DUTTON & CASEY P.C.
ATTORNEYS AT LAW

79 West Monroe Street | Suite 1320
Chicago, Illinois 60603

Tel 312.899.0950
Fax 312.899.0959

Janna Dutton | Attorney
Kathryn Casey | Attorney
Helen Mesoloras | Attorney
Michaela Franco | Attorney
Melissa LaPointe | Attorney
Erin Vogt | Client Care Coordinator
Edward Stawicki I Of Counsel
Michael Wood | Of Counsel

Do You Really Need a Living Trust?

A geriatric social worker recently shared with us a conversation he had with an older woman who attends the senior program the social worker manages. The older woman, who I will refer to as Mrs. G, told the social worker that she attended a free seminar on living trusts after learning about the seminar from an advertisement in her local newspaper. Mrs. G told the social worker that the seminar discussed how living trusts help people avoid having their estates managed by a complicated and expensive legal process after they die. The social worker knew from previous conversations with Mrs. G that she did not want to burden her children in any way, including with her estate issues after she dies. Therefore, the social worker was not greatly surprised to learn that, shortly after attending the seminar, Mrs. G contacted the attorney who presented the seminar and paid the attorney to create a living trust for her.

When the social worker relayed Mrs. G's story to me, he sounded concerned about whether Mrs. G. had made a good decision. Mrs. G told the social worker that she paid the attorney a lot of money to create the living trust and she believed the money was well-spent. The social worker explained to me that Mrs. G is of very modest means, owning a savings account worth $10,000 and a mobile home of nominal value. The social worker asked me whether someone like Mrs. G, with so few assets and minimal savings, truly benefits from having a living trust. Below is a summary of my response to the social worker regarding living trusts, generally, and, specifically, my thoughts on Mrs. G's situation.

Living Trusts: A Way to Avoid Probate?

Living trusts are commonly marketed to the general public as a way to avoid having one's estate managed in probate court after one dies. Probate is the legal process of transferring assets from a person who has died to the person, people, or organizations designated in the deceased person's will or, if no will exists, to the deceased person's heirs. The general rule is that probate is necessary when a person dies and the assets owned solely by the person total more than $100,000 or include real estate—there are exceptions to this rule that an attorney may address after reviewing an estate. The probate process can sometimes be costly and time-consuming, especially for larger estates. For a small estate, however, the probate process can be efficient.

The theory behind a living trust, sometimes referred to as a revocable trust, is that, if all of a person's assets are owned by his or her living trust at the time of the person's death, then the person's estate will not need to be managed in probate court. This is because, as a general rule, courts do not oversee trust administration. Instead, the trustee of the living trust is charged with managing the trust. The person who creates the living trust may name himself or herself as trustee;

often times, however, the person creating the trust names as trustee a close friend, family member, or institution, such as a bank. The person creating the trust can also name a successor trustee to manage the trust in the event the original trustee dies or becomes unable to act as trustee, such as because of mental incapacity. Additionally, a living trust is revocable at any time prior to the death or permanent mental incapacity of the person who created the trust; in other words, once the person who creates the trust dies or becomes permanently mentally incapacitated the trust is irrevocable. In short, if all of a person's assets are titled or otherwise included in the living trust, that person's estate can avoid the probate process entirely.

There are other ways to avoid probate, however, which may be more appropriate for certain individuals than creating a living trust. For example, in Illinois, if a person leaves personal assets valued at $100,000 or less, such estate can avoid the probate process with a Small Estate Affidavit. A Small Estate Affidavit is a short document that lists the total assets in the estate and names the person or people who are entitled, according to the Illinois Probate Act, to receive those assets. Again, a Small Estate Affidavit is an option in Illinois only for estates that do not include real estate and with assets that total $100,000 or less—in other words, modest estates.

Another way to avoid the probate process is for a person to purchase certain kinds of assets prior to his or her death that allow the person to name a death beneficiary or a joint tenant of the asset. For example, most certificates of deposit, savings accounts, stocks, brokerage accounts, and many bonds can be made "payable on death" to a designated beneficiary or beneficiaries. Additionally, if an account names two joint tenants and one of the joint tenants dies, generally, the remaining living joint tenant automatically becomes the 100% owner of the account.

In Mrs. G's case, a living trust was not her only option for avoiding probate. Because of the modest size of her estate, Mrs. G could have relied on a Small Estate Affidavit to ensure proper distribution of her assets at her death. Alternatively, Mrs. G could have named her children as death beneficiaries on her savings account. Either or both of these options may have been less costly for Mrs. G (and her estate) compared to the cost of paying an attorney to create a living trust.

Living Trusts: A Way to Plan for Incapacity?

A living trust is an effective way for one to ensure his or her estate is administered according to his or her wishes in the event the person becomes mentally incapacitated. As previously mentioned, the person who creates the living trust can name a successor trustee to manage the trust in the event the original trustee dies or becomes unable to act as trustee. Thus, if the person who created the living trust named himself or herself as trustee and then subsequently becomes unable to act as trustee due to his or her own mental incapacity, the successor trustee is then responsible for administering the trust pursuant to the terms of the living trust.

Another, potentially less expensive, alternative to a living trust for the purpose of planning for mental incapacity is a durable power of attorney for property. An Illinois Power of Attorney for Property gives the agent named under the document the authority to manage the financial affairs of the person who created the document, referred to as the principal. Additionally, the principal of an

Illinois Power of Attorney for Property can, if he or she wishes to, specifically state in the document that the agent may act only after a physician determines that the principal is mentally incapacitated. Most financial institutions located in Illinois will accept a properly executed Illinois Power of Attorney for Property; however, out-of-state institutions holding an asset of the principal may not be as willing to accept the Illinois Power of Attorney for Property.

In Mrs. G's case, her savings account is held at a local bank in Illinois and her mobile home is also located in Illinois. Thus, Mrs. G could have executed an Illinois Power of Attorney for Property to allow, for example, one of her children to make financial decisions on her behalf if she becomes mentally incapacitated in the future.

Living Trusts: Who Really Benefits from a Living Trust?

A living trust may be most appropriate for a person who owns sophisticated assets of substantial value or for estates with assets that have a total value of at least $100,000 or which include real estate. For example, if a person owns equities, such as stocks, corporate bonds, mutual funds, or brokerage accounts, exceeding $100,000 in value and/or the person owns valuable real estate, then a living trust is a very effective tool for avoiding probate. Additionally, in the event of mental incapacity, the trustee of a living trust generally has an easier time exercising authority than an agent under an Illinois Power of Attorney for Property with regard to financial management of stocks, bonds, mutual funds, brokerage accounts, and assets held in national institutions. Specifically, financial institutions located (or with national headquarters) out-of-state may impose additional requirements for an agent under an Illinois Power of Attorney for Property, making the document difficult or impossible to use.

Thus, for individuals like Mrs. G, with a modest estate valued at $100,000 or less and without real estate, a living trust may not be necessary or the most economical legal planning option.

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For assistance with your estate planning, probate, and elder law matters, think of the attorneys at Dutton & Casey. We have over 90 years of combined experience in estate planning, probate, and elder law related matters. Our attorneys, Janna Dutton, Kathryn Casey, Helen Mesoloras, Michaela Franco, and Melissa LaPointe are here to assist you, and those you care about.

Partners Janna Dutton and Kathryn Casey are two of only a few certified elder law attorneys in Illinois. In addition, in 2016, they have been named 2 of the Top 10 Elder Law Attorneys in Illinois by Leading Lawyer network. In addition, Attorney Helen Mesoloras is President Elect of the National Academy of Elder Law Attorneys, Illinois Chapter.

312-899-0950 Chicago, Illinois
847-261-4708 Arlington Heights, Skokie, and Westchester, Illinois
www.duttonelderlaw.com
contact@duttonelderlaw.com (feb 2016)

Appointments are available in Arlington Heights, Chicago, Skokie, and Westchester, Illinois.