REVOCABLE LIVING TRUSTS

Get the Facts

A PUBLICATION OF THE REGISTERS OF WILLS OF MARYLAND

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OVERVIEW

The purpose of this booklet is to inform you about revocable trusts, including their advantages and disadvantages, and to debunk myths regarding these instruments. Its contents have been developed jointly by the Estates & Trusts Law Section of the Maryland State Bar Association and the Offices of the Registers of Wills. It is provided for informational purposes only and does not constitute or is intended to constitute legal advice. Please consult an attorney for legal advice.

What is a Revocable Living Trust?

A revocable living trust (also called a "revocable trust" or "living trust") is an arrangement you create to manage your assets during your lifetime and, like a will, to distribute those assets upon your death. A revocable trust can be a useful tool for managing your assets during any period of incapacity. It also avoids probate for the assets held in the trust, because trust assets are "non-probate" property.

Understanding Probate

Probate is the legal process to determine whether a decedent's will is valid. The Register of Wills and Orphans' Court then supervises the distribution of the assets the decedent owned individually at the time of his or her death, other than assets passing by beneficiary designation, pay on death designation, rights of survivorship, or held in a revocable trust. These are known as probate assets. If the decedent had a will, the assets will be distributed to the beneficiaries named in the will.

Non-probate property includes life insurance death benefits, retirement plan proceeds, and jointly owned assets. These assets are not controlled by the decedent's will. Upon the owner's death, they transfer automatically to the named beneficiaries or joint owners, and thus avoid the probate process. The assets held in a revocable trust are also non-probate property. They are not subject to the terms of the decedent's will and instead transfer upon his or her death to the beneficiaries named in the revocable trust agreement.

The Settlor

There are three parties to a revocable trust, the settlor, trustee, and the beneficiary. Typically you fill all three roles, although there may be circumstances when you would not want to serve in one role—the trustee. The settlor (also called the "grantor") creates the trust. The settlor has the power to transfer property into the trust, remove property from the trust, amend or revoke the trust, and change the trustee and beneficiaries. As the settlor, you maintain these powers for as long as you are competent.

The Trustee

Unless you direct otherwise, you are also the trustee and continue to control your property, just as you are doing now. If you ever lose the ability to competently manage 2 your affairs, a successor trustee you have named in the trust agreement can take your place as trustee. This person would also act as the trustee upon your death.

The Beneficiary

During your lifetime, you are the trust's primary beneficiary. The trustee manages the trust property for your benefit in accordance with the trust agreement. Upon your death, however, the trust agreement acts like a will and provides for the distribution of your assets to your beneficiaries, either outright or in further trust. As long as you transfer your assets into the trust before your death, the assets do not go through probate.

Advantages of Revocable Trusts

The advantages of incorporating a revocable trust into your estate plan include the following:

- ***Minimize or Avoid Probate***. A revocable trust can help you minimize or avoid the probate process for any assets you transfer into the trust during your lifetime. As an essential part of setting up your trust, you will need to transfer (that is, retitle) your assets into the name of your revocable trust. Assets that are not retitled may still be subject to the probate process. Depending on the nature and scope of your assets, avoiding probate may, but is not guaranteed to save time and money and streamline the administration of your affairs upon your death.

- ***Minimize or Avoid Ancillary Probate***. If you own real estate in more than one state, having a revocable trust may enable you to avoid a separate probate proceeding, called "ancillary probate," in the states where the property is located.

- ***Managing Affairs During Life***. A revocable trust can be useful for someone in poor health who wants someone else to manage his or her assets. A general financial power of attorney can also serve this purpose and tends to be less complicated and expensive than a trust. It is important to note, however, that while a financial power of attorney terminates upon your death, a trustee's asset-management powers under a revocable trust continue after your death.

- ***Revocable Trusts Ensure Privacy***. With probate, the terms of a will and a list of the decedent's probate assets are filed on the public record. By contrast, with a revocable trust, neither the trust agreement nor the trust assets become part of the public record. Still, using a revocable trust cannot guarantee that your assets will remain completely confidential.

Disadvantages of Revocable Trusts

While revocable trusts can be useful under certain circumstances, there are also disadvantages to consider before determining whether a trust makes sense for you.

- ***Complexity***. Revocable trusts are generally considered to be more complicated estate planning tools than wills. You will have to become familiar enough with the language of trusts to make good decisions regarding what you want to include in your trust agreement. If you make the effort, however, you should get an estate plan that works well for you and carries out your planning goals efficiently.

- ***Funding the Trust***. After you sign your revocable trust agreement, you will need to transfer your real estate, bank accounts, investment accounts, motor vehicles, and other titled assets into the trust. To do this, you will need to change title from your name to the name of your trust. Some assets should not, or cannot, be transferred into your trust, and your attorney can discuss these with you. Your attorney can help you with some of this work, such as preparing a deed for your home, but funding your trust is an essential part of the process. **NOTE**: Failing to transfer your assets into the trust before your death will diminish or eliminate the benefits of having a revocable trust because these assets may still be subject to probate.

- ***Cost***. Incorporating a revocable trust into your estate plan will cost more than a will, but it may bring about savings after your death if the trust is properly established and funded. Because of the complexities of revocable trusts, your attorney will spend more time setting one up than would likely be necessary if you used a will instead. Costs vary from attorney to attorney, so be sure to ask for an estimate before work begins.

Debunking Myths about Revocable Trusts

SEVERAL MYTHS SURROUND REVOCABLE TRUSTS, INCLUDING THE FOLLOWING:

- **REVOCABLE TRUSTS REDUCE TAXES.**
- **PROBATE MUST BE AVOIDED.**
- **ONLY REVOCABLE TRUSTS CAN BE USED TO MANAGE AFFAIRS AND AVOID GUARDIANSHIP.**
- **REVOCABLE TRUSTS SAVE TIME AND MONEY.**
- **REVOCABLE TRUSTS CAN BE USED TO AVOID CREDITORS.**
- **REVOCABLE TRUSTS ENSURE PRIVACY.**

CLAIM: Revocable trusts reduce taxes.

FACT: Revocable trusts do not save estate, inheritance, or income taxes.

As the settlor, you are treated as the owner of the trust assets during your lifetime. As a result, all the income the trust assets generate is included in your income. Similarly, upon your death, the trust assets are included in your estate for federal and Maryland estate tax purposes. Strategies for minimizing Maryland and federal estate taxes (such as using the federal and state estate tax exemptions, the unlimited marital deduction, and the charitable deduction) can be incorporated into a will or a revocable trust. Thus, despite the claims of some living-trust advocates, a revocable trust provides no income tax advantages while you are living or estate tax advantages upon your death.

After your death, however, a trust that continues and does not terminate may be able to change the state which has the authority to tax the trust's income (e.g., from Maryland to another state). Under some circumstances, this could reduce state income taxes and may be easier to accomplish if you created the trust under a revocable trust agreement rather than a will.

CLAIM: Probate must be avoided.

FACT: Probate is relatively uncomplicated in certain cases.

Although some advocates of revocable trusts argue that probate must be avoided at all costs, in Maryland the probate process is usually efficient and relatively uncomplicated. There are court costs and legal fees associated with probate, but these costs are based on several variables, such as the complexity of the matter and the relationship among the interested parties. What is not quantified in dollars is the time and legwork the personal representative must dedicate to administering the estate. These can be nominal or significant depending upon the nature, extent, and complexity of the estate assets. Still, the time and effort a trustee must expend administering a revocable trust may be just as significant.

Probate provides certain benefits that revocable trusts do not. The Register of Wills oversees the administration process and provides notices to beneficiaries, who are given an opportunity to object. Problems that arise during administration are often resolved quickly through the Orphans' Court. Maryland law now requires certain notices and reports to be provided to the beneficiaries of a revocable trust as well, with a similar opportunity to object. With a revocable trust, however, the trust administration is not supervised by any court. In addition, if a trust beneficiary challenges the actions of a trustee and is not satisfied with the trustee's response, the beneficiary must petition the circuit court to seek a resolution. The circuit court is generally more formal than the Orphans' Court.

In certain cases, Maryland offers streamlined probate procedures that can be used for small estates (net estate $50,000.00, or $100,000.00 if a surviving spouse is the sole beneficiary under your will or your sole heir under the rules of intestacy). In addition, "modified administration" is available when the residuary beneficiaries consist only of your spouse, descendants, parents and other ancestors, siblings, and/or personal representatives, the estate is solvent, and certain other conditions are met. These options can greatly reduce the cost and administrative burdens of probate.

In fact, in many estates, probate fees are nominal compared with other costs of estate administration, such as preparing the federal estate tax return. In Maryland, for example, the probate fee for an estate of between $500,000.00 and $750,000.00 is $750.00 (based on 2020 rates). The cost of preparing a federal estate tax return and a fiduciary income tax return (which may both have to be prepared, regardless of whether a will or a revocable trust is used) could be several times the cost of the probate fee.

Proponents of revocable trusts argue that a settlor can establish maximum trustee commissions that are lower than the commission a personal representative (also called the "executor") can receive under Maryland law. This is true, but personal representative commissions in Maryland are not mandatory. Instead, they are optional and are subject to a statutory cap (9% of the first $20,000.00 and 3.6% of the balance of the estate).

A revocable trust is not the only way to avoid probate. Some jointly owned property passes automatically to the surviving joint owners, life insurance proceeds and retirement plan assets pass directly to the designated beneficiaries, and a life estate deed will pass property to the remainder beneficiary—all without going through probate. Other forms of ownership, such as payable-on-death ("POD") accounts for banks and transfer-on-death "TOD") accounts for brokerage accounts also avoid probate.

These probate-avoidance techniques should be used with great care. For example, if the goal is to distribute your assets equally among your children, these provisions should be set up with this goal in mind. Also, when titling assets jointly with others in order to avoid probate, creditors of each joint owner may attach these assets, and joint owners have full access to these assets. Finally, if your assets transfer directly to a surviving joint owner or named beneficiary outside of probate, problems and friction may result if there is no source of funds to pay for your funeral expenses, final income taxes and other debts, and the costs of settling your affairs.

CLAIM: Only revocable trusts can be used to manage affairs and avoid guardianship.

FACT: A durable power of attorney can avoid guardianship.

Three tools are available to help manage your financial affairs if you become incapacitated: a durable general power of attorney, a revocable trust, and a legal guardianship. Guardianships require medical exams and a court proceeding and most attorneys agree that they should generally be avoided whenever possible.

General powers of attorney are relatively inexpensive to create. Maryland law even includes forms that you can use. Revocable trusts, on the other hand, are much more expensive tools. They also do not preclude the need for general financial powers of attorney because only financial powers of attorney can be used to manage your retirement accounts, file annual income tax returns, deal with insurance companies, and handle other matters.

Some revocable trust proponents argue that only revocable trusts save the cost and time involved in having a guardian of the property appointed. In recent years, however, changes in the law have made the use of general financial powers of attorney to manage one's financial affairs much more predictable. Therefore, the practical differences between a revocable trust and a general power of attorney for asset management have been much reduced. In addition, a revocable trust cannot serve as a tool for managing your affairs with respect to non-trust matters, and a general power of attorney is often recommended even if you have a revocable trust. For example, matters involving your income taxes, property and casualty claims, the ability to file a lawsuit, your retirement accounts, and many other aspects outside the scope of your revocable trust cannot be managed through your revocable trust.

There is one clear benefit for using a revocable trust in addition to a general power of attorney—a general power of attorney terminates upon the death of the principal. A revocable trust does not terminate, but continues under the terms of the trust agreement. If the only goal is to avoid guardianship, consider using a general power of attorney.

If your other estate planning goals call for a revocable trust, avoiding guardianship for any assets held in the trust is a secondary benefit.

CLAIM: Revocable trusts save time and money.

FACT: In most cases, this is true, but read on.

Revocable trusts can save time and probate costs, including court costs and legal fees. For a regular estate (typically one with more than $50,000.00 in assets), probate often takes from nine months to a year. Complications, like the need to sell a home, tax issues to resolve, or a will contest, can lengthen the process. The primary costs of probate, other than the relatively minor probate fees, bond costs, and advertising expenses, are usually the personal representative's commissions and attorney's fees. Because every estate is different, it is nearly impossible to estimate the total costs, but usually it is in the thousands of dollars.

Probate also has a schedule the personal representative must follow once the estate is opened with the Register of Wills. Inventories, accountings, and other formal filings all must be filed on a timely basis. This is not normally a problem, but when complications arise, these time constraints can add pressure to an already stressful situation.

Administering a revocable trust usually requires no court oversight. It involves many of the same tasks as administering an estate, such as managing your tangible property (such as furniture, family pictures, and jewelry), selling your home, and preparing and filing income tax returns. But avoiding the formalities of probate can reduce the cost and time necessary to wind up your affairs. Nevertheless, prudent administration of a revocable trust can also involve the same time horizon as administering a probate estate. Settling your affairs upon your death takes time, regardless of whether probate is involved or not.

Some advocates argue that while a trustee may distribute the assets of a revocable trust immediately after your death, estate assets cannot be distributed until the estate is closed which will be at least six months after the estate is opened. It is possible to make distributions from a revocable trust sooner than from an estate, but all of your debts still must be paid first. In all events, it is prudent to wait until the period for creditors to make claims against the trust has ended. This period is six months from the date of your death if proper notice is published, or much longer if notice is not published.

CLAIM: Revocable trusts can be used to avoid creditors.

FACT: In some circumstances revocable trusts can be used to avoid creditors.

During your lifetime, assets in your revocable trust are treated by courts as being owned by you. Trust assets are therefore subject to your creditors. There is one exception to this general rule with respect to trust property previously owned by a married couple as tenants-by-the-entirety, described below. In other words, revocable trusts cannot be used to protect your own assets from your creditors.

A trust can include a "spendthrift clause" so that after your death, a subsequent beneficiary's interest in the trust cannot be attached by his or her creditors. This provision would typically be used for trusts established upon your death under your will or revocable trust for the benefit of children or other descendants. Specifically, a spendthrift clause can be used to protect assets from creditors in a trust created under your revocable trust agreement or under your will.

When you die with a will, creditors have six months from the date of death to make a claim against your estate. With revocable trusts, a trustee may publish the same type of notice giving trust creditors six months from the date of publication to make a claim against the trust.

Maryland does provide one special form of creditor protection for property owned by spouses. When a married couple titles an asset as "tenants by the entirety," the property is protected from the individual creditors of either spouse. This protection can be applied to assets like real estate and bank accounts and applies regardless of whether wills or revocable trusts are used as the couple's primary estate planning documents. This protection used to be lost if the couple split the property into tenancy in common interests for purposes of funding their separate revocable trusts, and subsequently, the credit shelter and/or marital trust(s) of the first of them to die. However, Maryland law now provides that under certain circumstances, property owned as tenants by the entirety and subsequently conveyed to the trustees of one or more trusts will have the same immunity from the claims of the separate creditors of the husband or wife as would exist if the husband and wife had continued to hold the property as tenants by the entirety. If you are seeking this type of protection, it is advisable to consult with an experienced estates and trusts attorney

CLAIM: Revocable trusts ensure privacy.

FACT: Revocable trusts ensure some but not complete privacy.

As mentioned above, the terms of your will, the inventory of your assets, and all estate accountings become public documents as part of the probate process. With revocable trusts, neither the trust agreement nor the assets passing under the trust are normally made a part of the public record. Revocable trusts do not, however, guarantee that your assets will remain completely confidential. For example, it may be necessary to disclose the provisions of a trust after your death to your beneficiaries, or banks may require a copy of the trust in order for the trustee to set up an account. Also, under certain limited circumstances, the Register of Wills or Orphans' Court may require a copy of the trust but do not typically make the trust a public record.

Conclusion

In certain situations, revocable trusts may be useful estate planning vehicles. This may be the case if you (i) own substantial assets in your name that would otherwise have to go through a regular probate proceeding, (ii) own out-of-state real estate, (iii) desire to have someone else manage your assets currently, (iv) anticipate a will contest, or (iv) do not want your affairs to be made part of the public record. Nevertheless, in some cases, the immediate costs and administrative burdens involved in setting up a revocable trust and transferring assets to it outweigh any potential savings that may be realized by avoiding probate in the future. As stated, the benefit of using a revocable trust will depend on the nature, location, and titling of your assets and other facts and circumstances.

When deciding whether to use a revocable trust, it is advisable to consult with an experienced estates and trusts attorney. Mass-marketing advertising and high-pressure sales tactics should be avoided. Whoever you work with, ensure that he or she is a Maryland attorney who specializes in estates and trusts law. By reading this guide, you have already taken an important step toward understanding whether a revocable trust should be part of your estate plan. Next, you should speak with friends and colleagues about their experiences with estate planning attorneys. Find one you feel comfortable working with, make sure your concerns are addressed, and enjoy the peace of mind that having a well-drafted estate plan can provide.

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