



## Mortgage Insight: Real Estate Advantages of Living Trusts

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Two subjects nobody enjoys thinking about are death and taxes. Because April 15 just passed, we don't have to talk about income taxes until next year. But death is a topic that is difficult to avoid, especially as the huge "baby boomer" generation approaches its golden years.

Shockingly, less than 20 percent of the U.S. population has a written will designating who shall inherit their assets after death. If a person dies without a will, he or she is said to die "intestate." The state law of the residence then determines who automatically receives the assets, usually a surviving spouse, children, or other close relatives.

However, especially in second marriages, intestate succession often results in unintended consequences. Also, except for very small estates, probate court proceedings are usually required when a person dies without a will, thus delaying distribution six to 18 months, and often much longer.

Another reason to avoid probate court proceedings is state law determines the attorney and administrator fees, ranging from 6 to 22 percent of estate assets. However, these fees are negotiable so don't hesitate to negotiate if you are an estate heir.

But a far better, faster, and less expensive approach is to have a

**Revocable Living Trust** to hold title to your major assets such as your home, real estate investments, bank accounts, brokerage account, and mutual funds.

However, life insurance policies, tax-deferred annuities, IRA and 401k should remain outside your living trust because they pass automatically to the designated beneficiary.

### THE FIRST REVOCABLE LIVING TRUST ADVANTAGE

Most real estate owners are not aware of the two key living-trust benefits. The most important advantage is to avoid probate costs and delays after the trustor or principal dies.

Until then, the trustor is the controlling beneficiary and trustee of his or her living trust. Assets can be bought, sold, and managed as desired. Tax benefits are not affected because a living trust is merely a method of holding title.

To illustrate, instead of holding title to your home as "John and Mary Smith," title can be held in your living trust as "John and Mary Smith, trustees." For those who want privacy, some living-trust attorneys advise holding living trust in a creative name such as "1234 Easy Street Trust."

When a living-trust creator dies, the successor trustee takes over management of the living-trust assets. Often this is a surviving spouse, or it could be a trusted adult child, relative, or friend named in the living trust.

The successor trustee can distribute trust assets according to the

living-trust terms immediately, but it is usually wise to wait 30 to 60 days so debts of the deceased can be paid.

When a principal or trustor dies owning major assets such as real estate in more than one state, holding title to those assets in the living trust avoids probate costs and delays in each state.

For example, Susan dies while owning real estate in Florida, Minnesota and North Dakota. She did not have a living trust. Her son or heirs would have to assume costly probate court proceedings in all three states, thus delaying asset distribution, and reducing the estate's assets.

### THE SECOND REVOCABLE LIVING TRUST ADVANTAGE

Most people are not aware there is also a second major revocable living trust advantage. It is management of living-trust assets if the trustor or principal becomes incapacitated, such as with Alzheimer's disease or is in a coma.

Without a living trust, it will be necessary to have a court-appointed conservator or guardian manage your assets if you are unable to do so. However, if you have your assets in your living trust, your successor trustee can then manage your assets without expensive court interference.

For this continued management reason, holding title to your home, real estate, bank accounts and other major assets in your living trust is usually far better than joint tenancy with right of survivorship, tenancy by the entireties (where allowed,) or

community property. The successor trustee can take over after a physician determines the principal or trustor has become incapacitated.

For example, suppose husband and wife own their home in joint tenancy with right of survivorship. If one spouse acquires Alzheimer's disease and is no longer able to comprehend, the other joint tenant would not be able to sell their home without court approval of a conservator or guardian. However, if title to the home is held in a living trust, then the successor trustee spouse can easily sell the house without court intervention.

### **ADDITIONAL LIVING-TRUST BENEFITS**

Privacy is a major living-trust benefit, as compared to a will, which becomes public knowledge after a decedent dies.

To illustrate, although Bing Crosby died in 1978, most of his assets were held in his living trusts, which never became public knowledge to this day. A few states allow living-trust registration, but there is no penalty for failure to do so.

Or perhaps you recall the nasty will contest after well-known CBS television personality Charles Kuralt died a few years ago. His written will left all his assets to his widow, but his Montana mistress claimed his Montana property was given to her in Kuralt's holographic will. In a very expensive will contest

lawsuit, the court ruled the Montana property became the mistress'. This public will contest could have been avoided if Kuralt held title to the property in a living trust instead.

Just like a will, a revocable living trust can be changed or even revoked at any time. Another benefit is a living trust has no effect on the trustor's or the heir's tax benefits, such as the \$250,000 and \$500,000 principal residence sale tax break, homestead rights, tax-deferred real estate sales benefits, and even stepped-up cost basis for heirs.

### **LIVING-TRUST DISADVANTAGES**

Although there are some excellent do-it-yourself living-trust books available, most people prefer to consult an attorney who specializes in living trusts.

Costs vary widely, depending on the complexity and the extent of asset transfers into the living trust. Some attorneys charge as little as \$500, but most living-trust attorney fees are in the \$1,000 to \$2,500 range. This is far less expensive than costs for probating a will.

A perceived disadvantage can occur if you want to refinance your home. Most mortgage lenders require taking the title out of the living trust momentarily so the lender's mortgage or deed of trust can be signed and recorded by the borrower rather than the trustee. But then the title can be transferred back into the living trust

one moment later.

Although many states allow "payable-upon-death" checking and savings accounts, and a few even permit payable-upon-death deeds, that doesn't solve the potential problems of incapacity of the owner, or complications if the recipient predeceases the principal. Power of attorney and durable power of attorney forms can work well, but they don't allow the attorney-in-fact to distribute assets after death.

### **SUMMARY**

Revocable living trusts provide major benefits of avoiding probate costs and delays, and providing asset management if the principal trustor becomes incapacitated. Additional benefits include privacy, far lower costs than for probate proceedings, and no change in the trustor's and heir's tax benefits.

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