

TRUSTS 101

1. **Introduction.** On the radio, on television, in newspaper ads, and from your friends, it seems everywhere you turn someone is trying to sell you on the idea of trusts. Trusts to avoid probate, trusts to maintain government benefits, credit shelter trusts, trusts for children, insurance trusts, trusts for adults, revocable living trusts, trusts to avoid estate tax, trusts for...well you get the idea. Sometimes the sales pitch is very heavy handed: "If you don't hire me to draft this trust, the probate monster will eat up all your assets while your loved ones starve." This article describes trusts, identifies certain types of trusts, and explains how military legal assistance offices may be able to help.
2. **What is a trust?** A trust is a written, legal document wherein person A (the grantor, or trustor) gives property to person B (the trustee) to manage for person C (the beneficiary). Often, the principal purpose of the trust is to care for the needs of person C, the beneficiary. Perhaps the beneficiary cannot manage the assets because the beneficiary is a minor, or has a disability, or is a spendthrift who will spend the funds unwisely if given property directly. Sometimes, the purpose of the trust is to avoid probate (the revocable living trust), or to avoid estate tax (the credit shelter and marital deduction trusts). Occasionally the purpose of the trust is to exert control over beneficiaries; describing conditions precedent to qualification for the gift, or other conditions resulting in forfeiture of the gift.
3. **Testamentary and Intervivos Trust Basics.** A testamentary trust is one that is created by words in a will, and the transfer of the property to the trustee does not occur until the death of the testator (will maker). A Living Trust, or to use the fancy Latin term, an "intervivos" trust, is one that is created in a document separate from the will, and property can be conveyed to the trustee prior to death of the grantor. Unless there is some compelling reason otherwise, grantors typically want the option of revoking the trust during their lifetime; thus, the name, revocable living trust.
4. **Multiple Beneficiaries, Pooled and Separate Trusts.** Sometimes a client wants to make trusts for multiple people; most commonly, dividing the estate between multiple children. The trust can be set up as a pooled trust or separate trusts for each of the beneficiaries.
 - a. **Pooled Trusts.** In a pooled trust, the trustee has the authority to manage one pool of assets and has the discretion to spend unequally on the children as the trustee sees fit. Such an arrangement gives the trustee flexibility to address differing needs of beneficiaries; e.g., beneficiary A wins the lottery and beneficiary B has extraordinary medical expenses. The trust ends when the youngest beneficiary attains the age designated by the grantor, and at that time the remaining funds are distributed equally among the beneficiaries.

b. ***Separate Trusts.*** The trust for multiple people can also be set up so that each the estate is given in trust to multiple children, with each child taking an equal share that cannot be encroached upon by the trustee to assist any of the other beneficiaries. When a beneficiary attains the age designated by the grantor, the trust ends and any remaining funds in that beneficiary's share are distributed outright to that beneficiary.

c. Trusts can also be set up so that beneficiaries receive some specific, designated property; military legal assistance offices do not typically draft such documents.

5. ***Testamentary Trusts***

a. ***Trusts for Minor Beneficiaries.*** Wills prepared at military legal assistance offices typically contain a provision stating that if a minor or incapacitated beneficiary is to receive a gift, then the executor (also called "personal representative") will manage that gift for the beneficiary until the beneficiary is no longer a minor or is no longer incapacitated. The testator designates the age of majority in the will, choosing an age between eighteen and twenty one. Sometimes, however, that the testator wants someone to continue to manage the funds for the beneficiary beyond the age of twenty one. Often, parents are concerned that a child may not be sufficiently mature at age twenty one to receive a large sum of cash; perhaps delaying such a gift for a few years might better position the child to pay for college expenses rather than depleting the assets with frivolous purchases. In such cases, clients often ask for a testamentary trust extending to age twenty five or some similar age. Of course, as with all trusts, the client will need to identify the trustee, and it is a good idea to name an alternate trustee to act in the event that the primary trustee is unable to. Many military legal assistance offices can prepare various types of testamentary trusts for children.

b. ***Testamentary Life Insurance Trusts for Children.*** Sometimes clients wish to name a minor child as the beneficiary of their life insurance policy. This is often the case with single parents, or with clients pending divorce. However, the life insurance company will not write a check out to a minor beneficiary. Instead, the company will want to see a court order designating who should receive the funds. Such a predicament poses some obvious problems: (i) the need for court action, and (ii) the possibility that the court identifies some person to manage the funds that the insured would not have chosen: e.g., crazy Uncle Harry, who petitions to control funds; or more commonly, the former spouse. The same problems may arise where the client wishes to name children as the contingent beneficiary; the beneficiaries to take in the event that the spouse predeceases. These problems can be addressed by creating a testamentary life insurance trust for the children and then filing out the insurance beneficiary election form naming the trust, not the children directly, as the beneficiary. In the case of a divorcing, but not yet divorced parent, careful review of your state's law is needed to ensure that you do not inadvertently increase the elective share of your spouse. [Each state has an elective share statute, offering spouses the option of taking what s/he is given in the other spouse's will, or electing to take the "elective share," a minimum amount of the estate provided by law. If the elective share is defined as a percentage of probate assets; that is, assets passing through a will, then the testamentary life insurance trust may have some serious downsides.]

c. ***Trust Termination.*** As discussed above, military legal assistance offices typically prepare testamentary trusts terminating when the beneficiary attains a certain age. Many military legal assistance offices can also comply with client requests for a trust structured with mandatory payout of half the trust assets at one age, with the remainder at an older age, when the trust terminates. Or, alternatively, the trust can be structured for a payout of one third of the assets at one age, half of what is left at another, and the remainder at a third age, when the trust terminates. Sometimes clients want a trustee to manage the assets for the entire life of the beneficiary. Military legal assistance offices do not ordinarily prepare such trusts (but see below concerning special needs trusts).

d. ***Credit Shelter Trusts.***

(1) The United States government imposes an estate tax, sometimes called a “death tax,” on decedent estates. U.S. tax law also gives every taxpayer a credit against such tax; in effect, establishing a threshold level of assets before estate tax is imposed. Over the years, the threshold at which federal estate tax is imposed has increased to the extent that it is imposed on very small percentage of estates, and almost never on the estates of service members or military retirees. As of this writing, the federal estate tax threshold for married couples is about ten and a half million dollars. The federal estate tax threshold for single, unmarried persons is about five million dollars. While the taxable estate includes all assets, such as real estate, investments and insurance, rarely is the estate so large as to have federal estate tax levied.

(2) Credit shelter trusts are designed to assist married couples to increase the amount of property that can be passed to children tax free. If husband H has a simple will bequeathing his entire estate to wife W, then upon H’s death W takes without estate tax, regardless of the size of H’s estate. Under federal law, there is an unlimited marital deduction that exempts any testamentary gift from one spouse to the other from estate tax. However, when W dies, bequeathing her assets to the children, an estate tax will be imposed on the amount by which W’s estate exceeds her credit. Credit shelter trusts are designed to preserve the credit of both spouses, effectively doubling the amount that can be passed tax free to the next generation. Accordingly, H might therefore prepare a will giving the entire estate to W, except allowing W to disclaim any or all of the gift, with the disclaimed amount pouring into a lifetime trust for the benefit of W, giving W use of funds in the trust only as defined by certain rules of the Internal Revenue Service. Upon W’s death, the trust funds pass to the children, protected by H’s credit. By this mechanism, H’s credit is not wasted upon his death, and at W’s death both the credits of H and W can be used to shield assets passing to the children from estate tax. As mentioned above, federal estate tax is imposed only on very large estates. Furthermore, spouses now have the right of “portability;” that is, one spouse can file a form upon the death of the other spouse that saves the credit of the first spouse to die. High estate tax thresholds and portability have all but eliminated the need for military legal assistance attorneys to draft complex credit shelter trusts.

e. **Marital deduction trusts.** Marital deduction trusts are similar to credit shelter trusts, but are designed to avoid the imposition of *state* estate tax. However, most states do not impose any estate tax. In particular, most states with large military populations do not impose any estate tax, including, but not limited to: Virginia, North Carolina, Florida, California, and Texas. Some states have relatively high tax thresholds; e.g., New York, while still others impose a tax at very low thresholds; e.g., Pennsylvania. The efficacy of a marital deduction trust and the ability of a military legal assistance office to draft it depend on the particulars of state estate tax law and the assets available at the legal office.

6. **Living Trusts.** As discussed paragraph three above, a living trust is made by a document separate from the will. The living, or *intervivos* trust, often is given a name; e.g., “The Jones Family Trust dated a January 2017,” or “The Non-payback Special Needs Trust for the benefit of George W. Washington dated 2 February 2018.” There is no need to wait until the death of the grantor to transfer property to the trust or distribute trust assets to a beneficiary (unless the trust instructions themselves contain such a limitation). Assets are often poured into the trust through various beneficiary election forms; e.g., a life insurance policy naming the trust as beneficiary, or an investment account identifying the trust as death beneficiary. Although the names are similar, the living trust and the living will are completely different documents; the living will is an advance medical directive through which the maker describes circumstances under which extraordinary medical care is to be terminated.

a. **Uses of Living Trust.**

(1) **Tax Avoidance.** The living trust is sometimes sold as a device to avoid estate tax and to avoid probate. First, let’s address the tax issue. As described above, estate tax, particularly federal estate tax, is only imposed on very large estates. Further, even if there is an estate tax, the living trust does nothing to avoid it. If someone tells you to invest in a living trust in order to avoid tax, run away... quickly.

(2) **Probate Avoidance.** Typically, the grantor (s) and the initial trustee (s) are the same people; e.g. H & W as grantors entrust property to H & W as trustees. Upon the death or incapacity of the initial trustee(s), the named successor trustee takes over the management of the trust assets and may distribute property to beneficiaries as directed in the trust. Thus, the management of any trust assets passes to the successor trustee outside of probate. The trick is to ensure that assets are structured in such a way as to be covered by the trust: naming the trust as pay on death beneficiary of investment accounts, real estate, or other assets. Additionally, hiring a private attorney familiar with estate planning will be required; military legal assistance offices typically do not draft revocable living trusts. In general, a properly drafted and funded living trust reduces or eliminates probate burdens, and pushes administrative burdens and cost up front rather than delaying them until death. A revocable living trust may be particularly useful in certain circumstances: (a) if the client owns real estate in several different states, the living trust can help avoid ancillary probate in each of those states; (b) the state law involved and the circumstances are such that probate costs and difficulties will be greater than usual; e.g., a complicated, large estate in New York; and (c) a special needs beneficiary is involved.

7. ***Special Needs Trusts.*** A person may be eligible for certain government benefits, such as Medicaid and Supplemental Social Security Income (SSI) if that person is (a) “disabled” as defined by the Social Security Administration and (b) does not have assets or income that exceed a fairly low threshold. In military legal assistance practice, this issue arises in when a parent wishes to make a special needs child a beneficiary. Depending on the disability, the beneficiary may not be able to manage the gift, as in the case of a beneficiary with a severe cognitive problems. Furthermore, receipt of a testamentary gift may cause the beneficiary to own assets exceeding the threshold for eligibility for the above mentioned government benefits. The special needs trust (SNT) is designed to address these problems.

Assets given to the child in a properly drafted SNT, and managed by a person other than the beneficiary (or beneficiary’s spouse) do not count against the beneficiary when determining Medicaid and SSI eligibility.

a. ***Eligibility of Minor Children.*** Generally, the *minor* children of service members are not eligible for these benefits because the income of the service member is imputed to the child. However, when the child attains the age of majority, the parent’s income will no longer be counted as the child’s. It is often at this point when the special needs child becomes eligible for Medicaid / SSI. As an aside, while the child is still a minor, parents should consider filing an adult guardianship petition to maintain control of the child’s assets, to make decisions on behalf of the child, and to maintain access to medical, school, financial, and other records. Adult guardianship can be filed up to six months before the child’s eighteenth birthday. The legal assistance office at Camp Lejeune can assist with North Carolina adult guardianships. POC: Vickie O’Brien Vickie.Obrien@usmc.mil.

b. ***Funding the Special Needs Trust.*** Often, the SNT is funded by a pour over will; that is, a will that provides that any gift going to the special needs child shall not be distributed to the child directly, but rather to the named SNT. Upon the death of the testator, the trustee assumes management of the testamentary gift, and is guided by the terms of the SNT. Parents who want special needs children to receive the benefit of life insurance proceeds either as the primary beneficiary or contingent beneficiary should consider the usefulness of making the SNT the beneficiary instead; again to prevent disqualification for government benefits.

c. ***Survivor Benefit Plan and the Special Needs Trust.*** Until the enactment of the National Defense Authorization Act of 2015, which amended sections 1448, 1450, and 1455 of title 10, a trust could not be named as the beneficiary of the military Survivor Benefit Plan (SBP). Thus parents who wanted their special needs family members to have the benefit of SBP faced a difficult situation since a SNT could be designated as beneficiary, and naming the special needs family member resulted in disqualification for government benefits. NDAA 2015 allows a service member to designate a SNT, but added additional requirements, including (1) a requirement to obtain a tax ID number for the trust, (2) certification by a licensed attorney or the social security administration that the SNT qualifies pursuant to federal law and (3) in order to qualify the SNT must be a “payback” trust’ that is, a trust that specifies that any funds remaining in it at the beneficiary’s death will be used to pay back the government for any services rendered or benefits extended. Accordingly, parents who want to name a special needs child as SBP

beneficiary should consider whether to have two SNTs: (1) a payback trust for receipt of SBP, and (2) a non-payback SNT, if authorized by the relevant state, to receive insurance and testamentary gifts.

d. **ABLE Accounts.** North Carolina and some other states have established an ABLE (Achieving a Better Life Experience) account program. Assets placed in such accounts, up to program limits, do not count against special needs beneficiaries when determining Medicaid / SSI eligibility. Information (and points of contact) concerning NC ABLE accounts can be found at: <https://savewithable.com/nc/home.html>

8. **Gun Trusts.** Gun trusts are drafted to pass possession of a firearm, especially highly regulated items such as a silencer or machine gun, to another person without inadvertently violating state or federal laws regulating the ownership of firearms.

9. **Assistance Available through Military Legal Assistance Offices.** The extent to which military legal assistance offices can advise on and draft trust documents varies from service to service and even from office to office. The ability to assist is dependent on resources available (including time), and the training and experience of resident personnel. In general, the larger the military installation, the greater the services it can provide, particularly if the office staff includes civilian attorneys. The chart below provides a general assessment of what services are available; prospective clients will need to call the individual legal assistance office for specifics.

Service	Availability
Testamentary Trusts	Camp Lejeune and many legal assistance offices are able to prepare wills with testamentary trusts for children that terminate when the child attains a certain age. Offices generally will not prescribe a series of conditions precedent to qualifying the beneficiary or limiting the powers of the trustee (e.g., beneficiary must be married, trustee can only spend on educational expenses); or conditions causing a forfeiture of the benefit.
Credit Shelter/Marital Deduction Trusts	Offices generally do not draft this type of testamentary trust. In any event, the credit shelter trust is rarely needed, the marital deduction trust only slightly more so.
Testamentary Life Insurance Trusts	Camp Lejeune and some other legal assistance offices can draft this type of trust and can provide appropriate language to name the trust as SGLI beneficiary.

Special Needs Trust

Camp Lejeune can draft a special needs trust and pour over will, but only for those clients who will reside in NC for the foreseeable future. Very few other legal assistance offices provide this service. Such expertise and assistance may be obtained through civilian attorneys that have expertise in this field. Many state bars recognize a field of specialization in estate planning. For NC, see <http://www.nclawspecialists.gov/> For assistance with drafting the SNT for NC or non-NC residents, clients may wish to consult the Special Needs Alliance, online at <https://www.specialneedsalliance.org/> The Alliance is not a pro bono service.

Revocable Living Trust

Camp Lejeune can provide general advice concerning this issue (other offices typically do not), but does not draft the RLT. This author is aware of no military legal assistance office that drafts RLTs. Such assistance may be obtained through civilian attorneys that have expertise in this field. Also, many state bars recognize a field of specialization in estate planning. For NC, see <http://www.nclawspecialists.gov/>

Gun Trusts

This author is aware of no legal assistance office that drafts gun trusts.

Michael S. Archer
Legal Assistance Director
Marine Corps Installations East

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