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## OBJECTIVES OF REVOCABLE TRUSTS

Why use a revocable trust? Revocable trusts can be a good tool to help clients achieve their objectives; but they are only a tool. Let's review some key objectives:

1. **Tax Savings.** Clients sometimes ask how trusts can save them transfer taxes. Let's look at the long and the short of the matter, starting with the short: The short answer is that trusts have no magic to reduce taxes. The long answer, however, is more interesting: Nevertheless, certain transaction structures can reduce taxes, and trusts are marvelous tools for creating such structures.

The transfer taxes which are a concern are the federal estate, gift, and generation-skipping taxes. In general, these taxes can apply to estates in excess of \$5.49 Million (in 2017) and \$11.18 Million (in 2018) (the amount is indexed and changes yearly, and the lower amount, with inflation adjustments will again apply after 2025). The tax rates for estates over the threshold can reach 40% (in 2018). So the ability to save on these taxes can be very important to families with more than moderate wealth. The property taxed essentially includes all forms owned or controlled by the person, including life insurance, investments, retirement funds, real estate, and so on, and includes all property held in a revocable trust.

Some trusts are useful because they can cut off the types of ownership and control of property which will otherwise cause the property to be taxed to the person or estate. The result can be that the property is no longer subject to these taxes. For example, a life insurance policy can be given away at low value during life but restricted under the terms of the trust. Another example would be using a trust to retain certain benefits during life but have the contributed property pass to charity on death. These uses are not appropriate for revocable trusts, however. A trust would need to be irrevocable and without any retained control "strings" to cut off taxable ownership and control. Irrevocable trusts are strong medicine but their terms can be made flexible enough to allow for various future events.

This leads us to the key reason trusts are so useful—they are very flexible. They can coordinate a plan designed to take advantage of the available credits, exclusions, and deductions

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to minimize taxes yet still accomplish the goals of the family. The primary reason for planning is, after all, to benefit the family, and trusts can accomplish many things which would be very difficult using any other tool in the legal toolbox.

This flexibility can be of great benefit for tax planning even in a revocable trust, the kind most often used in estate planning. Such trusts, for example, often contain formula provisions to maximize the tax savings from the use of the unified credit and the marital deduction. The property held in such a trust will be included in the person's taxable estate but will be covered by credits and deductions to the family's best advantage.

Thus, although trusts alone do not save taxes, they are such useful tools that just about any tax-saving plan will at some point likely use one or more trusts. However, the tax results will be substantially the same whether the trusts are revocable or are testamentary. But if a trust is needed in any event, a revocable trust may provide some additional benefits and will often be used in plans for larger taxable estates.

2. **Probate Avoidance.** Clients sometimes are very concerned to avoid probate and want to use trusts as will substitutes. The truth is that trusts provide a mixed blessing compared to wills which need to be probated. The true costs of probate, as opposed to costs of administration and property transfers, which are incurred in any event, are relatively low and there is no substantial delay inherent in the Utah probate system in the ability to accomplish administrative tasks. Also, revocable trust costs are incurred up front in additional fees for drafting and providing for the transfers for funding the trust. At least the transfer costs can be postponed under a will which is subject to no substantial lifetime hassle factor. There is no reason, absent a dispute, that a testamentary trust once funded, will be subject to any continuing probate court supervision.

Thus, as the sole or main reason to use a revocable trust, probate avoidance is greatly over rated, at least in Utah. On the other hand, if there are other reasons to use a trust, probate avoidance is an extra added benefit of at least some value.

Also, avoiding more than one probate, for example, avoiding ancillary probate where there is real property in jurisdictions outside of Utah, is generally a good reason to use a trust even if there are no other specific reasons.

3. **Privacy.** Some clients have heard that trusts protect the privacy of family affairs from the prying eyes of the public because trusts need not be filed as a public document. On the other hand, wills are probated in the public courts. Again, this is a mixed matter. First of all, most people simply don't care about this because they know the public simply doesn't care about them.

Trusts are not routinely probated, but where there is a dispute, exactly the sort of dirty laundry families (or at least many members of families) would rather not see in the public records will end up in the same courts where probates occur. Arbitration provisions in trusts or wills could help avoid such exposure in at least some disputes.

Also, to transfer property or transact business, copies of the trust, or at least portions of the trust will need to be filed in county recorder's records or made available for review by banks or businesses. Without too much trouble the amount of trust information made public in recorder's offices can be limited to certain administrative clauses and the identity of the trustee by the use of certifications. Banks, in particular, but other businesses too, generally keep their client's affairs reasonably confidential. Thus, although not perfect, trusts can provide those who care about such matters with some level of privacy protection as to strangers.

The same is not always true as to other family members. A revocable trust is generally operational when created, and any provisions of it are relevant later in any review of its operations, including after the trustor's death. Some trustors would loathe to have beneficiaries see how benefits have been changed from time to time under the trust as it is amended as family circumstances change. A revoked will can be destroyed without problem because it would only speak at death. A change in a trust and the provision changed are effective during life and subject to being discovered by the family. Nevertheless, some protective provisions to prevent this can be added to a trust amendment with at least some hope of success where the trustor is the only lifetime beneficiary and trustee.

4. **Management.** Most revocable trusts do not provide outside management, but they could do so, and where desired, this can be very important. It becomes very important, for example, when the trustor becomes incapacitated. Then having a successor trustee ready to step in to manage a fully funded trust will provide a protection for the trustor at very little cost and without a conservatorship or guardianship proceeding.

On the other hand, a good durable power of attorney could provide rather similar benefits. A durable power should be recommended even where a trust is used-in case there is a need to transfer assets into the trust for a disabled trustor. Trusts, however, put legal title in the name of the trustee and are more widely respected and recognized than durable powers of attorney. Although durable powers are becoming very common, the power holder still needs to convince the bank or other party to a transaction to rely on it. Some other parties can be remarkably intransigent about the "risk" of reliance where, as in some states, the applicable statutes do not provide the same clear protection for persons relying on the power of the attorney-in-fact as they do for persons relying on the power of a trustee. Utah has relatively good provisions to require, in many cases, reliance on powers of attorney.

Where the family has a member for whom long term management will be needed, for example, a disabled person or a spend thrift, it may be most advisable to use a revocable trust rather than a testamentary trust. For healthy minors, however, a contingent trust to be set up if needed pursuant to a will if both parents should die, will generally be sufficient, and a full blown revocable trust may be overkill except where a great deal of property will be distributed in stages over many years.

5. **Organization.** Not all clients have the self discipline to use a trust for a vehicle to organize their affairs, but for those who do, trusts are a good organizational tool. Funding the trust requires going through assets (perhaps culling some assets in the process) and making

transfers at a time when the trustor is still alive and (at least usually) able to help clean up any messy situations which may exist. Trusts are certainly not the only way to organize and clean up title to assets; nevertheless, where there is some other need for them, this organizing use is an added attraction for trust usage.

Not all assets are amenable to being held in trust, however, so some problem assets such as business interests or other property with transfer restrictions, qualified plans, tangible items, etc. may need to be handled separately. A trust may not be the first choice to have named as a qualified plan beneficiary, but it may be good as a back up. Tangibles may be transferred easily by a written statement if there is a will which refers to such a statement. There is no similar trust rule; however, the trustee can be granted under the trust the discretion to follow such a statement without the need to probate the will.

6. **Asset Protection.** Some clients are under the mistaken belief that a revocable trust will somehow provide protection against creditors. This is clearly in error. Some irrevocable trusts can be of help; but revocable trusts provide no better protection than was provided by the underlying asset without being held in trust. For example, the protection from creditors for life insurance payable to a trust is the same as if the policy were payable directly to beneficiaries. Property which passes to the trust as the result of the settlor's death, which property was otherwise exempt from creditors' claims, does not become subject to such claims but remains exempt. See UCA § 75-7-505(1)(c). It is not yet clear how far the "otherwise exempt" concept extends, but it would seem to cover life insurance proceeds. (As to insurance proceeds, UCA § 78B-5-505(1)(a)(xii) exempts from creditors the proceeds of life insurance on the decedent's life, provided the policy has been in existence for a continuous unexpired period of one year and is payable to the decedent's spouse or children or a trust of which they are the beneficiaries. This provision seems to imply that other proceeds (short term policy or payable to some other beneficiary) may be subject to creditors.)

To the extent their assets are not otherwise exempt from creditors, revocable trusts generally will, under Utah's trust statutes, be subject to claims against the settlor of the trust and for estate administration and funeral expenses and for statutory allowances to the surviving spouse and children to the extent the settlor's probate estate is inadequate to cover these things. UCA § 75-7-505(1)(c).