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LIVING TRUSTS:

What *You*
Should
Know



Attorney General
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What *You* Should Know About Living Trusts

When creating an estate plan, many people are unsure whether a will or a living trust is the most appropriate estate planning device for them. A living trust can be a valuable estate planning device for some people. But for others, a simple will is all that is needed, and often may be preferable to a living trust.

The following information should assist in evaluating whether to use a living trust or a will. However, this fact sheet presents only a general introduction to this complex area, and is not a substitute for consulting with a trusted and well-referred attorney.

What is a living trust?

A revocable *inter vivos* trust ("living trust") is created for the purpose of holding ownership to an individual's assets during the person's lifetime, and for distributing those assets after death.

The individual who creates the trust (the "grantor") names a person who will serve as trustee and follow the trust's terms after the grantor dies. While alive, the grantor usually may serve as a trustee and control the assets even though they belong to the trust.

Why is it called a living trust?

It is called a living trust because it is created during the grantor's lifetime, and takes effect during the grantor's lifetime. By contrast, a will does not take effect until after death.

What does "funding" the trust mean?

For a living trust to take effect, title to the grantor's assets must be transferred into the trust (i.e., the trust must be "funded"). For example, title to any bank accounts, stock certificates or real estate owned by the grantor must be transferred into the trust. Contrary to the impression created by many living trust salespeople, the grantor must take affirmative steps to transfer assets and fund the trust; merely executing the living trust itself will not cause the trust to become funded.

Does a living trust avoid probate?

Perhaps the biggest advantage of a living trust is that it does not have to go through probate, as does a will. However, there are other estate planning devices which avoid probate, such as a joint tenancy, a life insurance policy, an in-trust-for bank account (also known as a Totten Trust), and individual retirement, pension or Keogh accounts.

In addition, living trust salespeople often overstate the cost of probate and the length of time it takes to probate a simple will.

What is a "pour-over" will?

A "pour-over" will is necessary to distribute any property that is acquired in the name of the grantor after the living trust was established, or any property that was not transferred into the trust in the first place. Certain assets, such as co-op apartment shares, cannot be held in trust. The use of a "pour-over" will together with a living trust ensures that assets not held in trust will be distributed in accordance with the wishes of the deceased, and not by the laws of intestacy. A "pour-over" will, like any other will, must go through probate if the decedent died owning assets which must pass through the will.

Does a living trust avoid the imposition of estate taxes?

With proper planning, a living trust can be a valuable estate and tax planning device. However, there is no inherent estate tax advantage to using a living trust. While a trust may contain provisions taking effect at death which do save on taxes, the identical tax savings can be contained in the grantor's will instead of a living trust.

Does a living trust avoid income taxes?

There are no substantive income tax advantages in the use of a living trust. The grantor is treated as the owner of the trust for income tax purposes, and must report all trust income on his or her personal return under the "grantor trust" income tax rules.

Is a living trust more private than a will?

A will becomes a matter of public record during the probate process, and a copy can be obtained by anyone upon request to the Surrogate's Court. A living trust is a private document that is not generally subject to public scrutiny.

However, a "pour-over" will becomes a matter of public record when it is submitted for probate, and the "pour-over" will often incorporate the living trust by reference. In addition, when title to real property is transferred into a living trust as part of the funding process, the consent of the mortgagee is required. Before giving its consent to the transfer of mortgaged property, the mortgagee typically requires that the living trust document be recorded, with the deed, at the office of the County Clerk. The living trust can thereby become part of publicly-accessible land records.

Can a living trust be contested?

A trust can be contested by an objectant in a special proceeding. There is no blanket rule that a living trust cannot be contested.

Will the use of a living trust instead of a will save legal fees?

The legal fee for representing an estate would most likely be the same, whether the assets pass in trust or by will. The only legal costs saved by using a living trust are the costs incurred in a probate proceeding. However, the costs of probating a simple, uncontested will are often minimal. In addition, one must consider the extra legal fees that can be entailed in drafting a living trust as opposed to a will, and the additional legal fees entailed in funding the trust.

What is the living trust scam?

Unfortunately, high pressure sales pitches for living trusts are surfacing throughout New York and around the country. Unscrupulous living trust salespeople charge elderly consumers thousands of dollars for what amounts to a set of pre-printed legal forms. In many instances, because all seniors are sold the same package, the living trust itself may be ill-suited or even contrary to these consumers' estate planning needs.

In addition, the seniors are provided with little or no personal guidance on how to execute the forms, or how to fund the living trust. Instead, after having spent large sums of money and being assured that they would receive free legal assistance, the seniors are then told *for the first time* -- at the point they receive their living trust documents -- to consult with their own attorneys. In the end, these consumers are left thousands of dollars poorer and with no effective estate plan. Worse yet, the absence of an effective estate plan may not become apparent until after the victims of the scam have died, when the harm has become irreparable.

Advice for consumers:

It is important to remember that when you are planning for the disposition of your estate, the best advice is to avoid dealing with anyone but a trusted and well-referred professional in your community. Do not agree to contract for any legal service from someone selling door-to-door or over the telephone. If you have already purchased a living trust on that basis, take the time to show it to an attorney.

If you have a complaint concerning the marketing or sale of a living trust, contact the nearest office of Attorney General G. Oliver Koppell.