

# Nolo's Guide to **Living Trusts**



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**S**o you're thinking about making a living trust, great! It's a wise choice for many people. Living trusts are relatively simple documents that can save your family time and money.

Nolo's Online Living Trust is a fast and dependable way to make your living trust. You will go through an interview, answering questions about yourself and your property and when you're done, you download your living trust straight to your computer. If you're unsure how to answer a particular question, you'll find lots of practical and legal information to help you along the way.

Making a living trust may seem like a big project, but it doesn't have to be difficult or confusing. This guide has useful information that explains in detail what a living trust is, how it works, and whether or not a living trust is right for you.

Congratulations on working on your estate plan; it's a wonderful thing to do for your family. We know from long experience that putting a sound estate plan into place can bring peace and satisfaction to those who take the time to do it.

## Living Trusts 101

This living trust is simple to set up and makes transferring property after your death quick and easy.

### How a Living Trust Works

A revocable living trust does what a will does: it leaves your property to the people you want to inherit it. But with a trust, your property doesn't have to go through probate at your death.

You can create a trust simply by preparing and signing a document called a Declaration of Trust.

Nolo's Online Living Trust is a revocable living trust. Revocable means you can cancel it at any time. It's called a "living" trust because it's created when you're alive, not at your death like some other kinds of trusts.

When you create a revocable living trust, you appoint yourself as trustee with full power to manage trust property. Then you transfer ownership of some or all of your property to yourself as trustee, keeping absolute control over the property held in trust. You can:

- sell, mortgage, or give away property held in trust
- put ownership of trust property back in your own name
- add property to the trust
- change the beneficiaries
- name a different successor trustee, or
- revoke the trust completely.

No separate income tax records or returns are necessary as long as you are both the grantor and the trustee. (IRS Reg. § 1.671-4.) Income from property held in the living trust is reported on your personal income tax return.

If you and your spouse or partner create a trust together, both of you must consent to changes, although either of you can revoke the trust entirely.

After you die, the person you named in your trust document to be “successor trustee” takes over. This person transfers the trust property to the relatives, friends or charities you named as the trust beneficiaries. No probate is necessary for property that was held in trust. In most cases, the whole thing can be handled within a few weeks. After all the property is transferred to the beneficiaries, the living trust ceases to exist.

When a couple creates a basic probate-avoidance living trust, the surviving spouse or partner becomes sole trustee when the other spouse or partner dies. The trust itself is automatically split into two trusts. Trust 1 contains the deceased grantor’s share of trust property. No one can change its terms or revoke it. The survivor distributes this property to the beneficiaries. Trust 2 contains the survivor’s share. The survivor is free to revoke Trust 2 or amend its terms.

## A Mini-Glossary of Living Trust Terms

Unfortunately, you can’t escape legal lingo entirely when you deal with living trusts. Here are some basic definitions:

- The person who sets up the living trust (that’s you) is called a **grantor**, **trustor** or **settlor**.
- The person who has complete power over the trust property is called the **trustee**. You are the original trustee of your living trust, so you keep total control over property in the trust. If you and your spouse or partner make a trust together, both of you are trustees.
- The property you transfer to the trustee is called, collectively, the **trust property** or **trust principal**. (And, of course, there’s a Latin version: the trust corpus.)
- The person you name to take over as trustee after your death (or, with a shared trust, after the death of both grantors) is called the **successor trustee**. The successor trustee’s job is to transfer the trust property to the beneficiaries, following the instructions in the Declaration of Trust. The successor trustee may also manage trust property inherited by young beneficiaries.
- The trust **beneficiaries** inherit the trust property when the grantor dies. With a basic trust, there is just one kind of beneficiary. If you make an AB trust, there are two kinds: the life beneficiary, who is always the surviving spouse, and the final beneficiaries, who inherit trust property after both spouses have died.

If any of your beneficiaries inherit trust property before they are 35 years old, the successor trustee (or the surviving grantor, if you made a trust with your spouse or partner) will follow the instructions you left in the trust document, and either:

- transfer the property inherited by the child to the “custodian” you chose, to manage the property until the child reaches an age specified by your state’s law (21 in most states, but up to 25 in a few states), or
- keep the property in a “child’s subtrust,” using it for the child’s benefit, until the child reaches an age you designate, up to age 35.

## How a Living Trust Helps Your Family

If you make a living trust, you can save your family a great deal of time and money. The big advantage is that property left through a trust avoids probate. There are other pluses as well.

### Avoiding Probate

Unless you make a trust or use some other probate-avoidance method, your property will probably have to go through probate before the beneficiaries receive it. Generally, property left through a will must go through probate.

In the probate process, the will (if there is one) is proved valid in court, and debts are paid. Then, the remaining property is distributed to the beneficiaries named in the will or, if there isn’t a will, the closest relatives. The cost of probate varies widely from state to state, but attorney, court, and other fees can eat up about 5% of your estate (the property you leave at death), leaving that much less to the people you want to receive it. If the estate is complicated, the fees can be even larger.

The Cost of Probate	
If you leave property worth:	Probate may cost about:
\$200,000	\$10,000
\$500,000	\$25,000
\$1,000,000	\$50,000

At least as bad as the expense of probate is the delay it causes. In many states, probate can take a year or two, during which time the beneficiaries generally get nothing unless the judge allows the immediate family a small “family allowance.”

If you own real estate in more than one state, it’s usually necessary to have separate probate proceedings in each state. That means the surviving relatives might need to find and hire a lawyer in each state and pay for multiple probate proceedings.

From the family's point of view, probate's headaches are rarely justified. If the estate contains common kinds of property—a house, stocks, bank accounts, a small business, cars—and no relatives are fighting about it, the property merely needs to be handed over to the new owners. In the vast majority of cases, the probate process entails nothing more than tedious paperwork, and the attorney is nothing more than a very highly paid clerk.



#### RESOURCE

**Other ways to avoid probate.** A living trust isn't the only probate-avoidance method around. For more about probate avoidance, see *8 Ways to Avoid Probate*, by Mary Randolph (Nolo). You will receive this book if you purchase the Nolo's Online Living Trust Deluxe or Suite packages.

### Avoiding the Need for a Conservatorship or Guardianship

A living trust can be useful if you become incapable, because of physical or mental illness, of taking care of your financial affairs. That's because the person you named to serve as trustee at your death (or, if you made a shared trust, the other grantor) takes over management of the trust assets. The person who takes over has authority to manage all property in the trust and to use it for your benefit.

If there is no living trust and you haven't made other arrangements for someone to take over your finances if you become incapacitated, a court must appoint someone. Typically, the spouse or adult child of the person seeks this authority and is called a conservator or guardian.

### Keeping Your Estate Plan Confidential

When your will is filed with the probate court after you die, it becomes a matter of public record. A living trust, on the other hand, is a private document in most states. Because the living trust document is never filed with a court or other government entity, what you leave to whom remains private. (There is one exception: Records of real estate transfers are always public.)

Some states require you to register your living trust with the local court. But there are no legal consequences or penalties if you don't.

The only way the terms of a living trust might become public is if—and this is very unlikely—someone files a lawsuit to challenge the trust or collect a court judgment you owe.

### What Living Trusts Don't Do

As wonderful as living trusts can be, they aren't a complete estate plan by themselves. Here are some things that trusts can't do.

**Shelter assets for purposes of Medicaid.** Assets held in a living trust are “countable resources” for purposes of Medicaid qualification. Because you have complete control over trust assets, those assets are treated just as if you owned them in your own name. For more information, read *Long-Term Care: How to Plan & Pay for It*, by Joseph Matthews (Nolo), which explains Medicaid eligibility and asset protection in detail.

**Convey your wishes about medical intervention.** A living trust has absolutely nothing to do with conveying your wishes about life support systems and other medical intervention at the end of life. You’ll need other documents—an advance directive (“living will”) and durable power of attorney—to make your wishes clear and legally binding. (See [www.nolo.com](http://www.nolo.com) for more information.)

**Protect Assets from Creditors.** A living trust does not provide any protection from creditors, at least while you’re alive. Because you keep the power to transfer the property back to yourself or revoke the trust entirely, if a creditor sues you and wins, and a court issues a judgment against you, the creditor can seize trust property to pay off the judgment.

**Change your obligations to your family.** Most married people leave much, if not all, of their property to their spouses. But if you don’t leave your spouse at least half of your property, your spouse may have the right to go to court and claim some of your property—possibly including trust property—after your death.

State law may also give your minor children the right to inherit from you, especially if their other parent dies before you do. If you don’t plan to leave at least half of the property in your estate to your spouse, or are concerned about your children’s inheritance rights, you should see a lawyer experienced in estate planning.



#### CAUTION

**Be cautious if you’re getting divorced.** You could run into trouble from a former spouse if you try to transfer assets in or out of trust while your divorce proceeding is pending. Some states have very specific rules about what you may and may not do during this period.

## Do You Also Need a Will?

Even if you create a living trust, you will almost certainly need a simple back-up will, too.

Having a will is important for several reasons.

First, a will is an essential back-up device for property that you have not transferred to your living trust. If you don’t have a will, any property you own at your death that isn’t transferred by your living trust (or other probate-avoidance device) will go to your closest relatives, in an order determined by state law. These laws may not distribute property in the way you would have chosen.

Second, in a will you can name someone to be the personal guardian of your minor child, in case you and the child's other parent die while the child is still under 18. You can't do that in a living trust.

Finally, if you want to leave nothing to your spouse or a child, you must make your wishes clear in a will.



#### CAUTION

**Avoid Conflicts Between Your Will and Living Trust.** When you make both a living trust and a back-up will, pay attention to how the two work together. If your will and your trust document contain conflicting provisions, at the least you will create confusion among your inheritors and, at the worst, bitter disputes—maybe even a lawsuit— among friends and family.

You make a will online at [www.nolo.com/products/wills-trusts](http://www.nolo.com/products/wills-trusts).

## Is a Living Trust Right for You?

With Nolo's Online Living Trust, you can make a basic living trust, either on your own or jointly with your spouse or partner. A basic living trust is not the only type of trust. More complicated trusts can be useful in certain circumstances. For example,

- If you are married and you know that your combined estate will be more than the \$10 million, you may benefit from a “bypass” trust.
- If you want to leave property to a person with a disability, you may want to make a special needs trust.
- If you want to leave property to someone who cannot be trusted to manage money, you might consider a spendthrift trust, which limits the beneficiary's ability to spend the money.

To learn more about these kinds of trusts, read *Plan Your Estate*, by Denis Clifford (Nolo), or see an estate planning attorney.

Fortunately, most people don't need a fancy trust, they'll do just fine with a basic trust, like Nolo's Online Living Trust.

### When to Use a Trust

Like a will, a basic revocable living trust lets you leave your property to the people you want to inherit it. The advantage of a living trust is that your assets don't have to go through probate at your death. Consider a living trust if any one of the following applies to you:

**You're middle-aged or older, or in poor health.** As you get older, you'll want to think more about sparing your family the expense and delay of probate.

**Simpler probate-avoidance methods aren't available.** A living trust is an excellent way to avoid probate for real estate that you own alone and many other miscellaneous assets. But if your money is in bank, brokerage, or retirement accounts, it's simpler and equally effective just to name payable-on-death beneficiaries for each account. While these methods don't offer all the features of a living trust—most important, you probably won't be able to name an alternate beneficiary—that drawback may be outweighed by convenience—especially for younger people.

**Your estate probably won't qualify for simplified probate.** Most states allow certain amounts or types of property to be transferred without probate or by a streamlined court procedure, even if it's left by will. If your estate is eligible for a simple transfer procedure, you may not need to create a trust. Simplified probate is available to estates of just a few thousand dollars in some states, and all the way up to \$300,000 in Nevada. In some states, if a surviving spouse inherits less than a certain amount of property, no probate is necessary.



#### RESOURCE

Every state's approach to handling small estates is listed in *8 Ways to Avoid Probate*, by Mary Randolph (Nolo). You will receive this book if you purchase the Nolo's Online Living Trust Deluxe or Suite Package.

**You own out-of-state real estate.** Using a living trust can let you avoid probate proceedings in that state, saving your family a big headache.

**You aren't worried about big creditors' claims.** If you own a business that has many creditors, you may want your assets to go through probate, so that creditors' claims are cut off after a certain period. If creditors don't make their claims by the deadline, your inheritors can take your property free of concern that creditors will surface later and attempt to claim a share.

**You're concerned about privacy.** A will is filed with the probate court after you die and becomes a matter of public record. A living trust, on the other hand, is not, so what you leave to whom remains private. (There is one exception: Records of real estate transfers are always public.)

**You don't mind some extra paperwork.** Creating a trust document is no harder than making a will. There is, however, one more essential step to making a living trust effective: You must make sure that ownership of all the property you listed in the trust document is legally transferred to you as trustee of the trust.

**You're concerned about incapacity.** A living trust can be useful if you become incapable of taking care of your financial affairs. With a trust, the person named to serve as trustee after your death can take over management of the trust assets. Without a living trust or other arrangements, a court must appoint someone to take over.

## One Trust or Two?

With Nolo's Online Living Trust, you can make an individual trust or a shared trust with your spouse or partner. If you and your spouse or partner own big assets together, you may want to make a basic probate-avoidance trust together.

Many couples prefer to make one shared trust, because that way they don't have to divide property they own together. For example, to hold a co-owned house in two separate trusts would require the spouses to sign and record a deed transferring a half-interest in the house to each spouse as trustee. And to transfer household furnishings to separate trusts, spouses would have to allocate each item to a trust—or end up transferring a half-interest in a couch to separate trusts.

There is another advantage to making a shared trust if you and your spouse want to leave significant trust property to each other. With a shared trust, property left by one grantor to the survivor stays in the living trust when the first grantor dies; no transfer is necessary. With separate trusts, property left to the survivor must usually be transferred first from the trust to the survivor, and then (to avoid probate) to the survivor's living trust.

If you and your spouse or partner own most of your property together but each of you has some separate property, a shared trust is fine. You can transfer all of it to the trust, and each spouse can name beneficiaries (including each other) to receive his or her separate property.

If, however, you and your spouse own most of your property separately, you may want to make individual trusts. Most couples in this situation fit one of these profiles:

- You and your spouse signed an agreement stating that each spouse's earnings and other income are separate, and you have kept your property separate.
- You are recently married and own little or no property together.
- You each own mostly separate property acquired before your marriage (or by gift or inheritance), which you conscientiously keep from being mixed. Couples who marry later in life and no longer work often fit into this category.

Another reason to make separate trusts is if each of you wants to keep sole control over your own trust property. With a shared trust, each of you has authority over all trust property while both of you are alive.

Your decision may be affected by the marital property laws of your state.

- **Community Property States:** In community property states, the general rule is that spouses share everything 50-50, so it usually makes sense to make one shared trust, especially if you have been married for a number of years. All property earned by either spouse during the marriage, regardless of whose name is on the title slip, is community property. Each spouse owns one-half interest in it. However, property acquired by one spouse by gift or inheritance, or before marriage, is not community property; it is the separate property of that spouse. Federal Social Security benefits and certain retirement plan benefits are also separate, not community, property. Community property states are:

Community Property States			
Alaska*	Idaho	New Mexico	Washington
Arizona	Louisiana	Texas	Wisconsin
California	Nevada		

\* If spouses sign a community property agreement.

- **Non-Community Property States.** In a non-community property state, it's usually fairly easy for spouses to keep track of who owns what. The spouse whose name is on the title document (deed, brokerage account paper or title slip, for example) owns it. If you own most of your property together, you'll probably want to make a shared trust; if you own things separately, consider individual trusts.

## Nolo's Online Living Trust

Nolo's Online Living Trust is easy to make—we guide you every step of the way, offering in-depth legal and practical information about trusts and estate planning on every screen.

### It Won't Take Long

It takes three steps to make and finalize your living trust:

1. **Make the trust document.** Making your trust document could take as little as just a few minutes. But a living trust is an important document, so don't rush. Put aside an hour or two to think about your wishes.
2. **Have your trust notarized.** After you make the document, you need to sign it in front of a notary public. It shouldn't be hard to find a notary public near you, or you can have one come to you (this will cost more).
3. **Transfer property into your trust.** How long this takes depends on what type of property you put in your trust. Items without title documents are transferred by the assignment of property that prints out with your trust document. However, items with title documents—like real estate, cars, or stocks—may take a few weeks to transfer because you must have the title documents changed. This step is absolutely essential!

You'll get detailed instructions for finalizing your trust when you print out your trust document.

## You Get More Than Just a Living Trust

With every Nolo's Online Living Trust package, you get:

- **your living trust document**
- **an assignment of property** (the document that transfers property to the trust)
- **a certification of trust** (an abbreviated version of the trust document, useful when dealing with banks and other institutions)
- **a blank revocation of trust** (for later use), and
- **detailed instructions** on how get your trust notarized and how to transfer property into your trust.

Then, for one year you can:

- **revise your trust** (this is called making an “amended and restated” trust)
- **create a certification for your trust**, or
- **revoke your trust**.

After one year, your subscription ends, and you will not be able to access your trust. However, you can renew your subscription for a modest fee.

## What You'll Need to Get Started

It will be easier to make your living trust if you have this information on hand:

- an inventory of the property you want to leave through your living trust
- a list of beneficiaries
- a list of alternate beneficiaries
- a list of young beneficiaries who might require property management until they become adults, and
- your first and second choices for successor trustee.

## Changing or Revoking Your Living Trust

If you find that your circumstances have changed—you've acquired more property, or you want to add or remove beneficiaries—you can make those changes to your trust for two years free of charge. The revised trust is called the Amended and Restated Declaration of Trust.

When you amend and restate your trust, that is, if you add or remove property from your trust, you will need to update your property schedules (lists of trust property, which you attach to the trust document) and revise your property titles. We provide detailed instructions on how to do this.

If you want to end your trust, you can revoke it. A Trust Revocation prints out with your trust document. You can save this with your trust, in case you need it in the future. Or you can return to the program and print a revocation.

If you revoke your trust you will also need to transfer your trust property out of the trust. We provide detailed instructions on how to do this.

Your trust revocation must be notarized.

## When You Need a Lawyer

Making a trust requires thought and attention to detail, but it does not require a law degree. We'll walk you step-by-step through the process of making your own living trust, giving you help on every screen. And if a situation arises in which you might benefit from the advice of a lawyer or other expert, we'll be the first to tell you.

For example, you should see a lawyer if:

- you may leave assets worth more than \$5 million (if you're not married)
- you and your spouse may leave assets worth more than \$10 million (if you're married)
- you anticipate family fights over your property, or
- you want to set up a long-term trust for a child with special needs.

If you need a lawyer, Nolo's Lawyer Directory can help you find one. Go to [www.nolo.com/lawyers](http://www.nolo.com/lawyers) to search for a lawyer near you. ●