



# Your Estate Can't Wait

Basic principles of estate  
planning you need to know.



Estate planning is one of those topics that most people know they need to consider but which often gets swept under the carpet, to be considered at some later date. Understanding some of the basic principals of estate planning will help explain why it's so important to get a solid estate plan in place, rather than deferring to the future.

While estate planning can get quite complicated for those fortunate enough to have significant assets to distribute, even a simple but well thought-out plan can help streamline what could otherwise be a time-consuming and expensive process.

The following pages will give you a better understanding of the terms, scenarios and options you'll need to understand when initiating your own estate planning process.





## What is your “estate”?

Generally, an estate includes all the property owned by a person who has died (the “decedent”). This includes not only assets, but any outstanding liabilities (mortgages, loans, etc.) the decedent may have. The net assets (what’s left after the fulfillment of liabilities) are what will be distributed from the estate to your beneficiary (ies). Upon death, the decedent’s estate goes in to probate unless other vehicles are in place that supersede the probate process.

## What is probate?

Probate is the legal process that transfers legal title of property from the decedent’s estate to the beneficiaries. The primary functions of the probate process are to:

- validate the authenticity of the decedent’s will (if any)
- identify and account for the decedent’s assets and liabilities
- fulfill financial obligations and debts of the decedent
- identify decedent’s beneficiaries, and
- distribute decedent’s assets according to decedent’s will, or, if no will exists, according to state law.

When an individual dies owning property titled directly in only his or her name, that property must go through the probate process.



## Why avoid probate?

Probate is a court-supervised process, involving not only a judge and attorneys, but other professionals as needed; as such, it is a costly and time-consuming process. Probate fees are based on the gross value of property in the estate at the time of the decedent's death, so it does not get reduced by outstanding debts. Additionally, if any of the decedent's assets are not accounted for in a valid will, distribution of those assets will be made according to state law, and not necessarily according to the decedent's wishes.

The reasons for avoiding probate, therefore, are to:

- minimize legal costs and other fees, to the extent possible (and therefore retaining those funds in the estate for distribution to beneficiaries);
- minimize the time delay in distributing assets from the estate to the intended beneficiaries;
- have a vehicle in place that ensures that the decedent's assets are distributed according to the decedent's intentions, which may differ from the default allocation defined by state law;
- privacy, since probate is public record.





## Methods to avoid probate

The simplest way for an individual to avoid having their estate subjected to probate is to develop an estate plan.

A good estate plan should achieve the following:

- distribute the decedent's property to whom the decedent intends;
- distribute the decedent's property at the time the decedent intends;
- keep the income, estate, and inheritance taxes to a minimum; and
- incur the lowest possible costs, including professional/legal and other administrative fees.

Avoiding probate can be an important component in achieving these goals, and a variety of estate planning devices are available to assist in achieving this effort.

Among the most widely used are:

**JOINT OWNERSHIP** Typically joint tenancy with rights of survivorship or, in California and certain other community property states, community property with rights of survivorship.

### **BENEFICIARY OR PAYABLE/ TRANSFER ON DEATH**

**DESIGNATIONS** Commonly available on retirement accounts such as pension, profit sharing, 401(k) or IRA accounts, life insurance policies, bank accounts, securities (stock brokerage) accounts and vehicle registrations.



**GIFTING** Gifting property and assets out of the estate prior to death removes the property from the assets that must potentially go through probate. If gifts are numerous or large, the donor may need to complete a federal gift tax return in the year of the gift.

It is important to keep in mind that property distributed at death pursuant to these probate avoidance devices normally will not be governed by the provisions of a will. Any assets not considered by such a device will be distributed in probate either pursuant to a valid existing will, if there is one, or by state law.

**TRUSTS** Of these commonly used vehicles, trusts are perhaps the most talked about, as they represent the core of most individuals' estate plans. And of the trusts, the **revocable living trust** is arguably the most widely-used. But what, exactly, is a revocable living trust, and what are the benefits and pitfalls of using such a trust?





### The revocable living trust

A revocable living trust is a non-taxpaying legal entity that can hold title to property and assets during an individual's lifetime (the individual is often referred to as the "grantor" or "trustor"). A trustee is named to manage the trust assets according to the trust's terms – during his or her lifetime, the grantor can, and typically does, serve as trustee, even though the assets belong to the trust. Upon death of the grantor, a named trustee can quickly settle any liabilities of the trust and transfer remaining trust property to the named beneficiaries without going through probate. In effect, the trust functions much like a will but avoids the time-consuming and potentially costly probate process.

Revocable living trusts have the following advantages over using a will:

**PRIVACY** Because the living trust is a private document, it is not filed with any court and is therefore not subject to public scrutiny. A will, on the other hand, becomes a matter of public record during probate and copies can be obtained upon request to the court. There are instances when a living trust might be incorporated by reference, for instance, by a "pour over" will, which is sometimes necessary if there are assets acquired in the name of the grantor after the living trust is established. In such an instance, the living trust may become part of public record.



**COST SAVINGS** Assets named in a revocable living trust avoid the court costs and additional attorneys' fees that would be incurred in a probated estate.

**CONTINUITY** Revocable trusts serve as an ongoing mechanism after death to pay bills, pay taxes and manage and distribute assets without any delay or probate court verification and approval.

## Other types of trusts

While the revocable living trust may be the most commonly used trust vehicle in the U.S., is not the only trust option. A number of different (and increasingly specialized) trusts exist, all of which have the benefit of keeping assets out of probate and which serve a variety of different purposes, depending on the desires and goals of the grantor. A sampling of the available options include:

**IRREVOCABLE LIVING TRUSTS** Unlike revocable living trusts, irrevocable living trusts may not be altered or terminated by the grantor once the trust agreement has been signed. Additionally, the grantor must typically forego ownership and control of the trust assets and income in favor of the trust. The benefit to this arrangement is that the grantor is no longer the taxable entity for the income from the trust assets – the trust becomes the taxable entity. The irrevocable living trust is often used to set aside funds for minor children, life insurance policies, and the like, when trust assets





are not currently needed by the grantor and can be set aside permanently. Tax results can be mixed, so, as with all estate planning matters, check with a qualified tax planning professional to determine appropriateness and impact.

**CHARITABLE TRUSTS** Charitable trusts are utilized to set aside assets that will ultimately benefit the general public through charitable means. Some types of charitable trusts distribute trust assets during the grantor's lifetime, others are set up to provide the grantor or the grantor's beneficiary(ies) with the income stream from trust assets, with the trust asset then reverting to the charity upon death of the grantor (or beneficiary(ies)). Significant tax advantages can be attained if the trusts are properly structured. Again, consulting with a qualified tax planning professional is advised.

### Key items to remember

- Fund the trust – for a living trust to take effect, the title to the grantor's assets must be transferred to the trust. This is not automatic upon execution of the trust; affirmative steps must be taken by the grantor to ensure that title to desired assets are actually transferred into the trust. Examples of such property include titles to bank accounts, brokerage accounts, real estate and automobiles.
- Property held in the grantor's name outside of a trust will likely still be subject to probate – again, emphasizing the importance of funding the trust.



- Watch for living trust scams – stories of unscrupulous living trust salespeople preying on the elderly and the unsuspecting are on the rise. Work only with trusted advisors who are knowledgeable about the specific laws and regulations in the grantor’s community, and who can be trusted with details regarding the grantor’s full estate planning needs.

## **The last word**

A well thought-out and properly executed estate plan provides you with the security of knowing that your hard-earned assets will be efficiently, appropriately and expeditiously distributed. Even those with relatively simple estates should consider talking with a professional tax or legal advisor, as the impact of having a plan versus not having a plan can affect not only the timing, allocation and cost of distribution, but the tax implications as well.

Regardless of the size and complexity of your estate, the great variety of planning vehicles available today ensures that there is an appropriate plan for you.





**SSF ESTATE & TRUST GROUP**

For more information about these and other estate planning techniques, please contact the Sensiba San Filippo Estate & Trust Team at [estate@ssfllp.com](mailto:estate@ssfllp.com).

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