

Living Trusts

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Practice Areas

- Estate Planning & Probate
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"LIVING TRUSTS" are being aggressively marketed to the unsophisticated public by some attorneys at "free" seminars in local hotels and public libraries, by door-to-door salesmen in elderly neighborhoods and by publishing houses which offer do-it-yourself Living Trust kits for the "especially low" price of \$39.95, plus handling charges. Prospects are offered bonuses such as a free initial legal consultation, a discount on the legal cost of setting up the trust or "unique" reports on estate planning if they act quickly. The promoters claim that the "living trust" will save costs and taxes, avoid lawsuits, and the other negative fears associated with "probate". Here's part of a recent ad for living trusts in The Times Picayune:

Did you know that writing a Will may be one of the biggest mistakes we can make? It's true! A Will does not protect our loved ones against paying high fees to lawyers, executors and courts for even the smallest estate. Probate can slice up to 10% or so from an estate and take months or years for final settlement.

All of the hype about "living trusts" has led to much misinformation and confusion. Many claims about the living trust's virtues are untrue and overstated. A living trust is hardly a cure for proper estate planning. Let's examine the pros and cons of a living trust.

Generally, a living trust is created by transferring assets to a trust and remaining the sole beneficiary of the trust during your lifetime. Usually, you are designated as the Trustee of your living trust. The trust is "revocable," which means that you can amend the trust, add or withdraw property from the trust or call it off at any time. The living trust serves as a Will substitute by stipulating who gets the assets in the trust at your death.

Myth 1 - Tax Savings. Promoters claim that living trusts will save federal estate taxes and Louisiana inheritance taxes. Actually, a revocable living trust is tax neutral. The trust assets are subject to death taxes at your death. If your estate is under \$1.5 million, federal death taxes are not even an issue. A properly drafted revocable trust can take advantage of the \$1.5 million federal equivalent exemption amount and, if you are married, the tax deferral opportunities of the unlimited marital deduction at the first spouse's death. However, a properly drafted Will can achieve the same tax benefits.

You will lose your homestead property tax exemption if you place your family home in a revocable trust. Furthermore, although a family home usually is not a countable resource in determining Medicaid eligibility, it may be counted if it is held in a trust.

Myth 2 - Probate Delays. The usual estate does not take very long to probate. The nature and mix of assets and liabilities determine whether an estate can be distributed at nominal cost and without delay or at a larger cost and with some delay. A non-liquid estate unable to pay all taxes or debts or an estate with pending litigation will require substantially more management, whether or not the assets are held in trust.

During the probate process, estates generally are not "frozen", especially if others such as your spouse or children are designated as joint owners ("A or B") on accounts or certificates or have joint authority to sign checks or enter bank boxes. Even where an account or safety deposit box is "frozen" or certificates are registered solely in your name, the probate court routinely authorizes immediate access upon application.

Many larger taxable estates purposely are kept open for at least nine months, not because of probate delays but for tax reasons. Taxes are due nine months after death and there is no reason to prepay taxes any sooner than necessary. Furthermore, by delaying distribution to the heirs for at least six months, the estate can elect to value the assets for death tax purposes other than as of the date of death. For example, if the stock market drops substantially from date of death values, the family may save significant death

taxes by keeping the estate open and using an alternate valuation date for computing death taxes. Finally, Trustees as well as Executors may be personally liable for death taxes if assets are distributed to beneficiaries prior to payment of the taxes, including any taxes assessed by the IRS within three years after the federal estate tax return is filed. Therefore, Trustees of living trusts may be reluctant to make immediate distributions of assets to beneficiaries after your death.

Myth 3 - Save Probate Expenses. Living trusts can be expensive to set up. Some promoters charge \$2,500 - \$10,000 for prepackage kits, many of which are not appropriate for the individual's particular situation or which do not comply with Louisiana law, including forced heirship laws. The costs don't stop here. Hundreds more may be spent in changing title to assets, such as real estate, into the name of the trust. An up-front cost of only \$4,000 to set up a living trust compounded at 7% for 20 years is the equivalent of paying more than \$15,000 in probate costs.

In Louisiana, probate often is inexpensive and largely hassle-free. Court costs generally are less than \$500. Attorneys' fees will vary depending upon the size and complexity of the estate. These fees are negotiable and should be discussed at the beginning of the engagement. The Executor of your estate can select any attorney to represent the estate, even if the Will designates another attorney. Although an Executor is entitled to a fee of 2½% of the gross estate, the fee normally is waived where your Executor is your spouse or one or more children.

Louisiana enacted an "independent" administration statute in 2001 which permits you to designate your executor as an "independent" executor. An independent executor has all of the powers, duties and responsibilities of a regular executor and can act without court approval, thus avoiding unnecessary costs and delays. In some cases, it may be appropriate to require court supervision of the executor.

Myth 4 - Avoid Probate. A probate proceeding may be necessary even with a Living Trust. It is common for assets to be left out of the trust, either inadvertently or by design. These omitted assets will be subject to probate.

If the trust owns real estate, such as the family home or investment property, how will a title examiner be certain without a probate that the distribution from the trust complies with applicable Louisiana forced heirship rules?

Myth 5 - Avoid Publicity. Although a probate proceeding is a public record, a revocable trust may not be entirely secret. If the trust owns real estate, either the trust or an extract of the trust must be recorded in the public records of each parish where the real estate is located. Financial institutions, such as banks, homesteads or brokerage houses, may require copies of the trust for their records before they re-title assets in the name of the trust, thus exposing your testamentary plan to others. A Will, on the other hand, is a private document until it is filed with the court after your death.

CONCLUSION

Clearly, the usefulness of living trusts in Louisiana has been overstated in many cases through scare tactics aimed at the elderly. The average person probably will not accomplish anything by using a living trust that could not be as easily accomplished through a Will and simple Power of Attorney. The touted cost savings of living trusts may be illusory. So why are living trusts getting so much attention? The answer is primarily based on the disparate probate laws of other states, such as California, New York and Florida, where probate costs can be significant, particularly if the lawyer's fee is based upon a fixed percentage of the estate. Before you trust in a living trust, you should consult with independent legal counsel who is not "selling" living trusts or other financial products to determine if it is appropriate in your situation.

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