I have a will. Why would I want a living trust? Contrary to what you've probably heard, a will may not be the best plan for you and your family. That's primarily because a will does not avoid probate when you die. A will must be validated by the probate court before it can be enforced. Also, because a will can only go into effect after you die, it provides no protection if you become physically or mentally incapacitated. So the court could easily take control of your assets before you die—a concern of millions of older Americans and their families.

Fortunately, there is a simple and proven alternative to a will—the revocable living trust. It avoids probate and lets you keep control of your assets while you are living—even if you become incapacitated—and after you die.

What is probate? Probate is the legal process through which the court sees that, when you die, your debts are paid and your assets are distributed according to your will. If you don't have a valid will, your assets are distributed according to state law.

What's so bad about probate? • It can be expensive. Legal fees, executor fees and other costs must be paid before your assets can be fully distributed to your heirs. If you own property in other states, your family could face multiple probates, each according to the laws in that state. These costs can vary widely; it would be a good idea to find out what they are now.

• It takes time, usually nine months to two years, but often longer. During part of this time, assets are usually frozen so an accurate inventory can be taken. Nothing can be distributed or sold without court and/or executor approval. If your family needs money to live on, they must request a living allowance, which may be denied.

• Your family has no privacy. Probate is a public process, so any “interested party” can see what you owned, whom you owed, who will receive your assets and when they will receive them. Any process “invites” disgruntled heirs to contest your will and can expose your family to unscrupulous solicitors.

• Your family has no control. The court process determines how much it will cost, how long it will take, and what information is made public.

Doesn't joint ownership avoid probate? Not really. Using joint ownership usually just postpones probate. With most jointly owned assets, when one owner dies, full ownership does transfer to the surviving owner without probate. But if that owner dies without adding a new joint owner, or if both owners die at the same time, the asset must be probated before it can go to the heirs.

Watch out for other problems. When you add a co-owner, you lose control. Your chances of being named in a lawsuit and of losing the asset to a creditor are increased. There could be gift and/or income tax problems. And since a will does not control most jointly owned assets, you could disinherit your family.

With some assets, especially real estate, all owners must sign to sell or refinance. So if a co-owner becomes incapacitated, you could find yourself with a new “co-owner”—the court—even if the incapacitated owner is your spouse.

Why would the court get involved at incapacity? If you can't conduct business due to mental or physical incapacity (dementia, stroke, heart attack, etc.), only a court appointee can sign for you—even if you have a will. (Remember, a will only goes into effect after you die.)

Once the court gets involved, it usually stays involved until you recover or die and it, not your family, will control how your assets are used to care for you. This public, probate process can be expensive, embarrassing, time consuming and difficult to end. It does not replace probate at death, so your family may have to go through probate court twist.

Does a durable power of attorney prevent this? A durable power of attorney lets you name someone to manage your financial affairs if you are unable to do so. However, many financial institutions will not honor a power of attorney unless it is on their form. If accepted, it may work too well, giving someone a “blank check” to do whatever he/she wants with your assets. It can be very effective when used with a living trust, but risky when used alone.

What is a living trust? A living trust is a legal document that, just like a will, contains your instructions for what you want to happen to your assets when you die. But, unlike a will, a living trust can avoid probate at death, control all of your assets and prevent the court from controlling your assets if you become incapacitated.

How does a living trust avoid probate and prevent court control of assets at incapacity? When you set up a living trust, you transfer assets from your name to the name of your trust, which your control—such as from “Bob and Sue Smith, husband and wife” to “Bob and Sue Smith, trustees under trust dated (month/day/year).”

Legally your no longer own anything; everything now belongs to your trust. So there is nothing for the courts to control when you die or become incapacitated. The concept is simple, but this is what keeps you and your family out of the courts.

Do I lose control of the assets in my trust? Absolutely not. As trustee of your trust, you can do anything you could do before—buy and sell assets, change or even cancel your trust. That's why it's called a revocable living trust. You even file the same tax returns. Nothing changes but the names on the titles.

With No Will With A Will With A Living Trust

At Incapacity: Court appointee oversees your care, must keep detailed records, report to court, and usually must post bond (even if appointee is your spouse). Court approves all expenses, oversees financial affairs.

- At Death

Probate: Court orders your debts paid and assets distributed according to state law. Probate: Same as no will, but assets distributed per your will (if valid and any contests are unsuccessful).

Court Costs, Legal & Executor Fees

- With No Will: Often estimated at 3-8% of estate’s value. Incapacity: Impossible to estimate.
- With A Will: Same as no will. Costs can increase if will is contested after your death.

Court Control: Same as no will. No Court Control: Your successor trustee manages your financial affairs according to instructions in your trust for as long as necessary. (In some states, court intervention may be required for health care decisions.)

- Time

Debt: Usually 9 months to 2 years or longer before heirs inherit. Incapacity: Court involved until recovery or death.

- Flexibility & Control

Note: Court processes, not your family, have control at incapacity and death. Limited: Same as no will except, when you die, assets are distributed according to state law. Limited: Same as no will, but assets distributed per your will (if valid and any contests are unsuccessful). You can change your will at any time.

- Privacy

Note: Court proceedings are public record. Family can be exposed to disgruntled heirs, unscrupulous solicitors. Note: Same as no will. Maximum: You can change/discontinue your trust at any time. Assets stay under your control, even after your death. More difficult than a will to contest.

Is it hard to transfer assets into my trust? No, and your attorney, trust officer, financial adviser and insurance agent can help. Typically, you will change titles on real estate, stocks, CD’s, bank accounts, investments, insurance and other assets with titles. Most living trusts also include jewelry, clothes, art, furniture, and other assets that do not have titles.

Some beneficiary designations (for example, insurance policies) should also be changed to your trust so the court can’t control them if a beneficiary is incapacitated or no longer living when you die. (IRA, 401(k)s, etc. can be exceptions.)

Doesn't this take a lot of time? It will take some time—but you can do it now, or you can pay the courts and attorneys to do it for you later. One of the benefits of a living trust is that all of your assets are brought together under one plan. Don't delay “funding” your trust; it can only protect assets that have been transferred into it.
Doesn’t a trust in a will do the same thing? Not quite. A will can contain wording to create a testamentary trust to save estate taxes, care for minors, etc. But because it’s part of your will, this trust cannot go into effect until after you die and the will is probated. So it does not avoid probate and provides no protection at incapacity.

Is a living trust expensive? Not when compared to all of the costs of court interference at incapacity and death. How much you pay will depend primarily on your goals and what you want to accomplish.

How long does it take to get a living trust? It should only take a few weeks to prepare the legal documents after you make the basic decisions.

Should I have an attorney do my trust? Yes, but you need the right attorney. A local attorney who has considerable experience in living trusts and estate planning will be able to give you valuable guidance and peace of mind that your trust is prepared and funded properly.

If I have a living trust, do I still need a will? Yes, you need a “pour-over” will that acts as a safety net if you forget to transfer an asset to your trust. When you die, the will “catches” the forgotten asset and sends it into your trust. The asset may have to go through probate first, but it can then be distributed as part of your overall living trust plan. Generally, a guardian for minor children must also be named in a will.

Is a living will the same as a living trust? No. A living will is for medical affairs—it lets others know how you feel about life support in terminal situations. A living trust is for financial affairs. A living will is for medical affairs—it lets others know how you feel about life support in terminal situations.

Are living trusts new? No, they’ve been used successfully for hundreds of years.

Who should have a living trust? Age, marital status and wealth don’t really matter. If you own titled assets and want your loved ones (spouse, children or parents) to avoid court interference at your death or incapacity, you should probably have a living trust. You may also want to encourage other family members to have one so you won’t have to deal with the courts at your incapacity or death.