

# THE DAILY RECORD

WESTERN NEW YORK'S SOURCE FOR LAW, REAL ESTATE, FINANCE AND GENERAL INTELLIGENCE SINCE 1908

## EstatePLANNING

# Uncovering the truth about revocable trusts

I once had a new client arrive at our first meeting with a tabbed copy of a Suze Orman book in hand in which she touts the value of using revocable trusts as part of a proper estate plan. Seeing as how I had not read her book, I was not in a position to either defend or oppose her position.

Because the client seemed adamant to accept her advice as gospel, the better portion of our meeting was spent discussing truths and dispelling myths about the use of revocable trusts.

The following are common statements, both true and false, made when discussing the use of revocable trusts:

### **Using a revocable trust will avoid probate.**

#### **TRUE, but ...**

If a grantor is successful in moving substantially all of his assets into the revocable trust, probate can be avoided. Assets that pass by beneficiary designation do not need to be re-titled in the name of the trust, although the grantor should confirm that proper beneficiaries are designated to ensure that these non probate assets will not be payable to the estate.

A revocable trust can be a successful method for avoiding probate. In practice, however, this is often very difficult to accomplish. The grantor needs to be particularly diligent in making sure all assets in his name are re-titled in the name of the trust, both at the time of trust creation and on a going-forward basis.

It is quite common for a grantor to forget to move certain assets, such as stock certificates found in a safe deposit box or the sailboat at the local marina. Even if the assets have all been successfully transferred, there are myriad examples where unanticipated circumstances foil the plan.

Retirement account custodians or life insurance carriers have on occasion misplaced beneficiary designations, often resulting in the designation of "the estate" as the contractual default beneficiary. Similarly, if an executor is required to file a claim against a third party debtor of the estate, assets collected as a result of this proceeding will be first paid to the estate and not

the revocable trust.

### **Using a revocable trust will avoid ancillary probate.**

#### **TRUE**

For those clients domiciled in New York who own property in their name outside of the jurisdiction, e.g., a Florida townhouse, transferring the title of the property located in the foreign jurisdiction will avoid an ancillary administration proceeding. This is particularly helpful in states such as Florida where restrictions are placed on the non domiciliary person who can be appointed as the legal representative of the estate.

It is important to note, however, that transferring legal title of the property into the name of the revocable trust will not avoid the claim by that foreign jurisdiction for its share of estate taxes based on the value of the property.

### **Using a revocable trust will reduce or eliminate estate taxes. FALSE**

Transferring assets into a revocable trust will not save estate taxes for the grantor's estate upon his or her death. When a grantor retains the use, enjoyment, possession or right to income from the assets in the trust, the trust assets are fully includable in the grantor's estate pursuant to Internal Revenue Code (IRC) § 2036. IRC §§ 2037 and 2038 also provide for estate asset inclusion, including where the grantor retains the right to alter, amend or revoke the trust.

### **Using a revocable trust will avoid the delay in estate asset distribution. TRUE**

The trustee appointed to serve after the death of the grantor will immediately be in a position to continue to manage the assets in the trust. The administration of the trust is not subject to the rules applicable to probate estates, including the need to first probate the will and marshal the assets. While the executor of a Last Will and Testament can apply for preliminary letters testamentary to help begin administering the estate assets,

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pleadings are still required and, therefore, a time delay is inevitable.

**Using a revocable trust allows for privacy. TRUE, but ...**

In order to probate a Last Will and Testament, the will must be filed with the surrogate's court. Once that takes place the will becomes a public document and is accessible by the eyes of the public. If you ever wondered how Elvis' will became accessible on the Internet, now you know.

Conversely, a revocable trust does not typically need to be filed in the surrogate's court in order to begin the administration of the trust. This is often desirable when individuals do not want to share the disposition of their estate with certain family members or others who may potentially challenge how the estate is to be divided. If, however, the grantor does not transfer all of his or her assets into the revocable trust and certain assets are captured by a will which pours over to the revocable trust, the surrogate's court will request a copy of the trust agreement to ensure that all proper parties are provided with notice of the probate proceeding.

**Using a revocable trust will provide creditor protection. FALSE**

Section 7-3.1 of the Estates, Powers and Trusts Law provides that, "A disposition in trust for the use of the creator is void as against the existing or subsequent creditors of the creator." While an irrevocable trust which continues under the revocable trust after the death of the grantor may provide protection for the beneficiaries of that trust, a grantor cannot shield himself from his potential or future creditors by placing his assets into a revo-

cable trust.

**Using a revocable trust is beneficial when the grantor becomes incapacitated. TRUE**

The ability of a successor trustee to continue to administer the assets in a revocable trust upon the incapacity of the grantor can be a major advantage for the use of these trusts. For individuals who become incapacitated at some point during their lifetimes, their families and friends must rely on the use of a valid Power of Attorney to assist with the management of their assets.

Unfortunately, historically Powers of Attorney have not always been readily accepted by financial institutions. While the laws in jurisdictions such as New York helped to partially remedy this situation by providing a statutory short form where acceptance by financial institutions is required, this only applies to those that have signed the updated version of the form (effective September 2009).

**Conclusion**

While the use of revocable trusts may be presented as the standard in many jurisdictions, a careful examination of a client's circumstances is necessary to determine whether or not it is an appropriate part of the estate plan. It is also important to note that the probate process is very different from jurisdiction to jurisdiction. Clients must first be educated on the true benefits and drawbacks of revocable trusts, and only then will they be in a position to make a well informed decision.

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