

Use of revocable trusts in estate plans

PROFESSIONAL OPINION



LUCY M. BERKMAN
Special Counsel
Phillips Lytle LLP

PROFESSIONAL OPINION



BENJAMIN S. CRANSTON
Senior Associate
Phillips Lytle LLP

A Last Will and Testament (“Will”) is generally considered the centerpiece of an individual’s estate plan. However, use of a Revocable Trust as an estate planning vehicle can provide the same, or more, flexibility as a Will and can be used to avoid the probate process, resulting in savings passed on to the next generation.

What is a Revocable Trust?

A Revocable Trust, also called a “revocable living trust” or “inter vivos trust,” is created by a trust agreement during a person’s lifetime. It involves three key players: the person who creates the trust (“grantor”); the person who manages the trust property in accordance with the trust agreement’s terms (“trustee”); and the individuals whom the trust will benefit (“beneficiaries”). Notably, it is common for the grantor to also serve as trustee of his or her own trust. A successor trustee is appointed under the trust agreement to step into the shoes of the trustee should he or she become incapacitated or die.

A Revocable Trust is not effective until it is funded with assets. Funding is accomplished by retitling and transferring assets into the name of the trustee to hold for the benefit of the trust beneficiaries. For example, real property is transferred by deed from the grantor to the trustee; a bank account is retitled from the grantor to the trustee. A grantor can also designate his or her Revocable Trust as the beneficiary of retirement plan assets and life insurance death benefits.

A Revocable Trust, by its very definition, can be revoked or amended, in full or part, at any time by the grantor. Further, the grantor can reacquire any property that is held in the trust.

Upon the grantor’s death, a Revocable Trust becomes irrevocable, the successor trustee assumes his or her role and distributes or retains

the remaining trust property in accordance with the trust agreement.

Benefits of Revocable Trusts

Generally, the funding of a Revocable Trust with the grantor’s assets will not affect the grantor’s rights related to such property. For example, transferring real property from the grantor to the trustee will not affect tax credits or exemptions the grantor may receive by owning the property outright.

A key benefit of a Revocable Trust is the avoidance of probate. Only when a Will is formally admitted to probate by a Surrogate’s Court does an Executor have authority to act and take control of the assets of an estate. Administration and distribution of estate assets by probate can be costly and last more than a year. If all of a decedent’s assets are held within his or her Revocable Trust, the probate process can be avoided. Unlike a Will, the trust agreement does not need court approval, and the successor trustee can access and administer trust assets immediately upon or shortly after the death of the grantor.

For grantors owning real property in multiple states, probate will generally be necessary in each state where the properties are located. By transferring the properties into a Revocable Trust, probate will not be necessary in any state as the trustee has authority over the trust property, regardless of its location.

When an individual becomes incapacitated, it may be necessary for a court to appoint a guardian to manage the assets of the incapacitated individual. With a Revocable Trust in place, costly guardianship proceedings may be avoided. A successor trustee can step into the role of the then serving trustee upon incapacity to manage the trust’s assets for the benefit of the grantor, without court intervention or supervision.

Use of a Revocable Trust can provide privacy to the grantor with respect to the grantor’s estate plan. With a few exceptions, most documents filed with a Surrogate’s Court become public record. By avoiding probate with a Revocable Trust, the grantor’s assets and beneficiaries will not be disclosed through court filings and proceedings. In addition, because the trust agreement is not subject to court approval, family members entitled to notice of the probate will not be notified.

Drawbacks to Revocable Trusts

While a Revocable Trust can provide many benefits to an estate plan, those benefits should not be overstated. A trust agreement does not replace a Will, does not provide estate tax planning benefits, and does not protect a person’s assets from creditors. In addition, the time and cost to include a Revocable Trust in one’s estate plan will be more expensive than creation of a Will only.

The trust agreement only affects assets that are transferred or retitled to the trustee to be held in the trust. If an asset is not properly transferred or retitled and remains titled to an individual at death, that asset must be administered through the probate process.

Use of a Revocable Trust does not generally result in avoidance of estate tax. The assets held within a Revocable Trust are still included in the grantor’s gross estate for estate tax purposes because the grantor retains the power to amend or revoke the trust agreement. Similarly, since the grantor has the ability to take assets out of the Revocable Trust, it does not operate as a shield to protect assets from a grantor’s creditors or eliminate them from consideration as grantor’s resources for Medicaid eligibility.

Lastly, depending on the complexity of an individual’s estate, creating and funding a Revocable Trust can be more expensive than preparation of a Will. These costs should be balanced against potential savings from the avoidance of probate and against the ease of succession to the management and distribution of trust assets to beneficiaries upon the grantor’s death.

Conclusion

Inclusion of a Revocable Trust can be a valuable addition to an estate plan if properly funded, resulting in (1) a quick and smooth transition of authority in the event of a grantor’s incapacity or death; (2) avoidance of probate in one or more jurisdictions; and (3) cost savings to intended beneficiaries while maintaining privacy for a grantor’s estate plan.

Lucy M. Berkman, Special Counsel at Phillips Lytle, is a member of the Trusts and Estates Practice Team. She can be reached at lberkman@phillipslytle.com or (716) 504-5746.

Benjamin S. Cranston, Senior Associate at Phillips Lytle, is a member of the Trusts and Estates Practice Team. He can be reached at bcranston@phillipslytle.com or (716) 847-7079.

Madeline J. Drechsel, Law Clerk, contributed to this article.