



PREVENTIVE LAW SERIES  
**LIVING TRUSTS**



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## **WHAT IS A LIVING TRUST?**

Many people are curious about the concept of a "living trust" because they have heard it will assist in their estate planning. This handout will discuss the living trust and its advantages and disadvantages. This handout is not comprehensive, and our office is not permitted to prepare a living trust for you. If you are interested in using this option in your estate planning, you should consult a probate or estate planning attorney. Ask a RLSO attorney for a copy of this office's referral list for civilian attorneys.

A trust is a legal entity that owns property for the benefit of a living person, called the beneficiary. The trust is created by a grantor, who sets the rules of the trust and provides the trust with money. The trust is then managed by a trustee, who invests the money and pays it out for the benefit of the beneficiary. The beneficiary does not have legal title to the money in the trust, but does enjoy the benefits of that money.

In the typical living trust the grantor, trustee, and beneficiary are the same person. That means that you (as the grantor) set up the trust and give money to it. Then you (as the trustee) manage the trust's money, invest it, and pay it out as needed for the benefit of the beneficiary (who is also you).

Living trusts are further divided into two categories: revocable trusts, which may be canceled or changed during the grantor's lifetime and before your incapacity, and irrevocable trusts, which cannot be altered. In the typical revocable living trust, you transfer your property to the trust by written agreement. The agreement basically provides for the trustee to pay you all of the income from the trust during your lifetime along with any principal that you may request. You may amend or revoke the trust or change the trustee at any time before your death or incapacity. However, upon your death, the trust becomes irrevocable and its terms cannot be changed. At that point the trustee, or a successor trustee if you were the trustee, continues to administer the trust assets, and, like a will, the trustee must distribute any property in accordance with the terms of the trust agreement that apply at your death.

## **WHAT ARE THE ADVANTAGES OF A LIVING TRUST?**

A living trust has a number of advantages. First, the trust usually provides for continuous management of the trust assets regardless of the grantor's physical or mental incapacity or death. There is usually no need to appoint a conservator (or guardian in the case of a minor) for an incompetent person since the trustee manages the trust assets according to the terms of the trust agreement. In fact, usually there is no need for a durable power of attorney if the trust document has been properly completed because the successor trustee would be the same person selected to be an agent under a power of attorney.

Proceedings for appointing a conservator or guardian for a person's property involve court control of the incompetent person's assets of, substantial legal fees, and the requirement of a bond; the proceedings may often provoke unpleasant family tension or quarrels. Accordingly, elderly or ill persons find the ability to name a successor trustee outright particularly attractive. If the trust provides for it, the trustee may collect income, purchase and sell trust assets, manage a business or real estate, and pay hospital or other medical bills. When the crisis ends, and the grantor recovers, the grantor can usually revoke the trust if he desires or take up management of the assets. If the grantor should happen to die, the trust should provide for the disposition of trust assets to beneficiaries.

Second, trusts are a good means of keeping property separate. For example, if one spouse has inherited property from his or her parents and desires that the property be kept separate from the other spouse, the separate

property can be placed in a trust.

Another advantage of the revocable living trust is that assets placed in a living trust should avoid or minimize probate costs and processes. This may result in the reduction of probate expenses, since all probate fees are based on the gross fair market value of the assets passing through probate. In addition to a possible reduction or elimination of probate fees, assets placed in a living trust would usually avoid delays in distribution caused by the probate court. Assets in a living trust can usually be transferred immediately to the beneficiaries.

Also, living trusts are private; they are not filed at the courthouse as wills are. Finally, living trusts may provide a tax benefit because a properly drafted complex living trust may minimize or eliminate the federal estate tax.

### **WHAT ARE THE DISADVANTAGES OF A LIVING TRUST?**

The living trust is not without disadvantages. For example, transferring the title in a home or other real estate, bank accounts, securities and other investments into a living trust can be troublesome and almost always requires the help of a specialized attorney. In refinancing a home, many lenders demand that the house be taken out of a living trust pending refinancing because they are unwilling to extend credit to a trust. The person who established the trust then needs to make sure that he places the house back into the trust once the refinance has been accomplished.

Also, military members may lose some of the exemptions which they receive under various states' laws by transferring ownership into a living trust, which is not afforded the benefits of the Servicemembers' Civil Relief Act. Finally, the validity of the trust is only as good as the expertise of the lawyer assisting the client. For instance, problems may arise in transferring property located in other states into a living trust. Today, the living trust business is booming, particularly in California, and many lawyers of differing abilities have inundated the market. Potential clients should be wary of low cost, and possibly lower quality, services which may not afford the protection which the client had intended. Additionally, you should be aware that there have been many scams involving living trusts shut down by the Federal Trade Commission. Exercise caution.

The costs associated with creating the living trust vary from law firm to law firm. For instance, many law firms charge a flat fee for the trust agreement, but additional fees accrue each time property or assets are transferred into the trust.

In conclusion, a living trust is an excellent estate planning tool for many persons. However, not all persons require a living trust. Young, active-duty military personnel with relatively few assets would probably incur a greater expense by obtaining a living trust than the expenses associated with the probate of a small estate. Also, the mobility of younger persons presents problems with observing trust formalities, e.g., continually acquiring and transferring property to the trust, for many years. On the other hand, older persons, particularly retired persons with substantial assets and tax avoidance concerns, may benefit from a living trust. Ultimately, each person must weigh the prospect of saving money for their survivors against the effort and expense of establishing and maintaining a living trust.

### **LEGAL ASSISTANCE SERVICES**

A legal assistance attorney is available by appointment Monday through Thursday from 0800 - 1030 and 1300 - 1500, and Friday from 0900 - 1100. Powers of attorney and notaries are available Monday through Friday at the same times. For more information, please contact the Legal Assistance Office, located in Building 56, 32nd Street Naval Station, San Diego, CA, by telephone at (619) 556-2211, or our office at Naval Air Station North Island – Coronado, Building 318 – Second Deck, above the Fleet and Family Support Center, Saufley Road, by telephone at (619) 545-6437.

### **RESOURCES**

**Federal Trade Commission:** (877) FTC-HELP; [www.consumer.ftc.gov/features/feature-0009-military-families](http://www.consumer.ftc.gov/features/feature-0009-military-families)  
**San Diego County Bar Association** Lawyer Referral and Information Service: (619) 231-8585;  
[www.sdcba.org/index.cfm?pg=MainLRIS](http://www.sdcba.org/index.cfm?pg=MainLRIS)

California Probate Code §§15200 et seq. (2013)