

I. PROBATE a/k/a SUCCESSION

A. What is it?

1. Proves the will valid
2. Pays debts and creditors
3. Most importantly – transfers title to heirs

B. Disadvantages of Probate

1. Delays
 - a. Nationwide average delay is from 9 to 24 months
 - b. My grandfather's succession was from 1983-1994!
2. Loss of control of heirs
 - a. From executor to attorney to courts
3. Psychological effects
 - a. Most of us have heard stories of successions that were traumatic.
 - b. The most common thing we see is that families break up, pitting siblings/children against each other.
4. Fees
 - a. Court fees
 - b. Attorney fees
 - c. Executor fees
 - d. Publication fees (You've seen the "succession" listings in the Times-Picayune.)
5. Multiple probates
 - a. If real property is owned in other states, including Time Shares (if they are recorded).

6. Publicity

- a. Succession records are PUBLIC records!
- b. Information on file:
 - 1) ALL assets inherited by the heirs
 - 2) Account numbers, locations, exact amounts
 - 3) Heirs' addresses and social security numbers
 - 4) The original will and any private dispositions
- c. It is a fact that some financial planners "buy" this information from prospect list companies who peruse the public record for this type of information – how's that for a "qualified lead"!
- c. Check out this website:
<http://www.willsandtrustslawfirms.com/famous-wills>
 - 1) John F. Kennedy, Jr.'s will (and his mother's)
 - 2) John Lennon's will and lots more . . .
 - 3) How did they get these? Probate is Public!
 - 4) Notice that Frank Sinatra's will is not there. He had a Living Trust!

C. Advantages of Probate

1. Limits time for challenges to the will.
2. Limits the time that creditors can make claims against the estate.
3. After a Judgment of Possession is obtained, there is a two-year prescription rule for claims by unrecognized successors.

II. REVOCABLE LIVING TRUSTS

A. What are they?

1. The true Louisiana term is Revocable Inter Vivos Trust
 - a. Revocable (as opposed to Irrevocable) means it can be amended, revoked, or changed at any time.
 - b. Inter Vivos means it is created during your life as opposed to "Testamentary" which means it was created to take effect after your death.

2. Contrary to popular belief, Revocable Inter Vivos Trusts, a/k/a Revocable Living Trusts (RLTs) have been allowable in Louisiana for as long as our Trust Code has been in existence! Many detractors will have you believe that RLTs are a “new” thing here in Louisiana, or worse yet, illegal – they are wrong!

B. Structure of a Living Trust

1. Parties

- a. Settlers a/k/a Trustors – these are the creators of the RLT – this would be you, or you and your spouse, if married.
- b. Trustees – generally this will be you, or you and your spouse, if married. You will choose who will be your successor Trustee(s) upon your death or incapacity. Generally it is a child, friend, trust company, bank, or a combination thereof.
- c. Beneficiaries – you and your spouse are called the sole “original” beneficiaries, you have access to all income and can invade and withdraw the principal for your benefit, after your death your children/grandchildren (or whomever you choose) are your ultimate principal beneficiaries.
- d. All forms of trusts have these three positions: 1) Settlers, 2) Trustees, and 3) Beneficiaries. In an RLT, you (and your spouse) serve as all three, therefore giving you (and your spouse) total and complete control over your assets!

C. How do RLTs work?

1. The Revocable Living Trust (RLT) is not an asset that you “own” at your death. The principal beneficiaries (usually your children/grandchildren) are vested in their ownership when the Trust becomes irrevocable (at your death) therefore leaving YOU with ownership of nothing when you die. If you own nothing, you have nothing to probate!
2. Think of the RLT as a “BOX”
 - a. This box will hold title to all of your assets (with exceptions as noted below).
 - 1) The process of re-titling your assets to your trust is called “FUNDING” and is mandatory for the RLT to work.

- a) Put simply – anything inside the box will avoid probate, anything you have left out of the box will go through your succession (see example below).
- 2) Exceptions: some assets will not be “owned” by your RLT, such as IRAs, annuities, pension plans, and some life insurance policies.
 - a. However, these are NON-PROBATE assets. They will not go through your succession. Sometimes your RLT will be the contingent beneficiary of these assets.
 - b. Upon your death, you “pass the box” and all of its contents to your beneficiaries (heirs) entirely free from probate and succession!
 - c. IMPORTANT! – an unfunded RLT (empty box) is useless for avoiding probate/succession.

D. Advantages of Revocable Living Trusts

1. Avoidance of Probate/Succession

- a. As mentioned above, if, at your death, ALL of your probate assets are owned by your RLT, YOU WILL AVOID PROBATE/SUCCESSION.
 - 1) Avoids court costs, time delays, publication, executor fees, and attorney fees (see FAQ #5 below).
 - 2) Although heirs may contest anything, a trust proves much more difficult. The heirs must hire an attorney and sue the trust entity in a separate lawsuit.

2. No Succession = PRIVACY

- a. There will be no succession records for view by the public.

III. FREQUENTLY ASKED QUESTION (FAQs) ABOUT RLTs

FAQ #1: Will I lose my Homestead Exemption if I transfer my primary residence to my RLT?

ABSOLUTELY NOT. There are seven different Attorney General Opinions on file (going back to the tenure of Billy Guste) that will assume that you will retain your Louisiana Homestead Exemption with a properly drafted RLT, and in 2006 our Louisiana Constitution was specifically amended to allow this exemption.

FAQ #2: I was told that I would have to get a "Trust I.D. #" from the I.R.S. and file special tax returns for my RLT.

This is a common misconception. The Internal Revenue Service classified the RLT as a "Grantor Trust." It is like a "pane of glass" in that it is "invisible" for tax treatment while both Settlers are alive. Your RLTs "tax number" will remain whichever Settlor's social security number your institution uses for tax purposes. You can also continue to file your tax returns *exactly* as you did prior to setting up the Trust.

FAQ #3: I read that a RLT avoids federal estate taxes.

No, an RLT is entirely tax *neutral*. With proper planning, as with a well-drafted will, an RLT can help to reduce federal estate taxes by utilizing both spouses' Applicable Exclusion Amounts. In 2009, the exemption amount was \$3,500,000. For 2010 the federal estate tax will be totally repealed, then in 2011, unless changed, the exemption will be \$1,000,000, with a tax rate of 55% over this exemption amount.

FAQ #4: I read that a RLT avoids Louisiana State Inheritance Taxes.

No, an RLT is entirely tax *neutral*. The state includes all assets owned by an RLT in its calculation for state death taxes. However, for deaths occurring after June 30, 2004, Louisiana Inheritance Tax had been repealed.

FAQ #5: Do I need an attorney or CPA to file my State and/or Federal Inheritance/Estate Tax Form(s)?

If an estate or inheritance tax return is due, I would strongly urge you to retain an attorney or CPA. However, our RLT clients generally have their assets in order, thereby reducing the costs of time and preparation. As to public filing, *there is no succession record* in which to file anything.

FAQ #6: I read that when an RLT owns real estate it “clouds the title”?

This is something I have heard addressed for years. I, nor any of the other reputable RLT attorneys or real estate title attorneys I know of have ever found it to be true. The theory is that since a Judgment of Possession has a two-year prescription rule (and remember, if there is no succession, there is no Judgment of Possession), without that, title examiners would not be willing to give property titled in an RLT “clear title.” (See I.C.3 above.) What we have found in every RLT property transfer we have administered is that the title examiner merely wants to be positive that there are no undisclosed forced heirs out here (which is identical if the decedent had only a will). As long as there is a recorded “Affidavit of Death and Heirship” in the public record stating that no undisclosed forced heirs exist, the title examiners are granting favorable title opinions and *issuing title insurance policies!*

FAQ #7: Does an RLT avoid Forced Heirship?

ABSOLUTELY NOT. An RLT cannot circumvent any aspect of Louisiana law, however, like a properly drafted will, an RLT can leave a forced heir’s portion in trust subject to the rules as set out by the Settlor.

FAQ #8: Are my assets in a RLT protected from lawsuits, creditors, and Medicaid?

ABSOLUTELY NOT. An RLT offers no protection whatsoever from any of these types of claims. Since the RLT is entirely revocable and amendable at any time, and you have full access to the assets at anytime, it offers you no more or less protection that you had prior to the formation of the RLT.

FAQ #9: My attorney, CPA, banker, friend, advisor, etc., told me that RLTs are illegal in Louisiana, or that they “just won’t work.”

THEY ARE WRONG! A properly drafted, *and funded*, Revocable Living Trust is entirely legal and will work just fine in Louisiana. Please feel free to give them a copy of this handout, my telephone number, or invite them to come to one of my estate planning seminars. Much of the “bad press” about RLTs stems from trust companies coming into Louisiana from other states and “marketing” RLTs, mostly to the elderly and infirm, some even solicit door-to-door, without stressing proper funding! Most of these trusts have never so much as crossed a Louisiana attorney’s desk for review. You will always hear about those RLTs that “don’t work” – it’s time to start talking about those that do.