

**SENIOR BULLETIN: ESTATE PLANNING & GUARDIANSHIP**

## Living trusts – they’re not for everyone

**What is a trust?** A trust is a legal arrangement in which a person (called a “trustee”) manages and controls property given by another person (called a “grantor,” or sometimes a “trustor”) for the benefit of a third person (called a “beneficiary”). There are many different kinds of trusts and many different uses for them. This bulletin discusses one kind of trust called a “*living* trust.”

**What is a living trust?** A living trust is a trust that goes into effect while the grantor is alive. (The grantor, once again, is the person who puts his or her property into the trust.) Often, a living trust is used as a form of estate planning – that is, as a way to manage property during the lifetime of the grantor and to provide for what will happen to any property that is left after the grantor’s death. Sometimes this is a good idea; sometimes it is a bad idea. (More about this later.)

A simple living trust might work like this: Jane signs a paper, called a “trust instrument,” creating a trust. Jane names Ellen as the trustee. She names herself (Jane) as the primary beneficiary, and she names Kim as the secondary beneficiary. Then she takes the legal steps necessary to transfer ownership of her property to the trust. The trust instrument says that Jane can revoke (cancel) the trust at any time. If she revokes it, the property held in trust will be transferred back into her name. The trust instrument says that after Jane’s death the property held in trust is to be given to the secondary beneficiary, Kim.

Here is another example: Jane creates a trust naming herself as trustee with Ellen as a successor trustee (to become trustee when Jane dies). Jane also names herself as beneficiary and names Kim as secondary beneficiary. She takes the legal steps necessary to transfer ownership of her property to the trust. During Jane’s lifetime, she uses the property in trust as she pleases. After her death, whatever is left is disposed of according to the terms of the trust instrument. The trust instrument says that when Jane dies the successor trustee is to manage the property held in trust for Kim’s benefit until Kim reaches the age of 30, and then to transfer all trust property to Kim.

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In both examples, no probate or other court proceeding should be required to transfer trust property after Jane's death.

**Some claims sometimes made for living trusts:**

Unfortunately, some claims made about living trusts are mistaken or exaggerated.

- **Claim:** Living trusts avoid the delays and the expenses of probate.  
**Fact:** Washington State has one of the most streamlined, simplified and least expensive probate systems in the nation. The court costs are nominal: a \$110 filing fee. The fees of the estate attorney and personal representative, unlike in many other states, must be based on the amount of work performed, rather than on a percentage of the value of the estate.

Most of the work performed in a probate, such as contacting beneficiaries, settling creditors' claims, distributing assets and, when required, dealing with estate tax and income tax matters of the estate, will need to be done regardless of whether there is a probate or a living trust. The delays associated with probate generally are not related to complying with probate procedure, but to complying with the federal estate tax laws. *Additionally, for persons with modest estates there are other much less costly or complicated ways to avoid probate than creating living trusts, such as holding assets as joint tenants with right of survivorship or having a community property agreement in place to transfer assets to the surviving spouse upon the death of the first spouse to die.*

If an individual's goal is to avoid probate, it is best to consult with a licensed estate-planning attorney for advice on the most cost effective way to avoid probate for the individual's particular situation.

- **Claim:** Living trusts save taxes.  
**Fact:** The same estate-tax planning can be done in either a living trust or in a will. A living trust will not save any more estate, gift or generation-skipping taxes than will an appropriately drafted will. In addition, no income taxes are saved during the life of the grantor of a revocable living trust. The Internal Revenue Service views all income received by a revocable living trust as belonging to the grantor, basically ignoring the existence of the trust for income tax purposes.

It is worth noting that in many cases no federal estate-tax return is ever required. A federal estate-tax return must be filed only when the value of an individual's estate exceeds the applicable estate-tax exemption amount, which for 1998 is \$625,000 and for 1999 is \$650,000.

- **Claim:** Living trusts avoid the need for a guardianship if an individual becomes incapacitated.  
**Fact:** This may be true (if decisions about the individual's financial matters, but not decisions about the individual's health care, are needed). But there is a simple and inexpensive alternative that should be considered: a well-drafted durable power of attorney may serve the purpose without the expense and administrative complexity of a living trust.

**Situations where a living trust may be an advantage for a Washington State resident:**

Why would someone want to create a living trust? There are some situations in which living trusts may make good sense for Washington residents. Living trusts:

- *May avoid a second probate for real property owned in another state.* If real property is owned out of state, a living trust that holds that property can avoid the expense of a second (ancillary) probate in the other state.
- *May offer greater privacy.* Unlike a will, which is filed in court at the time of death and which then becomes a public record, a trust instrument is generally not filed in court. Thus a trust may offer more privacy to those concerned about the nature of their property or whom they wish to benefit.
- *May offer the opportunity to observe trustee performance.* A living trust may give the grantor a chance to observe the performance of a trustee and see if it is satisfactory. If the trustee's performance is unsatisfactory, the grantor can make a change.

**Some potential disadvantages of a living trust, even when the trust is prepared by an experienced estate-planning attorney:**

- *High up front cost.* The cost of drafting a living trust and retitling one's assets into the trust may be relatively high by comparison to the cost of a will and ordinary probate.
- *Failure to fund the trust.* Failure to transfer all assets to the trust before death may necessitate a probate for the assets left out of the trust. Thus, if probate avoidance were a main reason for creating the living trust, its purpose would be defeated and costs would be increased.

- *Administrative headaches.* Maintaining the trust formalities and its continuing administration may be a problem for some people. If the grantors are also the trustees, they may not remember that they need to buy and sell each asset as trustees, not as individuals. If they don't observe the formalities, they may lose the benefits they hoped to get from use of the trust.

**Some special disadvantages of purchasing a living trust from trust salespersons:**

Someone who has a particular interest in selling you a living trust is probably not the best person to advise you about which approach to estate planning is best for you. Many consumers have been poorly served by promoters of living trusts whose goal was to market a product.

- A living trust should be tailored to the individual's specific needs; the living-trust packages sold by living-trust promoters may be "one size fits all."
- The cost of purchasing a living trust through a promoter may be greater than the cost of paying an experienced estate planning attorney for a living trust drafted specifically for that individual's circumstances.
- Some salespersons may give misleading or false information, such as greatly exaggerating the cost and time involved in a probate, and falsely claiming that taxes can be saved and that creditors cannot reach assets in the trust.
- Some salespersons may fail to explain that the purchaser's present and future assets need to be transferred to the trust for the trust to provide the promised benefits.

The Attorney General of Washington has investigated a number of the promoters of living trusts and has obtained agreements or court orders to halt some of their activities, such as making false claims, and using abusive and unfair sales techniques. The consumer should be very suspicious of high pressure sales tactics or claims such as:

- claims that the consumer must act quickly, often the same day, to take advantage of the promotion;
- advice that the consumer should not take the time to talk to an attorney or relatives about the offer; or

- claims that the company selling the trusts is somehow connected with or endorsed by a non-profit organization such as the American Association of Retired Persons (AARP). (Some of the companies use names deceptively similar to the AARP's name, however, it is important to remember that the AARP does not sell living trusts and does not endorse any company that sells living trusts.)

***Complaints about unfair practices in the sale of living trusts may be made to the Washington State Attorney General's Consumer Protection Division at 1-800-551-4636 or 206-464-6684.***

**A practical approach:**

Before deciding on a living trust, will or any other estate-planning tool, individuals should review their assets and distribution plan with a knowledgeable estate-planning attorney. The attorney should help evaluate each person's unique situation and discuss the most appropriate and cost-effective estate-planning options available for carrying out individual wishes. The attorney should be able to estimate the cost of a living trust in comparison with the cost of a will and probate for an individual's particular circumstances.

Persons of modest financial means should contact their local bar association, Senior Information & Assistance office or Columbia Legal Services for information on the availability of reduced fee or free estate-planning services.