The Revocable or "Living" Trust

by Attorney Michael Hooker

There are generally two types of trusts used in estate planning: revocable or "living" trusts and irrevocable trusts. For this column I will discuss the simpler version, the revocable, or "living" trust.

It its most simplistic form, a trust is a legal document that establishes legal title with one entity and beneficial title with another. In effect, trusts are a legal "creation" not too dissimilar from corporations. Let's take the real estate conservation group "Trustees of the Reservation" for example. The title to its property (the Chesterfield Gorge) is in the name of the trust. There are certain trustees elected by the membership or appointed under the terms of the trust to manage the property. But do the trustees actually own the gorge themselves? Not really. There is another group that owns the beneficial interest. In this case, that is the dues-paying members of that conservation group. The trustees cannot do whatever they want with the property. There are restrictions under the trust, which exist to protect the beneficiaries.

A revocable trust is one that the grantor (the person establishing it) can revoke provided they are competent to revoke. These were very popular several years ago because a) you can revoke them if you change your mind and b) you could place your house and other assets into the trust and have them pass directly to your children upon your death. Trusts, in essence, avoided the delay, red tape and cost of probating (processing your will) in court. It also avoids attorneys' fees for that process and keeps your affairs private and out of the public domain. They can still be effective for these purposes.

Their utility, however, has, in my opinion, diminished. Why? Because if you are admitted to a nursing home, a revocable trust does not protect your assets. Why not? Because Medicaid says…if you can revoke it, then you must do so and then use the funds to pay for your care.
Perhaps equally important, in a nursing home husband/wife situation, the spouse in the community gets to keep the house. That is not true if the house is in a revocable trust. At that point the house would have to come out of the trust or the couple would not be eligible for Medicaid. I "fixed" one such situation recently by deeding out of the trust to the individual in the community (the husband). In this case the husband and wife were both trustees. Fortunately the document allowed one trustee to act alone, because the other one had dementia. I had to put on record a certification from the doctor that the spouse with dementia could not act as trustee. Who paid for all this legal work? The client, who wondered why they put the house in a trust in the first place. They were told by their attorney that the trust protected the house. Not so.
Revocable trusts can be useful in certain situations. You need to identify trustees — who get what income during the life of the creators and upon their death. Who are the identified successor trustees if the primary trustees die or become incapacitated?

In many ways a revocable trust is like a Will except that it is a document that may be put into usage while you are alive (hence the name "living trust") and may be used after death (as the document which directs the balance of your estate to your heirs/loved ones). I would caution you, however, not to take trusts lightly. I have seen too many cases where a general practitioner attorney caused more problems than he or she solved by using a revocable trust. For many people their house is their biggest asset. That is why you should be cautious if you are going to consider placing your house in a trust.

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