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**ARTICLES BY JAMES DE MARTINO**

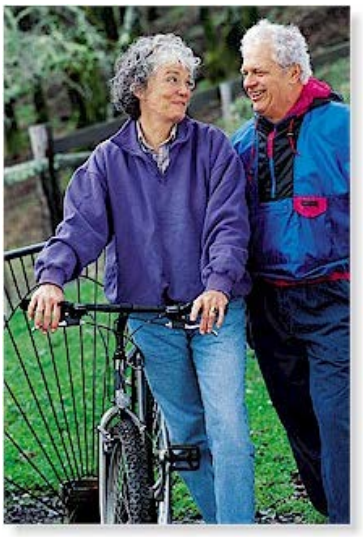


# ESTATE PLANNING

## Introduction to Revocable Living Trusts

Assistance in Revocable Living Trusts

### THE ROLE OF REVOCABLE LIVING TRUSTS IN ESTATE PLANNING



As an **estate planning attorney**, I am surprised to hear different sectors of the bar proclaim that the probate/estate-settlement process in New Jersey is so basic, that it obviates the need for attorney representation.

As I recall, when I was graduated from Seton Hall Law School with a Juris Doctor, and passed the NJ Bar, I was not given a carte blanche to practice law. I had to enroll and successfully complete a Skills and Method regimen. One of the subjects in this curriculum was entitled "Probate Practice and Administration." If the process of estate settlement is so elementary, then why was there a special course and textbook dedicated to the topic?

As I write this letter, I am gazing at a two volume treatise entitled New Jersey Probate Procedures Manual, by Walter Kane, Esq. The length and breadth of such a publication seems to indicate that there is a bit more to settling an estate than to merely have a Will recorded in the County Surrogate's office. The probate of one's Will is merely an initial step in the estate-settlement process.

I have been informed by various people that one really doesn't need an attorney to settle an estate in NJ. I can wholeheartedly agree with that concept. After all, one doesn't need an attorney to represent himself or herself in virtually any legal situation. O.J. Simpson didn't need Jonnie Cochran to represent him in establishing a defense. He could have proceeded pro se. From a financial standpoint, there would have been a significant cost savings factor had Mr. Simpson represented himself. Nonetheless,

Mr. Simpson's gridiron common sense dictated that only an experienced criminal attorney could successfully "dot the "i"s and cross the "t's" in providing a superlative and successful defense which covered all bases.

If one wants to "cover all bases" in the settling and administration of an estate, in a disability or death, then chances are that they will engage an attorney to navigate the way.

#### HOW DOES A LIVING TRUST ALLOW FAMILIES TO ADMINISTER ESTATES, IN EVENT OF DISABILITY OR DEATH, WITHOUT THE ACTIVE ENGAGEMENT OF AN ATTORNEY?

A Living Trust, standing by itself, will not accomplish this! When our office drafts a Revocable Living Trust, it is done within a compendium of other legal instruments

which include a Pour Over Will, Power of Attorney, Healthcare Directive, and Living Will. Additionally, each compendium contains instructions which act as a "how to" manual to administer an estate in both matters of disability and death. In such a manner, a family can is given a procedural format which "dots the "i's" and crosses the "t"s. This is virtually the same format that an attorney would perform if they were so retained. Our office stands on the sidelines much like an athletic coach, and offers verbal guidance and support where needed or requested —without a fee attached.

### WHY IS IT SAID THAT A REVOCABLE LIVING TRUST CAN BE A MORE COMPREHENSIVE VEHICLE THAN A BASIC WILL?

A Revocable Living Trust does not usually become a publicly recorded instrument. Thus, the general public does not have ready access to clues about the character or size of the client's estate. Large bequests, the establishment of by-pass or Credit Shelter Trusts, or Generation Skipping provisions are off-limits to the browsing public. Consequently, a Revocable Living Trust offers more privacy if such is a concern to a family

A Revocable Living Trust is easier to be managed or subjected to the laws of a sister State. This may be an important concern where a client or beneficiary may be relocated to another jurisdiction. Utilizing the laws of a sister State may become key when issues such as state income taxes, probate administration rules, or protection against creditors are concerned (i.e. Alaska Trusts). The Revocable Living Trust provides is a much more efficient instrument, than a basic Will, for dealing with real estate situated outside NJ.

A Living Trust is perhaps the best instrument, in American jurisprudence, for dealing with the management of assets and distributions for the client's benefit, or someone else's benefit, in the event of incapacity. Living Trusts circumvent guardianship proceedings in the event of subsequent incapacity. Consequently, the time, expense, delay, and publicity of a guardianship or conservatorship proceeding is avoided.

### DOESN'T A GENERAL DURABLE POWER OF ATTORNEY PROVIDE COMPREHENSIVE PROTECTION IN EVENT OF DISABILITY OR INCAPACITY?

Maybe–and maybe not. Many Powers of Attorney are not sufficiently detailed and specific. Consequently an institution can opt not to accept even said General Durable Power of Attorney. This can occur at a most inopportune time for a family when dealing with a loved one's incapacity, disability, or incompetency.

Title Insurance companies are known to create obstacles when one wants to convey title by virtue of a Power of Attorney grant. This frustration may become moot when the real estate is registered to a Revocable Living Trust.

When out-of-state property is conveyed into a Revocable Living Trust, there is also less likelihood that the title insurance companies, in those estates, will create any obstacles.

### CAN FEDERAL ESTATE TAX PROVISIONS BE INCORPORATED INTO A REVOCABLE LIVING TRUST, UPON THE DEATH OF ONE SPOUSE?

The Revocable Living Trust can provide that upon the death of one spouse, the estate will be sub-divided into a Survivor's Trust and a Family Trust (Credit Shelter Trust). The Survivor's Trust remains as a Revocable Living Trust while the Family Trust becomes Irrevocable.

### CAN'T A WILL CONTAIN FEDERAL ESTATE TAX PROTECTION FOR MARRIED COUPLES?

Yes it can–except for such to be accomplished, the assets of a husband and wife must be split evenly to provide optimum protection. Every so often, the husband and wife must then audit their records to determine whether or not their individual shares have grown (or diminished) equally.

With a Joint Revocable Living Trust, all items registered to it can be classified as an evenly split tenancy in common. This eliminates the need for a Husband and constantly shift assets, to make certain that each owns exactly "half".

For those assets which are not specifically registered o the Revocable Living Trust, a Pour Over Will and/or Comprehensive Estate Planning Document can bring such into the trust umbrella for estate-tax planning.

### DO ASSETS REGISTERED TO A REVOCABLE LIVING TRUST BECOME "UNAVAILABLE" FOR MEDICAID/NURSING HOME PURPOSES?

Absolutely not. Regardless of whether or not assets are registered to a Revocable Living Trust, they may be considered as "available" for Medicaid purposes since they belong to the individual.

Medicaid uses the FIVE YEAR "rule of thumb." This means that when a person applied for Medicaid, the agency looks back 5 years to determine if any assets were transferred for less than full market value.

The Medicaid code does have exceptions to the FIVE YEAR RULE. These exceptions allow certain assets to be converted in such a manner that they are deemed unavailable for Medicaid purposes. Note, however, that a family of an incapacitated loved one may be unable to take advantage of the exceptions to the FIVE YEAR RULE, unless they have the proper legal game plan in effect.

### IS THERE ANY ONE SINGLE LEGAL INSTRUMENT WHICH CAN ACT AS A "CURE ALL" FOR ALL OF A FAMILY'S ESTATE PLANNING EXPOSURES?

Definitely not. Even though the Revocable Living Trust has some significant advantages, it should only be drafted as part of a compendium of other legal instruments. Such include, but are not necessarily limited to, a Pour Over Will, Power of Attorney, Healthcare Directive, and Living Will.

### WHAT SHOULD BE THE OBJECTIVE OF ANY COMPENDIUM OF ESTATE PLANNING INSTRUMENTS?

To give a family comfort and peace of mind, when confronted with disability, incompetency, or death. Additionally, to ascertain that a family doesn't have to expend any more court costs, attorney fees', death taxes, and nursing home costs than they absolutely have to.

Respectfully submitted,

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