

# All of the Assets in My Trust Are Protected....Right?

By Caitlin E. Harper, CELA  
May 2013

The answer is...maybe. In a society where people are living longer thereby increasing the chance that they will outlive their assets, many individuals are attempting to engage in asset protection planning in anticipation of future long term care costs. Frequently, I have sat down with a client who says: "My spouse and I transferred all of our assets to a trust a couple of years ago in order to protect them from the nursing home. So, now that my spouse requires care in a facility, we are immediately eligible for government benefits, right?" That may or may not be the case. The answer is dependent upon the type of trust that is holding the assets, what you are trying to "protect" the assets from, and when the transfer of assets to the trust was made.

## Revocable Living Trusts

More often than not, the trust to which a client is referring is a Revocable Living Trust. Let's break down what it means to have a Revocable Living Trust. By definition, the word *revocable* means that something can be cancelled. A Living Trust, also called an *inter vivos* trust, is a trust that is created during an individual's lifetime. If we put these two definitions together, a Revocable Living Trust is a trust that is created during one's lifetime and can be cancelled or revoked. As a result, when an individual creates a Revocable Living Trust, he or she has created a trust that is effective during his or her lifetime and can be cancelled or amended by them at any time.

This type of trust can be attractive for many reasons. It typically provides the creator (also known as a settlor or grantor) the same level of control over the assets owned by the trust as he or she would have if the assets were titled in the individual's name. This is due to the fact that he or she is typically also the trustee. This type of trust also shelters the trust assets from probate which can be time consuming and more expensive. Probate is the process of administering a deceased individual's estate. Assets that are subject to probate are assets that are titled in the individual's sole name and do not name death beneficiaries. In order to distribute these solely owned assets to the rightful beneficiaries either named in the Last Will and Testament or through intestate succession (hereditary succession) as outlined by each state's laws, the probate process is typically inevitable. However, not everyone must go through this process. It can be avoided by titling assets jointly with a third party, naming death beneficiaries, or transferring them into a trust. A Revocable Living Trust can also make for a more efficient distribution of a deceased individual's estate upon his or her death. If most or all of the assets are owned by the trustee of the Revocable Living Trust, then they are all governed by the same rules of distribution. This can make for a fairly simple distribution of the trust estate to the designated beneficiaries named in the trust.

Although a Revocable Living Trust does many great things, if a person is facing long term care costs, it WILL NOT protect the trust assets from inclusion for government benefits eligibility determinations for programs such as Medicaid (Medical Assistance in Pennsylvania) or VA Aid & Attendance benefits. So, when an individual believes that his or her assets are protected by a Revocable Living Trust when applying for means tested benefit programs such as the ones mentioned above, this is simply not the case. Many are shocked when they learn that their assets titled in a Revocable Living Trust are completely exposed and available.

So, what type of trust does protect these assets for government benefits planning?

### **Irrevocable Trusts**

An Irrevocable Trust is similar to a Revocable Living Trust in that both of these types of trusts are created during one's lifetime and avoid probate. The major difference between these two types of trusts is simply stated in their title: "irrevocable" versus "revocable". Under Pennsylvania law, the creator of an irrevocable trust (the settlor or the grantor) cannot cancel or amend it, like he or she can with a revocable trust, without the written agreement of the settlor / grantor and all of the named beneficiaries in the trust. As a result, when assets are placed into an irrevocable trust, they are protected from inclusion by a government entity when determining if the individual is eligible for certain types of benefits.

As mentioned above, the timing of when the assets are placed into an irrevocable trust can affect an applicant's eligibility for government benefits. This is dependent on which benefit the applicant seeks. For example, currently The Department of Veterans Affairs ("VA") does not penalize a veteran or surviving spouse for transfers made to third parties or irrevocable trusts when applying for a non-service connected VA Aid & Attendance benefit. On the contrary, under the federal Deficit Reduction Act of 2005 and the implementing state laws and regulations, The Department of Public Welfare (the government body that administers Medicaid in Pennsylvania) reviews an applicant's records for five years prior to the date of eligibility. As a result, any asset transfer made into an irrevocable trust within the five years preceding the filing of an application for Medicaid may cause a period of ineligibility for the program. So, while the assets in an irrevocable trust may be protected from inclusion when determining eligibility for Medicaid, if the application for this benefit occurs within five years from the date of the aforementioned asset transfer, the transfer itself will affect whether or not the settlor / grantor is immediately eligible for the benefit if the settlor is unable to access the principal of the trust.

Alas, the answer to the question as to whether or not assets held in a trust are "protected" can be complicated. There are many determinative factors to consider:

- the type of trust: revocable versus irrevocable;
- the type of benefit for which the settlor / grantor is applying; and
- when the assets were transferred if dealing with an irrevocable trust.

If there is a question as to whether or not a trust that you have created is appropriate for your planning needs, it is advisable to seek proper legal counsel because as you have read in this article, it may not always be a simple answer.