UNDERSTANDING LIVING TRUSTS

FOR FLORIDA RESIDENTS

A PRACTICAL GUIDE ON HOW TO:

- **Avoid Probate**
- **Save Estate Taxes**
- **Minimize Court Intervention**

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INTRODUCTION

When I first wrote about Living Trusts for Florida residents over seventeen years ago we were at the beginning of the **Living Trust Revolution: Trusts were replacing wills as the principal planning tool for persons regardless of age or income**. The primary force driving this change was that people did not want a court or probate judge to intervene in their family or business affairs. People wanted to avoid probate in the event of disability or death. As you will read here, a Will requires a court to step into your personal affairs. Today, Living Trusts have become firmly established as the legal tool of choice for most people. This booklet will explain why.

What we're talking about is called estate planning. **Estate planning is not just for the wealthy**. Regardless of your age, marital status, or wealth it's something we all need to do if you want to keep control of your assets (your estate) and of decisions about your medical care when something happens to you. It's important to plan now, while you can, because with estate planning no one gets a second chance.

I'll look at five basic ways people "plan" their estates. (You're already using at least one of them now, even if you think you haven't done any estate planning.) We'll explain what can happen when you use them. We'll show you how one plan gives you a way ***to keep legal control in the family and stay out of the court.*** I'll do my best to explain it all in plain English.

1. LOSING CONTROL WITH A WILL

Contrary to what you've probably heard, a Will is usually not the best plan for you and your family, primarily because ***a Will does not avoid probate when you die***. All Wills, including those with trusts in them, must be admitted to the probate court before they can go into effect. Equally, if not more important, **a Will does not avoid guardianship** – the legal process where the court steps into your life and appoints a guardian to manage your personal and/or financial affairs. A Living Trust can avoid these two basic problems. These are the reasons the Living Trust, not a Will, has become the primary legal planning tool for families in Florida and nationwide.

What is probate and why do we have to go through it?

Probate is the legal process through which the court makes sure that, when you die, your Will is legally valid, your debts are paid and your assets are distributed according to your Will and Florida law. It is a bureaucratic, costly, and time consuming procedure to transfer title from your name to your beneficiaries.

What assets go through probate?

Not everything you own is automatically subject to probate. Jointly owned assets that transfer to the surviving owner and assets that have a valid beneficiary designation (like an insurance policy) generally do not go through probate. But there can be some significant problems with both. You'll want to finish reading this booklet before you rely on them.

What's bad about probate?

It can be expensive. According to a study by the American Association of Retired Persons (AARP), attorney fees for probate are usually three percent or more of the estate's gross value. Florida presumptive statutory probate fees for attorneys (F.S.733.6171) are approximately:

Estate	Florida Probate Fee
$100,000	$3,750
$250,000	$7,500
$500,000	$15,000
$750,000	$22,500
$1,000,000	$25,000
$2,000,000	$50,000

These fees are not the total cost of probate**:** they do not include the Personal Representative's fee, which are often paid to a family member or waived. If not waived, the Personal Representative's fees can be up to 3% of the total probate estate.

Probate takes time - usually 9 months to 2 years. During this time, your assets will be frozen (unless you wish to incur the expense of a bond) so an accurate inventory can be taken, and nothing can be distributed or sold without the court and/or personal representative's approval.

Loss of Privacy. Probate is a public process. An "interested party" can find out details about your estate, including who the heirs are, what they will receive, their addresses, etc. This information is sometimes used as "business" leads by solicitors.

Loss of Control and Intervention of the Courts in your Family Affairs. The probate judge—not you or your family—has supervision over how your Will is interpreted, how much probate will cost, how long it will take, and what information is made public. Families are accustomed to handling their affairs privately and independently. Suddenly, losing that control to a legal process and having to pay for it can be frustrating.

Wills Cannot Plan for Disability. This is the most serious, yet least understood limitation of Wills. Disability is the lack of capacity to manage your own affairs. Think about this for a few moments. If you can't handle your affairs because of mental or physical incapacity - for example, if you have a stroke or a heart attack, develop Alzheimer's Disease, or are injured in an auto accident—who will conduct business for you? Sooner or later, your signature will probably be required for something—to withdraw savings, sell/ refinance assets to pay your expenses, etc. Unless you have legally given another person the legal authority to sign for you, you will not be able to transfer these assets without the intervention of the probate court.

2. LOSING CONTROL BY DOING NOTHING

What happens is you don't do anything? If you own assets in your name and you become incapacitated, the court can take control just as we explained. And when you die, your estate will go through probate. The only difference is that your assets will be distributed according to Florida law, which is probably not what you would have wanted. Under Florida law, if you are married and have children, they will each receive a share of your estate. This means your spouse could receive only a fraction of your estate, which may not be enough for him or her to live on. And if you have minor children, the court will control their inheritances and it will **appoint their guardian(s) without knowing whom you would have chosen**.

3. LOSING CONTROL WITH JOINT OWNERSHIP

Have you seen the designation, "JTWROS" on your mutual funds or other investments? This means Joint Tenancy with Right of Survivorship. Upon death of one person holding as "JTWROS", the survivor takes everything. Joint ownership is probably the most commonly used estate plan - and probably causes more problems than any other estate plan, such as (a) Since ***jointly held property is not controlled by your will***, it could defeat the objectives of your will; (b) Putting a savings account in joint name with a son or daughter will expose those monies to the creditors of those children; and (c) For married couples with a taxable estate over two million dollars, jointly held property can have adverse estate tax consequences.

4. LOSING CONTROL BY GIVING AWAY ASSETS

Some people re-title assets in their children's names while they are living, thinking it will make things easier for their children when something happens to them. The primary problem with giving away an asset is - it's gone. What if you want or need it back? What if the son or daughter becomes mired in a divorce? What if the child is in an auto accident and is sued? Another problem is the gift tax: if the value of the gift exceeds $12,000 per person annually, a gift tax return should be filed.

5. KEEPING CONTROL WITH A REVOCABLE LIVING TRUST

A recent article in *Forbes* magazine titled, "Trust a Trust", advises: "***Have you set up a trust? If you haven't, get cracking. No middle-class family should be without one."***

What is a Revocable Living Trust?

The key word is "REVOCABLE", which means you have unfettered discretion to alter, change, amend or revoke the trust. You are THE BOSS. A Revocable Living Trust is a legal document that includes your instructions for what you want to happen to your assets when you die, just like a Will. But, unlike a Will, a Living Trust avoids probate at death. It also prevents the court from controlling your assets if you become incapacitated and it gives you control of the assets you leave to your minor children or grandchildren—***without court supervision***.

How does a Living Trust avoid probate and prevent court supervision at incapacity?

When you set up a Living Trust, you transfer assets from your individual name to the name of your Trust, which you control, such as from "John and May Smith, Trustees, of the Smith Family Trust, dated 6/7/__." Technically, you no longer own anything, so there is nothing for the courts to administer when you die or if you become incapacitated. The concept is very simple, ***but this is what keeps you and your family out of the courts - even if you own assets in other states.***

Do I lose control of the assets I put into my Living Trust?

Absolutely not. You ***keep full control***. You can do anything you could do before - including buying, selling, investing, etc. You can make changes or even cancel your Trust (that's why it's called a revocable trust). In fact, the Internal Revenue Service considers putting assets in a Revocable Living Trust to be a "non-event" because you can take them out at any time. Nothing changes but the names on the titles. And, as you'll see in the next few pages, you'll actually have more control with your assets in a Living Trust than you do now.

How does a Living Trust work?

When you set up a Living Trust, you become the Trustmaker, Trustee and Beneficiary. If you are married, you and your spouse can be Co-Trustmakers, or you can be Trustmakers of your own separate Trusts. Only you, the Trustmaker, can make changes to your Trust. ***That's how you keep control***.

What happens if I become incapacitated?

If you have named someone else as your Trustee or to be a Co-Trustee with you (for example, your spouse or a family member), they will continue to manage your financial affairs according to your Trust's instructions for as long as necessary. If you recover, you automatically resume control. If you are the only Trustee or your Co-Trustee is unable to act (for example, if your spouse is also incapacitated or has died), your hand-picked Successor Trustee(s) will step in and act for you. ***That's how you keep control within Your family***.

What happens when I die?

Your Trustee or Co-Trustee essentially has the same duties as a Personal Representative. He/she collects any income or benefits, pays your remaining debts, sees that tax returns are filed, and distributes assets according to your Trust's instructions. If estate tax planning is involved, he/she will work with your team of professionals to make sure everything is done strictly according to your wishes. All of this can be done efficiently and privately - with no court interference.

Who can be a Successor Trustee?

Successor Trustees can be individuals (your adult children, other relatives, or trusted friends) and/or a Corporate Trustee, such as a bank or trust company. If you choose an individual, you should name more than one in case your first choice is unavailable or unable to act. You can name two or more to act together.

How do I know my Successor Trustee will do what I want?

A Trust is a binding legal contract, and Trustees are fiduciaries. Under Florida law, they have a legal duty to follow your Trust's instructions and act in a "prudent" (conservative) manner at all times for the benefit of your Beneficiaries. If your Successor Trustee were to abuse his/ her duties by not following the instructions in your Living Trust, he/ she could be held legally liable.

Does a Living Trust reduce my taxes?

A Revocable Living Trust has no effect on your income taxes. There are even income taxes on the income you receive in the year you die. However, depending on the size of your estate, a Living Trust can help reduce or even eliminate estate taxes when you die.

What is the Current Estate Tax or "Death Tax"?

The 2012 American Taxpayer Relief Act (ATRA) has fundamentally changed estate tax planning. For 2015 the new law increases the estate tax exemption to $5.43 million per person; above this exemption the tax rate is 40%.

Note: Under the new law, if a person is not a U.S. citizen, the tax rate is 40% over the exemption of $60,000. Foreign investors who are non-residents and own property in the U.S. need to do special planning to avoid this tax.

Important Planning Note: To determine your current net estate, add up the present value of your assets and subtract your debts. Your assets include everything you own: home, other real estate, investments, personal belongings, retirement benefits, IRAs, death benefits and life insurance. Many persons do not know this latter fact: Many persons believe life insurance benefits are not subject to the estate tax because such benefits generally are not subject to income tax. This is wrong. If you own the policy, the life insurance benefits will be subject to the estate tax if you are over the exemption amount listed above.

Is there anything I can do about estate taxes?

YES! - IF YOU PLAN NOW. One thing you can do, if you are married and your spouse is a U.S. citizen, is to use Uncle Sam's plan - the marital deduction. (If you or your spouse are not U.S. citizens, there are other options we should discuss.) When you die, you can leave an unlimited amount to your spouse tax-free. And when your spouse dies, the estate will be entitled to a tax exemption.

But what many people don't realize is that every U.S. citizen is entitled to an exemption. ***And when you leave everything to your spouse through the marital deduction, you forfeit your valuable exemption***.

How does a Living Trust reduce or eliminate estate taxes?

It can include provisions that lets a married couple tax full advantage of their estate tax exemptions, so that married persons can shelter up to approximately 10.8 million dollars from the federal estate tax. Under ATRA (the 2012 Federal tax law mentioned earlier), a married couple has portability options that may need to be addressed in your living trust to provide maximum flexibility for tax planning.

What's involved in setting up a Living Trust?

You make the basic planning decisions by deciding who will be your Trustee, Successor Trustees, and Beneficiaries. The legal document is then prepared from your decisions. After you've approved and signed the document, you transfer your assets to your Living Trust. This is called "funding" your Trust.

Do I need to fund my Living Trust now?

If you want the control we've been talking about, you must fund your Living Trust now, while you are able. Your Living Trust can only control the assets that have been transferred into it.

Is it hard to put assets into my Living Trust?

No, and your attorney, financial advisor and insurance agent can help. You'll need to change titles on real estate (local and out-of-state) and other assets with formal titles, such as savings, stocks, CDs, other investments, insurance, safe deposit box, etc. Tax deferred savings plans, like IRAs and 401(k) plans are exceptions. If you are married, there may be valid tax reasons for you to name your spouse as first Beneficiary and your Trust as second Beneficiary. You'll want to discuss your options with your attorney and tax advisor.

Doesn't it take a lot of time to change titles and beneficiary designations?

It will take some time. But you can do it now, or you can pay the courts and attorneys to do it for you later when you can't. Think about this for just a minute. Who knows better than you what you own and where all the paperwork is located? And if there is a problem with a title, wouldn't it be better for you to straighten it out now than for your family (and attorneys) to try to resolve it without your help? One of the benefits of a Living Trust is that it organizes all your assets under one plan, with one master set of instructions.

Should I have an attorney prepare my Living Trust?

Yes, preferably an experienced attorney who specializes in Living Trusts. I have yet to review a "do-it-yourself" trust that comes close to meeting Florida law requirements and fulfilling the family's needs. Invariably, these attempts to save money result in the opposite: expensive fix-ups, expensive litigation, family headaches, and family division.

Is a Living Trust expensive?

Not when compared to the costs and loss of control that come with probate at death and court supervision at incapacity.

How much does a Living Trust Cost?

The cost for a Living Trust depends on how complicated your estate is and whether you need to do tax planning. I can tell you the exact cost following our initial meeting.

How long does it take to get a Living Trust?

It will only take two to three weeks to prepare the documents after you make the basic decisions.

Are Living Trusts new?

Not at all. Trusts are as old as Wills: They have been used effectively for hundreds of years.

When should I set up a Living Trust?

Now, while you are healthy and you don't think you need one. Because, remember, with estate planning, you don't get a second chance, to KEEP CONTROL IN YOUR FAMILY - AND OUT OF THE COURTS.

CONSULTATION

You may schedule an initial consultation by calling Rarick & Beskin at (305) 556-5209 or email to info@raricklaw.com. At this first meeting, our job is to listen to you and learn about your family. We will then outline an estate plan designed to meet your needs and the needs of your family. We will give you the total cost of the plan at this meeting, so that if you decide to go forward with your planning, you will know the exact cost. If you elect not to proceed, there is no further obligation. **We hope to meet you soon!**

ESTATE PLANNING CHECKLIST

The following checklist will help you determine whether estate planning is necessary. Please answer each question YES or NO.

1. Has it been more than three years since you reviewed your estate plan, including your Will, life insurance policies and any other documents? [ ] YES [ ] NO
2. If you or your spouse passed away today, are you uncertain about what would happen to your property? [ ] YES [ ] NO
3. If you became incapacitated, would your family have to go through court proceedings to carry on your affairs? [ ] YES [ ] NO
4. Do you have minor children or other people who are dependent on you? [ ] YES [ ] NO
5. If a death occurred and court approval was required to release accounts for working capital, could it disrupt your business or family life? [ ] YES [ ] NO
6. Would you like to avoid probate of your estate? [ ] YES [ ] NO
7. Does your life insurance or other accounts name a minor child as a beneficiary? [ ] YES [ ] NO
8. Do you have children by a previous marriage? [ ] YES [ ] NO
9. Have there been any major changes in your family since you last signed your will, such as marriage, separation, divorce, birth, etc.? [ ] YES [ ] NO
10. Are any of your children poor money managers, have credit card debt, or in a marriage that is not stable? [ ] YES [ ] NO

If you answered any one of the above questions YES, you may need estate planning now. YES answers indicate potential problems in the areas of tax, cost and delay of probate, or simply lack of a plan which carries out your wishes. **Planning now can help solve these problems later!**

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