

Irrevocable Trusts

by Attorney Michael Hooker

Revocable trusts can be useful to avoid probate of an estate, to maintain privacy and to provide for a spendthrift and/or mentally ill child. The downside to revocable trusts, is that they do not protect your assets should you need long-term nursing-home placement. In other words, if you are concerned about asset protection, revocable trusts are not the answer.

The corollary must therefore be that irrevocable trusts will protect your assets. That is generally true and they do have the many of the same benefits as revocable trusts (probate avoidance etc). The critical distinction between the two forms of trust is the word “irrevocable.” The grantor (the elder) cannot revoke the trust.

Once the assets are in the irrevocable trust, they are in there for good. Many of my clients do not like the finality of such an arrangement. They want to be able to access their funds should they decide to move to Florida, buy into an assisted living facility, buy a car, and the like. Put differently, the clients want to be able to access their principal/savings. They don't want to give up control. But give up control you must.

With nursing home placement/asset protection you cannot have access to your funds. If the trust allows you access, then you have to access the funds and use them to pay for your care. That is why income-only trusts are generally the preferred trust that I use in estate planning (and I don't use trusts often). If you only have the right to income, then that is all the state can mandate that you pay for your care – just the income, not the principal.

Before February of 2006 Medicaid penalized a person a maximum of three years for transfers of assets directly to someone else. But in cases of transfers to a trust, the penalty period (sometimes referred to as the look-back) was five years. That is no longer the case. Now any transfer, either directly to a child, or to an irrevocable trust will trigger the same five year ineligibility period. So the rationale of making direct transfers to children because they had two years less of a penalty, is gone.

Do I think irrevocable trusts are useful? In the right circumstances, yes. But I would never create and fund one lightly. The elder has to have strong reasons, such as an inability to trust their child to hold assets informally for the elder, or a disabled child who can't have assets in his or her name because he/she is on Medicaid and collects SSI. In these situations it may make sense to employ an irrevocable trust.

The key to irrevocable trusts is that the elder needs to know he or she can't undo the trust, can't invade the principal, and only gets the income. The elder also needs to know that there are significant consequences for transferring to a trust if you need long-term nursing-home placement soon after the funding of the trust. If you can live with all that in the interest of protecting your assets (presumably for your children) then maybe an irrevocable trust is for you.