CONSUMER CONCERNS
Information for Advocates Representing Older Adults
National Consumer Law Center®

# Avoiding Living Trust Scams: A Quick Guide for Advocates

Dishonest living trust salespeople prey on seniors' fears that after their deaths, their life savings and assets will be stolen by the government or by predatory probate attorneys. These salespeople use high-pressure tactics and deceptive claims to coerce vulnerable seniors into buying a product that many of them don't need.

Seniors may be bombarded with advertisements, phone calls, and pitches from door-to-door salespeople insisting that living trusts are the keys to eliminating problems in estate planning. This may be true for some. For others, buying a living trust is simply a waste of limited resources.

Worst of all is over-reliance on trusts by seniors who do not fully understand estate planning issues, lack clear goals and have not sought and received competent, disinterested advice and guidance. Those seniors are vulnerable to exploitation by predators, including trust mill operators who use estate planning as a pretext to sell expensive and unsuitable insurance and other financial products to seniors.

## Understanding the Terms

It is important for advocates to help educate seniors on the different types of estate planning tools. Key terms to understand include:

1. **TRUST**: A trust is a legal arrangement where one person (known as the "**trustee**") controls property given by another person (known as the "**grantor**" or "**trustor**") for the benefit of someone else (known as a "**beneficiary**"). Although it is not a requirement, with most living trusts, the grantors are also the trustees during their lifetimes, as long as they remain competent. Grantors name successor trustees to take over if they become incompetent or die, and to distribute the property after they die.
2. **LIVING TRUST:** The term "living" refers to the fact that these trusts take effect while the grantor is still alive. In order for this to happen, grantors must transfer their property and assets into the trust. Under most living trust arrangements, grantors, while still competent, are free to change the terms of the trust. A **living trust** is different from a **living will**. **Living wills** are documents that ex-

press an individual's wishes about being kept alive if s/he becomes terminally ill or seriously incapacitated.

3. **WILL**: A will is a legal document that gives direction about how to distribute property after death. It does not take effect until the person's death.

4. **PROBATE**: Probate is the legal process that usually involves filing a deceased person's will with the local probate court, taking inventory of the person's property, paying all legal debts, and distributing the remaining assets and property. If the person died without a will (this is called intestacy), the estate still must be probated and property will be distributed according to state law.

## Living Trusts vs. Wills: Helping Seniors Make Good Choices

Wills and living trusts allow seniors to direct how their property will be distributed after death. Although there are other issues to consider, when used appropriately a living trust can help a senior avoid the costs and delays that arise in probate. Property transferred into a living trust before death does not go through probate. Although this may seem like an important benefit, the reality is that probate will not be a concern for many seniors. In many cases, the estate will not be probated regardless of whether the senior had a living trust or a will.

The first step is to help seniors learn about their state laws and then assess the size and value of their estates. This will help them determine whether they have to worry about probate. If they choose to go ahead and create a living trust, additional issues to consider include the suitability of various products and whether the benefits from a living trust justify the expense.

Some of the most important concerns to consider are:

1. Is it likely that the senior's estate will be probated?

Most states have rules that allow small estates to be administered through an expedited process. The dollar limit for using an expedited administration process varies from state to state. In most cases, the property of low-income seniors will be distributed either outside of probate completely or through an expedited probate process.

2. Are there other ways to avoid probate?

Living trusts are not the only ways to avoid probate. For example, another option is to hold property in joint tenancy with a right of survivorship. This property passes after death to surviving joint tenants. This does not necessarily mean that advocates should advise clients to place property in joint tenancy just to avoid probate. It is merely another option to consider.

3. Is the living trust worth the expense?

Seniors who decide they want to go ahead with living trusts should be advised that the process could be expensive. Lawyers often charge five or six times the cost of a will to set up a living trust. Depending on the size of the estate, the costs of a living trust may be much higher than the costs of probate. This depends on each individual situation.

4. Does the senior know what is required to set up a trust?

It can take a lot of time to set up a trust properly. Writing up the document is not enough. The trust will not be valid until property is transferred from the individual's name to the trust. This is called "funding the trust." Seniors should also be counseled that even if they decide to buy a living trust, it is still a good idea to have a will as a back-up.

The decision about the appropriateness of a living trust should be made, whenever possible, in consultation with an experienced estate planning attorney. Concerns about the effect of a living trust on Medicaid eligibility should also be considered.

## Common Living Trust Scams

Many living trust mills advertise through the mail, door to door, or by sponsoring special seminars. These types of sales are especially suspicious. Other questionable sales tactics include:

- Companies that use names that sound a lot like the names of legitimate non-profit organizations. AARP, for example, does not sell or endorse living trusts. Companies will often try to use names that sound a lot like "AARP" or "American Association of Retired Persons" to imply falsely that they are endorsed by AARP.

- Companies that sell "self-help living trust kits." These kits are usually not a good idea because they are not tailored to individual needs. They often require consumers to transfer assets on their own. Sometimes the kits fail to even inform consumers that assets must be transferred. There are a few high quality products available, but the basic lesson for seniors is to be cautious and ask a lot of questions before buying.

- Companies that market living trusts and use estate planning as a pretext to learn about a consumer's assets. These schemes aim to harvest rich commissions by selling seniors financial products, such as annuities or life insurance. These transactions may needlessly burn up seniors' savings, affect eligibility for some public benefits or tie up assets so that they cannot be tapped easily when medical or other needs arise.

In some cases, problems arise because of false or misleading claims and advertisements. In other cases, the product may be legitimate, but grossly overpriced. Common exaggerated or false claims include:

- **Overstatement of the length and cost of probate.**

Many companies use slogans such as "The Choice is Yours: Sacrifice Money to the State or Protect Your Loved Ones." Living trust companies tend to deceptively inflate the costs and hassles of probate. It is important for clients to know the truth about their state laws and practices in order to decide whether probate is likely to take a big chunk out of their estates. Information can be obtained from the clerk (or Register) of wills or a local attorney.

- **Misrepresentations as to tax advantages of living trusts**

The truth is that a simple living trust (as opposed to a more complicated tax-saving living trust) has no effect on taxes.

- **False claims that salespeople are attorneys.**

- **Misrepresentations about what is required to establish a living trust.**

- **False claims that creditors can't go after property in a living trust.**

The truth is property and assets in a living trust are not automatically sheltered from creditors.

## What can be done to Challenge Living Trust Scams?
## Legal Remedies

Victims of fraud should consult a lawyer if possible. There are many consumer law claims that can be used to combat scams including:

- **State Unfair and Deceptive Acts and Practices Statutes (UDAP).**

UDAP statutes may be used to challenge unfair, deceptive, or fraudulent practices. For more information, see the National Consumer Law Center's manual, Unfair and Deceptive Acts and Practices. To order, contact NCLC Publications at 617-542-9595 or find out more on NCLC's web site, http://www.consumerlaw.org

- **State Unauthorized Practice of Law (UPL) Statutes.**

UPL statutes usually do not provide for separate causes of action. Violations, however, can be brought as per se UDAP violations or by prosecutors in criminal actions.

- **Door-to-Door Sales Acts.**

These laws should apply if the trust is sold door to door or somewhere other than the seller's permanent place of business (at a hotel seminar for example). Door to door statutes provide a three day cooling off period in addition to other consumer protections. More information on these laws can be found in NCLC's *Unfair and Deceptive Acts and Practices* manual.

- **Common Law Fraud, Breach of Contract, and Breach of Fiduciary Duty.**

- **Criminal Prosecution.**

Advocates should also assist clients in preparing complaints to government law enforcement agencies. Unscrupulous salespeople can be criminally prosecuted for fraud. Most UPL and UDAP statutes provide for criminal penalties.

Complaints can be filed with state and local consumer protection agencies as well as the Federal Trade Commission (1-877-FTC-HELP; http://www.ftc.gov). Advocates should also consider contacting the local Better Business Bureau. (http://www.bbb.org).

## Preventing Fraud

Consumer education and legal assistance are critical to help seniors understand their estate planning options and resist the high pressure sales tactics of living trust companies. Education is important for seniors of all income levels. Concern about property distribution after death is an issue that crosses class lines. The amount of worry does not necessarily correspond to the size of the estate. The stakes are simply higher in most cases for low-income seniors who are too often persuaded to dip into limited funds in order to purchase a product that does not meet their needs.

## Selected Resources and Websites

AARP, "10 Things You Should Know About Living Trusts", posted on-line at www.aarp.org/money/estate-planning/info-09-2010/ten_things_you_should_know_about_living_trusts.2.html.
For more information, contact AARP at 1-800-424-3410 or visit their web site at www.aarp.org.

American Bar Association (ABA), "Guide to Wills and Estates" (2d ed. 2004). For more information, contact the ABA at 1-800-285-2221 or visit their web site at http://www.abalawinfo.org/mon1.html

Better Business Bureau: www.bbb.org

Federal Trade Commission, "Living Trust Offers: How to Make Sure They're Trust-worthy" http://www.ftc.gov/bcp/edu/pubs/consumer/products/pro08.shtm

Loonin, Michon, and Kinnecome, "Fraudulent Notarios, Document Preparers, and Other Nonattorney Service Providers: Legal Remedies for a Growing Problem," 31 Clearinghouse Review 327 (November/December 1997).

National Academy of Elder Law Attorneys: www.naela.org

National Association of Consumer Advocates: www.naca.net

National Consumer Law Center, *Unfair and Deceptive Acts and Practices*, (7th Ed. 2008 and Supp.).

Nolo Press: http://www.nolo.com/legal-encyclopedia/wills-trusts-estates/

Vallario, "Living Trusts in the Unauthorized Practice of Law: A Good Thing Gone Bad," 59 Md. L. Rev. 595 (2000).

Advocates seeking more information can also call the National Consumer Law Center at (617) 542-8010; http://www.nclc.org

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