

Stiller Law Offices

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Client Article-Part Two

Estate Planning – Revocable Living Trusts – Part Two **Opportunities and Options for Everyone**

Nothing is more important to you than your family. What is your vision for them after you are gone? Will you leave them with a financial disaster or a secure future? You have the power to reduce the cost, risk and stress that they will suffer if you have a well-designed estate plan. Okay, your name is not Rockefeller, Buffett (Warren or Jimmy) or Gates. So you may think the idea of using a Trust for your estate plan is not an option. After all, Trusts are just for rich people, right? That's what many people believe. If you are like them, you may decide to skip this article – but you'll be missing out on a great opportunity. You owe it to yourself and your family to learn more about Trusts before you decide. This article is the second part of a three part series of articles regarding revocable living trusts. It is designed to educate you about the structure of a Trust and the people involved in the Trust, namely, the Grantor, the Trustee and the Beneficiary. It is meant to educate you on the reality regarding Trusts so that you can decide for yourself if it is an appropriate option for your family.

THE ANATOMY OF A TRUST

Every Trust has three main players. The "Grantor" or "Settlor" is the person who creates the Trust. The

"Trustee" is the person who manages the Trust. A "Beneficiary" is the person who benefits from the Trust. Grantors have the most control over a Trust because

You Should Know



A trust is an agreement for the management and distribution of assets. You are in control. In control of the rules to be followed by the persons involved with the Trust, in control of who will manage the Trust, and in control of who you name as the Beneficiaries.

they are the ones who decide what it says. They can keep a lot of control, too, by reserving the right to amend the Trust later if they change their mind about how they want it to work. If they decide they don't need the Trust anymore, they can terminate it. As long as they are alive, Grantors control the Trust.

Trustees manage the Trust the way the Trust tells them. They don't have a right to change or terminate the Trust – they just carry out the instructions in the Trust. Being a Trustee is an important responsibility because the Trustee has an obligation to act in the best interest of the Beneficiaries according to the terms of the Trust. Lawyers call this the Trustee's "fiduciary" duty – they have a responsibility to act with a high degree of good faith, trust and confidence for the benefit of the Beneficiaries.

Beneficiaries are the ones who enjoy the fruits of the Trust. The Grantor created the Trust for their benefit. A Trust can have one Beneficiary or many. Usually, the Beneficiaries are people, but they can also be entities, like charities. The

Beneficiary who gets the immediate benefits of the Trust is the "Current" Beneficiary. A "Contingent" (or "Remainder") Beneficiary is one who only gets benefits after some event happens, like after a Current Beneficiary passes away. Typically, in a Revocable Living Trust you are the initial Grantor, Trustee and Beneficiary all at once. You create the Trust, name yourself as Trustee and are the sole Beneficiary as long as you are living. No one else takes over as Trustee unless you become incompetent or die. No one else becomes a Beneficiary until after you die. You are in control!

A Revocable Living Trust is effective immediately when you sign it, so it starts working instantly. There is no waiting around to die like with a Will. Your Trust applies for the rest of your life. If you happen to become incompetent, the Trust continues for your benefit, although a "successor" Trustee will take over the management of the Trust while you are incapacitated. When you die, the Trust can continue for the benefit of your "Contingent" Beneficiaries (such as your

spouse, children or grandchildren) for as long as you want it to last.

Sometimes you might hear about an "Individual" or "Separate" Trust. That just means there is only one Grantor. This is what a person who is not married would have.

However, in Ohio and Pennsylvania married spouses can own property separately, so they can form Separate Trusts, too. A married couple also has the option to form a "Joint" Trust together. A Joint Trust is just one Trust with two Grantors. It is usually best for a married couple to use Separate Trusts if they have children from different marriages, or if they want the flexibility to have different Trust terms to accomplish different goals. Separate Trusts can also give a married couple better creditor protection if one spouse works in a high-risk profession. Joint Trusts work best when the couple has a long, stable marriage, no high-risk jobs and all of their goals are identical.

It is important to understand that a Trust only controls assets that are actually in the

Trust. So, somehow you have to get your assets into the Trust in order for it to work. We call this “funding” your Trust – putting your “funds” in it. There are three basic ways to “fund” your Trust. The first way is to transfer the ownership of your assets to your Trust while you are alive. This is the best thing to do if you want to get the full advantage of your Trust. It can be a tedious task, but it is worthwhile.

The second way to fund your Trust is by beneficiary designations. Some assets, such as qualified retirement plans and annuities, cannot be in your Trust while you are alive or there would be some adverse income tax consequences. In order to avoid that problem, you simply name your Trust as the beneficiary of those assets. It is not hard to do, but it does require caution to be sure you use the right wording on the beneficiary designation forms.

The final way to fund your Trust is by naming your Trust as the beneficiary in your Will. Your Will would simply contain a provision directing your executor to transfer your assets to your Trust after you

die. The assets “pour-over” from your Will to your Trust – hence the name “Pour-Over Will.” The downside of this funding method is that everything has to go through probate first.

Technically, the actual Trust itself will not “own” anything. Remember, the Trust is like a contract, so it doesn’t have the legal capacity to “own” anything. Instead, when you fund your Trust you title the assets in the name of the Trustee. The Trustee does not own the assets personally, but rather in his or her “fiduciary capacity” on behalf of the Beneficiaries. Still, it is common and easier to say that your assets are “in your Trust.”

Why are we so concerned with funding your Trust? Well, if one of your goals is to avoid probate, you must have all of your assets correctly in your Trust *before* you become incompetent or die. Every asset that you still have titled in your personal name when you die will have to go through probate in order to get into your Trust. The single most important rule you will ever learn about estate planning in general and probate in particular is *The*

success of your estate plan all comes down to how you title your assets. No estate plan – Will or Trust – will work correctly unless you properly title all of your assets to coordinate with your specific plan.

Asset titling (or “asset alignment” because the assets are ‘aligned’ with your estate plan) is a detailed and complex subject that is beyond scope of this article. Improper asset titling will ruin even the best estate plan. Proper asset titling will make your estate plan work the way it should. Proper asset alignment is critical to make the Trust useable. Without assets, the Trust doesn’t do anything. So to get the maximum benefit from your Trust, follow the instructions to get your assets into it as soon as you create it, not after you become incompetent or die.

Now, you may be concerned that having a Trust will make your life more difficult when it comes time to do your income taxes. Fortunately, that is not true. As long as you are alive, your Trust uses your personal Social Security

Number and you continue to report all of your income tax on a Form 1040. No new taxpayer identification number or separate tax returns are necessary.

After you die, the successor Trustee of your Trust will need to get a new taxpayer identification number and file a separate income tax return (a Form 1041 Fiduciary Income Tax Return). That is because when you die, your Social Security Number is no longer valid and dead people do not file income tax returns on a Form 1040. Your Trust will only pay income tax after your death on the income that the Trustee *keeps* in the Trust. If the Trust says to distribute all of the income to the Beneficiaries, then the Beneficiaries will pay the income tax. In that case, there is no difference than when you were alive, except a little cost for preparing the Form

1041 each year.

Now that you know about the general structure of Trusts, we'll take a more in-depth look at Trustees and Beneficiaries.

WHOM DO YOU TRUST?

You already know from the previous section that the Trustee's job is to manage the Trust for the benefit of the Beneficiaries. The Trust document contains the instructions that the Trustee must follow and gives the Trustee a wide range of powers to do its job. Being a Trustee is a big responsibility. As the title implies, your Trustee should be someone you can trust. After all, you will be counting on them to do what you intend to accomplish with your Trust. You don't want a Trustee

who is going to do a bad job or squander all of the Trust assets. That wouldn't be a good result for the Trust Beneficiaries.

Normally, you are the initial Trustee of your Trust. If you are married, you and your spouse can be the initial Trustees together. But if you become incompetent or pass away, you need to have some backups ready to step in as the successor Trustee. You have two primary choices regarding your Trustee selection. One option is to select a real, live person. The other option is to use a "corporate" Trustee – a business that has the legal authority to serve as a Trustee. Each choice has its own pros and cons.

Real people have some distinct advantages as Trustees. The main benefit is that if you pick someone who

A Note About Trustees:

Many clients name their children, in chronological order from oldest to youngest, as successor Trustee when they can no longer serve as Trustee. While this is common, it isn't always wise. The youngest child may have a better temperament or better financial and record keeping skills than the eldest child and the middle child may have more available time to devote to the job.

At Stiller Law Offices we are always available to listen to you and to advise you about options for resolution of your estate planning issues, including designation of successor Trustees.

is familiar with you, they are more likely to understand your goals and objectives. They also probably know your Trust Beneficiaries and will be compassionate and personally committed to acting in their best interest. A real person is the closest substitute you can get for yourself. Ohio law allows you to pick any competent adult to be Trustee of your Trust. The main drawback is that most individuals don't have technical skill and experience in being a Trustee. They can make up for that by hiring professional advisors, such as an attorney, accountant and financial advisor, to provide them with guidance in their Trustee duties.

Corporate Trustees, on the other hand, are professionals at managing Trusts. The most common corporate Trustees are trust departments of larger banks and brokerage firms or specialized trust companies. They must have legal authority to provide trust services in order to be a Trustee in Ohio. Corporate Trustees are usually full service operations, doing all of the investing, financial and tax work in-house. A perfect

situation for using a corporate Trustee is if you anticipate difficulties or disputes among the Trust Beneficiaries.

There are two main downsides to corporate Trustees. First, they are businesses in the business of making money. While they do a good job, they are usually not as compassionate and sensitive to the needs of the Beneficiaries. Second, corporate Trustee fees may be higher than an individual would charge. It is always important to consider that issue before you decide on your Trustees. You don't have to pick just one Trustee. You can have two or more Trustees serve together at the same time as Co-Trustees. The Co-Trustees can be individuals, corporate Trustees or a combination of both. Pairing an individual and corporate Trustee is a way to benefit from their respective strengths – compassion and expertise.

Sometimes it may even be good to have a Beneficiary serve as Co-Trustee with a more experienced individual or a corporate Trustee. It can provide the Beneficiary with an opportunity to have some

input over his or her Trust Share without having free rein over the assets. This may help a younger Beneficiary gain some financial maturity and experience before receiving large distributions. Be sure you have a good reason to have Co-Trustees, though. Naming two of your children just because you don't want to hurt anyone's feelings is not always a good idea. It can lead to a lot of friction and make the Trust more difficult to administer. If your family is a bit dysfunctional, you may be better off having a completely independent Trustee instead of forcing the kids to work together.

If you really want to get creative, you can assign different roles to Co-Trustees. Perhaps one would be responsible for all of the administrative functions, like investments, accounting and taxes. The other Co-Trustee may be in charge of determining when distributions to Beneficiaries are appropriate. Splitting the duties can balance some of the strengths and weaknesses that individual and corporate Trustees have. Sometimes one Trustee may be in charge

of one type of asset, such as trust-owned real estate or a family business.

The final consideration regarding whom you select as Trustee, and whether to use Co-Trustees, is how long the Trust will last after you are gone. If your Trust will wrap-up and distribute everything to the Beneficiaries relatively quickly, it may not be as important to have Co-Trustees and delegate tasks between them. However, Trustee selection and defining the roles of Trustees requires more careful consideration if your Trust is going to last for years into the future.

Another idea to consider for Trusts that will continue for a long term is to appoint a "Trust Advisor" or a "Trust Protector" in addition to the Trustee. A Trust Advisor is a person that you designate to oversee the actions of the Trustees or the Beneficiaries. For example, you can give a Trust Advisor the right to remove and replace Trustees. A Trust Protector is a person that you designate, or that the successor Trustee designates, to make changes such as technical amendments to administrative parts of your

Trust after you are gone if needed to comply with changes in the law or to make changes to respond to the changing needs of your Beneficiaries. A Trust Advisor or Trust Protector can be a powerful bonus feature in your Trust.

It is always important to name "backup" Trustees in your Trust. You can designate backup Trust Advisors, too. There may come a time when your first choice is not able to serve as Trustee or Trust Advisor, such as if they become incompetent or die. It is wise to have others in line to take their place. You can never have too many backups.

As a final word on Trustees, consider their compensation. Trustees deserve payment for their services, so do not expect someone to do it for free. It takes a lot of time, effort and responsibility to be a Trustee. A corporate Trustee will not work for free, and most will not even share their compensation with Co-Trustees. You can include provisions in your Trust as to what you believe is a reasonable Trustee fee, but only in rare circumstances should it be zero. The role of

Trustee is a powerful position but it also carries a great deal of responsibility. You need to give your successor Trustee selection careful consideration when designing a Trust.

WHO DO YOU LOVE?

As you probably know, if you don't have any estate plan – Will or Trust – both Ohio and Pennsylvania law dictate who inherits your estate when you die. Why would anyone ever let the state make such an important decision for them? Relying on Ohio or other state law will also cost your beneficiaries more in probate costs than dying with a Will. At least with a Will you get to name who your Beneficiaries are going to be. You can pick anyone you want, regardless of what the state's "default" law says. But if a close relative feels that you shouldn't have left them out, they can file a legal action in probate court to contest your Will. And a surviving spouse who feels slighted can demand a specific percentage no matter what your Will says.

In a Revocable Living Trust, the Grantor has complete freedom to choose the Beneficiaries, too. Like the

old Doors song asks, Who Do You Love (and want to name as Beneficiary of your Trust)? A disgruntled relative can file a lawsuit to contest the validity of your Trust, but it is likely to be a difficult case for them. They might win if they prove you that were completely incompetent when you signed it or that someone tricked you or forced you to sign. No legal document is valid under those circumstances. With a Trust, there are no probate procedures for a Beneficiary to follow to automatically demand a bigger share.

As we mentioned earlier, the Grantor is usually the original Beneficiary in a Revocable Living Trust.

In a Joint Trust, both spouses are typically the original Beneficiaries. It stays that way as long as you are alive, even if you become incompetent. Just as you have backup Trustees, your Trust needs to have backup Beneficiaries to receive the assets when you are gone. The backup (“Contingent”) Beneficiaries become the Current Beneficiaries when something happens that triggers a change. Most likely,

that is the death of the prior Current Beneficiary. Since you control exactly what the Trust says, however, you can adjust the order and timing of Trust Beneficiaries any way you want to meet your personal goals.

In a traditional family setting, the husband and wife are the only Beneficiaries as long as they are living. When one spouse dies, the surviving spouse becomes the sole Beneficiary. So, like many Wills, nobody else gets anything until both spouses are gone. Unlike a Will, however, a Trust can provide a way to manage the family’s finances even if both spouses become mentally incompetent. Normally, the couple’s kids are the Contingent Beneficiaries in the Trust, and become the Current Beneficiaries when both parents pass away.

The Trust should also address what happens to a child’s share if the child predeceases the parents, or dies before receiving a final distribution from the Trust. Does that child’s share go to his or her children, or to the child’s living siblings? What about stepchildren? What if all of

your children, grandchildren and other Contingent Beneficiaries are gone? Who gets the remaining Trust assets? That’s probably a remote possibility, but it could happen. You should address that issue in the Trust to be sure things work the way you want.

As you can see, designing a good Trust involves planning for many different contingencies. You never know for sure what’s going to happen. It’s best to think things through and address as many possible contingencies as you can in your Trust. If they happen, you will have successfully controlled the outcome the way you want. If they don’t happen, then all is still well.

There is no requirement that all of your children have to be the Contingent Beneficiaries in your Trust. Maybe you feel that you have already done enough for one or more of them during your lifetime. Maybe they are all independently wealthy and successful already and they don’t need your assets. Perhaps you would rather skip your children and provide benefits directly to

your grandkids. Then again, maybe you don't even have kids and grandkids.

A Trust gives you the flexibility to mix and match your Beneficiaries any way you want. You can easily make special bequests of money or particular assets to as many people as you want. You can include special provisions for continuing the care of your elderly parents if they might need assistance after you're gone. Instead of disinheriting a potential Beneficiary with special needs (mental or physical disabilities), you can tailor provisions in your Trust to enhance the quality of the Beneficiary's life without disqualifying him or her from government benefits. Many people also want to do something for their church or their favorite charities. You can do that in a Will, too, if you want to make an outright distribution. A Trust allows

you to be more creative in how you provide for religious or charitable Beneficiaries.

You can even provide for the ongoing care of your beloved pet, be it Fido or Tabby, or a pet with a more significant lifespan, like a parrot!

The law does not give anyone an absolute, binding right to receive an inheritance, except when you fail to do any estate planning. A Trust gives you virtually unlimited control over whom you want as Beneficiaries of your estate. It is entirely your choice.

Now that we've covered "who" gets your assets, let's explore "when" and "how" you want them to get their inheritance.

The third and final part of this article will focus on the options for when and how assets will be distributed from your Revocable Trust to your Beneficiary.

Contact us for more information about the topics discussed in this article. This information is provided as a service to our clients and is not intended to be and does not constitute legal advice.

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