ownership does transfer to the surviving owner without probate. However, if that owner dies without adding a new joint owner, or if both owners die at the same time, the asset must be probated before it can go to the heirs.

Watch out for other problems. When you add a co-owner, you lose control. Your chances of being named in a lawsuit and of losing the asset to a creditor are increased. There could be gift and/or income tax problems. Moreover, since a will does not control most jointly owned assets, you could unintentionally disinherit your family.

With some assets, especially real estate, all owners must sign to sell or refinance. Therefore, if a co-owner becomes incapacitated, you could find yourself with a new "co-owner" -- the court--even if the ill owner is your spouse.

**5) What is the marital deduction?**

The Internal Revenue Service allows an individual to leave any amount of assets to his or her spouse without taxation. At the death of the surviving spouse, however, all assets in the estate over \$1,000,000 will be included in the survivor's taxable estate; estate taxes on assets above \$1,000,000 begin at a rate of 37 percent and increase to 55 percent.

**6) How can I leave my estate to my spouse tax-free?**

An outright gift at death qualifies for the unlimited marital deduction for estate taxes and, therefore, there will be no tax paid on the amount left to the surviving spouse. However, the \$1,000,000 exemption on the estate of the first deceased spouse is lost when the second spouse dies.

**7) Why would the court get involved at incapacity?**

If you cannot conduct business due to mental or physical incapacity (Alzheimer's, stroke, heart attack, etc.), only a court appointee can sign for you – even if you have a will. (Remember that a will only goes into effect after you die.)

Once the court gets involved, it usually stays involved until you recover or die. The court, not your family, controls how your assets are used to care for you. This public process can be expensive, embarrassing, time consuming and difficult to end if you recover. Moreover, it does not replace probate at death – your family could have to go through the court system twice!

**8) Does a durable power of attorney prevent the court's involvement at incapacity?**

Under a power of attorney, you may appoint someone else to act for you when you are unable to do so yourself. The reason may be your mental incapacity or your inability to be somewhere when needed. Traditionally, powers of attorney expired upon the grantor's incapacity. However, under new law, "durable" powers of attorney continue indefinitely unless revoked. The power can be very effective when used with a living trust, but risky when used alone.

**9) What does a Health Care Proxy do?**

Similar to a power of attorney, through a health care proxy you may appoint someone else to act as your agent --but for medical, as opposed to financial, decisions. Unlike a power of attorney, the health care proxy does not take effect until your doctor determines that you are incapable of making decisions yourself. Before that decision, your agent may make no decisions on your behalf. You may include in your proxy a guideline for your agent to use in making decisions. These may include directions to refuse or remove life support in the event you are in a coma or a vegetative state. On the other hand, your instructions may be to use all efforts to keep you alive, no matter the circumstances.

**10) What is a living trust?**

A living trust is a legal document that, just like a will, contains your instructions for what you want to happen to your assets when you die. Nevertheless, unlike a will, a living trust avoids probate at death, can control all of your assets, and prevents the court from controlling your assets at incapacity.

**11) How does a living trust avoid probate and prevent court control of assets at incapacity?**

When you set up a living trust, you transfer assets from your name to the name of your trust, which you control -- such as from "Bob and Sue Smith, husband and wife" to "Bob and Sue Smith, trustees under trust dated (date of trust)."

Legally you no longer own anything (do not panic: everything now belongs to your trust), so there is nothing for the courts to control when you die or become incapacitated. The concept is very simple, but this is what keeps you and your family out of the courts.

**12) Do I lose control of the assets in my trust?**

Absolutely not. You keep full control. As trustee of your trust, you can do anything you could do before -- buy/sell assets, change or even cancel your trust (that is why it is called a revocable living trust). You even file the same tax returns. Nothing changes but the names on the titles.

**13) Is it hard to transfer assets into my trust?**

No, and your attorney, trust officer, financial adviser and insurance agent can help. You need to change titles on real estate (in- and out-of-state) and other titled assets (stocks, CDs, bank accounts, other investments, insurance, etc.). Most living trusts also include jewelry, clothes, art, furniture, and other assets that do not have titles.

Also, beneficiary designations on some assets (like insurance) should be changed to your trust so the court cannot control them if a beneficiary is incapacitated or no longer living when you die. (IRA, 401(k), etc. can be exceptions.)

**14) Doesn't this take a lot of time?**

It will take some time -- but you can do it now, or you can pay the courts and attorneys to do it for you later. One of the benefits of a living trust is that all your assets are brought together under one plan. Do not delay "funding" your trust. It can only protect assets that have been transferred into it.

**15) Should I consider a corporate trustee?**

You may decide to be the trustee of your trust. However, some people select a corporate trustee (bank or trust company) to act as trustee or co-trustee now, especially if they don't have the time, ability or desire to manage their trusts, or if one or both spouses are ill. Corporate trustees are experienced investment managers, they are objective and reliable, and their fees are usually very reasonable.

**16) If something happens to me, who has control?**

If you and your spouse are co-trustees, both of you can take action and have instant control if one becomes incapacitated or dies. If something happens to both of you, or if you are the only trustee, your handpicked successor trustee will step in. If a corporate trustee is already your trustee or co-trustee, they will continue to manage your trust for you.

**17) What does a successor trustee do?**

If you become incapacitated, your successor trustee looks after your care and manages your financial affairs for as long as needed, using your assets to pay your expenses. If you recover, you automatically resume control. When you die, your successor trustee pays your debts and distributes your assets. All this is done quickly and privately, according to instructions in your trust, without court interference.

**18) Who can be successor trustees?**

Successor trustees can be individuals (adult children, other relatives, or trusted friends) and/or a corporate trustee. If you choose an individual, you should name more than one in case your first choice is unable to act.

**19) Does my trust end when I die?**

Unlike a will, a trust does not have to die with you. Assets can stay in your trust, managed by the person or corporate trustee you have chosen – until your beneficiaries (including minor children) reach the age(s) you want them to inherit, or to provide for a loved one with special needs.

**20) How can a living trust save on estate taxes?**

If you die in 2001 and the net value of your estate is more than \$675,000, federal estate taxes (starting at 37%) must be paid. If married, your living trust can include a provision that will let you and your spouse leave up to \$1.35 million estate tax-free, saving \$270,750. If you own a family business or farm that qualifies, up to \$1.3 million of your estate could be exempt from estate taxes. Your living trust could then let you and your spouse leave your family up to \$2.6 million estate tax-free.

**21) How do I fund my trust?**

Funding a trust entails transferring assets you own as an individual into the name of your trust. For some assets, our law firm makes the transfers and prepares the documents for you to sign, for example, real estate. For other assets that our law firm is unable to change for you, we will give you instructions as to how title is changed, and will provide you with the necessary paperwork. For example, to fund your trust with bank accounts, a letter is prepared for you to take to the bank to change title of your accounts. You will have to go to the bank in person to sign a new signature card as trustee of your trust.

**22) What assets are left outside of my trust?**

Although there's nothing wrong with having your checking account in the name of your trust, some individuals like to have just their name on the checks. You can do so even if the account is in the trust, or you can simply choose to leave a small checking account outside of the trust. Other assets that are not generally funded into the trust are IRAs and pension plans, since these contain assets that are already in trust. What's important is to coordinate the appropriate beneficiary designation with your overall estate plan. This is a complex area of planning and must be based on each person's individual family circumstances and size of estate.

**23) Doesn't a trust in a will do the same thing?**

Not quite. A will can contain wording to create a testamentary trust to save estate taxes, care for minors, etc. But, because it is part of your will, this trust cannot go into effect until after you die and the will is probated. So it does not avoid probate and provides no protection at incapacity.

**24) Is a living trust expensive?**

Not when compared to all the costs of court interference at incapacity and death. How much you pay will depend on how complicated your plan is. Be sure to get an estimate.

**25) How long does it take to get a living trust?**

It should only take a few weeks to prepare the legal documents after you make the basic decisions.

**26) Should I have an attorney create my trust?**

Yes, but you need the right one. An attorney with experience in living trusts can provide valuable guidance and peace of mind that yours is prepared properly.

**27) If I have a living trust, do I still need a will?**

Yes, you need a "pour-over" will that acts as a safety net if you forget to transfer an asset to your trust. When you die, the will "catches" the forgotten asset and sends it into your trust. The asset may have to go through probate first, but it can then be distributed as part of your living trust plan.

**28) Is a "living will" the same as a living trust?**

No. A living trust is for financial affairs. A living will is for medical affairs—it lets others know how you feel about life support in terminal situations.

**29) Are living trusts new?**

No, they have been used successfully for hundreds of years.

**30) Who should have a living trust?**

Age, marital status and wealth do not really matter. If you own titled assets and want your loved ones (spouse, children or parents) to avoid court interference at your death or incapacity, consider a living trust. You may also want to encourage other family members to have one so you won't have to deal with the courts at their incapacitates or deaths.

**Summary of Revocable Trust Benefits**

- Provides maximum privacy;
- Provides security to you and your loved ones;
- More difficult to contest;
- Allows for continued control over assets after death or incapacity;
- Avoids the expense generally associated with probate proceedings;
- Minimizes estate taxes and defers payment of estate taxes;
- Assets can remain in trust until you want beneficiaries to inherit;
- Offers flexibility and can be changed or revoked at any time;
- Can protect dependents with special needs