



COMMONLY ASKED QUESTIONS ABOUT REVOCABLE LIVING TRUSTS AND AVOIDING PROBATE

1. What is a Revocable Living Trust?

Answer: A revocable Living Trust is often referred to as a substitute for a Last Will and Testament and is a contract entered into by you to establish a separate entity, the Living Trust, which will own your assets. You retain control of those assets and have the right to change it, amend it or revoke it at any time.

2. Is the Living Trust a new idea?

Answer: Living Trusts date back to old England. Traditionally, they have been used only for people with very large estates. Now, estate planners recognize that individuals with modest estates can utilize a Living Trust to avoid probate, structure a beneficiary's inheritance and to provide creditor protection and disability protection for the individual's families and beneficiaries.

3. Is a Living Trust known by any other names?

Answer: Yes, they are also known as Revocable Living Trusts, Inter Vivos Trusts, Grantor's Trusts and "Loving" Trusts. Although there may be some variation from one Living Trust to the next, they are essentially the same.

4. Can I revoke my Living Trust?

Answer: Yes. The creators of a Living Trust reserve the right to revoke it at any time.

5. Can I sell my assets once they are in a Living Trust?

Answer: Yes you can. You have the same control over your assets, including the right to buy, sell or transfer those assets as you did before they were placed into the Living Trust.

6. How does a Living Trust help me to avoid probate?

Answer: Once you have created your Living Trust, you can avoid probate on all of the assets that you transfer into the Living Trust. By transferring your assets into the Living Trust, your assets are then owned by the Living Trust and upon your death, the Living Trust operates to provide for the distribution of those assets to your beneficiaries pursuant to your instructions.

7. Is the Living Trust valid in all fifty states?

Answer: Yes, Living Trusts are recognized in each of the fifty states and in many foreign countries as well.

8. Why doesn't everyone have a Living Trust?

Answer: Living Trusts are becoming increasingly popular. In some states, like Florida, they have substantially replaced Last Will and Testaments as the preferred means of handling one's estate.

9. How are a Last Will and Testament and a Living Trust different?

Answer: A Last Will and Testament guarantees probate. It must be admitted into court and approved by a judge before assets can be transferred. A Living Trust avoids probate and provides for a quick and inexpensive transfer of assets upon death.

10. Does my Last Will and Testament avoid probate?

Answer: No. Living Trusts avoid probate, Last Will and Testaments do not.

11. Does a Living Trust make sense for a single person?

Answer: Yes. A Living Trust avoids probate and guardianship and provides for a quick and private transfer of your assets to your beneficiaries. In addition to avoiding probate, a Living Trust can be used to structure a beneficiary's inheritance and to provide creditor protection and disability protection for the individual's family and beneficiaries.

12. Does a Living Trust make sense for a couple in a "blended" family (i.e., a second or third marriage)?

Answer: A Living Trust can be used to provide for your spouse and allow your spouse to utilize your interest in your residence and assets, all in a way that will ensure your assets stay with your family upon the passing of both spouses. Using "dual" Living Trusts is sometimes one of the only ways to ensure that one spouse's family and beneficiaries are not disinherited.

13. What is an irrevocable Trust?

Answer: An irrevocable Trust is a Trust where you do not retain the right to amend or revoke it. Once it is created, it is permanent and cannot be changed. Revocable Living Trusts are not irrevocable.

14. Should my children read my Living Trust?

Answer: Many people show their Living Trust to their children and consult with them. It is up to you. We strongly recommend that you specifically inform your children that you do have a Living Trust.

15. Where should I keep my Living Trust?

Answer: Your Living Trust is a valuable document. You should store it in a safe place. Access to a safe-deposit box can be limited upon your death. A fire box would be a good place. Let your Successor Trustee know where your Living Trust can be found.

16. Who are the parties to the Living Trust?

Answer: The parties to a Living Trust are, the Grantor(s)/Settlor(s), which is(are) the person(s) who creates the Living Trust, the Trustee(s), which is(are) the person(s) who manages the Living Trust, and the beneficiaries, who benefit from the Living Trust's income and assets. In most Living Trusts, the Grantor(s)/Settlor(s), the Trustee(s) and initial beneficiaries are always the same unless you specifically request otherwise.

17. What are the rights of the surviving spouse as Trustee?

Answer: The surviving spouse retains full rights to all of the Living Trust assets and continues to have the ability to amend or revoke the Living Trust. The only exception is if a Credit Shelter Trust (a/k/a "A/B Living Trust") has been created. Further information about the Credit Shelter Trust is found below.

18. How is the Successor Trustee forced to abide by the wishes of the creators of the Living Trust?

Answer: A Successor Trustee has a fiduciary obligation to follow the instructions provided in the Living Trust. The beneficiaries named in the Living Trust have the right to take the Trustee to court if the Trustee fails to abide by those instructions.

19. Can my Successor Trustee make changes to my Living Trust?

Answer: Once both of the individuals who created the Living Trust have passed away, no changes are permitted in the Living Trust.

20. Does a Bank or Trust Company have to be involved?

Answer: No. If you choose, you can name a Bank or Trust Company to be Trustee of your Living Trust and to manage your financial affairs. Most people choose to use individual Trustees. The person who creates the Living Trust is, almost always, named as the first Trustee. They then designate Successor Trustees to handle their affairs if they become disabled or die.

21. If I set up a Living Trust, is a Last Will and Testament also required?

Answer: A Last Will and Testament is not required, but is highly recommended. A “Pour-Over” Will is created as part of every Living Trust Package. The purpose of the Pour-Over Will is to capture any assets inadvertently omitted from the Living Trust and transfer them into the Living Trust. However, the use of the “Pour-Over” Will to capture such assets requires a probate proceeding.

22. What is a Pour-Over Will?

Answer: Since it is sometimes impossible to include everything you own in your Living Trust by deed, account or name, you have a simple Pour-Over Will. Unlike the normal Last Will and Testament that you may be used to, the Pour-Over Will simply directs your named Personal Representative to "pour over" any asset which you failed to include in your Living Trust, into your Living Trust, for distribution under the terms of your Living Trust. Hopefully, you will have already transferred all major assets into the Living Trust so that no probate is necessary to transfer the remaining assets into the Living Trust through the Pour-Over Will. You may wish to think of the Pour-Over Will as a safeguard for any assets inadvertently left out of your Living Trust.

23. What does a Durable Power of Attorney accomplish?

Answer: When you create a Living Trust, a legal entity is established for the maintenance and care of your assets and estate. In the event that you leave the country or become incapacitated, the Durable Power of Attorney allows you to designate an individual to act on your behalf in managing your affairs, usually on a temporary basis.

24. What does a Durable Power of Attorney for health care decisions mean?

Answer: A Durable Power of Attorney for health care decisions allows a person of your choice to make medical decisions in the event you are physically unable to make decisions or give consent to treatment yourself. The Durable Power of Attorney for health care also allows your designated agent to withhold medical treatment in certain circumstances.

25. What is the difference between a funded and unfunded Living Trust?

Answer: A Living Trust will not take effect until you execute it by signing all of the necessary papers and obtaining witness signatures and a notary. However, even then your Living Trust will remain "unfunded" until you transfer your assets into it. Transferring your assets into your Living Trust is quite simple. For example, with a deed, you can transfer your real property from your current ownership to your Living Trust. The law does not consider such a transfer to be a sale for the purposes of reassessing your property for tax purposes. In addition, you may contact your bank or other institution where you hold assets to rename your assets and accounts as belonging to your Living Trust. After your assets are transferred to your Living Trust, your Living Trust is considered "funded".

26. Must I transfer all of my assets into the Living Trust?

Answer: It is recommended that all probatable assets, or assets that do not have beneficiary designations, be placed in the Living Trust.

27. What happens to assets that are outside my Living Trust? Since they pour over in the Living Trust, must they go through probate?

Answer: Assets left outside the Living Trust are captured by the “Pour-Over” Will and transferred into the Living Trust. However, as a result these assets must go through probate and there are additional expenses incurred.

28. Is there anything that I should not put into the Living Trust?

Answer: Yes. You should not put in your IRAs or Keogh plans or other assets that may become disqualified for tax advantaged treatment.

29. Is it necessary to put personal property into the Living Trust?

Answer: No, it is not necessary to make a transfer of all of your personal property into the Living Trust at the time you create the Living Trust. Your Personal Representative will have the authority to distribute your personal property to your beneficiaries according to your instructions.

30. Can I transfer my assets from my Living Trust?

Answer: The assets in your Living Trust are totally accessible by you. You can spend them, give them away, transfer them into your own name or to other individuals, all without any restriction.

31. What should be inside my Living Trust?

Answer: To receive the full benefit of your Living Trust, every asset should be placed into your Living Trust with a few minor exceptions. Also, IRA accounts must be owned by an individual and should not be changed over to the Living Trust, however, in most cases it is recommended that the death beneficiary be changed so the Living Trust is designated as the death beneficiary. Lastly, life insurance policies do not need to have the ownership changed, but the death beneficiary can be changed to the Living Trust. **PLEASE NOTE** whether your spouse or the Living Trust will be designated as the primary beneficiary of your IRA accounts, annuities and life insurance policies will depend on your individual circumstances.

32. Should my life insurance policies be placed inside the Living Trust?

Answer: No. However, your Living Trust can be the beneficiary of your life insurance policies. By naming your Living Trust as the beneficiary of your life insurance policies, you are able to consolidate all of your wishes into one comprehensive plan, structure a beneficiary's inheritance and provide creditor protection and disability protection for your family and beneficiaries.

33. Should I put IRAs and Keoghs inside the Living Trust?

Answer: No. IRA and Keogh accounts must be owned by the individual. However, the death beneficiary can be changed so the spouse is primary and the Living Trust is the secondary death beneficiary. The Living Trust should not be the owner of your IRAs and Keoghs, as this disqualifies them from their tax favored status.

34. How are assets acquired after my Living Trust is created?

Answer: They are acquired just as easily as before you created your Living Trust. However, you should use your name as Trustee of your Living Trust on all acquisitions. For example, "John Doe, Trustee of The Doe Family Trust dated 01/11/2011."

35. Do I need to change ownership of my stocks and bonds?

Answer: Yes. Ownership of your stocks and bonds should be titled to the name of your Living Trust in order to avoid probate.

36. Should I transfer my mortgage into the Living Trust?

Answer: No. It is not necessary. Your liabilities follow your assets. You transfer your assets into the Living Trust. However, it is not necessary to transfer your liabilities into the Living Trust.

37. If I place my home in the Living Trust, will it affect my mortgage? Can the mortgage company "call" my mortgage?

Answer: No. Transferring your home into the Living Trust will have no effect on your mortgage.

38. Do I have to value my assets as they go into the Living Trust?

Answer: No. There is no reason to value your assets as you place them into your Living Trust. It is helpful, however, for you to have an understanding of the value of your assets so that you can properly plan strategies to reduce estate taxes.

39. Will having a Living Trust affect my social security benefits?

Answer: No. Social Security benefits are totally unaffected by a Living Trust.

40. Will a Living Trust change my income taxes?

Answer: No. A Living Trust does not affect your income taxes. You continue to file your income tax return as you have in the past.

41. If I put my home in a Living Trust, can I still deduct my mortgage interest?

Answer: Yes. A revocable Living Trust has no impact on your income taxes.

42. Do I place rental properties in my Living Trust, and, if so, how is the rent treated?

Answer: Yes. It is important that you transfer your assets into the Living Trust including your rental properties. The rental income is recorded on your tax return just as you have done before. Depreciation expenses on your rental real estate will also be handled in the same manner as you did prior to creating your Living Trust.

43. Will I lose my Capital Gains exemption on my home if it is in a Revocable Living Trust?

Answer: No. The \$250,000.00 exemption for an individual and \$500,000.00 exemption for a couple, is preserved even if your home is in a Living Trust.

44. Are the assets in my Living Trust available to pay for nursing home care?

Answer: Since the Living Trust is totally revocable, assets in the Living Trust are available to pay for nursing home expenses. Some people mistakenly believe that if they transfer their assets into the Living Trust and then enter a nursing home and apply for medical assistance, that the assets in the Living Trust will be protected. This is not the case. **PLEASE NOTE** with proper planning with an elder law attorney, it is often possible to preserve some or, in some cases, all of your assets and still qualify for long-term VA, Diversion or Medicaid nursing home benefits.

45. Does the Living Trust protect me against my creditors?

Answer: No. A Living Trust is fully revocable during your lifetime and does not protect you from your credit obligations. However, drafting a Living Trust does not forfeit any statutory protections available to you under the laws of the State of Florida. Moreover, if the Living Trust is properly drafted, it can often provide creditor protection for your heirs.

46. How is distribution upon death different if I have a Living Trust rather than a Last Will and Testament?

Answer: When your assets are not in a Living Trust, they are distributed according to your Will through the probate process. Once probate is completed, your assets can usually be distributed outright. When you have a Living Trust, the Successor Trustee steps in and has immediate power to distribute the assets as set out in your Living Trust. However, with a Living Trust, the assets may remain in the Living Trust to be distributed later if the Living Trust so provides, since the Living Trust is a legal entity and "lives on" after a person's death.

47. How should you name assets that are transferred into the Living Trust, or acquired by the Living Trust?

Answer: Title to property in your Living Trust should be as set out as follows: "John Doe, Trustee of the John Doe Trust Agreement dated 1/11/2010."

48. Is it difficult to change my Living Trust, and when would I want to make a change to my Living Trust?

Answer: It is very simple to amend your Living Trust. Typically there are two types of changes that you might want to make to your Living Trust. One would involve making a change to your plan, such as a change of beneficiary or a change of Successor Trustee. The second type of change would involve amending your Living Trust to keep current with the tax laws, either because of a change in the laws or because of a significant change in your assets. If a change would benefit your estate, you may want to incorporate that change into your Living Trust.

49. Can I make a gift to charity through my Living Trust?

Answer: Yes. In a Living Trust you can simply list the charity as beneficiary to receive an asset or a portion of your Estate.

50. Do I ever need to update my Living Trust?

Answer: You should periodically review your Living Trust to see if there are any changes by way of amendment that you would like to make and to ensure that all of your assets are titled properly.

51. Does the Living Trust prevent you from borrowing against assets in the Living Trust?

Answer: No. Your ability to borrow against assets in the Living Trust has not been affected in any way.

52. Will my Living Trust protect me from law suits?

Answer: No. However, if the Living Trust is properly drafted, it can often provide creditor protection for your heirs.

53. Do I need to notify my attorney that I replaced my Last Will and Testament?

Answer: There is no need to notify your attorney. When you execute your Pour-Over Will, you revoke any former Last Will and Testaments or Codicils.

54. Is there any problem with transferring assets held in joint tenancy into the Living Trust?

Answer: No. Transfers of joint tenancy property into the Living Trust are quite common. Once transferred into the Living Trust, the property is jointly controlled by both spouses as are all of the assets of the Living Trust.

55. Can probate be avoided by the use of joint tenancy?

Answer: Yes. Joint tenancy property avoids probate upon the death of the first spouse. However, when the second spouse dies, all of the assets and the property must go through probate unless they are contained in a Living Trust. There can also be serious income tax consequences with the use of joint tenancy as a probate avoidance technique.

56. Will a Living Trust reduce estate taxes?

Answer: Yes, a Living Trust can take advantage of all of the estate planning options to reduce estate tax. An estate under the estate tax limit can be passed to your heirs without any Federal Estate Tax being payable. An estate over the estate tax limit can be subject to Federal Estate Tax. The Federal Estate Tax rate can be between 45% and 55% on the portion of the estate over the estate tax limit. Preserving the Federal Estate Tax exemption of both spouses often requires the addition of “credit shelter provisions” to your Revocable Living Trust.

57. Does a Living Trust make sense for an estate of less than the estate tax limit?

Answer: Yes, the estate tax limit has nothing to do with probate. If your estate is valued at less than the estate tax limit, it will not be subject to Federal Estate Tax. However, in most instances, smaller estates are still required to go through probate unless the estate is held in a Living Trust. Now, estate planners recognize that individuals with modest estates can utilize a Living Trust to avoid probate, structure a beneficiary’s inheritance and to provide creditor protection and disability protection for the individual’s family and beneficiaries.

58. Must special income tax returns be filed?

Answer: No, special Trust tax returns are not filed for a Revocable Living Trust. However, upon the death of a spouse, one-half of an A/B Living Trust becomes irrevocable and the surviving spouse must then file a Trust Tax Return. When a Living Trust becomes irrevocable, then a Trust Tax Return is required. If you are single, your Living Trust becomes irrevocable upon your death. A Trust Tax Return would have to be filed if the Living Trust continued to hold assets following your death. If you are married, your Living Trust becomes irrevocable upon the death of both husband and wife. Again, if assets are retained in the Living Trust, then a Trust Tax Return would be filed each year.

59. How does the Living Trust dissolve, and is there any probate at that time?

Answer: A Living Trust is effectively dissolved once all of the assets in the Living Trust have been distributed to your designated beneficiaries in accordance with your wishes. There will be no probate if all of the assets are titled in the Living Trust.