Theodore Sliwinski, Esq.
East Brunswick, NJ

NJ WILLS AND ESTATES GUIDE

Contents:

Getting Started

What is estate planning?

Estate planning is basically planning how to distribute your money and property after you die. The phrase sounds very dry and technical. However, in today's world it is extremely important to have a carefully thought estate plan drafted by an affordable and competent lawyer.

What does my estate consist of?

Your estate consists of all your property, including the following:

- Your home and other real estate
- Tangible personal property such as cars and furniture
- Intangible property like insurance, bank accounts, stocks and bonds, and pension and social security benefits

What is the difference between an estate plan and a will?

An estate plan is a blueprint for where you want your property to go after you die. Meanwhile, a will is usually the most important part of an estate plan. However, a will is not the only part of it. These days, it is very common for a person to have many different types of wills. Essentially, many New Jersey-ites use various methods to distribute their property regardless of whether the person has a formal will. Pensions, life insurance, gifts, joint ownership, and trusts are some of the ways you can transfer property at or before death quickly and inexpensively.

Are estate plans just for senior citizens?

We are all squeamish about death, but it is coming sooner or later. The number of Americans who have will has grown by 50% in just 15 years. Thanks in part to growing interest in living wills, simplified procedures, and lower costs, millions of people of all ages and economic levels have taken steps to distribute their money and property according to a sound estate plan.

Estate planning is emphatically not just for seniors. One glance at the news demonstrates that far too many young and middle age people die suddenly, often leaving behind minor children who need care and direction. Estate planning needs to be factored into your overall financial plan, along with your children's college tuition and your retirement needs. If your financial or familial circumstances change later in life, it's usually easy and inexpensive to adjust your plan. Most people also plan for mental or physical incapacity resulting from an accident or illness.

Through living wills, health-care powers of attorney, and other mechanisms, they control beforehand how they and their property are to be cared for if disaster strikes.

What are the laws of intestacy?

If you die intestate and without a will, then your property still must be distributed. By not leaving a valid will or trust, or transferring your property in some other way, such as through insurance, pension benefits, or joint ownership, you have essentially left it to the State of New Jersey law to write your will for you. This doesn't mean that your money will go to the New Jersey. That happens only in very rare cases where you leave no surviving relatives, even very remote ones. However, it does mean that the state will make certain assumptions about where you'd like your money to go. These assumptions you might not agree. The New Jersey intestate laws descent laws prefer "blood" over "marriage." These laws assume that the more closely related you are to someone, then the more likely you'd want your property to go to him or her. Therefore, some of your hard-earned money might end up with people who don't need it.

Meanwhile, some of your other relatives for loved ones who might need the money more, or who are more deserving, could be shortchanged in your estate plan. For instance, such as that favorite nephew of yours, or your other child, who has had trouble finding steady work. Moreover, if you die without a will, there is a good chance that your surviving relatives may fight over who gets particular items of your property, since you didn't make these decisions before you died. Unfortunately, the New Jersey intestacy laws might also fail to provide adequate support for your spouse. Only a carefully thought out estate plan gives you the feeling of control that comes from knowing your family is provided for as you wish. You will be able to decide who gets your property, when they get it, how they get it, and how much they get.

What are the top ten things that estate planning can do for you?

The first step in planning your estate is to identify your major goals. Here are some typical goals and suggestions on achieving them.

1. **Provide for your immediate family**

Married couples want to provide enough money for the surviving spouse. They often choose to provide this income through life insurance, particularly for spouses who don't work outside of the home.

Couples with children want to assure their education and a proper. Therefore, if you have children under 18, both you and your spouse should have a will that nominates a guardian for the children, in the unfortunate case you both should die before they grow up. If you don't appoint a guardian, then a court will decide without your input where your kids will live and who will make important decisions about their money, education, and way of life.

2. **Provide for other relatives who need help and guidance**

You might to provide for your family members whose lives might become more difficult without you, such as an elderly parent, disabled child, or a grandchild whose education you want to assure. In your will you could establish a special trust fund for family members who need your support that you won't be there to provide when you die.

3. **Get your property to beneficiaries quickly**

You may want your beneficiaries to receive your property and money in a reasonable time after you have left this earth. Some of your options may include avoiding or easing probate through insurance paid directly to beneficiaries, a joint tenancy, a living trust or other means.

4. **Plan for incapacity**

During estate planning, it is critically important for New Jersey-ites to also plan for possible mental or physical incapacity. Living in the Garden State alone is enough to drive any New Jersey-ite to his wits end. Planning for incapacity is also important for single people as well. Living wills and durable healthcare powers of attorney can enable you to decide in advance about important issues such as life support and pick someone to make decisions for you about medical treatment.

5. **Minimize expenses**

Everyone wants to keep the cost of transferring property to beneficiaries as low as possible. The less a person spends on the probate process, then this leaves more money for the beneficiaries. A well thought out and a carefully crafted plan can reduce these expenses significantly.

6. **Choose executors/trustees for your estate**

It is very important to choose a competent executor. Don't choose someone who has a gambling problem, or issues with drugs and alcohol. I have heard of many stories of executors blowing the decedent's estate, and wasting all of the heirs inheritance. The executor does not have to be a genius, but he or she should be responsible and fair minded. You should not pick Uncle Tony who constantly loses his paycheck at Atlantic City.

7. **Ease the strain on your family**

Many people take a burden from their grieving survivors and plan their funeral arrangements when planning their estate. Moreover, you may simply want to limit the expense of your burial or designate its place. You also can provide for your body to be cremated or given to medical science after you die.

8. **Help out your favorite cause**

Your estate plan can help support your favorite religious, educational, and other charitable causes. It is important to note that charitable bequests offer important tax breaks to the decedent.

9. **Reduce taxes on your estate**

Every dollar your estate has to pay in estate or inheritance taxes are a dollar that your beneficiaries won't get. Therefore, it is critical that a good estate plan can give the maximum allowed by law to your beneficiaries and the minimum to the government. This factor becomes especially important as your estate approaches the magic number of $1 million, the level at which the federal estate tax kicks in under current law.

10. **Make sure your business goes on smoothly**

If you have a small business, then the operation might crash upon your death. You can provide for an orderly succession and continuation of the business spelling out what will happen to your interest in the business.

Why is taking an inventory of my assets so critical to develop a good estate plan?

It is very critical for a person to take a careful inventory of all of their assets. A person should prepare a checklist of assets and debts. This checklist should spell out what you own and what you owe. A detailed inventory will enable you to do much of the preliminary work needed to prepare a solid estate plan.

What type of information should I have available to give to my attorney to assist him to prepare my estate plan?

In planning your estate, it is very helpful to have as much of the following information on hand as possible.

- The names, addresses, and birth dates of your spouse, children, and other relatives whom you might want to include in your will. List any disabilities or other special needs they may have
- The names, addresses, and phone numbers of possible guardians (if you have young children) and executors or trustees
- The amount and sources of your income, including interest, dividends, and other household income, such as your spouse's salary or income your children bring home, if they live with you
- The amounts and sources of all your debts, including mortgages, installment loans, leases, and business debts
- The amounts and sources of any retirement benefits, including IRA's, pensions, Keogh accounts, government benefits, and profit sharing plans
- The amounts, sources, and account numbers of other financial assets, including bank accounts, annuities, outstanding loans, etc.
- A list of life insurance policies, including the account balances, issuer, owner, beneficiaries, and any amounts borrowed against the policies
- A list (with approximate values) of valuable property you own, including real estate, jewelry, furniture, jointly owned property (name the co-owner), collections, heirlooms and other assets. This list could be cross-referenced with the names of the people you might want to leave each item to

- Any documents that might affect your estate plan, including prenuptial agreements, marriage certificates, divorce decrees, recent tax returns, existing wills and trusts, property deeds, and so on

Should my spouse be involved in my estate plan?

It is impossible to adequately plan your estate if you don't know the facts about all the family assets. However, I still receive many clients who come to my office for estate planning advice and they don't have basic information about their spouse's income. In many families, the client doesn't know how much the spouse earns, what benefits he or she is entitled to, or where the money is invested. Whatever the reason for this situation, it is very important to know this information when you are planning your estate. It's especially important to find out how property you and your spouse own is titled, including insurance and other beneficiary designations.

Many people might be afraid to cause a rift in the marriage by asking a spouse about financial affairs —especially if that spouse is the primary breadwinner in the family. The need to share information and plan ahead can be raised indirectly through another family member, an attorney, or other trusted professional. However, full knowledge of the family's assets should be part of any sound estate plan.

What will it cost to prepare an estate plan?

The fees to prepare an estate plan are very reasonable. Theodore Sliwinski, Esq. strongly believes that a carefully thought out estate plan should be prepared at an affordable price. He charges $100 for a living will, $100 for a power of attorney, and $250 for a joint set of basic wills. If the will(s) complicated then the rates will be increased. Mr. Sliwinski, Esq. prides himself in providing quality services at affordable rates. If you need to have a trust prepared, or a specialized estate plan, then the fees are also very reasonable.

What steps should I undertake to prepare my will and trust?

Even if you have carefully thought about your estate plan on your own, don't just expect to throw a bunch of papers on your lawyer's desk and have a will or trust magically appear in a few weeks. To prepare these documents is seldom as simple as filling in blanks on a form. Most people will have to meet with their lawyer twice in the process, and more complicated estates may require even additional consultations.

At the first meeting, you would probably discuss your financial situation and estate planning goals. You should be prepared to tell your lawyer about some rather intimate details of your life. These details include how much money you have, how many more children you plan to have, which relatives you want to get more or less of your assets. Your lawyer will also have review any documents you've brought in and ask questions that will help you think through various issues and possibilities. Thereafter, he will probably outline some of the options the law provides for accomplishing your goals. Even though certain methods may be recommended over others, depending on your circumstances, it will still be up to you to make your own individual choices from among those options.

Thereafter, based on the choices you have made, your lawyer will draft a will or trust. At a second meeting or numerous phone conferences, he will review that document with you. If it meets with your approval, then the estate planning documents it can be signed.

If you estate planning is more complicated and you have a larger estate, then you may have some long phone conversations with your lawyer. Moreover, you will be required to review several drafts of various estate planning documents, before everything is settled.

It is important to emphasize that you should review your estate plan on a period basis. You will want to stay in touch with your lawyer. You should not think of estate planning as a one-time retail transaction at the mail. Instead, preparing your estate plan, should be viewed as an occasional process that works best when you have a continuing relationship with your professional advisors.

What other costs are involved with my estate plan?

Good estate planning, as described above, should minimize costs that come about after your death. These include the following:

- **Probate costs**

Probate is the court-supervised legal procedure that (1) determines the validity of your will and (2) gathers and distributes your assets. If the probate of a will is not contested, then the cost of probate in New Jersey is a rather simple procedure and it won't cost you an arm and a leg.

Proper estate planning can greatly minimize these expenses by passing assets through means other than a will, thus limiting the size of your probate estate. The smaller the estate, the lower the costs, especially if it is small enough to qualify for quick and inexpensive processing.

- **Executor fees**

By having a will and planning well, you can minimize the executor's fees. If you name a relative who's a beneficiary under the will as executor (most likely your spouse), he or she will probably waive the fee. On the other hand, if you die without a will, the probate court will appoint a personal representative to see the estate through probate, at a cost to be deducted from your estate. Similarly, if you pick a third party, such as a lawyer, to be the executor, that person is entitled to a "reasonable fee" for seeing an uncontested will through probate. While the amount varies, the fee is usually tied to what trust companies would get for performing similar duties.

- **Legal fees in probate**

If your estate is small and uncomplicated and your will is well-drafted, then your spouse or other executor may be able to reduce the costs of administration. If your estate gets more complex then the legal fees could be sizable. There could be for example, someone challenges the will, your will is out of date because you have a new spouse or child, or if the will is improperly prepared or executed, etc. The more complex the probate process, the more hours the lawyer will spend on the file, and the more it will cost your loved ones.

Why is it important to have a family meeting before I prepare my estate plan?

A couple should communicate with each other so they agree on what goes to the surviving spouse and what to the children. Because estate planning affects several generations, it may be a great idea, especially for families with grown children, to make your estate plan a family affair. A family should set aside a day and gather all family members who are involved in the plan. The parents can explain how this plan can have a major influence on all their lives, and why they are distributing gifts and trusts the way they are. They can also find out whether the children want to continue the family business, and ask if any property has sentimental values for them.

If you have such a meeting, you should encourage your family to voice their concerns and feelings about all this. This is very important when personal or financial considerations lead you to make unequal distributions among siblings. It is important to emphasize that fairness doesn't always mean equal treatment, and you need to spell out the good reasons for making unequal arrangements to avoid later resentment. Your family members may even raise issues that will lead you to call your lawyer or change your estate plan.

Finally, do not forget to tell the persons you've selected as executors or guardians of the children, to make sure they agree to serve.

Why is important to keep track of your finances for your executor?

One of the hardest tasks for an executor is to figure out just what money the dead person had coming in, and what bills and other payments need to be made. It is important to think about your personal finances for a moment. Now is the time to put yourself in an outsider's shoes and write down all such expenses and income that might not otherwise be apparent to an executor. In doing so, you'll probably put your life in better shape. It's another example of how estate planning is more than planning for your death. It can also make your life a lot simpler as well.

Transferring Property Without a Will

Why is having a will just not enough?

Unfortunately, this situation is familiar to most estate lawyers. Too many people don't understand that there's more to estate planning than merely writing a will. A will is the most important document in planning your estate. However, a will does not cover every aspect of your estate plan. Other assets and monetary benefits that are not controlled by a will include your IRAs, insurance policies, income savings plans, retirement plans, and joint tenancy. A good estate plan should coordinate these assets that pass outside of your estate with your will and trust. By using them well can give your beneficiaries money much more efficiently than a will can. Meanwhile, if you use them badly, and you can negate your estate plan and frustrate your wishes.

What other ways can you transfer property at death?

There are other ways you can transfer property;

- Retirement benefits and annuities

Many people leave most of their wealth to their loved ones outside of their will. Your retirement benefits often pass outside of the will. Typically, a retirement plan will pay benefits to beneficiaries if you die before reaching retirement age. After retirement, you can usually pick an option that will continue payments to a beneficiary after your death.

When you start up a 401K or IRA you have to designate a beneficiary. This beneficiary will receive your retirement savings after you die. The beneficiary designation on your 401K plan will receive your retirement monies even if your will bequests your retirement savings to someone else.

- IRAs (Individual Retirement Accounts)

Your IRA will provide a ready means of cash when one spouse dies. If your spouse is named as the beneficiary, then the proceeds will immediately become her property when you die. Like retirement benefits (and unlike assets inherited via a will), they will pass without having to go through probate.

- Life insurance

Life insurance is often a great estate-planning tool, because you pay relatively little up front, and your beneficiaries get much more when you die. When you name beneficiaries other than your estate, the life insurance money passes to them directly, without having to go through probate. If most of your money is tied up in non-liquid assets like your company or real estate, then the life insurance gets cash into your beneficiaries' hands without they're having to resort to a quick fire sale of other assets. In most cases, the beneficiaries usually receive their insurance proceeds promptly.

Generally, the beneficiary informs the company in writing of the death, sends a copy of the death certificate, and receives a check, often within a few weeks. In general, the older you are, then the less your family needs large amounts of life insurance. Term insurance provides protection not for your entire life, but only for a specified term of years; it's cheap when you're young, but gets more expensive as you grow older.

- Joint tenancy

There are many different ways that you can own property. Any times that you own property with someone else it is called joint tenancy ownership. Join tenancy is a legal term that means, effectually "co-ownership." If you and your spouse buy a house or car in both your names, then each of you is considered a joint tenant and both have co-ownership of that asset. When one of you dies, the other joint tenant will immediately own that individual asset by themselves, regardless of what either of you says in your will.

- Joint tenancy with rights of survivorship

Joint tenancy with rights of survivorship can be very useful way to transfer property at death. Family automobiles and bank accounts often pass that way. Particularly in old age, people often place bank accounts or stocks in joint tenancy with their spouses, one or more children, or friends. When one of the co-owners dies, then joint ownership gives the other ones instant access to the account to help pay bills. The transfer avoids probate, lawyers, and court fees.

I love the idea of avoiding probate and having joint tenancy of my assets with my spouse and children. What are the downside of owning my assets jointly with my family members?

Joint tenancy is not the answer to all of your estate planning goals. Here are some tips about when to avoid it.

- When you don't want to lose control.

If you give someone co-ownership, then you give them co-control. If you made your son or daughter a co-owner of the house, then you can't sell or mortgage it unless he agrees. If he or she later marries, then their spouse may also have to agree. If you do sell it, then he may be entitled to part of the sale proceeds. Joint ownership of stock also means you've lost control. If you put your son or daughter on your stock accounts as a joint tenant, then they could also veto any of your stock sales.

- When the co-owner's creditors might come after the money.

If creditors come after your co-owner, then they may be able to get part of the house or bank account. For example, creditors could attach your co-owner's half of your joint bank account, or get a lien on his half of the house. If a creditor obtains a lien on your home, then this could prevent you from selling it.

- When you can't be sure of your co-owner.

You and your co-owner could have a falling out. Moreover, the other co-owner could take all the money out of the bank account. There's nothing you could do about it, since the person is a co-owner. Basically, I have heard of situations wherein co-ownership of assets has turned into a disaster.

- When you're using co-ownership to substitute for a will.

Having joint tenancy of your assets doesn't address the situation if all of the joint tenants die at once. Therefore, each joint tenant needs a will. Moreover, joint tenancy does not answer the question where your property goes if the younger joint tenant dies first. Therefore, you will still need a will. And if you put one child's name on an account assuming he'll divide the money equally among the other children, know that he is on his honor and legally can do with it what he pleases. Additionally, the transfer of property setting up this type of ownership could result in adverse income tax consequences when the surviving beneficiary sells the appreciated property.

- When it compromises tax planning.

Careful planning to minimize the taxes on an estate can be thwarted by assets held by joint tenancy ownership that passes property outright to a beneficiary. For example, passing property by joint tenancy can increase estate taxes by preventing transfer to the children through a tax-avoiding bypass trust. It can also increase gift taxes--the IRS may consider adding a joint tenant to be taxable gift giving.

Many of these problems occur with institutional revocable trusts and pay on death forms of ownership of bank, broker, and mutual fund accounts and savings bonds. If you own any of these kinds of property, be sure you understand what happens to them when you die, and plan accordingly.

- When you're in a shaky marriage.

Your individual property becomes joint marital property once it's transferred into joint names.

- When one of the co-owners becomes incompetent.

If one of the co-owners becomes legally incompetent to make decisions, part of the property may go into a guardianship. If your property goes into a guardianship then this may make it cumbersome at best if the other joint tenant wants to sell a house or some stock.

- When you don't want to transfer assets all at once.

Joint tenancies may also deprive you of the flexibility of a will or trust, in which you can use gifts and asset shifts to minimize taxes, and pay out money over time to beneficiaries, instead giving it to them all at once. Nonetheless, a joint tenancy does have its advantages. It's inexpensive to create. But the ultimate costs can far exceed these initial savings.

- Tenancy in common

Don't confuse joint tenancies with tenancies in common. In joint tenancy, you and your spouse both own the whole house, which means, among other things, you must both agree to sell it. In tenancy in common, on the other hand, you each own a half-share of the house, and either of you may sell your half-share without the other's consent. In tenancy in common, different partners can own unequal shares of the property. For example, your will might leave your vacation home to your three children as tenants in common.

Another major difference is that if you own an asset in joint tenancy with anyone and you die, then ownership of that asset passes to the other joint tenant automatically. In a tenancy in common, your share passes as provided in your will or trust, with possible probate, estate tax, and other consequences. Tenancy in common can be less risky than joint tenancy, and it is very useful for larger estates in which you give shares of property to the children during your lifetime.

- *Inter vivos* gifts

Perhaps the most common estate planning technique outside of having a will is to gift away your assets during your life. The most important benefit of this type of planning is that it is excellent Medicaid planning.

Are gifts made while you're alive a good idea? Maybe, especially if you have a large estate: they can help you avoid high death taxes. Another advantage of giving property away before you die is that you get to see the recipient enjoys your generosity.

What is a summary of the type of property that does not pass via a will?

- Property held in joint tenancy
- Life insurance payable to a named beneficiary
- Property held in a trust
- Retirement plans payable to named beneficiaries, including IRA's, Keogh accounts, and pensions
- bank account trusts (including pay-on-death accounts) payable to a named beneficiary

Making a Will

What is the legal importance of making a will?

A will is a revocable transfer to take effect on death. Wills have been with us since the first days of recorded history. What you put in your will depends on what property you have, whom you want it to go to, the dynamics of your family, and soon.

What are the five essentials to create a valid will?

To be valid, your will doesn't have to conform to a specific formula. However, there are certain elements that usually must be present.

1. You must be of legal age to make a will. This is 18 in the State of New Jersey
2. You must be of sound mind. This means that you should know you are executing a will, know the general nature and extent of your property, and know who are the people who should ordinarily receive estate. This includes your spouse, descendants and other relatives that would ordinarily be expected to share in your estate.
3. The will must have a provision that disposes of property, and it must also indicate your intent to make the document your final word on what happens to your property. In simpler terms, your will must indicate that you really intended it to be a will.
4. The will must be voluntarily signed by the testator.
5. A formal will must be properly executed**.** This means that it contains a statement at the end attesting that it is your will, the date and place of signing, and the fact that you signed it before witnesses, who then also signed it in your presence--and watched each other signing it. New Jersey allows a self-proving affidavit, and this form eliminates the necessity of having the witnesses testify that they witnessed the signing, and the affidavit is proof enough.

If your will doesn't meet these conditions, it might be disallowed by a court, and your estate would then be distributed according to a previous will or under New Jersey's intestacy laws.

In recent years, a number of books and computerized will kits have come on the market which claim to enable you to make your own will. These books normally cost $20 or more, and the cost of a kit $70 or more. These kits are basically garbage and should be avoided. There are many lawyers who will prepare estate plans and wills for an affordable fee.

What are the important clauses that should be in my will?

There's no set formula for what clauses should be in a will. However, there are some subjects that should be addressed in a will. Below are the more common clauses of a basic will:

- **Funeral expenses and payment of debts**

Your debts don't automatically disappear once you die. Your estate is responsible to pay for your debts once you die, and your estate is still liable to pay for them. If your debts exceed your assets, then New Jersey state law will prescribe the order in which the debts must be paid by category. Funeral expenses and expenses of administration receive first priority.

- **Forgiveness of Debts**

You can also forgive any debts someone owes you by saying so in your will.

- **Gifts of personal property**

It is critically important to carefully identify all recipients of your estate, including their address and relationship to you.

Don't just leave household property to someone, because that category is vague enough to spark a dispute in court, or at least in the family. Spell out the items stereo equipment, clothing, books, and cash.

In general, it is much simpler for your executor if you leave your property to people in broad but specific categories ("all my furniture") rather than passing it on it piece-by-piece ("my kitchen table") to many different people. If you want specific gifts of sentimental value to go to certain people, then you should consider giving them to those people before you die.

- **Gifts of real estate**

Most people prefer that their spouses receive the family home. If the home isn't held in joint tenancy with rights of survivorship, you should have instructions about what will happen to it in your will.

It is possible to give a loved one a life estate in real property. This is giving something to a person, to use for as long as he or she lives but that reverts to your estate or passes to someone else after he or she dies. It's a way of assuring, for example, that your wife will have the use of your house while he lives, but that it will pass to the children of your first marriage after he dies.

- **Executors**

It is very important to spell out certain powers the executor can have in dealing with your estate: to buy, lease, sell and mortgage real estate; to borrow and lend money; to exercise various tax options. Giving the executor this kind of flexibility can save months of delay and many dollars by allowing him or her to cope with unanticipated events.

- **Residuary clause**

This is also one of the most crucial parts of a will. The residuary clause covers all assets that are not specifically disposed of in your will. Most people will probably accumulate assets after you write your will, and if you haven't specifically given an asset to someone, it won't pass through the will unless you have a residuary clause. The residuary clause distributes assets that you might not have anticipated owning at the date of your death.

- **Testamentary trusts**

You can set up a testamentary trust in your will, or have your will direct funds from your estate into a trust you had previously established. You would normally do so in a separate clause in your will.

- ***What if* clause**

You should always try to figure out where a gift would go if something unexpected happened. What if one of your beneficiaries dies before you do? In that event, the gift you made to the dead person is said to lapse**,** and the gift goes back into your residuary estate, to be distributed to whomever you made the residuary beneficiary.

How is a will executed?

After your will is drafted and proofread, you still must have the will formally executed. This requires two witnesses to verify that you signed your will. In New Jersey, the testimony of at least two witnesses is needed as proof of the will's validity. However, a will which is formally executed with the signatures notarized and a self-proving affidavit attached is considered to be self-proved. A self-proving will may be admitted to probate without testimony of witnesses or other proof.

Who should you pick to be your witnesses?

The witnesses should have no potential conflict of interest. This basically means they should absolutely not be people who receive any gifts under the will, or who might benefit from your death. You needn't bring them with you to your lawyer's office; typically, some employees of your lawyer will to witness the signing. You should sign every page of the original. The witnesses will watch you sign the will and then sign a statement attesting to this.

Where should I keep my will after I have executed it?

Your will should be kept in a safe place, such as your safe deposit box or your lawyer's office. You should also keep a record of other estate planning documents with your will, such as a trust agreement, IRA's, insurance policies, income savings plans such as 401(k) plans, government savings bonds (if payable to another person), and retirement plans.

What should I do if I lose my will?

You should have your lawyer draw up a new will as soon as possible, and execute it with all the necessary formalities. If your family situation, state of residence, or income hasn't changed, then your lawyer should be able to use copies of your lost will as a guide.

If you do keep it in a safe deposit box, you should make sure to provide that someone else (and certainly the executor you name) can get at the will when you die. Tell your executor and your beneficiaries where the will is located, and make sure your executor, or someone you trust, has authority and a key to open the box after your death. Many estates have gone through long probate delays because the bank didn't have permission to let anyone open the safe deposit box except the person who had just died.

It's perfectly acceptable to store copies of the will in your home. Personal papers such as your birth certificate, citizenship records, marriage certificate, coin collections, jewelry, heirlooms, medals and so on may be kept in your safe deposit box. Financial records, like securities, mortgage documents, contracts, leases and deeds are also safe to store.

What are the different types of wills?

There are several different types of wills. Here's a brief overview of the type of wills that are commonly used by New Jersey-ites.

- **Simple will**. A will that just provides for the outright distribution of assets for an uncomplicated estate.
- **Testamentary trust will**. A will that sets up one or more trusts for some of your estate assets to go to after you die.
- **Pourover will**. A will that leaves some of your assets in a trust that you had already established before your death.
- **Holographic will.** A will that is unwitnessed and in the testator's handwriting.
- **Joint will**. One document that covers both a husband and wife
- **Living will**. A living will is not really a will at all. Instead, a living will is often executed at the same time you make your will. This document tells doctors and hospitals whether you wish life support in the event you are terminally ill or, as a result of accident or illness, cannot be restored to consciousness.

What is a living trust?

Some people think that in order to avoid probate, they should avoid a will and instead use a living trust to transfer property between generations. A living trust can be a very useful part of estate planning. However, using a living trust alone can't accomplish many of the most important goals of estate planning. For example, you may have to have a will to name a personal guardian for your children, even if you have a trust. And even with a living trust, you'll need a simple will to dispose of property that you didn't put into the trust. It is important to emphasize that the probate process in New Jersey is also no longer the costly, time-consuming nightmare that it used to be.

What state's law would apply to my estate?

The laws of the state where your primary home is located determines what happens to your personal property such as your car, stocks, cash. The distribution of your real property is governed by the laws of the state in which the property is located. If you do own homes or property in different states, then it is a good idea to make sure that the provisions comply with the laws of the appropriate state.

Why is having a joint will such a bad idea?

Both spouses should execute separate wills. A joint will generally provides that each spouse's property will go to the other one, and then spells out what will happen to the property when the second person dies. Because both parties have to agree to modify such wills, they often aren't revised as frequently as they should be, whether because of family disagreements or just other factors. Joint wills can keep the survivor from using the property as he or she wishes, and they don't allow for circumstances that change after the will was made, and may be impossible to revoke.

Choosing an Executor

Why is picking an executor so important?

One of the most important decisions that you will make is picking the picking the person to be in charge of your assets after you're gone. That means the executor of your will and the trustee of any trusts you set up. The most important thing is that you pick someone who is financially responsible, stable, and trustworthy. The law requires an executor because someone must be responsible for collecting the assets of the estate, protecting the estate property, preparing an inventory of the property, paying valid claims against the estate (including taxes), representing the estate in claims against others, and, finally, distributing the estate property to the beneficiaries. These last two functions may require liquidating assets; that is, selling items like stocks, bonds, even furniture or a car to have enough cash to pay taxes, creditors or beneficiaries.

What are the attributes that I should look for in an executor?

It is important to be sure the executor is capable of doing the job. The quality most desirable in an executor is perseverance in dealing with bills especially the hospital, Medicare, ambulance and doctor charges incurred in a last illness. These often require a lot of paperwork, and payment first, then reimbursement from insurance companies. You should pick someone who has the time and inclination to deal with bureaucrats and forms. Moreover, the executor may have to deal with relatives who may have no patience. These relatives will constantly hound the executor why is it taking so long to receive their inheritance. Moreover, many relatives will complaint that their inheritance is much smaller than they expected.

The executor will probably hire a CPA or lawyer to handle the tax returns. In most estates, no significant legal expertise is required to serve as executor; the issues are all financial. The executor will generally work with a lawyer to probate the will. Estate fees must be paid to the lawyer may be set by law

Whomever you choose, be sure to provide in your will for a replacement executor in case the original executor dies or is unwilling to act. Otherwise the court will have to choose someone.

What are the responsibilities of the executor?

An executor has many responsibilities:

- Guiding the will through probate to legal acceptance of its validity, including defending it against will contests
- Collecting the assets of the dead person
- Transferring legacies and gifts to the beneficiaries
- Evaluating and paying claims against the estate, especially bills and taxes
- Raising money to pay these claims, often by selling estate assets
- Preparing and filing a budget and accounting for the court

Trusts

What is a trust?

A trust is a very useful instrument in the estate-planning arsenal. Estates can be as different as people, and the flexibility of a trust makes it useful for many different needs. A trust can do a number of things a will can't do as well, including:

- Manage assets efficiently if you should die and your beneficiaries are minor children or others not up to the responsibility of handling the estate;
- Protect your privacy (unlike a will, a trust is confidential);
- A trust can protect your assets by reducing taxes;
- If it is a living trust, the trustee can manage property for you while you're alive, providing a way to care for you if you should become disabled. A living trust also avoids probate, lowers estate administration costs, and speeds transfer of your assets to beneficiaries after your death.

Should I have a trust?

It depends on the size of your estate and the goals of establishing the trust. If you mainly want a living trust to protect assets from taxes and probate, but your estate is under the current federal tax floor and small enough to qualify for quick and inexpensive probate in New Jersey, then it would not be worth the administrative cost to prepare the trust. The main advantages of having a trust are if you want to avoid a court hearing if you become incompetent or unable to provide for yourself. Moreover, a trust may be helpful if you want to provide for grandchildren, minor children, or relatives with a disability that makes it difficult for them to manage money.

What is the legal significance of having a trust?

A trust is a legal relationship in which one person (or qualified trust company) (trustee) holds property for the benefit of another (beneficiary). The property can be any kind of real or personal property such as money, real estate, stocks, bonds, collections, business interests, personal possessions and automobiles. It is often established by one person for the benefit himself or of another. In those cases, it generally involves at least three people: the grantor (the person who creates the trust, also known as the settlor or donor), the trustee (who holds and manages the property for the benefit of the grantor and others), and one or more beneficiaries (who are entitled to the benefits).

A trust as a contract between the grantor and the trustee. The grantor makes certain property available to the trustee, for certain purposes. The trustee who often receives a fee agrees to manage the property in the way specified. Putting property in trust transfers it from your personal ownership to the trustee who holds the property for you. The trustee has legal title to the trust property.

Trustees have a legal duty to use the property as provided in the trust agreement and permitted by law. The beneficiaries retain what is known as equitable title, the right to benefit from the property as specified in the trust. The donor may retain control of the property. If you set up a revocable living trust with yourself as trustee, you retain the rights of ownership you'd have if the assets were still in your name. You can buy anything and add it to the trust, sell anything out of the trust, and give trust property to whomever you wish.

If you set up the trust by your will to take effect at your death then this is called a testamentary trust. The grantor retains the title to the property during his lifetime, and on his death it passes to the trustee to be distributed to your beneficiaries as you designate. Holding property in trust is a form of ownership that holds it for your benefit.

How do trusts operate?

There is no such thing as a standard trust. There are many different types of trusts that can be drafted. The provisions of a written trust instrument govern how the trustee holds and manage the property.

In a living trust, the grantor may be the trustee and the beneficiary. In trusts set up in your will, the trustee is often one or more persons or, for larger estates where investment expertise is required, a corporate trust company or bank.

Trusts can be revocable. This means that you can legally change the terms and end the trust. A trust can also be irrevocable and it can't be changed. A revocable trust gives the donor great flexibility but no tax advantages. If the trust is revocable and you are the trustee, then you will have to report the income from the trust on your personal income tax return, instead of on a separate income tax statement for the trust. The theory is that by retaining the right to terminate the trust, you have kept enough control of the property in it to treat it for tax purposes as if you owned it in your name.

Irrevocable trusts offer far less flexibility but there are several possible tax benefits. The trustee must file a separate tax return. Trusts can be very simple, intended for limited purposes, or they can be quite complex, that span two or more generations, provide tax benefits and protection from creditors of the beneficiary, and replace a will as the primary estate planning vehicle.

Who needs a trust?

Parents with young children often use a trust as their major estate planning tool. If you have young children, you want to assure a good education for them, and will have enough assets to do so after death. Therefore, young parents should consider setting up a trust. The trustee manages the property in the trust for the benefit of your children during their lifetime or until they reach the ages that you designate. Then any remaining property in the trust may be divided among the children. This type of arrangement has an obvious advantage over an inflexible division of property among children of different ages without regard to their respective ages or needs.

What should the assets be used for?

You can specify that the trust pay for education, health care, food, rent, and other basic support. Given the unpredictability of life, it is often better to write a vague standard (e.g., "for the support of my children") into the document and allow the trustee the discretion to decide if an expenditure is legitimate. Such a provision also gives the trustee flexibility.

When should the assets be distributed?

Some parents pick the age of majority (18) or the age when a child will be out of college (22 or so).

If you have separate trusts and a pretty good idea about each child's level of maturity, then you can pick the age that seems appropriate for each one to receive his or her windfall.

If you don't know when each child will be capable of handling money, then you can leave the age of distribution up to the trustee, have the trustee distribute the assets at different times.

Trusts are especially popular among people with beneficiaries who aren't able to manage property well. This includes elderly beneficiaries with special needs or a relative who may be untrustworthy with money. For example, if you have a granddaughter who has a drug problem, it may be advisable to require her to obtain the money at intervals from a trustee instead of giving her a gift outright in your will. A discretionary trust gives the trustee leeway to give the beneficiary as much or as little he or she thinks appropriate.

Another type of trust is for improvident beneficiaries a spendthrift trust. A spendthrift trust gives the trustee the authority to carefully control how much money is released from the trust and at what intervals. A spendthrift trust keeps an irresponsible beneficiary from the temptation of getting thousands of dollars in at the end of probate. You can stipulate in the trust that the trustee will pay only certain expenses for the beneficiary. These expenses can be only for legitimate expenses such as rent and utility bills.

In a spendthrift trust the beneficiary cannot assign his or her interest in the trust, and creditors of the beneficiary can't get at the principal in a trust, but can make a claim on whatever income the beneficiary receives.

What are some other good reasons why people want to have a trust?

People who want to control their property because of family dynamics. Through a trust, you can maintain more control over a gift than you can through a will. Some people use trusts to pass money to a relative when they have doubts about that person's spouse. For example, you love your son, but don't trust his wife, and if you are afraid she'll blow the money you give to your son, then you should leave the money in trust for your son instead of making a direct gift to him. Through a trust you can direct that he get only the income, so neither he nor his wife can squander the principal.

In New Jersey, if you leave money in trust to your son, then his wife can't get at the assets if they divorce. Moreover, he can choose how much, if any, of the trust income or principal to leave his wife; if she hasn't been a good and faithful companion, he can leave the whole thing to whomever he desires.

What are some other good reasons to establish a trust?

People who want to provide for administration of their estates if they become physically or mentally unable to do so.

People concerned about estate taxes Trusts are very useful to people with substantial assets, because they can help avoid or reduce estate taxes.

How do you set up a trust?

If you establish one in your will, then the trust provisions are contained in that legal document. If you create a trust during your lifetime, the provisions are contained in the trust agreement. The provisions of that trust document will determine what happens to the property in the trust upon your death. With any type of trust, one of the most important issues is choosing the trustee.

How is a trust funded?

A testamentary trust is funded after your death, with assets that you have specified in your will and through beneficiary designations of your life insurance, IRA, and so on.

If your estate with life insurance benefits included will add up to more than $1 million, you can save taxes by removing the life insurance proceeds from your estate and establishing an irrevocable life insurance trust that owns the policy. However, all incidents of ownership in the policy belong to the trust. When you die, the proceeds are paid into the trust. An irrevocable life insurance trust escapes estate taxation and creditors in so far as the insurance policy is concerned.

How can a trust be terminated?

Your trust agreement should contain a clause that provides how it can be terminated. A good trust drawn up by a lawyer will certainly have such a clause. A trust often terminates when the principal is distributed to the beneficiaries, at the time stated in the trust agreement. For example, you might provide that a trust for the benefit of your children would end when the youngest child reaches a certain age. At that time, the trustee would distribute the assets to the beneficiaries according to your instructions.

You can also give your trustees the discretion to distribute the trust assets and terminate the trust when they think it's a good idea, or place some restrictions on their ability to do so. For example, you could allow the trustees to terminate the trust in their discretion, provided that your son has completed his college education. All trusts should have a termination provision.

What if I set up a trust, and then move to Florida? Which law applies?

State law governs trusts. If the trust involves real estate, then the law of the state where the property is located applies. If it's personal property, like a car or money, or most other things, the law of the state where the grantor created the trust will probably control. If you have residences in more than one state, you can provide in your trust which of those states' laws will control the disposition of your real property.

What are the different types of trusts?

1. **Charitable trusts -** Charitable trusts are created to support some charitable purpose. These trusts often will make an annual gift to a worthy cause of your choosing. The best part of a charitable trust is that it reduces the taxes on your estate.

2. **Discretionary trusts -** Discretionary trusts permit the trustee to distribute income and principal among various beneficiaries or to control the disbursements to a single beneficiary, as he or she sees fit.

3. **Insurance trusts -** Insurance trusts are tax-saving trusts in which trust assets are used to buy a life insurance policy whose proceeds benefit the settler's beneficiaries.
4. **Living trusts** - A living trust enables you to put your assets in a trust while still alive. You can have many roles in a living trust. You can be the donor, trustee, and beneficiary.
5. **Medicaid qualifying trusts -** Medicaid trusts are trusts that may help you qualify for federal Medicaid benefits by placing certain property in a trust. Thus, in these trusts you are limiting your assets for Medicaid purposes. This type of trusts is mostly used when family members are concerned with paying the costs of nursing home care.
6. **Revocable trusts -** Revocable trusts are trusts that can be changed, or even terminated, at any time by the donor. Most living trusts are revocable.
7. **Irrevocable trusts -** A irrevocable trust cannot be changed or terminated before the time specified in the trust. The loss in flexibility in an irrevocable trust is offset by savings in taxes.
8. **Spendthrift trusts -** A spendthrift trust is set up for people whom the grantor believes wouldn't be able to manage their own affairs. Quite commonly these trusts are used to insure that an inheritance given to extravagant relative, or someone who's mentally incompetent are not blown. They may also be useful for beneficiaries who need protection from creditors.
9. **Support trusts** - These trusts direct the trustee to spend only as much income and principal as may be needed for the education and support of the beneficiary.
10. **Testamentary trusts -** A testamentary trust are set up in wills.
11. **Totten trusts -** These trusts are not really trusts at all. They are simply bank accounts that pass to a beneficiary immediately upon your death.

What are the other five major reasons to have a trust?

1. Trusts are generally more difficult to contest than wills.
2. Trusts can be flexible; you can authorize that payments fluctuate with the cost of living, allow extra withdrawals in case of an emergency, or even set a standard figure for payment each year; if the income doesn't meet that amount, the difference can be made up out of the principal.
3. Trusts can be used to impose discipline on the beneficiary. You could require the beneficiary to live within a set figure, getting a certain amount of income each year, regardless of inflation, need, or the stock market's effect on the principal.
4. Trusts are sometimes set up in divorce, for example to provide for the education of the couple's children.
5. Trusts can also be helpful if you want to make a major charitable gift but wish to retain some use of the property.

Living Trusts

What is a living trust?

A living trust allows you to put your assets in a trust while you're still alive. If your living trust gives you great flexibility. You or someone in whom you have confidence manages the property, usually for the benefit of you or your family. Most people name themselves as trustees, and find there is no difference between managing the trust and managing their own property. In a living trust you have the right to buy, sell, or give property as before, though the property is in the trust's name rather than their own.

A living trust is one of the two main ways to avoid probate. The other way to avoid probate is by a joint tenancy with rights of survivorship. One of the purposes of probate is to determine the disposition of the property you leave at death. Since the trustee of your living trust owns that property, there is no need for the probate process?

Living trusts have become extremely popular in recent years. Even though they are useful, simple, and relatively inexpensive way to plan your estate, they will not solve all of your estate planning issues. New Jersey has a very simplified probate process. Therefore, many of the advantages of living trusts have diminished in the Garden State. And though they're great for some people, you can't assume they're great for you.

Deciding whether a living trust is right for you depends on the size of your estate, what kinds of assets it contains, and what plans you have for yourself and your family.

How does a living trust work?

In general, you execute a document saying that you are creating a trust to hold property for the benefit of yourself and your family. Some living trusts list the major assets such as your home or investments that you are putting in trust. Meanwhile, some other living trusts only refer to another document called a schedule in which you list the exact property that will begin the trust. In any type of living trust you prepare, you can add and subtract property whenever you want. If you decided to have a living trust, then there is a reasonable mount of legal paperwork that you will have to prepare. In a living trust, you basically have to retitle most of your assets to be owned by the living trust. You will have to change the ownership registration on whatever property you put into the trust. You will have to change the deed of your real estate to be owned by the living trust. Moreover, you will have to have your brokerage accounts, bank accounts, mutual funds from your own name to the name of the living trust.

If you make yourself the trustee, you will have to remember to sign yourself in transactions as "Robert Johnson, Trustee," instead of using only your name. When you put property into a living trust, the trust becomes its owner. Thus, this is the reason why you must transfer title to the property from your own name to that of the trust. Nonetheless, you retain the right to use and enjoy the property.

In the view of the tax authorities, the property in the trust belongs to you, the grantor, for tax purposes. Thus, if you receive income from the assets, you must still report the income from the trust directly on your income tax return. The trust itself often files a separate income tax statement as well, though the IRS doesn't require one if the grantor and trustee are the same person.

If you choose to have a living trust, then it is advisable to apply to the Internal Revenue Service for an employers identification number for the trust.

You can make anyone you want the trustee. You can also name an alternative trustee. An alternative trustee is also sometimes known as successor trustee to take over in the event of the original trustee's death or incapacity.

In a riving trust, you keep the right to manage your property whether you're the trustee or not, since you have a right to change the terms of the trust, the trustee, and the property in the trust at any time. When you die, your alternative trustee distributes the property according to the terms of the trust. Usually, your alternative trustee is your surviving spouse or an adult child, but you can name a bank or trust company if you are willing to pay their fees.

Living trusts can exist long after you die. If you want the trust to benefit your grandchildren, for example, you might specify that the trustee make gifts to them as needed until they are fully grown. Living trusts give you wide flexibility in distributing your property.

It can be a hassle to set up and fund the living trust, but the payoff for your family comes when you die. However, there are two major benefits of a living trust. First, since the property does not have to go through probate, there's no break in continuity. Second, a living trust in some cases saves a person substantial probate costs. If a probate action is contested then it could get expensive.

What are the other advantages of a living trust?

A living trust can help you to managing your affairs. If you have a trustee, a living trust can manage your property. Say you rent out condos; your trustee can take over the management, while you receive the income, minus the trustee's fees.

A living trust can also provide a way to care for you and your property in case you become disabled, which is why many people use them. You'd typically set up a living trust, fund it adequately, and name a reliable alternative trustee (often an adult child) to manage it should you become ill. This avoids the delay and red tape of expensive, court-ordered guardianship. And at the same time the trustee can take over any duties you had of providing for other family members.

Does a living trust protect my privacy?

One of the best advantages of a living trust is that it maintains the deceased's privacy more than wills, since there's typically no public record required. However, if the trust is funded through a pour over provision in your will, the items transferred from your probate estate may indeed appear in a public record, especially if the will is contested.

Are living trusts easy to prepare and change?

For a simple estate it is not that hard for a lawyer to create a living trust tailored to your estate objectives, and you don't have to go through the formalities required to execute or change wills.

What is the best reason to have a living trust?

In my professional option, the best reason to have a living trust is if you have real estate in multiple states. If you have property in another state, I always recommend setting up a living trust to hold the title to that property. This helps you avoid time-consuming, complicated ancillary probate procedures.

What are the disadvantages of having a living trust?

The biggest disadvantage is the cost involved. It takes much more time to prepare a living trust and to prepare the documents to transfer title to the living trust, than it does to prepare a set of wills. It only costs a few hundred dollars in legal fees to prepare a set of wills. Meanwhile, the legal costs to prepare a living trust range form $1,000 to $2,000. Moreover, there are expenses to retitle your assets and to prepare new deeds. There are also filing fees that must be incurred to file your deed with the County Registry.

Will I have any title problems with my assets if I decide to go with a living trust?

Some people do have title problems if they decide to go with a living trust. Not all items may be easily transferred into a trust. Jewelry can be a problem, and if you transfer title to your car into the trust, you may have trouble getting insurance on it, since you don't own it anymore.

Will I have any tax problems if I choose to have a living trust?

The federal estate tax allows an estate to use a year other than a calendar year as the "taxable year" used in tax deadlines. Living trusts don't receive the same flexibility. If you have a large estate and timing is a consideration, then it might save you money to pass your assets via will instead of trust. You don't have to have a separate taxpayer ID number for a living trust, but trusts are required to make estimated tax payments, while estates are exempt from this requirement for the first two years.

Are there any other types of traps if I decide to go with a living trust?

There are other traps in having a living trust. Living trusts along with other non-probate transfers like insurance policies, are not automatically revoked or amended on divorce, unlike wills. If you don't amend the living trust, then your ex-spouse could end up being the beneficiary.

What special considerations should I take when I prepare my living trust?

When you write your living trust, make sure you consider these issues:

- **Coordinated estate plan**. It is important to make sure to coordinate the trust with the rest of your estate plan. The executor of your will still must pay income and inheritance taxes and various probate expenses, but if too many of the estate assets are in the trust, he or she may not have enough money to do so. One way to meet this contingency is to give the trustee (and successor) power to make these payments from trust assets.
- **Coordinated disability plan.** If you prepare a living trust, then you should also name your attorney in fact as specified in your power of attorney as your

successor trustee. You don't want the provisions of your living trust to conflict with your power of attorney. If they do this could create a disaster and massive litigation.

Should my living trust be revocable or irrevocable?

Living trusts can be revocable (changeable) or irrevocable. Most living trusts are revocable. However, some people (usually those with a lot of money) do use irrevocable living trusts to avoid taxes and for Medicaid planning. If you choose to have an irrevocable living trust then you give up control over the assets in the trust, in return for escaping some estate, income or gift taxes and for Medicaid planning.

An irrevocable trust doesn't avoid taxes entirely. A living trust merely sets up a separate taxable entity that might be able to pay taxes at a lower rate than if all the assets were combined in one estate. It can also offer a bit more protection from creditors.

If you make the trust irrevocable to reduce taxes and avoid creditors, prepare for a lot of paperwork. And understand that you lose the flexibility of a revocable living trust. Be sure to consult a lawyer before setting up an irrevocable trust.

How is a living trust funded?

The easy part is setting up the trust. The harder part is putting something in it the living trust. This process is called funding the trust. This includes not just depositing money in the trust account, but also transferring title of assets to the name of the trust.

Living trusts can be funded now, while you are alive, or after you have died. If you want to fund it before you die (a funded trust), you transfer title of your assets to the trustee and make the trustee the owner of any newly acquired assets you want to go in the trust. Any assets in the trust will avoid probate. The more you leave out, the more involved probate will be.

How do you transfer title of your assets to the trustee?

You have to re-register title document for your assets. Thus, you have to transfer title of your bank accounts and stocks to the trustee's name. Moreover, you have to prepare and sign a new deed to your house that designates the trustee as owner.

Some people are just afraid to take the family house out of the husband and wife's names in joint tenancy and put it into a living trust in the name of one of the spouses. Maybe that's because then they don't own their house and the trust does. Moreover, some people don't trust the spouse who is trustee to hold and manage it for the benefit of both spouses.

Finally, keeping a few assets out of the living trust can help protect against creditors' claims down the line. When your estate contains some property and when it goes through probate, it triggers the running of the statute of limitations on claims that can be filed against your entire estate. Your creditors are put on notice that you have died, and once the statutory period runs out, the estate is safe from most claims. If everything you had was in the living trust and there were no probate, then the time within which a creditor can come after the estate may be extended.

How does a living trust work if it is unfunded?

The other way to fund a trust is to have the assets transferred to the living trust just before you die or after your death. Many people choose to fund it through their will. To do this you set up a living trust and a pourover will, which transfers the assets into the trust upon your death. Thereafter, you can add some assets to the trust before you die. Generally, the will would specify that all estate property would pour over into the trust, including life insurance and other death benefits.

Should I have a living trust?

The debate over having a living trust focus on saving the cost to go through the probate process. However, in New Jersey the cost incurred in the probate process are not substantial. Having a living does not guarantee you to save you money. If your records are well-organized, your assets are simple, your beneficiaries get along reasonably well, then the cost to probate an estate is very reasonable. The cost to go through probate might actually be less that having your estate pass through a living trust.

It is important to emphasize, that you will still need a will even if you have a living trust. You may want to determine how much probate will cost your estate and compare it to the costs, financial and otherwise, of a living trust for the same size estate.

What are the disadvantages of having a living trust?

A living trusts is a very important estate planning tool. In recent years, many people erroneously have become led to believe living trusts are miracle makers. This is an urban legend. Here's a list of miracles they won't perform.

- **Won't help you avoid taxes**. A living trust doesn't save any income or estate taxes that couldn't also be saved by a properly prepared will. The property in the living trust is still counted as part of your taxes. Your successor trustee still has to pay income taxes generated by trust property and owing at your death. Your executor would have to pay such taxes out of your estate if you had disposed of the property by a will instead of a trust.
- **Won't make a will unnecessary**. You will still need a simple will to take care of assets you fail to transfer to the living trust, or that you acquire shortly before your death. Moreover, if you have small minor children, a will is required to appoint a guardian for them.
- **Won't affect non-probate assets**. Like a will, a living trust won't control the disposition of jointly owned property, life insurance payable to a beneficiary, or other non-probate property
- **Won't protect your assets from creditors.** A living trust won't provide you with asset protection. Your creditors can still try to seize and attach your living trust assets.
- **Won't protect your assets absolutely from disgruntled heirs.** It is harder to challenge a living trust than a will. However, a relative can still file a lawsuit in trial court to challenge a living trust on the grounds of lack of mental capacity, undue influence, duress, or for other reasons.

- **Won't entirely eliminate delays.** A living trust could reduce the time required to distribute your assets after you die. However, it won't completely eliminate any delays. New Jersey

Choosing a Trustee

Who should I choose as a trustee if I set up a trust?

If your will leaves assets to a trust, then the executor will transfer those assets to the trustee for distribution to the beneficiaries, or for continued management. An executor's duties can be time consuming and at times difficult. However, the executor's duties are at least over within at most a few years. Meanwhile, a trustee's duties can continue for generations. And they require expertise in collecting estate assets, investing money, paying bills, filing accountings (quarterly or annual) and managing money for beneficiaries. The trustee consults with your beneficiaries about the size of the checks issued periodically, what expenses will be paid, what withdrawals against principal will be permitted. Obviously, then, it's preferable to choose someone with whom the beneficiaries feel comfortable. Since no individual lives forever, a bank or trust company should ultimately be designated as successor trustee.

What powers should you give the trustee?

In general it is advisable good idea to give wide latitude to the trustee, because the economy changes so quickly. And because the law often limits what kinds of investments a trustee can make, you have to spell out these powers in the trust agreement.

The most important decision to make in designating a trustee is whether to use a family member or a professional.

What are the advantages of having a relative named as a trustee?

Many people choose family members to serve as trustees. They don't charge a fee, and they generally have a personal stake in the trust's success. If the family member is competent to handle the financial matters involved, has the time and interest to do so, and if you're not afraid of family conflicts if one relative is named trustee, using a family member can be a good move for a small to medium sized trust. If you do make a relative a trustee, then make sure to consider who the successor will be in the event of death, incapacity, divorce or other family strife.

Many settlors or grantors name co-trustees. Usually the spouse will be a co-trustee, so that when one spouse dies, the other takes over, with a successor co-trustee who's a lawyer or has some specialized legal or financial knowledge. But corporate trustees, while expert, may be too expensive for moderate estates. Before selecting a trust company, it is advisable to discuss this with a trust officer of the institution.

What is the downside of choosing a family member(s) as a trustee?

Here are the downside to choosing family members;

- **Lack of expertise**. Your relatives often lack the financial acumen of a professional trust officer, and so must often hire professional help.
- **Relatives Die**. Trusts can last for many years. Human trustees die; banks don't and if they merge, the new company automatically will succeed to its trust operations.

- **Family wars.** Depending on their relationship with the beneficiary, family trustees may have problems with what the beneficiary wants and what's best for him or her. Sibling rivalries may also complicate arrangements in which one brother or sister serves as trustee for others. I always recommend a middle course between naming an institutional trustee and naming a family member is choosing a relative as co-trustees.

What are the pros of having an institutional trustee?

Banks are permanent institutions that can manage your trust for decades. They also have professional knowledge of and experience with investment options. They're objective and regulated by law. If you question the honesty or reliability of friends or family members, a bank is the usual preference; and it can handle the investments, tax preparation, management, and accounting.

What are the disadvantages of having an institutional trustee?

- **Cost**. If you do use a bank or trust company to manage the assets, expect to pay a fee for those services. These institutions sometimes have a minimum fee that makes them costly for a small trust.

Ask your trust company for its schedule of fees or discuss it with a trust officer. Find out what services are included and those for which additional fees are charged, including a termination fee.

Fees are deductible for income tax purposes, to the extent the income is taxable to the trust or beneficiaries.

- **Impersonality**. While a bank probably won't die, that doesn't mean your beneficiaries will always be dealing with the same person; personnel move around, or move on. As depositors in many banks have learned, the bank itself can change hands. And your beneficiaries will want someone who's willing and able to listen to and discuss their needs and questions; impersonal institutions are sometimes weak in these interpersonal areas. On the other hand, when squabbling relatives are involved, impersonality can be a disadvantage.

If you do choose an institutional trustee, make sure you and your beneficiaries are comfortable with the people they'll be dealing with.

Changing Your Mind

Can I change my will or trust after I have executed it?

Life always changes. Relationships with loves ones sometimes gets better and sometimes worse. After you have prepared your initial estate plan your individual circumstances change could change. You could acquire more assets, have a falling out with family members, your children will grow up, you and your spouse may split up. Moreover, the law estate law and tax laws constantly change. Thus, a change in the law could radically effect the viability of your estate plan.

Most of these life changes will also cause you to change your estate plan. Therefore, it is imperative that you review your will and other estate planning documents on a periodic basis.

How is a will changed?

You can change, add to or even revoke your will any time before your death as long as you are physically and mentally competent to make the change. An amendment to a will is called a codicil. You can't simply cross out old provisions in your will and scribble in new ones if you want the changes to be effective; you have to formally execute a codicil, using the same formalities as when executing the will itself. Any codicils must be dated so the court can tell whether they were made after your will. The codicil should be kept with the will.

How can I revoke my will?

Sometimes when you undergo a major life change, such as divorce, remarriage, winning the lottery, having more children, or getting the last child out of the house, then is advisable to rewrite your will rather than making a lot of small changes through codicils. This procedure is best accomplished by executing a new will that states that it revokes the old one.

How can I amend my trust?

A trust is generally easier to amend than wills, requiring fewer formalities. You can modify a trust through a procedure called amendment. You should amend your trust when you want to change or add beneficiaries, change disposition of assets in the trust, or change trustees. You amend a trust by a writing, called an amendment to the trust. This amendment explains the changes, specifying the new additions or deletions, signed by you and dated. You should not detach a page from the trust document, retype it to include the new information, and put it back in, because this could invite a legal challenge from a disgruntled non-beneficiary or require a court's construction of the trust.

You don't have to write a formal amendment to the trust to add property to it, because a properly drafted trust will contain language giving you the right to include property acquired after the trust is drafted. You simply make sure the new property is titled as being owned by the trust and list it on the schedule of assets in the trust. You do have to amend the trust if the newly acquired property is going to a different beneficiary than the one already named in the trust, or if the trust has more than one beneficiary listed.

What kind of information do I need to assess if I need to update my estate plan?

If you are considering revising your estate plan then you should review this checklist;

- Ask yourself if any of these changes have occurred in your life since you executed your will or trust.
- Have you married or been divorced?
- Have relatives or other beneficiaries or the executor died or has your relationship with them changed substantially and no provision is made in your will or trust for this contingency?
- Has the mental or physical condition of any of your relatives or other beneficiaries or of your executor changed substantially?
- Have you had more children or grandchildren, or have children gone to college or moved out of, or into, your home?
- Have you moved to another state?
- Have you bought, sold, or mortgaged a business or real estate?
- Have you acquired major assets (car, home bank account)?
- Have your business or financial circumstances changed significantly (estate size, pension, salary, ownership)?
- Has New Jersey law (or have federal tax laws) changed in a way that might affect your tax and estate planning?

If you do update your estate plan, you should also update your final instruction and will with the addresses and phone numbers of beneficiaries, trustees, executors and others mentioned in estate planning documents. It will make administrating your estate much easier.

Death and Taxes

What are the general legal principles of the federal estate tax?

Your estate isn't liable for federal estate taxation unless it exceeds the available exemption amount. This is the value of assets that each person may pass on to beneficiaries without paying federal estate tax. The Economic Growth and Tax Relief Act of 2001 provides for a gradual increase in the exemption. In the year of 2009, the exemption if $3.5 million. In addition, you can pass your entire estate, without any estate taxes, to your spouse. This is referred to as the unlimited marital deduction. If you simply leave your estate to your spouse and don't create an appropriate trust to take advantage of your $3.5 million exemption, your spouse's estate will pay taxes on this sum when he or she dies.

To decide what the property in your estate is worth, the IRS does not look at what you paid for it, but generally uses the fair market value of property you own at your death. For appraisal purposes, the government uses the face value of insurance policies in your name, including most group policies from work or professional organizations, but only cash value on someone else's life if you die before it has matured.

To the extent your estate exceeds the available exemption, the federal estate tax rates start at 37 percent. The assets subject to tax at death may include the family home, the family farm, life insurance, household furnishings, benefits under employee benefit plans, and other items that produce no lifetime income. In short, you may be richer than you think. If your estate is likely to exceed the threshold, then good estate planning can sharply reduce the amount of money that goes to the government instead of to your beneficiaries.

Although the federal estate tax misses most people, it is a very onerous tax. The federal estate tax is at 37% and may be as high as 50%. Therefore, if you are in jeopardy of exceeding the threshold, then you should be certain to perform an asset inventory, and then see your lawyer if you need tax planning.