JULIAN GRAY ASSOCIATES
ELDER LAW ♦ ESTATE & DISABILITY PLANNING
AVOID MISTAKES. PROTECT ASSETS.

To Revoke or Not to Revoke; THAT is the Question!

Revocable or Irrevocable Trusts - Part II

By Cindy S. Alvear, Esquire
December 2016

In my last Newsletter article published in April 2016, I discussed some differences between revocable and irrevocable trusts. You may recall that revocable trusts, often called Revocable Living Trusts or RLTs, do not provide any "asset protection" for the creators of the trust, but that there are other good reasons to consider adding an RLT to your plan.

At the end of the article I began to explore how different types of irrevocable trusts work, how they provide asset protection and asked: "Is there a way to still have control of your assets, even if they are in an irrevocable asset protection plan?" The answer is YES, if you know how.

In this article I will answer this question and will provide you with a little more guidance on how one specific type of irrevocable trust works. We will refer to this trust as a Medicaid Asset Protection Trust, or MAPT. Hopefully, this overview will provide you with a better understanding of what type of trust may best fit your planning goals as you choose, and work with, your eldercare attorney.

Before we dive into the discussion, however, let's first briefly review the different positions individuals fill in the structure of any trust.

The first position or role is that of the "Grantor." The Grantor of a trust is the creator of the trust. If you decide to add a trust to your plan, you will be the creator of the trust, and therefore the Grantor of your trust.

The second is the role of "Trustee". You, as the Grantor, choose or appoint the Trustee. The Trustee, who may be an individual or a professional entity, will manage the trust, make decisions regarding the investment and use of trust assets, and will make distributions pursuant to the terms of the trust. In MAPTs, which are primarily used for Medicaid planning purposes, you, the Grantor, may actually act as your own Trustee if you wish.

The third is the role of the *lifetime* "Beneficiaries". Generally, a trust exists for the benefit of the beneficiaries. A trust has two types of beneficiaries: the principal beneficiaries, who may receive distributions of trust principal (principal is the money or assets you put in to the trust); and the income beneficiaries, who may receive distributions of trust income (any income produced by the trust principal). In a MAPT, you may be the lifetime beneficiary of income.

Keeping those positions in mind, let's discuss the various facets and workings of the Medicaid Asset Protection Trust as compared to a Revocable Living Trust (RLT).

1. Ownership of the Property

Once your assets, which are also called principal, are placed into your MAPT, the assets will no longer belong to, or be owned by, you as the Grantor; they will belong to the trust. Neither you as an individual, or any Trustee, will be allowed to take the property back out of the Trust and give it back directly to you.

Generally, almost any asset may be retitled, or placed, into a MAPT. If you re-deed your home into your trust, for instance, you may continue to live in your home but you will not technically own it. If a decision is made to sell the home, the Trustee will participate in the process and may also purchase another home. Remember, however, that if you are the Trustee of your MAPT, you would manage such a transaction.

2. Modification

The terms of a MAPT generally may not be changed, amended, modified or revoked even with a court order, thus offering the sought-after asset protection. On the other hand, a RLT may be amended, modified or revoked at the Grantor's discretion, thereby leaving the assets vulnerable to any financial demands on the Grantor by a Nursing Home.

3. Estate Taxes

Although some irrevocable trusts may be structured in such a manner as to take the property out of your estate at your death, the irrevocable MAPT is NOT one of those trusts. With a MAPT, although the Grantor no longer personally owns the property, it is still included in net worth calculations at the time of death. In this area, the MAPT is actually similar to a Revocable Living Trust.

4. Medicaid Planning Purposes

In elder care planning, frequently one of the prime benefits being sought is to enable the elderly Grantor to obtain Medicaid benefits if he or she moves into a nursing home. By placing assets into a MAPT five (5) years before the actual need, the Grantor has secured his assets for the benefit of named beneficiaries. This irrevocable change of ownership serves to protect assets from possible medical spend down or from exposure to future Medicaid Estate Recovery. The same cannot be said about RLTs because the Grantor retains too much access to, and control over, the RLT assets.

Above are just a few of the major differences between irrevocable and revocable trusts. As you can see, the main purpose of an irrevocable Medicaid Asset Protection Trust is to protect assets. But what about the answer to our initial question: "*Is there a way to still have control of your assets, even if they are in an irrevocable asset protection plan*?" The answer is a resounding yes! If you choose to name yourself as the Trustee of your MAPT, you will not only be able to control investment decisions within the trust, but you will also be able to control distribution of principal to the lifetime beneficiaries and, on top of it all, will be able to receive monthly income from investments held within the trust!

Now that you have learned a little bit about one type of asset protection trust that is frequently used by elder care attorneys, you may realize that there are other types of irrevocable trusts and may also have noticed that we did not discuss planning for Veterans Benefits anywhere in the article!

Stay tuned for Part III in the coming months! Until then, if you have any questions or would like to learn about asset protection trusts that may be useful in VA benefit planning, please give us a call! We would be happy to sit down with you, one on one, to review your needs and design the plan that will best meet your challenges and goals.