LIVING TRUSTS:
NO HEADACHES, NO HASSLES, NO PROBATE

This booklet deals with how living trusts can be used to avoid probate. With that said, not everyone is a candidate for a living trust and, sometimes, there are easier and less expensive ways to avoid probate than a living trust. I have found that, in general, people have the same questions about living trusts. Therefore, in an attempt to make this information about living trusts clear to you, I am presenting it in a question and answer format.

WHAT IS A LIVING TRUST?

I give workshops with a financial planner who always starts the seminar by asking this same question, "What is a living trust?" The audience will always try to come up with some type of legal definition. Finally, my friend will say, "No, a trust is nothing but a piece of paper." And he is right. A trust is simply a piece of paper with your instructions and signature on it. The "living" aspect to a living trust simply means that it is a trust that has been created and is used during your lifetime, as opposed to a testamentary trust that comes into being and is used upon your death.

WHY SHOULD I HAVE A LIVING TRUSTS?

About 70% of the reason for having a living trust is to avoid probate. Probate is the legal process through which the court makes sure that, when you die, your debts are paid and your property is distributed according to your will. When I say "avoid probate," I really mean avoid attorneys' fees, personal representative's fees and court costs. Florida statutes suggest attorney and personal representative fees of 3% of your gross estate. So, if you have an estate of $200,000, avoiding probate will potentially save your beneficiaries $12,000.

HOW DOES A LIVING TRUST AVOID PROBATE?

It is easier to understand the answer to this question if you compare your living trust to a corporation. A corporation owns assets. The president of the corporation can buy, sell and transfer those assets. The president might pass away, but the corporation continues. All that happens is that a new president is appointed. Now, the new president can buy, sell and transfer those corporate assets. Now compare this to your living trust. Your trust owns your assets. You are the initial trustee of your trust. As trustee, you can buy, sell and transfer the trust's assets. You might pass away, but the trust continues. All that happens is that a successor trustee is appointed (typically one of

your children.) Now, the successor trustee can buy, sell and transfer the trust's assets. For example, upon your death, the successor trustee simply goes to the bank and says, "Here is Dad's trust in which I am named successor trustee and here is Dad's death certificate. Now, I am in charge of the bank account that Dad owned in his trust."

About 20% of the reason for having a living trust is to avoid guardianships. For example, your child comes to your house one day and finds that you have given $10,000 cash to a fly-by- night business to fix a leak in your roof. It is apparent to your child that you are being ripped off by con artists. Historically, the remedy available to your child is to go to court, have you declared incompetent and have the court order that your child or someone else takes charge of your assets. As you can imagine, this involves attorneys' fees and court costs. However, in the living trusts that I prepare, the trust document says that, if you are ever deemed to be incompetent as certified in writing by your primary physician, your successor trustee becomes trustee of your trust. Now your successor trustee simply goes to the bank and says, "Here is Dad's trust in which I am named successor trustee and here is a letter from Dad's doctor stating that Dad is incompetent. Now, I will be taking care of Dad's financial affairs." If the thought of your child having

control of your trust's assets scares you, keep in mind that, as explained below, your trust should clearly state its “purpose.” Generally, this purpose will state that as long as you and/or your spouse are alive, all of the trust's assets and income are for your benefit only. Your child will be obligated to follow this purpose.

About 5% of the reason to have a living trust is that the settlement of your affairs through a living trust is faster than probate. In a full administration probate, your beneficiaries typically don't receive your assets until four to six months after your death. With a trust, your successor trustee can literally begin distributing your assets to your beneficiaries the day after you pass away. The successor trustee simply needs to keep enough money on hand to pay your creditors and taxes.

About 5% of the reason for having a trust is that it is more private than probate. A probate file is a public record that anyone has a right to look at, even if it is just out of idle curiosity (although, unless you are an interested party, you do not have access to the inventory). A trust is a private document that is between you and your attorney and only those other persons with whom you want to share it. Usually, my clients will provide a copy of all of the trust documents to their successor trustees.

WHAT DOES A TYPICAL LIVING TRUST SAY?

Your trust will be anywhere from 10 to 30 pages long so, obviously, the following is a summary.

Most important, the trust should state its purpose. It should state that, as long as you and/or your spouse are alive, all of the trust assets and income are for your benefit only. This is important because there may be a time when you are alive and yet you are not the trustee of your trust. For example, if you become incompetent your successor trustee will become trustee. Just because the successor trustee is now trustee does not mean the successor trustee can start spending money on himself or anyone else. The successor trustee is obligated to follow the trust's instructions, which should state that, as long as you are alive, all of the trust's principal and interest are for your benefit.

The trust should state that it is absolutely revocable and amendable by you. Therefore, any of the trust's terms can be changed right up to the moment of your death. You can shut the trust down or you can take assets in and out of your trust. You can amend the trust and, for example, change who will be your successor trustee or who will be your beneficiaries when you pass away.

The trust typically provides for you and/or your spouse to be the initial trustee(s). The trust names successor trustees who will become trustee upon your death, incapacity, or your resignation. In my trusts, I have a first, second and third choice. This way, if the first choice is not able to serve, we go to the second choice. If the second choice is not able to serve, we go to the third choice. Sometimes, a client wants to have two of his children act as co-trustees. Unless you don't fully trust your children, having them act as co-trustees is unnecessary and is burdensome in transacting business. Remember, acting as successor trustee is a job, not a reward.

Finally, just like a will, the trust has a plan of distribution. The trust directs what the successor trustee is to do with your assets when you die. Again, the successor trustee is obligated to follow these instructions.

WHAT ARE THE TYPICAL DOCUMENTS THAT GO WITH A LIVING TRUST?

The trust document itself, which I have been discussing above.

A **Pour-Over Will.** This term comes from comparing the pour-over will to a pitcher of water that you would pour. If every- thing is done just right, the pour-over

will not be needed when you pass away. When I say "just right," I mean that all of your assets have been transferred into the name of your trust. When you do a trust, it is as though you have built an empty safe and then you must fill it up with your assets. The only assets that get the benefit of your trust (i.e., avoid probate), are the assets that are owned by your trust. For example, if upon your death you own a $10,000 CD that is not owned by the trust but, rather, is still in your own name, that CD will go through probate (which is exactly what we are trying to avoid.) It will be governed by your pour-over will that says, take the $10,000 and "pour it over" into my trust. The money is then disposed of pursuant to your trust's plan of

A **Durable Power of Attorney for Financial Affairs and for Medical Affairs.** Sometimes these are separate documents and sometimes they are combined into one document. You have probably heard of a power of attorney before. It is a document by which you appoint someone to transact business or make decisions on your behalf. Under a standard power of attorney, your representative's powers end when you die or should you become incompetent (for example, comatose or senile). Under a durable power of attorney, your representative's powers end when you die, but they stay in effect should you become incompetent. That is the "durable" aspect of a durable

power of attorney. We have a durable power of attorney in Florida because the Florida Statutes authorize it. The statute provides certain "magic words" that must be in a power of attorney to make it a durable power of attorney.

A **Living Will.** The living will is strictly an optional document. A living will is a document in which you ask that you not be kept alive by artificial means. It is a two-step process. Step one is that a doctor must declare you to be in a terminal condition and that your death is imminent. Only then does your living will come into play. Step two is for your designated representative to make the final decision to "pull the plug." Both steps must happen. Historically, in Florida we have talked in terms of disconnecting you from a machine, like a respirator. In Florida, you can now go further and also ask that you not be given food and water through a tube if that is the only thing keeping you alive. Keep in mind that you must first be in a terminal condition. Furthermore, the living will states that you are to be given all the medication you need to keep you pain free.

If you are competent, obviously you could make your own step two decision. Assuming you are not competent, in my living will form, I have the client name their first choice for who will make this step two

decision and an alternative in case the first choice in not available. When my client's choice is "let all of my kids decide," I have the client specify whether they are to decide by majority decision or by unanimous decision.

IS THERE ANYTHING ELSE THAT MUST BE DONE TO AVOID PROBATE?

Yes. The preparation and execution of the living trust documents is really only one-half of the job. The other half of the job is what I call "funding" the trust. Funding is the process whereby your assets are transferred out of your individual name and into the name of your trust.

DO I NEED A LIVING TRUST?

Every person's situation is different. Let's say your only goal is to avoid probate (i.e., avoid fees and court costs) and you own a home and CD’s. Rather than a complex living trust, we could avoid probate on your home using an enhanced life estate deed and avoid probate on your CD’s by making them “ITF” (in trust for), “POD” (payable on death) or “TOD” (transfer on death.) However, if you have investment properties or a vacation home (especially in another state), you are definitely a candidate for a living trust.

CAN I DO MY OWN LIVING TRUST USING PACKAGED FORMS?

The answer is yes. My advice is "do not."

WHAT SHOULD I DO NOW?

I offer free initial office consults regarding the preparation of your living trust. Call me, Attorney Tom Olsen, at (407) 423- 5561 to schedule your office conference.

QUESTIONS, COMMENTS, SUGGESTIONS?

Did you read something in this booklet that was not clearly explained? Do you have a question about this topic that was not answered? Have you found a typographical error or a legal inaccuracy in this booklet? Please contact me with your questions, comments or suggestions. Your thoughts and suggestions are greatly appreciated.