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## Trust Me? Estate Planning with Revocable Trusts

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## TRUST ME? ESTATE PLANNING WITH REVOCABLE TRUSTS

BRADLEY E.S. FOGEL\*

### ABSTRACT

Revocable trusts are one of the most common estate planning techniques. Unfortunately, many advisors use them without considering the merits for the particular client. Like any other estate planning technique, they are appropriate only for some clients.

Typically, a settlor creates and funds a revocable trust during his or her lifetime. The settlor then uses trust funds to pay living expenses. Upon the settlor's death, the successor trustee administers the trust, collects the settlor's assets, pays creditors, and distributes the assets to the named beneficiaries. In the optimum case, this is done without any court involvement.

Due to the lack of court involvement, it is possible to use a revocable trust to avoid probate and reduce the associated expenses and delays. However, this goal is achieved only if settlor transfers all of his or her property to the trust during his or her lifetime. As a practical matter, this almost never happens.

Revocable trusts also provide advantages in terms of privacy (after the settlor's death) and planning for the settlor's incapacity. However, these advantages, like probate avoidance, are obtained only if the trust is funded during the settlor's lifetime.

Revocable trusts also have disadvantages; most notably, increased complexity during the settlor's lifetime and higher estate planning costs. The essence of the trade off is that the settlor suffers the disadvantages during his or her lifetime. The advantages are mostly savings and efficiencies that obtain only after the settlor's death.

Whether this trade off is acceptable is up to the attorney and client to decide based on the situation of the specific client. Such a subjective balancing is not easy. However, the client is not well served by an estate planner that eschews careful analysis in favor of using revocable trusts for all (or no) clients.

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## INTRODUCTION

Revocable trusts are probably the most ubiquitous estate planning tool. In law schools, however, revocable trusts tend to be given little attention. The dichotomy is striking. Practicing estate planning attorneys use revocable trusts in “most”<sup>1</sup> or “all”<sup>2</sup> of the estate plans they write. In contrast, revocable trusts are largely ignored in the basic Trusts and Estates course offered in all law schools.<sup>3</sup>

The result is unfortunate. Many practicing estate planning attorneys and financial advisors recommend revocable trusts without considering the needs of the individual client. Similarly, claims of the advantages of revocable trusts are frequently exaggerated,<sup>4</sup> and the disadvantages are ignored.<sup>5</sup> This one-sided discussion contributes to the widespread lack of understanding of the operation of revocable trusts among lay-persons—even lay-persons that have created revocable trusts.<sup>6</sup> This lack of understanding also leads to misuse of the trust that, in turn, vitiates many of the advantages that caused the attorney and client to be so smitten with revocable trusts in the first place.

Of course, revocable trusts have an important place in many estate plans. The advantages of revocable trusts—although frequently overstated—are significant. Like any other estate planning tool, however, they are appropriate for *some* clients. Also like any other estate planning tool, they are appropriate only if the attorney explains the pros and cons to the client, weighs the advantages and disadvantages and, significantly, educates the client regarding how the client should manage the newly created trust.

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1. *Ten Frequently Asked Questions Concerning Estate Planning*, GREENSFELDER, [www.greensfelder.com/revocable-trust.aspx](http://www.greensfelder.com/revocable-trust.aspx) (last visited Dec. 19, 2013) (“[F]or most people . . . use of a Revocable Trust offers more advantages than any other alternative.”).

2. Kamil Skawinski, *Why you Need a Revocable Living Trust*, BANKRATE (Nov. 19, 2007), [www.bankrate.com/brm/news/financial\\_literacy/Nov07\\_revocable\\_living\\_trusts\\_a1.asp](http://www.bankrate.com/brm/news/financial_literacy/Nov07_revocable_living_trusts_a1.asp) (“The main ‘main document’ that everybody needs, every single person needs—and I know that other people have different opinions about this, but this is my opinion—is a revocable living trust. In fact, the less money you have, the more you need a trust.”) (quoting Suze Orman).

3. For example, the index of a widely used casebook lists about thirty references to revocable trusts scattered throughout the 958-page book. See JESSE DUKEMINIER, STANLEY M JOHANSON, JAMES LINDGREN & ROBERT H. SITKOFF, *WILLS, TRUSTS, AND ESTATES* (7th ed. 2005). The section specifically on revocable trusts is twenty-three pages in length—approximately two and one-half percent of the entire book. *Id.* at xv–xvi.

4. See, e.g., ROBERT A. ESPERTI & RENNO L. PETERSON, *LOVING TRUST: THE RIGHT WAY TO PROVIDE FOR YOURSELF AND GUARANTEE THE FUTURE OF YOUR LOVES ONES* xi (rev. ed. 1994); Skawinski, *supra* note 2.

5. See, e.g., *Why is Talking About and Planning for Death Important?*, ST. LOUIS PUBLIC RADIO (July 10, 2013), [news.stpublicradio.org/post/why-talking-about-and-planning-death-important](http://news.stpublicradio.org/post/why-talking-about-and-planning-death-important).

6. See *infra* note 13.

This Article will describe how revocable trusts work. In addition, it will discuss some of the advantages and disadvantage of revocable trusts. The goal, of course, is an accurate description of the merits of revocable trusts that avoids the hyperbole inherent in the selling of revocable trusts by some professionals.

### I. OPERATION OF A REVOCABLE TRUST

A revocable trust may be defined accurately, albeit uselessly, as a trust that is revocable. Any trust that by its terms<sup>7</sup> may be revoked under a given set of circumstances is, technically, a revocable trust.<sup>8</sup> Typically, though, when estate planners refer to a “revocable trust”<sup>9</sup> they mean an *inter vivos*<sup>10</sup> trust that the settlor<sup>11</sup> may relatively freely revoke or amend and that is intended to be the vehicle by which the settlor’s estate plan will be effected at his or her death.

Typically, such a revocable trust is created by a settlor as part of his or her overall estate plan. During the settlor’s life, the settlor is frequently the trustee (or at least a co-trustee) and a beneficiary of the revocable trust.<sup>12</sup> The settlor

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7. Even an irrevocable trust may be modified or revoked under certain circumstances. For example, administrative provisions may be revised. UNIF. TRUST CODE § 412 (amended 2010). Generally, a trust may be revoked with the consent of the settlor and all beneficiaries regardless of the trust terms. *See, e.g., id.* at § 411(a). In some states, the settlor’s consent may not even be necessary. *See* MO. ANN. STAT. § 456.4B-411 (West 2007). *But see* Claffin v. Claffin, 20 N.E. 454, 456 (Mass. 1889).

8. UNIF. TRUST CODE § 103(14). Under the Uniform Trust Code, a trust is a revocable trust if it is “revocable by the settlor without the consent of the trustee or a person holding an adverse interest.” *Id.* Thus a trust that may be revoked by the settlor only with the consent of a non-trustee third party may be considered a revocable trust depending on the third party’s interest, if any, in the trust. Such a trust would also be treated as revocable for transfer tax purposes even though, practically, the settlor’s power to revoke may be significantly curtailed. Treas. Reg. §§ 25.2511-2(c, e) (2013); I.R.C. § 2038 (2006). So limiting a settlor’s power of revocation is sometimes useful in order to protect the settlor (perhaps from himself or herself) or the other beneficiaries of the trust.

9. This sort of revocable trust is also sometimes called a “living trust” or even a “loving trust.” BLACK’S LAW DICTIONARY 935 (6th ed. 1990); ESPERTI & PETERSON, *supra* note 4, at 7.

10. An *inter vivos* trust is a trust created by the settlor while the settlor is living. BLACK’S LAW DICTIONARY, *supra* note 9, at 821. In contrast, a trust that is created in a will is not effective until the probate of the will and is called a “testamentary trust.” *Id.* at 1475.

11. The “settlor” is a person who creates or transfers property to a trust. UNIF. TRUST CODE § 103(15). Frequently, the same person creates and funds a trust; thus, that person is the sole settlor. If multiple people create or fund the trust, then the trust will have multiple settlors. *Id.* In that case, each person is usually the settlor over the portion of the trust they funded. *Id.*

12. Even if the settlor is the sole trustee and is also the sole beneficiary during his life, the revocable trust will invariably have contingent beneficiaries who will succeed to the beneficial interest after the settlor’s death. Since there are multiple beneficiaries in the trust, merger is not possible. *Id.* at §§ 402(a)(5), 402(b).

It is common to use joint revocable trusts—a single revocable trust with two settlors—for married couples and life partners. *See* Bette Heller, Ken Ransford & Carl Stevens, *Joint*

creates the trust and then transfers as much property as possible to the trust.<sup>13</sup> In many ways, this transfer is a relatively insignificant act. It has no significant tax ramifications,<sup>14</sup> because the trust is revocable. Usually, the settlor is both the transferor (as settlor) and the transferee (as trustee). Thus, no third party is involved, except the custodian of the asset, if any. The transfer to the trust is usually no more than a slight change in the name on the account or deed. For example, if Jane Smith is the settlor and trustee of her own revocable trust, then transferring her mutual fund to the trust merely means changing the account owner from “Jane Smith” to, perhaps, “Jane Smith, as trustee of the 2014 Jane Smith Revocable Trust.”<sup>15</sup>

Once the trust is created and funded, the settlor becomes the trustee<sup>16</sup> of a trust of which he or she is also a beneficiary.<sup>17</sup> The settlor’s three roles are important in light of the fact that the settlor has, theoretically, transferred a large portion of his or her assets to the trust. Suppose that the settlor has to pay a bill. How can the settlor make that payment if he or she has transferred most of his or her assets to the trust?

As shown below in Figure One, this is the importance of the settlor’s three roles in the trust during his or her lifetime. In order to pay the settlor’s

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*Revocable Trusts*, 26 COLO. LAW., Aug. 1997, at 63, 63. For simplicity, this Article discusses only single-settlor revocable trusts. The operation of a joint trust is similar.

13. A trust may be viewed either as an entity or as a relationship between the various parties. Bradley E.S. Fogel, *What Have you Done for Me Lately? Constitutional Limitations on State Taxation of Trusts*, 32 U. RICH. L. REV. 165, 201–02 (1998). Thus, it is technically incorrect to say the settlor transfers property to the trust. Instead, the settlor transfers property to the trustee of the trust to hold in trust. Despite the imprecision, this Article will frequently use the former description for grammatical ease.

14. See, e.g., Treas. Reg. § 25.2511-2(c) (2013). Indeed, the trust will likely use the settlor’s social security number. Treas. Reg. § 1.671-4(b)(2) (2006); Treas. Reg. § 301.6109-1(a)(2) (2013).

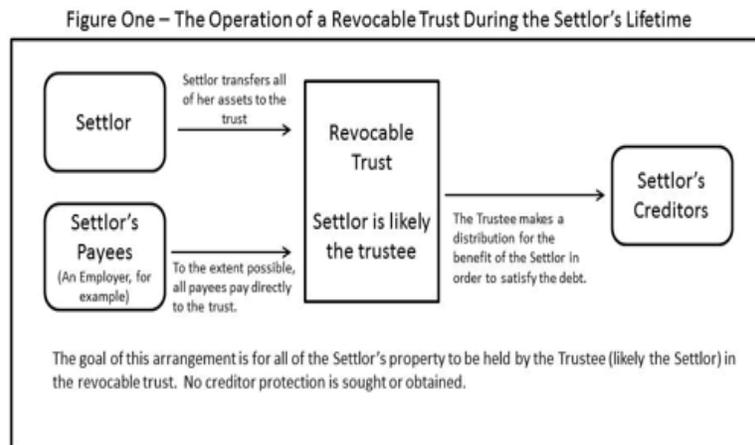
15. Many attorneys name trusts they create. This is accomplished by simply adding such a provision into the trust document. Some attorneys eschew naming trusts they create. If the trust has not been given a name, then the transferee in the example above might be something like “Jane Smith, as trustee of a trust created under an agreement dated May 11, 2014, by and between Jane Smith, as Settlor, and Jane Smith, as Trustee.” Obviously, whatever the merits of naming a trust, failing to name it does make the description more verbose.

16. As mentioned, the settlor is usually, but not always, a trustee of his or her own revocable trust.

17. The revocable trust may be drafted so that only distributions to the settlor are permitted during the settlor’s life or there may be other permissible beneficiaries (such as the settlor’s children) as well. Essentially, the question is whether the settlor wants the trustee (usually himself or herself) to have the power to make gifts to others directly from the trust. Regardless, under the Uniform Trust Code, the trustee owes fiduciary duties only to the settlor. UNIF. TRUST CODE § 603(a). At common law, the trustee owed fiduciary duties to all beneficiaries, even if the trust was revocable. See Ronald R. Volkmer, *New Fiduciary Decisions*, 39 EST. PLAN., Feb. 2012, at 43, 46; GEORGE GLEASON BOGERT, *THE LAW OF TRUSTS AND TRUSTEES* § 543 (2d ed. 1993).

creditors, the trustee (who is also the settlor) makes a discretionary distribution of trust assets for the benefit<sup>18</sup> of the beneficiary (who is also the settlor) to the creditor. Thus, the creditor gets paid from the settlor's assets, as intended. From the settlor's point of view, he or she is merely paying the bill from a different checking account. From the creditor's point of view, the only difference, if any, is the name on the upper left corner of the check, if an actual paper check is used.<sup>19</sup>

Similarly, whenever the settlor receives an asset, such as periodic salary, he or she will transfer that to the trust.<sup>20</sup> As shown in Figure One, this transfer may be effected by simply depositing the check into the account the settlor holds as trustee or even having the payment directly deposited into that account.



Of course, the trust is revocable by the settlor. Thus, he or she can amend any of the provisions at any time. This is especially important because the trust agreement is going to determine how the settlor's assets will be distributed at death.<sup>21</sup> Thus, any change in the settlor's wishes may be effected by an amendment to the trust.

Assuming no incapacity,<sup>22</sup> the settlor will likely continue serving as trustee until his or her death.<sup>23</sup> Upon the settlor's death, the trust becomes

18. In order for this to be possible, the trust agreement should allow distributions to, or for the benefit of, the settlor.

19. Frequently, banks will put the account owner's name on the face of the check, although there is no requirement that it do so. *See* U.C.C. § 3-104 (2011-12). That name will be the somewhat verbose name of the transferee discussed above. *See supra* note 15.

20. As discussed below, it is very common for the settlor to forget to properly title some assets. *See infra* notes 38-48 and accompanying text.

21. *See infra* notes 22-31 and accompanying text.

22. *See infra* notes 23-31 and accompanying text.

irrevocable<sup>24</sup> and the successor trustee designated in the trust agreement begins serving as trustee.<sup>25</sup> This new trustee will administer the trust as required by the trust agreement. At this point, the no-longer-revocable trust serves like a will. Any provisions that the settlor might have wanted in his or her will—such as gifts to charity, distributions to children or friends, dispositions of tangible personal property—will instead be made through the trust with a similar degree of flexibility. For example, if the settlor wanted a gift to his or her son to be held in trust until the son reached a certain age, the trust for the settlor’s son could be created in the revocable trust.<sup>26</sup>

This process is the source of the frequent claim that revocable trusts “avoid probate.”<sup>27</sup> Revocable trusts effectively transfer property from the (now-deceased) settlor to his or her desired beneficiaries without the requirement of a will or, indeed, any court involvement.<sup>28</sup>

As discussed in more detail below, however, for a variety of reasons it is uncommon for settlors to successfully transfer all of their assets to their revocable trust during their lifetime.<sup>29</sup> These forgotten assets, which may be of substantial value, must be accounted for. The usual method is through a “pour-over” will. As shown in Figure Two, the pour-over will provides that the decedent’s entire probate estate (all of the forgotten assets) should be paid to his or her revocable trust.<sup>30</sup> This is done so that all of the settlor’s assets—both those in his or her revocable trust and those forgotten assets that were never transferred to the trust—all end up in the trust for ultimate distribution to the intended beneficiaries.

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23. It is, of course, also possible that the settlor/trustee could resign as trustee before death, even if not incapacitated. *See* UNIF. TRUST CODE § 705 (amended 2010).

24. HOWARD M. ZARITSKY, *TAX MANAGEMENT: ESTATES, GIFTS, AND TRUSTS: REVOCABLE INTER VIVOS TRUSTS* A-63 (2003). Of course, the person who had the power to revoke the trust—the settlor—is no longer living. It is possible that, under the terms of the trust agreement, some other person might have the power to revoke the trust after the settlor’s death. Such a provision is, in fact, common in joint revocable trusts. However, in single-settlor revocable trusts, the settlor is generally the only person given the power to revoke the trust, and his or her death renders the trust irrevocable.

25. UNIF. TRUST CODE § 704(c)(1). If there is no available successor trustee named in the agreement, then, traditionally, the court would appoint a successor trustee. *See* BOGERT, *supra* note 17, at § 532. The Uniform Trust Code provides for a few different ways—including some that do not require court involvement—for filling such a vacancy. *See* UNIF. TRUST CODE § 704(c).

26. *See id.* at § 401(1).

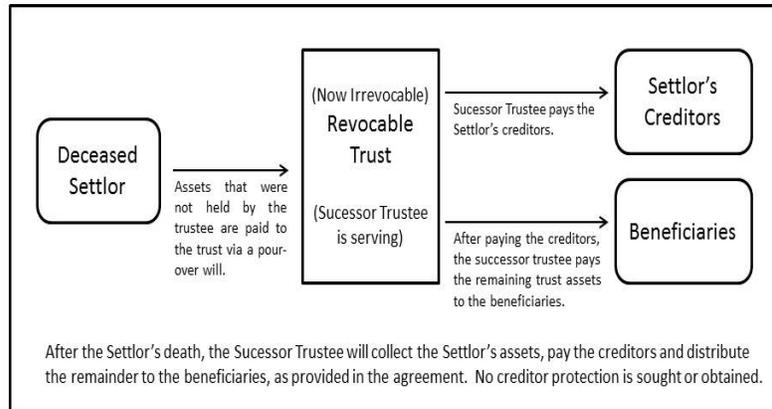
27. *See, e.g.,* ZARITSKY, *supra* note 24, at A-51 (stating that a revocable trust is appropriate for those wishing to avoid judicial supervision of an estate).

28. Of course, problems can erupt that would involve the court in the revocable trust. *See* UNIF. TRUST CODE § 201. For example, a disgruntled beneficiary could claim that the settlor lacked capacity to create the trust or make an amendment thereto. *See id.* at §§ 402(a)(1), 406.

29. *See infra* notes 38–48 and accompanying text.

30. *See* BLACK’S LAW DICTIONARY, *supra* note 9, at 1169.

Figure Two – The Operation of a Revocable Trust After the Settlor's Death



Although a pour-over will is a simple instrument, it remains fully subject to state probate laws. Specifically, a pour-over will—like any will—is ineffective until it has been probated.<sup>31</sup> Indeed, the fact that almost all settlors leave some assets out of their revocable trusts and that these forgotten assets require the probate of a pour-over will yields the result that estate planning with a revocable trust rarely obviates the need for probate. This also brings us to our next section.

## II. THE ADVANTAGES AND DISADVANTAGES OF REVOCABLE TRUSTS: DON'T BELIEVE (ALL OF) THE HYPE<sup>32</sup>

### A. Avoids Probate

Perhaps the most frequently cited advantage of revocable trusts is that they avoid probate. This claim is usually packaged with horror stories about the length and expense of the probate process<sup>33</sup> and, occasionally, claims that the

31. See, e.g., MO. REV. STAT. § 473.087 (2000) (noting that a will is not effective until it is probated).

32. This reference is drawn from PUBLIC ENEMY, DON'T BELIEVE THE HYPE (Def Jam 1995).

33. See, e.g., NORMAN F. DACEY, HOW TO AVOID PROBATE 8 (1965) (“Before your family gets a penny, the probate racketeers will have exacted their legal tribute.”); BARBARA R. STOCK, IT’S EASY TO AVOID PROBATE 13 (1985) (describing probate as “a system designed by attorneys for the benefit of attorneys.”). In HOW TO AVOID PROBATE, the author states that the probate system does not get reformed due to bribes paid by attorneys and judges to “non-lawyer legislators” and “newspapermen.” DACEY, *supra* note 33, at 8.

court will decide who gets your property regardless of the terms of your will.<sup>34</sup> There are two problems with the claim that revocable trusts avoid probate. First, settlors with revocable trusts are almost never successful in fully avoiding probate. Second, the expense avoided and time saved is not nearly as significant as represented.

Property held in a revocable trust will be distributed at the settlor's death as directed in the trust agreement.<sup>35</sup> Obviously, the revocable trust is not a will and does not need to be probated. Moreover, if everything works smoothly, distribution of the revocable trust happens without court involvement. Of course, things do not always work out smoothly. For example, a financial institution may question the designated successor trustee's authority to act, a beneficiary (or heir) may claim the settlor lacked capacity, or there may be a dispute regarding the meaning of trust terms.<sup>36</sup> These disputes would be settled by the probate court and would largely vitiate any advantage in avoiding probate.<sup>37</sup>

Even if everything does go smoothly, revocable trusts rarely eliminate the need for probate. Settlors very rarely transfer all of their property into their revocable trust. There are numerous reasons for this failure—some significant, some trivial. For example, a settlor may fail to transfer his or her car to the trust because he or she does not wish to make a trip to the local department of motor vehicles.<sup>38</sup> More significantly, married settlors frequently fail to transfer their residence into their revocable trust because doing so could compromise the creditor-protection advantages of holding the property as tenants by the entirety.<sup>39</sup> Moreover, the paperwork required to deed real property to the trust, and possible title insurance issues, may prevent the settlor from taking this action.<sup>40</sup>

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34. See, e.g., *Why is Talking About and Planning for Death Important?*, *supra* note 5. At the risk of stating the obvious, probate courts are required to follow the terms of the will (with exceptions, of course) if a decedent died testate. See, e.g., MO. REV. STAT. § 474.430 (2000).

35. See *supra* notes 21–27 and accompanying text.

36. See, e.g., UNIF. TRUST CODE §§ 406, 601 (amended 2010) (noting that a trust is void if its creation was caused by fraud, duress, or undue influence). Cf. GEORGE M. TURNER, REVOCABLE TRUSTS § 64:7 (5th ed. 2013) (arguing that revocable trusts are less subject to attacks than wills due to the substantial amount of attorney-time it takes to draft a trust).

37. See UNIF. TRUST CODE § 201.

38. See, e.g., MO. REV. STAT. § 301.196 (stating that when the interest in a motor vehicle is being transferred, the transferor must notify the department of revenue).

39. See 41 AM. JUR. 2D Husband and Wife § 36 (2005). After the death of the first spouse, the residence would be completely owned by the surviving spouse. At that time, the surviving spouse could transfer the residence to the revocable trust without losing any creditor-protection benefits.

40. *Understanding the Basics of Revocable Living Trusts*, KAISER LAW FIRM, <http://www.kaiserlawfirm.com/kaiserlaw/files/RevocableLivingTrustsBrochure09.pdf> (last visited Dec. 20, 2013).

Some settlors are concerned with privacy during their lifetime and do not wish to pay bills with checks that list their revocable trust on the face of the document.<sup>41</sup> Thus, they will maintain a checking account in their own name (not in their revocable trust) in order to pay such bills.

Perhaps the most common reason for the settlor's failure to transfer property to his or her revocable trust is a simple lack of information regarding the necessity that they do so. A large portion of individuals who execute revocable trusts do not understand how the trusts work or how they "avoid probate."<sup>42</sup> Correspondingly, they are unaware of the requirement that they transfer their property to the trust. Moreover, estate planning attorneys generally do not assist their clients with transferring assets to their trust<sup>43</sup> and may not even mention the need to do so to the client.<sup>44</sup> Although the process of transferring most assets to a revocable trust is not complicated, it may be somewhat daunting for a lay-person.<sup>45</sup> For example, determining how to

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41. See *supra* note 15 and accompanying text.

42. See, e.g., *Why is Talking About and Planning for Death Important?*, *supra* note 5. For example, one (presumably lay-person) caller in this radio program had parents who executed an estate plan using a revocable trust and pour-over will. Unfortunately, the parents did not understand how the two documents work together and, having validly executed revocable trusts, failed to safeguard their wills. Upon the parents' demise, the wills were not found (and were thus presumed revoked) and their revocable trusts were unfunded. Thus, the parents died intestate despite careful estate planning to provide, *inter alia*, for a special needs child. *Id.* See also *Johnson v. Cauley*, 546 S.E.2d 681, 683 (Va. 2001).

43. For example, one law firm notes that "[s]etting up a Revocable Trust is relatively easy and usually only involves a one-time charge . . . . Clients can make most of the transfers to their Revocable Trust themselves, but as mentioned above, our Firm will work closely with our Clients and their advisors to assure that the Revocable Trust is funded." *Understanding the Basics of Revocable Living Trusts*, *supra* note 40 (emphasis added). Of course, one would expect that the attorney who helped their clients transfer property would have to charge the client for his or her time. Many clients would likely be justifiably reluctant to pay an attorney's hourly rate for such minutiae. Of course, an attorney anxious to provide the best service possible could employ a paralegal to assist clients in this regard.

44. *Why is Talking About and Planning for Death Important?*, *supra* note 5.

45. See, e.g., *Transferring [sic] Mutual Funds to a Trust*, BOGLEHEADS, <http://www.bogleheads.org/forum/viewtopic.php?f=1&t=94341> (last visited Dec. 20, 2013) (listing various questions and ample confusion regarding transferring a mutual fund to a revocable trust). One website states that funding a revocable trust "[t]ypically . . . involves making the trust the named beneficiary [of] retirement accounts." Joseph Nicholson, *How to fund a Revocable Trust*, EHOW, [http://www.ehow.com/print/how\\_5858246\\_fundrevocabletrust.html](http://www.ehow.com/print/how_5858246_fundrevocabletrust.html) (last visited Dec. 20, 2013). In fact, naming the settlor's revocable trust as the beneficiary of the settlor's qualified retirement accounts could have significant adverse tax consequences, if not done properly, and, in any event, is only done in certain circumstances. See Bradley E.S. Fogel, *When Babies Retire: Using Trusts as Beneficiaries of IRAs*, A.B.A., [http://www.americanbar.org/publications/probate\\_property\\_magazine\\_2012/2013/march\\_april\\_2013/article\\_fogel\\_when\\_babies\\_retire.html](http://www.americanbar.org/publications/probate_property_magazine_2012/2013/march_april_2013/article_fogel_when_babies_retire.html) (last visited Dec. 20, 2013).

transfer a Vanguard<sup>46</sup> mutual fund account required a phone call to Vanguard. The documentation to effect that transfer is a surprisingly complicated nineteen-page form that requires copies of portions of the trust agreement.<sup>47</sup>

Thus, for a variety of reasons, settlors frequently fail to transfer all of their assets to their revocable trust. The remaining property—their probate estate—necessitates the probate of their pour-over will. Pour-over wills are relatively simple<sup>48</sup> and the probate estate—consisting only of property that for one reason or another was never transferred to the revocable trust—may be relatively minor;<sup>49</sup> however, as long as there is any probate estate, the will needs to be probated. Thus, it is uncommon for settlors with revocable trusts to completely escape probate.

When individuals discuss the disadvantages of probate, they are usually referring to more than simply the court process of proving a will. Colloquially, “probate” refers to the entire process of proving the will, collecting the testator’s assets, paying creditors, paying estate taxes (if relevant),<sup>50</sup> distributing assets to the named beneficiaries, and obtaining a release of liability for the fiduciary. At best, using a revocable trust eliminates only the first of that litany. It is still necessary to collect all of the settlor’s assets and

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46. The Vanguard Group is one of the largest families of mutual funds in the United States. *Largest Mutual Funds*, HOW THE MARKET WORKS, <http://education.howthemarketworks.com/mutual-funds/mutual-funds-intermediate/largest-mutual-funds/> (last visited Dec. 20, 2013).

47. Determining how to effect such a transfer was not immediately obvious from the Vanguard website. *Keep more returns with Vanguard funds and ETFs*, VANGUARD, <https://investor.vanguard.com/corporate-portal> (last visited Dec. 20, 2013). The necessary documentation was secured through a phone call to Vanguard. The nineteen-page (with instructions) form requires that a new account be created for the revocable trust. Form, Change of Ownership Form For Transfers other than Due to Death (2013) (on file with author). Various information about the trust is also requested. *Id.* (“If you’re transferring assets into a new trust account, you must attach a copy of the pages of the trust agreement that show the name of the trust, the trust date, and a listing of all trustees, including successor trustees, if any, and their signatures. In addition, you must attach a completed Account Registration Form to establish the new trust account.”). *Id.* The form is also unclear whether a signature guarantee—generally available at some financial institutions—is required. *Id.*; see also *Transferring [sic] Mutual Funds to a Trust*, *supra* note 45 (noting confusion about signature guarantees).

48. See *supra* notes 29–31 and accompanying text.

49. In many states, there is some form of “small estate administration” that may be used if the probate estate is very modest in size. See, e.g., N.Y. SURROGATES COURT PROCEDURE ACT LAW §§ 1301–1312 (McKinney 2011).

50. As of 2013, federal estate taxes are owed only if the decedent’s gross estate exceeds \$5,250,000 in value. I.R.C. § 2010(c)(3) (2006); Rev. Proc. 2013-15, 2013-5 I.R.B. 448. There are a variety of credits and deductions—for transfers to charity or spouses, for example—on top of that. I.R.C. §§ 2056, 2055. Thus, federal estate taxes are relevant for a very small portion of individuals.

transfer them into the name of the successor trustee.<sup>51</sup> It is still necessary to pay creditors.<sup>52</sup> Beneficiaries will still want their distributions. It is not necessary that the successor trustee obtain a release; however, it would certainly be advisable to do so. In short, the process of collecting and distributing the settlor's assets after his death is somewhat similar whether it is the probate of the will or administration of a revocable trust. Both scenarios require similar administrative duties of the fiduciary (trustee or executor) and should, therefore, incur similar fees from the attorney and the fiduciaries.<sup>53</sup>

In essence, the common statement that revocable trusts "avoid probate" should, to borrow the methodology of the political fact checkers, be labeled as true but misleading.<sup>54</sup> It is theoretically possible to completely avoid probate through the proper and careful use of a revocable trust. However, even if probate-avoidance nirvana is achieved, the actual savings in cost, time, and effort is not as substantial as many claim.<sup>55</sup> Moreover, for a variety of reasons, it is very uncommon for a settlor to completely avoid probate even with a properly drafted revocable trust.<sup>56</sup> Thus, there are probate-avoidance advantages to revocable trusts, but they are not nearly as significant as frequently claimed.

#### B. Privacy

Probate is a public process.<sup>57</sup> Anyone can view, copy, publish, etc. a will once it has been probated. Thus, the wills of many famous deceased individuals are available online. From these one can, for example, discover that Jerry Garcia (icon and putative leader of the Grateful Dead)<sup>58</sup> was concerned that individuals he did not know during his lifetime would, after his death, claim to be his children in order to obtain a portion of his estate.<sup>59</sup> Leona

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51. After the settlor's death, the trust will be required to obtain its own tax identification number and of course, the identity of the trustee will change from (usually) the settlor to the successor trustee. 26 C.F.R. §§ 1.671-4(b)(2), 301.6109-1(a)(2) (2012).

52. UNIF. TRUST CODE § 505(a)(3) (amended 2010).

53. Of course, the amount of attorney's and fiduciary's fees in the different situations will vary greatly from state to state. For example, in Missouri, the attorney representing an executor in probate receives a set statutory fee. MO. REV. STAT. § 473.153 (2012). That is not the case in most states. Trustees generally receive "reasonable" compensation; however, there may be a separate or additional fee received upon termination of the trust. *See, e.g.*, UNIF. TRUST CODE § 708; N.Y. SURROGATES COURT PROCEDURE ACT LAW § 2309(1). *But see* TURNER, *supra* note 36, at § 64:7.

54. *See* POLITIFACT, <http://www.politifact.com> (last visited Dec. 20, 2013).

55. *See supra* notes 33–34 and accompanying text.

56. *See supra* notes 38–48 and accompanying text.

57. TURNER, *supra* note 36, at § 64:7.

58. *Bio*, JERRY GARCIA, <http://jerrygarcia.com/bio/> (last visited Dec. 20, 2013).

59. The second article of Mr. Garcia's will provides: "I declare that I am married; my wife's name is DEBORAH KOONS. We have no children by our marriage. I have four children now

Helmsley (wealthy New York hotelier)<sup>60</sup> was generous to most of her grandchildren, but disinherited two grandchildren “for reasons which are known to them.”<sup>61</sup>

In contrast, revocable trusts do not need to be probated and, usually, do not become part of the public record.<sup>62</sup> Thus, revocable trusts provide privacy in that a decedent’s estate plan does not become public. Although this privacy is frequently cited as an advantage of revocable trusts, its value is limited for most individuals.

If a revocable trust becomes embroiled in litigation, the trust document, or portions thereof, will likely end up public.<sup>63</sup> For example, Leona Helmsley’s estate plan, mentioned above, is most famous for a twelve million dollar gift to her dog, Trouble.<sup>64</sup> However, that bequest is not actually found in her will.<sup>65</sup> The fact that the twelve million dollar bequest to the “LEONA HELMSLEY JULY 2005 TRUST” was for Trouble’s benefit was uncovered by the tabloids almost immediately after Ms. Helmsley’s death,<sup>66</sup> and was confirmed during subsequent litigation concerning the trust.<sup>67</sup> Thus, despite the efforts of Ms.

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living from prior relationships, namely HEATHER GARCIA KATZ, born December 8, 1963, ANNABELLE WALKER GARCIA, born February 2, 1970, THERESA ADAMS GARCIA, born September 21, 1974, and KEELIN GARCIA, born December 20, 1987. I have no deceased children leaving issue, and I have not adopted any children. The terms “child” or “children” as used in this Will shall refer only to my children and if any person shall claim and establish any right to participate in my estate other than as provided in this Will, whether as heir or in any other capacity whatsoever, I give and bequeath to each such person the sum of One Dollar (\$1.00).” *The Last Will and Testament of Jerome J. (“Jerry”) Garcia*, ROCKMINE, <http://www.rockmine.com/Reaper/GarcWill.html> (last visited Dec. 20, 2013).

60. *Leona Helmsley Biography*, BIO, <http://www.biography.com/people/leona-helmsley-9334418> (last visited Dec. 20, 2013).

61. *Last Will and Testament of Leona Helmsley*, LIVING TRUST NETWORK, <http://livingtrustnetwork.com/estate-planning-center/last-will-and-testament/wills-of-the-rich-and-famous/last-will-and-testament-of-leona-helmsley.html> (last visited Dec. 20, 2013). The excluded grandchildren contested her will and received substantial payments in settlement. Jeffrey Toobin, Rich Bitch: The Legal Battle Over Trust Funds for Pets, *THE NEW YORKER*, Sept. 29, 2008, at 39.

62. See TURNER, *supra* note 36, at 64:7.

63. See UNIF. TRUST CODE § 201 (amended 2010).

64. See, e.g., Dareh Gregorian & Braden Keil, Heir of the Dog: Leona Wills \$12M to a Pooch but nothing to 2 Grandkids, *N.Y. POST*, Aug. 29, 2007, at 6–7 (the front page of the paper famously dubbed the dog a “Rich Bitch”).

65. Ms. Helmsley bequeathed the famous dog to her brother or grandson and gave twelve million to the “Leona Helmsley July 2005 Trust”; however, the will does not describe the terms of the trust or any benefit the dog might receive. *Last Will and Testament of Leona Helmsley*, *supra* note 61. Both Ms. Helmsley’s brother and grandson refused to accept the dog, who was then receiving death threats. Toobin, *supra* note 61, at 40.

66. See Gregorian & Keil, *supra* note 64, at 7.

67. See Toobin, *supra* note 61, at 41.

Helmsley and her attorneys, their use of the trust did little to prevent the publicity of her substantial bequest to her treasured dog.

More generally, revocable trusts are quite effective at maintaining the privacy of an individual's estate plan after his or her death. However, the simple fact is that most estate plans are not worth substantial effort in keeping private. Even among the famous decedents whose wills are available on the internet, the majority contain dispositions to the expected friends and family and few scandalous (or even interesting) provisions.<sup>68</sup> Among less famous individuals, it is likely that the only persons interested in the decedent's estate plan are the beneficiaries (and expected beneficiaries) of the estate plan.<sup>69</sup> Thus, the privacy obtained through the use of the revocable trust is likely of negligible benefit.

### C. Incapacity

The most substantial advantage offered by estate planning through the use of a revocable trust is, surprisingly, less discussed than some of the other purported advantages. That is, if the settlor becomes incapacitated, revocable trusts provide substantial benefits in administering the settlor's property.

When the settlor of a revocable trust becomes incapacitated, he becomes ineligible to continue to serve as trustee, if he was doing so.<sup>70</sup> Upon the settlor/trustee's incapacity and concomitant ineligibility, the designated

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68. For example, Chief Justice Warren Burger's epically brief will simply divided his estate between his children. *Last Will and Testament of Warren Burger*, LIVING TRUST NETWORK, [livingtrustnetwork.com/estate-planning-center/last-will-and-testament/wills-of-the-rich-and-famous/last-will-and-testament-of-warren-burger.html](http://livingtrustnetwork.com/estate-planning-center/last-will-and-testament/wills-of-the-rich-and-famous/last-will-and-testament-of-warren-burger.html) (last visited Dec. 20, 2013). President Richard Nixon's will detailed the disposition of his historical documents, but gave the bulk of his estate to his daughters. *Last Will and Testament of Richard Nixon*, LIVING TRUST NETWORK, [livingtrustnetwork.com/estate-planning-center/last-will-and-testament/wills-of-the-rich-and-famous/last-will-and-testament-of-richard-nixon.html](http://livingtrustnetwork.com/estate-planning-center/last-will-and-testament/wills-of-the-rich-and-famous/last-will-and-testament-of-richard-nixon.html) (last visited Dec. 20, 2013). After his recent death, actor James Gandolfini's estate plan—and the possible lack of tax planning—received a great deal of press. See, e.g., Paul Sullivan, *A Public Debate Over the Wisdom of Gandolfini's Will*, N.Y. TIMES, July 20, 2013, at B5. His will, however, is a simple distribution among the expected friends and family. *Last Will and Testament of James Gandolfini*, LIVING TRUST NETWORK, [livingtrustnetwork.com/estate-planning-center/last-will-and-testament/wills-of-the-rich-and-famous/last-will-and-testament-of-james-gandolfini.html](http://livingtrustnetwork.com/estate-planning-center/last-will-and-testament/wills-of-the-rich-and-famous/last-will-and-testament-of-james-gandolfini.html) (last visited Dec. 20, 2013).

69. It has been posited that a public probate allows con artists to target beneficiaries. Videotape: *The Living Trust Seminar: Inheritance Planning for You and Your Family in 2013 and Beyond* (Robert P. Bergman) (on file with author). That risk would be eliminated if probate is completely avoided. However, it is likely that a pour-over will would need to be probated. See *supra* notes 48–49 and accompanying text. The heirs listed in that probate will likely, although not necessarily, be the beneficiaries of the revocable trust and suitable targets for the aforementioned con artists.

70. See UNIF. TRUST CODE § 706 (amended 2010).

successor trustee will commence serving as trustee.<sup>71</sup> Of course, if the settlor was not serving as trustee, his incapacity has little effect on the revocable trust.<sup>72</sup> In either case, the trustee then acting will have the ability to manage the assets in the revocable trust for the benefit of the settlor and any other beneficiaries.<sup>73</sup>

This is a substantial benefit of revocable trusts. Without a revocable trust, the only options to manage an incapacitated individual's assets are a durable power of attorney<sup>74</sup> executed while the individual had capacity or a guardianship.<sup>75</sup> However, guardianships are notoriously troublesome. The appointed conservator will be chosen by the court—not the ward.<sup>76</sup> The process tends to be costly and conservators tend to be reluctant to take any action (such as making gifts for tax purposes) that might reduce the value of the ward's property, even if it is likely that the ward would approve of the activity.<sup>77</sup>

Durable powers of attorney are useful. However, financial institutions tend to be relatively hostile to allowing an attorney-in-fact a free hand to act.<sup>78</sup> In addition, the agent's power will terminate immediately upon the principal's death.<sup>79</sup> Moreover, durable powers of attorney tend to exclude some powers—such as the power to make gifts of the principal's property—that are useful from an estate-planning point of view.<sup>80</sup>

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71. *Id.* at § 704. If a custodian of assets held in the revocable trust requires a court ruling of incapacity, the advantages of the revocable trust in this regard will be compromised.

72. *See id.* at § 601.

73. *See supra* notes 22–26 and accompanying text.

74. A “durable power of attorney” is a document whereby the principal gives the agent (also called the attorney-in-fact) broad powers to act on his or her behalf in financial matters. Dennis N. Whitmer, *The Durable Power of Attorney: Defining the Agent's Duties*, 41 COLO. LAW., May 2012, at 49, 49. The type of power of attorney used in estate planning is, typically, “durable” in that the power granted is not affected by the principal's incapacity. RESTATEMENT (SECOND) OF AGENCY § 122 (1958); N.Y. GENERAL OBLIGATIONS LAW § 5-1501A (McKinney 2010).

75. BLACK'S LAW DICTIONARY 776 (9th ed. 2009) (A guardianship is a “fiduciary relationship between a guardian and a[n] . . . incapacitated person, whereby the guardian assumes the power to make decisions about the ward's person or property.”); MO. REV. STAT. §§ 475.010–475.100 (2012).

76. MO. REV. STAT. § 475.050. In some states, it is possible for an individual to nominate a conservator in a properly executed durable power of attorney. *See, e.g., id.* at § 475.050(1)(2).

77. *See In re Estate of Cross*, 664 N.E.2d 905 (Ohio 1996).

78. Paul L. Sturgul, *Financial Durable Powers of Attorney (with Form)*, 41 PRAC. LAW, June 1995, at 21, 23 (“Perhaps the biggest problem with durable financial powers arises from the fact that their effectiveness is, as a practical [sic] matter, limited by the degree to which third parties are willing to honor them . . . . The very process of getting judicial approval of the power robs it of its most significant advantages . . .”).

79. RESTATEMENT (SECOND) OF AGENCY § 120.

80. *See, e.g., Sturgul, supra* note 78, at 23.

In cases of incapacity, property held in a revocable trust can be managed by a successor trustee with minimal delay or expense. Of course, the disadvantage of the revocable trust in this regard is that the successor trustee can only access property held in the trust.<sup>81</sup> In contrast, an attorney-in-fact or conservator can manage any property owned by the principal or ward.<sup>82</sup> Nonetheless, funded revocable trusts are quite beneficial in cases of incapacity.

#### D. Creditor and Elective Share Protection

Occasionally, creditor protection will be cited as an advantage of revocable trusts. In fact, revocable trusts provide nearly no protection from the settlor's creditors.

During the settlor's life, assets held in a revocable trust are fully subject to claims by the settlor's creditors.<sup>83</sup> Upon the settlor's death, revocable trusts provide little or no protection from the settlor's creditors.<sup>84</sup> Depending on the state, it may be easier (or harder) to present a claim against a revocable trust, as compared to an estate.<sup>85</sup> However, the differences in properly presenting a claim tend to be administrative nuances rather than a substantive difference in the negligible amount of creditor protection offered.

Moreover, in some states it is possible that if no probate is open for a decedent, then creditors' claims will remain viable for the full statute of limitations.<sup>86</sup> In contrast, probate proceedings typically provide a relatively short time for creditors to present claims.<sup>87</sup> After the expiration of that time period, creditor claims are time-barred. Thus, there may be an advantage to probate in terms of curtailing late submitted creditor claims.

If a married person wishes to partially or fully disinherit a surviving spouse, revocable trusts may provide some advantage depending on the state. In most states, by statute<sup>88</sup> or case law<sup>89</sup> a surviving spouse may elect against property held in a revocable trust. However, in a few states a surviving spouse

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81. See *supra* notes 22–26 and accompanying text.

82. It is possible to leverage the power of attorney to make the revocable trust more useful. A well-drafted durable power of attorney will specifically allow the agent to make transfers (deemed gifts) of the principal's property into the principal's revocable trust. The agent will generally not have that power without such a provision. See, e.g., N.Y. GENERAL OBLIGATIONS LAW § 5-1502G (McKinney 2010).

83. UNIF. TRUST CODE § 505(a)(1) (amended 2010).

84. See *id.* at § 505(a)(3).

85. Compare FLA. STAT. §§ 733.607(2), 736.05055 (2013), with MO. REV. STAT. § 473.033 (2012).

86. See ZARITSKY, *supra* note 24, at A-44.

87. See, e.g., MO. REV. STAT. § 473.033.

88. See, e.g., UNIF. PROBATE CODE § 2–205(1) (amended 2010); N.Y. ESTATE, POWERS AND TRUSTS LAW § 5–1.1–A(b) (McKinney 2010).

89. See, e.g., *Sullivan v. Burkin*, 460 N.E.2d 572, 574, 577 (Mass. 1984).

either cannot elect against a revocable trust<sup>90</sup> or can elect against a revocable trust only in certain circumstances.<sup>91</sup> Thus, depending on the state, use of a revocable trust may provide some benefit to a settlor who wishes to avoid his or her surviving spouse's elective share.

#### *E. Save Taxes*

Occasionally claims will be made that use of a revocable trust reduces taxes. Regardless of the type of taxes being discussed, this claim is almost completely false.

Creating and funding a revocable trust is, essentially, a non-tax event. Because the trust is revocable, transfers to the trust will not be taxed as a gift.<sup>92</sup> For income tax purposes, a revocable trust is a "grantor trust" and all trust income will be taxed to the settlor,<sup>93</sup> just as if the settlor retained ownership of the assets. For estate tax purposes, any assets held in the revocable trust will be included in the settlor's gross estate.<sup>94</sup> In short, there are no substantial tax advantages or disadvantages engendered by the creation or funding of a revocable trust.<sup>95</sup>

After the settlor's death, the use of a continuing trust for the benefit of the beneficiaries may generate income tax savings based on the tax brackets of the beneficiaries and the trust.<sup>96</sup> Moreover, trusts for the beneficiaries may be used for transfer tax planning.<sup>97</sup> However, the potential tax savings are identical whether the continuing trust is created under the settlor's revocable trust or as a testamentary trust created under a will.

#### *F. Complexity and Cost*

Most lay-people understand generally how wills work.<sup>98</sup> In contrast, the working of a revocable trust is beyond the ken of most laypersons.<sup>99</sup> Even

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90. *Cherniack v. Home Nat'l Bank and Trust Co. of Meriden*, 198 A.2d 58, 60 (Conn. 1964).

91. *See, e.g., McDonald v. McDonald*, 814 S.W.2d 939, 948 (Mo. Ct. App. 1991) (holding that a surviving spouse may elect against a revocable trust created by the decedent only if the decedent "intend[ed] to defraud [the spouse] of her marital rights.>").

92. *See* Treas. Reg. §§ 25.2511-2(c, e) (2013).

93. I.R.C. §§ 671-77 (2006). Indeed, usually the revocable trust will use the settlor's social security number instead of a tax identification number of its own. *See* Treas. Reg. §§ 1.671-4(b)(2), 301.6109-1(a)(2) (2013).

94. *See* I.R.C. § 2038.

95. It is possible to eke out some very minor differences due to nuances in the tax code. ZARITSKY, *supra* note 24, at A-55 to A-80. These issues are insignificant in the overwhelming majority of cases. Indeed, this footnote is included solely for the sake of completeness.

96. *See* I.R.C. §§ 651-52, 661-62.

97. *See, e.g., CHRISTOPHER CLINE, TAX MANAGEMENT: ESTATES, GIFTS AND TRUSTS: DYNASTY TRUSTS* A-22 to A-24 (2008).

98. This is not to say that they know how to properly draft or execute a will.

individuals who have created revocable trusts as part of their estate plans frequently do not understand how they work. Such individuals may compromise the value of the revocable trust by, for example, failing to transfer their property to the trust.<sup>100</sup>

One noteworthy facet of revocable trusts, as compared to wills, is that the complexity is faced by the settlor during his or her life.<sup>101</sup> In contrast, whatever complexity is engendered in estate planning with a will is not encountered until after the testator's death. There is, thus, an interesting trade-off between wills and revocable trusts. Estate planning with a will is generally simpler during the testator's lifetime but more complicated after the testator's death. In contrast, administration of a revocable trust after the settlor's death is, one hopes, relatively simple. However, that postmortem simplicity comes at the cost of added complexity to the settlor during his or her life.

Consistent with the added complexity of revocable trusts is the added cost of estate planning. Attorneys' fees vary widely, and correspondingly, estimates vary widely. However, it is relatively clear that the estate planning fees for the creation of a will are substantially lower than the estate planning fees for the creation of a revocable trust.<sup>102</sup> In contrast, it is possible that the total post-death expense may be substantially lower for a revocable trust than a will.<sup>103</sup> However, once again there is a trade off—higher fees during the settlor's life in exchange for potentially lower fees after the individual's death.

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99. Julia Ann Garber, *Estate Planning Strategies for Today's Clients*, July 2011, at \*7, available at 2011 WL 2941002 ("I have found that many attorneys and their clients from other states do not understand the importance of putting their properties into a revocable trust . . ."); Calvin Massey, *Designation of Heirs: A Modest Proposal to Diminish Will Contests*, 37 REAL PROP. PROB. & TR. J. 577, 590 (2003).

100. Garber, *supra* note 99, at \*7; see also *supra* notes 38–48 and accompanying text. Clearly, this problem could be at least partially remedied if the estate planning attorney took the time to explain the working of the revocable trust in detail along with the advantages and disadvantages thereof. However, the length of this article is, perhaps, anecdotal proof that doing so would be a time consuming (and thus expensive) endeavor.

101. See *supra* notes 16–20 and accompanying text.

102. See, e.g., *How Much Does a Will Cost?*, COSTHELPER, <http://personalfinance.costhelper.com/will.html> (last visited Dec. 22, 2013) (noting that the average cost of a will is \$150, although user comments on the page range between \$200 and \$3500); *How Much Does a Trust Cost?*, COSTHELPER, <http://personalfinance.costhelper.com/trust.html> (last visited Dec. 22, 2013) (noting that a simple revocable trust typically costs \$900–\$1500 and that added complexity can substantially increase the fees).

103. See *supra* notes 33–52 and accompanying text. There is an interesting relationship here. The more time the attorney spends helping the settlor transfer assets to the revocable trust and explaining the working of the trust, the more likely that the post-death fees could be reduced. See *supra* notes 43, 55–56 and accompanying text. However, this additional attorney time will increase the cost of the estate planning.

Both in cost and complexity, the will seems to be the winner during the testator's life,<sup>104</sup> while the revocable trust may come out ahead after the settlor's death. Whether this trade-off is acceptable to a given client will, of course, depend on the client.

#### CONCLUSION

Revocable trusts are quite popular. Moreover, there are numerous adoring and uncritical summaries of the purported advantages of revocable trusts. In light of this, it is difficult to accurately balance the advantages and disadvantages of revocable trusts without sounding overly critical.

Revocable trusts have substantial advantages for many individuals. It is possible to avoid probate (and thereby reduce costs) through the use of a revocable trust. However, completely avoiding probate is uncommon and unlikely. Revocable trusts provide privacy for the settlor's estate plan; however, that privacy is frequently compromised and, in any event, is likely of little value. Revocable trusts provide substantial benefits in case of the settlor's incapacity; however, those benefits obtain only if the settlor has funded the revocable trust.

In essence, revocable trusts are like any other estate planning tool. They have some advantages and some disadvantages and are appropriate for some clients. The problem, however, is that many attorneys and financial planners automatically use revocable trusts for all of their clients without considering the appropriateness of that choice.

For example, posit a young client at the beginning of his or her career with limited assets. In all likelihood, this client has many years before death.<sup>105</sup> During life, there will likely be changes in family (marriage, births, deaths, etc.) and the acquisition and disposal of numerous assets. Given the client's situation it seems unlikely that he or she would keep a revocable trust fully funded. In this case, it seems that balancing the added complexity and expense during his or her lifetime against the possibility of reduced complexity at his or her (hopefully distant) death militates towards using a will for his or her estate plan.

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104. The advantages of revocable trusts in terms of incapacity are an exception to this statement. *See supra* notes 70–76 and accompanying text.

105. There are, of course, exceptions. For example, John Kennedy, Jr. died at age thirty-eight. Moreover, he died in a common accident with his wife, Carolyn Bessette-Kennedy. Although Kennedy used a revocable trust in his estate plan, he was unsuccessful in avoiding probate, to the extent that was his goal, as shown by his pour-over will. *Last Will and Testament of John Kennedy, Jr.*, LIVING TRUST NETWORK, <http://livingtrustnetwork.com/estate-planning-center/last-will-and-testament/wills-of-the-rich-and-famous/last-will-and-testament-of-john-kennedy-jr.html> (last visited Dec. 22, 2013).

Of course, some number of years later when the same client has acquired more property, is unlikely to be buying and selling homes as frequently, and has a shorter life expectancy, the balance may shift towards estate planning with a revocable trust.

The moral of the story is twofold. First, revocable trusts are appropriate for many—but not all—clients. Attorneys must consider the particular client's situation in order to decide if a revocable trust is appropriate. Second, in order to secure the advantages of a revocable trust, and to avoid thwarting the settlor's estate plan, the attorney must assure that the client understands how a revocable trust works and the importance of funding the revocable trust during his or her lifetime.

When used appropriately, revocable trusts can be an important part of an individual's estate plan. When used inappropriately, they are just one more inexplicable document that the attorney has the client sign. It is up to the attorney to assure that revocable trusts are fully explained. Then, it is up to the client to follow the attorney's (hopefully) sound advice.

