

Estate Planning

Estate Planning with the Living Trust

by William Raymond

The living trust is the most commonly used estate planning tool. This article will briefly examine the nature of the living trust and some of the beneficial effects which can be achieved by employing a living trust in an estate plan.

What is a Trust? A trust is a legal entity to which the creators of the trust (known as the trustors or settlors) transfer some or all of their assets for the purpose of having those assets held, administered, and distributed by a trustee in accordance with the trustors' legally binding directions contained in a declaration of trust signed by the settlors. The persons for whose benefit the trust exists are known as the beneficiaries.

What is a Living Trust? A living trust, also referred to as a revocable inter vivos trust, is a trust that comes into existence when the declaration of trust is signed by the settlors, and that can be revoked or modified by them should they later desire to do so. The living trust, or revocable inter vivos trust, is to be contrasted with the irrevocable inter vivos trust, which the trustors cannot revoke or amend, and with the testamentary trust, which is a trust contained in a will and cannot come into existence until probate administration of the trustor's estate has been completed.

The Doe Family Trust. Consider a hypothetical married couple, John and Jane Doe, who decide to establish a living trust, which we will call the Doe Family Trust. What estate planning goals can John and Jane achieve with their living trust?

- ✦ **Retention of Control of Assets.** The declaration of trust provides that John and Jane will be the trustees and beneficiaries of the trust during their lives. This means they will manage the trust assets for their own use and benefit.
- ✦ **Providing for Incapacity.** Assume that John dies and Jane later becomes incapacitated. The successor trustee named in the declaration of trust, who may be one of John's and Jane's adult children or any other person they have designated in the declaration of trust, can step in and assume management of the trust assets for Jane's benefit without the need for judicial conservatorship proceedings.
- ✦ **Avoidance of Probate.** Assets held in trust are not subject to probate. While probate offers the advantage of judicial oversight of the administration of a decedent's estate, it has several disadvantages that frequently make probate avoidance desirable. Among these are cost, delay, procedural complexity and loss of privacy (probate court files are public records).
- ✦ **Flexibility in Dispositive Provisions.** When it comes to providing for beneficiaries, the trust is the most flexible estate planning tool. The key to this flexibility is the fact that the trust can continue in existence long after the deaths of the settlors.



Consider the John and Jane situation, and assume that John predeceases Jane. Typically, The Doe Family Trust will continue after John's death for the benefit of Jane for the remainder of her life. When Jane dies, a successor trustee named in the declaration of trust will take over the duties of trustee and will continue to hold, administer and distribute the trust assets in accordance with the provisions of the declaration of trust. The beneficiaries of the trust at this point may be John's and Jane's children, grandchildren, other relatives, nonprofit organizations, and any number of other persons or entities specified in the declaration of trust.

The manner in which the benefits of the trust flow to the beneficiaries is directed by the declaration of trust. The declaration of trust may provide for outright distribution of shares of the trust estate to John's and Jane's adult children. It may provide that the shares of minor children or young adults are to be held in trust by the trustee until a certain age is reached, with payments permitted to or for the benefit of those beneficiaries for support, education, medical care, or other valid purposes. The declaration of trust may provide that certain beneficiaries' shares are to be held in trust for the duration of their lives, with distribution of income and limited distributions of principal authorized. The declaration of trust may provide that, until the youngest beneficiary reaches a certain age, the trust is to remain a single fund, with the trustee authorized to make discretionary distributions to the beneficiaries in accordance with their individual needs (the so-called "family pot" or "sprinkling" trust). These are just a few examples of the wide variety of dispositive arrangements which can be directed by the settlors in the declaration of trust.

- ✦ **Minimization or Elimination of Federal Estate Tax.** A living trust, if properly written and administered, can be an effective means of minimizing or eliminating federal estate tax, particularly for a married couple. A trust designed to reduce or eliminate estate tax is referred to as a "tax-planned" trust. The tax advantage of a tax-planned trust can be dramatic. For example, if John and Jane have an estate valued at \$4,000,000, a tax-planned trust can completely eliminate estate tax on both of their deaths. Without a tax planned trust, an estate tax of up to \$900,000 (this is not a "typo") could be payable when the second spouse dies.
- ✦ **Protection of the Estate of the First Spouse to Die.** A living trust can be used to protect and preserve the estate of the first spouse to die (the "deceased spouse") while keeping the deceased spouse's half of the trust available for the benefit of the surviving spouse. A properly drafted and administered trust can facilitate preservation of the estate of the deceased spouse so that, when the

When Laws Overlap: ADA and Workers' Comp

Many employers don't realize the Americans with Disabilities Act applies to employees who become injured on the job.

The Americans with Disabilities Act (ADA) prohibits employment discrimination against disabled individuals. Many employers don't realize that this includes existing employees who become disabled on the job. Penalties for violating the ADA can include back pay, promotion, reasonable accommodation, attorneys' fees, expert witness fees and court costs. Compensatory and punitive damages also may be available where the Equal Employment Opportunity Commission finds intentional discrimination.

How does ADA apply to workers' compensation claimants?

The ADA applies to any employer that has 15 or more employees for 20 weeks or more during the current or preceding year. When workers meet the ADA's definition of disability, regardless of the cause, employers must make "reasonable accommodations" to enable them to continue working. However, if an employee is unable to perform the "essential functions" of the job, even with "reasonable accommodations," the ADA does not apply.

Injured or disabled employees who need accommodations must notify their employer that they need an adjustment or change at work for a reason related to a medical condition. To request accommodation, an individual may use "plain English" and need not mention the ADA or use the phrase "reasonable accommodation."

What exactly are "reasonable accommodations"?

No hard-and-fast rules guide employers in this area. Instead, the ADA considers accommodations to be reasonable unless they impose an "undue hardship" on the employer. Undue hardship includes significant difficulty or expense, disruption or fundamental alteration of the business's nature.

ADA and leave

Before the enactment of the ADA, employers with maximum leave-of-absence policies would send a disabled employee a notice of termination when he or she had used all available leave. Under the ADA, the employer must send employees on leave a certified mail notice, at least 30 days before the end of the leave, that explains the reasonable accommodation requirement. A reasonable accommodation under the ADA may mean extending the leave period. However, an employer does not have to provide more leave than it would provide to other employees in a similar situation.

Employers should allow an employee with a disability to exhaust accrued paid leave first and then provide unpaid leave. For example, if employees get 10 days of paid leave, and an employee with a disability needs 15 days of leave, the employer should allow the individual to use 10 days of paid leave and 5 days of unpaid leave.

As for the employee's position, the ADA requires an employer to hold it open while the employee is on leave and to return the individual to the same position, unless doing so would cause undue hardship. If the employee can no longer perform the essential functions of the position, even with reasonable accommodations, the employer must reassign the employee to a vacant position for which he or she is qualified, barring any undue hardship.

If you have questions on accommodating a disabled employee, the Job Accommodation Network, or JAN, may be able to help. Sponsored by the federal government, JAN provides information on how employers across the country have accommodated employees with disabilities. Their toll-free number is 1-800-526-7234, or visit their Web site at <http://janweb.icdi.wvu.edu>.

For more information on managing disability leave under workers' compensation, please contact us.



What types of disabilities does the ADA cover?

The ADA defines a disability as:

- ✓ a mental or physical impairment that "substantially limits one or more of the major life activities." These "major life activities" include the basic activities that the average person can perform with little or no difficulty, including caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working.
- ✓ a record of a substantially limiting impairment.
- ✓ being regarded as having a substantially limiting impairment.

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surviving spouse dies, the estate of the deceased spouse can pass to the beneficiaries intended by the deceased spouse.

Assume, for example, that John and Jane each have children by prior marriages. John's and Jane's trust is valued at \$2,000,000 and consists entirely of community property. John desires that, if he dies before Jane, his half of the trust will remain available for the economic wellbeing of Jane during her life, and will pass to his children on Jane's death. Jane has similar desires regarding her half of the trust and her children, should she die first.

Assume that John dies first. A properly drafted trust can keep John's half of the trust available for Jane's economic wellbeing, while eliminating, or at least minimizing, the likelihood that the following situations could occur to John's half of the trust assets (\$1,000,000) during the remainder of Jane's life: (1) Jane remarries and her new spouse squanders the trust assets; (2) Jane remarries and her new spouse persuades her to change the beneficiaries of the trust (for example, to the children of the new spouse); (3) dishonest persons defraud Jane and severely deplete the trust estate; (4) Jane incurs unforeseen liability (e.g., a car accident) which severely depletes the trust; (5) Jane has an unfriendly relationship with John's children, and modifies the trust to leave everything to her own children when she dies, notwithstanding that John wanted his children to receive his half of the trust after Jane died.

Conclusion. The purpose of this rather brief article has been to highlight some of the beneficial attributes of the living trust as an estate planning tool. These and other beneficial attributes of the living trust make it an essential component of almost every estate plan.

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