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Revocable vs. Irrevocable Trusts for Real Estate: Pros, Cons, and Key Differences



When deciding how to hold real estate, the available options can quickly become overwhelming. We've covered LLCs, revocable trusts, and Massachusetts realty trusts in a prior article (see LLC, Revocable Trust, or Realty Trust: Which Structure Is Right for Your Property?). In this article, we take a deeper dive into trusts, specifically comparing revocable trusts to irrevocable trusts to explain the advantages and trade-offs of each approach.

What Is an Irrevocable Trust?

In Massachusetts, an irrevocable trust is a trust that "cannot be in any way revoked by the grantor," as the Supreme Judicial Court explained in *Guilfoil v. Secretary of Executive Office of Health and Human Services, 486 Mass. 788 (2021)*. Similarly, the Appeals Court emphasized *in Poulos v. Poulos, 100 Mass. App. Ct. 40 (2021)* that an irrevocable trust is "an independent entity, subject to the terms of the trust and otherwise beyond the settlor's control." Once created, an irrevocable trust generally cannot be amended or revoked without the consent of the beneficiaries or court approval. After assets are transferred into the trust, the grantor typically relinquishes direct ownership and control over those assets.

Advantages and drawbacks of an irrevocable trust.

Irrevocable trusts can be useful when the goal is to move assets out of your personal ownership. If properly structured, they may offer (a) creditor protection, (b) potential estate tax benefits, (c) Medicaid planning advantages and (d) avoiding probate.

CREDITOR PROTECTION

Under M.G.L.A. 203E § 505, with respect to an irrevocable trust, "a creditor or assignee of the settlor may reach the maximum amount that can be distributed to or for the settlor's benefit." In practice, this means a creditor generally may only access the portion of the trust that could be distributed to the settlor, rather than the entire trust estate. As a result, assets or interests held exclusively for other beneficiaries may remain protected from the settlor's creditors, which can be a significant advantage of a properly structured

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irrevocable trust. On the other hand, the more rights a grantor retains to receive distributions or benefit from trust assets, the more vulnerable those assets may become to the grantor's creditors. Courts generally look at the extent of the grantor's retained control and beneficial interest when determining whether creditors can reach trust assets.

TAX BENEFITS

Depending on how the trust is drafted, income may be taxed to the settlor, to the trust or to beneficiaries, which can create planning opportunities. Although the Tax Reform Act of 1986 compressed trust income tax brackets (limiting certain income-tax advantages), irrevocable trusts can still be useful for strategies such as business succession planning and asset protection. One thing to be mindful of is careful drafting to avoid pulling assets back into the settlor's estate if the settlor retains certain powers or ownership-like rights.

MEDICAID EXEMPTION

Irrevocable trusts can also matter for long-term care planning when structured correctly. For example, in *Daley v. Secretary of Executive Office of Health and Human Services*, 477 Mass. 188 (2017), the Supreme Judicial Court held that "the equity in the homes owned by the trusts" was not "a countable asset for the purpose of determining Medicaid eligibility for long-term care benefits" in the circumstances presented. In other words, Massachusetts courts have recognized that real estate held in a properly structured irrevocable trust, often paired with retained rights such as a life estate or use-and-occupancy, may not be treated as a countable asset for Medicaid eligibility.

PROBATE AVOIDANCE

Like revocable trusts, irrevocable trusts can keep titled real estate out of the probate process, which often means a faster and more private transfer at death.

DRAWBACK

The tradeoff is flexibility. Once you transfer property into an irrevocable trust, the transfer is generally complete and the asset becomes part of the trust corpus. In *Poulos v. Poulos*, 100 Mass.App.Ct. 40 (2021), the Court describes an irrevocable trust as "an independent entity, subject to the terms of the trust and otherwise beyond the settlor's control," and it explains that the settlor "has no power following a transfer of property to an irrevocable trust to extinguish (that) specific gift of property." That means, if you later need to change course, modification or termination is possible, but it is more procedural and uncertain than with a revocable trust. Under M.G.L.A. 203E § 411, modification or termination of certain "non-charitable irrevocable trust[s]" is allowed but requires the consent of all beneficiaries and court approval.

What Is a Revocable Trust?

M.G.L.A. 203E §103 defines a "revocable" trust as "a trust that is revocable by the settlor without the consent of the trustee or a person holding an adverse interest." M.G.L.A. 203E § 602 states that "the settlor may revoke or amend a revocable trust" using the method in the trust instrument (or, if the instrument is silent, by statutory default rules). A revocable trust is, in essence, the "alter-ego" of the settlor

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Advantages and drawbacks of a revocable trust.

CONTROL

The biggest advantage of a revocable trust is control. The settlor can sell the property, refinance, change beneficiaries, or dissolve the trust as circumstances change. Unless the trust says otherwise, Massachusetts law generally preserves the settlor's ability to amend or revoke, which is why revocable trusts are a common fit for owners who want probate avoidance without giving up day-to-day control.

PROBATE AVOIDANCE

Revocable trusts can also help avoid probate, allowing a smoother and more private transfer of real estate at death.

DRAWBACK

The major drawback is creditor exposure. M.G.L.A. 203E §505 provides that, "during the lifetime of the settlor, the property of a revocable trust shall be subject to claims of the settlor's creditors," even if the trust includes a spendthrift provision. After death, property in a trust that was revocable at the settlor's death can also be reached by creditors "to the extent the settlor's probate estate is inadequate." In short, a revocable trust does not shield real estate from creditor claims during the settlor's lifetime (or, in some circumstances, after death).

Choosing between a revocable and irrevocable trust for real estate comes down to balancing control and flexibility against asset-protection and planning goals. A revocable trust typically offers easier management and amendment, while an irrevocable trust can provide stronger creditor and long-term care planning advantages when properly structured. There is no one-size-fits-all solution. You should prioritize your goals when choosing your type of trust ownership.

Disclaimer: This summary is provided for educational and informational purposes only and is not legal advice. Any specific questions about these topics should be directed to attorney Yana Zheng.

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