

**DRAFTING IRREVOCABLE
MEDICAID PLANNING
TRUSTS**

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What are the Goals of your Client?

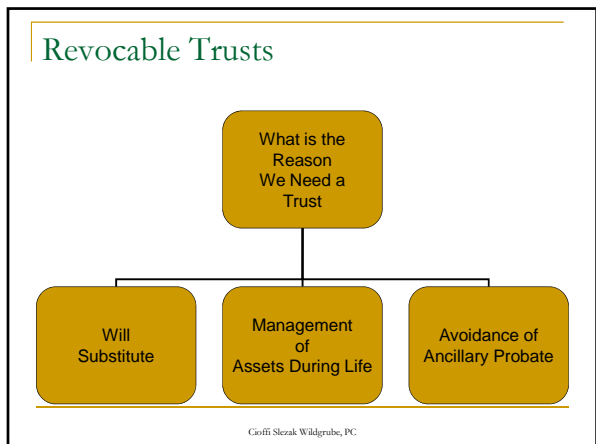
- Asset management during client's lifetime
- Protection from possible estate taxes
- Protection from the costs of long term care expenses
- Asset protection regarding the eventual beneficiaries - their inability, disability, creditors or predators
- It is all about control – how much control is your client willing to give up to accomplish his/her goals?

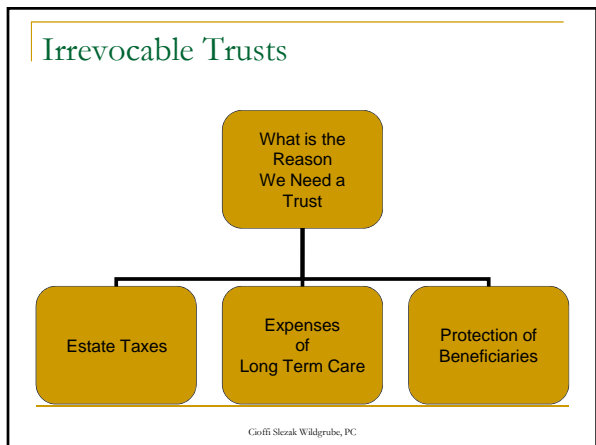
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Types of Trusts

- Testamentary (i.e. in a Last Will) vs. Intervivos (i.e. during lifetime)
- Revocable Living Trusts
- Irrevocable Intervivos Trusts
- Irrevocable Medicaid Trusts
- Irrevocable Life Insurance Trusts
- Irrevocable Supplemental Needs Trusts

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Irrevocable Medicaid Trusts

Focus of this segment is Irrevocable Medicaid Trusts

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Basic Medicaid Rules to Place This Discussion in Context

- Eligibility for Medicaid benefits: income and asset/resource tests
- Transfers without consideration
- Five year (60 month) look-back period
- NYS Capital Region average monthly regional cost for 2013: \$8,950.00
- Penalty period commencement date

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Why recommend a Trust to your client rather than an Outright Transfer

Irrevocable Trust

- Partial retention of control
- Stream of income
- Creditor protection
- Retained ability to alter remainder beneficiaries

Outright Transfer

- No control over assets
- Loss of income
- No protection against creditors of donees
- Completed gift – cost basis considerations

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Do Not Draft with only the Rules & Regulations for Medicaid in Mind

- Income tax considerations
- Estate tax considerations
- Gift tax considerations
- For transfers of real property, capital gains tax exclusion for primary residence
- For transfers of real property, property tax exemptions for primary residence

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Elements of a Trust

- Grantor/Creator/Settlor
- Trustee
- Beneficiary – Income/Remainder
- Language directing whether the Trust is revocable or irrevocable during the Grantor's lifetime
- Provisions for distributions during Grantor's lifetime, upon Grantor's death and beyond
- Funding of the Trust, i.e., how and when to get assets into the Trust

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Gift Tax Considerations

Completed Gifts

- Cost basis carryover to Donee
- Excluded from future Estate of Donor
- Gift tax return needed

Incomplete Gifts

- Step up in basis in future Estate of Donor
- Included in future Estate of Donor
- May not need gift tax return

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Income Tax Considerations

- Simple Trust – all income is required to be distributed to the income beneficiary
- Grantor Trust – discretionary distribution of income, but can still be taxed to the Grantor as income beneficiary
- Complex Trust – taxation of income occurs at trust level (compressed tax brackets)

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Estate Tax Considerations

- Assets transferred into an Irrevocable Medicaid Trust will still be includable in the Grantor's future estate because of
 - the retained right to income from the trust;
 - the retained right to use and possession of the real property in the trust; and/or
 - the retained right to change remainder beneficiaries
 - Step-up in basis will apply

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Capital Gains Tax Considerations

- Capital gains tax exclusion of a principal residence
- If the trust is a Grantor trust under IRC Sections 671 through 679
- Another method for Grantor to retain exclusion is to retain power to substitute other property

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Real Property Tax Exemption Considerations

- NYS STAR exemption – Grantor is still eligible for STAR on principal residence as the income beneficiary of the trust
- Compare and contrast life estate retained in the deed vs. life estate as income beneficiary
- Veterans property tax exemptions – still apply

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Provisions of an actual trust

- Date of instrument and identity of parties
- Statement of irrevocability
- Statement of consideration and delivery

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Provisions

- Article I: Payments During Life of Grantor
 - Payment of Income
 - Invasion of Principal
 - Additions to Principal
 - Distributions of Principal for Family Benefit
 - Duty of Support for Beneficiary(ies)
 - Trustee as Beneficiary
 - Provisions regarding real property

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Provisions

- Article II: Successor Beneficiaries
 - Limited Power of Appointment
 - Upon death of Grantor – distributions
 - Provisions for surviving Grantor by certain time period
 - Provisions for further trusts – perhaps for minor beneficiaries

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Provisions

- Article III: Resignation & Replacement of Trustees
 - Grantor names successors
 - Commissions language
 - Bond
 - Judicial settlement of accounts
 - Procedures for resignation by a trustee

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Provisions

- Article IV: Powers of Trustees
- Article V: Distributions to Minors/Disabled
- Article VI: Irrevocability
- Article VII: Governing Law
- Article VIII: Gender Neutral
- Article IX: Acceptance by Trustees
- Schedule A: Listing of property to be conveyed and re-titled to trustees

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Administration of Trust

- After execution of trust instrument, obtain Tax Identification Number (TIN) from IRS
- Prepare Trustees Duties Letter
- Docket and file IRS Gift Tax Return (709)
- Docket for annual letter to Trustees regarding fiduciary income tax return filings (1041s)

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Questions?

THANK YOU!!

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