

### TRUSTS AND ESTATES LAW

# Demand Grows for Revocable Living Trusts

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New York's elderly population is expanding, with individuals living longer in the aging Baby Boomer generation. This growth has led to more people suffering health and incapacity incidents, more deaths and an increased workload for New York Surrogate's Courts. This comes as the metro area courts have not recovered from increased caseloads and delays created by COVID-19 shutdowns.

Because of this, revocable living trusts have become more appealing to advisors and their clients. Revocable trusts have been used in New York State for decades because of their many advantages. The assets titled in the trust can escape court intervention because the trustee of the trust maintains legal control of the assets after the grantor dies.

A revocable trust also enables the swift transfer of control over assets for elderly clients when failing health or incapacity cause individuals to



require help in managing their assets. Revocable trusts may provide other benefits including facilitating the transfer of a decedent's real property located outside of New York, avoiding estate litigation, and avoiding the consequences of delays in a Surrogate's Court proceeding.

This article will discuss some of the issues and trends that are driving practitioners to recommend revocable trusts more often and to a wider variety of clients.

Two key statistics help clarify the reason for today's shift from traditional will planning to the use of revocable trusts. First, from 2010 to 2020,

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the population of Americans 65 or older increased by 39 percent to 56 million people, according to the U.S. Census Bureau. It is estimated that by 2040, that number will exceed 80 million Americans (more than double the amount in 2000). Second, with a growing population in the oldest age demographic, the likelihood of long-term care/incapacity events has become an important issue to plan for. According to the federal Administration on Aging, more than two in three persons over the age of 65 will have a long-term care event and twenty percent will have events that last longer than five years.

Revocable trust planning provides this growing population with numerous benefits unavailable to people who base their estate plans solely on last wills and testaments. This is how a revocable trust works: the grantor establishes the trust and frequently is both trustee and beneficiary of the trust while alive. Under the trust agreement, the client appoints a co-trustee or successor trustee to handle the trust's assets if the client dies or if health issues prevent the client from acting as trustee.

The revocable trust creates one convenient ownership package of the client's major assets. If the client dies or becomes incapacitated, the previously named co-trustee is immediately authorized to manage the client's assets. This ensures a seamless administration of the trust's assets while eliminating the need for a family member, friend, or advisor to seek guardianship of the property through the courts.

To open an estate, a nominated or voluntary fiduciary must petition the Surrogate's Court for the legal power to access, collect and distribute a

decedent's property. In the metro area, what used to be a process that might take several weeks, now often takes several months or longer. Until a fiduciary is appointed, the assets cannot be accessed by anyone. Market volatility while the assets cannot be accessed may result in declines in the value of a decedent's assets, harming the ultimate beneficiaries. The practitioner may also have the unpleasant task of explaining to a new client why it is taking so long to get access to the assets while their values decline.

The transfer of the assets to the revocable trust by the grantor is not a taxable event because the trust can be revoked by the grantor and he or she still "owns" the assets for income and estate tax purposes. Frequently, the client uses his or her social security number when setting up the trust account at a financial institution. This enables the grantor, also acting as trustee, to maintain the same access and control over the assets that he or she had before the assets were transferred. Only the legal title changes, e.g. instead of the current financial account owner being "Jack Smith", the trust account is titled "Revocable Trust of Jack Smith, dated \_\_\_\_\_".

On the death of the grantor, the trust becomes irrevocable but still enables the co-trustee or successor trustee to have immediate access to the trust assets without any additional court proceeding. For any property in the client's name that has not been transferred to the trust prior to the client's death, a Surrogate's Court proceeding is still necessary and therefore potentially subject to delays.

If the client succeeds in transferring most of his or her assets to the revocable trust before dying, it is the trust, rather than the estate, that holds the

major assets and may be used to begin paying the estate's expenses including funeral expenses, legal fees, debts of the decedent and general estate administration expenses. The trustee handles all of this. After paying the expenses and administering the assets held by the trust, the trustee follows the instructions in the trust agreement to distribute the remaining assets to the Grantor's beneficiaries.

It is common for a client to leave a few assets outside of the revocable trust. This can be a deliberate choice or simple inattention: a client with multiple bank accounts may fail to transfer one of them to the Trust. To address this, most practitioners advise clients to couple a revocable trust with a "pour over" will.

A "pour over" provision in a will instructs the executor to transfer into the trust any assets that remain in the decedent's probate estate. These

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assets may include checking accounts, tangible personal property or any other asset that was not transferred over to the revocable trust during the grantor's life. These assets must go through probate and will be inaccessible until the court grants the named executor or volunteer administrator legal authority over the estate's assets.

Some assets don't need to be transferred to a revocable trust because they pass directly to the beneficiary on death. These assets include life insurance and retirement accounts (when a beneficiary other than the estate is named), jointly held

property and accounts that are payable on death (POD) or that transfer on death (TOD). These assets pass directly to the beneficiary without court approval in most situations.

The grantor of a funded revocable living trust has removed the disposition of his or her transferred property from the court's authority in most cases. This allows the grantor's beneficiaries and fiduciaries quicker access to the assets and more freedom to administer them as the grantor instructed.

**Other Reasons To Use Revocable Living Trusts**

• *Property Owned Outside New York*

New Yorkers' real and tangible personal property located outside of New York creates additional complications for which a revocable trust is an excellent solution. Each state or country has jurisdiction over the transfer of real and tangible personal property located within their jurisdiction on the death of the owner regardless of where that owner was domiciled during his or her life. The client's heirs or beneficiaries will have to bring an original estate proceeding in a New York Surrogate's Court and an ancillary proceeding in each additional jurisdiction where the client's real and tangible personal property is located. The time and expense of the ancillary proceedings can be avoided if these types of property have been transferred to a revocable trust before the client's death.

• *Avoidance of Conflict*

Certain individuals face an increased risk that their instructions for distributing their assets will be challenged because of the nature of their families. As part of the estate administration process,

the court will require notice to all “distributees” of the deceased (persons who would inherit the estate under New York’s intestacy law). If the deceased has few or very distant relatives, the risk increases of a fraudulent heir or a legitimate heir looking to take advantage of his or her relative’s estate. This is also true in contentious families. Children born from multiple marriages, children born out of wedlock and family members who have fallen out of favor with the deceased can all potentially challenge the decedent’s will and cause time and money to be wasted.

Using a revocable trust can avoid many of these problems. First, the revocable trust is not a public document even when it is filed in the court. For people who want the details of their dispositions to remain private, a revocable trust is a way to accomplish this. Second, the grantor of the trust has removed the disposition of his or her property from the court’s authority in most cases. This allows the grantor the ability to benefit the chosen beneficiaries as he or she sees fit. Third, the trust agreement can be drafted to diminish potential challenges by providing small bequests that are contingent on the avoidance of conflict. The trust document and its administration can still be challenged in court, but the automatic need for court involvement can be significantly reduced if not eliminated.

- *Common Mistakes Made with Revocable Trusts*  
Proper planning requires both the advisors and

clients to do their part to have the estate plan work as intended regardless of what instrument is used. Revocable trusts require more than just the execution of a document to maximize the benefits and minimize the risks. One of the most common mistakes is a client’s failure to sufficiently fund his or her trust prior to his or her incapacity or death. Some clients fail to transfer any assets at all to their trust. Clients should be vigilant about retitling assets including those held as joint tenants or received via a POD or TOD account.

Drafting mistakes may also create unnecessary problems. Deficient language regarding the selection of trustees can leave a trust improperly administered or without any fiduciary at all. If a trustee has no successors provided in the trust instrument, the current trustee may need to petition the court to name a successor or co-trustee unless he or she is explicitly given the power to appoint one. The dispositions of trust property can also require judicial interpretation or other interventions if the language of the trust agreement is ambiguous regarding the beneficiaries, disposition or other key parts of the trust.

### **From Situational to Essential**

New Yorkers are finding revocable trusts to be increasingly helpful as they plan for their estates and how their assets will be administered when they are gone.