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Irrevocable and Revocable Trusts: *Best Practices*

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By Renée C. Lovelace

“Oh no, Toto. . .We are not in Law School any more.”

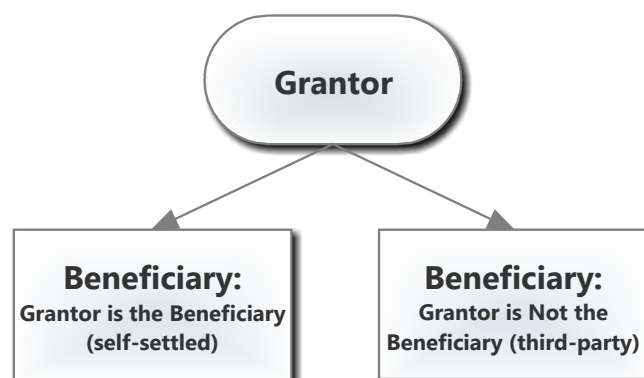
Dorothy, paraphrased from The Wonderful Wizard of Oz

A. Trusts: Theory vs. Practice. Basic trust principles are relatively timeless. Trusts enable property owners (grantors) to provide benefits from their property to themselves or other parties (beneficiaries) while such property is managed and/or controlled by the grantor, beneficiary or others (as trustees). In theory, goals and objectives may be clear. In practice, the same trust terms could have different results depending upon (1) whether the trust is revocable or irrevocable, (2) the relationships between grantors, trustees, primary beneficiaries, secondary beneficiaries, and remainder beneficiaries, and (3) the term (lifespan) of the trust, property funding the trust, distributions from the trust, and administration required.

B. Purpose of This Paper. The purpose of this paper is to deconstruct trust drafting and review processes in order to assist the attorney when his or her primary focus is to draft documents that help clients meet their objectives in a cost-effective manner.

C. Deconstructing Trusts. It may be helpful, whether examining best practices or errors, to identify key trust components and how the relationships between components impact the attorney’s ability to help clients realize their goals.

(1) Example: Self-Settled versus Third-Party Trusts. In elder law cases, the first drafting or review step should generally be to determine whether the trust is funded with the beneficiary’s own property or the property of a third party.



(2) Dividing the World Into Thirds. Before going further, and using the comparison above between third-party and self-settled trusts, consider that each time there is a choice between “a” and “b,” there will often be exceptions. For example, a

third-party trust may be treated as a self-settled trust *for some public benefits purposes* if the grantor is a spouse or if the grantor is applying for Medicaid benefits himself or herself. In other words, almost all general trust rules will have exceptions. In this paper and other resources, whenever there are two obvious choices, there will often be a third less-obvious choice that includes exceptions to the obvious choices. *Note: Complex tax objectives are an entirely different dimension and are not addressed extensively in this paper.*

(3) **Build-A-Trust Components.** Whether drafting, administering, or analyzing a trust, key components include:

- Starting Parties
 - Grantor
 - Beneficiary
 - Trustee
- Revocable vs. Irrevocable
 - Revocable Terminating to Estate
 - Revocable that Becomes Irrevocable
 - Irrevocable but Unfunded
 - Irrevocable and Funded
- Inflows and Outflows
 - Property Funding the Trust
 - Distributions
 - *The heart, soul, driving purpose, and raison d'être of most trusts in the elder law and special needs law fields is to provide distributions to one or more beneficiaries*
 - Administration
 - Tax Structure
 - Other Expenses
- Term/Lifespan—Trust Ending Points and Changes Over Time
 - Impact on Beneficial Interests
 - Who Receives Property
 - When and How Beneficiaries Receive Property
 - Continuity of Administration
- Remainder Beneficiaries
 - When and How Property is Distributed
 - Whether Remainder Interests are Vested or Contingent
 - Whether Remainder Beneficiaries are Friendly or Unfriendly
- Trust Formalities
 - Date
 - Signatures
 - Witnessing and/or Acknowledgements

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Title search: Irrevocable and Revocable Trusts: Best Practices

Also available as part of the eCourse

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