The Alchemy of Revocable Trusts: Creating the Perfect Solution for Each Client's Problem

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Introduction

- Chefs fall in 2 categories
 - Non-bakers
- Bakers
- Bakers use some sort of magic to create something that bears no resemblance to what went in.
- Bakers have solutions for all sorts of problems
 - Sweet/savory
 - Crunchy/chewy
 - □ Etc.
- Revocable trust are much the same.



Outline

- This talk will focus on 4 questions:
 - What is a trust?
 - What is a rev. trust?
 - What problems are rev. trusts typically used to solve?
 - $\hfill\Box$ What should a drafter consider when crafting a rev. trust?
 - What do you do with an existing rev. trust?



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- Split of property rights between 3 parties
 - Settlor
 - Trustee
- Beneficiary
- Trust is a relationship, not a legal entity
 - □ Cannot own property, be sued, etc.
 - Reason it's called a trust
- Trust is abstract and intangible, not a physical thing
 - □ Compare with a Will
 - □ Distinguish trust from trust instrument



What is a Trust?

- Nomenclature
- Settlor/Grantor/Trustor
- Revocable Living Trust/Revocable Management Trust/Revocable Inter Vivos Trust



What is a Trust?

- Trusts categorized in various ways:
 - lacktriangledown Revocable or irrevocable;
 - Grantor or non-grantor (also called a "true" trust);
 - Simple or complex;
 - Express or implied;
 - • Self-settled or non-self-settled
 - Testamentary or inter vivos.



What is a Rev. Trust?	
- Qualities: Express	
□ Self-settled	
■ Effective during his/her/their lifetime	
Revocable	
 Grantor trust for tax purposes (grantor trusts can be neither simple nor complex.) 	
Will substitute?	
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Uses	
Elderly Clients Post at a marid man	
□ Probate avoidance □ Help with managing assets	
■ Smooth transition of control with co-trustee	
■ More effective than powers of attorney, joint accounts, or guardianship	
Characterization of Property	
 Designate rev. trusts property as settlor's separate property by agreement Helps with identification issues 	
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Uses	
U 3 C 3	
Out-of-State Property	
Avoid ancillary probate	
- Avoiding Contests	
■ Standing of expectant heirs presents a problem.	
Capacity and undue influence harder to argue.	

- Privacy

Privacy trusts are in increasing demand.Appointment of special trustee.

Uses	
- Limitations	
■ No creditor protection ■ No tax savings (as compared with Wills)	
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Drafting Considerations	
- Community Property - Maintain character	
■ How to track? ■ How to avoid comingling?	
■ Who holds responsibility? ■ Solution is often to execute premarital agreement or partition.	
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Drafting Considerations	
 When to terminate initial trust? Second death or first death? 	
□ Transfer tax considerations	
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Drafting Considerations		
Powers of Appointment		
■ Special v. limited powers		
Potential appointees?Provide flexibility		-
■ Avoid GSTT		-
		-
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Orafting Considerations		
Successor Trustees? Spouse		
□ Children		
□ Parents □ Guardians		
Other Individuals		
Professional TrusteesCorporate Trustees		
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Drafting Considerations		
Framing Considerations		-
Independent Trustees? IRC. §§ 674(c)(1997) and 672(c). Functions		

Drafting Considerations	
 Trust Protectors/Committee Fiduciary duty? Standing or springing? Flexibility 	
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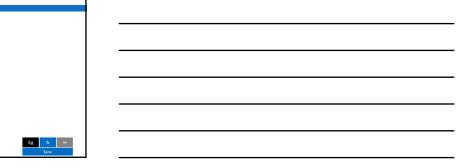
Drafting	Consi	id	erat	io	ns

- Trust Protector Powers (That I Like)
 - $\hfill\Box$ Removing and replacing trustees
- Naming new trustees
- Correcting typos
- Addressing changes in law, particularly tax laws
- Converting trust to a supplemental needs trust
- □ Changing the governing law applicable to a given trust.



Drafting Considerations

- Trustee Comp
 - "Reasonable" is common, but confusing
 - □ 5 in, 5 out rule
 - Bank models
 - □ Hourly fees



Drafting Considerations	
Trustee Removal	
■ Settlors' typically have broad powers	
■ Balance flexibility with functionality	
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Drafting Considerations	
Distributions	
□ Spectrum of discretion □ Ascertainable Standards	
Modifying language	
■ Support or supplement?	
□ Upjohn clause	
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Drafting Considerations	
In Terrorem Clause?	
□ Applicability/Enforceability? □ Teeth?	
□ leeth? □ Overuse?	
= Exclusions	
□ Individual or entire line?	
□ Indirect benefits?	
□ Treat as predeceased	

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- Accountings and Information Sharing
 - $\hfill\Box$ Separate duties to account and inform
 - Trustee's perspective
 - Beneficiary's perspective
 - First-tier beneficiaries
 - Non-waivable duty (TTC § 111.0035)



Drafting Considerations

- Contingent Trusts
 - Backstop against minor or incapacitated person taking outright
- Retirement Account Considerations
 - ${\color{red} \blacksquare } \ {\color{blue} Increasingly important}$
 - Beneficiary designations
 - Requires understanding of tax rules
- Special Assets
 - How pay for upkeep?
 - □ Licensure?
 - □ Few forms



Existing Trusts

- You can't always revoke, amend, or restate
- But actually, yes you can
- □ Court control is nonwaivable under TTC § 111.0035
- Decanting/merger
- Read the trust instrument...and understand it.
 - Lay people may not understand the language



Existing Trusts

- Trust funding
 - □ To paraphrase Winston Churchill, execution is not the end. It is not even the beginning of the end. But it is, perhaps, the end of the beginning.
 - Assignments, deeds, replating, etc.
 - Blanket transfers
 - □ Homesteads?
 - $\hfill \blacksquare$ Retirement accounts should not be put into rev. trusts



Existing Trusts

- Grantor intent
 - 4-corners doctrine
- Communication with Beneficiaries
 - Demands
 - Best practices
- Investments
 - UPIA applies unless waived
 - Ability to deal with related trusts?
 - Ability to hold family business?



Existing Trusts

- Self-dealing
 - Non-waivable, but exceptions apply
 - Breadth of duty
 - Loans, purchases, transactions between related trusts
- Considerations Upon Death of Settlor
 - ■§ 665 election?
 - S-corp stock?



Questions?	
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