DANIEL TIMINS, Esq., CFP®

THE LEGAL BULLETIN

Vol 11. December 2019

Free Everything For EVERYBODY!!!

TRIGGER WARNING

The following publication contains personal opinions on politics, economics, meat eating, and maybe a little fat shaming. And since emotions are, like, hard and stuff, I will likely offend everyone in some way. So, get ready to draft your complaint to Human Resources, post a self-righteous rant on Twitter and sob to your emotional support animal, as you read Dan's opinions on the world we are stuck living in together. Or sit next to Uncle Jack at Christmas again, and attempt to get through him explaining how the earth is actually flat, it's clearly more entertaining.

In the Holiday spirit of Santa Clause, Hanukkwanza Harvey, and about 2/3rds of the people running for president, we are all giddy with anticipation for imminently receiving free everything: Free health care, free universal income, free education and free elimination of student loan debts, throw in some free home loans, a $60 Trillion plan to stop climate change that will materialize from thin air, free nursing homes / housing / food / internet / squeeze toys, all a mere few months away from happening.

Meanwhile the Mayor of McWashington – whose Twitter feed sounds more like an insult comic at a playground than an elected official - funds military spending at the level of defending against an alien invasion (of course for free), Social Security and Medicare continue to chug along (no expense for that), and trade wars continue to be waged at no cost to the citizenry. All good, right?

Seriously, try reading any comment from President Trump in Triumph the Insult Comic Dog's voice. It's hilarious.

Now for some truth to power: Drop a Xanax and listen to a Coldplay song. Elections (especially at the primary level) are always emotionally charged and bring out the worst pandering imaginable. Add in round-the-clock coverage of political proceedings which are dangled in front of our face by shameless TV pundits and journalists (even though we know deep down that nothing is going to happen) and basically everyone is driven insane. So we should take most current political proposals with a grain of salt. But when we forget basic economics we knew when we were 7 and assume there are no consequences to unlimited spending we are already in deep trouble. And when we call everyone who disagrees with us a racist, or rush to our preferred social media app and share a self-righteous diatribe proving that most of us are idiots, then all adults have clearly long-since left the building and we are making emotion-fueled reactions instead of rational decisions.

Just because you find a meme that agrees with your opinion does not prove your point.

First, do we really, I mean honestly, believe corporations or the wealthy will

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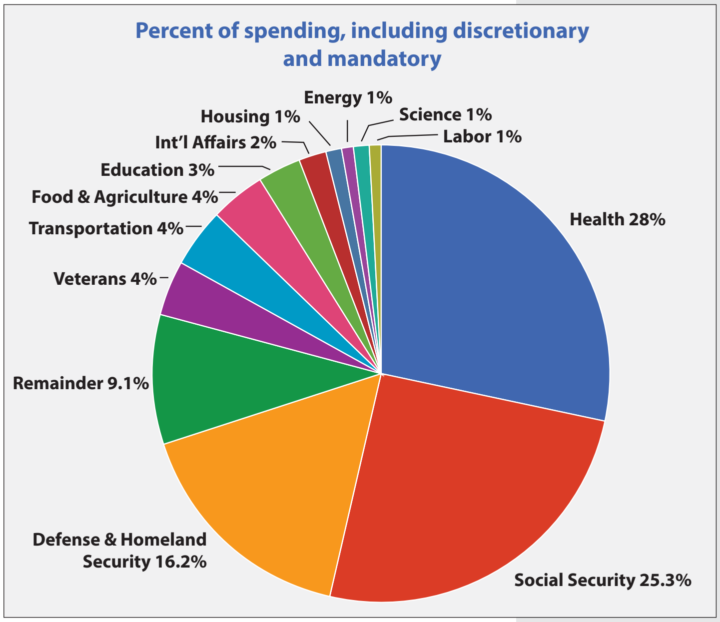
sit back and accept super-high taxes? Relative tax revenue (I.e. what the government collects) has remained relatively stable the last several decades, plus history is not ripe with examples of the rich solemnly accepting their disenfranchisement, so my feeling is that no "Uber Wealthy" taxes will be implemented.

Second, is it even possible to sustain our current spending? Yes, we spend a lot of money on our military, but social programs are almost 4 times higher than them. Guns won't bankrupt us, Geriatrics will (but we should also acknowledge we have enough guns to ensure a zombie apocalypse lasts 20 minutes tops). And most people don't realize how much money the federal government has borrowed from Social Security's Trust Funds ($3 Trillion) so any sustained spending will only last so long before it threatens the most important programs - Medicare and Social Security – whose funding are now coming primarily from direct tax dollars instead of OASDI savings. Expect Medicare Part B and D charges to increase, higher taxes on all people, and future reductions in existing entitlement programs.

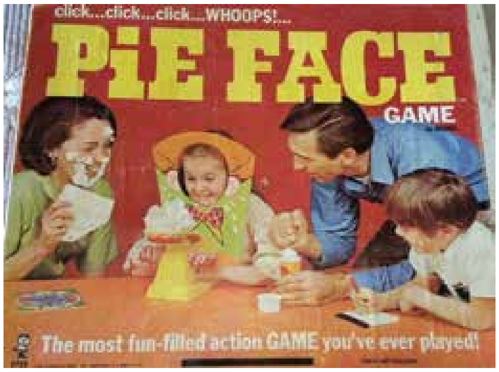


Lastly, and most importantly: Do you think the uber-wealthy are concerned that the government is going to take away their guns / rights to an abortion / trans fats in their croissants? Are CEOs and the leaders of industry fuming furiously at proposed public policy? Of course not, they're loaded and get whatever they want.

The good news is that you too can have their mindset. Remember Dan's **First Declaration: Wealth is the Great Equalizer.** Money has always been the best insurance for maintaining your options and shall continue to be. Government is raising taxes? Invest in further tax deferred investments. Having cash flow issues? Reevaluate your expenses and modify your expectations and spending habits. Worried about health care? Get off your butt and do some Pilates, then start saving in your Health Savings Account. And if you have children, plan to help them with home down payments, consider placing your home in a Medicaid trust, and invest in 529 Plans and other savings vehicles. And spend some time learning about how investing works: If you are sick and are going to the doctor you will automatically Google "will drinking eggnog lead to a shingles outbreak", so why not learn a bit about taxes before you visit your accountant, or ask about asset allocation prior to vising your financial planner. If you control your financial future you will probably stop watching your favorite cable news network and go outside for some fresh air, just like you used to tell your kids to do.

Stocks Are Not Just For Young People Anymore

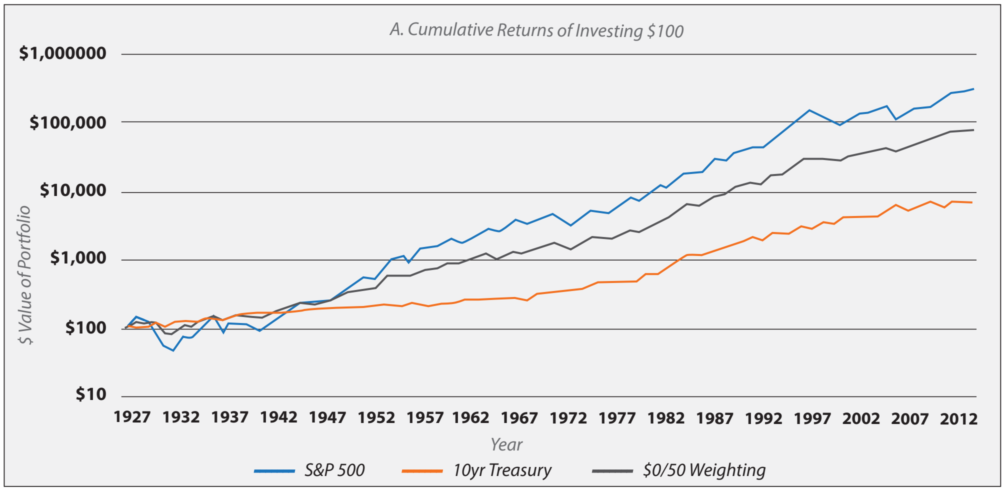
Since Andrew Carnegie proposed that a corporation's primary purpose is to earn as much money as possible, corporations have stockpiled a famine's-worth of crappiness and distrust for the public to stew on for a million years. And don't forget about their central role in climate change, deforestation, species extinction, and mass production of Pregnant Barbie (and let's forget our part in buying their too-often-useless stuff).



Yet, Hasbro clearly called up my number for this awesome board game. 2020 version to have a "Now with simultaneous Instagram post" option

But let's ask the tough questions: Corporations sure seem to know more about making profits than most people do, so why do we become averse to trusting them with our investment dollars as we grow older? And for those that do continue investing as they age, why do we think increasing corporate taxes will not hurt us in our most vulnerable years of life? And what REALLY happened to piss off Bernie Sanders so much at Corporate America: No toy in his Happy Meal? Not getting that modeling job for the Tom's Health Tonic's add in the first Sears Catalogue? The world wonders.

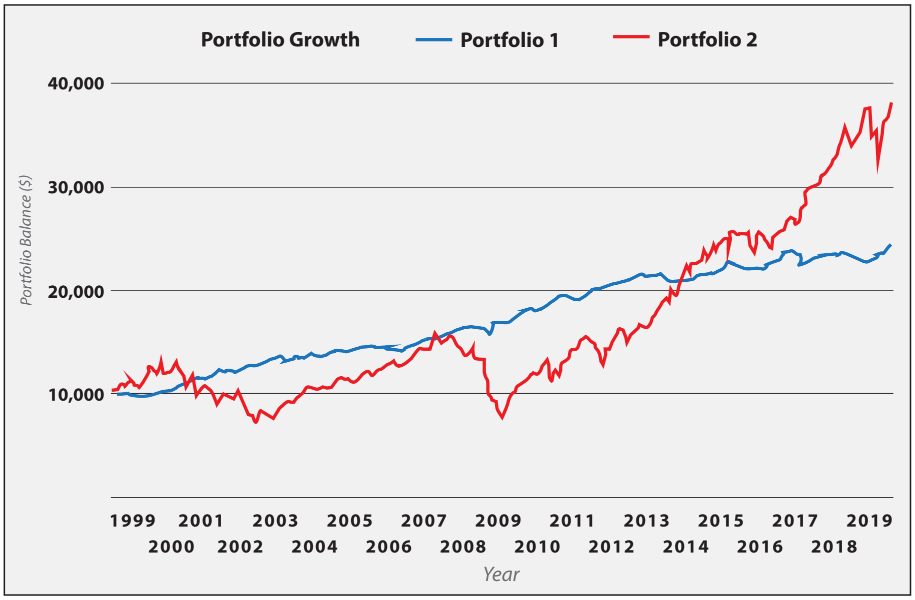
It's not breaking news for me to remind you there haven't been many fixed investments generating great retirement income for almost a decade, so retirees are already withdrawing some principle from their investments. And the fact that you will probably live 15 years longer than your parents should make you wonder how your accumulated wealth will last for the rest of your life if it is generating 2% per year for 25 years. The bad news is that fixed income alone will clearly not fulfill your retirement needs for the near future.



If you had enough time to ride out some volatility, you see that holding stocks are almost required for people with long lives to succeed

I am often concerned to see people under-invested in stocks at relatively young ages, since my **Second Declaration is You are not Old until you are 90** (Caution: this rule does not apply to my dating life). At that point you will likely want a part-time aid or may need to help with a grandchild's higher education. I might even propose that my 80-year-old clients who clearly will not meet their retirement goals should likely be invested at least 40% - 60% in stocks. I can also appreciate the concern of losing money at this age, but you likely have at least one more full market cycle waiting for you, maybe two, so time should ease-out the bumps in the road.

Other benefits are that stocks and mutual funds tend to be partially taxed at capital gains tax rates, which are historically lower than income tax rates for most people. These capital gains are also assessed at a date of your choice (I.e. you choose when to buy and sell, which is not the case with income) and capital gains are erased if you own appreciated stock when you pass away. This makes equities and stock-based mutual funds good investments in a Medicaid trust as well, since you can withdraw the income while the principal is protected and distributable to your heirs at the time of your death.



True, the last 20 years has been a rocky ride but, in fairness, this graph includes the Tech Bubble and Great Recession, and look how fixed income completely stalled-out since 2013.

I won't neglect the fact that while modernization has cut worldwide poverty by 75% in 30 years, it has done so at the merciless expense of our environment and innocent fluffy creatures. And if you figure "I have a government pension, so this isn't my fault", don't forget that your pension is invested in the same stuff as someone else's IRA, so please tone down your smugness. If you want long-term investment returns without requiring your great-grandchildren to negotiate with Mad Max over a barrel of petrol speak with your financial planner and pension plan administrator about eco-friend investing and socially responsible mutual funds.

Supreme Court Rules On Trusts *(world yawns)*

For some people Trusts and Estates law is as exciting as looking at 2017's Plus-Sized Models Calendar. Face it, you have seen TV shows and movies based on criminal law attorneys, divorce courts, heck even corporate law attorneys got Tom Cruise to serve as their ambassador in John Grisham's "The Firm", but my chubby chasing colleagues and I seem to be the invisible players in the world of Anglo-American jurisprudence. So it seemed like the Jimi Hendrix Experience was resurrected exclusively for a T&E attorneys' conference when the Supreme Court, which hears an estate planning issue perhaps once every 5 years, ruled on **North Carolina Department of Revenue v. Kimberley Rice Kaestner 1992 Family Trust, Docket No. 18-457.**

And then we all fell asleep instantly since the mere act of reading the case's name caused you to involuntarily lapse into a comatose state wherever you were standing. Plus, the case only affects a handful of wealthier clients with multi-generational plans. But they are people too and pay me pretty well, so here we go:

You, right now. Yeeeeesssss, sleeeeeeppp…

Basically, States are hungry like an obese hippo from the Midwest, and your deep-fried tax dollars are their bacon-crusted cheesecake thus, North Carolina found nothing wrong with taxing a Trust created by Lee Rice for his daughter Kimberley Rice Kaestner in 1992.

The problem was that Lee lived in New York, set up the trust in New York and died in New York, the independent Trustee was in New York, none of the investments were North Carolina companies, and the sole reason North Carolina had any relevance whatsoever (aside from the existence of the Charlotte Hornets) was that Kimberley had moved there, so they taxed Kim for trust income.

The issue was that Kim hadn't received any distributions from the Trust for years and had no power to demand any distributions, so why was the Trust required to pay North Carolina taxes?

The Trustee paid the North Carolina taxes (as well as presumably paying income taxes to New York, where they income had actually been earned), probably included a Post-It saying some cheesy movie catchphrase like "I hope Court won't be too taxing on you", then sued the State.

The Supreme Court agreed unanimously (which is nowadays as rare as running into a manatee at Walmart doing a Seinfeld impersonation circa 1988) with the Trustee and smacked the living dickens out of North Carolina. The Court said the fact Kim merely resided in North Carolina was not enough of a reason to tax income that the New York Trust had earned but never distributed to her.

Their argument was that North Carolina violated Kim and the Trust's Due Process rights under the 14th Amendment, which is a Constitutional no-no at the level of smacking Queen Victoria on the butt then high-fiving your bros on live TV: You don't do it unless you want to be made an example of or are being utterly turdy. Or, in this case, both.

North Carolina Dept. of Revenue departmental seal (Artist's impression)

I suppose the takeaway is that if your Trustee has complete discretion over trust distributions and the Trustee isn't your beneficiary that Trust will only be taxed in its home state until it distributes income to your beneficiary, which is helpful if your beneficiary lives in a high tax state. I have written extensively about the potential benefits of having a disinterested Trustee having discretion over Trust funds, which tends to make more sense for long Trust durations and the greater the amount of funds held in Trust. I have also stated how this does not always work for shorter-term Trusts with smaller funds in them. In addition, if you are reading this Newsletter you likely live in one of the highest-taxed states anyway, so like I said this doesn't apply to too many people. If, however, you have 8-figures of assets, want a dynastic component to your estate planning and wish to maintain utmost flexibility you may want to discuss discretionary Trusts with your otherwise mind-numbingly boring T&E attorney.

OK BOOMER: Is There any reason not to have a Medicaid Trust?!?!

Many aging individuals appreciate how much they have worked during their lives, how much risk they took, and how they were somehow able to save up enough money to live in retirement for over 20 years. Then, without warning, they have a stroke, or a fall, or are diagnosed with dementia, and it becomes clear to them that their aging health issues can erase their entire net worth in a mere few years. The family then finds out that receiving home care Medicaid is pretty easy, but to protect family assets from Medicaid nursing home care benefits requires you to be indigent for at least 5 years. And (unfortunately but predictably) the family home was never transferred or properly placed in a Medicaid Trust, meaning Medicaid will place a lien against it for your nursing home care.

If only you had transferred your house to a Medicaid Trust five years ago! Then your family would receive an inheritance and you would receive Medicaid benefits.

Well, just like that time Axel Foley pimp smacked Hans Gruber into next Tuesday in that 80's movie, I'm about to make you dizzy with delight: There is nothing stopping you from changing the Deed to your house to being owned by a Medicaid Trust and protecting its value for your family members. True, you may not want to do this if you are health and in your 30s, 40s or 50s, but if you are in your 70s or 80s, or if you have a progressive illness, Medicaid Trusts may be a great option for maintaining your family wealth while simultaneously facilitating Medicaid eligibility. In fact, it is hard to imagine why an aging or disabled individual would not place their home in a Medicaid Trust.

Warning Old Person: We will make fun of you! Until we need something.

Almost any non-retirement plan asset can be transferred to a Medicaid Trust, but the creator of the Trust cannot withdraw principle. This is why these trusts are also known as "Income Only Trusts" (because the creator can only withdraw income) or "Medicaid Asset Protection Trusts" (because the principle is protected for transfer to future generations). Many people in the 70s still have many years to spend their investments on travel, food, and gifts to family members, so they don't usually want to place their investments in a trust that limits them to receiving only the income on those investments.

But placing your real estate in a Medicaid Trust is ideal:

1. The Trust allows you to continue living in the home the rest of your life by reserving a legal "Life Estate" for you and your spouse.

2. Because you maintain that life estate the Internal Revenue Code allows a "step up" in your cost basis at death, so your children won't owe capital gains taxes if they sell the home after your passing.

3. In addition, since you are living in the home, you continue to receive any STAR exemption on your real estate taxes. If you happen to be renting out a part of the home, the Trust can receive the rental income and transfer it to you.

4. If one of your beneficiaries in the trust ticks you off and you want to now disinherit them, you can maintain a "Power of Appointment" in the Trust that allows you to change its ultimate beneficiaries using your Will when you die.

5. Future Beneficiaries Can Access Principle: Medicaid Trusts only protect the assets from you and your creditors, NOT your children, who may (typically) withdraw principle whenever they want. You can limit this power, but you may want to maintain it in case there is an emergency and they need to withdraw trust funds for your benefit.

6. Lastly, even if the house is sold (with your consent) any replacement home for you can be purchased by the Trust.

The only major downside with Medicaid Trusts is the same downside with all irrevocable trusts: You cannot predict what will happen in the future and can only make so many contingency plans. Still, a half-decent attorney can establish one of these trusts for you with a lot of unforeseen issues being dealt with, the Power of Appointment is a sort of nuclear option to preserve trust assets, and you can't get kicked out of the house even if you tick off your Trustee to no end. In short: There are few good reasons not to place your home in a Medicaid Trust if you want to protect family assets while still receiving Medicaid benefits. Make sure you name a Trustee you feel will do the right things by you. And do not hesitate: Time is always the best friend (or foe) of Medicaid planning.

Dan Says

Know the Limitations of Medicaid Trusts: While all of these benefits do make Medicaid Trusts look like a great place to park your real estate, it is important to remember these points:

- The Medicaid Trust is irrevocable: You don't like your original choice of Trustees? You want to cancel the Trust? You want to withdraw principle? Too bad, you can't do it.
- You (and Your Spouse) Cannot be the Trustee: Yes, your family members (including your children) can be Trustee, but you do not legally have any control over any assets in the Trust. Make sure you trust your Trustee (there can be no "Trustee" without "trust").
- Income Tax Issues: If the Trust is receiving income from your downstairs renter / tenant, you need to distribute the income to yourself or face higher trust income tax rates.
- Look Back Still Applies: The 5 year "Look Back" for nursing home Medicaid still applies: Placing your home in the Trust anytime within the past 5 years does not protect the home from Medicaid pay-back.
- Another Reason Coops Stink: Many Coops do not allow their shares to be owned by your irrevocable trust, and Medicaid Trusts are no exception, so if you own a Coop none of this planning may be available to you.

Estate Madlibs!!!

The ________ (political party, plural) passed legislation saying taxpayers can ________ (verb) anything they want, as long as we give them plenty of ________ (noun). But the evil ________ (opposing political party) said people should ________ (verb) themselves instead, and submitted their ________ (noun) for a ________ (group activity). ________ (rich or wise person) was not concerned, because they had created a ________ (name of legal document) with their lawyer and was able to get away with ________ (pronoun) they wanted. Becoming ________ (emotion) with everyone's behavior, ________ (your favorite person) came to the rescue, and brought ________ (adjective) ________ (noun, plural) for everyone to ________ (verb). Having already married someone ________ (number) years younger, and knowing ________ (family member) would be upset, they set up a consultation with ________ (name of attorney) at $________ (number) per hour. ________ (different person) was particularly ________ (adjective) when hearing about this, and immediately contacted ________ (authoritative figure) so everything was clear. However, ________ (same authoritative figure) was busy attending to his ________ (type of animal) ________ (a pet name) 's ________ (bodily function) and told them ________ (famous line from your favorite movie). Now exasperated, ________ (person) quoted ________ (a book or movie) and, emboldened to take action, told ________ (least favorite politician) to ________ (figurative action), but in the end only succeeded in having the price of ________ (your favorite thing). raised and taxed more. Thanks for nothing ________ (lawyer's name).

Legal Magic Tricks: Revoking Irrevocable Trusts

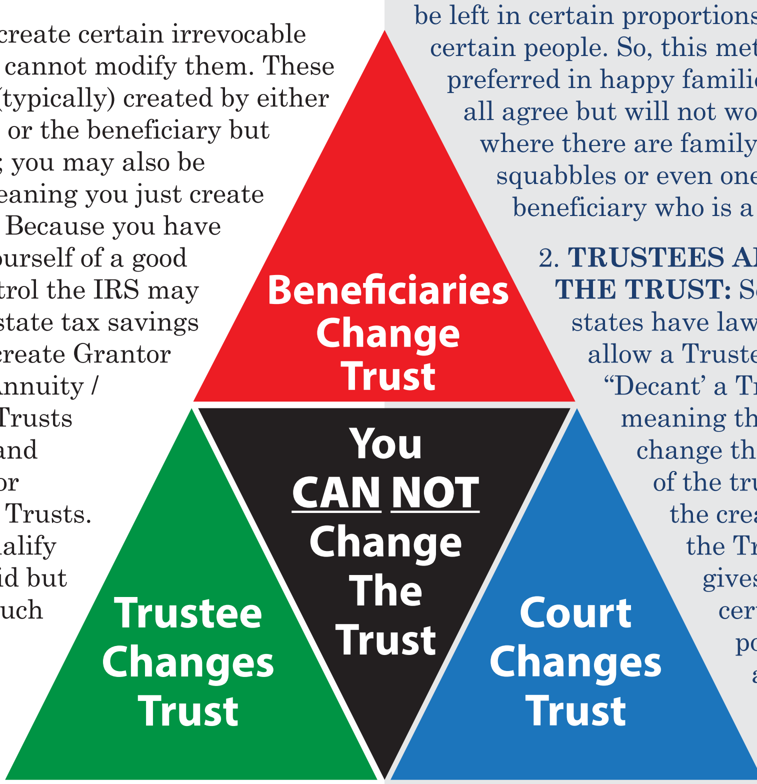
The world changes, and so does our family, friends and charitable organizations. And we do too: We start to care more about relationships than money, health instead of inebriation, and sometimes come to an understanding with those people we disagree with. However, estate planning benefits do not always lend themselves to changed circumstances, so if you want creditor protection, government benefits, estate tax savings or the ability to control your family's inheritance "from the grave" you usually need an irrevocable trust, I.e. one you cannot change even if you desperately need to change the documents.

When you create certain irrevocable trusts, you cannot modify them. These trusts are (typically) created by either the trustee or the beneficiary but never both; you may also be neither (meaning you just create the trust). Because you have divested yourself of a good deal of control the IRS may allow for estate tax savings when you create Grantor Retained Annuity / Unitrusts Trusts ["GRATs" and "GRUTs"] or Charitable Trusts. Want to qualify for Medicaid but have too much money? You will likely have to create a Medicaid-compliant Irrevocable Income Only Trust. Creditor issues also require you to leave your money to a trust company located in Nevada or Delaware or some other state with 7 people in it. So now your life or your beneficiaries change, and your legal documents are locked and loaded, and you are stuck with them.

Not so fast: An irrevocable trust may not actually be irrevocable.

1. **BENEFICIARIES AMEND THE TRUST:** Sometimes beneficiaries may choose to revoke a trust or modify its terms or choose to distribute all funds even if the required time frames have not been met. The good news is that any "unborn" beneficiaries do not need to consent (supposedly through some mystic power), but the bad news is that minor beneficiaries cannot give this consent (nor can their parental guardian) so even one minor can ruin this course of action.

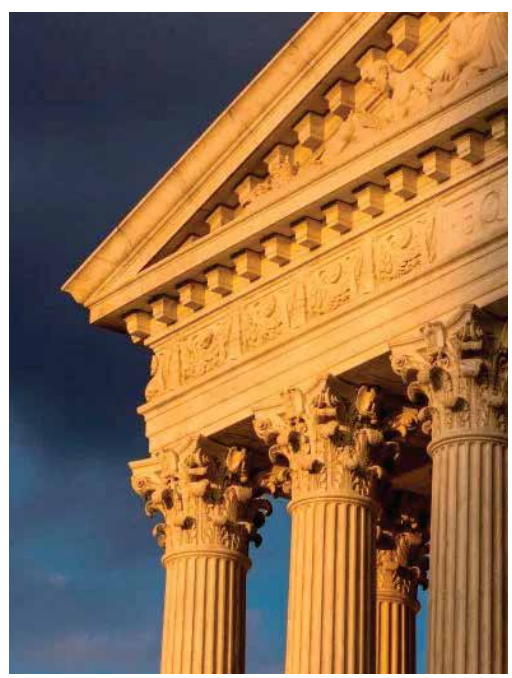
One alternative is to allow the Trustee to distribute funds when and to whom the Trustee believes is worthy, but state you prefer funds to be left in certain proportions to certain people. So, this method is preferred in happy families that all agree but will not work where there are family squabbles or even one beneficiary who is a minor.



2. **TRUSTEES AMEND THE TRUST:** Several states have laws that allow a Trustee to 'Decant' a Trust, meaning they can change the terms of the trust if the creator of the Trust gives them certain powers and discretion in the trust. For example, a Trust stating "The Trustee shall distribute principal to all of my descendants" could be able to cut out a disfavored or drug addicted child but cannot stop income payment currently going to a second wife if she has a vested right. Decanting is preferable where you have confidence the Trustee will make the right decision for each beneficiary but can be disastrous if the Trustee and one of the beneficiaries have a hostile relationship.

3. **COURT AMENDS THE TRUST:** In some cases, you can petition the Court to change the terms of your Trust. This may be necessary where the only named trustees have predeceased you or no longer want to serve. Or if you have a family member who is now disabled and will lose Medicaid benefits unless the Trustee is given the power to create a Supplemental Needs Trust in the document. This is a great approach but for the fact you will need a court date (and probably an attorney to create paperwork and represent you, or the Court could refuse to modify the Trust.

The most powerful way to change irrevocable trusts is to find trustworthy Trustees, maintain a good deal of discretionary power in the Trustee, and write out instructions inside and outside of the Trust stating what you want to take place. Where future plans are subject to change (and they often are) planning for the future during the drafting phase of your documents can pay off handsomely.



What Has Dan Been Doing?

July 16 : Dan speaks at PSS Circle of Care regarding "Tips for Funding Long Term Care".

July 17: Dan is a member of a caregiver's roundtable in Riverdale for PSS Circle of Care.

July 23: Dan gives a caregiver's seminar at Willkie Farr & Gallagher in NYC.

July 26: Dan gives a presentation on "All About Trusts – from Estate Planning to Medicaid" at SIBL NYPL.

September 7: Dan speaks with Circle of Care at the First Corinthian Baptist Church in Harlem.

September 10: Dan presents Medicaid Planning at Calvary Hospital for people with Multiple Sclerosis.

October 23 & 30: Dan conducts a 2-part webinar for Nielsen Ratings on Estate Planning.

November 6 & December 16: Dan speaks at the Center for Independence of the Disabled on basic Estate Planning.

November 7: Dan speaks at the New York City Bar's Small Law Firm Symposium on "Building Resilience: Developing Well-Being Skills to Manage Stress and Maximize Performance".

November 11 & December 17: Dan presents "From Medicaid Planning to Estate Planning" to Philip Howard NORC in Flatbush, Brooklyn.

November 22: Dan teaches on "Wills v. Trusts" to the Community Service Society of New York.

December 12: Dan speaks on "Taking Care of Caregivers" at the New York Memory Center.

Avvo Ratings 10.0 Daniel Alan Timins Top Attorney

RATED BY Super Lawyers® Daniel A. Timins

Special Thanks: My Study Group

As a sole practitioner I spend most of my workdays meeting and calling clients, drafting documents, visiting courts, running a business, responding to emails…the tasks and time commitments seem endless. Thankfully, I have a trusted group of colleagues whom I meet with regularly and can call upon to help me with daily legal opinions: My Study Group.

My current Trusts, Estates and Elder Law Study Group started back in 2013 with 5 lawyers. Since that time the group has grown to almost 20 experienced and competent attorneys who share many of the same values I have, and many have become my close friends. If the bedrock of human happiness is based on our connections with other people, then I am truly one of the happiest on this planet, thanks to the following people, all of whom have helped me so I can help you:

- Thomas Chu, Esq.
- Rosanna Roizin, Esq.
- Laura Burns, Esq.
- Brian Zimmet, Esq.
- Marianna Moliver, Esq.
- Daniele Nodelman, Esq.
- Veronica Escobar, Esq.
- Angelica Kontoroff, Esq.
- Natalie Elisha, Esq.
- Katya Sverdlov, Esq.
- Laura Fischer, Esq.
- Irina Yadgarova, Esq.
- Miriam Davidson, Esq.
- Lorraine Paceleo, Esq.
- Shannon McNulty, Esq.
- Matthew Rappaport, Esq.
- Daniel Reiter, Esq.
- Peter Arcese, Esq.

I BLOG! A LOT!

I blog about once per week and am a contributing author for several online periodicals. I also have informational webinars and presentations on my website that may help explain Medicaid, Estate Taxes, Estate Planning, and other things that affect your wealth. Check out my website:

www.timinslaw.com/blog
www.timinslaw.com/presentations

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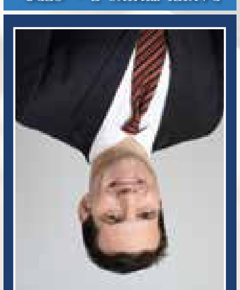

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