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MEMORANDUM REGARDING REVOCABLE LIVING TRUSTS

I prepared this memorandum to respond to the request of interested persons for information about whether they should create a revocable living trust. I have found it necessary to prepare this memorandum because of the large amount of false and/or misleading advertising about these trusts.

Most of this advertising is being done by businesses that are trying to appeal to unrealistic fears. These businesses generally fall into the following three categories:

1. Those businesses that are selling investments that have nothing to do with revocable living trusts. After these businesses have gotten your attention by appealing to unrealistic fears, they switch you to their real agenda which is to invest your money for you. This is a common sales gimmick.
2. Those businesses that make money serving as trustees.
3. Those businesses selling revocable living trusts whether you need one or not.

Unfortunately, some of the misleading advertising is being done by attorneys. I can only assume that these attorneys are not aware of the current law in Florida or that they are also trying to appeal to unrealistic fears.

Most of what is advertised about revocable living trusts leads one to believe that everyone needs a trust. I think revocable living trusts are great. I do them all the time for people who will benefit from them, but trusts are not for everyone. I have tried to write this memorandum impartially. I am not trying to encourage or discourage you from making a trust. Whether you make a trust is an individual decision based on your situation and your goals.

How the revocable living trust works. For a revocable living trust to work properly, you usually must transfer assets to the trust. In the typical revocable living trust, you appoint yourself as trustee. Therefore, you have complete control over those assets until your incapacity or death.

If you become incapacitated, a successor trustee who you selected uses the assets of the trust to care for you during your incapacity. Upon your death and after probate is done or after the two year statute of limitations expires, whichever is first, the successor trustee pays your bills and distributes the assets to the beneficiaries that you named in the trust.

Situations when revocable living trusts can be beneficial:

I. **A Revocable Living Trust Is Great for Special Needs Situations.** I often prepare revocable living trusts for people who have special needs. For example, I often have an elderly married couple come in where one of them is disabled because of stroke, Alzheimer's Disease, or some other disability, and the well spouse is handling all of the couple's affairs. The well spouse is fearful that if he or she were to die first, the disabled spouse would not be able to manage the affairs. A revocable living trust is the perfect remedy for this problem. The assets are transferred to the revocable living trust and the well spouse serves as trustee until he or she becomes incapacitated or dies. At that time the successor trustee would assume responsibility for managing the trust for the benefit of the disabled spouse.

II. **A Revocable Living Trusts Can Reduce Probate Fees in Larger Estates.** Under the Florida law, the reasonable fees for administering a revocable living trust are 75% of the reasonable fees for administering a will. In larger estates this 25% savings can be substantial. In smaller estates the probate fees are not that much and this reduction in fees are hardly worth the effort.

III. **A Revocable Living Trust Can Free You from Investment Responsibility.** Many people want a professional to manage their assets. If this is your concern, you can appoint a professional as trustee. Corporate trustees charge about one percent of the principal amount of the trust per year as their fee. Most corporate trustees have a minimum fee that is around \$3,000.00 per year. The peace of mind created with a professional, independent, experienced, fully insured corporate trustee may be well worth the expense.

IV. **A Revocable Living Trust Can Avoid Guardianship upon Incapacity.** If you become incapacitated, a court supervised guardianship is usually required to manage your assets. Guardianships are expensive, time consuming, and often humiliating for the person declared incapacitated. You can avoid guardianship by creating a revocable living trust and transferring all of your assets to it. Upon your incapacity, the successor trustee will take over management of your financial affairs and avoid the guardianship.

However, I usually recommend that my clients give a trusted person a durable power of attorney to avoid guardianship. While not as reliable as a revocable living trust for avoiding guardianship, the durable power of attorney is much less expensive and a fairly reliable way to avoid guardianship.

FALSE AND/OR MISLEADING CLAIMS ABOUT REVOCABLE LIVING TRUSTS. Advertisers and commentators often overstate the benefits of a revocable living trusts. This has led to a widespread misunderstanding of trusts. The following is a discussion of issues that frequently appear in advertisements that are either misleading or simply not true.

I. Assets in a Revocable Living Trust Are Not Subject to the Claims of Creditors. This claim is not true in Florida. The current Florida law makes assets in a revocable living trust subject to the claims of creditors.

II. Your Estate Will Avoid Probate If You Have a Revocable Living Trust. The most common reason that clients tell me that they are interested in a revocable living trust is to avoid probate. At one time this claim was true in Florida. However, under current Florida law, in most situations, a revocable living trust will not avoid probate.

As previously stated, Florida law makes the assets in revocable living trusts subject to the claims of creditors for two years after your death. This forces a prudent trustee to eliminate the claims of creditors before distributing the estate. To eliminate the claims of creditors, the trustee must either wait two years from the date of your death or probate your estate which shortens the waiting period to three months. A prudent trustee will usually choose to probate the estate and shorten the waiting period from two years to three months.

III. Assets in a Revocable Living Trust Are Distributed Sooner than Assets Subjected to Probate. This has never been true for estates required to file a federal estate tax return. The time required to prepare the Federal Estate Tax Return together with the time required for the IRS to review the return is generally 18 to 24 months. The typical probate estate takes five to six months.

This claim is also not true for Florida estates not required to file a Federal Estate Tax Return. As previously stated, if the estate is not probated, the trustee must wait two years for the claims of creditors to be eliminated. If the estate is probated, the waiting period is shortened to three months.

IV. A Revocable Living Trust Will Save Federal Estate Taxes. This claim is not true. A revocable living trust by its nature does not achieve any tax savings. The assets in a revocable living trust are subject to the federal estate tax just as are the assets in a probate estate. A revocable living trust with estate tax planning provisions can save estate taxes for married persons, but so can a will with estate tax planning provisions. The revocable living trust with estate tax planning provisions provides no tax saving over a will containing similar provisions.

V. A Revocable Living Trust Can Permit Distribution over a Long Period of Time. This claim is misleading. Many people have valid reasons for wanting to delay distribution of assets. An example would be to provide for a retarded child after your death. With a trust you may have the trustee make distribution at some later time or upon the happening of some specific event. However, one also can accomplish this with a will containing a testamentary trust. This type of trust does not take effect or have to be funded until after your death.

VI. **A Revocable Living Trust Does Away with the Need for a Will.** This claim is not true. When you have a revocable living trust, you still need a will (called a pour-over will). The will is necessary to dispose of any property that you did not or could not transfer to the trust.

VII. **A Revocable Living Trust Is Immune from Contest.** This claim is not true. The same legal arguments used in attacking wills can be used to attack a trust.

VIII. **A Revocable Living Trust Will Avoid Publicity.** Many persons promoting revocable living trusts have created the fear that all your financial affairs are going to be public when you die. In Florida the inventory is confidential, and the residuary beneficiaries can agree that no financial accounting is filed.

IX. **A Revocable Living Trust Will Insulate You from Pleas for Money.** This claim is ridiculous. With a revocable living trust, the money is not really tied up. You can take money out of the trust at any time. Consequently, the excuse is not an honest one. If one is going to lie anyway, it is easier to say the money is tied up and not bother creating the trust.

Estate planning is a constantly changing field, and there are many potholes. You should not use this letter as a basis to plan your estate without professional help. Each of us is in a unique situation. The use of "do-it-yourself" estate planning or a "will kit" is not much different from "do-it-yourself" hospital surgery.