THE STATE BAR OF CALIFORNIA

Do I Need a Living Trust?

1. What is a living trust?

It is a written legal document that partially substitutes for a will. With a living trust, your assets (your home, bank accounts and stocks, for example) are put into the trust, administered for your benefit during your lifetime, and then transferred to your beneficiaries when you die.

Most people name themselves as the trustee in charge of managing their trust's assets. This way, even though your assets have been put into the trust, you can remain in control of your assets during your lifetime. You can also name a successor trustee (a person or an institution) who will manage the trust's assets if you ever become unable or unwilling to do so yourself.

The living trust described in this pamphlet is a revocable living trust (sometimes referred to as a revocable inter vivos trust, revocable trust or a grantor trust). Such a trust may be amended or revoked at any time by the person or persons who created it (commonly known as the trustor(s), grantor(s) or settlor(s)) as long as he, she, or they are still competent.

Your living trust agreement:

- Gives the trustee the legal right to manage and control the assets held in your trust.
- Instructs the trustee to manage the trust's assets for your benefit during your lifetime.
- Names the beneficiaries (persons or charitable organizations) who are to receive your trust's assets when you die.
- Gives guidance and certain powers and authority to the trustee to manage and distribute your trust's assets. The trustee is a fiduciary, which means he or she holds a position of trust and confidence and is subject to strict responsibilities and very high standards. For example, the trustee cannot use your trust's assets for his or her own personal use or benefit without your explicit permission. Instead, the trustee must hold and use trust assets solely for the benefit of the trust's beneficiaries.

A living trust can be an important part — and in many cases, the most important part — of your estate plan. For more detailed information on estate planning, order a free copy of the State Bar pamphlet **Do I Need Estate Planning?**

2. What can a living trust do for me?

It can help ensure that your assets will be managed according to your wishes — even if you become unable to manage them yourself.

In setting up your living trust, you may serve as its trustee initially or you may choose someone else to do so. You can name a trustee to take over the trust's management for your benefit if you ever become unable or unwilling to manage it yourself. And at your death, the trustee — similar to the executor of a will — would then gather your assets, pay any debts, claims and taxes, and distribute your assets according to your instructions. Unlike a will, however, this can all be done without court supervision or approval.

3. Should everyone have a living trust?

No. Whether or not to create a trust is a personal decision. Young married couples without significant assets and without children, who intend to leave their assets to each other when the first one of them dies do not necessarily need a living trust. However, if the couple should die in a common accident, or shortly after each other, without a trust their estate(s) may be subject to a probate. (See discussion below.) Other persons who do not have significant assets (less than $150,000) and have very simple estate plans also do not need a living trust. Finally, anyone who believes that court supervision over the administration of his or her estate would be beneficial should not have a living trust. The greater the value of your assets (particularly if you own real estate), the greater the benefits of a living trust. Having a living trust could be important in the event of an accident or sudden illness.

4. How could a living trust be helpful if I become incapacitated?

If you are the trustee of your own living trust and you become incapacitated, your chosen successor trustee would manage the trust's assets for you. If your assets were not in a living trust, however, someone else would have to manage them. How this would be accomplished might depend on whether your assets were separate or community property, and whether you have a durable financial power of attorney. (Even if you have executed a living trust, it is still recommended that you execute a durable financial power of attorney. See #12.)

If you are married or in a registered domestic partnership, assets acquired by either you or your spouse or domestic partner while married or in the partnership and while a resident of California are community property. (Note: In domestic partnerships, earned income is not treated as community property for income tax purposes.)

On the other hand, any property that you owned before your marriage or registration of your partnership, or that you received as a gift or inheritance during the marriage or partnership, and the earnings or appreciation associated with such property, would probably be your separate property.

In California, most transactions concerning community property could be managed by your spouse or registered domestic partner if he or she is competent. If you own separate property (or are not married or in a registered domestic partnership) and you become incapacitated, such assets could be managed by an agent or attorney-in-fact under a durable power of attorney (See #12). Without planning, however, some or all of your financial matters would be subject to a probate court proceeding, generally called a conservatorship.

During the conservatorship process, a judge could determine that you were unable to manage your own finances or to resist fraud or undue influence. The court would then appoint someone (a conservator) to manage your assets for you. And the conservator would report back to the court on a regular basis.

Your conservator might be someone whom you previously nominated, or, if no one had been nominated, it might be your spouse, registered domestic partner or another family member. If none of those persons are available, then it might be the public guardian.

Conservatorship proceedings are designed to help protect you at a time when you are vulnerable or incapable of managing your assets. However, they are also public in nature and can be costly because of the substantial court intervention. In addition, conservatorship proceedings may be less flexible in managing real estate or other interests than a well-managed living trust.

5. How could a living trust be helpful at my death?

The assets held in your living trust could be managed by the trustee and distributed according to your directions without court supervision and involvement. This can save your heirs time and money. Because the trust would not be under the direct management of the probate court, your assets and their value (as well as your beneficiaries' identities) would not become a public record. Your heirs and beneficiaries would still have to be notified about the living trust and advised, among other things, of their right to obtain a copy of the trust.

If your assets (those in your name alone) are not in a living trust when you die, or do not otherwise pass by "beneficiary designation," and the total of such assets exceed a specified threshold (currently $150,000), they would be subject to probate. Probate is a court-supervised process for transferring assets to the beneficiaries listed in one's will.

After your death, a petition would be filed with the court (usually by the person or institution named in your will as the executor). After notice is given, a hearing would be held. Then your will would be admitted to probate and an executor would be officially appointed. An inventory of your assets would be filed with the court and notice would be given to your creditors so they could file claims. The process would end once the court approved a final distribution of assets.

Probate can take more time to complete than the distribution of property held in a living trust. In addition, assets tied up in probate may not be as readily accessible to the beneficiaries as those held in a living trust. The cost of a probate is often greater than the cost of managing and distributing comparable assets held in a living trust.

6. Who should be the trustee of my living trust?

Many people serve as trustees of their own living trusts until they become incompetent or die. Others decide they need assistance simply because they are too busy or too inexperienced or do not want to manage their day-to-day financial affairs.

Choosing the right trustee to act on your behalf is very important. Your trustee will have considerable authority and responsibility and will not be under direct court supervision.

You may choose a spouse, adult child, domestic partner, other relative, family friend, business associate, or professional fiduciary to be your trustee. The professional fiduciary could be a licensed, registered individual, or a bank or trust company licensed by the State of California. You may also name co-trustees.

Discuss your choice with an estate planning lawyer. There are many issues to consider. For example, would the appointment of one of your grown children cause a problem with his or her siblings? What conflicts of interest would be created if you name a spouse, child, business associate, or partner as your trustee? Will the person named as your successor trustee have the time, organizational ability?

7. How are my assets put into the living trust?

Once your trust has been signed, an important task remains. To avoid court-supervised conservatorship proceedings if you should become incapacitated, or the probate process at your death, your assets must be transferred to the trustee of your living trust. This is known as funding the trust.

Deeds to your real estate must be prepared and recorded. Bank accounts and stock and bond accounts or certificates must be transferred as well. These tasks are not necessarily expensive, but they are important and do require some paperwork.

A living trust can hold both separate and community property. This makes it convenient for spouses and registered domestic partners to plan for the management and ultimate distribution of their assets in one document. (Note: Although registered domestic partners have many of the same rights as spouses, be aware that federal tax law does not provide the same tax benefits for domestic partners as it does for spouses.)

If you own real estate in another state, you might (depending on that state's law) transfer that asset to your trust as well to avoid probate in that other state. A lawyer from that state can help you prepare the deed and complete the transfer. If the real estate is located in California, a California lawyer should prepare the deed and advise you on transferring such property.

A lawyer can help you address the transfer of other assets as well. In addition, you should consider changing the beneficiary designations on life insurance to the trust. As for the beneficiary designations on a qualified plan (such as a 401(k) or an IRA), you should seek a qualified professional's advice as distributions after death are subject to different income tax treatment depending on the designation.

8. 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 may, in some cases, be able to take advantage of you. (In a probate, direct court supervision of an executor reduces this risk.)

In addition, the cost of preparing a living trust could, in some cases, be higher than the cost of preparing a will. However, it depends on the particular estate plan. The difference in cost may not be significant if the estate plan is complex.

Also, keep in mind that a living trust can create additional paperwork in some cases. For example, lenders may not be willing to lend to a trust and may require that real property be taken out of the trust (by a deed) before they will agree to a loan on that real property.

9. If I have a living trust, do I still need a will?

Yes. Your will affects any assets that are titled in your name at your death and are not in your living trust or some other form of ownership with a right of survivorship. If you have a living trust, your will would typically contain a pour over provision. Such a provision simply states that all such assets should be transferred to the trustee of your living trust after your death. (This does not mean, however, that your beneficiaries can avoid going through probate for these assets.)

Your will can nominate guardians for your minor children as well. Any assets held in a trust for your children would still be managed by the trustee.

To find out more about wills, see the State Bar's consumer pamphlet entitled **Do I Need a Will?** For information on ordering a copy of this or another State Bar consumer education pamphlet, see #1 above.

10. Will a living trust help reduce the estate taxes?

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

11. Will I have to file an income tax return for my living trust?

No, not during your lifetime. The taxpayer identification number for accounts held in the trust is your Social Security number, and all income and deductions related to the trust's assets are reportable on your individual income tax returns.

After your death, the income taxation of the living trust is similar to a probate.

12. What other estate planning documents should I have?

A durable power of attorney for property management could be helpful if you ever become incapacitated. It deals with assets that were not transferred to your living trust before you became incapacitated and any assets that you receive afterward. It also empowers your agent to act on your behalf with respect to other financial matters, such as signing tax returns, or dealing with retirement benefits. (Such benefits are not transferred to a trust during one's lifetime.) With this power of attorney, you appoint another individual (the attorney-in-fact) to make financial decisions on your behalf.

This power of attorney, however, cannot replace a living trust because, among other things, it expires when you die. It cannot provide instructions for the distribution of your assets after your death.

You might also consider setting up an advance health care directive/durable power of attorney for health care. This allows your attorney-in-fact to make health care decisions for you when you can no longer make them for yourself. In your advance health care directive, you may state your wishes regarding life-sustaining treatment, organ donation and funeral arrangements as well. A health care directive also allows an authorized agent to access your medical information, which could be important in light of strengthened federal privacy laws.

13. What other kinds of trusts are there?

Testamentary trusts and irrevocable trusts are two other types of trusts:

- Testamentary trusts are trusts that are based on instructions in your will; such trusts are not established until after the probate process. They do not address the management of your assets during your lifetime. They can, however, provide for young children and others who would need someone to manage their assets after your death.
- Irrevocable trusts are trusts that cannot be amended or revoked once they have been created. 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 can assist you with such documents.

14. Who should draft a living trust for me?

A qualified estate planning lawyer can help you prepare your living trust, as well as a will and other estate planning documents (see #17).

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

In addition, 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.

Ask the professional about his or her qualifications, and ask yourself whether the adviser may have an underlying financial incentive to sell you a particular investment, such as an annuity or life insurance policy. Such a financial incentive could bias that professional's advice.

A living trust is often held out as an enticement or "loss leader" by offices that 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. Should I beware of "promoters" of financial and estate planning services?

Yes. There are many who call themselves "trust specialists," "certified planners" or other titles that suggest the person has received advanced training in estate planning. California has experienced numerous promotions by unqualified individuals and entities which only have one real goal—to gain access to your finances in order to sell insurance-based products such as annuities and other commission-based products. To better protect yourself:

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 — before considering a living trust or any other estate or financial planning document or service.

Always ask for time to consider and reflect on your decision. Do not allow yourself to be pressured into purchasing an estate or financial planning product.

Know your cancellation rights. California law requires that sellers who come to your home to sell goods and services (with some exceptions) that cost more than $25 must give you two copies of a notice of cancellation form to cancel your agreement. You, the buyer, generally would be able to cancel this transaction up until midnight three business days later. Depending on the circumstances, you may have longer to cancel life insurance and annuity transactions. For example, if you are 65 or older, you have 30 days to cancel.

Be wary of organizations or offices that are staffed by non-lawyer personnel and that promote one-size-fits-all living trusts or living trust kits. An estate plan created by someone who is not a qualified lawyer can have enormous and costly consequences for your estate. Do not allow yourself to be pressured into a quick purchase.

Be wary of home solicitors who insist on obtaining 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.

Insist on the person's identification and a description of his or her qualifications, education, training and expertise in estate planning. Also, keep in mind that legal document assistants are not permitted to give legal advice. And paralegals must work under the direct supervision of a lawyer. (As a precaution, ask to speak directly to the supervising attorney if you are not given an opportunity to do so.)

Always ask for a copy of any document you sign at the time it is signed.

Report high-pressure tactics, fraud or misrepresentations to the police or district attorney immediately.

16. How much does a living trust cost?

It depends on your individual circumstances and the complexity of documentation and planning required to achieve your goals and objectives. The costs may vary from lawyer to lawyer. Generally, the costs will include the lawyer's charges for discussing your estate plan with you and for preparing a living trust agreement, your will, power of attorney or other necessary legal documents; supervision over their execution; and services or instructions for funding your living trust.

It is crucial to keep in mind that a living trust is a very important part of your estate plan. Avoid being lured by promotions for extremely low-cost living trusts without checking out those who are making the offer.

If you retain a lawyer, you should understand what services are to be provided and how much they will cost. California law generally requires that a lawyer explain, in writing, the nature of the services to be rendered, the cost of those services and the payment terms. Some lawyers charge a flat fee for estate planning services. Others charge on an hourly basis or use a combination of both types of fees.

17. How do I find a qualified lawyer?

If you do not know a lawyer who is qualified to help with your estate plan, ask someone whose judgment you can trust — a friend, associate or employer, for example — or call a local State Bar-certified lawyer referral service. For an online list of certified lawyer referral services, visit the bar's website at www.calbar.ca.gov/lrs. For phone numbers of certified services in your county, call 866-44-CA-LAW (442-2529). Out-of-state callers can call 415-538-2250 to hear the same message or check the Yellow Pages of a telephone directory or contact your local bar association.

State Bar-certified lawyer referral services, which must meet minimum standards established by the California Supreme Court, can help you find the right lawyer for your situation. Most of these services offer half-hour consultations for a modest fee. Attorneys who are members of certified lawyer referral services must carry insurance, agree to fee arbitration for fee disputes, meet standards of experience and be State Bar members in good standing.

Some lawyers who work in the trust and estate planning area are "certified specialists in estate planning, trust and probate law." This means that they have met certification standards set by the State Bar of California. Not all lawyers who have such experience in estate planning, however, have sought such certification. For a list of specialists and more information on the certification program, go to californiaspecialist.org or call 415-538-2120.

If you do decide to hire a lawyer, make sure that you understand what you will be paying for, how much it will cost.

For more information, see the State Bar pamphlet **Finding the Right Lawyer.** To order this pamphlet, see #1 above.

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