



# Foley & Foley

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A Newsletter from **Foley & Foley, A Professional Corp.**

# Generations

For our clients and our professional estate planning partners

## The Living Trust: *A Super Power of Attorney*

By Richard and Susan Foley

*A living trust is like a power of attorney on steroids. The trust agreement will transfer control of your financial affairs to your successor trustees in a more efficient manner than a durable power of attorney, and it will give your trustee greater control to manage assets. A living trust is a superior disability planning solution – so long as your property has properly been re-titled into the name of your trust.*

Much has been written in recent years about how a revocable living trust can be used to avoid having your estate pass through probate. Creating a trust and transferring assets to the trust assures that your loved ones can take control of your assets after you pass away, without having to proceed through the court system.

Of course, probate avoidance isn't the only benefit of a properly implemented living trust. A living trust is an excep-

tional tool for transferring control (but not ownership) of assets to others during your lifetime if you become incapacitated. In this way, the trust allows your **successor trustee** to manage your assets for your benefit if you can no longer manage your own affairs. This disability planning benefit of a living trust allows loved ones to avoid filing a guardianship action in court to determine your competency and then continue reporting to the court for many years to come.

A durable power of attorney can perform a similar function, but powers of attorney rarely include specific instructions about your desires, and third parties sometimes refuse to accept a power of attorney even if they are properly signed.

Here are two examples of how a living trust might be used in disability planning:

**Example 1:** Robert and Beth Harrison are in their mid-50s with three adult children. Robert owns a successful wholesale business and Beth is a CPA. Robert and Beth established a joint revocable living trust and transferred all of their real estate, bank accounts, investment accounts, and business interest



### Estate Planning Workshops

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Don't forget that Foley & Foley offers two workshops every month for people who want to know more about wills, trusts, insurance, probate, estate taxes, children's trusts, and more.

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**There is no charge and no obligation.**

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You can check our schedule, times, and location online at [www.foleyfoley.com](http://www.foleyfoley.com).

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## The Living Trust

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into the trust. Robert and Beth are co-trustees of their trust. The trust also provides that when two independent licensed physicians determine that either one of them is incapacitated, the other spouse will serve as sole trustee. If the non-incapacitated spouse cannot serve for any reason, the Harrisons have named their oldest daughter, Michelle, as successor trustee.

Robert and Beth were in a car accident. Robert was killed and Beth was critically injured and now requires full-time nursing care. The accident is a family tragedy, but the living trust allows Michelle to immediately step into control of all of the family assets and continue to manage them for Beth's benefit. Michelle might decide to sell Robert's wholesale business and hire another CPA firm to help wind down or purchase Beth's accounting practice. She might also sell the family home or liquidate other assets. This will take some time to accomplish, but the living trust transfers the legal power and authority to Michelle to deal with the family crisis, manage or sell assets and preserve the family wealth held by the trust.

If the Harrisons did not have a trust or a durable power of attorney, one or more of the Harrison children would have had to petition the court to become Beth's guardian, which can take months and possibly invite a dispute among the children.

**Example 2:** Mary Masters just celebrated her 79<sup>th</sup> birthday and is find-

ing it harder and harder to manager her financial affairs. Mary doesn't see well, which makes it hard to pay her bills, maintain her house, keep track of social security, follow her investments, and apply for her permanent fund dividend. She wants to turn everything over to her son, Bud. But if all of Mary's accounts are put in Bud's name, he is free to do anything he likes with the money and home, and he might not choose to transfer shares of the property to his siblings after Mary's death. Moreover, once the assets are in Bud's name, they could be subject to the claims of his creditors or by his wife, if he were divorced.

A better choice is for Mary to establish a revocable living trust and name Bud as her co-trustee. When all of Mary's assets have been transferred into the name of the trust, Bud has the legal authority to manage the assets, pay Mary's bills, keep track of finances, and help Mary make financial decisions. Bud doesn't need a power of attorney to manage Mary's affairs because he is a co-trustee of the trust and all of Mary's assets are owned by the trust. By making Bud a co-trustee, Mary hasn't given up her authority to make decisions about her money and she can always fire Bud if she likes. Bud acts more like a "helper."

Mary has good days and bad days, but Bud doesn't have to worry about going to court to have Mary declared incompetent because he already has the power to act on Mary's behalf. As a trustee, he has a fiduciary duty to manage the property for Mary's benefit and not his own. When Mary passes away, the

trust provides that Bud will pay any remaining bills and distribute the assets left in trust equally to all of Mary's children.

*If you would like to name a co-trustee on your trust before you become incapacitated, contact our office so we can review your planning and make the appropriate changes. Naming new trustees on your plan is a covered expense under our **Generations** trust maintenance program.*

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