

LEGACY COUNSEL LAW, PLLC

LIVING TRUST FAQs

1. I HAVE A WILL. WHY WOULD I NEED A LIVING TRUST?

Contrary to what you have probably heard, a Will may not be the best plan for you and your family. Specifically, a will does not avoid Probate when you die, but rather must be validated by the Probate Court before it can be enforced.

Additionally, because a Will is only effective after you die, it provides no protection if you become physically or mentally incapacitated. Without proper planning, you could find yourself in the midst of a guardianship proceeding, where the Court determines who should control your person and property.

An alternative to Will-based planning, Revocable Living Trusts avoid Probate and allow you to keep control of your assets while you are living, during incapacity, and even after death.

2. WHAT IS PROBATE?

Probate is defined as the legal process through which the court sees that your debts are paid, your assets are distributed according to your Will, and unknown creditors have a chance to stake a claim. If you don't have a valid Will, your assets are distributed according to state law.

3. WHAT'S SO BAD ABOUT PROBATE?

- Probate can be expensive: Legal fees, Executor fees and other costs must be paid before your assets can be fully distributed to your named heirs. If you own property in other states, your family could face multiple Probates, each of which will be dictated by state law. In Virginia, fees to administer a Probate Estate can be in the range of 3% of the assets being administered.
- It's Time Consuming: The Probate process by its very nature has various deadlines and waiting periods. Probates can take 9 months to 2 years, sometimes longer. 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 while the estate is being settled, they may have to request a living allowance.
- It's a Public Process: Probate is a public process so any 'interested party' can see what you own, whom you owe, who will receive your assets and when they will receive them. This public nature can invite unscrupulous solicitors or disgruntled heirs to delve deeper into your estate.
- Lack of Control: the Probate process determines how much it will cost, how long it will take and what information is made public.

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Wealth Enhancement & Preservation Strategies

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4. DOESN'T JOINT OWNERSHIP AVOID PROBATE?

Using joint ownership may postpone Probate, but won't avoid it altogether. And there are other problems: adding a joint owner causes a loss of control. Your chances of being named in a lawsuit and of losing the asset to a creditor are increased, and there could be gift and/or income tax problems related to the joint ownership. Joint ownership planning can also result in unintended consequences, such as disinheritance of an intended beneficiary.

5. WHY WOULD THE COURT GET INVOLVED IF I'M INCAPACITATED?

If you can't handle your own affairs due to mental or physical incapacity, only a court appointee can sign for you – even if you have a Will. Once the Court gets involved, it usually stays involved until you recover or pass away, and it controls how your assets are used to care for you. The guardianship process can be expensive, time consuming, embarrassing and intrusive.

6. DOES A DURABLE POWER OF ATTORNEY PREVENT THIS?

A properly drafted durable power of attorney allows you to name someone to manage your financial affairs in the event you are unable to do so. That said, many financial institutions will not honor them unless it is on their form. Also, some powers of attorney work too well, giving the agent a 'blank check' to do what they want with your assets. Such powers should be used in conjunction with a well-drafted trust plan.

7. WHAT IS A REVOCABLE LIVING TRUST?

A Revocable Living Trust is a legal document that contains your instructions for how you want your assets managed during incapacity and at your death. A properly-drafted and funded Revocable Living Trust can avoid Probate, control all of your assets, and prevent the loss of control that is inherent in Will-based planning.

8. HOW DOES A REVOCABLE LIVING TRUST AVOID PROBATE AND PREVENT COURT CONTROL OF ASSETS AT INCAPACITY?

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When you create a Revocable Living Trust, you take action to transfer assets from your name to the name of your trust. You control the trust as a trustee. Legally you no longer own anything, everything now belongs to your trust. Therefore, upon your incapacity or death there is nothing for the Court to control, and all assets are managed and distributed by your successor trustee, outside of the court system.

9. DO I LOSE CONTROL OF THE ASSETS IN MY TRUST?

No! You keep full control as the trustee of your trust. You can still act in all the ways you could before – buy assets, sell assets, revise or revoke your trust. You even file the same tax returns. Nothing changes other than the names on your accounts and real property, and the beneficiaries that you designate on insurance and retirement assets.

10. IS IT HARD TO TRANSFER ASSETS INTO MY TRUST?

No. And if you have an attorney or advisor, they can help. If you have real estate, stocks, CDs, bank accounts and investments, you will just change the title on those accounts. If you have insurance or retirement assets, the beneficiary designations can be updated to reflect your trust-based planning.

11. DOESN'T THIS TAKE A LOT OF TIME?

It takes some time, but it's an investment in the peace of mind that you have controlled the process. By doing it now, you avoid paying the courts and attorneys to do it for you later. It is imperative that your trust is funded, and that you review your funding strategy with your attorney and/or financial advisor on an ongoing basis.

12. IF SOMETHING HAPPENS TO ME, WHO HAS CONTROL?

If you and your spouse are co-trustees, either can act and have instant control if one becomes incapacitated or dies. If both of you are unable to serve as trustee, or if you are the only trustee, the successor trustee that you selected during your planning process would step in to manage your affairs.

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13. DOES MY TRUST END WHEN I DIE?

Unlike a will, a trust doesn't have to end when you pass away. Many clients choose to have assets passed on to their beneficiaries in Legacy Trusts, which provide ongoing protection from creditors, divorce, and future estate taxes.

14. WHO SHOULD HAVE A LIVING TRUST?

Age, marital status and net worth don't really matter. If you own assets and want to maintain control over who manages your affairs, who inherits your estate, and how they inherit your legacy, you should consider consulting with an experienced estate planning attorney.

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