

# Law Offices of Barbara H. Cane

Suite One · 50 Piermont Avenue · Nyack · New York 10960

845 · 727 · 4000 fax 845 · 727 · 4023 NYC 212 · 864 · 6401  
bhcanec@canelaw.net ceboniface@canelaw.net www.canelaw.net

**Barbara H. Cane**  
Admitted in NY · MA  
**Courtney E. Boniface**  
Admitted in NY · NJ · CT  
**Attorneys at Law**

## WHAT YOU SHOULD KNOW ABOUT REVOCABLE LIVING TRUSTS

**What is a revocable living trust?** A revocable living trust is a legal entity which can own and manage your property. Because the trust is a separate legal entity, not flesh and blood, it keeps working even if you become incompetent or die. It can do everything a will can do, and more!

**What advantages do revocable living trusts provide?** Everything owned by the trust passes without intervention of the surrogate court (the court that handles estates) when you die, so your trust can act like a “will substitute” to carry out your wishes. If you own property in more than one state, having title to the property in your trust will avoid probate/administration in multiple jurisdictions. If you become incompetent during your lifetime, your back-up trustees can take care of your affairs without the need to be appointed as your guardian by the court. A trust can also give you more privacy than a will.

**What is “probate”?** When we die, our property passes to the next owner by one of five basic methods: 1) by operation of law, 2) by beneficiary designation, 3) by contract, 4) by your will, or 5) if you have no will, according to the laws of the state. For example, if you own a house with your friend as “joint tenants with right of survivorship,” your ownership interest automatically passes by operation of law to your friend when you die. If you own a life insurance policy or retirement account such as an IRA, it passes automatically to the person you have chosen by “beneficiary designation.” A revocable living trust is a type of contract between you and a trustee. The property it owns when you die passes according to the terms of the trust without court involvement. Anything else that you own in your name alone or which has no beneficiary designation will have to go through a court procedure. That procedure is called “probate” if you have a will; if you have no will, the process is called “administration”.

**If I have a revocable living trust, will my estate escape probate?** Yes, but only to the extent that your trust holds legal title to your property. For example, Harold created a revocable trust, and then put it in a drawer. He never changed the title of any of his assets from his individual name to the name of his trust. When he died, his bank accounts, investment accounts and his house all still had to go through the surrogate’s court because the trust did not own them. Marion, however, did her homework and changed the title on her property (except the property that passed by beneficiary designation or by operation of law) to the name of her trust. When she died, it was not necessary to involve the surrogate’s court.

**I thought that if I have a will my estate will not have to go through probate?** Many people share that misconception! In fact, if you have a will, your estate **must** go through probate if you die owning assets in your individual name.

**How do I create a revocable living trust?** You and your attorney work together to create a trust agreement tailored to your individual circumstances. Every trust is a contract between you and the trustee for the benefit of the beneficiaries. Probably you will fill all three roles: you will be the grantor (the person who creates the trust), the trustee (the person who carries out the purposes of the trust) and the beneficiary (the person who benefits from the trust). You will select back-up trustees to take over management of the trust if you no longer can do it yourself, and, of course, upon your death. The trust document will spell out what you want to have happen while you are alive and who will be the beneficiaries when you die. The trust must be signed with certain formalities.

**What does it mean to “fund the trust”?** Funding the trust means changing the title of assets from your individual name to your trust. When you “fund the trust” the trust becomes the owner of the assets. For example, suppose you have an account in your own name at XYZ Investment Company. Once you have created your trust, you will fund it by instructing XYZ Investment Company to change the name on your account from your individual name, “John Doe”, to the name of the trustee, “John Doe, Trustee of the John Doe Trust dated April 1, 2005”. Your goal is to make the trustee the owner of all of your assets except those that pass by operation of law or by beneficiary designation. However, for estate tax planning purposes you may want to discuss making your trust the owner of property which otherwise would pass by operation of law. Only rarely do you want your trust to be the beneficiary of an asset that passes by beneficiary designation. You must review funding your trust with your attorney.

**If I have a revocable living trust, do I still need a will?** Yes, it is good practice for you to have both. For clients who create revocable living trusts we also do what is commonly called a “pour-over” will. The “pour-over” will gives everything not already in your trust (except assets that pass by beneficiary designation or by operation of law) to your trust when you die. Its purpose is to “pick up” any assets that you may not have moved from your individual name while you were alive and add them to your trust. It is a “belt and suspenders” step to make sure your wishes are carried out. Also, if you have young children, you may choose to name guardians by way of a will, especially if there is no alternative procedure like a Deed of Guardianship available. Remember, though, in order for the “pour-over” will to transfer assets in your name into the name of your trust upon your death, it must be probated through the surrogate’s court.

**Suppose I change my mind? Can I change my trust?** Sure you can! As long as you are alive and competent you can change your trust. That is why it is called a “revocable” living trust; an “irrevocable” trust is the kind you cannot change. Your lawyer will help you with the formalities that you must follow to change your trust and up date your pour-over will.

**Who should be the trustee?** Usually you will be your own trustee as long as you are alive and competent, although many married couples choose to act as co-trustees of each

other's trusts. An elderly person, someone with poor health or someone who travels frequently may select a co-trustee to serve with them.

**Who should serve as trustee if I am ill or dead?** Whom do you trust? Who is competent and sensible? Whom can you count on to put your interests above their own? A trustee doesn't have to know everything, and, in fact, should be encouraged to seek help and advice from knowledgeable people. A spouse, an adult child, a sibling, a close relative, a trusted friend, a professional advisor like a lawyer or accountant, or a corporation might be good choices. Your choice will depend on many factors which you will discuss with your attorney.

**Can I remove a trustee if things change?** Of course you can! In the trust you will reserve the right to remove trustees. You should review your documents regularly to make sure that the choices you made when you created your documents are still the best ones and change them if they are not!

**Who gets to say that it is time for me to step down as trustee?** Obviously you cannot serve as trustee once you have passed away. It is trickier to say who decides if you should step down while you are alive. Most of our clients choose to give that power to one or more trusted individuals. We prefer to have this power in the hands of trusted individuals rather than a doctor who may not know you well, or may be reluctant to exercise so much power.

For example, the document may say that dad's children, acting unanimously, can remove dad as a trustee so that the ABC Trust Company takes over, once they have given dad notice of the change and a chance to object to his removal. You must discuss this with your attorney.

**Does a revocable living trust need a separate income tax return?** No. If you control it, it is "yours" and you are taxed on all of the income while you are alive.

**Does a revocable living trust save estate taxes?** The trust format itself is tax-neutral. However, you can include smart tax planning language in your trust to take advantage of potential tax savings.

**Will putting my assets into a revocable living trust make me eligible for Medicaid?** No. Medicaid eligibility is a very technical area of the law and you must consult a lawyer who knows that area of law inside and out to determine what is best for you.

**What kind of assets can I put in my revocable living trust?** Most things: real estate (and if you own real estate in another jurisdiction, this will avoid probate/administration in more than one state), investment accounts, bank accounts, notes receivable, stocks and bonds, and tangible personal property like art and jewelry.

**Can I put the shares of my co-op in my revocable living trust?** There is no inherent reason why not, although co-op boards may be reluctant to allow it until they understand that as a shareholder the trust will be obligated to all the cooperative's rules, including the

restrictions on who can occupy the apartment. In fact, it may be an advantage to a co-op to have the ownership of shares pass more smoothly than they would if there were a probate proceeding. You should check with your co-op board to see if they allow shares to be transferred into trusts and what paperwork and fees they will require.

**What are the disadvantages of using a revocable living trust format?** It usually costs a bit more to create a trust than a will, and it won't be effective unless you fund it. You have to do some homework once you establish the trust if you want it to work as you intend. An improperly done trust, or one done for the wrong reasons, is not useful. See what Attorney General Spitzer's office says about the proper uses of revocable trusts and possible scams at [http://www.oag.state.ny.us/seniors/living\\_trust.html](http://www.oag.state.ny.us/seniors/living_trust.html).

**Are there times when a revocable living trust is not the best format for an estate plan?** Yes. Here are a few of them: all of your assets will pass by beneficiary designation or operation of law as you desire and with good tax results; you know you will never bother to fund the trust; having a low-cost plan is your highest priority at the moment. While I like the living trust format, I will always point out situations where it doesn't offer significant benefits---each case is unique!

**What are the advantages of using a revocable living trust format?** Avoiding probate/administration and having an effective way to manage your assets if you cannot do it yourself are the primary benefits. Court procedures can handle these matters even if you do not have a revocable living trust, but having the trust will make it easier for your loved ones. Death and disability are stressful enough without adding bureaucratic hurdles to the difficulties!

**Are there situations where a revocable trust is especially useful?** Yes. Here are just a few of them: you are getting older; your health is failing; you own property in more than one state; you are single and have no children; you have no close relatives; you suspect some people will be unhappy with what you want to do with your estate; you do not intend to benefit relatives who would otherwise inherit your estate if you had no estate plan; you are not married to your life partner; you want your assets to be able to be traded, used or distributed quickly after your death; you want to have your affairs be as private as possible; you are divorced and want assets protected for your young children without your ex-spouse being involved; or you want to reduce or eliminate the administrative burdens on your family when you die.

**How do I decide what is best for me?** Learn as much as you can. Meet with an experienced attorney to analyze your situation to determine what is best for you.

**To comply with IRS requirements, we must inform you that any tax advice in this article is not intended or written to be used, and cannot be used for the purpose of avoiding penalties. It is intended for general informational purposes only. You should seek advice based upon your particular circumstances from an independent tax advisor.**

c. 2005 Barbara H. Cane, Attorney at Law

