IN THE SUPREME COURT OF FLORIDA

IN RE: THE FLORIDA BAR ADVISORY OPINION -- NONLAWYER PREPARATION OF LIVING TRUSTS

CASE NO. 78,358

LIVING TRUSTS AMERICA, NATIONAL FAMILY TRUSTS, MID-AMERICA LIVING TRUST ASSOCIATES, INC.

REPLY BRIEF

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ARGUMENT

This Reply Brief has been written as a rebuttal to the Standing Committee's Answer Brief and addresses specific issues raised therein.

I. ADOPTION OF THE PROPOSED ADVISORY OPINION IS AGAINST PUBLIC INTEREST

The living trust companies agree that the drafting of living trusts must be done by an attorney (Line 19, P. 5, Answer Brief).

The assertion beginning on Line 7, P. 6, Answer Brief is spurious and misleading because attorney Volk clearly was not censured by the Colorado Supreme Court "for participation in a scheme identical to those considered by the Standing Committee and before this Court." To the contrary, Volk was censured because she effectively replaced Macy as Taylor's corporate attorney and Volk apparently was unaware that Macy was an attorney who had been suspended for assisting Taylor (a nonlawyer) market trusts that had been written by Taylor, a nonlawver. The methods of Taylor were substantially different than those of the living trust companies at bar because these companies only use attorney drafted documents. As an example, the attorney-drafted trusts and programs of Living Trusts America have been reviewed and recommended by leading members of the American Bar Association.

The statement beginning on Line 8, P. 7, Answer Brief, is also

very misleading. Albeit true that in People V Schmidt, 251 P.2d 915 (Colo. 1952) the Court held that Schmidt's selling of living trusts constituted the unauthorized practice of law, the major distinction between Schmidt and with this case, is that Schmidt was a nonlawyer who had been holding himself out to be an attorney. No one has ever suggested that any of the companies represented in this brief are guilty of such outrageous behavior. Schmidt deserved to be punished; the companies do not.

If any living trust company in Florida has nonlawyer agents who either draft trusts or hold themselves out as attorneys, then let them be shut down immediately. There will be no quarrel from this quarter on that point.

But the Standing Committee would have this Court shut down all living trust companies irrespective of their marketing programs.

The Court must not because to do so it would violate the fundamental constitutional rights of some very good and reputable companies and would be damaging to the public interest because valuable estate planning services would be denied to a large segment of the population.

11. LIVING TRUST COMPANIES ARE GETTING NEW STANDARDS

Living Trusts America, National Family Trusts and Mid-America Living Trust Associates, Inc., only market trusts that have been drafted by attorneys. In fact, these three companies have gone to great expense to insure that their living trust documents comply

with both federal and state laws.

Because Living Trusts America has representatives in all 50 states, and all three competing companies eventually want to do business in all 50 states, they recently held a meeting in Sacramento, California, where significant steps towards establishing comprehensive industry standards were taken. These three companies agreed to the following principles:

A. Each company would continue to retain its own counsel;

B. Sales made in foreign jurisdictions would require that the customer hire an independent attorney who would represent the customer's interests. The customer's attorney shall be involved at all critical stages of the process;

C. Proper training is essential, e.g., before making any sales in a foreign jurisdiction, National Family Trusts and Mid-America Living Trust Associates, Inc. provide a minimum of six hours of training to their recruited marketing representatives. These educational programs are presented by their Corporate Counsels and the curriculum has routinely been approved for Continuing Education Credits (Please see the attached curriculum outline). Additionally, Living Trusts America has recently instituted an extensive correspondence training course for their recruited marketing representatives.

D. Safeguards to insure proper execution and funding of the living trust are required, e.g., a copy of a signed, notarized document must be sent back to the company along with proof of transfers of property into the trust. Furthermore, Living Trust

America's living trust documents are funded automatically with all non-registered property, through the signing of the document.

E. Before entering a new foreign jurisdiction, the companies will submit all marketing materials and trust plan documents to a qualified member of the bar for review and modification as necessary, e.g., Florida contracts must include Fla. Stat. 501.025, the 3-day right to rescind. Living Trusts America has already voluntarily submitted all such materials and documents for review to each of the Bar Associations of each of the 50 states.

F. The data that is collected from the customer by the marketing representative must be sent to the customer's own attorney who will contact the client to assess (1) the need for a trust; (2) the type of trust that would be best to achieve the client's goals; and, (3) what other documents may be required by the client.

At the close of the meeting it was agreed that these principles and standards would be submitted to this Court for consideration.

III. LIVING TRUST PROCEDURAL STEPS

National Family Trusts ("NFT") has developed and implemented a program in compliance with the Code of Professional Responsibility and has, therefor, been operating in Colorado, and many other states, for the past 18 months without any problems with the Attorney General. Also, Living Trusts America has operated in

Colorado since May, 1990. Living Trusts America had a complaint sent to the Unauthorized Practice of Law Committee, which was set aside by the Committee on April 3, 1991, and this company is still successfully operating in Colorado.

A. Gathering the Data

Since there is still some disagreement as to when an attorney is, or is not, required to participate, we will discuss the issues listed by the Standing Committee. NFT's program demands the independent evaluation and involvement of the customer's own attorney at every critical stage. Hence, when a trained marketing representative teaches the potential customer about living trusts and collects personal data, the data is immediately submitted to the customer's private attorney, therefor there is no incidence of the unlicensed practice of law.

Even the Standing Committee concedes that "... the taking of factual information in and of itself may not constitute the practice of law..." (Line 18, P. 7, Answer Brief).

Although a representative of Living Trusts America did explain at the January hearing that the company's policy did not require that its customers have their awn attorney, Living Trusts America has since reevaluated its program and has agreed, pending the outcome of this case, to adopt a similar program to the one used by National Family Trusts.

Mid-America Living Trust Associates, Inc., has already begun

implementation of such a program which will be in place and operating nationwide by January 15, 1992.

Program changes of this magnitude are not easily made nor inexpensively adopted. Retraining of marketing representatives is necessary and procedural guides must be revamped and distributed. Nevertheless, these three companies are committed to setting the highest possible standards of conduct in compliance with both the spirit and the letter of the law. The guidance of this Court is welcomed.

B. Assembly and Review

The concern of the Standing Committee regarding the conflicts of interest of the attorney, i.e., is he/she working for the company or customer (Line 17, P. 9, Answer Brief), has now been solved completely. As explained above, the customer will hire an attorney to represent him/her/them. The attorney receives no compensation from anyone other than the customer. The attorney owes no duty to anyone other than the client. Naturally, it is paramount that the attorney be a member in good standing with the local bar, and preferably, be one who is knowledgeable of living trusts. In this regard, the Court is probably aware that the pros and cons of living trusts are not taught in law schools and too frequently are brushed aside by traditional estate planning attorneys who seem to prefer perpetuating probate. These three companies, through their Corporate Counsels, are teaching many

citizens, lawyers and laypeople alike, the reasons why and how living trusts work.

C. Execution of Documents

There is no remaining point of contention here. The three living trust companies represented here have always incorporated proper execution into their training and are now requiring proof of execution. No further safeguards will be required because the customer has his or her own attorney who is already fully responsible for what flows from the transaction.

D. Funding of a Trust

We concur with the Standing Committee's concluding sentence, "The client is best served when the attorney and nonattorney work together." (Line 15, P. 14, Answer Brief). The living trust companies and their nonattorneys and their corporate counsels are very knowledgeable in this field and by working together, the best possible funding decisions will be reached. Corporate counsels provide easy access, via toll-free phone numbers, to the client's private attorney who may call for specific guidance on any living trust related subject. This back-up serves the clients and the local bar members as well as protects the public, By working together as a team, the company, the nonlawyer, the corporate counsel and the private attorney all join hands to "best serve the

client."

IV. THE PROCEDURES AND RECORD BELOW ARE INADEQUATE ESPECIALLY WHEN COUPLED WITH THE CONFLICTS OF INTEREST AND CONSTITUTIONAL LAW DEFECTS

The Standing Committee's Answer Brief regarding Notice misses the mark because even if advertisements were timely placed for the "public hearings", there was no real effort made to invite the public; but by contrast, bar members and sections were invited by letter (Line 14, P. 15, Answer Brief). Note that no effort was made to invite other estate planning professionals and there was no evidence of the use of press releases which is the best way to insure public awareness.

The Standing Committee admits that it "elicited the assistance of Alan Woodruff to act as voluntary counsel" (Line 13, P. 16, Answer Brief), but then has the audacity to deny that his memorandum had any "influence". This denial would be humorous were it not offered in such a solemn setting. Why did the Standing Committee solicit Mr. Woodruff's help? His memo was laden with erroneous information. The Committee would have been better informed if it had written letters to the living trust companies and solicited their input. To do from within that which required input from without, corrupted the entire process.

The Standing Committee would also have the Court ignore the fact that the Florida Legislature established an attorney to

layperson ratio of 3 to 1 in its Committee population but at the "hearings" there was an 11 to 1 ratio in favor of the attorneys. The Committee also argues that aggressive questioning by an attorney who announced a conflict of interest was not "improper" (Line 6, P. 18, Answer Brief). Not only was this improper, the resulting vote was tainted by these factors: (1) too many attorneys; (2) too many **built-in** conflicts of interest: **and,** (3) inadequate factual data from all interested parties.

The Standing Committee also argues in favor of a finding of ample evidence of public harm and regulation. Assuming arguendo that the living trust companies were to concede that there are inherent dangers in all estate planning documents (which they do not so concede), the central issue should focus on whether additional regulatory safeguards are needed.

The living trust companies, as stated supra, have taken the initiative in setting high standards. These standards, if adopted by this Court, will solve the problem for all concerned. The local bar will receive increased business. The citizens of Florida will be able to choose who they want to do **business** with. The **bar** and the citizens will all become better informed. Competition between the companies and local bar members will intensify and prices will be driven downward' by everyone for the benefit of everyone.

The Standing Committee spends **scant** effort addressing the constitutional law objectives raised by the companies. Of

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[1] In Sacramento, California, the average price for a living trust estate plan was $1,500.00 in 1988. By December 1991, the same trust was being marketed by attorneys at a price ranging from $395.00 to $1,000.00, with the average at 5750.00.

particular noteworthiness is the footnote argument on P. 29, Answer Brief. To argue that an Advisory Opinion, **if** adopted by the Supreme Court, "is not a statement of law" is to be ignorant of the power of this Court. If the Standing Committee is correct, then why does it use prior Opinions of this Court for authority? The overbreadth and vagueness protections of the constitution must be deemed applicable to all laws, whether established by this Court or by the legislature.

A similar criticism of the fallacies of the Standing Committee's argument arises in Line 16, P. 31, Answer Brief, wherein the Committee again says that because the Opinion is not a statute the commerce clause does not apply. It is the understanding of the undersigned that court decisions constitute common law and that such renderings may not violate the federal guarantees. If this understanding is correct then the argument of the Committee is wrong and should be ignored.

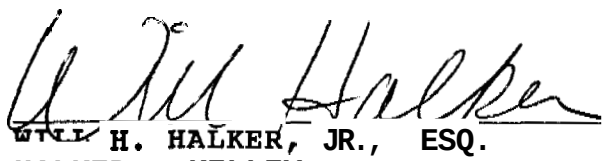
CONCLUSION

The purpose of this Reply Brief was to narrow the issues for the Court's consideration.

We urge the Court acknowledge the good faith efforts of the companies represented herein, and adopt or modify the proposed standards for program control and management as deemed appropriate. The Court should notice that these standards require the customer's independent attorney's involvement at each **critical** stage.

Should the Court disagree with one standard and not another, severance would be appropriate. If the Court declines to adopt either the Opinion or these standards, the living trust companies request appointment of an ad hoc committee, comprised of representatives from all concerned, to evaluate and recommend feasible alternatives that are less restrictive and constitutionally sound.

Respectfully Submitted,



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CURRICULUM OUTLINE FØR NEBRASKA SEMINAR

Purpose: Continuing Education for Insurance Licenses

Course Title: **Estate** Planning: Property; Gifts; Taxation; and Administration

I. Ownership of Property (1 Hour)
- Joint Tenancy
- Tenants in Common
- Community Property
- Separate Property
- Real Property
- Personal Property
- Life Estates
- Legal Interests
- Equitable Interests

II. Gifts (1/2 Hour)
- Transfers into Revocable Trusts
- Transfers into Irrevocable Trusts
- Valuation of Gifts (within 3 **years** of death?)

III. Taxation (1 1/2 Hours)
- Tax Advantages of Lifetime Gifts
- $10,000 per Donee per Year Exemption
- $600,000 Unified Credit
- Marital Deduction
  - Donor Must be a U.S. Citizen (trustees too!)
  - To Spouse (at time of gift)
  - Not a Terminable Interest
- Charitable Deduction

IV. Estate Administration (1 1/2 **Hours)**

OR

WITHOUT A WILL OR WITH A WILL	VS.	WITH A LIVING TRUST
- Probate		- No Probate
- Appoint Personal Representative		- No Delay
- Inventory Assets		- DistributeAssets
- Appraise Assets		
- Advertise		
- Pay Creditors and Taxes		
- Distribute Remainder		

V. Trusts (1 Hour)
- Types:
  - Living
  - Testamentary
- Elements:
  - Trustor/Settlor (Owner)
  - Trustee (Manager)
  - Beneficiary (One who receives benefits)
  - Property (Real and personal)
- Plus, up to 1.2 million dollars can be passed free of estate taxes by a married couple.

VI. Conclusion - Questions & Answers (1/2 Hour)

Property held in trust at death of trustor/settlor is not subject to probate. Therefore, anyone who owns more than $_____ worth of property in the state of Nebraska will benefit from a living trust estate plan.

QUESTIONS & ANSWERS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been forwarded by U.S. mail to the following individuals this 20th day of December, 1992:

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