

REVOCABLE TRUST CAN BE BETTER

ONE OF THE MOST COMMON PLANNING TOOLS BUT IT CAN DO SO MUCH MORE

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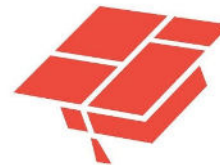
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Better Revocable Trusts Are Possible

ENHANCE THIS COMMON TOOL TO DIFFERENTIATE YOUR PRACTICE



Better Revocable Trusts are an Opportunity for Advisers

- Revocable trusts have become ubiquitous in estate planning, so much so that it is common for estate planning lawyers to get calls from prospective clients “I need a trust.” That frequent comment belies the many ways a good revocable trust plan can benefit you and your loved ones. While many people like the simple magic bullet, you need to understand what revocable trusts can do for you, how they can do it, and options you may have, to plan well. The magic bullet of “If I have a revocable trust I avoid probate, my family won’t have any issues” is unfortunately overly simplistic, and wrong. It may feel good, but it likely won’t do enough good.
- With a bit more thought and effort, and yes some additional complexity, you can make the power of a revocable trust plan (not just the document but the plan surrounding it) really accomplish important protections for you and your loved ones.
- There are tax consideration, optional plans, and special applications each of which can differentiate in a positive way a better revocable trust from the typical revocable trust.

Identify Real Client Goals Which A Typical Revocable Trust Won't Address

- Too many people are bamboozled into believing that avoiding probate is the issue. That is a valid planning goal but consider that clients need a comprehensive plan not just a form revocable trust:
- You own a residential rental property or home-based business. There could be significant potential liability from either endeavor, or a lawsuit could jeopardize your financial security. Having that business or rental property held in an entity, like a limited liability company, could insulate your personal assets from such a claim. That could be far more important than trying to avoid probate.
- Your estate is large enough to face a state or federal estate tax. More is in order than an online or boilerplate revocable trust that often doesn't address tax planning at the level your heirs need.
- If you don't have a proper budget and financial plan you could run out of money. That is not a theoretical issue and even many seemingly wealthy people spend too much relative to their wealth. Yes, avoiding probate is worthwhile but not if you are spending at a rate that you may have no assets.
- Do you have proper insurance coverage: life, long-term care, medical, liability, property, disability, etc.? If there are gaps in necessary insurance coverage that may eclipse probate avoidance in terms of importance for your security.
- Do or might you have an heir with special needs, mental health or addiction issues? Addressing the implications of these challenges and how they can be helped in your estate plan should be your priority.
- What are your real needs?

A Better Revocable Trust Plan Addresses Aging

**AVOIDING PROBATE IS THE MANTRA BUT OFTEN NOT THE MOST
IMPORTANT APPLICATION**



Elder Abuse is Epidemic, Plan for It

- In 2020, there were 176 women for every 100 men aged 85 and older. In 2023, life expectancy at birth for males, it was 75.8 years, and for females, it was 81.1 years, indicating a difference of 5.3 years. As a result, planning for the elderly including the use of revocable trusts, should address the unique perspectives and concerns of elderly women who are single, or whose husbands have predeceased them.
- According to the FBI seniors (60+) targeted by fraudsters suffered losses of \$3.4 billion in 2023, an almost 11% increase in reported losses from 2022. Financial exploitation is systematically underreported, meaning actual losses are likely substantially higher. It is likely impossible to know the real magnitude of these issues.
- Technology scams like phishing, investment fraud, and even romance scams are leading avenues for financial abuse. Merely signing a revocable trust, even a well-crafted document, without more will not safeguard you from a romance scam or a family member or caregiver using a power of attorney to steal your wealth.
- Who generally commits these crimes is shocking to many: family members, caregivers, and trusted advisers or proxies. The people you feel you can trust the most may be the ones actually stealing your wealth.

Protection Requires More than Just a Trust Document

- A key to securing better protection is to incorporate into both the planning and your legal documents checks and balances. These are critical to your protection. More can be done than what many “typical” revocable trusts address:
- Consolidating and simplifying financial accounts makes it easier for you and others you trust to track finances and identify issues earlier in the process.
- Having an independent CPA monitor financial transactions can be prudent, but it will incur costs. If those costs are beyond your reach perhaps an independent family member or longtime family friend who is not an heir or fiduciary might be willing to assist for less cost.
- Requiring the consent of an independent co-trustee, and/or a trust protector for certain transactions, may provide protection. Using a separate trust tax identification number might make it more difficult for someone to reach revocable trust assets if they scam your Social Security Number.
- Provisions can be included in the revocable trust for a named person, perhaps a trust protector, to change trustees, governing law and situs.

Trustee Selection, Provisions and Transition

- The traditional revocable trust often names you, the person creating the trust (called settlor, grantor or trustor) as sole initial trustee. Typically, a child or other family member is named as a successor. A broader perspective on the appointment of trustees and other fiduciary positions in your revocable trust may enhance protection. Consider:
- Make an honest assessment of your current health and cognitive status. Should you serve as the only (sole) trustee, or should you have a co-trustee to assist you? Or perhaps your situation is such that you should not serve at all?
- If you have a co-trustee to serve with you, or if you have successor co-trustees to serve when you no longer can serve, should co-trustees both (or all if more than two) be required to sign any check or document and unanimously agree on all actions? That is more protective but also potentially more cumbersome. What if a co-trustee is on vacation when an action is necessary?
- Should you name only family trustees? Many do this without further thought. Some do so because they believe family won't charge a fee for serving as a trustee. But take an objective look and discuss with your professional advisers, who makes sense to serve? If you have a beneficiary with addiction issues, for example, naming a family member they have a strong relationship with as trustee or successor trustee may not put that person in a conflict position with the beneficiary that could be harmful to really helping.
- Should you name a trust protector to provide a check and balance on the trustee? Who would you name? Knowing that there is an independent person that can monitor the trustee, and remove and replace the trustee if advisable, may give you more comfort in selecting a particular person to serve as a trustee.
- Should the powers and rights of the trustee be different when different persons serve as trustee? This is almost never done.
- The bottom line is that there are many options for whoever should serve, how the trustee provisions should be tailored to your specific situation, who should be expressly precluded from serving (e.g. an ex-spouse), etc. Too often not enough thought is given to what may be the single most important decision to protect yourself and your loved ones.
- There is another aspect to this, the transition to the successor trustee. Transitioning from you as the creator of your revocable trust to whoever you choose to be the successor when you cannot serve is one of the more dangerous inflection points in your revocable trust plan. It is that gray area where things can go wrong. Does your successor trustee even remember their role? How will your successor trustee know to take over from you? Often when someone begins to lose capacity, barring an acute medical event or brain injury, it is a slow and gradual process. At which point on that continuum do they take over?

Accountability: The Law Weighs Competing Goals which May Not Protect an Aging/Infirm Client

- The law often recognizes that revocable trusts are really intended to protect the settlor, you, and your privacy. The law often views a revocable trust as a functional equivalent of your will and you have the right to change your will at any time before death to almost anything you wish (e.g., subject to state law limitations like the right of a spouse to receive a certain percentage of your estate, called a spousal right of election). If your revocable trust is akin to a will it should be no one's business what you do with it or how you change it
- So, there is a tension in the law as to protecting you and your wishes and providing a check and balance on the trustee. Understanding this suggests that who you select as trustee, the state law you choose to apply to your trust, the checks and balances you integrate into your trust document, could all be critical to protecting you and your wishes. But in most cases this level of thought is not given to the plan and trust document.
- Thus, there may be an issue in some of the state the laws governing the application of revocable trusts to protecting aging or infirm clients. This gap in the protection that a traditional revocable trust can provide is significant and should be addressed in a robust revocable trust. The law treats a revocable trust as a will substitute. UTC Sec. 603. As a result, the remainder (successor) beneficiaries may not be able to obtain information about your trust while you are alive (e.g., an accounting), or otherwise question the use of revocable trust assets. The law in many states provides that while you the settlor are alive, the trustee has no obligation to report to remainder beneficiaries. The state of the law makes it difficult for interested parties to protect the grantor or the grantor's wishes. This is contrary to the application of revocable trusts to safeguard aging or infirm client. So, draft and plan accordingly.

Drafting to Make A Better Revocable Trust to Protect Aging Client

- Proactive steps should be taken when planning and drafting a modern revocable trust to address this shortcoming in the law and thereby ensure that while a settlor/beneficiary is alive but "fading" that protection is in place.
- Consider perhaps an institutional trustee, professional trustee, or at least an independent co-trustee (e.g., not a beneficiary under your trust).
- Name a CPA or other professional adviser in a formal role as monitor and have the trust instrument give specific rights and powers.
- Name a trust protector to serve in a fiduciary capacity and have the trust instrument give specific rights and powers.

Why I Have an Institutional Trustee on Every Trust for My Own Family

- As you age, or your health issues worsen, is it really fair to impose the responsibility of paying bills and handling other administrative tasks on a family member?
- Is the family member you would name capable of these tasks? Paying bills, investing and other fiduciary tasks are often not so simple.
- Have you realistically evaluated the time and responsibility imposed on a family member by tasks that might be better handled by a professional trustee.
- Is it really appropriate to burden a family member with investment decisions?
- Even assuming a family member has the knowledge to make investment decisions, if there are other heirs, there is liability exposure. Saddling one heir with investment decisions could create significant exposure. Many individual trustees do not adhere to the processes and procedures that institutional trustees have to comply with under the Prudent Investor Act and other trust formalities.
- The safeguards that an institution can bring, the potential to eliminate issues that might cause family strife, and the reduction or elimination of burdens and responsibilities for heirs, may be a better approach.
- A bank or trust company may be able to provide you with significant services and benefits to you as you age. An institution may assist not only with investment management but also with financial forecasting to ensure that your financial goals will be met, maximize assets to be bequeathed to intended heirs, and also help with many other aspects of your finances, such as bill paying, credit card management, and more as is appropriate for any particular phase of your aging, incapacity, or disease. But you have to ask to be sure and there are differences in what various trust companies or banks typically do.

Planning to Make A Better Revocable Trust to Protect Aging Client Requires Action Not Just Documents

- To protect yourself in addition to the safeguards in your trust document discussed earlier, you should build a planning team and address this risk. If you have professional advisers (CPA, attorney, wealth adviser), fiduciaries (trustee, successor trustee, trust protector), and family that you believe could be helpful with protecting you, coordinate them all.
- Having a periodic web meeting to be certain everyone knows their role, how their responsibilities fit into your bigger planning picture, and who else is involved, could be helpful.

Better Revocable Trusts Include More than Trustees

PROTECTION AND FLEXIBILITY WITH NUANCED ROLES



Trust Protector

- Naming a trust protector may be an important step in naming trustees and evaluating who will serve and under what parameters.
- This step is a significant and vital change in the application of a modern revocable trust.
- If a trust protector is appointed, consider expressly designating that person to serve in a fiduciary capacity. Although many commentators believe protectors always act in a non-fiduciary capacity, the law is not fully clear, so specifying this can avoid any issue as to status. The protector, as a fiduciary, should have standing to sue and protect the grantor from improper acts of a successor trustee.
- The trust protector this is a person for whom you specified in the trust document specific powers that they are given. Common powers include the right to remove and replace the trustee, change the situs and governing law (e.g., to a state with more favorable trust or tax laws), etc. Using a trust protector is recommended for other reasons discussed below. But then, you have to consider who you named to that role. Hopefully, someone independent and with integrity.
- In some instances, it might be advisable to limit the trust protector's replacement power to solely naming a successor institutional trustee to avoid the risk of the protector appointing himself or herself or someone who will do his or her bidding, thereby undermining the safety of the client's plan.

Care Manager

- If you now or in the future may face aging or health issues another precautionary step that may be helpful is to integrate a care manager's provision into your revocable trust. Care managers are typically social workers, registered nurses (RNs) or comparable service professionals. They can comprehensively evaluate your physical health and wellness, memory and mental health status, functional abilities, informal and formal social support networks, and living environment. They can make recommendations for your care based on the information gathered from the assessment, coupled with an understanding of your wishes. Care managers can be knowledgeable about the resources available to you, and the economic impact of the care required over time. Care managers can coordinate the experts in different specialties so as to establish a comprehensive plan of care for the client.
- This input can be valuable to the estate planner in crafting a plan or guiding your family on implementing a plan, because it provides professional expertise to tackle issues that family, financial advisors, and legal service professionals don't have the expertise to address.
- Include a mandate that the trustee must receive, perhaps once per year but more frequently if called for, a report from an independent care manager evaluating your status. The trust could require that the care manager issue a written report to the trustee, trust protector, agent under your health care proxy, and perhaps even one or more family members. This can provide independent verification of the status of the grantor/client and detect a range of problems that otherwise might not be noted.

Monitor

- You might consider adding a monitor role to your revocable trust.
- A person could be named, and given express authority to review financial statements, check books, and similar financial records for your revocable trust assets and activity. They have no further authority other than being able to receive periodic statements, review them, and to notify anyone on a list of names of their findings. So, for example, if the monitor identifies suspicious activity they may be able to notify the trust protector of their findings and the trust protector can investigate further and choose to replace the trustee.
- Depending on who you have serving as trustee and trust protector, you may benefit from this additional role. The rights and powers of the monitor may be expressly include a right to receive a copy of your trust and any amendments, the right to demand records from the trustee, the authority to demand statements from banks and brokerage firms, etc.
- Having the position be a non-fiduciary role so no standards apply, may make it safer for a professional such as your CPA or attorney to serve.
- In many cases the trust protector may be given these powers. In other situations, you might choose to divide the role as between a monitor and trust protector for added checks and balances.
- See New York General Obligations Law §5-1509 which permits appointing a monitor for a financial power of attorney. That framework may provide information and concepts to apply in the context of a similar position for your revocable trust.

Require a Named Person To Consent to Modification or Revocable of the Trust

- The hallmark of any revocable trust is that you can modify or revoke it at will. But is that always a positive option to have?
- If you are competent and change your mind you should have the unfettered right to change or invalidate your trust. However, as people age or their cognitive abilities decline there is a wide continuum from the point of unquestioned competency to being incapacitated. Too often when someone is in that gray continuum and inching closer to incapacity, nefarious people take advantage of them. You don't want a child or caregiver to convince or pressure you to modify your trust to leave them more money.
- As you become increasingly fragile you may not have the ability to resist the pressure.
- If your revocable trust required someone independent like your CPA, attorney, long time friend is not a fiduciary or heir, to have to approve any modification or revocation of your trust, that may provide a valuable safeguard to prevent you from being manipulated.

Powerholder Who Can Make Trust Irrevocable Triggering a Completed Gift

- Since you can revoke or modify the trust at your whim the assets of the trust are included in your estate for estate tax purposes.
- In 2026 the federal estate tax exemption is \$15 million inflation adjusted so few taxpayers worry about estate tax. Many states have much lower exemption amounts. Also, proposals to lower the federal estate tax exemption to \$3.5 million with no inflation adjustment have been proposed. Thus, even if you face no estate tax today, you may in the future.
- What if at the time you need to do estate tax planning (e.g., because the exemption will be made dramatically lower) you do not have the capacity (i.e., you are incompetent) and cannot change legal documents. You may be precluded from completing the tax planning you would have otherwise wished to do. If you have an independent person (not a beneficiary) the authority to make your revocable trust become irrevocable (e.g. by having the right to unilaterally terminate your right to modify or revoke the trust) the assets in your trust may be deemed gifted at that moment to an irrevocable trust.
- If you are to remain a beneficiary of the trust your trust would have to be moved to one of the approximately 22 DAPT states that permit you to be a beneficiary of a trust and yet make a completed gift.

Coordinate Ancillary Appointments, Designations and Documents

- Depending on your relationships with the people you name, and your circumstances, different permutations of each document may refine and improve how well you are protected and served. But there is more to this concept than just these two documents that you should tend to. Consider any of the following that apply to you:
- You should give thought to who is named agent under your durable financial **power of attorney** and co-trustee and successor trustee under your revocable trust. Who are the authorized signers on your safe deposit box? Opening a safe deposit box that is held in your name following your death will require probate. That alone may defeat your goal of avoiding the probate process. You might give up the box, or create an entity to own it that doesn't end with your passing.
- The Social Security's Administration (SSA) has a **Representative Payment Program** that provides for financial management for a recipient of Social Security and SSI payments who are not capable of managing your Social Security or SSI payments. You might name the successor trustee under your revocable trust.
- Long term care lapse rates are surprisingly high and the main cause is incapacity. Generally, an insurer cannot cancel a policy for failure to pay premiums unless the grace period provided for in the policy passes and notice of the premium due is given. While traditionally the premium notice has been only sent to the insured, that has not proven sufficient to prevent large lapses in long term care policies. For example, an elderly insured might have mobility challenges or start experiencing cognitive issues before being diagnosed as having dementia, when presumably the policy would begin payment. The industry has responded by permitting the insured to designate someone to receive a notice of a pending lapse.
- For a detailed analysis of more positions see Martin Shenkman and Sandra Glazier, "The Lack of Coordination in Estate Planning Documents & the Potential for Best Laid Plans to Go Awry," LISI Estate Planning Newsletter 2576 (August 24, 2017) at <http://www.leimbergservices.com> .

Get a TIN for the Revocable Trust

EVEN IF YOU CAN USE YOUR SOCIAL SECURITY NUMBER, SHOULD YOU?



Get a Tax ID Number, Don't Use a Social Security Number

- Do you need to obtain a Tax Identification Number (TIN) for your revocable trust or can you more simply use your Social Security Number for the trust and trust accounts? For most people and most revocable trusts you can probably use or Social Security Number. That avoids having to change the tax identification number on your investment accounts that you transfer to the trust. This will be discussed below. But even if you can use your Social Security Number, might you be better off obtaining and using a Taxpayer Identification Number from the IRS for your trust instead? Perhaps. Consider:
- Identity theft is rampant consumer losses in 2024 topped \$12.7 Billion. “The Social Security number (SSN) has essentially become the cornerstone of the identity framework... The SSN has become the lynchpin to identity theft.” Even if you are not required to obtain a new identification number for your revocable trust perhaps you would want to do so as it may deflect some of the potential attacks on your identity and assets.
- Revocable trusts do not require many formalities as compared to irrevocable trusts or entities, like limited liability companies (LLCs). While that can be favorable as that may make it easier to administer a revocable trust, it also has a negative implication. Then informality often results in people not transferring assets to their revocable trusts, not adhering the proper formalities such as having the trustee sign documents in their capacity as trustee, and the trust may not be front of mind for family, successor trustees, or professional advisers. Obtaining a trust Tax Identification Number, even if it means the extra effort of changing identification numbers on accounts, a simple trust income tax filing, etc., the result may be more awareness and attention to your trust. That may help you better accomplish all trust goals. This is especially important for some of the special applications of revocable trusts discussed below.
- Obtaining a trust Tax Identification Number is simple and cost nothing. Go onto the IRS website and complete Form SS-4.
- At some point, e.g. when you die, or if your revocable trust becomes irrevocable (cannot change it, e.g. by someone given the power to do so exercising that right). So, using your Social Security number is always temporary.

Special Uses For Revocable Trusts: Residence

THERE ARE MANY CREATIVE APPLICATIONS AND SPECIAL PLANNING
SITUATIONS



Residential Real Estate and The Revocable Trust - General

- If you are struggling with health or aging issues, or may in the future (and no one can be assured that they won't) having your home held in your revocable trust may not only avoid probate, but it may also facilitate a successor trustee, especially an institutional trustee, being in better control to protect you and your home.
- If you name a professional or institutional trustee who is based in a different state from the state where the home is located, consider a single-member limited liability company (LLC) to own the home rather than the trust owning it directly. Then you can transfer the LLC that owns your home to your trust. The residential property might then be deemed an intangible asset and not be subject to the laws of a state other than where the corporate trustee is based. Because a single member LLC is disregarded for tax purposes, this may have no negative income tax impact.
- While it is very common for people to have a home or vacation home owned by a revocable trust that decision is often more nuanced and nettlesome than the simplistic view most take:
- Transferring your home to your revocable trust might disqualify you for a senior citizen's property tax discount program. In some cases, the transfer to a revocable trust won't disqualify you, but if the house has to first be transferred to an LLC that may.
- In some states your primary residence may qualify for homestead protection, or protection as tenants by the entirety (a special form of joint ownership when spouses own a home) either of which may limit the right of a creditor to reach your home. That can be incredibly valuable protection. There are lots of stories of famous people in trouble who moved to a particular state just to take advantage of this rule. So, if you do have any measure of protection be certain to verify what happens to the protection, if any, afforded to your home if you transfer ownership to an LLC then your trust or just directly to your trust. If you lose protection you might opt not to make the transfer. Consult a real estate attorney for ways by which you might still avoid probate while retaining the protection of your home.
- If you plan to transfer your house to your revocable trust be certain that before the transfer you review the plan with your insurance consultant and update your homeowner's insurance coverage and excess personal liability coverage (called umbrella coverage) to see what may have to be amended to reflect the trust as owner.
- Plan for the tangible property in your home as well. This is art, furniture, collectibles, etc. If your home is to be transferred to your revocable trust, perhaps you might consider also transferring the contents too.

Residential Real Estate and The Revocable Trust – State Tax and More

- **Example:** A New York resident (domiciliary) would be subject to New York estate tax on death if her estate exceeds the New York estate tax exemption amount. Currently that is about \$7 million but proposals have been suggested to lower that to a mere \$750,000. Whatever eventually happens, there may always be uncertainty. That same person owns a Massachusetts vacation home. If the Massachusetts home is owned directly (i.e., real estate in Massachusetts) the value of that property could be exposed to Massachusetts estate tax at death if in excess of the Massachusetts estate tax exemption. This could be the case even though the person is a New York and not a Massachusetts resident. Massachusetts taxes non-resident decedents on Massachusetts real estate. A Massachusetts estate tax return may be required, and a Massachusetts estate tax lien may attach to the real estate, which must be released before sale or transfer of the home. The lien is designed to assure that the tax is addressed.
- If the home is transferred to a limited liability company (LLC) then the interests in the LLC owned by non-residents are treated as an intangible asset instead of real estate. That is true even if the LLC owns Massachusetts real estate. So, on first pass, putting the house into an LLC (which then may be transferred to your revocable trust) solves the Massachusetts tax problem. That may not be the best answer. You should consider whether transferring the vacation home to an LLC could jeopardize the home sale exclusion of gain should you make the vacation home your primary residence in the future. Note that if you did that you would be subject to income tax in Massachusetts as well. You could also face taxation in both states. States, unlike countries, don't always have arrangement to avoid taxation by more than one state of the same income.
- If the New York estate tax applies to your estate in New York (or will if the exemption, the amount you can pass estate tax free, is lowered) and you contribute your Massachusetts vacation home to an LLC, you may avoid Massachusetts estate tax, but then since you have converted the real property to an intangible assets if you remain a New York domiciliary, you will then be subject to a New York estate tax on the value of the Massachusetts home. That could defeat any benefit from the planning and depending on the relative tax rates, could be worse than had you done nothing at all. If that is coupled with the loss of the home sale exclusion, using an LLC could overall be a detrimental plan. The problem with the planning and analysis is that whatever you do you must both consider the risks and negative tax consequences, and the risks of changes in the law in the future.
- A common misconception in this type of planning is that if you put the Massachusetts vacation house into a revocable trust, that avoids Massachusetts estate tax. That, as explained above, is incorrect. A revocable trust does not change the character of the asset so that the trust will still own Massachusetts real estate. Thus, Massachusetts estate tax and lien exposure may remain unchanged. The LLC may succeed in avoiding Massachusetts estate tax because it should change the character of a real estate asset into an intangible asset, not because it is an estate planning vehicle.

Special Uses For Revocable Trusts: Joint Trusts

THERE ARE MANY CREATIVE APPLICATIONS AND SPECIAL PLANNING
SITUATIONS



Joint Revocable Trusts

- If you and your spouse create a joint revocable trust in a community property state (Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington and Wisconsin) on the death of the first of you all assets in the trust, no matter which spouse created them, receive a full basis step-up (adjustment). This very favorable tax result occurs because, for federal tax purposes, each spouse is treated as owning an undivided one-half interest in all community property.
- What if you and your spouse reside in a state other than one of the nine community property states? Some suggest that you can still qualify for a full-basis step-up on all asset in that trust. Some advisers believe that merely using a joint revocable assures a full basis step up on all assets in the trust as if those assets were community property. That probably does not work. Merely creating a joint trust in a non-community property state does not facilitate a step up in basis on all trust assets of each spouse on death of the first spouse. The fact that many advisers believe this and do this does not make it correct. If you're told that this is the case, inquire as to the legal basis for this as many suggest this is simply not the proper result in a non-community property state.
- There does not appear to be support for a basis step up in non-community property state with a joint revocable trust.
- Apart from the basic issue, some lawyers routinely create joint revocable trusts for spouses living in non-community property states. Some suggest that this simplifies trust administration, but it often does the opposite. Title or ownership of assets in such a trust must be carefully delineated in the terms of the trust document and the attached schedules. It is not uncommon that everyone involved misunderstands the terms of the trust as to asset ownership, that formal transfers between joint/tenant in common and each spouse's separate shares is not always addressed, and that the schedules attached to the joint revocable trust need to be carefully prepared and kept up to date.

Perhaps Consider a JEST Technique for Basis Step Up

- What if you live in a non-community property state and want a stronger position that all the assets in your joint revocable trust receive a basis step-up. There is another more technical approach that may give a better position to argue for a full-based step up, although there are naysayers for this approach as well. The technique is referred to as a “Joint Estate Step Up Trust (JEST).
- Some suggest that this is a viable option for a couple in a non-community property state to achieve a full basis step based on each spouse having a GPOA. More specifically, if you contribute assets you own to the joint trust those are included in your estate, and qualify for a basis adjustment, because you contributed the assets to the trust and have the right to control their use by modifying or revoking the trust as to those assets. You also, under the JEST technique arguably have a general power of appointment over your spouse’s assets on your death causing those assets to be included in your estate as well.
- There are several technical issues with the JEST according to some opinions. One is whether you can effectively have a general power of appointment while your spouse still controls those assets as you control yours. Can you have a GPOA over property owned by another person during the period when the trust can be revoked? If that doesn’t work then you only get a basis step up on your contributed assets and there is no full basis step up on the first death. If that is the result there may be no benefit to you from creating a JEST in a non-community property state. However, some may view a JEST as at least providing a more supportable position than a less sophisticated or more traditional joint revocable trust if you are in a non-community property state.
- Another technical issue is whether there is a deemed gift from one spouse to the other spouse at death? That gift may not qualify for the unlimited estate tax marital deduction. If your estate is taxable, and the IRS attacks your joint trust on that basis, it could be quite costly.

Special Uses For Revocable Trusts: Protect Separate Property

THERE ARE MANY CREATIVE APPLICATIONS AND SPECIAL PLANNING
SITUATIONS



Separate Property Revocable Trust vs DAPT

- Although a revocable trust does not provide protection from the claims of your ex-spouse, it can serve as an inexpensive tool to segregate premarital, gift and inherited assets from marital assets and thus reduce the risk that your spouse during a later divorce might succeed in a claim that those assets are marital property that he or she should be entitled to share in.
- Retaining assets under trust name, and under a separate trust tax identification number rather than your Social Security Number, may serve to maintain the integrity of the immune nature of those assets.
- The better approach is to create a self-settled Domestic Asset Protection Trust (DAPT) in one of the more than 20 states that permit such trusts. While that may provide better protection than the special application of a revocable trust discussed below, using a DAPT is very complex, costly and requires creating a trust in one of the states that permit them. If you live in one of those states this technique should be less costly than if you don't, and more secure since your state law respects that type of trust. For those with sufficient wealth and worries over divorce, a DAPT may be worth discussing. But if the cost, complexity and risk of a DAPT are a concern, a special revocable trust to only hold separate non-marital property may be another less costly approach. It will not be as secure or effective but may be an improvement over doing nothing.

Separate Property Revocable Trust

- Create a revocable trust (one tailored to this specialized use as discussed below) to own these separate property assets. If you create such a trust and transfer all separate immune property to the trust, that might help preserve the sperate nature of the assets by serving as a separate independent accounting entity that is less likely to be commingled, and which makes the proof of retaining the separate property nature of the assets easier. How so? The trust that will own the property is a separate legal entity. You can monitor the assets transferred into the trust to assure it only owns separate property assets.
- You can document the source of those assets, perhaps in an attached exhibit.
- The trust should be operated independently of your personal assets.
- Create a separate revocable trust just to hold separate or non-marital property. Even if you already have a revocable trust, segregating separate property should be done in a separate revocable trust used only for that purpose.
- Include precatory (descriptive) language in the beginning of your revocable trust stating the purpose and intent for the trust. That way, if there is any future challenge to the trust your intent will be clear. “The purpose of this trust is to hold separate property assets to maintain the characterization of those assets as separate property assets. No assets shall be given, or transferred in any manner, to the Trustee, and no Trustee shall have the authority to accept any assets into this Trust Agreement that is not inherited or gifted assets to the Grantor from a person (but expressly excluding the Grantor’s Spouse) and that is documented and confirmed as constituting separate non-marital property.”
- Since the purpose of the trust is to assure that the assets do not become marital property you might go further and provide that your spouse is not a beneficiary. You may also not want your spouse to serve as a trustee so that the spouse cannot argue in the future that their efforts enhanced the value of the property and that therefore they should have rights to the trust property

Special Uses For Revocable Trusts: Be Careful What You Sign

THERE ARE MANY CREATIVE APPLICATIONS AND SPECIAL PLANNING
SITUATIONS



Always Read the “Fine Print”

- Revocable trusts are about one of the most common estate planning documents. But common doesn't mean you can ignore the details of the trust's language or ancillary documents you as trustee may be asked to sign.
- **Example:** You are buying a new cooperative apartment to live in. At the closing you have your revocable trust purchase the new coop be bought in the name of your revocable trust. The cooperative corporation requires that you as trustee of the buying trust sign their standard form to approve your new apartment being held in your revocable trust has the following clause in it:
- *“No change, amendment, modification or revocation of the Trust Agreement shall be effective unless same is authorized by the Trust Agreement and this Agreement and until the Cooperative consents thereto in writing and receives and acknowledges receipt of any such change, amendment, modification or revocation by Certified Mail, Return Receipt Requested to the then Managing Agent for the Cooperative with a copy sent in the same manner to Tough Lawyer, Esq. at 123 Main Street, USA.”*
- The coop lawyer says they can't change the agreement; it's a “standard” legal form and “Everyone else has signed it so why are you complaining?” She's probably right. Most consumers sign whatever “standard” form is put in front of them. What might the consequences of this clause be? The provisions of the documents the coop provided restrict your ability to amend your revocable trust which has nothing to do with the coop management, protecting the coop, or anything that the Coop should care about. The agreement could and should provide that if you change your revocable trust any provision in the amended trust that contradicts or supersedes the agreements you made with the coop are void. That would seem reasonable to protect them. But this provision goes way further and prevents you from amending your revocable trust without their permission (it's not effective). If you want to add a \$10,000 bequest to your alma-mater, you need coop permission! And permission must be approved by the formulistic and assuredly time-consuming approach of getting coop approval and having that sent via certified mail to both the managing agent and the attorney for the coop.

Conclusion

Revocable Trusts



Conclusion And Summary

NOT BOILERPLATE

- There are a myriad of ways to tailor the drafting and planning for a revocable trust.
- As with all planning identifying real goals beyond an obvious and often immaterial goal of avoiding probate is essential.
- There are many opportunities by carefully planning and crafting fiduciary and other positions to accomplish client goals.

ANCILLARY STEPS ARE VITAL

- There are many creative ways to tailor application of revocable trusts. They can help aging clients, those with health issues, protect assets from a future divorce, facilitate tax planning, and more.

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Contact Information

We welcome your comments,
suggestions and inquiries