

# Living Trusts

## Important Facts For New Jersey Residents

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Dear Middlesex County Resident:

As the Surrogate of Middlesex County, it is my pleasure to welcome you to the Office of the Surrogate and to the various statutory and assigned functions that we perform for the citizens of Middlesex County.



Although our primary responsibility is the processing of estates, we are also engaged in matters relating to adoptions, guardianships, the management of minor's trust funds along with a number of other services.

Our Speaking Program, which is one of my special interests, enables us to share information about the office and its services and to assist people through lectures, seminars, workshops and informational literature.

This pamphlet, "LIVING TRUSTS - IMPORTANT FACTS FOR NEW JERSEY RESIDENTS" provides you with important information regarding living trusts. The benefits and detriments of a living trusts are widely misread. In New Jersey, the benefits of a living trust are quite limited and the use of a living trust is often counterproductive. Anyone considering a living trust should consult with a member of the Middlesex County Bar Association with an Estate Planning practice.

If there is any way that I can be of assistance to you in matters related to the work of the Surrogate's Office, please phone me at 732-745-3055.

Best Regards,

A handwritten signature in black ink that reads "Claribel Cortes".

Claribel Cortes  
Surrogate  
Middlesex County

## **Introduction**

This pamphlet is designed to address the value of creating a Living Trust in order to avoid probate. There are several types of Living Trusts on the market, and the advertisements describe Living Trusts as essential elements for any estate plan. The Surrogate believes that these advertisements contain significant misrepresentations regarding the probate process in New Jersey, and significant misrepresentations regarding the value of a Living Trust. The purpose of this pamphlet is to correct those misrepresentations so that the public might make informed choices regarding estate planning.

## **What is a Living Trust?**

A Living Trust (technically called a revocable inter-vivos trust) is a document through which the owner of an asset transfers ownership of that asset to a trustee. The advertised benefit of the Trust is to remove that asset from one's probatable estate by relinquishing ownership. According to the marketers of these Trusts, removing assets from one's probatable estate will result in significant tax savings and will streamline the probate process.

The misinformation that some of these aggressive marketers are disseminating include the following:

1. The Trust can substitute for a Will.
2. The probate process is expensive, time consuming, and an invasion of privacy.
3. Beneficiaries will have to pay a large percentage of the estate in legal fees.
4. The Living Trust provides significant tax advantages over Wills.
5. The probate process passes control over your estate to the court.
6. The probate of an estate is a lengthy process.

These statements are false and misleading.

## **Is there a value in having a living trust in New Jersey?**

Usually not. Living Trusts proclaim that the probate process is expensive, time consuming, and an invasion of privacy. The truth is that in well over 90% of New Jersey estate administrations, there is no conflict. The probate process is quick and usually done at the Surrogate's Office in less than an hour. The process is inexpensive and fees are set by state statutes. Your Will does become part of the public record, but remember, this is the last statement you make on this earth.

Living Trust advertisers proclaim that your beneficiaries will have to pay a large percentage of the estate in lawyers' fees. Again, that is simply not true in the overwhelming majority of estates. More importantly, since the amount of the legal fee depends on the amount of time the lawyer has to spend on the matter, the fee would be essentially the same whether there was a Will or a Living Trust. The New Jersey Supreme Court's Committee on Attorney Advertising observed, "The administration of a Living Trust is virtually identical to the administration of an estate ...."

"Assuming an attorney charges a fee for services on the basis of billable time, there will be a very small differential between the cost of administering a probate estate and the cost of administering the estates of a Living Trust." The Committee further observed that since, in most cases, a Will would still be required, the cost of having both may be unnecessarily higher. Living Trust advertisements proclaim that there are significant tax advantages of Living Trusts over a Last Will and Testament. Again, this is not true. There is absolutely no tax benefit available through a Living Trust that cannot be obtained through a Will.

Living Trust ads proclaim that the probate process passes control of your estate to the court. Again, that is not correct. The executor does not need a court order to distribute assets. The court only becomes involved if there are disputes between the parties and one of the parties specifically asks the court to be involved. That risk is not reduced by a Living Trust in any way. One of the parties involved can still ask the court to intervene.

Living Trust advertisements proclaim that probate is a lengthy process "typically one to three years." In truth, in most cases, probate takes less than an hour. The administration of the estate (liquidating and transferring assets, paying bills) takes longer, depending on the facts of each case. However, that time period is generated by the assets, which will be the same irrespective of whether they pass under a Will or a Living Trust.

### **If I have a Living Trust should I also have a Will?**

Yes! Although many advertisements for Living Trusts describe preparation of a Will as a mistake, a Will is still needed to effectuate the transfer of assets which are not within the trust.

### **Can I Prepare a Living Trust without an attorney?**

A Living Trust is a tool used in estate planning and/or other types of tax planning. It is not the only available tool; there are many other options. There is almost no benefit provided by a Living Trust that cannot be provided by some other estate or tax planning mechanism. It is dangerous to attempt to complete an estate plan without a comprehensive understanding of the entire process and all of your options. The ramifications of a mistake are usually serious. We recommend that you consult an attorney.

### **Will a Living Trust keep my assets out of probate?**

Yes, but the probate process in New Jersey is not the complicated labyrinth the Living Trust advertisements describe it to be. Probate in New Jersey is simple, usually done over the counter at the office of your County Surrogate. Probate in New Jersey is relatively inexpensive.

### **Will I realize any tax saving by placing my assets in a Living Trust?**

In most cases, the answer is NO! In New Jersey, there is no inheritance tax for bequests to a father, mother, grandparent, wife, husband, child, adopted child, grandchild or stepchild. There is no tax on bequests to public or charitable entities such as schools, churches or hospitals. Life insurance proceeds paid to a named beneficiary are exempt. Payments from the New Jersey Public Employment Retirement System and Federal Civil Service Retirement Benefits payable to a specific beneficiary are exempt. Most people who examine this list and think about how they want their estate distributed will realize that their estate will generate no tax. An individual with an estate in excess of the exempt amount may have federal estate tax liability. The exempt amount changes with the Federal Tax Code. However, an estate of that size requires detailed estate planning. A Living Trust may be part of that plan, but there are many other elements involved in estate planning, and an individual with an estate in excess of the exempt amount would be foolish not to consult an estate planning attorney. An individual with an estate in excess of the exempt amount can realize significant tax savings if their estate is planned properly. However, blindly placing assets into Living Trusts is not wise estate planning.

**Are there other problems with Living Trusts which are not set forth in the advertisements?**

YES! The assets to be transferred to the trust have to be retitled, and that can be a difficult and time-consuming process.

**What are the current Federal and New Jersey State Inheritance Tax schedules?**

**NOTE:** Tax laws are complicated and subject to change. The following is an overview used to illustrate the point that Living Trusts are of limited value.

**Federal and New Jersey**

Under current Federal and New Jersey law, property passing directly to surviving spouses and charities is not subject to taxation.

Estates currently are subject to various types of State and Federal Taxes. Unfortunately, those tax schemes are very complex and under constant revision. Anyone with a question regarding tax implications, may contact an attorney who practices in the areas of estate or tax planning.

Tax information for the State of New Jersey may also be obtained by calling the New Jersey Inheritance Tax Bureau by calling 609-292-5033.

**How soon must inheritance taxes be paid?**

State Inheritance Tax returns must be filed and the tax paid within eight (8) months after the decedent's death to avoid interest. Federal Inheritance Tax must be paid within nine (9) months. In some circumstances, where all beneficiaries are Class A, no return is required.

**Are unpaid inheritance taxes a lien on property?**

Yes! To sell real estate, you will need to obtain "tax waivers" from the New Jersey State Transfer Inheritance Tax Bureau, and the waivers must be filed with the County Clerk in the county where the land is located. Land held by husband and wife as "tenants by the entirety" need not be reported and may be transferred without a waiver.

Other property may be subject to a lien for unpaid inheritance taxes, such as bank accounts and certificates of deposit.

**– NOTES –**

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