

# HOWLAND, HESS, GUINAN, TORPEY & CASSIDY, LLP

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HOWLAND, HESS,  
GUINAN, TORPEY &  
CASSIDY, LLP  
2444 Huntingdon Pike  
Huntingdon Valley, PA  
19006  
phone: 215-947-6240  
fax: 215-947-6254  
[www.howlandhess.com](http://www.howlandhess.com)

## SPECIAL ESTATE PLANNING ISSUE

### Does Your Joint Bank Account Revoke Your Will?

The question arises when a person creates joint bank accounts that pass upon death to the surviving joint owner that is a different person than would inherit under the Decedent's Will. This situation has caused a steady stream of lawsuits for many decades, a result that is always costly and unfortunate, but can have far greater personal costs due to the frequency that such disputes are between or among family members.

The problem arises because it is so often difficult or impossible to know what the Decedent intended. Quite obviously, the Decedent can no longer explain, and the attorney who drafted the Will might not have been told that joint accounts existed, or alternatively, the joint accounts might have been created after the Will was signed.

Two recent Pennsylvania appellate court decisions have dramatically altered the underlying legal principles that govern the resolution of this issue when it arises, and have caused great uncertainty among legal practitioners in predicting what the future holds with respect to the resolution of the issue.

If you have created substantial joint accounts with persons other than your spouse – or perhaps if your elderly parent may have done so – please call us at Howland, Hess, Guinan, Torpey & Cassidy to discuss how that may impact on the operation of your Will, or conversely, whether your Will itself may negate the survivorship effect of the joint accounts.

## THE TRUTH ABOUT PROBATE & LIVING TRUSTS IN PENNSYLVANIA

THE TRUTH ABOUT PROBATE IN PENNSYLVANIA  
HOW DOES THE PROBATE PROCESS BEGIN?

When a person dies owning assets in his or her name alone, an estate must be started by a personal representative to handle the decedent's assets and take care of settling the decedent's affairs. This is called the probate or estate administration process. The personal representative is called an Executor if appointed in the decedent's Will and is otherwise called an Administrator. The personal representative can be an individual or corporation (such as a bank or trust company).

### **WHAT HAPPENS AFTER AN ESTATE IS STARTED?**

The job of the personal representative is to wind up the decedent's affairs by notifying beneficiaries, gathering assets, paying debts and taxes, accounting for all estate transactions and properly distributing the estate. The personal representative is the only one legally authorized to deal with the assets of the estate and handle matters of estate administration.

### **WHY IS THERE A PROBATE PROCESS?**

Reasons for the probate process include prevention of fraud and protection of creditors and rightful beneficiaries of estates. Beneficiaries are entitled to notice of the estate administration and an accounting of all estate transactions. They also have access to all documents filed by the estate. The probate process in Pennsylvania is an efficient way to protect beneficiaries and creditors and to assure proper distribution of estate assets.

### **WHAT ARE THE COSTS OF PROBATE?**

In Pennsylvania, the costs of probate include filing fees for opening the estate, advertising the estate, filing an inventory of estate assets and other papers to complete the administration process. In addition, legal fees are paid to the attorney handling the estate work, which may include preparation of various death and income tax returns. The personal representative may charge a commission. Obtaining appropriate legal advice about the administration of the estate can help keep down costs as well as taxes. Legal counsel is also advisable in dealing with assets which pass outside of probate, such as when a living trust is involved.

### **DOES PROBATE TAKE A LONG TIME?**

In Pennsylvania, probate need not and normally does not take long in comparison with other states. Personal representatives are accorded broad powers to accomplish the administration of estates expeditiously. They are empowered to handle most details (liquidating assets, paying debts and expenses, etc.) without seeking court approval for each and every transaction. Personal representatives are required to file only an inventory of estate assets and periodic short status reports stating whether the estate administration has been completed. Accounting of estate transactions to beneficiaries and heirs may be accomplished informally (not involving the court) or formally (filed with the court). Pennsylvania Court and Register of Wills charges are relatively modest since their involvement in the probate process is less supervisory than in some other states.

### **DO ALL OF A DECEDENT'S ASSETS GO THROUGH PROBATE?**

No. Assets held in joint ownership between spouses or with others with right of survivorship pass automatically to the survivor and are not subject to probate. Bank accounts held in joint ownership or in trust for another are usually not subject to probate. Assets with designated beneficiaries such as life insurance policies, annuities, IRAs and various retirement plans pass to named beneficiaries and are usually not subject to probate. Finally, assets held in a trust are governed by the terms of the trust rather than the decedent's Will and pass outside the probate process. It is important to note that assets controlled by the decedent at death, even if not subject to probate, are still subject to all of the same death taxes as probate assets.

### **HOW DOES THE PROBATE PROCESS END?**

The probate process ends upon receipt by the beneficiaries of their proper share of the estate and release of the personal representative from further responsibility for the administration of the estate.

### **THE TRUTH ABOUT LIVING TRUSTS WHAT IS A LIVING TRUST?**

A "living trust" is a legal entity to which your assets (bank accounts, securities, house, etc.) can be transferred and managed by a person, including yourself, or corporation (such as a bank or trust company) called a "trustee". The trustee manages your assets in accordance with written instructions contained in a trust document. Living trusts can be revocable or irrevocable.

### **ARE LIVING TRUSTS SOMETHING NEW?**

No. Living trusts have existed for centuries. They are more formally called "inter vivos trusts" to distinguish them from "testamentary trusts" which are contained in Wills and take effect upon death. Living trusts traditionally were and still are used for the management of assets of those requiring or desiring such services.

### **WHY AM I HEARING SO MUCH ABOUT LIVING TRUSTS NOW?**

Today, revocable living trusts are heavily marketed as substitutes for Wills, often using exaggerated tales of costs and delays in the administration of estates under Wills (sometimes called the "probate" process) as a sales tactic. Publicity has arisen from these sales activities as well as from press coverage of fines and other sanctions imposed by the Pennsylvania Attorney General on certain vendors of living trusts.

### **DO I NEED A REVOCABLE LIVING TRUST?**

The answer depends on your unique family situation, financial position and goals. In Pennsylvania, the benefit of creating a living trust for the sole purpose of avoiding probate is debatable. This is because in Pennsylvania, probate entails relatively moderate cost and less time in comparison to many other states. Executors named in Wills to administer estates are accorded much flexibility in decision making, and Courts do not become involved in each detail of the estate administration process. Also, trustees of living trusts must adhere to certain legal rules, many of which are similar to those executors are required to follow in the probate context.

## **DOES HAVING A REVOCABLE LIVING TRUST REDUCE TAXES?**

No. The Pennsylvania Inheritance Tax and Federal Estate Tax are the same, regardless of whether assets are administered through a revocable living trust or under a Will. Also, estate planning techniques designed to reduce these taxes are available under Wills to the same extent they are available under revocable living trusts.

## **WHAT ABOUT LEGAL FEES?**

Overall, legal fees may be more or less with revocable living trusts than Wills. For the provisions of a living trust to control, a trust document must be prepared and your assets must be transferred to the trust during your lifetime. This often entails significant legal fees. On the other hand, a living trust may reduce or eliminate Court filing fees incurred after your death with a Will. After death, both trustees of living trusts and executors under Wills require legal advice as to the proper payment of taxes and creditors, distribution to beneficiaries, document interpretation and other issues. Also, a Will is advisable even if you have a living trust to provide for the administration and distribution of assets not transferred to the trust during your lifetime. Note that the reasonableness of legal fees charged to trusts is judged by the same rules of professional responsibility as legal fees charged to estates.

## **ARE THERE DISADVANTAGES TO LIVING TRUSTS?**

The answer to this question depends upon your specific circumstances and goals. In 2006, Pennsylvania enacted its version of the Uniform Trust Act. Among other things, it requires trustees of living trusts to adhere to a detailed set of rules for the protection of beneficiaries, creditors, those who deal with trustees and trustees themselves. As mentioned, some of the rules, such as the duty to inform and report to beneficiaries, are similar to those which executors of Wills must follow. As with Wills, care must be taken in preparing and handling living trusts. Also, considerable hardship and additional expense may result from having a living trust which is unnecessary, defective or otherwise handled improperly.

## **How Do I Know What I Need?**

**The only way to be certain your specific needs and desires are met is to consult a trusted attorney or an attorney referred to you by a trusted source. High-pressure solicitations by mail or in person should be viewed with skepticism. Your financial and estate planning situation is unique and should be accorded the proper time, attention and expertise which only a properly trained and experienced attorney can provide.**

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**For all of your estate planning questions, please call Richard I. Torpey, Esquire, John R. Howland, Esquire, Thomas M. Guinan, Esquire or Robert G. Hess, Esquire.**



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Howland Hess Guinan Torpey & Cassidy, LLP | 2444 Huntingdon Pike | Huntingdon Valley | PA | 19006