

# LIVING TRUSTS



# REVOCABLE LIVING TRUSTS

By

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Living trusts have been promoted as the ideal solution for Montanans who wish to secure a wide variety of financial planning objectives. Avoiding probate and taxes are the primary goals of some. Others are concerned about protecting assets for family members should they be confined to a nursing home for a long period of time. Another may feel the need for investment assistance because of his or her inexperience. Still others want a way to continue their business if they should become disabled. Are all these objectives possible? The answer is **yes** - but the most appropriate legal tool to accomplish each one may not be a living trust.

## **What is a Living Trust?**

A revocable living trust is just what its name implies - one that is created during an individual's life that can be changed and terminated at any time. It is a legal arrangement by which an individual transfers ownership of assets to a trustee who manages the assets for the beneficiaries designated in the trust agreement. Beneficiaries named, in the trust agreement, can be the individual who formed the trust, friends, family members, a college, hospital, library, charity or other organization. Any type of asset - cash, certificate of deposits, stocks, bonds, life insurance or real estate - can be placed into a living trust.

The person providing assets for the trust is called the trustor or grantor. The grantor must actually change the title of ownership of each asset that will be placed in the trust from his or her name to ownership by the trust. The trustee manages the assets according to the directions in the trust agreement. The trustee can be the person creating the trust, several individuals, a corporate entity such as a bank or trust company, or any combination of these.

A trust agreement is a document containing instructions to the trustee stating, for example, who is to receive income from the trust and when and how it is to be distributed. When the trust terminates, the agreement designates the distribution of the assets to the beneficiaries who are named in it.

## **Considerations in Forming a Living Trust**

Consider the following issues to determine whether a living trust would fit into your specific financial planning goals.

**Tax Consequences** A revocable living trust is sometimes promoted as a tax avoidance tool. However, a living trust does not provide the tax savings that are often attributed to it. Income earned in a revocable living trust is taxed to the person creating it (grantor) and must be reported on his or her personal state and federal income tax returns. No federal gift tax is payable upon the creation of a revocable living trust because the trust can be changed at any time by the person forming it.

State and federal law require the value of revocable living trust property to be included in the grantor's estate upon death. Since the grantor is viewed as having control of the assets, their value must be included for determining federal estate and Montana estate tax. Typically, the following rights are reserved by the grantor when he or she forms a living trust: to amend the trust, to change the beneficiaries, to change the trustee, to change the date of termination or to change the entire trust by revoking it and having the property returned.

If none of these rights or similar rights are retained by the grantor, then the trust becomes irrevocable and the value of the assets in it are subject to federal gift taxation at the time the trust is formed. At the death of the grantor, the value of assets in an irrevocable trust is not usually subject to the Federal estate tax.

**Probate Costs vs. Living Trust Costs** Probate in Montana is not nearly as burdensome as it is in other states that have not adopted the Uniform Probate Code. In some states probate can be quite costly, as the attorney and personal representative must appear before the court for approval of almost every act involved in probating an estate. In Montana, formal approval by the court is not required for any action authorized in the Uniform Probate Code. The Montana Uniform Probate Code specifically exempts from probate the following: assets in living trusts, property owned as joint tenants with right of survivorship, payable-on-death deposits, and life insurance payable to a named beneficiary.

How much of your present estate is subject to probate? Typically only solely-owned property or a deceased's share in tenancy in common property is subject to probate. However, even for non-probate property there are reporting requirements for inventory taxes, and perhaps Montana and federal income taxes.

Even if your property is subject to probate, your heirs have the right to ask the attorney to handle the case on an hourly fee basis which may be less than the maximum statutory percentage. In Montana the maximum charge allowed for the attorney is one and one half times (1 1/2) the amount allowable to the personal representative. The percentage for the personal representative (which is a maximum fee) is three (3%) percent of the first \$40,000 and two (2%) percent in excess of that amount.

For example, on a \$200,000 estate, a personal representative could receive a maximum of \$4,400 and the attorney \$6,600. ( $\$40,000 \times .03 = \$1,200$ ;  $\$160,000 \times .02 = \$3,200$ ;  $\$1,200 + 3,200 = \$4,400$ ;  $\$4,400 \times 1.5 = \$6,600$ ).

An hourly fee could result in less expense for the estate and/or heirs, especially if the individual accomplished estate planning before his/her death.

There is no guarantee that a living trust will save money over probate. For example, if you use a paid trustee such as a bank or trust company, management fees over the years could easily exceed the cost of probate. Trust fees are often based on a percentage of income or principal, with annual minimums ranging from \$500 to about \$2,500 depending upon the institution. Many institutional trustees won't accept trusts with under \$50,000 in assets.

**Protecting Assets For Heirs** With private nursing home costs averaging \$69,800 a year, many parents are concerned with preserving assets for their heirs. One source of assistance is Medicaid. But to be eligible an applicant must not have cash and other non-exempt assets exceeding \$2,000 as an individual. Assets in a living trust would be considered as non-exempt assets. A home placed in a living trust is not exempt from creditors' claims. The one exception to the general rule is the family home; as long as one spouse is living at home, he or she can't be forced to sell the home to pay for the other's nursing home care. The state of Montana, however, can make a creditor's claim on the estate after the surviving spouse has died to recoup the nursing home costs. However, the Montana homestead allowance protects value in a home up to \$20,000. The homestead allowance is exempt from, and has priority over, all claims against the estate.

Those who are concerned about nursing home costs should explore a long-term care insurance policy to see if it would better meet their financial planning goals than does a living trust.

**Is an Inexperienced Investor A Concern?** There are many instances where inexperienced investors may prefer placing assets in a living trust until they feel the confidence to take over management themselves. For example, a recent widow had very little investment experience and did not want to be responsible for investing the sizable amount of money she received upon the death of her husband. Although she is willing to learn more about investing, she needed the emotional security of having someone else manage her assets for her, so she established a revocable living trust.

**Incompetency** Advancing age, serious illness, or accident may render a person incapable of either supervising his or her investments and business, or making necessary payments for his or her well being. A revocable living trust could be a management tool in this case. As an example, a retired bachelor with only distant relatives suffered a severe heart attack and was away from his business for several months. As a result of that experience he chose two living trusts - one naming a corporate -- trustee for his investments and the other naming a trusted partner for the business. Under this arrangement his investments are being continually supervised and, if he should become incapacitated, the corporate trustee can step in to take care of his living expenses. An alternative to a living trust may be a power of attorney.

### **SUMMARY**

Before establishing a living trust, make a list of financial planning objectives you wish to achieve. Then discuss your needs with professionals such as an attorney, a trust officer, a certified public accountant and/or a certified financial planner. They may suggest an array of financial planning tools that could better help you achieve your goals than a living trust.

# **Living Trust Scams: Montana Seniors Beware**

**By  
Rick Bartos**

The popular television series Dragnet introduced us to Sergeant Friday. A constant fighter of crime, Sergeant Friday was always able to protect the innocent by asking for, "Just the facts." Here are a few facts about living trusts.

## **What is a living trust?**

A living trust is an alternate way to own, manage and dispose of your property. It is much like a bank account in that you cannot see or touch the trust. The trust owns the property you transfer into it while you or someone you choose takes care of that property.

The living trust is created by a trust document. The document states who is creating the trust (grantor), who will manage the trust (the trustee), who will benefit from the trust (the beneficiary), and what property will become part of the trust.

You are the grantor of your living trust. You decide which pieces of your property should become part of the trust body. Your trust can include real estate, bank accounts, stocks, bonds and other personal property items. You decide if you want to transfer all or only some of your assets into your trust.

You may also be the trustee of your living trust. Being the trustee allows you to exercise full control of the property you have transferred into the trust. If you do not want to manage your living trust, you may appoint another person or a financial institution to do so for you.

## **Can I avoid probate with a living trust?**

In many instances the answer is yes. However, the cost of buying a living trust and transferring your assets into the trust may well exceed any probate costs you may encounter.

Your assets must be properly transferred into the trust. If they are not, you might not avoid probate. Even if you have a proper trust, you still need a will to cover property you might have missed or which is later acquired and never transferred into the trust.

In many instances, if your property is held in joint tenancy with right of survivorship (husband and wife) you will not have to probate any property when the first spouse passes away. The surviving spouse has no legal need to probate. Do not be misled by probate delay and fee horror stories. Not all individuals need a trust - not all probates are expensive or time consuming.

### **Can a living trusts save me estate or inheritance taxes?**

No.

### **Can a living trust allow me to qualify for Medicaid if I were to enter a nursing home and thereby save my assets?**

In virtually every instance the answer is no. It is unlikely a living trust will save any assets from the spend-down requirements to become Medicaid eligible.

### **What are the expenses of a living trust?**

1. Cost of having the trust instrument drawn up to establish the trust.
2. Paying the trustee's fee.
3. Paying for transferring the assets into the living trust.

### **Why should I consult an attorney?**

1. Licensed Montana attorneys must follow strict ethical standards. They are subject to review for their actions by the Commission on Practice and ultimately the Montana Supreme Court.
2. Montana attorneys have at least 7 years of higher education. They are required to complete rigorous legal education training and testing.

3. In consulting an attorney, you establish an attorney-client relationship. The information you share with the attorney must be kept confidential. You continue to receive the services long after the trust document was created.

If you are reluctant to approach an attorney, your local Area Agency on Aging office has trained volunteer counselors to assist. Also your bank trust officer or a licensed or certified public accountant would be excellent resource people to assist you.

Many trust kits and commercial packages are sold by unlicensed persons claiming to be insurance salespersons or financial planners. They walk the line of unfair trade practices and the unauthorized practice of law. They exaggerate the time and cost considerations of probate. And because they are neither licensed nor regulated, they may not keep your financial information confidential.

### **Why should I be cautious about the commercial trust packages?**

1. These salespersons are regulated by Montana Living Trust Act.
2. Trust kits do not allow the trust to be tailored to your specific needs and goals. You receive no individualized legal or estate planning advice.
3. Commercial trust packages will more likely cost you more than it costs to have a lawyer establish a living trust.
4. Trust kits and commercial trust packages require you to transfer your property into your trust. This can be a time consuming and complicated task, involving the completion of new deeds and transfer documents. If you have an attorney establishing your trust the attorney can assist in transferring your property into your trust.

### **Where can I get the facts on living trusts?**

Montana Office on Aging: 1-800-332-2272

Montana Attorney General Office: 1-406-444-2026

Montana State Bar Elder Assistance Committee: 1-406-442-7660

**REMEMBER: Determining if you really need a trust is the first step; correctly identifying your assets and tailoring the trust is the second step; and do not forget the third and critical step, legally and properly transferring assets into the trust.**

**They're your assets. It's your future. Be careful.**

# THE USES AND ABUSES OF REVOCABLE TRUSTS IN MONTANA: WHEN THEY ARE NEEDED AND WHEN THEY ARE NOT

By  
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## I. INTRODUCTION

A revocable trust is one where the trustor (settlor) has a right to revoke. In most states, this right to revoke must be retained by the trustor in the trust instrument. However, in Montana unless a trust is expressly made irrevocable by the trust instrument, the trust is revocable. Of course, from a drafting standpoint, it is preferable to include an express provision indicating the trustor's ability to revoke the trust.

Revocable trusts are often characterized as either "funded" or "unfunded". The primary purpose of the funded trust is to avoid probate of those assets which were placed in the trust prior to the trustor's death. The "unfunded" trust does not contain assets prior to the estate owner's death. Rather, the unfunded trust is to receive assets upon the death of the estate owner. Thus, the unfunded trust does not avoid probate.

The focus of this presentation is the funded revocable trust.

## II. USES OF REVOCABLE TRUSTS

There are a variety of uses of such trusts.

**A. Asset Management (during lifetime).** An estate owner may wish to have someone else manage assets for him or her during lifetime, but does not want to give up control. A number of circumstances could be cited where management by someone else is desirable. I will list three such circumstances:

1. Client A may have recently received a windfall but be inexperienced in asset management.

2. Client B may be intending to travel substantially. Client B wants someone else to handle the continuing monitoring of investments as well as the mechanics of transferring dividends and interest to a checking account.
3. Client C is an elderly person and no longer enjoys investment decision making.

In all of these circumstances, a revocable trust could be considered. In all of these cases, someone other than the trustor will be named trustee. While the trustee selection is beyond the scope of this outline, the client in need of asset management often considers the corporate trustee because of its investment experience.

This use of a revocable trust involving the selection of a corporate trustee is not one of the uses typically cited by promoters of revocable trusts. They focus on the "self-trusted" trust, where the trustor is also the trustee.

**B. Future Incapacity (during lifetime).** An estate owner may fear a possible future incapacity. Without a revocable trust, if a Montanan became incapacitated, a conservatorship proceeding could be initiated (see discussion under Guardianships & Conservatorships). Critics of the conservatorship proceedings cite the following, which they perceive to be disadvantages of a conservatorship.

- court costs;
- attorney fees;
- the potential publicity associated with a hearing concerning the alleged incapacity;
- the possibility of the court imposing bond;
- the requirement to inventory assets within ninety (90) days of appointment;
- the limitations on conservators making gifts, conveying or releasing contingent interests, entering into contracts, creating trusts, exercising options to purchase, and other restraints of conservators' powers which require prior court approval;
- the requirement of annual accounts.

With the use of a funded revocable trust, all of these disadvantages are avoided. A revocable trust is not the sole device used to avoid the disadvantages of a conservatorship. The estate owner can also utilize a durable power of attorney, to achieve the same goal.

**C. Privacy in the disposition of assets (Probate Avoidance).** A will is filed as part of the probate proceeding. A revocable trust is not part of the public record. Thus, clients who wish to dispose of their assets privately are likely to find the revocable trust to be the preferred vehicle.

**Examples of clients who wish private disposition include:**

- ◆ a parent who wishes to disinherit a child;
- ◆ a parent who wishes to impose further trust restrictions on an adult child who is incapable of managing assets;
- ◆ a man who is acknowledging the existence of an illegitimate child; and
- ◆ a man or woman whose estate plan is beyond the mores of the community.

**D. Privacy in the nature and value of assets (Probate Avoidance).** The probate statutes of many states require the personal representative to file in court an inventory of the property owned by the decedent and to list fair market values as of the date of the decedent's death. Some clients do not wish the nature and extent of their assets to be part of the public record.

However, privacy in the nature and value of assets is not a valid reason to establish a revocable trust in Montana. MCA §72-3-607(3), reads:

**The personal representative shall send a copy of the inventory to interested persons, or file the original of the inventory with the court and send a copy of the inventory to interested persons who request it.**

Thus, a personal representative in Montana is not required to file an inventory with the court.

**E. Avoiding the fees and costs associated with probate (Probate Avoidance).**

1. Effective July 1, 1992, the filing fee for the commencement of a probate is \$70. MCA §25-1-201(m).
2. The personal representative is required to publish a notice to creditors. MCA §72-3-801. Publication fees vary from newspaper to newspaper.

3. Personal representatives are entitled to reasonable compensation. Under Montana law, that compensation shall not exceed 3% of the estate for the first \$40,000 of assets and 2% of the value of the estate in excess of \$40,000 without court approval. MCA §72-3-631.

4. The compensation of the attorney shall not exceed 1 1/2 times the compensation allowable to the personal representative. MCA §72-3-633. An interested person may file a motion for a court determination of the "reasonableness" of the compensation of any person employed by the personal representative, including any attorney. MCA §72-3-634.

The Montana Supreme Court has concluded that these statutes require that the fee charged for legal services be reasonable. Such is ascertained by considering the time spent, the nature of the service, and the skill and experience required. *ESTATE OF ROBERT E. STONE*, 768 P.2d 334, 336 (Mont. 1989). In the same case the court expressly rejected the argument that the percentages set forth in MCA §§72-3-631 and 72-3-633 are standard fees.

Because of the lack of published and reliable data concerning all of these fees, it is simply difficult, if not impossible, to make any certain comparisons. Further, it is likely that fees vary substantially from lawyer to lawyer. Also, the same lawyer might charge different amounts to different clients for performing similar services depending upon the responsibility assumed, the matter's complexity, and the time devoted to the project. These variances in fees and the lack of data concerning fees opens the door for irresponsible advocates of revocable trusts and the advocates for probate to overstate their positions.

#### **F. Avoiding the delays associated with probate (Probate Avoidance)**

The public perceives that there are a number of delays associated with probate. In fact, the Montana Uniform Probate Code does set certain time periods which must elapse before the estate can be closed. A creditor has four months after the date of the first publication of notice to creditors within which to file a claim. An estate cannot be closed by a sworn statement until the expiration of six months after the date of the original appointment of the personal representative. No corresponding restrictions are applicable to a revocable trust.

If the value of the gross estate exceeds the applicable exclusion amount, a federal estate tax return must be filed within 9 months after the decedent's death. IRC §§6018 and 6075. If either a probate estate or a trust estate contains assets which are difficult to value or assets which raise other estate tax issues, it is not unreasonable to assume that the fiduciary will need the full nine months to collect the data necessary to complete the return. Further, the Internal Revenue Service has three years after the return was filed, to audit and assess additional tax. IRC §6501. This three year period applies both to a probate estate and to a trust estate.

In summary, while a probate estate does require that certain time periods elapse prior to closure, both the probate estate and the trust estate face the same tax considerations which could mean the continuation of the estate.

**G. Avoiding probate generally.** As noted, one primary use of the revocable trust is simply to avoid probate generally. Without identifying any specific perceived undesirable characteristic of probate, such as a lack of privacy or excessive cost, some of the public simply believe that probate is bad.

### **III. PROMOTERS OF REVOCABLE TRUST**

Unfortunately, there are a variety of unscrupulous promoters of revocable trusts who make misstatements and misleading statements concerning their uses. The following is a listing of such statements and one teacher's response.

**A. A revocable trust can save taxes which cannot be saved through a will and probate.**

**False.** To a considerable extent a revocable trust is disregarded for all tax purposes. For gift tax purposes, the transfer of assets to a revocable trust is not a taxable gift because of the trustor's power to revoke renders that transfer incomplete. For income tax purposes, the income, deductions, and credits of the trust are attributed to the trustor. IRC §§676 and 671. For estate tax purposes, all of the trust's assets are included in the trustor's gross estate. IRC §2038.

A common estate tax planning technique is the use of a "bypass B", or "credit shelter" trust. Assets placed in such a trust are not subject to estate taxation upon the

death of the surviving spouse. Often the maximum amount of assets which can be sheltered against the estate tax unified credit of IRC §2010 are placed in such a trust.

These trust provisions can be part of a will (a testamentary trust) funded upon the death of the estate owner. The same trust provisions can be made part of a revocable trust. The same estate tax savings can be achieved either instrument.

**B. A will is subject to possible contests. A revocable trust is not subject to contest, or is subject to contest to a lesser degree.**

**ESSENTIALLY FALSE.** Montana has cases which indicate that gratuitous transfers by trust are subject to attack on the basis of a lack of capacity, undue influence, and fraud. See e.g. ADAMS v. ALLEN, 679 P.2D 1232 (Mont. 1984). These same grounds can be used to attack a transfer by will.

Perhaps one could argue that the Montana Uniform Probate Code's notice requirements might encourage a contest. For example, MCA §72-3-603 requires a personal representative to give notice of his appointment to the decedent's heirs and devisees within 30 days of the personal representative's appointment. No similar requirement exists for revocable trusts upon the death of the trustor. However, I think that if there is evidence of a lack of capacity, undue influence, or fraud, a substantial gratuitous transfer will be attacked whether the transfer is made by trust or will.

**C. Assets placed in a revocable trust are not subject to creditor attack.**

**FALSE** During the trustor's lifetime, property in a revocable trust is subject to the claims of the trustor's creditors. MCA §72-36-301. After the trustor's death, trust property is subject to the claims of the creditors of the decedent trustor's estate. MCA §72-36-302.

**D. Assets placed in a revocable trust are not subject to a spouse's claim for an elective share.**

**FALSE** Assets placed in a revocable trust are included in the trustor's augmented estate and subject to the spouse's right of election. MCA §§ 72-2-222 and 72-2-221.

**E. Assets placed in a revocable trust are not counted for Medicaid purposes.**

**FALSE.** The income and principal of a trust is treated as an available resource of the trustor for Medicaid purposes if the trust was established by the trustor during the trustor's lifetime. 42 USC §1396p(d).

**F. One may transfer assets at death in trust wherein a second person is a discretionary beneficiary. The second person does not have to count those assets for Medicaid purposes.**

**ESSENTIALLY TRUE.** If such a trust is a testamentary trust (i.e., if the trust was created by will), the assets of such a trust are expressly excluded by statute. 42 USC §1396p(d). There is no similar express statutory exclusion if the discretionary trust provisions are part of a revocable trust. Policy considerations could argue that there should be no distinction between either trust since the discretionary beneficiary cannot force a distribution to him/herself in any event. Nevertheless, a cautious practitioner might prefer a discretionary trust created by will over one created by a revocable trust in such a circumstance.

**G. A probate proceeding necessarily includes many court hearings.**

**FALSE** An estate can be probated informally under the Montana Uniform Probate Code. While documents have to be filed with the Clerk of Court, **NO HEARINGS ARE REQUIRED.** MCA §72-3-201 et seq.

**H. Everyone needs a revocable trust.**

**FALSE** In Montana there are some good reasons to consider a revocable living trust. Perhaps a client desires asset management by another person or a trust company. Perhaps a client desires privacy in the disposition of his assets. Or perhaps, a client owns real property in another state where probate proceedings are more cumbersome or clearly costly.

While there are good reasons for some to consider revocable trusts, there is no good reason for everyone to adopt a revocable trust. Potential disadvantages must be considered.

First, typically revocable trusts are more expensive than wills to create. Trust instruments are usually more complex than wills. Also, time has to be devoted to assets transfers.

Second, simplicity favors retaining assets in the name of the estate owner. During the estate owner's lifetime there is no trust instrument which must be provided to a stockbroker, a title company, or other third party.

One alternative for a married couple who wants to avoid probate is to place assets in joint tenancy with rights of survivorship and adopt durable powers of attorney.

#### **IV. THE TRANSFER AND HOLDING OF ASSETS IN REVOCABLE TRUSTS: CONSIDERATIONS PRIOR TO THE TRUSTOR'S DEATH**

A. Title to assets should be transferred to "[name of trustee], trustee under Trust Agreement dated [date of execution] between [name of trustee] and [name of trustor]." Some trust drafters also provide a name for the trust in the trust instrument and include that name in the title of transferred assets.

B. If a partnership interest is to be transferred, any written partnership agreement should be examined. Express procedures for making the trustee an assignee of the partnership interest should be followed. Written consent of the other partners may be necessary. If a limited partnership interest is being transferred, it will also be necessary to amend the certificate of limited partnership.

C. If real property is to be transferred, the trustor's title insurance policy should be examined to see if the title company's guarantee will be sufficient after the transfer.

If the property is subject to an encumbrance, the deed of trust or the mortgage should be examined to see if it includes a "due on transfer" clause. Some practitioners as a matter of course obtain express written permission from the lender before making a transfer of encumbered property to a revocable trust.

D. If an asset does not have title, a written assignment should be prepared. Some practitioners who routinely include clauses in wills authorizing the use of a separate writing to dispose of tangible personal property as provided in MCA §72-2-533, include similar clauses in both the pour over will and in the revocable trust. Thus, even if such an asset was not effectively transferred in trust prior to the trustor's death, the dispositive provisions of both the will and the trust are identical.

E. Stock in an S corporation can be held in a revocable trust. IRC §1361 (c)(2)(A)(I) provides that when the grantor is treated for general income tax purposes as the owner of a trust, as is the case with a revocable trust, such a trust may own stock in an S corporation without jeopardizing the S election.

F. The transfer of an installment obligation to a revocable trust is not a disposition of the obligation which would result in a realization of the untaxed profit at the time of transfer. Rev. Rule. 76613. 1974 2 C. 3. 153.

Some uncertainty can arise if the installment obligation is owned by husband and wife and a transfer is intended to a trust which is revocable by only one spouse. One alternative is to make the transfer in two distinct steps. First, one spouse could simply make an outright transfer of his interest in the obligation to the other spouse. This transfer should not result in the recognition of gain. IRC §§453B(g)(1) and 1041. Second, the transferee spouse could make a subsequent transfer to her revocable trust.

G. The transfer of Series EE U.S. savings bonds to a revocable trust does not cause the acceleration of recognition of bond interest. Rev. Rul. 58-2, 1958-1 C.B. 236. PLR 9009053.

H. The capital gains exclusion on the sale of a principal residence is not affected if title to the house is held in trust. IRC § 121 provides a capital gains exclusion of up to \$125,000 to a person over the age of 55 who sells his principal residence. This exclusion is obtainable even when the title to the home is held in a revocable trust. PLR 8007050.

I. "Flower" bonds may be held by a revocable trust. Certain outstanding U.S. government bonds are eligible for redemption at par for the payment of the federal estate tax. When such bonds are held in a revocable trust, either (1) the trust instrument must require the trustee to pay all or a pro rata portion of the estate tax or (2) statutes in the decedent's domicile must require the trustee to pay the tax or the proportionate share of the tax that is attributable to the trust assets. While MCA § 72-16-603 is such an apportionment statute, it is preferable that the trust instrument require the trustee to pay such taxes. Any tax apportionment provisions of a pour over will should be consistent with the trust instrument.

J. The trust instrument and a durable power of attorney should be drafted so that the trustee could make similar distributions to an agent who in turn could make gifts to third parties.

K. Generally trusts must have their own identification numbers and file their own income tax returns, unless they have under \$600 in gross income. IRC §6012(a)(4). Most grantor trusts are subject to these same requirements, although all of the items of income, deduction, and credit are included in the computation of the trustor's personal income tax liability. Regs. §§1.6019-3(a)(1), 3(a)(9).

However, if the trustor or the trustor's spouse is a trustee or a co-trustee of a revocable trust, such a trust does not need its own identification number and no trust income tax return need be filed. Regs. §§1.671-4 and 301.6109-1(a)(2).

## **V. THE REVOCABLE TRUST AFTER THE TRUSTOR'S DEATH**

**A. Transfer of assets.** The trust instrument may provide for trust termination upon the death of the trustor. If the trustor is also the trustee, a successor trustee would serve. Typically that successor is designated in the trust instrument. However, if no practical method of appointment is included in the trust instrument, a co-trustee or a beneficiary may petition to court to fill the vacancy. The court is to give consideration to the wishes of trust beneficiaries who are 14 years of age or older. MCA §72-33-621.

The successor trustee will need to present proof to third parties with whom the trustee must deal that he or she is properly acting as trustee. If the successor trustee is court appointed, a copy of the trustor's death certificate and a certified copy of the court order should suffice.

If the successor trustee is not court appointed, the procedure is less certain and will likely vary from third party to third party. Perhaps a copy of the trustor's death certificate and a verified copy of the trust instrument will satisfy the requirements of most third parties. If a third party requires the copy of the trust instrument be certified by a public official (clerk and recorder or clerk of court), the revocable trust's advantage of privacy in disposition of assets would be lost.

In the case of Montana real property, the identity of any successor trustee may be established by a recorded affidavit of the successor trustee specifying: (1) his name, (2) his address, (3) the date of his succession, (4) the circumstances of his succession, and (5) confirming that he is currently lawfully serving as trustee. MCA §72-36-206(6).

**B. Corporation stock.** After the trustor's death, the trust becomes irrevocable. The irrevocable trust may continue to hold S stock for two years after the trustor's death. IRC §136(c)(2) (A)(ii). Unless the continuing trust provisions satisfy the requirements of a "qualified Subchapter S trust" as specified in IRC §1361 (d)(3), the corporation will lose its S status.