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Understanding
**The Revocable
Living Trust**

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Understanding the Living Trust

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 will 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 IS "FUNDING" THE TRUST?

For a living trust to take effect, title to the grantor's assets must be transferred into the trust. 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, and 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.

The use of "pour-over," 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 dies owning assets which must pass through the will.

DOES A LIVING TRUST AVOID THE IMPOSITION OF ESTATE TAXES?

With proper training, 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 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 THERE 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 upon request to the Surrogate's Court. A living trust is a private document that is not subject to public scrutiny.

However, a "pour-over" becomes a matter of public record when it is submitted for probate, and the "pour-over" often incorporates 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 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 then become part of the publicly-accessible records.

CAN A LIVING TRUST BE CONTESTED?

Yes. A trust can be contested 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, un-contested 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.

ARE THERE ANY SCAMS TO WATCH FOR?

Unfortunately, yes. High pressure sales pitches for living trusts are surfacing throughout 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. Even worse, 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.

WHAT IS THE BEST ADVICE FOR CONSUMERS?

When you are planning for the disposition of your estate, 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 phone. 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 the Attorney General.

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