



must part with dominion and control over the assets contributed for transfer tax purposes. While the potential transfer tax savings sounds enticing initially, some clients may have buyer's remorse when they realize that the assets contributed to the irrevocable trust cannot be used for their benefit (and they cannot control such assets by, for example, voting shares of a company).

Although the client may be anxious to complete the estate planning process, it is critical that the client understands the practical implications of signing and funding the irrevocable trust. Frequently, clients who regret this type of planning wish they had contributed less to the trust or had thought more about the dispositive provisions — both of which cannot be changed. Knowing these limitations beforehand enables clients to make an educated decision about whether irrevocable trust planning truly accomplishes their estate planning goals.

#### **Do You Have the Right Tour Guide? (Choice of Trustee)**

It is imperative that the trustees (the initial trustee and successor trustees) are chosen wisely. Naming someone as fiduciary is not another way of saying, "I love you." The author can confirm from representing fiduciaries that they would have appreciated money far more than fiduciary responsibility.

It is not that our loved ones are incapable of serving as trustee (although there may be some who are not qualified); rather, administering a trust is similar to a full-time job. The trustee has a myriad of obligations, including, but not limited to, managing and investing the trust's assets, filing tax returns, and distributing assets in accordance with the trust's terms. The person named as trustee may not have the bandwidth to assume additional responsibilities (and the potential liability).

Even if the appointed individual has the necessary time and expertise to serve as trustee, there may be other reasons to reconsider the appointment. If the trustee is a family member, it may be difficult for the trustee to maintain personal relationships with the beneficiaries while the trustee is controlling the purse strings. Furthermore, if the personal relationship was tenuous before the existence of the trust, the family member's appointment as trustee may escalate an

already volatile situation. Although the client may assume that naming the family member as trustee will repair a broken relationship, the author has found such dynamics generally result in additional legal fees.

#### **Watch Out for the Anaconda. (Constricting Trust Terms)**

It is difficult to predict the future: the valedictorian may fall victim to substance abuse, the spendthrift could become a good financial steward, or the perfect couple may have a messy divorce. Unfortunately, irrevocable trust planning requires clients to make binding decisions about the future based upon past performance. While it is impossible to address every potential situation in an irrevocable document, the trust should contain sufficient flexibility so that the trustee is able to manage unexpected situations.

Constricting trust terms can adversely affect a beneficiary if a mandatory distribution causes trust assets to fall into the wrong hands, or if distribution standards prevent the trustee from making a distribution that the grantor would have otherwise wanted made to the beneficiary.

As long as the client has confidence in the appointed trustee, both of these issues can easily be addressed in the irrevocable trust. First, clients should consider holding assets in trust for the life of the beneficiary and providing the trustee with the power to make substantial distributions in the trustee's discretion. For example, instead of requiring outright distributions upon the attainment of a specified age, the trust can suggest that the trustee consider making the outright distribution but the trustee is under no obligation to release trust funds.

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Second, clients should consider expanding the distribution standard to include distributions that the trustee determines are in the beneficiary's best interest. Many trusts limit distributions to health, education, support, and maintenance — also known as ascertainable standards. Although



these standards are quite broad, there may be other reasons to distribute funds to a beneficiary that do not squarely fit into one of those categories. For example, a beneficiary may request a sizable distribution to start a new business. If the trustee decides that the request is outside of the distribution standard, the beneficiary will not receive the distribution — even if the grantor would have wanted the beneficiary to receive funds for such purpose. Including a “best interests” standard enables the trustee to make distributions that the grantor may not have anticipated when the trust was created.

#### **What Do You Mean They Don’t Have the Internet? (Dealing with Outdated Trust Terms)**

Better estate planning documents come from experience. Estate planners frequently update their documents to address changes in the law, add new planning techniques, or improve existing provisions. Although these revisions are easy to incorporate into revocable documents, an irrevocable trust does not receive the same “freshening” during an estate planning update.

Luckily, Virginia has adopted certain laws that allow interested parties to deal with outdated trust terms. Depending upon the situation, it is possible to modify or terminate an irrevocable trust<sup>1</sup> or decant trust assets into a new irrevocable trust.<sup>2</sup> While these laws offer options for a trust that cannot otherwise be changed, it is imperative that counsel is retained to determine if the client’s goal can actually be accomplished under the relevant statute.

#### **Where Is the Bug Spray? (Managing Beneficiaries, Tax Authorities, and Other Pests)**

As alluded to previously, serving as a trustee can feel like a labor of love, and many times, the compensation seems inadequate. Administering a trust is a tremendous undertaking, and it is highly unlikely that the trustee will be able to do it alone.

At the outset, the trustee should engage the services of professionals to assist with the trust administration, including an attorney to provide legal advice, an accountant to assist with the tax reporting obligations, and a financial advisor to properly invest the assets. These professionals will not only relieve the incredible burden on the trustee, but have likely worked with other trustees

and are intimately familiar with the trust administration process.

Even if the trustee has a team of professional advisors, the fiduciary duties and liability may be too much for the trustee to handle. At such times, the trustee should consult with an attorney about resigning as trustee; generally, the resignation process is not as simple as declaring that one no longer wants to serve in a fiduciary capacity.

#### **Conclusion**

Although far from perfect, irrevocable trusts can accomplish tax and personal goals that cannot be achieved by other means. The most frequent concerns raised about irrevocable trusts can be addressed during the planning phase by educating the client. As with most journeys, a successful irrevocable trust is generally a product of a thorough plan with built-in flexibility.

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#### **Endnotes:**

- 1 See VA. CODE §§ 64.2-728 to 730, -732, -733, -735.
- 2 See *Id.* § 64.2-778.1.



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