

# **THE REVOCABLE LIVING TRUST**

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# THE REVOCABLE LIVING TRUST AS AN ALTERNATIVE ESTATE PLANNING TOOL IN TEXAS

The revocable Living Trust is becoming an increasingly popular Estate planning tool in Texas. It is already widely used in many other states such as California, Florida, New York and Illinois. One of the main reasons that Living Trusts are used in these other states is to avoid the probate process in those states. In Texas however, some commentators point to the fact that Texas allows for an Independent Executor which greatly simplifies the probate process. However, if a husband and wife establish a revocable Living Trust they avoid not one but two probates, one each for both the husband and the wife. They also avoid the expense of probate for both the husband and the wife. Furthermore, they will avoid the delays that may be inherent in the probate process.

With improvements in medical technology and longer life expectancies, problems such as incompetency or the inability to manage one's affairs is becoming of greater concern. Effective estate planning involves not only the distribution and management of property after death but also should include protection in the event of disability of one of the spouses, either because of mental incompetence or because of accident or other illness. The estate planning alternatives for disability planning are (a) to obtain a guardianship over the incompetent or disabled person through the probate courts; (b) by giving a power of attorney to someone to manage your affairs during disability or, (c) establishing a revocable Living Trust.

The guardianship alternative may be expensive because lawyers will have to be hired, including a court appointed lawyer to represent the proposed disabled person. Powers of attorney, another disability alternative, while certainly better than nothing, are not always accepted by financial institutions. However, the Texas legislature has again recently modified the law regarding powers of attorney in order to make them more effective. The revocable Living Trust is the most effective disability tool as it will avoid the emotional trauma, delays and expense involved in obtaining a guardianship.

The Living Trust is revocable and amendable. Unlike some trusts, it may be revoked by the husband and the wife. Additionally as circumstances change the husband and the wife may wish to amend some portions of the Living Trust which they may freely do. The trust is called a "Living Trust" because it is established while the makers of the trust are alive. Many trusts are established in wills and are testamentary trusts and are called "Testamentary Trusts".

Establishing a Living Trust is a two step process. First the Living Trust is created. This is done by having an attorney draft the documents related to the living trust. The husband and the wife are the makers of the living trust. During their lives they are also the beneficiaries of the living trust. That means it is established for their benefit. Upon the death of both spouses the children may become the beneficiaries of the trust. The trust may be made creditor proof and divorce proof for the children.

While both the spouses are alive and not disabled they may serve as the trustees. If one of

the spouses becomes disabled or unable to manage their affairs, then the nondisabled spouse will become the trustee and manage the property. As long as one or the other spouse is the trustee, no separate income tax return is required.

The second step in the establishment of the revocable Living Trust is the funding of the trust. This means that the legal title to property is transferred from the husband and the wife to the husband and the wife as trustees. For example a husband and a wife may presently own real estate which is in the name of John and Roberta Doe. It is now put in the name of "John and Roberta Doe, trustees of the Doe Family Living Trust". If for any reason some of the property is not transferred to the revocable Living Trust during the trustmakers' lifetime, a Pourover Will will "pour over" to the Living Trust any property which was not retitled to the Living Trust during the life of the trustmakers.

Besides avoiding the expense and delay of probates for both spouses and possible guardianship proceedings for both spouses in the probate courts some other advantages of revocable Living Trusts are:

1. Privacy - Probate is a public proceeding. The assets of a Living Trust do not go through probate and thus do not become public record. Thus individuals who do not wish to make their assets public may have some privacy.
2. Property in other states - If property is owned in multiple states sometimes an ancillary probate may be required in each state. If there is a Living Trust there is no need to have ancillary probate in other states.
3. Strong disability protection - If one of the spouses becomes disabled, then the other spouse, or a successor trustee, can manage the assets.
4. No Will Contest - A living Trust is less likely to have potential heirs fighting. A Will Contest in the probate court can be extremely expensive. It is more difficult to file a lawsuit involving a Living Trust because of legal issues such as "standing".
5. Outside Management - The Living Trust can provide for outside management of the property if it is desired.
6. Tax Planning - The Living Trust, through the use of other trusts contained in the Living Trust, can reduce or eliminate estate taxes in the same way that traditional estate planning can.
7. Business As Usual - The owners of the property stay in control during their lifetimes.
8. Peace of mind - Probate never comes at a good time. After the death of a spouse is always a very stressful time. Many couples have peace of mind knowing that they have taken care of the transition process while they were alive.

A Living Trust can be and are often done for single persons. For example a widow or a widower may have put property in trust to be managed by them until they are no longer able to

manage the property or until their death.