

SHOULD YOU HAVE A LIVING TRUST?

Once a high-end estate planning device of the rich, living trusts have become common and popular over the past 20-30 years. Probate proceedings in court can be avoided with a living trust, often resulting in large savings in attorney and executor fees and a quicker and more efficient settling of the estate. Whether you should have one depends on the property you own and your personal circumstances.

If you own real estate worth more than \$10,000, transferring it to your heirs on your death must be done in one of several ways: a joint tenancy, community property with right of survivorship, or revocable transfer on death deed under which the survivor receives the property nearly automatically (there is a simple affidavit to file); a probate proceeding; or a living trust.

Joint tenancy and community property deeds are usually sufficient for passing from a deceased spouse to a surviving spouse. However, for the survivor to pass real estate to children via a joint tenancy is usually inadvisable: (1) the children's creditors can get into the picture while the survivor is living, (2) the deed can only be changed with the heir's cooperation, and (3) there are complications if one child predeceases the survivor but leaves heirs (i.e. the survivor's grandchildren) for whom the survivor wants to provide (those heirs would not "take" under a joint tenancy deed).

Starting in 2016, California law has authorized a Revocable Transfer on Death (TOD) Deed by which a property owner may designate one or more beneficiaries to receive title upon the owner's death. This TOD deed has fewer infirmities than a joint tenancy deed (no creditor claims, beneficiary designation easy to change), but still has inadequacies as to beneficiaries who might predecease the owner.

A Will designating your heirs or reliance on state intestacy law which passes your property to your next of kin both require a probate proceeding for real estate. The probate process takes at least one year and generally involves fees for the attorney and executor totaling 5% (+/-) of the estate. Sometimes court supervision may be desirable, but generally the process is viewed as cumbersome, unnecessarily expensive, unduly time-consuming and lacking in privacy.

A living trust answers the problems which joint tenancy deeds and probate proceedings create.

Heirs' creditors cannot come calling until the death of the Trustor(s) (the person(s) who create trust and put their property into it). A full-blown estate plan can be implemented, dealing with such issues as the premature death of a child, educational or support arrangements for children or grandchildren, and special bequests. The delays and expenses of probate can be avoided. For these reasons, a living trust is considered the Rolls Royce of estate planning techniques for passing real estate and other high-value assets.

Younger couples in good health might reasonably choose to avoid the expense of setting up a living trust (approximately \$2500 for a simple trust for a married couple). If one dies unexpectedly, the other will succeed to his/her interest with little problem under a joint tenancy or community property deed. Real estate transactions are modestly complicated by the presence of a living trust, with title companies requiring copies of documents and lenders perhaps refusing to deal with a property in trust. For these reasons, many people choose to delay the creation and implementation of a living trust until retirement.

By retirement age, there are different considerations. For many folks, it becomes tougher psychologically to meet with an attorney as they pass into their 70's and it may become more difficult physically as well if health declines. Usually the frequency of real estate transactions declines as couples settle into their retirement home. Also, one nice side-benefit of a living trust is that the property of an incompetent or comatose person can be managed by the Successor Trustee, avoiding the conservatorship that could otherwise be required. For all these reasons, couples in their 60's should take a hard look at a living trust.

Unmarried people probably should consider a living trust once they own real property regardless of age. Otherwise, their heirs will be facing a probate should they die. Thus, if you are widowed or divorced, a living trust should be investigated.

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