

Frequently Asked Questions:

[Does Holding Title to Real Property as Joint Tenants Avoid Probate In California?](#)

Yes and No. Holding real property as joint tenants will avoid probate at the first death because of the joint tenancy's "right of survivorship" feature. However, when the surviving owner becomes a **sole** owner of the property, at his/her second death, the real property will need to be probated. It is notable that in joint tenancy, only the deceased joint tenant's interest in the property receives a step up in cost basis to the date of death value of the property. This is especially detrimental to married couples; for a married couple - the joint tenancy form of title **does not allow for a step up in cost basis** of the surviving spouse's share in the property. This may result in significantly higher capital gains taxes if the surviving spouse sells the property later. Conversely, for a married couple - if the property is owned in trust as community property, or if it is owned as "*husband and wife as community property with right of survivorship*" - the entire property (and not just the deceased spouse's share) will receive a step up in cost basis on the first death, which would reduce capital gains taxes to the surviving spouse, should they decide to sell.

[Why do I need a Will if I am setting up a Trust?](#)

The Trust can only govern the property you TRANSFER into your trust's name. Any property's title not transferred into the trust name will need to be probated. To avoid this downfall and to ensure your "probate estate" is distributed as part of your living Trust after you die, it is necessary to have a "Pour Over Will" in your estate planning portfolio. By its terms, this will "Pours" into your living trust any property which you did not transfer into your trust during your lifetime. The Pour Over Will is the safety net that ensures that all your assets are distributed as per the terms of your living Trust.

[What Is the Impact of Divorce on Estate Plans?](#)

By operation of law, a divorce in California will automatically change your Estate Plan in several ways. It removes your ex-spouse from receiving property, being named executor of your Estate, or from being given Power of Attorney. It also dissolves any Living Trusts you and your ex-spouse may have created once the Divorce decree is issued. Proper planning is necessary to resolve this immediate uncertainty, avoid mistakes and protect your legacy. To comply with the Marital Settlement Agreement and Divorce Decree issued by the Family Court, assets from the family trust will need to be "taken out" of the Family Trust, and "retitled" into the individual names of each former spouse. It is especially critical for spouses to rebuild their individual Single Person Estate Plans when minor children are involved, and where one parent has primary physical custody of minor children.

[How Can I Protect My Children From A Previous Marriage?](#)

This type of trust is especially useful in the case of a second marriage when each spouse comes into the marriage with significant separate property assets, and each has children from a prior

marriage. Without proper estate planning, there is a possibility that the children of one of the spouses will end up with all the couple's property, and the children of the other spouse will get nothing. A properly drawn living trust ensures that the interests of each set of children are properly protected, while the surviving spouse remains adequately cared for during his or her life, following the death of one spouse. In addition to its financial protections, this trust also addresses the goal of minimizing potential family feuds.

[How Does A Trust Avoid A Conservatorship?](#)

A Durable Power of Attorney as well as a Health Care Directive, drafted with your Estate Planning Portfolio enables a trusted person to conduct your financial and medical affairs without any court involvement, while protecting your privacy and maximizing your assets for your benefit rather than spending them on court costs and fees. When you set up a proper estate plan, a Conservatorship is not needed.

[What Does An Advance Health Care Directive Do?](#)

An Advance Health Care Directive is a legal document where you name a trusted third party to act as your Health Care Agent, to take care of you and make medical decisions for you in the event you cannot do so yourself. If you become incapacitated, your Health Care Agent will have the legal authority to make medical decisions for you, authorize medical treatment, review medical records, hire and fire your doctors and caregivers, and make life and death decisions, including terminating life support, organ donation, etc. Your Agent will also have your express permission to request and receive your medical records, and the holders of such records will be released from liability to surrender them to your Agent (which is generally referred to as a "HIPAA Release"). For incapacitated adults without signed Advance Health Care Directives, a family member would need to petition the Court to become a **Conservator of the Person** of such incapacitated adult.

[Can I Make Medical Decisions for my Child After He/She Turns 18 and Legally An Adult?](#)

The answer is "NO." As a parent, you can make medical decisions and access your children's medical records only until they reach age of majority. After they turn 18, you can no longer receive their medical records or authorize medical treatment on their behalf. You will not be given any information about their medical condition, nor will you be able to discuss their medical needs with their doctor. Therefore it is strongly recommended for parents (especially of college-age children) to have children sign an Advance Health Care Directive to permit the Parent to continue to serve as their Health Care Agent.

[What Is A Heggstad Petition?](#)

When a person establishes a trust but omits to title the property into the trust name, a Heggstad Petition seeks a Probate Court order to have the property transferred into the Trust after the trust creator's death. Absent this petition, if the property is not titled in the trust name, at death, the property becomes a part of their probate estate. However, if the person established a Pour Over Will, with this Petition, your attorney could seek the Probate Court to consider issuing an Order allowing the property to be transferred into the Trust without having to Probate the Pour Over Will. A Heggstad Petition is a "probate shortcut" and is granted at the discretion of the Court.

[Why Should You Title Your Property In A Limited Liability Company?](#)

A Limited Liability Company (“LLC”) provides a blend of the flexibility of a partnership regarding tax planning and ownership, along with the liability protection of a corporation. When setting up an LLC for your real property, the Operating Agreement for the LLC outlines important rules governing the property. This document spells out the administrative authority, rights, and responsibilities of each LLC member concerning the property. This document can also be binding on heirs who are future owners of the home.

1. Asset Protection:

An LLC can considerably limit the liability exposure of its owners (the LLC members). In the event of legal judgments against the property, the exposure in any settlement will be limited to the property itself and will shield the owners from liability exposure.

2. Management of Property & Usage:

A well-structured LLC Operating Agreement will set all terms of the agreement in writing, eliminating many disagreements. The terms would include who is responsible for legal decisions, acquiring the proper insurance coverage, and the property’s upkeep, as well as the transition from parent to family members when the time comes.

3. Estate Planning:

If the real property is not in the same state as your primary residence, the estate [executor will have to open an ancillary probate](#) which can be an expensive and quite lengthy probate proceeding.

4. Income & Expense Tracking:

Since the LLC is its own legal entity, it will have a separate bank account with which the LLC members can operate the property. Any expenses, such as mortgage, repairs, or accounting services, or income made from renting the home, can be allocated among family members based on any predetermined criteria.

5. Buy-Sell Provisions:

The Operating Agreement for the LLC can place transfer restrictions, preventing family members or owners from selling their interests to anyone outside the family, or at a minimum, offering their interests to the family first. Additional clauses can be placed to stipulate who can become an owner, preventing ex-spouses from becoming owners, and requirements for appraisals, if helpful, to determine fair buy-out prices and final sale price when placed on the market.

CAUTION: CALIFORNIA PROPERTY TAX CONSIDERATIONS

It’s important to note that while there are considerable benefits to holding additional properties in LLCs, you lose the 1 million parent-child exclusion from reassessment when the LLC, rather than a Trust, owns the property.

Also, if more than 50% of the LLC interest is transferred, the change made to the membership of the LLC constitutes a change in ownership of the property, which triggers reassessment of their portion.

It's essential for property owners and members of the LLC to work with an attorney who is up to date on Prop 58 and the change-of-ownership rules.