PRESENTED AT

18th Annual Estate Planning, Guardianship and Elder Law Conference

> August 11-12, 2016 Galveston, Texas

Irrevocable and Revocable Trusts: Best Practices

Renée C. Lovelace, CELA*

*Certified as an Elder Law Attorney by the National Elder Law Foundation as recognized by the State Bar of Texas

> Author Contact Information: Renée C. Lovelace The Lovelace Law Firm, P.C. P.O. Box 90912 Austin, Texas 78709

(512) 858-0707 <u>RCLovelace@aol.com</u>

The University of Texas School of Law Continuing Legal Education • 512.475.6700 • utcle.org

Table of Contents

A.	Trusts: Theory vs. Practice
	Purpose of This Paper
	Deconstructing Trusts
	(1) Example: Self-Settled versus Third-Party Trusts
	(2) Dividing the World Into Thirds
	(3) Build-A-Trust Components
D.	Framework / Grid for Understanding Trust Components
	(1) Trust Construction/Deconstruction Grid.
	(2) Modular Drafting
	(3) Component Factor Drafting Considerations
	(a) G-B-T Relationships: Grantor \rightarrow Beneficiary \rightarrow Trustee
	(b) RvI: Revocable vs. Irrevocable Trusts
	(c) TPI: Trust Property In—Funding of the Trust
	(d) TPO: Trust Property Out—Distributions, Administration
	Expenses (Basic and Additional), Special Property Costs, Taxes,
	Decanting, Litigation, and Other Outflows
	(e) EOT: End of Trust—How Long Is the Trust Intended to Last?
	(f) RBs: Remainder Beneficiaries Should Not Be an Afterthought
	(g) D/F: Date and Formalities
E.	b b b b
F.	Drafting Systems, Forms, and Tools
G.	Long vs. Short Trusts
H.	
	(1) The Risk of Creeping Incapacity
	(2) Houses, Cars, Drugs, and Social Desires
	(3) Public Benefits
	(4) Trusts with Corporate Trustees—Or with Individual Trustees
	(5) Second Families, Complex Gifts, Spousal Care Protection Trusts,
	Personal Property Distributions, and Other Balancing Acts
[.	Short vs. Long Options
	(1) The Micro Trust
	(2) The Mini Trust
	(3) Easy-Reading Light-Touch Trust
	(4) Family Harmony Essentials Trust.
	(5) Texas Two-Step Trust(s)
	(6) Precision-Engineered Trust.
	(7) Massive Form Whether-You-Need-It-Or-Not Trust aka Kitchen Sink
	Trust
	(8) Big Toolbox Trust
	(9) Small Toolbox Trust
	(10) The Right Trust
	(11) The Wrong Trust.
J.	Trustee Options Explosion
K.	Administration Costs
L.	Who Will Be the Best Trustee?
M.	Predicting the Future—Achieving Grantors' Objectives

Irrevocable and Revocable Trusts: Best Practices

By Renée C. Lovelace

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

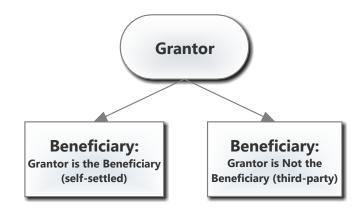
Dorothy, paraphrased from The Wonderful Wizard of Oz

A. <u>Trusts: Theory vs. Practice</u>. 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. <u>**Purpose of This Paper.**</u> 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. <u>Deconstructing Trusts</u>. 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) <u>Example: Self-Settled versus Third-Party Trusts</u>. 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) <u>Dividing the World Into Thirds</u>. 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

Irrevocable and Revocable Trusts: *Best Practices* by Renee C. Lovelace © 2016 Page 1 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) <u>Build-A-Trust Components</u>. Whether drafting, administering, or analyzing a trust, key components include:

- Starting Parties
 - Grantor
 - Beneficiary
 - o 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'etre of most trusts in the elder law and special needs law fields is to provide distributions to one or more beneficiaries
 - o 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
 - o Date
 - Signatures
 - Witnessing and/or Acknowledgements

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the <u>UT Law CLE eLibrary (utcle.org/elibrary)</u>

Title search: Irrevocable and Revocable Trusts: Best Practices

Also available as part of the eCourse <u>2016 Estate Planning, Guardianship, and Elder Law eConference</u>

First appeared as part of the conference materials for the 18th Annual Estate Planning, Guardianship and Elder Law Conference session "Best Practices in Drafting Revocable and Irrevocable Trusts"