

# Living with the Realities of Your Estate Planning Documents

Partial article taken from Ben Combs (<http://gettingolderhappens.com>) (Why you should have a living trust – see Ben’s third reason which is why most single individuals should have a living trust – Peter Kote)

One client asked, “If there is so much hassle caused by trusts why do I even want one in the first place?” That is a good question. I will try to answer that question in this introductory article.

The first reason usually given for having a trust is to avoid probate. Depending on the state you live in, this may or may not be an important reason. Many estate planning attorneys in states like Texas and some East Coast states, do not recommend trusts for this reason. In those states, probate is not an expensive or a long and involved process. However, it is still public. So those who want to avoid creating a public record of their financial affairs, at death, will still want to avoid probate. A trust is a good and useful way to avoid probate. I have a friend in Washington State whose husband died over a year ago. She is still receiving unsolicited calls that have been triggered by the public filing of her husband’s estate after his death.

The second reason for having a trust is to avoid or reduce estate taxes. Currently, in 2011 everything you leave to a spouse avoids estate taxation. Furthermore, you can leave up to \$5,000,000 to others without any estate taxation. If the first spouse to die leaves everything to the surviving spouse there would be no estate tax at the first death. When the surviving spouse dies, the first \$5,000,000 is not taxed as the estate goes to the ultimate heirs. To this \$5,000,000 amount is added the difference between what the first spouse left and \$5,000,000. As an example, if when the first spouse died he or she left a \$2,000,000, the surviving spouse could leave up to \$8,000,000 estate tax free. The net result is that through to the second death, the two spouses can leave a total of \$10,000,000 without any estate tax due. It used to be that the use of trusts in your estate planning could double the amount that could be left estate tax free. Now you could leave \$10,000,000 estate tax free with or without a trust. The estate tax bracket on the first dollar above the exemption amount is 35%.

These were the two most common reasons (probate avoidance and estate tax avoidance) for setting up a trust as part of your estate planning. Estate tax avoidance will begin to play a lesser and lesser role in this decision as time goes on. If probate avoidance is a concern a trust can be set up during your lifetime. The trust is then called a Living Trust or Intervivos Trust. It can also be set up at your death by the action of your Last Will and Testament. The trust is then called a Testamentary Trust. A Testamentary Trust, however, will not avoid probate.

There is still another significant reason to set up a trust and this reason requires a Living Trust. We are now living to the age of our incapacity. When I first wrote this series of articles in 2002 I was working with the daughter of a client who had developed Parkinson's disease and dementia. She and her mother had just put him in an Alzheimer's Skilled Nursing Home. The client's wife was in good health, except for back problems that had been aggravated by caring for her husband. He was no longer competent to manage his financial and personal affairs. The wife was emotionally tired and unwilling to take over these management duties. If they had had a Living Trust, she could have taken over as trustee when her husband became incapacitated with the option to resign in favor of a successor trustee when she no longer wanted the burden. This process would have all been laid out in the trust document. There would have been no need to go to court to transfer financial management of their personal affairs from one to another and then on to a successor during their joint lifetimes or anytime thereafter.

It is possible to pass the reins of control by the use of a Limited Power of Attorney but, I believe, a trust is easier to use and implement than a power of attorney, especially with investment custodians and transfer agents for stocks and mutual funds. Also, if the title of real property has been put in the trust (as it should), a trust is easier to use than a power of attorney with respect to that property. Because of this third reason I almost always encouraged my clients to establish a Living Trust as part of their estate planning. The trust should address the issues of continuing management of your financial affairs during your lifetime in the event of incapacity.