

ATTORNEY ETHICS AND LIVING TRUSTS

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The advertisement for the free seminar on living trusts nearly leaps off the newsprint, excoriating the “evils” of probate:

“Probate is Expensive”

“Psychological trauma: The agony of probate becomes more intense as time delays and proceedings linger.

“Family discord, stress and grief can make probate a nightmare for your loved ones.”

“Protect your loved ones, Use a LIVING TRUST.”

Can probate be so bad? More importantly, can the living trusts promised in the ads live up to their advance billing? While living trusts can be an appropriate testamentary device, the business of selling living trusts has received considerable publicity in recent years, much of it unfavorable. Lawyers who fail to be aware of or adhere to their ethical obligations have been a part of the problems with the sale of living trusts. The potential ethical pitfalls for lawyers include among others, assisting the unauthorized practice of law, failure to exercise independent judgment on behalf of a client, and misleading and deceptive advertising.^{Ftn 1}

For lawyers who practice outside the area of estate planning, a simple definition of a living trust may be helpful: a living trust, or *inter vivos* trust, is a legal instrument that transfers title to property to a trustee during the life of the person establishing the trust. The trustee holds and manages the property. In many instances the trustee is in fact the grantor, or person establishing the trust. After the death of the grantor, the trustee distributes the trust assets. (If the trustee was the grantor, the trust documents will generally name a substitute trustee.) This allows a person’s estate to bypass probate. As with any estate planning device, the creation of such a trust requires a complex and individualized analysis of facts and law to achieve a particularized end.

So why have living trusts received the negative press? Across the nation, companies have sprung up to sell these trusts. Many of the companies are owned and operated by nonlawyers. Some companies use

misleading and high pressure sales tactics, including door-to-door sales, or free seminars to convince prospective purchasers of trusts that probate is always “bad” and trusts are always “good.” The trust packages promoted by these companies tend to be generic, and have been characterized as “one-size-fits-all.” [Ftn 2](#) In addition to making exaggerated and misleading claims about the delays and costs involved in probate, some company sales representatives have failed to include information about the full costs to implement, fund, maintain, and distribute the assets of a living trust; and some have conveyed inaccurate and misleading advice about tax savings through use of a trust. [Ftn 3](#)

A Minnesota lawyer recently stipulated to public discipline for his actions in conjunction with an Ohio company that sold living trust packages to clients. [Ftn 4](#) The company’s agent, a nonlawyer, met with prospective customers, obtained only the information about their estates necessary to complete fill-in-the-blank trust documents, sold them a living trust “package” (containing a declaration of trust, pour-over will, powers of attorney, and living will), and sent the entire package of materials to the lawyer. In promoting the sale, the agent made exaggerated claims to the prospective purchaser about the cost of probate proceedings. [Ftn 5](#) These claims were included in documents submitted with the trust package to the lawyer. The agent advised purchasers in Minnesota of the identity of the Minnesota lawyer as their (the purchaser’s) lawyer for purposes of establishing and maintaining the trust.

The only services in fact provided by the lawyer were to make sure that the information originally gathered by the agent was correct as set out in the trust documents. He did not review the language of the document or assess the appropriateness of a living trust arrangement for the particular client, or provide any independent advice to the client. On several occasions, the lawyer signed trust documents as a witness, though he did not witness the document being signed and in fact had never met with the party.

Where did the lawyer go wrong? First, signing as a witness while never having even met the clients, let alone having seen them sign the document, is obviously inappropriate as it is an intentional misrepresentation which violates Rules 4.1 (“In representing a client, a lawyer shall not knowingly make a false statement of fact or law”), 8.4(c) (“engage in conduct involving dishonesty, fraud, deceit or misrepresentation”), and 8.4(d) (“engage in conduct that is prejudicial to the administration of justice”).

Second, the lawyer did not exercise independent judgment on behalf of the purchasers of the trusts that a living trust was the best, or even appropriate, testamentary device for their needs, in violation of Rules 2.1 (“In representing a client, a lawyer shall exercise independent professional judgment”), and 5.4(c) (“A lawyer shall not permit a person who recommends...the lawyer to render legal services for another to direct or regulate the lawyer’s professional judgment in rendering such services.”) In this case, the decision that the trust was the appropriate estate planning device had already been made by the nonlawyer agent on behalf of the company. The lawyer acted only in a ministerial capacity for the company and provided no independent judgment on behalf of the client. The purchasers all believed he was acting as their attorney and looking out for their best interests.

Finally, the lawyer assisted in the unauthorized practice of law in violation of Rule 5.5, MRPC. The company was engaging in the unauthorized practice of law by virtue of the fact that the exercise of judgment and advice to the purchaser was entirely that of the nonlawyer. The company agent met with potential purchasers, described the characteristics of wills and trusts, answered questions regarding estate planning, advised them that a living trust was the appropriate method of estate planning to meet their needs, and provided the completed documents to the lawyer. [Ftn 6](#)

The lawyer assisted in the unauthorized-practice by allowing the nonlawyer to exercise his judgment instead of the attorney's. He reviewed the documents only for accuracy of information already assembled by the nonlawyer. He provided no counsel whatsoever to the clients, therefore never questioning whether the advice or information provided by the nonlawyer was inappropriate or false.^{Ftn 7}

Let no one be confused about the intent of this article. A lawyer's independent professional judgment that a living trust is appropriate for a particular client is *not* the subject of this article. Educational seminars regarding living trusts are *not* automatically suspicious. The fact that a nonlawyer drafts trust materials is *not* in itself sufficient to constitute unauthorized practice. Companies owned by nonlawyers, that sell trusts, are *not* assumed to be out to get the consumer.

But in fact, several aspects of the creation of a successful living trust raise ethical concerns about which an attorney must be watchful. In closure, a few thoughts:

‡ If the arrangement you are being offered by a company that sells such trusts sounds too good to be true, it probably is. Representing a purchaser of a trust means more than a cursory review of the trust documents – it means that in the lawyer's own judgment a trust is appropriate for the client's particular goals and estate.

‡ Remember that an attorney-client relationship carries with it continuing obligations to the client, among them to insure that the trust documents are executed properly to fund the trust appropriately at the outset, to educate the client so as to ensure that new assets are titled in the name of the trust, and so forth. Alarming, some of the "nightmares" of living trusts are the failure of the company that sold the trust, or the attorney representing the purchaser, to ensure that these fundamental events occur.

‡ Attorneys are also advised to be aware of the source of information when choosing educational materials to promote living trusts. In certain cases, information has been provided to consumers which, while possibly accurate in another state, is false and misleading in its application to Minnesota residents. For example, a common method of promoting living trusts is a comparison of the costs involved in probate versus those in setting up a living trust. Use of informational materials prepared in California, based on California probate fee tables, can be false and misleading to purchasers in Minnesota. In California, probate costs are a certain minimum percentage of a decedent's estate, while Minnesota does not permit charging a percentage of the estate as a probate fee.

NOTES

¹ Attorneys have been privately disciplined in Minnesota in connection with the false and misleading advertising of living trusts in violation of Rule 7.1, e.g., describing probate as a "nightmare," or filled with "psychological trauma."

² The Committee of Professional Ethics and Conduct of the Iowa State Bar Assoc. v. Baker, 492 N.W.2d 695 (Iowa 1992)(citing David N. Anderson, "AG Joins ISBA's 'Living Trust' Battle," Ill. St. B. Ass'n. News, October 15, 1992, at 1).

³ In Minnesota, the Attorney General's Office has filed enforcement actions against such companies and/or their sales representatives under various consumer protection statutes, including §481.02 (1990) (unauthorized practice of law). See, e.g. State v. Heritage National and Daniel Allen, C4-92-806 (Third Judicial District) and State v. Senior Financial Services, Robert Koelfgen, and Timothy E. Graham, 92-9870 (Fourth Judicial District).

⁴ In re Bruce Erickson, 507 N.W.2d 612 (Minn. 1993). The lawyer stipulated to indefinite suspension for these actions as well as other misconduct.

⁵ The agent would ask the potential purchaser to estimate the value of their estate assets. The agent would then estimate the cost of probating the estate based on the values provided. The costs of probate were greatly exaggerated.

⁶ The Minnesota Attorney General's Office filed an action against the company and its agent, alleging unauthorized practice. See State v. Heritage, supra note 3. As set out in the complaint, the agent and company ran afoul of Minn. Stat. §481.02 by virtue of the materials used to

promote sale of the trust, which conveyed the message that a living trust is an appropriate testamentary device for nearly everyone, and the agent's representations to potential purchasers, that a living trust was an appropriate testamentary device for their estates.

⁷ *The Iowa Supreme Court recently followed this two-step analysis in addressing the issue of assisting unauthorized practice under the applicable Code of Professional Conduct. The Committee of Professional Ethics and Conduct of Iowa Bar Association v. William D. Baker, 492 N.W.2d 695 (Iowa 1992).*