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IN THE SUPREME COURT OF THE STATE OF FLORIDA

TALLAHASSEE, FLORIDA

IN RE:

FLORIDA BAR ADVISORY OPINION - UNLICENSED PRACTICE OF LAW NON-LAWYER PREPARATION OF LIVING TRUSTS

CASE No: 78,358

REPLY BRIEF

FAMILY LIVING TRUSTS, INC. OF FLORIDA

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ABBREVIATIONS

The following abbreviations will be used in this Brief:

Standing Committee - The Florida Bar Standing Committee on the Unlicensed Practice of Law

FLT or Company- The interested party herein, Family Living Trusts, inc. of Florida.

Living Trust Company - One of those entities engaged in the industry of marketing living trusts.

Living Trust - Unless otherwise indicated, the collection of documents developed to accomplish the living trust concept, including revocable intervivos trust documents as well as pour-over wills, various powers of attorney, designations of health care surrogate, declarations commonly known as a "living will" and other such documents.

Opinion - the proposed Advisory Opinion as propounded by the Committee, FAO # 91001.

UPL - The unlicensed practice of law.

ARGUMENT

The Answer Brief of the Standing Committee supporting adoption of the Advisory Opinion in this cause is flawed in that it overstates the case of public harm, does not contrast the alleged harm with public benefits and rests on arguments that are not supported by facts with any grounds for credibility, that could properly be used as a basis for review.

The Answer Brief primarily attacks the briefs filed by those in opposition to the opinion, and actually adopts in toto (Answer Brief P. 12) the brief filed by the Trust Law Section. This alignment makes clear the position of the Standing Committee as a biased body, intent not on placing an objective view before the Court, but on supporting the position and motivations of one of the natural competitors in the proposed activity, the entrenched legal profession, and its apparent spokesmen, the Florida Bar, and its subsections.

The specific arguments presented by the Standing Committee boil down to this: because there are agreed upon areas in the preparation of Living Trust documents that constitute the practice of law, the Supreme Court, rather than regulate those areas, should outlaw the ability of any entity to engage in activities that are not the practice of law, but are otherwise legitimate and helpful to the public.

THE APPLICABILITY OF VOLK

The Standing Committee apparently feels that because another state's Supreme Court has addressed one aspect of the issue, that

that state's holdings are conclusive in this matter. That is not so. Neither the facts, the type of action, nor the legal issues of that case, the case of People v Volk, 805 P.2d 1116 (Colo. 1991) are identical to the matter here.

Two items are, however, of interest in that case: First, the Volk Court found that there was no evidence that any purchaser of the trust suffered actual harm. And second, the Court found only that the potential for harm existed only because of the specific "manner in which Taylor's system operated". Volk at 118. This operation was such that, as the Court continues: " ...the purchasers did not have access to competent legal advice with respect to the effects and risks of the living trusts." And later, "...the respondent, as the lawyer apparently approving the trusts, had no contact with the purchasers." Ibid, emphasis supplied.

THE STANDING COMMITTEE'S CRITICISM OF THE FLT SYSTEM

In contrast to the facts of Volk, the "two tier" process suggested by FLT in its Initial Brief, and so categorized in the Standing Committee's Answer Brief, is actually a three part process in that the first leg, or tier is the non-practice-of-law activities by the non-lawyer representatives of the company giving out information only, facilitating access to the eventuating lawyer contacts only upon request, and facilitating ministerial duties in regards to funding. Then, between both practice-of-law tiers, there is lawyer-purchaser contact in information gathering, drafting, review, execution and funding.

This system, had it been the factual situation of Volk, might well have been perfectly acceptable to the Colorado Supreme Court. This one suggestion for proper activity that has been requested by this interested party to be mandated as allowable by this Court renders the holding of the Volk court decision inapplicable to this matter. In fact, the sheer variety of the "systems" suggested for this Court's consideration renders decisions elsewhere of marginal utility, and certainly without controlling influence save as to each narrow potential practice therein reviewed.

The proper relevance of other cases should be that while a particular system, such as that reviewed in Colorado, may not be found "good" - that decision does not render all other systems "bad" per se; and only begs the question that the Florida Supreme Court is herein being asked to render, ie: a decision on all potential activity, not on one specific pattern. And more especially the Supreme Court of Florida is being asked to tell the Florida entities affirmatively just what would be an acceptable system, including the regulatory aspects thereof.

Futhermore, as the Standing Committee states, "advisory opinions differ from prosecutions" (Answer Brief p 18). Therefore the use of the Colorado decision, a form of prosecution, as precedent is, by the Committee's own reasoning, inappropriate.

The Standing Committee also states that the question of attorney conduct was not before the committee (Answer Brief p. 19). Therefore, by its own reasoning, the arguments concerning

the value of the Volk case as well as the case of The Florida Bar v Consolidated Business and Legal Forms, Inc., 386 So.2d 797 (Fla. 1980) cited by the Standing committee are not appropriate to the matter, as they were precipitated by attorney conduct.

THE APPLICABILITY OF CONSOLIDATED BUSINESS FORMS

To address the concern the Standing Committee has with the process suggested by FLT in "tier one", the attorney gathering the information with which to draft the trust documents is clearly not contemplated to be an employee in the manner of The Florida Bar v Consolidated Business and Legal Forms, Inc, 386 So.2d 797 (Fla. 1980). The attorney's client is proposed to be the Company only for engagement and payment purposes: while for representation purposes, the client is the **"customer"**, the potential user of the trust, for whom the attorney is drafting the documents. This situation is analogous to the case in legal insurance arrangements or the common situation wherein one person hires the lawyer on behalf of another, as with a child for a parent, -the lawyer's duties and responsibilities remain clear that the **"customer-client's"** interests are foremost. It is clear that the proposed FLT process does not contemplate the many indica of employee status, including the provision of office space, support employees, salary arrangements, case handling, and hiring and termination practices treated at great length in the Consolidated Forms case. At the least, the Supreme Court is capable of drawing up a list similar to that in the case cited by several parties: The Florida Bar v Raymond, James & Assoc., Inc,

215 So.2d 613 (Fla. 1968) marking the distinctions between the permissible activities undertaken by "first tier" attorneys on behalf of the company and those on behalf of the client. The Standing Committee has not even suggested that the "second tier" attorney has any difficulty in this area. FLT feels that the "two tiers" provide not only a valid method of avoiding conflict of interest concerns but also a method of providing what is apparently the best method of guaranteeing a properly drawn document - review by one attorney of another attorney's work- something that is not automatically available under the Standing Committee's position that one attorney acting on his own is not just necessary, but entirely sufficient.

The proposed activities of the "second tier" attorney in the areas of review, execution and funding actually appear to be applauded by the Standing Committee. This attorney's advice might well be sought by the client in making his decisions. In fact, as presented by FLT, the plan has an advantage over the Standing Committee's attorney-only proposal as presently practiced in Florida because therein there is no guarantee that attorneys engage in this execution and funding practice as an integral part of their drafting of trusts. Presently, in fact, there is the fact that attorneys either leave this area uncompleted or add additional charges for executions and transfers thus possibly improperly encouraging the suggestion of more and more inclusions. The car-without-an-engine of the Standing Committee often sits in the attorney's office. (cf. Answer Brief P. 14)

FLT's reference in the Initial Brief is to the final paragraph of Page 6, The Florida Bar News, August 1, 1991, wherein the anecdote appears in the Proposed Advisory Opinion of an attorney neglecting execution and perforce funding. The Standing Committee, in desiring that the non-lawyers stay clear, has perhaps unwittingly made a hitherto unrequired act absolutely the continuing responsibility of attorneys. For, in the Standing Committee's position, all attorneys developing trusts have a mandatory continuing "tail" of responsibility for all initial and subsequent funding both as to advice and transfer (Answer Brief P.14). It is doubtful that many practitioners would welcome such a price for establishing the monopoly proposed by the Standing Committee. Apparently, the Proposed Advisory Opinion would have this effect even despite attorney attempts at limiting by prior expression the scope of engagement, without admitting that the entire engagement was as useless as the Committee's proverbial engineless car. (Answer Brief P. 14)

FLT would also point out that it has argued in the initial brief that financial institutions have a great self-dealing interest in this funding area. It is in this funding-step context that the Standing Committee retreats from its earlier repudiation of all possible non-lawyer participation (Answer Brief P. 12). If this was so clear from the Proposed Advisory Opinion, why did the Florida Bankers Association, the Certified Public Accountants of Florida and the Certified Life Underwriters of Florida feel compelled to submit briefs as interested parties defending their

activities if they didn't feel that their activities would definitely be affected if the original Proposed Advisory Opinion were to be adopted?

As the Standing Committee states, "the client is best served when the attorney and the non-attorney work together!! (Answer Brief page 14). But, in the instant cause, there can be no interpretation by the general public other than that the Standing Committee, together with its cohort in the Trust Section of the Bar, is attempting via the Proposed Advisory Opinion to wall off a section of practice exclusive to the legal profession. The trust companies and FLT merely ask the Court where their role is. The market place having proved by the very existence of the controversy that there is a role greatly desired by the public for a viable commercial alternative to both the attorney-only system and the bank-customer system.

PUBLIC HARM? - OR LACK THEREOF

The great public harm feared by the Standing Committee remains potential; the evidence anecdotal. In its Answer Brief, the Standing Committee does not address the participation of the banking and financial institutions in this industry and the potential or actual public harm (or lack thereof) associated therewith as described in FLT's Initial Brief. This industry segment as well as the legal profession will have serious questions to face, and be asked to respond to grievances which might well be brought in commercial and political as well as legal fora, if the living trust companies are outlawed or treated

differently under a law supposed to apply to all. The image of throwing the baby out with the bathwater is not inappropriate.

Instead, the public benefit is everywhere downplayed by the Standing Committee's information gathering process and Answer Brief. How many pleased clients were solicited for their opinions? Is there not a responsibility to compare and contrast public harm with public benefit to appraise the Court of the complete facts? This balance is lacking in the both the proposed Advisory Opinion and the Answer Brief.

Living trust companies generally believe the public potentially benefits in at least three ways from their participation in the industry: First, the public has at least one additional access to information about a subject that, once mostly in the hands of the legal profession has remained overly esoteric. Second, the public would have at least one additional avenue of access to the ready development of a valid trust and estate plan. In the FLT system, one that affirmatively incorporates attorney expertise, but does not require the uninformed client to brave the daunting attorney specialist's office ab initio. Thirdly, the public would have at least one alternative to consider as regards purchase price.

This last aspect has only been dwelt upon by the Standing Committee to imply that the prices of non-lawyers may in extraordinary circumstances be greater than fees of lawyers (Proposed Advisory Opinion, paragraph 2, page 7, The Florida Bar News, August 1, 1991). In fact, the fees for all the services

involved would be subjected to competitive market forces, and the services of attorneys acting alone in the market would come to reflect that. Thus not only is there a potential for business being removed from the sole control of the legal profession, but also the profit margin related to what can be charged as a going rate may be affected, with much greater potential in favor of the public.

Additionally, the Standing Committee **fails** to address the facts of the marketplace and the Florida community that the **trust** companies are not concentrating on a universal product for a undifferentiated market, but primarily attempting to bring the trust to the attention of what is rather a specific market segment too long ignored by the legal profession. As a general rule, subject to exceptions, simpler, more modest estates, estates with real property in two states facing potential multiple probates (a case with many recent retirees to Florida), estates of the elderly with concerns for in vivo health contingency plans, these are the natural markets of the trust companies. Complicated estates, larger estates, estates with intricate tax and asset holding considerations will still seek out more specially tailored legal advice. And, the living trust companies will on the whole actually be a source of identification and referral of those estates outside their competence to handle, to the benefit of the specialized legal profession.

The Standing Committee exhibits a lack of concern for (and

ignorance of) the public by its statement that it feels that few indigents have a need for living trusts (Answer Brief, footnote P. 25), as though this is an excuse for denying the living trust companies existence. Just because a product or service is not a physical requirement of life is no reason to outlaw it in our American capitalist system. Furthermore, there are legitimate reasons for the proper deposition of any size estate by way of living trusts without regard to its size (otherwise, why have a Statute of Wills at all, either), as well as the use of the living trust and its customary ancillary portfolio of documents for lifetime planning, especially useful in contemplating potential guardianships. Also, The Standing committee fails to realize that the standard of "indigence" for the affording of specialized legal services is much different from that of federal poverty studies analysis. The living trust companies are generally intending to serve a population by all accounts definitely underserved and outpriced by the legal specialists- the much maligned "middle class" of consumer-citizens.

THE RECORD AND ITS INADEQUATE EVIDENCE

This interested party, Family Living Trusts, Inc. of Florida, is referenced by name in the Standing Committee's Answer Brief by its reference to a letter of a Mr. Richard A. Leigh, purportedly an attorney, on page 19 of the Answer Brief, as appearing at Tab 4, pp. 46-48. The information in Mr. Leigh's letter is not sworn to, although he apparently attended a hearing where he could have been placed under oath. Mr. Leigh's letter

does nothing more than allege some hearsay evidence concerning statements purportedly made by FLT. Mr. Leigh has never contacted FLT, or copied FLT with this letter. This statement has never been subject to examination or cross examination, or contrasted with any form of explanation or defense by the accused, and is therefore by law of questionable veracity and credibility; especially given Mr. Leigh's possible if not probable, bias as an attorney with a potential personal and financial interest in seeing the elimination of the competition of living trust companies, and his lack of candor in apprising FLT of his accusation. Thus, viewed in a light favorable to the "accused," this accusation can only be supposed to have been for the purpose of defaming FLT before the committee with the purpose of eliciting just such a Proposed Advisory Opinion as did ultimately develop. This practice, multiplied many many times, and then relied upon by the Standing Committee in its promulgation of the unequivocally one-sided Proposed Advisory Opinion brings the basic fairness and legitimacy of the Standing Committee's process into question and mandates, as argued in FLT's Initial Brief, for a more thorough and unbiased investigation of the industry.

It is furthermore improper to begin with an investigation of the narrow activity presented as the question to be reviewed, and expand it post hoc into wholesale destruction. It is disingenuous of the standing Committee to rely upon a notice in the Tallahassee Democrat to apprise companies of a meeting in Miami. It is even more egregious to expect proper notice when it is

given only in the house organ of one faction, the Bar, and the obvious potential "victims" of the ultimate sanction (similar to the government's drastic and final action of taking in eminent domain, or the death penalty) are not noticed that their existence and livelihood is in actual fact being threatened. The Standing Committee's wholehearted adoption of the Trust Section's Brief begs the question of whether the Committee had in reality any intention of offering a differing opinion all along. The "attorney" position had many advocates within and without the committee; the companies were left in the position of unrepresented or self-represented defendants in a capital case, a circumstance that American jurisprudence feels is fundamentally unfair. To the untutored eyes of the public, it will inevitably seem as though there was a collusive arrangement between the Bar's Committee and the Bar's Section. The Supreme Court is the only entity that can exercise an unbiased judgement on behalf of the public and the endangered companies: justice owes those interests a much more thorough investigation and a much more independent opinion.

Further, the Standing Committee cites Mr. Leigh's letter as enclosing a trust containing improper provisions (Answer Brief P. 19). This trust may not exist. Lori Holcomb, Esq. of the Standing Committee has stated to FLT's counsel that the trust has had identifying marks blacked out. Mr. Leigh's letter itself does not identify the allegedly offending trust as FLT's. How much more of the same sort of "evidence" and "testimony" should be distrusted?

As to the Committee's having no objection to anecdotal evidence (cf. p. 20 Answer Brief), the above described instance concerning only one of the interested parties throws the entire process into doubt. What type of evidence would the parties like? the Committee asks (p. 20). This party would like that evidence that would be admissible in a court of law: not biased, not hearsay; subject to scientific standards of credibility and legal standards of rebuttal and cross examination - that is the only evidence an Appellate Court should properly deal with. If this matter were an ordinary appeal and the evidence relied upon by a lower court were shown to be thus tainted in the eyes of a appellate reviewer; would the case not be remanded for further taking of proper evidence by a proper trier of fact?

The Standing Committee specifically refers to the case of The Florida Bar re Advisory Opinion HRS Nonlawyer Counselors, 547 So.2d 909 (Fla. 1989), called HRS II (Answer Brief P. 20), and attempts to justify the evidentiary mass herein as sufficient for this Court to base a proper decision on, in contrast to that presented and relied on in HRS II. But then the Committee tries, via a footnote (p. 22, Answer Brief), to downplay the need for an ad hoc investigation at least on the minimal level of that mandated in HRS 11. The living trust companies have been consistent in arguing against the process, procedures and motivations of the Standing Committee in gathering evidence, and feel only at a minimum that an HRS II level investigation could save a decision by this Court in favor of the Proposed Advisory

Opinion from widespread criticism.

To keep the issues before the Court in perspective and to return to the initial incident that precipitated this matter, it must still be recognized that the Standing Committee has drafted a Proposed Advisory Opinion with an impact well in excess of the scope of the original question presented. The issue that began with a question of specific procedure has now ballooned to the attempted destruction of an entire industry. This is like developing a death penalty case using the standards of procedure and evidence of a traffic infraction. The Court has now an obligation to make decisions based on research conducted in keeping with the scope and scale of the impact and to mandate a process that is more objective and which will elicit more credible data. This process has antecedents in the HRS II case. Had the Standing Committee been consistent, and limited its Proposed Advisory Opinion to the narrow question originally presented, companies with a system such as FLT's would have had no reason to become parties to this matter. This is because these companies propose to operate in a fundamentally different manner, one that had already addressed the issues raised by the original question, and adopted a different method of operation, one that this party feels this court should mandate as proper.

CONCLUSION

The interested party herein is a living trust company whose existence is threatened. It has established standards and procedures described in its Initial Brief which it, in good

faith, and with justifiable legal, logical and historical support, believes comply with the requirements for a legal commercial venture. It has done this by identifying each potentially regulated activity and directing its undertaking by a proper person. It is motivated by legitimate commercial interests and the desire to serve the public. The proponents of the Proposed Advisory Opinion have argued the minutiae of the practice of law, gathered in a questionable manner a questionable body of support for their view, raised a false spector of great potential public harm, and have largely ignored the activities of lawyers and financial institutions already established (with no better claim to differential treatment than that they are already an accepted aspect of the market). The Proposed Advisory Opinion, therefore, is not the proper method of regulation in the public interest in this matter; it must be abandoned or drastically altered. This party asks that the matter be treated by a clear pronouncement by the Court of the propriety of the existence of living trust production companies, and the establishment of clear guidelines for activities in the field so as to recognize the proper roles for everyone concerned, lawyer, non-lawyer and public, and to base these guidelines on a foundation of proper information.

Respectfully submitted,

this 6th day of January, 1992.

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I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief has been furnished by US Mail delivery to the following; this 9th Day of January, 1992;

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