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A PROFESSIONAL LAW CORPORATION

Lukinovich, APLC has law offices in Metairie and Baton Rouge, Louisiana. Our areas of practice include estate planning, wills and trusts, business planning, wealth preservation, probate administration and specialized fiduciary litigation.

Our mission is to devote our best skills, efforts and resources to advise our clients enthusiastically and creatively to accomplish their business, tax, family and estate planning goals and objectives, and we offer superior personalized attention with the utmost regard for privacy and confidentiality.

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## Baby Boomers Beware!!



Carl Servat

Have your newspapers and mailboxes been flooded with advertisements for a free dinner to hear about revocable living trusts? Since the first set of baby boomers is approaching seventy (70) years old, revocable living trusts are being marketed heavily, and this topic may be pertinent to our clients and referral partners. Many states (including the Louisiana Attorney General a few years ago in its Elder Fraud Prevention educational guide) have issued warnings to its residents about the marketing and selling of revocable living trusts. Promoters target the elderly, many of whom will not gain anything by utilizing a revocable living trust plan.

It is helpful to be familiar with a few terms to explain fully how revocable living trusts are marketed and how they work. When a person dies (the “decedent”), his property is classified as either “probate” or “non-probate”. Non-probate property generally includes all assets that pass to someone else via beneficiary designation, such as IRAs, annuities, 401(K) plans and life insurance. Non-probate property does not pass pursuant to a decedent’s will, but rather pursuant to the beneficiary designation or contract that the decedent arranged during his life. Probate property generally includes the decedent’s property that does not have a beneficiary designation governing its disposition. There are typically three (3) ways that a decedent’s probate property passes at his death: (i) by “intestacy” if the decedent had no will or had an invalid will at his death, which allows Louisiana law to dictate who inherits the decedent’s probate property (these recipients are called “heirs”); (ii) by “testacy” if the decedent had a valid will at his death, with such will dictating who receives what property (these recipients are called “legatees”); or (iii) pursuant to the provisions of a revocable living trust if the decedent created such a trust during his life (to the extent of the property titled in such trust), thereby avoiding the probate process, which is called a “succession” in Louisiana.

In the overwhelming majority of situations for our Louisiana<sup>1</sup> clients, our firm recommends that a client execute a last will and testament to govern the disposition of his probate assets at his death, via a succession, as well as a power of attorney to dictate who can manage his assets during his life in the event of his incompetency. In most cases, these two (2) documents afford clients the same end result without incurring the expense and on-going administrative monitoring that a revocable living trust requires. Although there are special circumstances in Louisiana when a revocable living trust is advantageous, careful analysis should be given to the mechanics of a revocable living trust to determine if it is truly the best solution for the client.

### **Structure**

A revocable living trust is created when an individual (the “settlor”) signs a trust instrument naming a “trustee” (who can be a person(s), a corporation or both) to administer the trust assets, typically providing that such assets be managed for the settlor’s benefit. In most cases, the settlor retains certain rights and powers over the trust instrument during his or her lifetime, which may include the right to instruct the trustee to pay all or any portion of the trust assets to the settlor and the right to change or revoke the trust at any time. The trustee’s powers typically include the right to make discretionary distributions of income and principal to the settlor and, sometimes, to the settlor’s family, if the settlor becomes incapable of managing his own affairs. When a settlor dies, the trust functions like a will to dictate what happens to the trust assets, and such assets are distributed to the beneficiaries as directed by the trust agreement.

Revocable living trusts often are marketed as a tool to avoid the succession process; however, in order to avoid the succession process completely, all probate assets of the decedent/settlor must be re-titled in the name of the revocable living trust during the settlor’s life, including securities, real estate, bank accounts, vehicles, etc. owned by the settlor at the time the trust is created. Further, all future probate assets acquired for the settlor’s benefit also must be titled in the name of the revocable living trust. Even if there is one single asset that remains titled in the decedent/settlor’s name at his death, a succession may be required to transfer such asset to the decedent’s heirs/legatees. Some revocable living trusts are funded at the decedent’s death via a “pourover” will that transfers all of the decedent’s remaining assets to the revocable living trust, but this structure does not avoid a succession.

### **Disadvantages of Revocable Living Trusts**

- (1) Re-titling of Property.** As noted above, in order to avoid a succession, all of the settlor’s existing property must be re-titled in the name of the revocable living trust. This is usually cumbersome and may involve additional legal fees and recordation costs. Once the revocable living trust is funded, all future assets purchased for the settlor’s benefit must be titled in the revocable living trust. Forgetting to title even one asset in the name of the revocable living trust will necessitate succession at the settlor’s death.

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<sup>1</sup> In some states such as California, a properly drafted revocable living trust is highly recommended because this arrangement will avoid the probate process and save the client’s heirs and beneficiaries significant fees and costs since local law requires the probate lawyers and courts to receive a percentage of the gross probate estate. Louisiana’s probate process is not onerous and does not require the decedent’s estate to pay a percentage to the lawyers and courts. Typical court costs in Louisiana range from \$500 - \$700 (depending upon which Parish is handling the succession administration and the type of work involved) and most lawyers will handle a succession by an hourly rate.

- (2) **Complexity.** Many promoters of revocable living trusts to married couples do not explain fully the consequences of the death of the first spouse to die. To comply with Louisiana community property law, typically the initial revocable living trust agreement must be divided into one or more subtrusts at the death of the first spouse to die, resulting in increased complexity and administrative burden for the surviving spouse. Often, the surviving spouse becomes frustrated and confused because of an inadequate explanation and discussion when the revocable living trust was created since most clients believe that the work is completed once the initial documents are executed.

### **Myths About Revocable Living Trusts**

- (1) **“Revocable Living Trusts Save Taxes.”** Revocable living trusts do not save income taxes, nor do they save estate taxes. In most cases, the property in a revocable living trust is treated as if it were the settlor’s own property for both income tax and estate tax purposes; consequently, the revocable living trust is tax neutral. A general statement that a revocable living trust saves taxes should cause a client to be concerned.
- (2) **“Heirs Cannot Challenge a Revocable Living Trust.”** Revocable living trusts, like wills, can be attacked by disgruntled heirs. In fact, it could be argued that a settlor of a trust needs to have a higher level of capacity because he must possess the ability to contract, whereas a person who writes a last will and testament merely needs to “comprehend generally the nature and consequences of the disposition that he or she is making.” Therefore, any promotional materials claiming that a revocable living trust cannot be challenged are completely false.
- (3) **“Revocable Living Trusts Protect Assets from Creditors.”** Creditors may reach the assets of revocable living trusts during the settlor’s lifetime.
- (4) **“Property is Distributed More Quickly from a Revocable Living Trust.”** Upon death, beneficiaries do not receive property more rapidly from a revocable living trust than from a last will and testament. The trustee needs to handle the “unwinding” of the revocable living trust which may include creating subtrusts and preparing accountings and other legal documentation to satisfy the beneficiaries or Louisiana law.

Alternatively, an independent executor designated in a last will and testament may sell, lease or otherwise dispose of assets of the succession without having to obtain court authority, giving the independent executor the flexibility to make interim distributions to the surviving spouse and other legatees of the decedent’s estate without delay once appointed by the Court. It typically takes less than a week (the time delay usually depends upon the availability of the judges to sign the order) to have an independent executor appointed to handling the decedent’s affairs.

- (5) **“Revocable Living Trusts Lower Administrative Costs.”** Generally, revocable living trusts do not lower commissions or legal fees. Both an estate’s executor and the trustee of a revocable living trust are entitled to receive commissions (although a will or a trust may require the executor or trustee to waive any commissions since family members typically serve in those roles). However, if fees are being paid, it is likely that the trustee of a revocable living trust will receive more in fees than an executor would receive through succession because the revocable living trust often is administered for many years before being terminated.

Further, most legal fees are incurred in connection with postmortem estate and trust administration. The distribution of assets from a revocable living trust may require that the trustee hire a lawyer to prepare the legal documents to terminate the trust, and the trustee may have to prepare accountings and other legal documentation to satisfy the beneficiaries or the provisions of Louisiana law. Finally, the legal fees to prepare and implement a revocable living trust are typically much higher than a properly drafted will and power of attorney.

### **Conclusion**

Revocable living trusts do have a place in the estate planning arsenal, in specific circumstances. However, many revocable living trust promoters will use generic, form-based products that do not consider Louisiana law and a client's particular circumstances. Revocable living trusts are marketed heavily to our aging population as a "one-size-fits-all" solution for everyone's estate planning needs and should be scrutinized with caution. Knowing the disadvantages and myths associated with revocable living trusts can help avoid needless expense and inefficient administration.



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