

# BROOKS & BROOKS, LLP



## Trusts—The Big Difference!

Many of our clients have either a revocable living trust or an irrevocable trust. Some client have both. Sometimes it can be confusing for clients to know what purpose either serves. What follows is a thumbnail summary of each.

**Revocable Living Trust (RLT)** - the purpose of an RLT is principally to avoid probate, while still giving clients the ability to have detailed dispositive terms, including trusts for grandchildren or Special Needs Trusts for others. It is like having a will with all of the terms and conditions a person wants, without having to go to court.

In fact, there are still many people that believe if they have a Will, they do not have to go through Probate. Nothing could be further from the truth. A person owning assets at their death and relying upon a Will to disburse those assets will guarantee Probate. The RLT was designed to give all the benefits of the Will, but without the high costs and administrative burden of court Probate. An RLT also can be used to save estate taxes for high net worth clients. ~cont pg. 2

## Joint Bank Account—Is It What You Really Intended?

Joint bank account issues come up repeatedly in our practice. Joint accounts held by spouses are generally no problem. However, if the spouses are in a second marriage, each with children from a first marriage, this can potentially be a problem. But, more often the issues come up in the context of a single person adding a child, or niece or nephew, to his or her bank accounts. Often, it is someone from the bank who recommends a second name on the account. The banker's theory is that if you are laid up and could not get to your money, don't you want someone on the account who could pay your bills?

The problem with this approach is that all these accounts then become joint accounts, with *rights of survivorship*. This means that upon the account owner's death, the legal presumption is that the money now belongs to the joint tenant on the account. This is true despite the fact that the account owner's Will may provide for a distribution of his or her assets to all of the children equally (or nieces and nephews equally, or to others). The question in everyone's mind then is "Did the decedent intend for the joint owner to inherit the money, or was it supposed to be part of the decedent's estate and pass through his or her Will?"

A recent case, (*In Re Feinberg*, N.Y.L.J. March 29, 2017, p. 28, col.6) addresses this all-too-often occurrence. Before the Court was a contested administrator's accounting, in which the objectant claimed a certain checking account in the name of the decedent and the administrator should have been included as an asset of the estate.

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**Merry Christmas and  
Happy New Year from  
the Brooks & Brooks  
team!**



## Trusts—continued

One of the great attributes, among many, of an RLT is that the trust administration is private among the family, not a public document open for the world to inspect as is the case with Probate. **What an RLT does not do** - RLT's do **not** offer asset protection for the Grantors of the trust. Specifically, an RLT does not work to protect the Grantor's assets from the Medicaid Spend Down Rules. To accomplish that result, one needs to have an **Irrevocable Trust**. This is one of the requirements of the federal law that established the right for American citizens to protect some of their assets from the extremely high cost of long-term nursing home care.

**Irrevocable Trusts**—There are many kinds of irrevocable trusts and as the name implies, these trusts, with few notable exceptions, cannot be revoked by the one making the trust (the Grantor). A Medicaid Asset Protection trust is a irrevocable trust. This is what makes the trust work to protect clients' assets. The client creates the trust, transfers assets to it and after the assets have been held by the trust for 60 months, they are protected from the Medicaid Spend Down Rules.

There are other irrevocable trusts. For instance, the Total Protection Trust to protect against future unknown creditors; an Estate Tax Savings Trust, sometimes referred to as a "Crummey Trust"; and the Irrevocable Life Insurance Trust, which is used to keep insurance death benefits out of the Grantor's estate for estate tax purposes. Other irrevocable trusts can be created for very specific and special circumstances, such as a Medicaid Special Needs Trust (SNT). The SNT is used to provide the "extras" for a beneficiary that is receiving government benefits for his or her day to day living. This trust is designed to allow a trustee to pay for goods and services that government benefits are not designed to pay for.

So, we see that there are many different types of trusts and two general categories: Revocable and Irrevocable. The important thing to remember is that a revocable trust does not afford creditor or Medicaid protection. To achieve that purpose, the trust must be irrevocable.

We hope this explanation helps our clients and friends to further understand the differences and uses for each type of trust.

All trusts are good for their designed purposes and whether revocable or irrevocable, a trust will avoid Probate for assets of the Grantor decedent, both here in New York and elsewhere around the country. Who wants to have their estate Probated here in New York and then again Florida, or Texas, or Arizona just because they also owned a house in one of those states?

## Joint Bank Account—continued

During the trial of the case, the petitioner maintained that the account was a true joint account with rights of survivorship, and submitted the signature card which contained the notation "*Joint, payable either owner or the survivor*". With that evidence, the court found that the petitioner had met the burden as joint owner and presumptively had the right to the proceeds of the entire account.

The burden of proof then shifted to the objectant to establish, by clear and convincing evidence, that the account had been created for convenience only. Apparently the only evidence produced by the objectant was based on speculation and innuendo. Not having solid evidence to show the decedent's real intention, the objectant's claim failed.

All too often in these cases, the objecting parties are positive that the decedent did not intend to favor the other joint account owner over other beneficiaries. And, they may be right. Once a person passes, they can no longer speak for themselves as to what their true intention was. Further, none leave any instructions or written notices to other beneficiaries to indicate what the intention is in regard to the joint account. People often do things spur-of-the-moment and upon the suggestion of a well-meaning third-party, but the ramifications later on can be devastating to a person's estate plan.

**The solution?** You do not have to add a person as a joint owner of an account for them to have the power to pay bills from that account. A well-positioned Power of Attorney will give an agent the authority to access the person's bank account to pay bills, and also, the right to move money between accounts and banks if it necessary or advisable. Yet, the agent under the Power of Attorney is not an owner of the account and is not automatically entitled to it upon death.