



LIVING TRUST SCAMS *and the* SENIOR CONSUMER

This guide is published as a public service
by the Texas Young Lawyers Association and State Bar of Texas.
It is intended to provide general guidance only.
It is not a substitute for the advice of a lawyer.

If you are age 50 or older, you should take special care when creating living trusts. Your age group is often a target of salespeople whose goal is to sell you something without carefully analyzing your needs.

It is easy enough to become a victim. Living trust sales are a growing area of consumer fraud. Con artists make millions of dollars every year selling unnecessary trusts. Each year thousands of consumers lose from \$500 to \$10,000 through the purchase of living trusts. Unfortunately, families often face greater costs after the consumer's death because of problems with poorly drafted or inappropriate trusts.

To protect yourself, follow these guidelines:

1. Take time when making your decision.

Do not fall victim to high-pressure “act immediately” sales tactics.

2. Seek the advice of someone trustworthy and knowledgeable.

Contact your accountant, estate planning attorney, banker, or financial advisor. Remember, only a licensed Texas attorney can legally assist you in creating a trust.

3. If you conclude that a trust may be right for you, deal directly with a licensed Texas attorney who has substantial expertise in estate planning.

If the attorney is board certified in estate planning and probate law by the Texas Board of Legal Specialization, he or she is presumed to have this expertise (though an attorney does not need to have this designation to be qualified to do your estate planning work). Membership in the American College of Trust and Estate Council is also a good indication that the attorney has the required expertise to assist you.

FRAUDULENT AND MISLEADING STATEMENTS USED IN LIVING TRUST SCAMS

Con artists promote their business by making false or incomplete statements about the probate process, guardianships, and the taxation of estates. Such statements include:

1. “Living trusts save taxes. Your estate can be reduced by a 40 percent death tax.”

MISLEADING. Most Texans’ estates will face no death taxation at all because estate tax is imposed only if your estate is valued at over \$11.58 million for deaths in 2020. If your estate is taxable, a will can accomplish exactly the same tax savings as a trust at a much cheaper cost.

If the value of your assets could exceed the applicable limitation, you should see an estate-planning attorney to minimize your potential estate tax liability regardless of who receives your property. However, a living trust is not required to take advantage of other techniques to minimize estate tax liability, such as portability, in which the surviving spouse uses the deceased spouse’s unused estate tax exemption.

2. “Living trusts will help you qualify for public assistance benefits.”

FALSE. A living trust will not help you qualify for public assistance benefits, particularly nursing home Medicaid benefits.

3. “Living trusts help you avoid contested wills.”

MISLEADING. Because a "trust" and a "will" are separate legal documents, a trust is not subject to a will contest. However, just like

wills, trusts are subject to attack on the basis of lack of capacity, undue influence, and fraud.

4. “Living trusts help you avoid your creditors.”

FALSE. During your lifetime, assets in a living trust are subject to the claims of your creditors. After death, these assets are subject to the claims of your estate’s creditors.

5. “Living trusts avoid the expense of a guardianship.”

MISLEADING. While a living trust might be helpful to avoid the expense of a guardianship in case of your future incapacity, there is no guarantee. A durable power of attorney may be a simpler and less costly way to achieve the same goal. The key is to work with a Texas attorney familiar with estate planning to assist you in determining which instrument is right under your particular circumstances. Also, Texas has adopted a “Declaration of Guardian in the Event of Later Incapacity or Need of Guardian” which allows you to designate your preference of the individuals to be your guardian if you are later incapacitated. The Declaration also allows you to disqualify persons you do not want to serve as your guardian.

6. “Attorneys charge from 3 percent to 10 percent or more to probate your estate.”

FALSE. If your family hires an attorney, his or her fee may be based upon an hourly charge or a flat fee. Rarely do attorneys charge a percentage of your estate and if they do, the rate would be considerably less than 3 percent. Most attorneys charge an hourly rate for their work.

7. “Probate takes years to complete.”

MISLEADING AND VERY UNLIKELY.

Nontaxable probate estates generally take a year or less to complete. There are rare circumstances where families and/or the IRS fight for an extended period after a death. Such disputes can cause delays in the administration of either a probate or a living trust. In most circumstances the administration of a living trust is no more time efficient than the administration of a will in probate.

8. “Probate requires excessive time and money.”

FALSE. Texas has adopted a simplified probate process under the Texas Estates Code. These independent administrations, which account for more than 80 percent of Texas probates, involve only one court hearing and the filing of an inventory or an affidavit in lieu of inventory. Independent administrations can be accomplished through a properly drafted will. They may not be available if there is no will. An even simpler procedure, probating a will as a muniment of title, may also be available in certain situations.

9. “Everyone should have a living trust.”

FALSE. While a living trust is appropriate for some people, the cost of creating, funding and administering a living trust outweighs the benefit for many people. It is important to decide what your needs are before creating a living trust. For example, the living trust can be an important device to enable a person to obtain assistance in managing assets. Many people lack the capacity to manage their assets, or have lost that ability through ill health. For people who own out-of-state property, the

living trust can help avoid the need to probate their will in that state. If neither of these issues applies to you, however, a living trust may not be an appropriate document for you. Note that under the law of some states, probate is complicated and expensive so that most people benefit from a living trust. You are fortunate to live in Texas, which has one of the most economical and efficient probate systems in the United States.

10. “The living trust is the only way to avoid probate.”

FALSE. If your goal is to avoid probate, there are several ways to do so. Joint tenancy with rights of survivorship and multiple party accounts with financial institutions are common and inexpensive methods of avoiding probate. However, always consult with an attorney before proceeding with these options, as they may conflict with your current estate planning or cause undesired side effects.

WHAT YOU CAN DO TO PROTECT YOURSELF

It is very difficult to get your money back if you are cheated in a living trust scam. So before you buy, and better yet, before you allow a salesperson in your home, remember:

1. Always take sufficient time to make your decision.

- Legitimate advisors understand when you want more information about their services or products.
- Be sure to talk with someone knowledgeable whose advice you value when considering a trust.
- Never respond to an offer you do not thoroughly understand.

- Avoid buying on impulse or succumbing to sales pressure to “act now.”

2. If you conclude that a trust may be right for you, deal directly with a licensed Texas attorney who has substantial expertise in estate planning.

- Be sure you are working with someone with the necessary training and education.
- If a trust is right for you, an attorney with knowledge of Texas law should draft it.

The laws that apply to trusts vary from state to state. Forms, kits, computer software programs, and websites may not be tailored to the requirements of Texas law. A licensed Texas attorney with expertise in estate planning should prepare, or at least review, your living trust. Also, a trust prepared by an attorney will generally cost less than the prices charged by trust salespeople, and the attorney’s malpractice coverage may provide recourse in the event of error or unforeseen circumstances.

HOW PEOPLE BECOME VICTIMS OF LIVING TRUST SCAMS

Con artists make false and misleading statements to older people through:

- 1. telemarketing and mail solicitations;**
- 2. door-to-door sales;**
- 3. “free” seminars and workshops, and;**
- 4. advertisements.**

Often con artists attempt to meet in your home through offers of a free living will, a free power of attorney, or a free estate analysis. Many also offer unnecessary partnerships, limited partnerships, family partnerships, and limited liability companies.

If you believe that you have been a victim of a con artist or a living trust salesperson, contact your local law enforcement agency.

If you believe you have been a victim of an attorney acting unethically, call the State Bar of Texas grievance information hotline at **800-932-1900** or determine if filing a grievance with the State Bar is the right option at **texasbar.com/grievance**.

While non-attorneys are not subject to State Bar rules, they may be practicing law without a license. To contact the Texas Unauthorized Practice of Law Committee, email **info@txuplc.org**, or visit **txuplc.org** to file a complaint about unauthorized practice of law.

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