

# Lest We Forget

All too often people are confronted with the state and county bar associations' disinformation campaign. These organizations assert that we don't need a Living Trust because the probate process is simple and quick, or that the Living Trust has been promoted as the answer to preserving federal estate taxes for both husband and wife, and now that the estate tax exclusion has been substantially increased (for the present), many estates are no longer subject to such taxes, so the Living Trust is unnecessary

We tend to forget the primary purpose of the Living Trust: to avoid the cost, time, and agony of probate.

Thus, I would like to take this opportunity to give you an overview of the origins of the Living Trust, the more recent history of probate in this country and why you want to avoid it at all costs, why you want a Living Trust, and how to recognize some potentially serious pitfalls.

## **HUMBLE BEGINNINGS**

We can trace the Living Trust back to Roman law. Its origins go as far back as AM. 800.

Because the British Isles were long occupied by the Romans, English peasants adopted the Living Trust to protect their lands from abusive kings and nobles. It was common for the king or noble to accuse a peasant landowner of some crime so that the land could be appropriated. The peasants' answer to this practice was to place their land in a Living Trust where it was protected from seizure, Isn't that where we are today? We need to protect our hard-earned land and assets from the hands of the probate attorneys.

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## **The Source of Our Probate System**

Our probate system comes from English law. At the time this country was formed, England had three systems of probate: the king's courts, also called "common law courts," which were the most complex, time-consuming, and costly, to handle land; "ecclesiastical courts," a vast improvement, to handle personal property; and

"equity courts," an even greater improvement, to expedite transfer of fiduciary property such as stocks and bank accounts. We could have chosen any one or all three. We chose the most complex system—the king's court, or "common law court." It is also of note that while England has modernized its entire probate system, we remain in the dark ages. It is still an ordeal to go through probate in England, but according to one author, it takes seventeen times longer and costs one hundred times as much in the United States to transfer a deceased person's wealth to survivors.

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**Norman Dacey as a Modern-Day Pioneer** The abuse of the probate system in this country defies imagination. In 1965, Norman Dacey published a book called *How to Avoid Probate*. He was our pioneer. This book was a masterpiece of probate horror stories. Dacey lived in Connecticut and worked in New York, so his accounts came from these Eastern states. In response to his book, the legal fraternity had him jailed for the unauthorized practice of law. He was released after three months on the basis of the first amendment—which he had not violated, but the legal system had. That incident turned out to be the best possible publicity for the book. For the first time, people began to read of the true horror stories that were happening to their estates in probate. Dacey recommended that people get a Living Trust. He eventually learned that this recommendation proved fruitless because he was relying on the legal fraternity to satisfy clients' requests.

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### **The Response of the American Bar Association**

As a response to the growing anxiety of the American public regarding the probate process, the American Bar Association formed a

committee to revise the probate system. In 1968, the committee completed its work, producing what is known as the Uniform Probate Code. It was designed to substantially simplify the probate process and, as a result, it would seriously reduce the time, cost, and agony of probate. The chairman, a well-known professor of law, declared that all states must adopt this code and that "failure to do so would bring the wrath of the American people down on the legal profession in twenty years." Most state legislatures rejected this revision outright. A few accepted it in name only, having emasculated all of its provisions.

### **Early Studies of Probate**

Prior to and during this period, it was standard practice for local bar associations to poll their probate attorneys and ask them to review their files to determine the average fee they were charging for probate. Results of the poll were then published to all of the association's members. I remember seeing the results of the Los Angeles County Bar Association poll a number of times. The typical cost was 8 to 10 percent of the gross estate. (The gross estate is the total estate before deducting any liabilities, such as the mortgage on a home.)

### **The Antitrust Decision**

In 1968, the Government Antitrust Division found that the bar associations were using this method as price-fixing. They were in essence telling their members what they were to charge for probate. This stung the legal profession—and they haven't conducted a probate study or published any results since.

### **Probate as a Monopoly**

Settling estates through probate is a monopoly that attorneys are loath to give up without a fight. It is an example of what is very often a "simple" matter, of which Chief Justice Warren Burger commented, "There are a host of relatively simple transactions where ordinary folk must employ lawyers because our profession has a monopoly. In all too many cases . . . clients are 'ripped off' by fees that are greatly out of proportion to the complexity of the transaction of the time spent by the lawyers."

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### **THE AARP STUDY-THE FIRST DEFINITIVE ANALYSIS OF THE PROBATE PROCESS**

After the antitrust ruling of price-fixing against the bar associations, there were no more published reports on the time or cost of probate until the American Association of Retired Persons conducted an extensive two-year study of the probate system. The study was published in 1990 and is titled *A Report on Probate:*

*Consumer Perspectives and Concerns.* Within months, AARP put the study on the back shelf after the Will and probate attorneys came in with big money to publish the ads in AARP's magazine declaring that probate wasn't really that bad.

AARP's study was exhaustive and condemning. Consider:

- The purpose of probate is to pay creditors, but according to Professor John Langbein, "Even creditors who traditionally use probate are now beginning to question the system's usefulness."

- Joint tenancy is not the answer. The study found that a startling 90 percent of all estates of widows and widowers age sixty and above would go through probate because their assets were held in joint tenancy or as community property. They also lose one of their federal estate tax exclusions because the assets of the deceased spouse passed to the surviving spouse,

- Probate is a "cash cow" for attorneys. Indeed, small firms of one to ten attorneys dominate the probate practice. Probate doesn't just pay their bills; they make a good living at it.

- The Will is the attorney's assurance that he or she will eventually probate the estate. These attorneys often write a Will as a "loss

leader," knowing that they will more than make up the difference when they probate the estate. The study also established that many of these "loss leader" Wills were poorly drawn.

- The study concluded that the probate process is both costly and time-consuming. The average process took one year and five months and consumed 5 to 10 percent of the gross estate. AARP even documented cases in which attorney fees consumed 20 percent or more of the estate value.

- The study further concluded that time to completion is lengthened by redundant reporting requirements and flexible deadlines that are often unenforced or ignored.

- Education is needed. Specifically, the study recommended that "aging organizations should provide information to older consumers about estate-planning issues, including (1) information about the procedural and cost problems of probate . . . [and] (2) information about alternatives to probate such as living trusts." Among the study's recommendations was that "state and local bar associations should require members of the bar, when drafting a will, to disclose the ultimate cost of the probate proceeding."

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### **The Cost of Probate to the American Public**

AARP reported that the probate process, in 1989, cost the American public \$25 billion annually. In 1997, our study concluded that the figure was more like *\$50 billion annually*, but, because of the recent stock market debacle, I use the more conservative figure of \$25 billion annually.

### **MY DISCOVERY OF THIS REMARKABLE SOLUTION TO PROBATE**

In 1970, I learned about the Living Trust for the first time. Having just gone through the probate process for my father, I was incredibly

impressed with the simplicity of a Living Trust. For the next ten years, I told all of my investment clients that they must go to their local attorney and get one of these great estate preservers. It took me those ten years to discover that in many cases, one of the following situations occurred:

- The attorney convinced the client that a Living Trust wasn't needed because the probate process was so quick and inexpensive.
- The attorney drew up a Living Trust that wasn't worth the paper on which it was written.
- The attorney didn't put the client's assets in the Living Trust.
- The client didn't put the Living Trust into effect because he or she didn't understand it.

I then tried to recommend specific attorneys who I felt drew a decent Living Trust. It was still to no avail.

### **If You Want to Do It Right, You Invariably Have to Do It Yourself**

In August 1982, with the help of a very knowledgeable trust attorney, I formed a company in Westlake, California, called The Estate Plan, created for the sole purpose of providing the Living Trust for my investment clients.

I was a Registered Investment Advisor, and in those days I gave financial planning seminars and concluded each with an explanation of the need for a good Living Trust. As we reviewed the comments of the attendees, we realized that 70 percent of our audience were coming to the seminar to learn about the Living Trust. So, I changed my focus and began giving Living Trust seminars. To date, I have given more than three thousand Living Trust seminars nationwide.

### **The Emergence of *The Living Trust***

A publishing agent who attended one of my seminars suggested that I write a book. Urged on by both my clients and my agent, over the next few years I began to stay at the office for another hour or two each evening and simply dictated what my clients and I had discussed. From this, the book *The Living Trust* evolved.

Published in June 1989, it became a bestseller almost overnight and projected our Living Trust company nationwide. I revised the text in 1993, 1997, and, for this edition, in July 2002. In 1989, we created a new company, The National Estate Plan, to meet the overwhelming demand. To date, we have done more than sixty thousand Living Trusts nationwide through some five hundred advisers working with attorneys and have settled more than ten thousand Living Trusts with nary a problem.

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### **The Move to Reno**

In 1994, I became very dissatisfied with California's antibusiness sentiment. Corporate and personal income taxes were strangling us, and California's workers' compensation program was completely out of control. The company looked at a number of states as possible relocation sites and chose Nevada because of the commitments made to us by state and county officials. I am happy to say that every one of those commitments has been more than fulfilled. Even more important, the company received an unexpected bonus: the Nevada people have that Midwest work ethic, a sharp contrast to the California worker's belief that "you owe me."

An attorney recently said to me, "What good can come out of Reno?" I didn't justify his comment with a retort-it didn't need any. We know what we have here, and we appreciate it. We also appreciate that our home in Incline Village, just forty-five minutes from Reno, is on the north shore of Lake Tahoe, one of the most beautiful locations in the nation.

### **THE BATTLE BEGINS**

The story doesn't end there. The legal profession has done everything possible to try to stop us.

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In late 1991, I returned home from a series of seminars and found a fax from the attorney general of the state of Washington, who demanded that my wife and I appear in his office within the next few days with a list of all of our community property, which he purported to acquire because we were practicing law without a license.

We engaged the very reputable law firm of Lane, Powell, Spears, and Lubersky. With their astute guidance, David Boerner, an expert in legal ethics and dean of the Puget Sound School of Law (now the Seattle School of Law), established that our presentation was absolutely legal. Moreover, Professor William Oltman, an expert in Living Trusts, reviewed our documents and determined that they met all requirements.

The icing on the cake was an intensive study of probate in the state of Washington, conducted by Peterson Consulting. The report, titled *Study of the Average Cost and Average Length of Probate in the State of Washington*, was most revealing. The findings mirrored those of the AARP study. According to the researchers, the average cost of probate was 8 to 10 percent of the gross estate, with the average time of probate ranging from eighteen to twenty-four months. The study was conducted in 1992 and addressed probate cases opened in 1988, under the assumption that most would be closed by the time of this study. As it turned out, 22 percent of the 1988 cases remained open. We specifically researched estates that exceeded \$10,000, but it was noted that estates under \$10,000 had an average probate cost of 19.8 percent, with one as high as 75 percent. There was no way one could conclude that probate was anything but barbarous. As a result, the attorney general gave us a rare Letter of Assurance that our documents and process were appropriate.

### **Truth Isn't Necessarily the Byword**

The challenges continue. In the early '90s, the California Bar Association formed a special

committee called The Truth Squad. Its primary objective is to use every form of public communication to disinform the public about Living Trusts. Many other bar associations have followed with similar campaigns. Two examples are Maryland and New York. In Maryland, the bar association provides a manual and a website that state that probate is simple and economical, claiming that any estate up to \$750,000 can be settled for only \$700. Likewise, *Newsweek* and the *Kiplinger Letter* both published articles representing that probate was simple in New York, taking only thirty to sixty days. Last year, we conducted a probate study in Maryland, followed by another study this year in New York. The results were always the same: consumption of 8 to 10 percent of the gross estate and at least eighteen to twenty-four months to settle.

To this review I will add one more pertinent comment by Chief Justice Burger: "The greatest number of client complaints is about incompetence, neglect, and procrastination." Whitney North Seymour Jr. has reported that 80 percent of the client complaints to the Association of the Bar of the City of New York deal with the lawyer's failure to perform his or her professional responsibilities promptly, or at all.

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### **PROBATE IS TO BE AVOIDED AT ALL COSTS**

The simple truth is that the probate process is a monster. It is costly, time-consuming, and agonizing. I've personally settled more than one hundred Living Trusts. I have seen what happens to widows with Living Trusts as opposed to those who go through probate. The widow going through probate puts her life on hold during the eighteen to twenty-four months of the probate process. It's only at the conclusion that she learns how much money she will have to live on. That's agony. In contrast, the widow with a Living Trust comes in a week to ten days following the death of her spouse, and within an hour we can resolve all

of the basic issues. Her typical question is, "Can I go and be with my children (typically in another state) to get my life in order?" The answer is always yes, and she'll return in four or five months with her life in order. That's why I do what I do.

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### **Be on Your Guard**

Unfortunately, there is not a happy ending. In recent years, numerous Trust mills have arisen to sell you an inexpensive Trust as the *basis* of ultimately selling you something else, such as poor quality annuities that pay the agent a large commission. These Trusts leave much to be desired. Often the assets are not placed in the Trust and, most important, the Trust mill is not going to be around when the Trust needs to be settled.

The California insurance commissioner recently issued a warning titled "Living Trust Mills and Pretext Interviews." This notice warns that individuals selling annuities are unlawfully using the offer of a Living Trust as the means of obtaining an interview with unsuspecting clients and then eliciting the client's financial data. The clear implication is that their disservice is in providing a Living Trust as well as poor annuities. I agree that Living Trust mills have done all of us a great disservice and bring discredit on our industry. In far too many cases, these individuals are using the Living Trust as their means of promoting less-than-acceptable annuities. Nevertheless, to condemn the industry as a whole is unjust. In the more than twenty years in which we have been in business, we have provided more than sixty thousand Living Trusts and have settled well in excess of ten thousand Living Trusts without any problem.

Of course, the very fact that these Trust mills have provided clients with a Living Trust is anathema to the legal profession. How dare anyone divert individuals from the probate process? That's an outright attack on the income of the legal fraternity. My concern with

the Living Trusts provided by the Trust mills is more to the point. I would ask the following questions:

- Are the provided Living Trusts competent?
- Are the assets placed in the Living Trust, including the home?
- Does the client understand the Living Trust?
- Will the individual or company be around to settle the Living Trust when the time comes?

Granted, using the Living Trust to sell bad annuities is a violation of business ethics and a disaster for the client, but let us not throw the baby out with the bathwater.

### **Beware of False Prophets**

I recently issued the following warning to our clients: "There are numerous Trust mills operating throughout the country targeting seniors, using unscrupulous and aggressive telemarketers who have just enough knowledge to be dangerous. They will attack anyone's Living Trust and will use any scare tactic to get an appointment. The result is usually that an unaware buyer is sold a miserable Living Trust, with the ultimate objective being to market some other product of questionable quality (such as annuities). Don't be misled. If you are contacted, or harassed, by one of these telemarketers who tells you that your Trust should be replaced or changed--don't give the message any credence."

I suggest that you read the client letter included near the end of Chapter 3, which cites just this type of situation.

### **The Legal Fraternity Decides to Join the Living Trust League Rather than Fight**

Many members of the legal fraternity have decided that it is easier to join the Living Trust forces rather than fight the Will and Probate battle. Most of the resulting Trusts are simplistic; if your heirs have a problem in the future, the attorney can always resolve it---for a fee. The most insidious feature, however, is the settlement process. It has become standard for an attorney to take a Living Trust through an unnecessary administrative procedure, much like the probate process. Not only does

this step take unnecessary time, but also the typical fee is 5 percent of the gross estate. That's an improvement over the probate fee—but not by much. And it is totally unnecessary.

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### **Combating a National Disgrace**

In an effort to improve our service to communities nationwide, I created a nonprofit corporation, The Abts Institute for Estate Preservation, through which we give our advisers the most extensive estate-planning training possible and then award them with the title of Certified Estate Planning Professional (CEPP). We follow up annually with advanced institutes. If an individual fails to continue his or her education or to maintain our standard of ethics, we withdraw the CEPP credential.

### **REVIEW YOUR TRUST**

How is your Living Trust? My wife has an aunt whom we just moved into an assisted-living

facility in southern California. Years ago, I offered to do her Living Trust, but I never force myself on family members—or anyone else. She chose instead to get her Living Trust from a close friend and church member. While this man is a fine attorney with impeccable credentials, the Living Trust is not his specialty. He did the very best he could. Some months ago, she asked me to review the Trust and make any appropriate changes. I have spent the last two months consumed with rewriting and undoing what could have been a disaster. This was particularly important to me because my brother-in-law, whom I love dearly, is the successor trustee. I wanted to spare him the months of pain that he would have had to endure. Again, I must ask, how is your Living Trust?

If you have a Living Trust now, maybe it's time to get it reviewed to be sure that it's going to accomplish the goals for which you created it. A key question to ask is, "What will it cost to settle the estate?" And if I were you, I would get the answer in writing.