# DO YOU NEED A REVOCABLE TRUST?

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Pick up a Treasure Coast newspaper any weekend and you will likely find invitations to three or more seminars at which an attorney, financial planner or some other estate planning "expert" will speak about why you need a revocable trust. Some of these invitations foster the popular misconception that having a revocable trust is always preferable to having a will, and will eliminate unnecessary delay, expense and complication at your death.

While use of a revocable trust can have significant advantages, it is not the best approach for everyone. You should consider not whether revocable trusts are "good" or "bad," but whether creation of a revocable trust is the best estate planning technique for you.

## What is a revocable trust?

A trust is a legal arrangement under which a "settlor" or "grantor" delivers property to a "trustee" who holds the property for the benefit of a "beneficiary." Most trusts are governed by a written trust agreement which serves as instructions to the trustee concerning the administration and distribution of the trust.

A "revocable," or "living," trust refers to a trust under which the settlor of the trust has retained the power to revoke (cancel) and amend (change) the trust during his or her lifetime. Once the settlor dies, however, the terms of the trust may no longer be changed. Typically, the settlor is either the sole or primary beneficiary of the revocable trust during his or her lifetime and also serves as sole trustee or a co-trustee of the trust. The revocable trust also provides for disposition of the trust assets upon the settlor's death (either outright or in further trust), and in that respect is similar to a will.

There is no consensus about how large your estate must be in order for you to benefit from an estate plan which includes a revocable trust. However, if your estate is small or consists primarily of non-investment type assets, the current cost and effort necessary to create the trust may not be justified. In my opinion, if your estate is valued at $250,000 or more and a significant portion of your assets are investment assets, or if you hold real property outside Florida, you should at least consider creating a revocable trust.

Two steps are important to the effective use of a revocable trust. First, the trust agreement must be carefully drafted and executed by the settlor and trustee. Second, assets must be retitled from the settlor's individual name into the name of the trust. Only assets which are properly retitled will be available to the trustee and avoid probate at the settlor's death.

Where a revocable trust is used it is advisable for the settlor to also execute a companion will, sometimes referred to as a "pour-over" will. This will provides that any assets held in the settlor's individual name at death are to be added to the revocable trust at that time. Such a will is necessary in order to give the estate plan effect should the settlor die before completing the

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transfer of all assets to the trust, not choose to transfer some assets to trust during life, or simply forget to transfer a particular asset.

**What is probate? Shouldn't I try to avoid probate?**

Probate is one process by which property passes from a person to his or her beneficiaries at death. In Florida, every probate administration is supervised by a circuit court judge. The steps involved in the "formal administration" of an estate generally include: (i) proof of the deceased's will and its admission to probate by the court; (ii) entry of the order authorizing the named "personal representative" to manage the estate; (iii) publishing and serving a notice of administration which advises creditors that they must file their claims against the estate within 3 months; (iv) the personal representative's determination and payment of the deceased's final bills, taxes and expenses of administration; and, finally (v) distribution of the remaining assets to the beneficiaries named in the will (or to family members as provided by statute if there is no will). Where the value of the assets subject to probate does not exceed $75,000 (or, alternatively, if the decedent has been dead more than 2 years) an abbreviated form of probate, known as "summary administration," may be used. Under summary administration one petition is filed with the court, and the court completes the proceeding by entering an order directing to whom the various assets of the estate are to be distributed.

Only those assets which are in a deceased's sole name at death are in the "probate estate" and subject to probate. Assets which pass by right of survivorship (such as joint real estate or a joint bank accounts) or by a beneficiary designation (such as life insurance or IRA benefits) are not subject to probate. Assets which are transferred to a trust prior to death are not subject to probate at the transferor's death, because at that point they are owned by the trust rather than the transferor individually.

Probate horror stories abound among the general public. Usually these stories recount instances in which the costs of probate were enormous or the administration took years to complete. In reality, a probate proceeding, if competently administered, is not overly expensive or time consuming.

The usual costs of formal administration include court costs, personal representative's fees and attorneys fees. In most cases filing fees and related court costs do not exceed $250. Personal representative's fees are set by a statutory fee schedule at 3% of the value of the probate estate; for estates worth more than $1 million the percentage is reduced. The personal representative may choose not to take a fee, and this is often done where the personal representative is a family member. Attorney's fees for probate vary considerably and are not set by statute, although a recent Florida statute provides that an attorney's fee of approximately 3% of the value of the probate estate is presumed to be reasonable. The stated percentage is slightly higher for estates valued at less than $100,000, and is less for estates valued at more than $1 million. Our firm's practice is to fully discuss the matter of attorney's fees with all beneficiaries bearing the burden of the fee as early in an estate administration as practical, and agree in writing with the beneficiaries on a fee which is fair to all concerned.

It is also important to note that expenses of administration such as court costs, personal representative's fees and attorney's fees may be deducted for either federal estate tax or federal

income tax purposes (but not both). As a result, the after tax cost of these expenses is less than the amount paid. In some estates, the actual cost to the beneficiaries may be a little as 45% of the amount paid.

If no complications arise, a simple formal administration can generally be completed in 6 to 8 months; although distributions to the beneficiaries may occur earlier if all claims are resolved. In cases where an estate tax return is due, or where there is a will contest or litigation concerning a creditor's claim, administration takes longer to complete; although, again, distribution of most of the estate may occur long before the estate is ready to be formally closed.

In summary, the costs and delays encountered in probate administration are not as significant as perceived by the public. Accordingly, while probate avoidance is a factor to be considered in crafting your estate plan, it generally should not be a compelling factor.

**What a revocable trust can do for you**

1. **It can reduce the need for probate and the costs associated with probate.** To the extent that assets are transferred to trust prior to the settlor's death the portion of the estate subject to probate is reduced, and in some cases there may be no need for probate. In many cases, however, probate is necessary, either due to the settlor's failure (intentional or otherwise) to transfer all of his or her assets to the trust, or due to the need to clear title to homestead real property held by the trustee. Often, such miscellaneous assets be handled by a summary administration.

   Because a probate proceeding is court-supervised, it generally requires more attorney time to administer than would the administration of a comparable trust. That being the case, the creation and funding of a revocable trust typically will reduce the cost of passing assets at the settlor's death. However, use of a revocable trust does not eliminate these costs entirely, since there are certain steps which must be taken whether you die with a trust or with a will. For instance, the trustee may need an attorney to assist with the transfer of certain assets to the beneficiaries or preparation of trust accountings. Further, if your taxable estate is valued at more than $1,500,000 an estate tax return must be filed whether or not your assets pass through probate.

   A recent Florida statute provides that where an attorney represents an individual trustee with regard to distribution of a revocable trust after the death of the settlor, a fee of approximately 2.25% of the value of the trust assets is presumed to be reasonable; a lesser percentage would apply to trusts valued at more than $1 million. This is 25% less than the fee presumed to be reasonable in probate proceedings. Therefore, as a rule of thumb, it is suggested that use of a revocable trust may reduce probate costs by 25% or more, but that rarely, if ever, will those costs be eliminated.

2. **It can reduce the need for a legal guardianship should you become incapacitated.** A revocable trust would generally provide that if you become unable to manage your financial affairs your trustee is authorized to use the assets of the trust for your care and support. A revocable trust is, therefore, an excellent vehicle for avoiding a legal guardianship should you become incapacitated. Other estate planning documents may

help avoid the need for guardianship as well. For instance you might designate a health care surrogate to make medical decisions for you if you are unable to make these decisions yourself, and you might also execute a durable power of attorney which authorizes someone to deal with financial matters on your behalf, and to transfer assets to your revocable trust if you do not complete this process prior to becoming incapacitated.

3. **It can make the disposition of your estate more private.** When your will is admitted to probate by the court it becomes a matter of public record and may be viewed by anyone. By contrast, in most cases a revocable trust would not be recorded in the public records and the disposition of your estate would remain private. Whether you have a probate or not, specific information about the value and content of your estate would not be available to the general public.

4. **It can reduce the "elective share" which a spouse might otherwise be able to claim at your death.** Unless waived by a premarital or postmarital agreement, your spouse has the right to claim a 30% interest of your probate estate at death under Florida law. This is right is called the "elective share." Under present law the elective share does not apply to assets held in your revocable trust at death. It should be noted, however, that assets in a revocable trust will be considered in computing the elective share under a new law which applies to persons who die after October 1, 2001.

**What a revocable trust WILL NOT do for you**

1. **It WILL NOT eliminate all costs of passing your property at death.** As indicated above, while the costs of passing property at your death may be reduced through the use of a revocable trust, they likely will not be eliminated.

2. **It WILL NOT result in immediate distribution of your assets at death.** Typically, after the settlor dies distribution of the assets of his or her revocable trust is delayed until after the 3-month period for claims against the trust expires, and any claims filed have been paid or otherwise provided for. Additionally, where an estate tax return is due, distributions to beneficiaries should be limited until after the tax has been determined and paid; this usually does not occur until 9 months after the settlor's death.

3. **It WILL NOT reduce estate taxes payable at your death.** The settlor's retention of a power to revoke the trust results in the trust assets being includable in the settlor's estate at death for federal estate tax purposes. Although there is tax planning which can be done in a revocable trust in order to reduce the tax, these same tax reduction techniques may be utilized in a will. There are no tax planning opportunities which are unique to revocable trusts.

4. **It WILL NOT prevent a beneficiary from contesting the distribution of your assets.** Most of the same principles apply to the contest of a revocable trust as apply to the contest of a will. One distinction is that statutes concerning will contests provide a procedure for limiting the time within which a beneficiary can bring a will contest, whereas no similar procedure is presently available for limiting contests of revocable trusts.

**Do you need a revocable trust?**

Whether you should have a revocable trust depends on whether the benefits outweigh the disadvantages, when objectively assessed and in light of your particular assets and personal situation. This assessment requires the assistance of an experienced estate planner. If you would like to discuss how a revocable trust may be of particular benefit to you, or any other questions concerning your estate planning, please call our office to schedule a consultation.

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