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DO I NEED A LIVING TRUST?¹

1. What is a Living Trust?

The “living trust” is sometimes referred to as a revocable inter vivos trust, or a grantor trust. A living trust may be amended or revoked by the person creating it (commonly known as a “trustor,” “grantor” or “settler”), at any time during the trustor’s lifetime, as long as the trustor is competent.

A trust is a written legal agreement between the individual creating the trust and the person or institution named to manage the assets held in the trust (the “trustee”). In many cases, it is appropriate for you to be the initial trustee of your living trust, until management assistance is anticipated or required.

In a living trust agreement:

- The trustee is given the legal right to manage and control the assets held in the trust.
- The trust provides for the persons or charitable organizations (“beneficiaries”) who are to receive the income and principal on or after the trustor’s death.
- The trustee is given guidance and certain powers and authority to manage and distribute the trust property in a prudent fashion. The trustee is a “fiduciary.” A fiduciary is one who occupies a position of trust and confidence and is subject to strict responsibilities, usually higher standards of performance than one who is dealing with his or her own property. Without the trustor’s express written permission, the trustee cannot use trust property for the trustee's own personal use, benefit or self-interest. One must hold the trust property solely for the benefit of the beneficiaries of the trust.

A living trust can be an important part - in many cases, the most important part - of your estate plan. For more information, see the pamphlet entitled “Do I Need Estate Planning” which provides more detailed information about estate planning.

2. What Can a Living Trust Do For Me?

A living trust can provide for the private management of your assets if you choose not to act as trustee, or when you are unable to do so, by the person or persons whom you appoint as trustee. When you are incapacitated, your trustee can assume responsibility for your assets in an accountable fashion, and manage them for your benefit without direct court intervention or supervision. At your death, the trustee acts much as an executor would, gathering your assets, paying valid debts and claims and taxes, and distributing your assets as you have directed in your living trust.

3. Should Everyone Have a Living Trust?

No. The greater the risk of incapacity or death, the greater the need for a living trust. The greater the value of your assets, particularly if they include real estate, the greater the need for a living trust. A young, healthy individual with few assets probably does not need a living trust right now. Nor does the real estate developer who is frequently buying, selling or refinancing his or her real estate holdings want a living trust to hold those assets. On the other hand, many people recognize that a living trust will be helpful in the future, and set up a living trust now to have it in place in the event of an accident or sudden illness.

4. How Does a Living Trust Help if I Am Incapacitated?

If you are acting as trustee of your own living trust and become incapacitated, whoever you have named as your successor trustee will assume the responsibility for managing your assets on your behalf. If your assets are not in your living trust, someone else must manage them. How this is accomplished may depend on whether the assets are your separate or community property. If you are married, assets earned by either you or your spouse

¹ The purpose of this pamphlet is to provide general information on the law, which is subject to change. If you have a specific legal problem, you may wish to consult a lawyer. This pamphlet was made possible, in part, through the volunteer efforts of the Estate Planning, Trust and Probate Law Section, The State Bar of California.

while married and while a resident of California are community property. On the other hand, a married individual may own separate property as a result of assets owned prior to marriage or received by gift or inheritance during marriage.

In California, community property may be managed by your spouse, if he or she is competent. If not, or if you own separate property or are unmarried, assets held in your name alone at the time of your incapacity are subject to the jurisdiction of the probate court in a proceeding called a conservatorship. The probate court, at a hearing, determines that, among other things, you are substantially unable to manage your own financial resources or resist fraud or undue influence, and names a person to assume responsibility for the management of your assets (a "conservator") accountable to the court on a regular basis.

That person may be someone whom you have nominated to act as conservator, or, if you have not, may be your spouse or another family member. While conservatorship proceedings are designed to provide you with protection and security at a time when you are vulnerable or incapable of managing your assets, the proceedings are public in nature. Because of the substantial court intervention, a conservatorship proceeding can be costly as well. Compared with a well-managed living trust conservatorship proceedings may also be less flexible in managing real estate or other interests.

5. How Does a Living Trust Help at my Death?

Assets held in your living trust at your death can be managed by the trustee of your living trust and distributed in accordance with your directions in the trust. The trustee is also accountable to your beneficiaries for the trust assets held for their benefit after your death. The trust is not under the direct management of the probate court at and after your death and, therefore, the value and the nature of your assets and the identity of your beneficiaries do not become a public record. At your death, however notice must be given to all your heirs and beneficiaries of your living trust, advising them, among other things, of their right to obtain a copy of the living trust.

If your assets were in your name alone at your death, then they would be subject to probate. Probate is the court-supervised process developed under California law which has as its goal the transfer of your assets at your death to the beneficiaries set forth in your will, and in the manner prescribed by your will. At your death, a petition is filed with the court, usually by the person or institution named in your will as executor. After notice is given and a hearing is held, your will is admitted to probate and an executor is appointed. A full inventory of the assets held in your name alone at your death is filed with the court and the probate continues until your estate is ready for distribution and the court approves the final distribution of your estate. Probate can take more time to complete than the distribution of your trust following your death. Assets held in a living trust can be more readily accessible to beneficiaries than those in a probate. The cost of a probate is often greater than the cost incurred by a comparable estate managed and distributed under a living trust.

6. Who Should Be the Trustee of My Living Trust?

As noted, many people act as their own trustee until their incapacity or death. Others determine that they need financial assistance and management of their assets simply because they are too busy or too inexperienced or simply don't wish to have the responsibility of day-to-day management of their financial affairs.

Perhaps the most important decision for you to consider is your choice of a trustee to act in your place. As you have read, your trustee will have considerable authority and responsibility, is not under direct court supervision, and will assume that responsibility either during your lifetime (if you so choose), if you become incapacitated, or at your death.

A trustee may be a spouse, adult children, other relatives, family friends, business associates or a professional fiduciary. The professional fiduciary may be a bank or trust company which must be licensed by the State of California. You may also provide for co-trustees. You should discuss your choice with an estate planning lawyer. There are a number of issues to consider. For example, will the appointment of one of your adult children cause undue stress in his or her relations with siblings? What conflicts of interest are created if a business associate or partner is named as your trustee? Will the person named as successor trustee have the time, organizational ability, and experience to do the job effectively?

7. What are the Disadvantages of a Living Trust?

Because living trusts are not under direct court supervision, a trustee who does not act in your best interests or in a prudent fashion accountable to you or your beneficiaries may, in some cases, be able to take advantage of

the situation to a greater extent than would be possible had the trustee been under direct court supervision, which provides such safeguards as court accountings and, in some situations, a bond.

In some cases, the cost of preparing a living trust and other estate planning documents will be higher than the cost of simply preparing a will. However, in more complex estate plans, the difference in cost may not be significant.

Once created, the trust must be “funded.” The funding of a trust is simply the transfer of assets from your own name to whomever is acting as trustee of your living trust - be that you or some other person. Deeds to real property must, therefore, be prepared and recorded, bank accounts transferred, and stock and bond accounts or certificates transferred as well. These are not necessarily expensive tasks but they are important ones and require some paperwork to complete in order to make your trust effective.

People in certain businesses (for example, real estate development) sometimes find that having a living trust creates excessive problems in the operation of the business when it is necessary to deal with a third party such as a title company.

8. If I Have a Living Trust, Do I Still Need a Will?

Yes. Your will affects any assets which, for one reason or another, were held in your name alone at your death and not in your living trust or in some other form of ownership. With the living trust, your will usually contains as its primary provision for the distribution of your estate, a “pour over” provision, which simply directs that any assets held in your name be transferred at your death to your living trust. Of course, a probate is not avoided with respect to those assets which are transferred to your living trust by your will.

Your will may also nominate the guardians of the person and estate of your minor children, to care and provide for them.

9. Does a Living Trust Save Estate Taxes?

No. While a living trust may contain provisions which can postpone, reduce or even eliminate estate taxes, similar provisions could be placed in a will to accomplish the same tax planning.

10. Does a Living Trust Pay Income Taxes?

Not during your lifetime. For so long as you are either the trustee or a co-trustee, no income tax returns are required to be filed for your living trust. The taxpayer identification number for the trust is your Social Security number, and all income and deductions related to the assets held in the trust are reportable on your individual income tax returns. When you are no longer a trustee of your trust, then information returns must be filed by the trustee, reporting all of the income and deductions relating to the trust assets to the IRS and attributing them to your personal return; no additional tax is assessed by reason of the living trust. After your death, the income taxation of the living trust is similar to that applicable to a probate estate.

11. What Other Estate Planning Documents Should I Have?

A durable power of attorney for finances deals with assets which have not been transferred to your living trust prior to your incapacity or which you may receive after your incapacity. In such a power, you appoint another individual (the “attorney-in-fact”) to make property management decisions on your behalf. This document, however, cannot replace the living trust, inasmuch as, among other things, it cannot dispose of your assets in accordance with your wishes at your death.

An advance health care directive allows your attorney-in-fact to make health care decisions for you when you can no longer make them yourself. It may also contain statements of wishes concerning such matters as life sustaining treatment and other health care issues and instructions concerning organ donation, disposition of remains and your funeral.

12. What Other Kinds of Trusts Are There?

Testamentary trusts are trusts which are set forth in your will and which, therefore, cannot provide for any management of your assets during your lifetime. Testamentary trusts can, however, provide for young children and others who need management of their assets after your death.

Irrevocable trusts are trusts which, immediately upon their creation, are not amendable or revocable by you. These are generally tax-sensitive documents. Some examples include irrevocable life insurance trusts, irrevocable trusts for children, and charitable trusts. A qualified estate planning lawyer should be consulted with respect to these documents.

13. How Do I Transfer Assets to My Living Trust?

Once your trust has been signed, a very important task remains to be accomplished. In order to achieve your objectives of avoidance of court-supervised conservatorship proceedings if you are incapacitated or probate at your death, assets must be transferred to the trustee of the living trust. As discussed above, this is known as “funding” the trust.

A living trust can hold both separate and community property. If community property is held in a living trust, then both spouses are the grantors. Care must be taken to carefully designate the property held in a living trust by married persons as either separate or community property.

If you own real estate in another state, it is appropriate to transfer title to that asset to your trust, to avoid probate in the other state; you should consult with a lawyer in that state to prepare the deed and to advise you with respect to such a transfer. As for California real estate, a California lawyer should prepare the deed and advise you about the transfer of that asset.

Your lawyer can also advise you as to the title and process of transferring other assets. For example, you should consider changing beneficiary designations on life insurance to the trust. As for beneficiary designations on a qualified plan, such as a 401(k) or IRA, serious income tax issues require the advice of a qualified professional concerning the appropriate beneficiary designation on those assets.

14. Who Should Draft a Living Trust for Me?

You should consult with a qualified estate planning lawyer to assist you in the preparation of a living trust, together with your will and other estate planning documents.

While other professionals and business representatives may be involved in your estate planning process, your living trust is a legal document which should be prepared by a qualified lawyer.

The State Bar urges you to seek advice only from professionals who are qualified to give estate planning advice. Many professionals must be licensed by the State of California. Before retaining any professional to assist you with your estate plan, you should inquire about that individual’s qualifications. In addition, you should determine whether the professional advisor has any underlying financial incentive to sell you a particular investment, such as an annuity or life insurance policy, because that financial incentive may color the advice given to you. A living trust is often held out as an enticement or “loss leader” by offices which are not staffed with competent and qualified estate planning lawyers. Unfortunately, some sellers of dubious financial products gain the confidence and private financial information of their victims by posing as providers of trust or estate planning services.

15. How Do I Find a Qualified Lawyer?

Some lawyers who work in the estate planning area are “certified specialists in estate planning, trust and probate law.” This designation means that they have met standards for certification set by the State Bar of California. However, not all lawyers who have experience and expertise in estate planning have sought that certification.

If you do not already know a lawyer who is qualified to help with your living trust, obtain referrals from someone whose judgment you can trust - friends, associates, or your employer. Your local bar association maintains a list of State Bar certified lawyer referral services in your area. You should be wary of organizations or offices who are staffed by non-lawyer personnel and who promote “one size fits all” living trusts or living trust kits. A living trust created by someone who is not a qualified lawyer can have enormous and costly consequences for your estate and may not achieve your goals and objectives. Do not allow yourself to be pressured into immediately purchasing a living trust or any other estate planning product.

When you retain a lawyer, you should understand what services are to be provided and how much they will cost. California law requires that a lawyer explain, in writing, the nature of the services to be rendered, the cost of those services and the payment terms. You should indicate your understanding of the terms and conditions of the lawyer's employment with a fee agreement prepared by your lawyer.

16. Should I Beware of Someone Who is a “Promoter” of Financial and Estate Planning Services?

There are many who call themselves "trust specialists," "certified planners" or other titles which are intended to suggest that the person has received advanced training in estate planning. California is experiencing an explosion of promotions by unqualified individuals and entities which have only one real goal - to gain access to your finances in order to sell insurance-based products such as annuities and other commission-based products. Here are some helpful hints and suggestions:

- Before considering a living trust or any other estate or financial planning document or service, consult with a lawyer or other financial advisor who is knowledgeable in estate planning, and who is not trying to sell a product which may be unnecessary.
- Always ask for time to consider and reflect on your decision. Do not allow yourself to be pressured into purchasing any estate or financial planning product.
- Know your cancellation rights. California law requires that sellers who come to your home to sell goods and services (not including insurance and annuities) that cost more than \$25 must give you two copies of a notice of cancellation form to cancel your agreement. You, the buyer, may cancel this transaction at any time prior to midnight of the third business day after the date of this transaction.
- Be wary of home solicitors who insist on receiving confidential and detailed information about your assets and finances.
- Find out if any complaints have been filed against the company by calling local and state consumer protection offices or the Better Business Bureau.
- Know whom you are talking to and insist on identification of the person and a description of his or her qualifications, education, training and expertise in the field of estate planning.
- Always ask for a copy of any document you sign at the time it is signed.
- Report high-pressure tactics, misrepresentations or fraud to the police immediately.

17. How Much Does a Living Trust Cost?

As we have seen, a living trust is a very important part of your estate plan. Without careful investigation, do not be lured by claims of services providing extremely low cost living trusts. Costs will vary from lawyer to lawyer. The costs should include the lawyer's charges for reviewing your assets and their present title; discussing your estate plan with you; preparing your living trust, your will, and other documents to your satisfaction; supervising their execution; and providing you with services or instructions to fund your living trust.

When you retain a lawyer, you should understand what services are to be provided and how much they will cost. California law requires that a lawyer explain, in writing, the nature of the services to be rendered, the cost of those services and the payment terms. You should indicate your understanding of the terms and conditions of the lawyer's employment with a fee agreement prepared by your lawyer.