

The Estate Planning Advisor

Revoking an Irrevocable Trust

By Richard J. Shapiro, J.D.

There are two general types of trusts – revocable and irrevocable, with each type of trust capable of serving a variety of purposes. Revocable trusts, by their very nature, are fully amendable and revocable by the creator of the trust (the “Trustmaker”). While revocable trusts are wonderful estate planning vehicles, there are circumstances when only an irrevocable trust can meet the client’s goals and objectives. For example, revocable trusts do not afford any protection of the Trustmaker’s assets in the event the Trustmaker requires long-term care. A properly drafted and funded irrevocable trust can afford the Trustmaker partial or complete asset protection.

Despite the potential benefits of irrevocable trusts, many people are understandably hesitant to enter into an “irrevocable” arrangement. A typical planning goal for most people is to retain control over their affairs. Funding an irrevocable trust seems to conflict with that goal.

Fortunately, New York law provides a mechanism for the revocation of even irrevocable trusts. Under section 7-1.9 of the Estates, Powers and Trusts Law (“EPTL”), an irrevocable trust can be amended or revoked upon the written consent of the Trustmaker and the trust beneficiaries. Accordingly, if the trust names specific beneficiaries, all of whom are adults and none of whom is under any form of legal disability, the trust can be easily amended or revoked upon the written consent of the Trustmaker and the beneficiaries.

Complications will arise where the trust provides that upon the death of a beneficiary, that person’s share is to pass to his or her descendants or other named contingent beneficiaries. Under the statute, consent of any living contingent beneficiaries will be required to amend or revoke the trust. If a trust says that a disposition is to be made, “to my son John, but if he predeceases me then to John’s children James and Sally,” both James and Sally must consent to for the amendment or revocation to be effective. If either James or Sally is a minor, however, the case law holds that minors cannot give valid consent to amend or revoke a trust. One possible solution is for the trust to provide that upon a beneficiary’s death, his or her share would pass to the more generic “heirs” or “next of kin.” The statute specifically provides that such undefined contingent beneficiaries do not have a beneficial interest in the trust, and thus no consent of such persons is required. Such language, however, may not be in synch with the Trustmaker’s planning preference to include specifically named contingent beneficiaries. These issues need to be addressed by the client and his or her attorney during the counseling meeting.

EPTL § 7-1.9 provides for revocation of an irrevocable trust during the Trustmaker's lifetime. What options exist if all the beneficiaries of a trust wish to amend or terminate a trust *after* the Trustmaker's death? In such a case, the beneficiaries must petition an appropriate court for approval of such proposed amendment or termination. In general, courts will be favorably inclined to approve such amendment or termination if (1) all beneficiaries consent and (2) the reasons for the amendment or termination outweigh the material purpose of the trust. In addition, a court may modify a trust if, because of a change in circumstances not anticipated by the Trustmaker, the modification will further the trust purposes.

Richard J. Shapiro is a partner with the Middletown law firm of Blustein, Shapiro & Rich, LLP. Mr. Shapiro is a member of the National Network of Estate Planning Attorneys, the National Academy of Elder Law Attorneys, the New York State Bar Association (Trusts and Estates and Elder Law Sections), and the Hudson Valley Estate Planning Council. He can be reached at (845) 692-0011 or at rshapiro@mid-hudsonlaw.com. The information in this article is for general information purposes only and is not, nor is it intended to be, legal advice, including legal advice for Internal Revenue Code purposes as described in IRS Circular 230.