Potential Action Items for Revocable Trusts in the Minnesota Trust Code

Robert E. Lynn
Bartley & Lynn, LLP
Saint Paul, Minnesota

If one of your clients who has a revocable trust asks, "Is there anything in the new Minnesota Trust Code[i] that I should look at?" you may need to make a date for coffee, at least. While the short answer is yes, more questions will probably be raised once you begin picking through the detail. A meaningful answer won't fit into an elevator ride, even if you're going to the top of the IDS Tower.

Your client hopefully remembers two key features of a revocable trust.[ii] First, during the settlor's life, while competent and (as is usually the case) serving as trustee, he or she retains complete control of the trust property. Upon the settlor's incapacity, the management of that property is assumed by a successor trustee nominated in the governing instrument. This avoids any public court process (appointment of a conservator) or any significant delay. Second, upon the death of the settlor, the trust's provisions similarly control disposition of the property. So here as well, any public court process (probate) is avoided. The new Code affects each of these features. Here are four issues to start a discussion.

Is your successor a bank or some other professional trustee? If so, is that your first choice for all aspects of managing the trust when you're out of the picture?

Beginning in 2016, the trustee's responsibilities can be divided, so that particular decisions can be made by the persons whom the settlor would ideally choose. Specialized limited-scope fiduciaries called "directing parties"[iii] can take over critical trust functions if the settlor is incapacitated or when the settlor dies.

Quite often, the successor trustee for a revocable trust is a bank trust department or similar financial institution. The settlor may be resigned to that because a one-stop shop seems to be the only practical choice. For example, he or she may have years of history with a particular investment advisory firm, but the firm may not offer any trustee services. Or a family member might be the natural choice for questions about discretionary expenditures, both for the settlor during incapacity and for residuary trusts created under the instrument. But that family member might not be willing or able to manage trust investments.

Longstanding relationships affecting financial matters need not be abandoned. The Code will provide an opportunity to separate the successor trustee's administrative functions from a number of other aspects of the traditional comprehensive fiduciary role. Two of those, carved out in the statute, are 1) investment direction and 2) decision-making about discretionary distributions to beneficiaries.

Pre- 2016 trust instruments can be amended to provide for an "investment trust advisor" and/or a "distribution trust advisor", to assume one or both of these roles and the fiduciary duties connected with them.[iv] With this amendment, the main trustee's role will need to be changed so

that decisions of these "directing parties" must be followed, and the main trustee will normally be relieved of all fiduciary liability for doing so.[v] This offers several potential benefits:

- The professional trustee's charges may be reduced, since a significant part of such charges normally derives from investment management and planning.

- More comprehensive investment direction may be possible, at least during a settlor's incapacity. A financial advisor who has a longstanding relationship with the settlor may be familiar with his or her risk tolerance and assets mixes elsewhere (e.g., retirement plans). Using that person as the investment trust advisor might be preferable, if a professional trustee would be "playing catch-up".

- If ownership interests in a closely held business are a significant part of the trust's assets, having an investment trust advisor may be necessary before a professional trustee will even accept appointment. Being able to "off-load" fiduciary responsibility for decisions connected with such investments, e.g., exercising governance rights or approving intra-family transfers, could be critical.

- Similarly, having a distribution trust advisor can relieve the professional trustee of liability for choices about discretionary distributions to beneficiaries. Personal acquaintance both with the distributee(s) and with the settlor informs these decisions, regardless of how explicit any guidance provided by the trust instrument might be. The settlor might prefer to have a family member or close friend make the call—and so might the professional trustee.

In assuming and acting as a directing party, an individual or firm must attend to the documentation and other practices that are consistent with a fiduciary standard of care. So a particular family member or close friend of a settlor should give the same cautious consideration to a request to serve in one of these roles as he or she would to give a request to serve as general trustee of a trust without directing parties.

And, admittedly, much depends on the willingness of institutions that now offer comprehensive trustee services to offer some less-than-comprehensive, lower-cost services as well. One would expect, however, that if the use of directing parties becomes common with Minnesota trusts, these institutions will develop pricing models to accommodate them.

Do you have a statutory short-form power of attorney? Does it grant authority to act for you to someone other than the successor trustee of your revocable trust?

Amendment to a pre-2016 revocable trust may be required to avoid an impasse over trust expenditures between the successor trustee and the individual holding the settlor's financial power of attorney. A provision of the new Code creates a potential uncertainty about which has the final authority.

Perhaps your client has a longstanding relationship with the institution nominated as his or her successor trustee, and still believes it can provide excellent comprehensive trustee services. It

would not be surprising if your client has also executed a statutory short-form power of attorney (SFPOA), and the attorney-in-fact (AIF) is not an officer or employee of that institution. If so, ask whether there are *any* scenarios in which someone else should have ultimate decision-making authority about a financial matter. Possible conflict, or at least delay, may be averted with thoughtful re-drafting.

Using a SFPOA in Minnesota as part of one's incapacity planning is not uncommon. Either that form, or a common law power of attorney, will allow additional property to be transferred to a settlor's revocable trust after the settlor becomes incapacitated. If an SFPOA is used, every detail of the form provided in the law must be executed without any modification.[vi] This standardization creates a form that should be immediately acceptable to financial institutions and others dealing with the AIF.[vii] Any one or more of the listed powers in the form may be granted.[viii]

The Code provides that a settlor's powers "with respect to revocation, amendment or *distribution of trust property*" of a revocable trust, may be exercised by an agent under a power of attorney only to the extent expressly authorized by either the terms of the trust or the terms of the power of attorney[ix] (emphasis added). If neither document includes that express authorization, that new provision may conflict with a power defined in the SFPOA statute itself.

One of the listed powers that can be granted by a SFPOA—for "beneficiary transactions"—is defined to include the power "to represent and act for the principal in all ways and *in all matters affecting any trust*... out of which the principal is entitled, or claims to be entitled, as a beneficiary or participant, to some share or payment"[x] (emphasis added). Does this constitute express authorization for an AIF to direct distributions from a revocable trust also created by the principal of that SFPOA?

For example, assume the successor trustee for a revocable trust is a financial institution, but the AIF of the trust's settlor is a family member or close friend. If the settlor is incapacitated and cannot weigh in, a disagreement could arise about the use of trust assets for home improvements, or about continuing a long-standing practice of annual gifts of appreciated stock to a particular charity. Where such disagreements are foreseeable, the trust instrument may need to be amended to make clear who has the final word.

Does your trust hold any tangible personal property that you want to leave to particular individuals?

The new Code explicitly confirms a practice already in use[xi] with revocable trusts for disposing of tangible personal property, in the same way the practice can be used with a will. If there has been any reluctance to do this with a revocable trust in the past—lacking explicit authorization similar to what already exists in Minnesota's Uniform Probate Code[xii]—that reluctance should now disappear.

A revocable trust can incorporate by reference a separate written list of tangible personal property held by the trust, directing how each item will be disposed of at the settlor's death. The list will be treated in essentially the same way as it would be if incorporated into a will.[xiii] And,

once incorporated, it can be updated by the settlor as many times as he or she desires without amending the trust itself.[xiv] The statutory assurance that such a disposition will be respected may be important if, for instance, a settlor has transferred valuable art, antiques or collectibles into his or her revocable trust.

Does your trust instrument create other trusts that will be funded after your death?

To assess the Code's impact on your client's wealth management and disposition plan, you may need to look beyond its specific provisions for revocable trusts. Some part of the plan may involve one or more trusts that are *ir*revocable.

Unless your client revokes the trust (in which case, significant effort and expense has been for naught), some time will pass between your client's date of death and the date when all of the trust's property has been distributed and its administration is otherwise complete. During that period, at least, the trust will be irrevocable.[xv]

Also, a revocable trust's property may fund one or more successor trusts when its settlor dies. Whether such successor trusts are created under the revocable trust instrument itself, or they are separate trusts already in existence, they will normally be irrevocable. And even though a recipient trust in this scenario could be a revocable trust (e.g., that of a surviving spouse), the *dénouement* of the entire plan will almost certainly involve at least one irrevocable trust, even if for a short time.

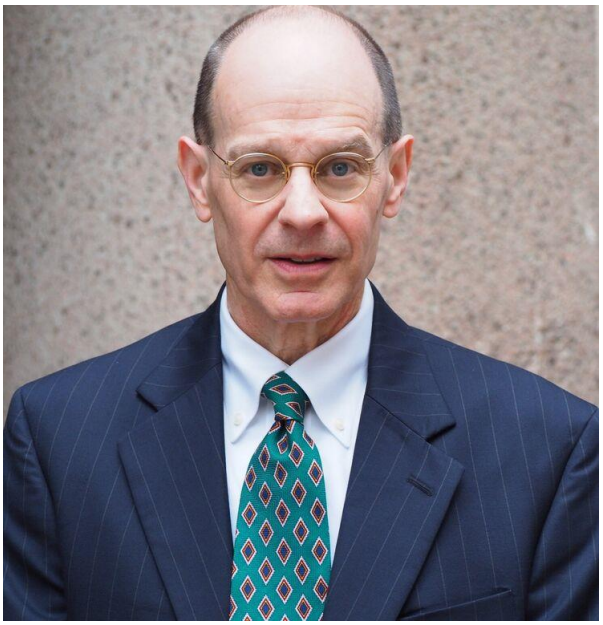
Conclusion

Hopefully a brief conversation about each of the above issues will prompt your client to schedule a longer one soon thereafter. There may be other aspects of the new Code which suggest changes to your client's revocable trust with an eye to the time when—inevitably—it will become irrevocable.

---

[i] Minnesota Statutes Chapter 501C, generally effective 1/1/16, herein, "the Code".
[ii] This article assumes that the reader has a general familiarity with revocable trust law regarding 1) the acceptance of revocable trusts as valid trusts rather than (potentially) defective testamentary transfers; 2) their use for management of a settlor's property in the event of incapacity; and 3) their use to transfer property after a settlor's death in accordance with trust terms, rather than through any court-supervised process.
[iii] Minn. Stat. § 501C.0808, Subd. 1(b).
[iv] *See generally* Minn. Stat. § 501C.0808, Subds. 1, 2 and 3. While the scope of each of these functions is detailed in the statute, the terms themselves are not inappropriate descriptors. The law also provides for another directing party, a "trust protector". The powers and responsibilities attendant to that position are not addressed here.
[v] Minn. Stat. § 501C.0808, Subd. 6.
[vi] *See generally* Minn. Stat. § 523.23 and, detailing each of the listed powers, § 523.24.
[vii] Minn. Stat. § 523.23, Subd. 4. A person refusing to accept the authority of one acting under a facially valid SFPOA is generally subject to liability as if that person had refused to accept the principal's authority to act on his or her own behalf in the same circumstance. Minn. Stat. § 523.20.
[viii] Minn. Stat. § 523.23, Subds. 1 and 2.
[ix] Minn. Stat. § 501C.0602(e).
[x] Minn. Stat. § 523.24, Subd. 7.
[xi] *See, e.g.*, any of the revocable trust forms in Minnesota Continuing Legal Education, *Drafting Wills and Trust Agreements* (Todd D. Andrews reporter, 7th ed. 2014).

[xii] Minn. Stat. § 524.2-513.
[xiii] Minn. Stat. § 501C.0603.
[xiv] *Id.*
[xv] Minn. Stat. § 501C.0103(n). A power to revoke held by someone other than a trust's settlor will not make that trust revocable as herein defined. So after its settlor dies, a trust can only be irrevocable under the Code.



Robert E. Lynn, JD, CPA, a partner in the law firm of Bartley & Lynn, LLP, concentrates his practice on tax, trust and estate matters. His prior career in public accounting, beginning in the mid-eighties, became progressively more focused on the taxation of fiduciary entities, closely-held businesses and their owners, until Bob felt that changing course was unavoidable. He was admitted to the Minnesota Bar in May of 2014, thereafter forming his firm with Charles Bartley, another Hamline Law alum and CPA.

Bob has presented seminars on tax, financial planning and fiduciary accounting topics for Minnesota CLE, the Minnesota Society of CPAs and various community groups, and taught income tax planning at Minnesota State University. His national journal publication credits include articles in *Tax Notes*, *Practical Tax Strategies*, and *The Tax Adviser*. He has also been trying for years, without much success, to be less of a pushover for pro bono work for small arts organizations.