



– The Basics of Living Trusts –

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NOTICE: The following information is intended for educational use only and not to replace or supplement any tax or legal advice. Personal tax and/or legal counsel should accompany the implementation of any planning methods described in this article. Gender is meant to be cross referenced and singular can mean the plural.

Regardless of the estate size, a Revocable Living Trust (RLT) addresses virtually every basic estate planning need in providing the privacy, convenience, practicality, safety and control that everyone wants. The cost savings and administrative efficiencies associated with a fully funded RLT are well established, undisputed facts. A living trust should be the *foundational* estate planning device for every family with legitimate planning needs.

The Reality of Probate –

When someone dies with assets titled in his name alone, as happens when using a "stand-alone will" (only) to transfer assets at death, such deceased person becomes a *decedent property owner*. A decedent is obviously unable to transfer his property to anyone. Consequently, the primary purpose of probate then arises which is to transfer title of assets from a decedent to the decedent's heirs. This proxy retitling/transferring of assets – to the decedent's personal representative who then conveys the retitled assets to the decedent's heirs – requires a surrogate court procedure called probate.

Problems with Probate –

Inherent complexities usually accompany probate. Detailed paper work and filings, formal hearings, asset appraisals, multiple agency fees, attorney fees, court fees, lengthy holding periods, and even unwanted litigation can all be a part of any probate process – consuming time and resources (compounded with *ancillary* probate required for real estate located in a non-domicile jurisdiction). In addition, privacy is completely forfeited since probate is a public matter. Because of the lack of privacy and control, and the imminent shrinkage of the estate due to improper planning, the decedent's family is now subjected to yet another factor – stress! Indeed, it is a worthwhile objective to avoid probate entirely regardless of the size of the estate. And that can surely be accomplished with proper planning.

Conservatorship... Probate for the Living –

Conservatorship is the legal requirement and procedure of a court to supervise the management and administration of an incapacitated person's assets. An ill or aged person may demonstrate erratic behavior and/or decision making, or be unable to make any decisions at all. At that point, family members must petition to have that loved one adjudicated as being legally incapacitated. It should be noted that *conservatorship requires a public declaration of an individual's incompetence.*

A Durable Power of Attorney (DPA) may help avoid the conservatorship process; however, powers of attorney bestowed upon a DPA agent can be controlled or even terminated by any court-appointed conservator. The reason is because the DPA agent was never "titled" the property that he was appointed to control. Moreover, although DPAs have a place in the estate planning process, they do not operate under contractual law (as do trusts) and are thus limited in functionality. *(NOTE: A fully funded living trust will normally avoid all conservatorship problems including the limitations of a stand-alone DPA arrangement.)*

The Operations of a Living Trust –

In simple terms, a living trust is an agreement between the *trustor*, also called the settlor/grantor, and the *trustee*. The trustor transfers title of assets to the "office" of the trustee. The (successor) trustee can then manage and eventually distribute those assets on behalf of the beneficiaries of the trust. Remarkably, with a living trust, one person or a married couple can function as all three parties – trustor, trustee and beneficiary – at the same time!

When the trustor/trustee dies, the successor trustee (who was originally appointed by the trustor) immediately assumes the office and duties of the trustee without the requirement of any outside approval or supervision. **Trustee succession to the title of trust assets simply occurs by operation of law through the legally binding terms of the trust.** Thus, probate court is not needed to accomplish the (re)titling of assets to the successor trustee for the eventual transfer to the heirs. After the death of the trustor, the trust becomes irrevocable; that is, it cannot be changed. Per the terms of the trust, the successor trustee will then either manage the trust assets on behalf of the beneficiaries and/or distribute the assets outright to them. It's that simple!

The Primary Benefits of a Living Trust –

In addition to avoiding probate with its inherent complexities and problems, a revocable living trust offers many other benefits. The following is a partial list of reasons why essentially anyone owning assets should establish a living trust:

Estate Tax Planning. When structured properly, a living trust can help maximize the full use and value of a married couple's transfer tax credits (estate tax exemption equivalent amounts) to help avoid or even eliminate unnecessary taxation. Improper transfer tax planning can be very costly to an estate. Optimal transfer tax avoidance can be fully realized with a proper marital trust format when utilizing the most suitable tax-shelter formula clauses and other applicable language *regardless* of the current estate tax laws then in place.

Privacy for the Estate. By inherent design, a living trust is a private arrangement. Generally, an estate owner utilizing a living trust can maintain privacy regarding the affairs of the family estate both during life and after death. Conversely, a probate estate is a different matter, a subject of public record. Probate records must usually disclose (a) the particular assets of the estate, (b) the names and ages of all the estate heirs including the amounts and times of asset dispositions made to them, (c) the outstanding debts of the estate, and (d) other sensitive information deemed pertinent to the decease of the asset owner.

Maximum Control. A living trust allows an asset owner to exercise prudent control over his/her estate that can be maintained even after death. A large sum of money suddenly acquired by a young and/or financially unsophisticated family member may cause more problems than it solves. An incremental, age-based allocation formula is an example of one of many methods that can be incorporated into a trust to exercise asset control. In fact, to the extent a beneficiary's inheritance is being held in a trust, it is usually protected from any creditor claims against that beneficiary, including (in most states) divorce settlements.

Recipient of Insurance Proceeds. A living trust is an ideal receptacle for life insurance proceeds (unless estate tax issues would warrant the use of an Irrevocable Life Insurance Trust). Insurance proceeds payable to a trust can be managed and administered just as the other assets of the trust estate. Also, if a named beneficiary of a life insurance policy does not survive the insured, the proceeds may be assigned to the deceased beneficiary's probate estate – a potential occurrence to always avoid. Additionally, if minor children (or grandchildren) become direct recipients of insurance death benefits without the benefit of a living trust, then a surrogate court will be required to create and supervise a statutory trust to receive and manage the proceeds on behalf of the dependent children. That will incur management and administrative fees otherwise avoidable with proper planning, and may also impose restrictions or other conditions not in each individual beneficiary's best interests.

Maximizing Stretch IRA Rules. IRAs (and other qualified retirement plans) can be payable to living trusts under the new “stretch-IRA” and “see-through” rules. Taxpayers can generally benefit their (financially unsophisticated) IRA beneficiaries by imposing limited withdrawal sanctions on IRA funds. That can be best accomplished by having IRA withdrawal rights payable to a living trust, rather than being payable directly to the IRA beneficiary, and therefore completely controlled by the terms of the trust. Without that control, an IRA beneficiary can demand and receive an immediate and full withdrawal of the IRA the day after the account owner's decease.

Special Needs Children. Parents with an incapacitated child currently receiving SSI benefits have special planning conditions to consider. If a distribution from the parent's will or trust is directly allocated to such a child, then a partial or even full disqualification of the child's governmental entitlement may occur. However, a properly drafted Special Needs Trust contained within a living trust can provide

funds to benefit that child, after the parent's decease, under a statutory standard and therefore not disqualify the child from continuing to receive SSI benefits.

Business Continuation. Transferring the management duties of a closely held family corporation or other limited liability entity(s) is often a concern for the owners. A post-mortem management structure in such case should always be arranged in conjunction with a family trust. That will allow the trustee to be the effective manager of the family corporation where corporate interests have been allocated to children or grandchildren. When a closely held business interest is controlled by a trust, the courts will not need to be meddling in the managerial operations because it was not subjected to probate in the first place. In addition, a living trust can be an ideal entity to serve as a succeeding general partner of a family limited partnership and trustee of a charitable trust.

Deterrent to Contestations. A living trust seems much more impervious to contests against an estate than a will. I have witnessed enough first hand experiences to verify this fact. We have seen our trust formats hold up perfectly in litigated situations caused by a disinherited or disgruntled child. Wills are more frequently targeted for contestations resulting in undesirable, adjudicated terms.

Avoids the Joint-Tenant-Survivorship Trap. A living trust, because of its probate avoidance capabilities, precludes the necessity to own property jointly with another to avoid probate. If a parent recasts personal property ownership into a joint-tenancy-with-right-of-survivorship (JTWROS) deed or any asset/account with a child, then *the control of that property has been forfeited*. Each respective tenant in a JTWROS ownership arrangement may be deemed to own 100% of that property for purposes of satisfying a creditor claim against a tenant. In other words, if the JTWROS donee/child gets sued, the parent could end up losing the property to a legal judgment. Additionally, JTWROS-held property between spouses forfeits beneficial transfer tax planning otherwise available with a Marital "A/B" Trust.

The Dynamics of Trust Implementation –

As we examine the benefits of a living trust, we see the obvious. A well-designed living trust is supreme in the basic estate planning arena. However, no living trust plan will realize its intended effectiveness unless it is correctly implemented and fully funded. After decades of experience and several thousands of trust estate plans generated by our system, my conclusion is that there is only one way living trusts can be consistently implemented/funded properly, and that is *through the direct assistance of the trustor's advisor/agent*. There is no substitute for a trained, third-party advisor providing the implementation/funding assistance for the trust creator. The advisor-supported service model is what makes it all happen.