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Scams in the Marketing and Sale of Living Trusts: A New Fraud for the 1990s

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I. The Problem

An elderly couple in Connecticut paid $7,000 to a door-to-door salesman for preparation of a living trust after he convinced them that this was the way to avoid probate. They later realized that the lawyer who allegedly prepared the trust was in Arizona and virtually inaccessible. They also discovered that there were mistakes in the document, that they still needed to transfer their property into the trust, and that they had paid more than they would have been charged by a local lawyer. /1/ This couple learned the hard way that a technique that seems appealing as a means of avoiding probate or guardianship can involve high-pressure sales tactics, misleading or incorrect information, exorbitant prices, and a document that may prove ineffective.

A living trust is an estate planning tool or an alternative to guardianship that may be useful to some individuals in some situations. It is a complicated document that may affect an individual's tax liability or eligibility for public benefits, including Medicaid payment of nursing facility care. A living trust is created when an individual (known as the "grantor," "settlor," "creator," or "trustor") transfers real or personal property into a trust for management by a "trustee." The trustee may be an individual (including, in most states, the grantor), an institution, or a corporation. A living trust may be revocable or irrevocable; a hybrid document may be drafted so that the trust remains revocable until a certain event (e.g., incapacity) triggers a change to irrevocability. The trust may be funded at creation or left unfunded until the grantor's incapacity or death. Upon the grantor's incapacity or death, the trustee (or successor) manages or distributes the trust assets, avoiding guardianship or probate.

Many older people are unfamiliar with or fearful about probate and guardianship; the marketing and sale of living trusts to these people is an area ripe for fraud and abuse. Recently, a number of national and state-based companies have been using nonattorney, door-to-door salespersons in a marketing campaign directed at the older population. Other companies have sponsored seminars advertised to the public and often conducted by nonlawyers. Many of these businesses have adopted names similar to legitimate nonprofit organizations and providers of
aging services, causing confusion to consumers. /2/ These businesses often present themselves as membership organizations offering a variety of benefits including prepaid legal services, but the living trusts seem to be their profitmaking hook. /3/

Problems associated with these companies include (1) high-pressure sales tactics; (2) excessive prices; (3) misrepresentation of a connection or endorsement by a legitimate nonprofit organization; (4) overstatement of the cost difference between probate or guardianship and living trusts; (5) misrepresentation of the tax advantages of living trusts; (6) provision of inadequate or misleading written information about the benefits of "membership" in the organization; (7) a "cookie cutter" approach to drafting the trust documents that is often ineffective due to errors or noncompliance with state law; /4/ (8) sellers naming themselves as trustees; (9) sellers creating the trust, but failing either to transfer property into it or to advise the client that transfer must occur; (10) sellers failing to inform consumers of their right to cancel the transaction within three working days; (11) improper completion of forms and documents; (12) sellers using financial data gleaned from creating the trust to sell annuities and other financial products; (13) misrepresentation about the privacy of living trusts when distribution of assets is made public under inheritance and estate tax laws; and (14) fraudulent claims that the company has been approved by the attorney general.

State attorneys general and consumer protection officials, aging advocates, and bar associations are collaborating to identify problems and players, to educate consumers and advocates, and to develop a unified plan for further action. This article will discuss (1) legal actions brought by state attorneys general against companies selling living trusts; (2) attempts by state courts and bar associations to determine whether the sale of living trusts by nonlawyers constitutes the unauthorized practice of law; and (3) the roles that legal services and other senior citizens’ advocates can perform to address this new scam.

II. Actions by State Attorneys General

A number of attorneys general, as their states' highest consumer protection officials, have conducted investigations, issued consumer advisories, and filed both civil and criminal lawsuits against companies and individuals selling living trusts. These measures have led to some success in limiting the deceptive marketing and sale of living trusts to the elderly.

Sales activities by the American Association for Senior Citizens (AASC) are under investigation in many states. Maine's Attorney General filed suit against AASC in April, seeking an injunction and damages for violation of the state's Unfair and Deceptive Acts and Practices (UDAP) law and its Consumer Solicitations Sales Act. /5/ The state alleges that AASC sales agents distorted the costs and complexities of probate, misrepresented themselves as related to the American Association of Retired Persons, and failed to provide consumers with notice of the right to cancel within three business days. An investigation by the Massachusetts Attorney General resulted in AASC's signing an assurance that it would discontinue sales in that state, cancel all contracts with Massachusetts consumers, and refund all monies. /6/ AASC was also the subject of a consumer advisory by Michigan's Attorney General, /7/ who, on the same day, filed a notice of intended action against the company,
pursuant to Michigan's Consumer Protection Act, ordering it to cease and desist from certain unfair trade practices. /8/

But AASC is not the only group selling living trusts door-to-door. Within the past year, at least eight suits have been filed against other companies by attorneys general in several states. /9/ Two of these actions are criminal prosecutions, charging that the company and two of its agents practiced law without a license and failed to provide customers with notice of their right to cancel. /10/ The other lawsuits are civil complaints, alleging that the defendant companies violated UDAP and other consumer protection statutes. Many of the complaints raise other allegations, including that (1) sales agents fraudulently claimed that their level of skill in preparing trusts exceeded that of attorneys; (2) agents failed to disclose the drawbacks of trusts; (3) agents gave inaccurate advice regarding state law or failed to give pertinent advice; (4) drafters of the documents were not licensed to practice law in the state; and (5) agents failed to disclose that they were not lawyers and thus not authorized to practice law.

Each of the civil complaints seeks an injunction against continued sales activity in the state, restitution or damages to consumers, penalties, and attorney fees and expenses. Iowa's attorney general sought additional damages under that state's Elderly Victim Fund law. /11/ Under this law, defendants charged with selling to a vulnerable consumer population (those over 65) are required to pay an additional civil penalty. This sum is deposited in the Elderly Victim Fund to be used for investigations and consumer education activities. /12/

III. Unauthorized Practice of Law

At least two state supreme courts have acted on the issue of whether the sale and preparation of living trusts by nonlawyers constitutes the unauthorized practice of law.

In 1990, Iowa's Supreme Court established a formal Commission on Unauthorized Practice of Law. Using its injunctive relief powers, the commission has sued three living trust companies. It has won one case, settled another, and is awaiting decision on the third. It also has obtained assurances from other companies. /13/

The Florida bar, through its Standing Committee on the Unlicensed Practice of Law, conducted hearings after being asked

[whether it constitutes the unlicensed practice of law for a corporation or other nonlawyer to draft living trust and related documents for another where the information to be included in the living trust is gathered by nonlawyer agents of the corporation or by the nonlawyer and the completed documents are reviewed by a member of The Florida Bar prior to execution?]

The committee concluded in its advisory opinion that lawyers, whether members of the Florida bar or not, actually played no part in the preparation of these living trusts, and that attorney review as proposed was not sufficient "to remove the activity from the unlicensed practice of law." /14/ The Florida Supreme Court heard oral argument on the proposed advisory opinion on March 3, 1992, and a decision is pending.
IV. Role for Senior Citizens' Advocates

Senior citizens' advocates can take both proactive and reactive steps to address the living trust scam. Programs can provide community education sessions and materials on the issue, with emphasis on senior centers where these companies often target their marketing efforts. Consumer advisories and public service announcements developed by the state's attorney general may prove useful. Advocates can alert the aging network to these problems, educating service providers to make appropriate client referrals and to avoid unwitting promotion of these companies. They also can incorporate information about living trusts and these companies into their intake and counseling paradigms. Advocates can also forge or strengthen relationships with bar associations, consumer fraud agencies, and the state attorney general's office by working together to alleviate this problem. And, of course, advocates can bring litigation on behalf of their clients.

V. Conclusion

Lower- and middle-income older persons may be particularly vulnerable to living trust scams because of their lack of knowledge or fear of probate and guardianship and the expenses associated with those matters. They also are easy prey because of their inability or reluctance to hire an attorney for advice about and assistance with living trusts. Thus, scams in the marketing and sale of living trusts are an important issue for low-income seniors' advocates.

footnotes

1. Interview conducted by Robin Talbert with the Connecticut couple (Apr. 30, 1992).

2. E.g., the "American Association for Senior Citizens" or "American Association of Retired Citizens" might be confused with the legitimate "American Association of Retired Persons." Other companies with questionable names include "Golden Age Services" in North Dakota (which was sued by the state attorney general's office) and "Senior Citizens Information Center" in Michigan (which was the subject of a notice of intended action and cease and desist order issued by the Michigan Department of Attorney General).

3. Cover memorandum from Jeff Joseph and Bruce Piazza of the American Association of Retired Citizens (AARC) to Illinois insurance agents (Jan. 21, 1992) (promoting AARC living trust sales).

4. Examples range from the almost funny, such as instructions to record the trust in county records, used in states that have no county government, to the truly egregious, such as the use of trusts based on community property laws in states that do not have community property, and vice versa.


11. Christensen, Equity No. 28723.

