

## Revocable Trusts

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*Defines and explains the benefits, shortfalls, costs, and tax consequences of revocable trusts under the Montana Uniform Trust Code.*

**ALTHOUGH REVOCABLE TRUSTS HAVE EXISTED** for years, they have recently gained visibility with advertisements for free seminars about their benefits. Television commercials suggest everyone should have one. Some people may have been approached by a door-to-door salesperson who says a revocable trust is right for them. Nationally, revocable trusts have been referred to as living trusts. The Montana Uniform Trust Code uses the term “Revocable Trusts.”

Legitimate educational seminars about trusts and other legal estate planning topics are offered by MSU Extension, attorneys, financial planners, and trust officers from banks and trust companies. Understandably, these professionals want to promote their expertise through these programs. There are some promoters, however, who give the impression that revocable trusts can solve every estate planning and financial problem imaginable.

Unfortunately, in haste to make a sale, some promoters of revocable trusts provide inaccurate or incomplete information. For instance, a sales representative may emphasize the “excessive” expenses of probate. They may say a revocable trust avoids all probate hassles and eliminates settlement costs and federal estate taxes. Other promoters suggest a revocable trust is not subject to income taxes. Some have even claimed that if all assets are transferred to a trust, a couple is totally protected from nursing home costs, with the applicants automatically qualifying for Medicaid. Revocable trusts are excellent tools for managing certain types of financial and estate planning situations, but they are not suitable or necessary for all Montanans.

A revocable trust can be a useful tool for managing some financial situations. Before deciding to set up a revocable trust, invest time and effort in learning what it is and what it does

not do. Also investigate alternative legal arrangements that could accomplish some estate planning goals more effectively and less expensively, such as:

- durable power of attorney for finances (MontGuide [MT199001HR](#))
- Will (MontGuide [MT198906HR](#))
- Testamentary Trust (MontGuide [MT202113HR](#))
- pay on death beneficiary designations (PODs) on bank or credit union accounts; Transfer on Death Registrations (TODs) for stocks, bonds, mutual funds; Nonprobate Transfers (MontGuide [MT199509HR](#))
- Probate in Montana (MontGuide [MT199006HR](#))
- Transfer on Death Deeds (MontGuide [MT202010HR](#)).

These MontGuides are available from local MSU Extension offices or Extension Communications (see page 5 for ordering information).

### What is a revocable trust?

A revocable trust is a legal arrangement by which an individual shifts ownership of property (such as securities, a home, real estate, bank and credit union accounts, certificates of deposits, stocks, bonds, and mutual funds) from personal ownership into the legal ownership of the trust. A revocable trust is just what the name implies – one created during an individual’s life, but can be changed or ended at any time. In Montana, unless a trust is expressly made irrevocable by the document setting up the trust, it is revocable.

### What is a settlor?

The person whose assets are placed in the trust is called a **settlor** in Montana. The settlor must change the title of ownership of each asset to be placed in the trust from the

settlor's name to ownership by the trust. Merely setting up a trust agreement does not put any property into the trust. A separate document transferring ownership from the settlor(s) to the trust is needed for each asset (such as a deed, bill of sale or assignment, certificate of title). Typically, a settlor reserves the right to amend the trust, change the beneficiaries, name a different trustee, change the date of termination, or revoke the trust and retitle property back to the person's name.

Property remaining in the sole name of a person, held in joint tenancy with right of survivorship with someone else, or owned as tenants-in-common, is not owned by or distributed by the trust. Life insurance and retirement plans with a named beneficiary other than the revocable trust are not owned by or distributed by the trust and are instead passed directly to the named beneficiary.

### What is the role of a trustee?

A **trustee** manages the trust's assets according to the directions in the trust agreement. The trustee can be the person creating the trust, a friend or family member, several individuals, a corporate entity (such as a bank or trust company), or any combination of these. As the first trustee, the settlor can keep full control of the trust until their death or incapacity.

If a person wants newly purchased assets to be subject to the trust agreement, the trustee must place them in the trust's name. If a person buys and sells assets often, this process could become burdensome. A trustee may find it difficult to deal with stockbrokers, life insurance companies, title insurance companies and other financial institutions (see *Managing Someone Else's Money: Help for Trustees Under a Revocable Trust*, [EB0243](#), from MSU Extension).

### What is the role of a successor trustee?

When the settlor relinquishes the trustee role, the named successor trustee takes over. The **successor trustee** has legal responsibility for administering the trust prudently and solely for its beneficiaries and must keep them informed by providing an annual accounting. A trustee has a fiduciary duty to act in good faith and follow the terms and purposes of the trust, the interests of the beneficiaries, and in compliance with state statutes.

Except in a dispute among the beneficiaries or between beneficiaries and the trustee that is brought before a court, the trustee does not have to make an annual accounting to the court system. Sometimes, two or more co-trustees are appointed as a check on one another. Naming more than one

successor trustee is also advisable in case one of the trustees dies or becomes incapacitated. The successor trustee should be trustworthy and have good business and management capabilities.

Some settlors prefer to name a financial institution, such as a bank's trust department or trust company, as a successor trustee. An institution can assure stability in the trustee role. Many institutional trust departments, however, may not accept small trusts or trusts that do not generate income. When selecting a bank or trust institution as a trustee, the settlor should examine the financial credibility of the institution's trust department and also gain consent of the institution in advance of completing and signing the trust document.

Questions to ask include:

- How long has the trust department been in existence?
- What are the qualifications of its personnel?
- What rate of income and growth has the trust portfolio achieved recently and historically?
- What are the fees for administration and services?
- Are the quoted fees competitive with other banks or trust companies?

While a family member may say they won't charge a fee to be a successor trustee, be cautious. They may have a limited understanding of trustee duties and may therefore not be the best choice.

### What is a trust agreement?

The **trust agreement** instructs the trustee about the trust assets, who is to receive income and/or principal from the trust, and what happens to the trust if the person creating the trust becomes incompetent or dies. The trustee can do only what the trust agreement specifies.

The trust agreement should say what is to be done with the trust property when the trust ends (often at the death of the settlor). The agreement should also say what happens to a beneficiary's share if the beneficiary dies before the trust ends. The settlor may wish to consider writing safeguards into the trust so beneficiaries cannot transfer expected shares to a third party. The settlor may also want wording to protect the beneficiaries' trust interests from creditor claims. The revocable trust assets are not protected from creditor claims against the settlor and do not insulate the settlor from claims of a surviving spouse.

## Who can be named as the beneficiary of a trust?

**Beneficiaries** are named by the settlor and can be the individual(s) who formed the trust, friends, family members, a college or university, hospital, library, charity, or other organization. Unless the beneficiaries are the trust settlors, they have no control over the trust.

## What should be considered when forming a revocable trust?

To decide whether a revocable trust fits into a person's financial and estate planning goals, consider the following: tax and probate consequences of the estate based on assets owned in Montana and out of state, the need for privacy, a person's level of investment experience, incompetency concerns, the cost of setting up a trust, and management aspects or management fees if someone else manages the trust.

### TAX CONSEQUENCES

Some promoters falsely claim revocable trusts are tax avoidance tools. That is not correct. Revocable trusts do not provide any income or federal estate tax savings. Income earned in a revocable trust is taxed to the settlor and must be reported on personal state and federal income tax returns. No federal gift tax is due when a revocable trust is created because the trust can be changed at any time.

State and federal law require the value of all property assets in a revocable trust to be included in the settlor's estate upon death. Thus, trust assets must be included when deciding whether federal estate taxes apply. The federal estate tax currently affects estates valued above \$13,990,000 in 2025; (\$27,980,000 for a married couple). At the end of 2025, the exemption sunsets. In 2026, unless there is congressional action, the federal estate tax will affect estates valued above \$5,000,000 adjusted for inflation. The amount for the current year can be found on the IRS website ([www.irs.gov/businesses/small-businesses-self-employed/estate-tax](https://www.irs.gov/businesses/small-businesses-self-employed/estate-tax)).

The Montana inheritance tax was repealed by legislative referendum in 2001. No Montana inheritance tax applies to the value of real and personal property passing from a trust to the deceased's beneficiaries.

### PROBATE COSTS VS. REVOCABLE TRUST COSTS

Trusts are often promoted by the claim that they avoid probate costs. While it is true that the asset value in revocable trusts is not included in probate because the property was retitled to the trust, trust fees are a consideration. Trust fees are usually based on a percentage of the trust's income or principal, with

annual minimums ranging from \$500 to \$3,000. A paid trustee's management fees over the life of the trust could exceed the cost of probate. Attorney's fees to set up the trust are also a factor, and these could also exceed the cost of probate.

Probate in Montana is much less burdensome and expensive than in other states that have not adopted the Uniform Probate Code (UPC). The UPC specifically exempts the following from probate:

- assets in revocable trusts,
- property owned as joint tenants with right of survivorship,
- payable-on-death designations (PODs) for accounts at financial institutions,
- transfer on-death registrations (TODs) for securities (stocks, bonds, and mutual funds),
- transfer on death deed for real property (TODD),
- vehicles and vessels with beneficiary designations using form MV 13, and
- life insurance payable to a named beneficiary

MSU Extension has MontGuides (fact sheets) on these topics: *NonProbate Transfers* ([MT199509HR](#)), *Probate in Montana* ([MT199006HR](#)), *Using a Beneficiary Designation (Form MV13) to Transfer a Montana Vehicle or Vessel Titled at Death* ([MT202404HR](#)), and *Transfer on Death Deeds in Montana* ([MT202010HR](#)).

### PRIVACY

True, probate is a public process through the District Court. However, the records of public figures, famous or notorious, are usually the ones news reporters examine. A probate file in a local district court does not have much to see, other than the terms of a Will and the names of family members or other beneficiaries. Contrary to popular belief, no inventory of assets or accounting information must be publicly revealed in a probate.

When a revocable trust ends and becomes **irrevocable** because the settlor has died, the terms of the trust cannot be kept secret from the beneficiaries. The trustee must notify the current beneficiaries and future beneficiaries of the terms of the trust at least annually, as well as the value of the trust assets and an accounting of the trustee's management of the trust.

### ATTORNEY FEES FOR PROBATE

If a personal representative hires an attorney to manage legal aspects of the settlement of the estate (the estate does not include assets owned by a revocable trust), the attorney's

compensation must be reasonable. The Montana Supreme Court has set up a seven-part test applicable to all civil matters to decide the reasonableness of an attorney's fee. For example, the court evaluates the requirements of the case, such as technical skills, the time needed, types of assets and property, and the complexity of the issues.

Another argument for revocable trusts is that assets pass more quickly to heirs than under probate. There are rare circumstances when disputes with the Internal Revenue Service or extended disagreements among family members can cause delays. Even so, in most cases, the administration of a revocable trust is no more time-efficient than a Will in probate. Probate does have to be completed before distributing most assets to beneficiaries. Before deciding on a revocable trust to avoid probate, consider how much property would be subject to probate, the cost of probate and whether there are other methods available for minimizing probate costs.

#### **SETTLOR'S LEVEL OF INVESTMENT EXPERIENCE**

Inexperienced investors may prefer placing assets in a revocable trust and having professionals manage the investments. For instance, a recent widow had little investment experience and did not want to manage investing the sizable amount of money she received after her husband died. Although she was willing to learn more about investing, she wanted the emotional security of having someone manage her assets and day-to-day financial affairs, so she set up a revocable trust.

#### **PROTECTION FROM INCOMPETENCE**

Advancing age, serious illness, or an accident may make a person incapable of either supervising their investments and business, or managing day-to-day payments needed for their well-being. A revocable trust could be a good management tool in this case. To make the trust workable, assets are transferred into the trust while the settlor is competent. An agent, under the **durable power of attorney**, could also be given the authority to make transfers into the trust if the settlor becomes incapacitated. The trust agreement should describe how and who is to decide whether a settlor/trustee is incompetent and direct how the successor trustee manages the financial affairs.

At the settlor's death, the trust becomes irrevocable, and the successor trustee distributes any remaining assets according to the directions in the trust agreement. A Will can be drafted to "pour over" into the trust any assets not transferred before death. The trust agreement directs how assets owned by the trust are distributed after the settlor's death.

An alternative to a revocable trust for persons concerned about incompetency include a durable financial power of attorney (POA) (see *Power of Attorney (Financial)*, [MT199001HR](#)), which is a written, usually notarized, document whereby one person gives another the power to act on their behalf for finances and/or health care (see *Health Care Power of Attorney and Related Documents for Montanans* [EB0231](#)). The power of attorney for finances could include the agent selling property, paying the bills, and depositing or withdrawing funds from checking or savings accounts while the principal is alive.

A revocable trust agreement cannot provide for others to make health care decisions for the settlor. The health care power of attorney is the tool for appointing someone to make health care decisions if a person is unable to give instructions to health care providers for directing their health care (see *Health Care Power of Attorney and Related Documents for Montanans* [EB0231](#)).

If a person does not execute a durable power of attorney for finances and/or healthcare, and they lack the capacity to manage finances or make health care decisions, a family member or friend would need to be appointed by the district court to be a **guardian** and **conservator**. A durable financial power of attorney (POA) for finances and another for health is simpler and less costly than a revocable trust. A POA also avoids the expense of having a guardianship and conservatorship appointed through the district court (see *Health Care Power of Attorney and Related Documents for Montanans* [EB0231](#)).

#### **MANAGEMENT FEES AND THE COST OF DISTRIBUTING ASSETS**

Before deciding on a revocable trust, investigate the cost of setting up and paying for the management of the trust. What are the estimated costs of distributing trust assets after the settlor's death? Setting up a revocable trust may cost more and take more time than preparing a Will. Trustee management fees may be payable if a person ceases to be the trustee. Settling and distributing the trust property after death is often only slightly less costly than probate.

When transferring assets into the trust, representatives of financial institutions – brokerage firms, mutual funds, life insurance companies, and banks – need to know who has what powers under the trust agreement. Some companies have a form on which this type of information is requested, others ask for a summary of the trust agreement (typically described as a **certification of trust**), and a few require a copy of the entire trust agreement.



Some financial institutions will not lend money to a trust. For example, to refinance a home mortgage when the home is owned by the trust, a person may have to transfer the house out of the trust, complete the refinancing, and then transfer the house back into the trust. If a person has real estate used for collateral on business loans, the added paperwork due to the trust ownership of the property could become cumbersome.

### **Does a revocable trust protect assets from nursing home costs?**

Trusts have been advertised as the ideal solution for Montana residents who wish to protect assets from the costs of long-term care. Some promoters claim that if individuals transfer property to a trust, all assets are protected from nursing home costs. This claim is not true. Since the revocable trust can be changed at any time by the person who formed it, the income and assets in the trust are considered available to cover nursing home costs under current Medicaid rules (see *Medicaid and Long-Term Care Costs*, [MT199511HR](#)). Those concerned about nursing home costs may wish to investigate whether a long-term care partnership insurance policy would meet their financial planning goals (see *Long-Term Care Partnership Insurance in Montana*, [MT201202HR](#)).

### **Should a “trust kit” advertised on television or online be considered?**

Individuals who choose to use revocable trusts through kits bought online, from bookstores, mail promoters, or door-to-door salespersons should exercise an elevated level of caution about the legal arrangements they want to set up. Estate planning is a highly individualized and legally complicated procedure. It is unlikely that a package or kit (often completed after a single interview with a sales representative) or a standard computer-generated trust program can provide proper documents for unique family situations. In fact, revocable trust documents sold by a company based out of state may not satisfy Montana’s legal requirements. Setting up a suitable trust requires careful drafting, planning and execution by legal counsel.

One of the most common mistakes in setting up a revocable trust is neglecting to retitle or transfer assets to the trust or forgetting to transfer assets into the trust by beneficiary designation or with a “pour-over” will. Remember, a revocable trust agreement has no control over a person’s assets unless the assets are owned by the trust.

### **Circumstances when a revocable trust is preferred over a Will**

There are good reasons to prefer a revocable trust over a Will to transfer one’s property at death. The following examples illustrate a few of those situations when a revocable trust would likely be preferred.

First, if a Montanan owns real estate in another state where the probate procedures are more formal and expensive than in Montana, a revocable trust holding the real estate would be preferred to avoid the cost of an out-of-state probate procedure.

Second, a person may want to have a distribution of their assets to be private. Perhaps the person has a child born out of wedlock. Providing for the child could come to the undesired attention of other family members, friends, or neighbors when the Will is submitted during the probate process. The parent/child relationship could be acknowledged in a revocable living trust, and the person could be named as a beneficiary, which is not a part of any public record.

Third, a rancher or farmer could develop health problems, hindering their continued operation of the business. The rancher or farmer could name a trusted and knowledgeable friend who has managed a similar property as trustee of a revocable trust with the ranch in the trust’s name.

Fourth, an ailing Montanan who owns investments like stocks and bonds could name a family member, a bank, a trust company, or a knowledgeable and trusted friend as trustee of a revocable trust to manage those investments.

### **Summary**

Before setting up a revocable trust, a person should make a list of their estate planning/legacy goals. Then, they should discuss these goals with professionals such as an attorney, a trust officer, a certified public accountant, and/or a certified financial planner, who may suggest an array of financial planning tools that could help achieve them.

### **Further information**

You can find additional MSU Extension Estate Planning information and MontGuides at [montana.edu/estateplanning/eppublications.html](http://montana.edu/estateplanning/eppublications.html) or request copies from a local MSU Extension office [montana.edu/extension/localoffices.html](http://montana.edu/extension/localoffices.html).

### **Disclaimer**

This MontGuide is not intended to be a substitute for legal advice about revocable trusts. It is designed to help families become better acquainted with a revocable trust and its role

in estate planning. Future changes in trust laws cannot be predicted, and statements in this MontGuide are based solely on laws in force on the date of publication.

## Acknowledgments

Members of the Business, Estates, Trusts, Tax, and Real Property Section, State Bar of Montana, have reviewed this MontGuide. They recommend its reading by Montanans who want to learn more about revocable trusts.



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