



## Protecting the people of Maine for over 100 years

### REVOCABLE LIVING TRUSTS

A revocable living trust, sometimes called a “living trust” or an “inter vivos” trust, is a trust established during life that the creator of the trust has the power to change or revoke. The trust creator can designate himself or herself as trustee to manage the assets in the trust. A revocable trust becomes irrevocable upon its creator’s death. Revocable trusts can provide important estate planning advantages, but they are not a universal solution to all problems.

#### **Planning for Disability**

A revocable trust facilitates management of assets if the trust creator becomes unable or unwilling to manage his or her own affairs. The trust creator can designate himself or herself as trustee and can manage the revocable trust as long as the creator is able, but when it becomes necessary or advisable for someone to take over management of the trust creator’s affairs, a co-trustee or successor trustee will be available to continue without any need for a court-appointed guardian or conservator.

#### **Minimizing Probate Delay and Expense**

Maine, along with most other States, has adopted a version of the Uniform Probate Code. Probating a will is generally no longer the burden it once was. Unless disputes or unforeseen circumstances arise, a will for a non-taxable estate often can be probated and the estate administered in an informal probate process that is neither expensive nor burdensome. A revocable living trust, however, can minimize even the streamlined, modern probate process. Trust assets are not generally subject to any will or the probate process. If most assets are transferred into a trust during life, only minimal assets will remain to be dealt with during the probate of a will. A “pour over” will can add any remaining assets to the trust at the trust creator’s death so that all assets become assets of the trust, which becomes irrevocable at its creator’s death.

#### **The Trust Creator Can Decide How Assets Will Be Used After His or Her Death**

By the specific terms of the trust document, the trust creator designates how assets in the trust are to be used after the trust creator’s death. The trust creator can provide for distributions of principal or trust income to designated beneficiaries, and can protect spendthrift beneficiaries by controlling how assets will be distributed to them. Maine law was recently changed to allow a trust to continue indefinitely, but even in jurisdictions that limit the duration of trusts, a properly drafted revocable living trust that becomes irrevocable at death can be used to provide for several generations of beneficiaries.

## A Revocable Trust Does Not Avoid Estate Taxes

Establishing a revocable living trust will not help to avoid estate taxes. Trust assets are not included in the trust creator's probate estate, but they may be included in the trust creator's taxable estate. The IRS considers assets held in a revocable living trust to remain in the control of the trust creator, and taxes such assets upon the death of the trust creator as if they still belonged to the trust creator.

## Funding a Revocable Living Trust Requires Conveying Ownership of Assets to the Trust

Simply signing a trust agreement does not fund the trust. The trust owns no assets until the trust creator legally conveys ownership of assets to the established trust. Putting a home in trust, for example, requires the trust creator to deed ownership of the home to the trust. Anyone considering establishing a revocable living trust needs to be aware of the necessary effort and cost of conveying assets to fund the trust and of administering the trust, including filing annual income tax returns.

## Do You Need a Revocable Trust?

Whether you need a revocable living trust as a component of your estate plan depends on your individual goals and circumstances. If you primarily own probate assets and would like to provide for a smooth transition in management of your assets, or if your circumstances are such that probate of your will may become complicated, you may wish to consider a revocable trust. If you have children, grandchildren, or others for whom you would like to set up a trust, you can begin during your lifetime by establishing a revocable living trust that allows for distributions to your chosen beneficiaries.

The following is a list of circumstances that may call for the use of a revocable living trust as your primary estate planning vehicle:

**Real Estate Outside of Maine.** If you own real estate in multiple states, your personal representative will be required to probate your will in each of those states. A revocable living trust can be used to consolidate title to all of the real estate and eliminate the need for probate in more than one state.

**Need for Privacy.** If you need or desire to have your estate plan remain private, a revocable living trust is one way to accomplish that goal. A will is a public document once it is probated; a revocable living trust is not probated and therefore remains private.

**Mobile Clients.** If you anticipate relocating but do not know your ultimate destination, a revocable living trust may be appropriate in the event that the state in which you ultimately die is one where probate is complex and expensive.

**Professional Fiduciary.** Some individuals prefer to name an entity like a trust company or a bank's trust department to manage their affairs in the event of incapacity. Generally, a professional fiduciary would decline to serve as an agent under a financial power of attorney but would agree to serve as trustee of a revocable living trust.

On the other hand, if your estate is limited or you own primarily non-probate assets such as joint property, life insurance, and retirement accounts, and you have executed a power of attorney, or if you do not wish to get involved in the bookkeeping required for trust management, a revocable living trust may not be of any advantage to you. You should discuss the particulars of your situation with your attorney and financial advisors to determine which estate planning tools will work for you.

## **A Revocable Living Trust Does Not Protect Assets for MaineCare Purposes**

When a client anticipates illness and there is a likelihood that he or she will need to apply for MaineCare nursing home or residential care benefits, a revocable living trust is not appropriate. In most cases, the primary residence of a MaineCare applicant is an exempt asset. Up to \$750,000 of value in a personal residence is not considered when determining an applicant's financial eligibility for MaineCare if the residence is located in Maine and if there is either a community spouse or an "intent to return home" on the part of the institutionalized individual. But if the primary residence is transferred to a revocable living trust, it will no longer be exempt because the property is no longer owned by the individual.

There is also a quirky transfer rule that could make a revocable living trust problematic. When an individual creates a revocable trust and then transfers assets into that trust, those transfers are not subject to the transfer penalty calculation. That is because the asset is still available to the individual. But any distributions from the trust to anyone other than the individual (or the individual's spouse) are transfers, and those transfers are subject to a sixty-month look-back period.

### **Conclusion**

There is no one-size-fits-all estate plan. Whether you need a revocable living trust as a component of your estate plan depends on your individual circumstances. When planning for the management of your assets in the event of incapacity and for the protection and distribution of those assets upon your death, work with an experienced attorney who will take the time to learn about your family, your finances, and your goals to help you determine what your estate plan should include.

2/15/19

This article is intended to provide information of a general nature only. It does not provide or replace professional legal advice, and it does not establish an attorney-client relationship with Rudman Winchell. Please consult an attorney for advice regarding your specific circumstances.