

## Legal Alert September 2006. **Wills & Living Trusts; A Necessity?**

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Business Motivational Quote.

"Your Worth consist of what you are and not in what you have" ? Thomas A. Edison.

Legal News.

The attempt to increase the rate of Value Added Tax, which is a consumption tax, has failed at the Nigerian National Assembly. The Legislators have in stead recommended an improvement in the machinery of collecting the tax, financial independence for the tax collecting agency, etc.

It is expected that the complete amendments to all the existing tax Laws in Nigeria with the contemplated new ones would come into effect before the beginning of the coming year, 2007.

Legal Alert. Wills & Living Trusts; A Necessity?

The perception that the making of a Will is a contemplation of immediate death has caused many people to permanently defer the consideration of the making or writing of a Will. This is in spite of the estate and business advantages of making a Will. You can visit our web site ?

[www.oseroghoassociates.com](http://www.oseroghoassociates.com) ? for basic information on Wills, Intestacy, Trusts, etc.

The making of a Living Trust, in the likelihood that you share the apprehension of making a Will, is an alternative legal method of ensuring that while you are alive, in good or bad health or for any other unforeseen circumstance, your assets and your dependants would be properly managed according to your wishes by your appointed individuals/institution as opposed to the Laws of your jurisdiction which may not be agreeable to your wishes.

What is a Living Trust?

A Living Trust has been described as a written legal Agreement between the person/persons creating the Trust, who is called the Trustor, and the person or Institution named to manage the assets of the Trust, who is usually called the Trustee. The person(s) who would receive the Trust Properties is/are called the beneficiaries while the person or Institution who takes over from any appointed Trustee is called the Successor Trustee.

One of the beautiful attraction of making a Living Trust is that the person who makes it can also name himself as the initial Trustee whilst he is alive! In the event of any form of incapacity, the Successor Trustee immediately steps into the Trustor's place without the complexities and costs

of engaging a Solicitor, applying for Probate, appointing a Guardian for Infants, death taxes, etc.

#### Advantages of a Living Trust.

1. It is a very flexible legal Instrument which the Maker can amend or revoke at any time provided he is in good mental capacity at the time of doing so.
2. It allows the Maker and his Trustees or Successor Trustees to manage the assets while the Maker is still alive! This guarantees a practice and fix strategy.
3. It allows for confidentiality and private management of your assets unlike a Will which must be filed in a public Probate Registry and is available for scrutiny on an application and payment of the probate search fees.
4. In the event of your unavailability for any reason ? i.e. travel, ill health, too busy, death, preference for professional management, etc ? it allows your appointed Trustees to, without the permission of a Court of Law, manage your assets in a professional and accountable fashion.
5. It is a probate tax avoidance instrument particularly as probate/death tax is above 10% of the value of the estate in many jurisdictions. This cost is in exclusion of Solicitors fees and other miscellaneous expenses. You can save your beneficiaries these expenses.
6. A Living Trust commences immediately it is executed and funded ? a Living Trust is funded when assets are transferred to it. This is in marked contrast to a Will which takes an average of four to eighteen months to obtain a Probate Certificate presuming that the Will is not contested.

#### Disadvantages of a Living Trust.

1. Initial set-up challenges and costs are associated with the creation of a Living Trust. The names and title certificates of all the trust assets would need to be changed including the names on landed properties. Associated expenses here would include Solicitors and registry fees.
2. A Living Trust has less legal protection, less judicial intervention and less public accountability.
3. Except for a reduction in death/estate tax, no direct tax reduction is foreseen. The possibility of double taxation of income when it is distributed to the beneficiaries of the Trust by the Trustee could occur.
4. Problematic if you contemplate regular trades in your landed properties or you are a real estate developer.
5. Not a complete substitute for the making of a Will. For example, in some jurisdiction, a Guardian cannot be effectively appointed for a Minor in a Living Trust though it is recommended that he is mentioned in the Living Trust; neither are assets acquired after the making of the Trust save those assets are purchased in the name of the Living Trust.

To remedy the above disadvantages, it is recommended that you have prepared both a Living Trust and a Will to protect your assets and beneficiaries.

## Duties of Trustees in a Living Trust.

The duties of Trustees under a Living Trust are both legal and contractual. The essential duties include:

- A. Fiduciary duty to the Trust, the Trustor, the beneficiaries and the society.
- B. Strict compliance with the instructions of the Trust.

A Court of Law can hold a Trustee liable where the Trust instructions are not followed.

## Taxation & Myths of Living Trust.

One of the common myths of a Living Trust is that it is a tax avoidance tool. Except for countries that are regarded as tax "heavens", most tax Laws are not interested in the legal vehicle or title under which assets are held and income is earned. All income are subject to taxation. Please consult your Solicitor for advice on the application in your jurisdiction.

Also, a Living Trust does not protect you or your estate/beneficiaries from your creditors. A Living Trust may only delay the ability of your creditors to trace your assets but it does not extinguish the debts.

Finally, a Living Trust does not exempt you from writing a Will. In its stead, it is strongly recommended that you have both a Will and a Living Trust, if that is what works for you.

## Conclusion & Last Word.

It is recommended that having worked very hard for your assets, you should have the added luxury of determining who it should go to when you are not around.

Estate planning and investment vehicles, apart from a Will and a Living Trust, include Joint Tenancy with right of survivorship, Financial Power of Attorney, Life Insurance Policy, etc.

It is necessary that you update your inventory of all your assets and liabilities, depending on your age and health, every two years.

The last word would be that not everyone needs to create a Living Trust. Consult an estate planner for more information. Where however a Living Trust is prepared, it should be executed in the presence of a Notary Public with another Witness, both present at the same time of the Trustor executing the Living Trust. While this latter requirement might seem to be superfluous, you can only do as much as possible to eliminate legal challenges to your instructions.

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