THOITS LAW

Trusts & Estates Notes

A Series of Articles on Legal Issues Regarding Estate Planning and Estate Administration

# Living Trusts

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## What is a Living Trust?

A living trust is an estate planning tool that, similar to a Will, can be used as a means to transfer a person's assets on his or her death. As opposed to a Will, however, a living trust is often called such because it can also provide for management of a person's assets during his or her lifetime.

A living trust is a legal agreement between the "Settlor," who is the person who creates the trust and owns the assets that will fund the trust, and the "Trustee," who is the person who holds legal title to the trust assets and who manages those assets for the benefit of one or more beneficiaries. A living trust is often also commonly referred to as a revocable trust or revocable living trust because it can be modified or terminated by the Settlor while the Settlor is living and has the capacity to do so. A living trust can be created by one Settlor or multiple Settlors (e.g., husband and wife).

The Trustee and the beneficiaries of a living trust will change over time. For example, you may create a living trust, as the Settlor, designate yourself as the initial Trustee, and manage the trust assets for your own benefit as the beneficiary during your lifetime. You may later become incapacitated and cease to act as the Trustee, so that the successor Trustee you designated in the trust agreement then becomes the Trustee. Upon your death, you will cease to be the beneficiary of the trust, and the Trustee will distribute the trust property to the beneficiary or beneficiaries you designated in the trust agreement.

## Advantages of Living Trusts

In California, the primary advantage of establishing a living trust is to avoid probate after death. Probate is a court proceeding that takes place at the Superior Court for the county in which the person resided or owned real property. Under California law, when a person dies with more than $150,000 in assets that are subject to probate, the person's estate must go through the probate process before the assets can be distributed to the person's heirs. Certain types of assets are not subject to probate, such as life insurance and retirement benefits with valid beneficiary designations; assets owned with another person or persons as joint tenants or

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as community property with right of survivorship, if there is a surviving co-owner; or assets with valid pay-on-death or transfer-on-death beneficiary designations. Assets held by a living trust are also not subject to probate.

Avoiding probate is an important factor in California because California's probate procedure is more formal, time consuming and expensive than probates in many other states. The cost of a probate can be substantial. Court fees are incurred, and attorney fees are determined based on the value of the deceased person's gross estate. Probate can also be time consuming due to legal notices, petitions and court hearings that are required. Having a living trust and avoiding probate does not mean that costs will not be incurred, but it can often result in lower attorney fees and costs. The Trustee can also often act more quickly to distribute the estate because court supervision is not required. If an asset is located in another state, a probate proceeding will typically be avoided in that other state as well if the asset is held by the trust. For some people, avoiding probate is also important from a privacy standpoint, since a probate proceeding becomes a public record.

Living trusts are also beneficial because they can be used to manage a person's assets during his or her lifetime, even if the person becomes incapacitated. When a person can no longer manage his or her assets and therefore is incapable of continuing to act as Trustee of his or her living trust, the designated successor Trustee can take over and manage the trust assets for the incapacitated person's benefit. Without such an arrangement, a costly and inconvenient court procedure to appoint a conservator (a legal guardian) may be necessary. While a power of attorney can also be used to allow an agent to manage a person's property while incapacitated, the agent will not have the same broad range of powers or fiduciary obligations as a Trustee. In addition, a power of attorney terminates when the incapacitated person dies.

**Disadvantages of Living Trusts**

One of the disadvantages of a living trust is that one must invest the time and money to meet with an attorney to plan, draft and establish the trust. After signing the trust agreement, the Settlor must also "fund" the trust by transferring legal title to his or her assets to the trust. If someone other than the Settlor becomes the Trustee during the Settlor's lifetime, the Trustee will need to maintain careful records and provide periodic accountings to the Settlor, and there will usually be Trustee fees to pay. After the Settlor's death, the Trustee and the trust's beneficiaries will not automatically have the safeguard of having the probate court oversee the administration of the trust, as occurs with probates. However, because court involvement can be helpful if questions arise, disputes occur or creditors are involved, the Trustee or the beneficiaries can initiate a court proceeding if necessary or desirable.

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