

Living trusts can be among the most useful of legal creations. A living trust may allow a person's heirs to avoid probate proceedings after he dies while retaining full control over his property while he is alive. It may also avoid conservatorship proceedings and can be useful in avoiding or reducing estate taxes.

The power and flexibility of living trusts make them vulnerable to abuse. Unless a beneficiary or trustee requests it, trusts are not supervised by any court. In other words, the operative word is "trust."

### *Nature of a Trust*

A trust is really a special type of gift. A gift may be made with conditions (strings) attached. For example, suppose one gives a parcel of property to a church, so long as it used for religious purposes. If the property were used as a service station, the property would go back to the person who made the gift.

With trusts, the one making the gift (the grantor, settlor or trustor) gives assets to another (the trustee) and directs him to use the property to benefit a third person (the beneficiary). It used to be that the parties had to be different people.

Trusts have been and still are employed to make sure that a spendthrift, incompetent or minor was taken care of without allowing him to spend or have control of the principal. A father (the grantor) might give money to a friend or banker, (the trustee) with instructions that it be used to take care of his incompetent child (the beneficiary). Thus, all trusts must have four elements: a grantor, a trustee, a beneficiary, and the asset or property of the trust.

(A trust should not be confused with a trust deed, which is a security device like a mortgage,

used to make sure a debt is repaid.)

### *Modern Living Trusts*

Under modern law, the grantor, trustee and beneficiary may be the same person. In most living trusts, the grantor is also the initial trustee, and continues to manage the trust property just as he did before making the trust. He is also usually the beneficiary entitled to the income while he is alive (the income beneficiary). The grantor may direct that after he dies, the property will be given to his children or other persons (the residual beneficiaries) outright, although the assets may be kept in trust for a time if that is what he wants.

Also, under modern law, a grantor may make his trust revocable and amendable. If the trust is revocable, property may be placed in it and later taken out and dealt with exactly as the grantor did before making the trust. Since he may amend the trust, the grantor may change the way the property is distributed on his death, much as though he made a change in his will. Any other provision of the trust may also be changed.

The trust instrument usually designates a person to act as trustee of the trust when the grantor is unable to do so. If the cause of the inability is the grantor's death, the successor trustee's usual duty is to distribute the property to the residual beneficiaries as dictated by the trust. The successor trustee's function is similar to that of an executor of a will.

If the grantor is unable to act as trustee because of disability or illness, the successor trustee is called upon to care for the property and manage the financial affairs of the trust while the grantor continues to be disabled. The trustee is usually instructed to use income and principal (if necessary) of the trust for the support of the grantor.

### *Results of Living Trusts*

After one's death, his property or assets are ordinarily transferred to his heirs or the persons named in his will by means of a probate proceeding. The probate court ultimately makes an order accomplishing the transfer, and thereafter, the assets belong to the heirs. Such proceedings usually take eight months to two years to complete and involve significant legal costs and fees.

However, because a trust is a present transfer of title (like a gift), when the grantor dies, no probate proceeding is necessary. The new trustee merely takes over and continues acting under the instructions given by the grantor, which are may be to distribute the remaining trust property to the grantor's children or in any other manner he may specify.

The practical result of a revocable trust is to allow a person to have all of the privileges of ownership of the trust property (because it is amendable and revocable), at the same time avoiding much of the expense, delay and effort inherent in probate proceedings.

Another result is if a grantor becomes incapacitated, the trust may avoid a conservatorship proceeding. When one is unable to handle his affairs, a court can appoint a conservator to do so, who will sign checks, pay bills and otherwise attend to one's financial affairs. Conservatorships involve ongoing legal costs and fees. With a trust, if such disability occurs, the successor trustee merely steps in and manages the property of the trust as the grantor has directed, usually applying the income and principal of the trust to the grantor's expenses. (The new trustee may not amend or revoke the trust).

## *Disadvantages*

The primary disadvantage of a trust is that no independent party is watching to make sure the trustee is doing his job properly. In theory, the beneficiaries will do so, but in practice, the beneficiaries are in a weak position. The trustee has all of the power and information, as well as access to all of the funds of the trust. If the beneficiary suspects or even knows that the trustee is breaching his duties, the beneficiary must retain an attorney (at his own expense) and bring the matter to court. The trustee can use the trust funds to defend himself. If the trustee has already spent or secreted trust assets, the beneficiaries may never receive the distributions they are entitled to.

Another disadvantage of a trust over a will is that legal fees are higher when it is created. The protection of the court in probate and conservatorship proceedings is less available. Assets which are to be a part of the trust must be transferred to it, which involves time and expense. Some people may be uncomfortable with this manner of owning property. In some estates, accounting requirements may be somewhat more complicated.

For many people, a trust is a desirable alternative to a will, allowing both the avoidance of probate and full management and control of one's assets.

### ABOUT ESTES & ESTES

Estes & Estes represents clients in estate planning and administration matters, as well as litigation relating to those areas. The firm's attorneys have collectively more than 50 years of service to families in South Orange County.

We strive to deliver legal services at the highest level and at the same time, fully understand the unique needs of each of our clients.

Pamphlets are based on general California law. They should not be used as a substitute for obtaining the advice of a qualified attorney on any particular issue.

---

---

## LIVING TRUSTS

---

---



ESTES



ESTES

ESTES & ESTES  
Attorneys at Law  
629 Camino de los Mares  
Suite 203  
San Clemente, CA 92673  
949.443.9011  
949.443.9144 (fax)  
[EstesandEstes.com](http://EstesandEstes.com)