Revocable Trusts and Other Important Documents

Our prior issue of Professional Notes considered the fundamental reasons for making a will, and explained who benefits from an estate in the absence of a will under New York intestacy laws. While a will is traditionally viewed as the main estate planning document, many estate plans also include a revocable trust as a key document to govern the disposition of assets at death. In addition, there are a number of other documents that may be part of an estate plan, depending on the particular circumstances of each individual. These are discussed in this issue.

The Basic Structure of a Revocable Trust

A revocable trust (sometimes referred to as a living trust) can have many purposes, but as a component of an estate plan it takes a standardized form: the trust will be created by an individual as grantor, who will remain the primary beneficiary during life, and who will maintain the power to revoke the trust and amend the terms of the trust.

The grantor may act as the sole trustee of the revocable trust, although in cases where the grantor anticipates needing assistance with management of assets, another individual or a trust company or bank might also be named. If the grantor is acting as the sole trustee, provision will be made for a successor trustee to act when the grantor...
dies or becomes incapacitated. The trust instrument usually includes a non-judicial mechanism for determining the grantor’s incapacity, such as a certification by the grantor’s physicians or, in some cases, the vote of a trusted protector or committee of protectors.

For reasons explained below, the grantor may choose to fund the trust during life with some or all of the grantor’s assets, or alternatively, the trust may remain essentially unfunded until the grantor’s death. If funded during life, the grantor will usually retain the unilateral right to invest and direct the distribution of trust assets. If the grantor becomes incapacitated, the successor trustee will continue the management of the trust assets, and will invest and make distributions for the primary benefit of the grantor. In this manner, a revocable trust can serve an important purpose in allowing for the continuity of the management of the grantor’s assets during incapacity without the use of a durable power of attorney, which can often be more cumbersome to present to financial institutions and others.

Upon the grantor’s death, the trust will become irrevocable and the trust instrument will provide for the distribution of the trust’s assets in a manner similar to a will. Commonly, a primary function of the revocable trust is to act as a substitute for the grantor’s will, and will be part of an estate plan that includes a so-called “pour-over will.” The revocable trust will contain the main dispositive provisions of the estate plan to take effect at the grantor’s death. And the pour-over will generally provide that all assets that are a part of the grantor’s probate estate simply “pour over” to the revocable trust to be governed by its terms.

Creating and Funding the Trust

The formalities required to create a revocable trust differ from state to state. In New York, a revocable trust may be effectively executed by the grantor (and, if applicable, the other trustee or trustees) in the presence of two witnesses, or it may be acknowledged by the grantor in front of a notary public. Notarization is the favored method of execution in most jurisdictions when the trust is expected to hold real property. Problems can arise where assets were intended to be transferred to the trust but the proper formalities were not observed; if not effectively transferred to the trust during life, those assets generally would remain a part of the probate estate and pass under the grantor’s will. An estate plan that unifies the grantor’s will and revocable trust can therefore be important. In New York, reciting the transfer of assets to the trust within the trust document generally will be insufficient; an effective transfer will
involve re-registering securities in the name of the trust, executing a deed to transfer real property, and executing a separate assignment for tangible personal property that adequately identifies the property being transferred. In New York City, apartment cooperatives may not permit a transfer of shares to a revocable trust or may require specific agreements, trust terms or other procedures to effectively register the cooperative stock and lease in the name of the trust. Some states—but not New York—have more streamlined procedures for funding a revocable trust and may even allow certain assets to be transferred by simple recitation in the trust document.

**Primary Reasons for Using a Revocable Trust**

There are several reasons that a revocable trust may be favored as a component of an estate plan.

**Avoiding Cost and Delay of Primary Probate.** Generally, there is concern that probate can be costly and can impose undue delays in the administration of an estate, particularly with respect to distributing assets to beneficiaries, paying immediate post-death expenses, and making any immediate post-death changes to investments. Where a funded revocable trust is used, even where the grantor was sole trustee during life, a successor trustee may accept appointment and may begin to manage and distribute trust assets immediately (subject to appropriate fiduciary evaluation of ultimate cash needs, including debts and obligations of the decedent that will not be satisfied with probate assets).

The cost and complexity of probate varies widely by jurisdiction, and it is not always simple to completely avoid probate. In New York, a probate proceeding will typically be required unless virtually all assets have been transferred to the revocable trust or are held in other non-probate form, such as jointly with a living person with right of survivorship, or in accounts with named beneficiaries. It is not uncommon for some assets to be overlooked, in which case the pour-over will is desirable (and probate is typically necessary) so that these assets can pass to the revocable trust. Where an individual’s assets have a great deal of complexity and complete probate avoidance is unlikely, an individual might choose to fund the revocable trust partially with sufficient cash and investments to ensure continuity during the period that probate may be pending.

New York follows a so-called “solemn form” of probate, which affords interested persons service of process and the opportunity to object to a will in the context of a formal probate proceeding. Interested persons consist principally of those family members who would benefit if the decedent had died intestate, commonly known as heirs-at-law. Where there are no known heirs-at-law, or only distant ones who are not beneficiaries of the revocable trust, avoidance of the time and expense of locating the heirs-at-law for this purpose may be a reason to favor the use of a revocable trust. Revocable trusts can be attacked by heirs-at-law just as wills can, but where a trust is fully funded during life and probate is avoided, it can be more difficult for heirs to gain information necessary to mount such a contest.

**Avoiding Ancillary Probate.** Where an individual owns real property in more than one jurisdiction, the use of a revocable trust might be used solely for the purpose of avoiding probate proceedings in multiple jurisdictions. By transferring real estate to
a revocable trust, local proceedings may be able to be minimized or avoided. Sometimes a limited liability company (LLC) is used for this purpose and it takes title to the real estate while the individual is still alive, so that he or she dies owning interests in an LLC rather than real estate.

Privacy. In New York, the probate process is matter of public record. The terms of the decedent’s will, including beneficiaries and major categories of assets that pass under the will, are public information. For many individuals and their families, privacy is paramount and the use of a pour-over will and revocable trust can help preserve this. Where a will does pour over assets to a revocable trust and a probate proceeding is required, the trust document is typically exhibited to the court clerk but does not become a part of the public record. In such a case, beneficiaries under a revocable trust are entitled to notice of probate in the same manner as if they had been beneficiaries under a will, including the attorney general on behalf of charitable beneficiaries, but those beneficiaries often will not be provided with a copy of the full trust document.

Avoiding Court Supervision Over Continuing Trusts. Where the estate plan will establish ongoing trusts, such as a marital trust or trusts for children and other descendants, a key feature of using a revocable trust is avoiding the court supervision that applies to testamentary trusts. For example, where a trust is created under a will, a formal court proceeding is ordinarily required (on notice to interested persons) when there is a change in trustees at any time during the continuation of the trust. Where the same trust is created under a revocable trust document, usually no court involvement is necessary for changes in trustees; the trust document will simply require a written acceptance by a successor.

Power of Attorney

The New York statutory durable power of attorney form authorizes the person appointed (an “attorney-in-fact”) to manage a person’s financial matters even in the event of incapacity. Even where a revocable trust is used for the continuity of management of an individual’s assets following incapacity, a power of attorney may be needed for authority to deal with tax or governmental authorities or to manage assets that have not been funded into the trust. In addition, while gifts of an individual’s assets can be authorized under a revocable trust document, the New York statutory form also provides a specific “gifts rider” for authorizing gifts of property. This may be particularly useful where the individual has a pattern of charitable giving that should be continued by the attorney-in-fact following a period of incapacity. ¹

Durable powers of attorney are also sometimes used for a limited purpose, such as to handle a real estate closing that the individual cannot attend or does not wish to attend. A non-durable power of attorney also may be used for this kind of limited power.

If an individual becomes incapacitated without a durable power of attorney in place, it may be necessary to commence a judicial proceeding for the appointment of a guardian for management of property. The process of

¹ A model form of durable power of attorney is available at nysenior.org/wordpress/wp-content/uploads/2012/07/New York State Power-of-Atty.pdf
obtaining a court-appointed guardian can be invasive, time-consuming and expensive, and it can be divisive among friends and family. It is typical for individuals who are aware of what is involved in having a court-appointed guardian to choose to have a durable power of attorney and a health care proxy, provided they know people whom they would trust to serve in those roles.

**Health Care Proxy**

A health care proxy is used to appoint someone—for example, a family member or close friend—to make health care decisions for an individual if and when he or she becomes unable to make those decisions. The appointed person, known as the health care agent, carries out his or her understanding of the individual’s wishes about health care, but only at the point of time when the individual is no longer able to make those decisions. Hospitals, doctors and other health care providers are generally bound to follow the agent’s decisions as if they were the patient’s own decision. In New York, the health care agent is typically authorized to make any and all health care decisions, although limitations on the agent’s authority can be imposed in the health care proxy.

In order for the agent to begin to make decisions, a physician or nurse practitioner must make a reasonable determination that an individual who has executed a health care proxy is unable to make his or her own decisions. For a decision to withhold or withdraw life sustaining treatment, an additional doctor or nurse practitioner must agree the patient is unable to make decisions. A health care proxy can also be used to document the individual’s wishes or instructions with regard to organ and/or tissue donation.\(^2\)

Who should be named as agent? The common first choice is the individual’s spouse or partner. Any adult can serve, but it makes more sense to have it be someone who lives in the area. The individual’s doctor generally cannot serve as his or her health care agent unless the doctor is a relative. And to avoid a conflict of interest, an operator, administrator, or employee of the hospital or nursing home where the patient is admitted generally may not serve as agent, unless the individual is a relative or was appointed before admission.

Copies of an executed health care proxy usually are given to the health care agent and any alternate agent, and to family members, doctors, and anyone else the individual will want to be involved his or her health care or to be aware of the existence of the proxy.

In the absence of a health care proxy, or a living will, discussed below, New York law provides family members and others may make decisions regarding medical treatment in accordance with known wishes or, if unknown, in the individual’s best interests. This includes the withdrawal of life-sustaining treatment or the consent to a DNR (“do not resuscitate”) order.

For an individual without a health care proxy, particularly if there is an extended medical condition, it may be necessary to secure a court-appointed guardian to make health care decisions, which is sometimes sought in tandem with the process described above for the appointment of a guardian when there is no durable power of attorney; otherwise, a physician may seek instruction from a health care surrogate based on an established order of family priority.

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Living Will or Advanced Health Care Directive
A living will is an expression of wishes to the health care agent or others regarding the kind of treatment that an individual would want if the health care agent is making decisions, typically in the case of an end-of-life situation. For example, it might include whether the individual wants medical treatment withheld or withdrawn if it will only prolong dying or, more specifically, whether the individual wants or does not want resuscitation, mechanical respiration, or artificial nutrition or hydration in such a situation.

A living will may be used in lieu of a health care proxy (e.g., if an individual does not have a friend or family member appropriate to serve in that role), but it is more commonly used in combination. In New York, a living will typically recognizes that it is not intended to be binding on a health care agent, and that the health care agent’s decision will in all cases control.

Burial Instructions
New York law provides that an individual may appoint an agent with authority to make decisions about burial and funeral arrangements. The instructions may indicate, for example, whether cremation is desired, whether a religious service or burial in a cemetery with a religious affiliation is preferred, if and where the individual has made advance arrangements, and what name should be used on a marker. An instrument making this designation can be especially valuable if an individual is estranged from family members or does not accept religious or other views within the family concerning his or her burial or if the individual expects family members to disagree on the subject.

Digital Inventory
A digital inventory is not a legal document, but an extension of the assets list many lawyers ask estate planning clients to prepare. The inventory lists online accounts and passwords so that social media accounts can be closed, personal email accounts can be accessed, etc. It also may include information on accessing photos or other digital material stored in the cloud through a third party as well as account information for retirement, banking, and investment accounts. Coordinating the digital inventory with the estate plan and making sure it is available to executors is advisable, particularly if there are digital accounts such as a website, blog, database, archive, or other online presence that may have financial value and therefore subject to collection, reporting and valuation for estate tax purposes. An individual’s will or default provisions of state and/or federal law may provide specific authority to an executor to manage digital assets. Additionally, separate digital accounts may have specific procedures for how those accounts can be dealt with following death.

Any digital inventory should be regularly updated and left in a readily accessible place. For attorneys, it would be ideal to keep the digital inventory with the original will or the attorney’s copy of it. However, because receipt of an updated list every time a client changes a password or adds an account would likely be a nuisance, it may be preferable to urge clients to indicate where the list is kept and keep a note to that effect with the will or the attorney’s copy of it.

Conclusion
In some circumstances, a revocable trust may be a key component of the estate plan to assist with management, continuity, and privacy. Those advantages will need to be weighed
against the additional complexity and cost of creating (and, where applicable, funding) the trust. A will and revocable trust alone do not complete the documents an individual needs in planning for the future. In almost all cases, a health care proxy and durable power of attorney should be in place. In many cases, a living will also is advisable to offer guidance to the health care agent, or if there is not an agent, to family, friends and caregivers in the event an individual is unable to make his or her own decisions for treatment and end-of-life care. And individuals should be urged to take inventory of their online accounts and passwords and determine how those accounts will be handled upon death or incapacity.

For more information, see:
- ag.ny.gov/sites/default/files/advancedirectives.pdf
- health.ny.gov/forms/doh-5211.pdf (appointment of agent to control disposition of remains)
- NY Public Health Law Article 29-CC (Family Health Care Decisions Act)
- NY General Obligations Law, Article 5, Title 15.
- NY Public Health Law Sec 4201
- NY EPTL 7-1.17
- NY EPTL 7-1.18

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