

What about Probate and Trusts?

Author: **Jeffrey P. Deiss, CFP®, AEP®, Senior Wealth Advisor**

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This week's wealth commentary will provide some additional, basic estate planning information on probate and the use of revocable living trusts and transfer on death/payable on death account registrations.

While trusts have primarily been thought of for minimizing federal estate taxes (which

applies to very few people today), they can offer other benefits as part of a well-crafted estate plan.

What Is a Trust?

A trust is a fiduciary arrangement that allows a third party, or trustee, to hold assets on behalf of a beneficiary or beneficiaries. Trusts can be arranged in many ways and can specify exactly how and when the assets they hold pass to the beneficiaries.

Since trusts usually avoid probate, your beneficiaries may gain access to these assets more quickly than they might when compared to assets that are transferred using a will, saving time, court fees, and potentially reducing estate taxes as well.

The most common use of a trust, and which is marketed to seniors on a regular basis, is a Revocable Living Trust.

How revocable living trusts work

When you set up a revocable living trust (typically with the help of a lawyer), you can appoint yourself as trustee, which gives you the authority to manage whatever assets you transfer in and are included in the trust. Such assets might

include your home or other real estate, stocks, bonds, or even cash (but not IRAs or retirement accounts).

While you're alive, you can maintain control over your trust assets and reap any benefits from them as you see fit. You also retain the right to amend the terms of your revocable living trust, or even terminate it altogether. Upon your passing, whoever you name in your trust document as your successor trustee (typically whoever you name as executor of your will) will be responsible for managing the assets covered under the trust. That trustee must then disburse those assets as per the terms of your trust.

Benefits of revocable living trusts

While a revocable living trust can help you plan for what happens after you die, another major benefit is the ability to name a successor trustee, which could be a spouse, a partner or a child, and include provisions for when and how they should manage the assets in your trust in the event of your incapacity during your lifetime.

With longer life expectancies, we often observe that there comes a point in life where folks are no longer physically or cognitively able to manage their financial affairs. Your trust can help you plan for these unexpected situations, including whether your trust funds should be used to pay for your care. Importantly, this empowers your chosen successor trustee to not only handle your care, but also your ongoing financial affairs while you're still alive (paying bills, managing investments, filing your taxes) similar to naming a power of attorney.

Another major benefit of revocable living trusts, and the main selling point, is that they allow the assets they hold to avoid "probate".

Probate is the legal process for settling an estate according to the will of the deceased. Only assets in the deceased's name will generally have to go through probate. The typical probate process is where your executor (or an attorney on behalf of your executor) presents your will to the local "surrogate" court. If your will is valid, then the surrogate legally appoints your executor, who is then responsible for settling and distributing your estate. Probate may be complex and time-consuming, and sometimes it can also become expensive. And often

it's not. With a living trust, however, your beneficiaries can typically access whatever assets you leave them as soon as possible.

Another advantage of revocable living trusts is that they help protect your privacy. If you create a will that's filed with a probate court, that document becomes public record, whereas with a living trust, only your beneficiaries and trustee are privy to the information contained therein.

Drawbacks of revocable living trusts

While there are plenty of good reasons to establish a revocable living trust, there are also some disadvantages to consider. First, revocable living trusts cost money to set up—more money than you'd typically spend on a will. The trade off to the up-front cost of a trust is that you might actually save money in the long run by avoiding the expense of probate.

Another downside of living trusts is that retitling your probate assets into your trust can be both time-consuming and complicated. If you hold a variety of assets, you'll need to contact your different banks, brokerage firms and agents to have everything you own transferred into your trust—a process that could involve a fair amount of paperwork. The trust is only as good as what you transfer in. If you transfer your investments, but not your house, for example, then your house will still be subject to probate.

Additionally, a living trust doesn't negate the need for a will. Most people who set up living trusts inevitably fail to transfer all of their assets. If you have leftover assets not owned by your trust, you'll need a will to dictate how those assets will be distributed after your death. Furthermore, you can't use a living trust to appoint guardians for your children; you'll still need a will to accomplish that.

So, what should you do?

If you or a loved one don't have much in the way of assets, then you may be better off with a standard will instead of a living trust. Many states today offer a quick and less expensive probate option for smaller estates and so the cost of setting up a trust won't be worth it.

Because you'll spend a fair amount of money to establish your trust (typically a few thousand dollars), from a purely financial standpoint, the only way to

“recoup” that expenditure is by saving money on probate. Probate is a process, but it’s not insurmountable and it’s reasonably manageable by a competent executor in most jurisdictions. If this is not something you can handle yourself and your family is likely to outsource the probate and estate settlement process to an attorney and/or accountant to settle the estate and file your personal and estate tax returns anyway, then a revocable living trust is worth considering.

But there is another viable option to consider before creating the trust. If your assets simply consist of a few taxable financial accounts and retirement accounts, then you can simply add a “payable on death” (POD) or “transfer on death” (TOD) designation to your taxable accounts, which allow for the naming of beneficiaries and, therefore, may transfer to beneficiaries like your retirement accounts without going through the probate process.

Combining TOD/POD account registrations with naming a durable ‘power of attorney to handle your affairs in the event of your incapacity during your lifetime, you can potentially replicate the same benefits of a revocable living trust. Putting this together effectively is also a process as you’ll need to work with each of the financial institutions that hold your assets to add the TOD/POD registrations and also make sure that they all recognize the power of attorney you’ve named and will, in fact, allow them to act on your behalf when the time comes.

If you own real estate, then the TOD options depend on where you live, and a revocable trust may still be necessary. In New Jersey, for example, there is no TOD deed option. Also in NJ, the deceased’s estate needs to obtain a “tax waiver” for real estate located in New Jersey before the property can be transferred to your heirs. This takes time and, for most of us, the services of an attorney. Property held in a revocable trust in New Jersey is exempt from the waiver requirement and so a revocable trust will be needed in NJ if you want your NJ property to avoid probate.

In some states, you can prepare a deed now but have it take effect only at your death. These transfer-on-death deeds must be prepared, signed, notarized and recorded (filed in the county land records office) just like a regular deed. But unlike a regular deed, you can revoke a transfer-on-death deed. The deed must expressly state that it does not take effect until death.

States that allow TOD deeds are Alaska, Arizona, Arkansas, California, Colorado, District of Columbia, Hawaii, Illinois, Indiana, Kansas, Maine, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin, and Wyoming.

Either TOD/POD account registrations with a power of attorney or a revocable living trust can be useful estate-planning strategies, but neither is a one-size-fits-all solution. It makes sense to take the time to investigate which makes sense for you where you live. Or give us a call to discuss. If you live in a state where the probate process is costly and complex, and you know that the value of your estate is high enough for it to be subjected to probate, then you could consider a revocable living trust for all or a certain portion of your assets.

Similarly, if you're worried about estate taxes, you might establish a living trust with strategic tax-planning provisions. There are many other types of trusts and strategies beyond the scope of this week's commentary, but the use of a revocable living trust is probably the most common and where we get a lot of questions. Reach out to our team at Bridgeview Wealth to discuss what trust strategy might be best suited to your situation.



www.BridgeviewWealth.com

724-940-6321

435 Swanson Lane • Wexford, PA 15090

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