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The Role of the Irrevocable Trust in Estate Planning

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Research Guides

The Role of the Irrevocable Trust in Estate Planning

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Overview

Although the traditional will is the most common legal mechanism to pass on one's possessions, trusts are another popular estate planning device. Unlike a will, which is ambulatory and except in rare circumstances not be finalized until death, trusts can be created both inter vivos (in life) or testamentary (at death). Transfers made in life are subject to gift tax consequences, while those made at death face estate taxation. Although trusts are often used to avoid probate and for tax benefits, they are also used to provide for incapacity, to provide for wealth and asset management, or to pass assets in a gradual manner.

Trusts can be both revocable and irrevocable; however, irrevocable trusts offer superior tax advantages in estate planning. Therefore, irrevocable trusts are used instead of revocable trusts when one wants to get the assets out of one's estate so that they are not taxed upon death even though the settlor (creator of the trust) still determined where the assets were dispersed.

Like everything else, irrevocable trusts also have its share of disadvantages. The most severe disadvantage is that once the settlor places the trust assets in an irrevocable trust he/she can no longer has ultimate control over how the assets are dispersed. Although the settlor provides instructions for the trustee as to how the assets are to be dispersed, the settlor has no legal right to control their distribution. There are however three notable exceptions whereby a settlor who has created an irrevocable trust can still control how the trustee distributes assets. They are known as: (1) independent trustee (2) ascertainable standard and (3) administrative powers.

As soon as the settlor gives up any power to revoke, a gift is complete and the settlor has to pay gift tax at this point.

About the Author

Peter Bricks is a 3L law student at Georgia State University, who will graduate in Spring 2006. He chose this topic because he is interested in a career in estate planning. At Georgia State he has taken courses in Wills, Fiduciary Administration and Estate & Gift Tax. In his final semester at GSU, he will take the Estate Planning Seminar.

Scope

This web guide will show the current state of irrevocable trust planning law both in federal and Georgia law. Through statutory and case law as well as a variety of secondary legal sources, this guide should assist both law students and attorneys in understanding the various effects of estate planning through irrevocable trusts.

Disclaimer

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Primary Sources

U.S. Code

Almost every federal statute that impacts the taxation of irrevocable trusts can be found in Title 26 of the United States Code. The text is available online for free through websites such as http://www.gpoaccess.gov/uscode/. The United States Code Annotated (USCA) is available online through paid services such as Lexis or Westlaw. Below are the most important sections of the tax code in relation to irrevocable trust taxation.

26 USCA § 1015(b): Covers what the basis will be to the recipient of property which has been transferred by an irrevocable trust.

26 USCA § 2035: Covers what property can still be included in the decedent's estate that has been transferred by him/her in life by irrevocable trust or otherwise, if the transfer occurred within 3 years of decedent's death. An example of this code section's application is provided below.

Q: Decedent created an irrevocable trust in 2002. Under the terms of the trust the income was to his son, the remainder passing to his grandson. The decedent dies in 2004. Is any of the trust property included in the decedent's gross estate?

A: No. None of the corpus is included in the decedent's estate under 26 USCA § 2035, because although the decedent died within 3 years of the transfer of the property, the value of the property could not have been included in his estate under section 2036, 2037, 2038 or 2042.

26 USCA § 2036(a): Covers what property can still be included in the decedent's estate that has been transferred by him/her in life by irrevocable trust or otherwise. An example of this code section's application is provided below.

Q: Decedent created an irrevocable trust. Under the terms of the trust the decedent was entitled to all trust income and upon Decedent's death, the remainder passes to his friend. Is any of the trust property included in the decedent's gross estate?

A: Yes, the entire corpus is included in the decedent's estate under 26 USCA § 2036, because the decedent retained a life interest in the trust income.

26 USCA § 2037: Covers what property can still be included in the decedent's estate that has been transferred by him/her in life by irrevocable trust or otherwise, if the decedent retained a reversionary interest. An example of this code section's application is provided below.

Q:The decedent established a trust for the beneficiaries. One of the provisions of the trust provided that if the beneficiaries predeceased the decedent, the trust estate would revert back to the donor. The decedent dies while the beneficiaries are still living. What amount is included in the decedent's estate?

A:At the decedent's death, the entire trust properties were included as part of the taxable gross of his estate. It makes no difference how vested the remainder interests in the corpus or how remote or uncertain may be the decedent's reversionary interest, if the corpus did not shed the possibility of reversion until at or after the decedent's death, the value of the entire corpus on the date of death was taxable. (*Weadock v. Kavanagh*, 62 F. Supp. 270 (E.D. Mich. 1945), affirmed 168 F.2d 840.

Note: The property is included only if (1) the donee must survive the decedent to receive the property and (2) the decedent retained a reversionary interest that exceeds 5% of the value of the transferred property.

Note: This section rarely results in property being included in the decedent's gross estate because trusts and other instruments contain a sufficient number of alternate beneficiaries so the property does not revert to the decedent's estate.

26 USCA § 2038: Covers what property can still be included in the decedent's estate that has been transferred by him/her in life by irrevocable trust or otherwise, if the decedent had the ability to alter or amend a transfer that property. This statute also covers property relinquished by decedent within 3 years of his/her death while decedent possessed one of the prohibited powers. Two examples of this code section's application is provided below.

Q1: Settlor created an irrevocable trust for his friend. Settlor retained the right to remove his friend as beneficiary and to substitute his grandchild. Is any of the trust property included in the decedent's estate?

A1: Yes, the entire corpus is included under 26 USCA § 2038 because the decedent retained the right to alter the trust. It is irrelevant that this alteration may not occur and that it would not benefit the decedent personally.

Q2: Decedent created a revocable trust in 2000 for the benefit of a friend. In 2002, the decedent amended the trust to eliminate all of the decedent's authority to alter, amend, revoke or terminate the trust. Decedent dies in 2004. Is any of the trust property included in the decedent's estate?

A2: Yes, the entire corpus is included in the decedent's estate under 26 USCA § 2038, because he did not live more than 3 years after the 2002 amendment. None of the property would have been included in his estate had he lived past 2005. (See: 26 USCA § 2035 example for when it would not be included in decedent's estate).

26 USCA § 2042: Covers what proceeds of life insurance can still be included in the decedent's estate that has been transferred by him/her in life by irrevocable trust or otherwise, if the decedent possessed incidents of ownership. An example of this code section's application is provided below.

Q: Decedent purchased an insurance policy on his life in 2001 in which he names his son as beneficiary. He/she then transfers ownership in that policy to an irrevocable trust with a corporate trustee in 2002. Decedent dies in 2004. Is the property included in his estate?

A: Yes, the entire corpus is included in the decedent's estate, because although he no longer possesses "incidents of ownership" in the policy, he did not live three years after creating the trust.

26 USCA § 2055: Covers what property is included in the decedent's estate that has been transferred by him/her in life by irrevocable trust or otherwise to a charity. An example of this code section's application is provided below.

Q: Decedent leaves his personal residence in an irrevocable trust to a qualified charity under Sec. 644 but decides to let his child have the income benefit of it first for his/her child's life. Does the value of the remainder interest to the charity qualify for a Section 2055 deduction?

A: No, this is not a valid deduction, because it did not give the life beneficiary a fixed amount or percentage of the corpus. If the child was allowed to take 10% of the corpus as income for 10 years, then it would have been valid.

26 USCA § 2056: Covers what property is not included in the decedent's estate via the martial deduction that has been transferred by him/her in life by irrevocable trust or otherwise to his/her spouse. An example of this code section's application is provided below.

Q: Decedent by will leaves $100,000 of property to a testamentary trust under which the trustee is to pay any amount of income that trustee deems desirable to Decedent's

Surviving Spouse, and any accumulated income and corpus to Surviving Spouse's estate at Surviving Spouse's death. Does the $100,000 qualify for the marital deduction?

A: Yes, the entire $100,000 is a marital deduction and excluded from taxation of decedent's estate. This is because it is an estate trust that goes entirely to the surviving spouse. Should anyone other than the spouse have had an income interest in the trust, then the entire amount would have been included in the decedent's estate.

26 USCA § 2503: Covers what amount of gift tax is owed when property is transferred by irrevocable trust as a gift. When property is transferred during life (inter vivos) into an irrevocable trust, the settlor must pay a gift tax upon that transfer. He/she thus would not have an estate tax issue when he/she dies. This code section codifies the annual exclusion amount, transfers to benefit of a minor, exclusion for educational or medical expenses, among other things. An example of this code section's application is provided below.

Q: Taxpayer transferred $25,000 into an irrevocable trust for his/her son's college education. Must the taxpayer pay a gift tax because this amount is above the $11,000 annual gift tax exclusion.

A: No gift tax is owed, because under 26 USCA § 2503(e)2(a) any payment as "tuition to an educational organization described in section 170(b)(1)(A)(ii) is excluded from the gift tax.

26 USCA § 2601-2663: Covers what property is included in the decedent's estate that has been transferred by him/her in life by irrevocable trust or otherwise to family members more than one generation removed from him/her. An example of this code section's application is provided below.

Q: Decedent leaves $5,000,000 by irrevocable trust, with income to his/her son for life, with the remainder income going to his/her grandchild, the remainder of that going to his/her great grandchild, etc. What taxes does the child and grand child pay?

A: As the child is the first to receive a life estate, the death taxes the child pays is only on the income he has received. He would not have to pay taxes on the trust's corpus, because he never had control of the corpus. The transfer to the grandchild however, as the second generation taker, will incur a Generation Skipping Tax. This tax will be on the entire corpus.

The Internal Revenue Code (I.R.C.)

As discussed immediately above, the Internal Revenue Code (IRC) is contained in Title 26 of the United States Code (26 USC) and also may be located online via the "US Tax Code On-Line". Title 26 specifically, can be found here. The link to Title 26 allows for easy navigation through the entire tax code. The relevant section to this topic is Subtitle B (Estate and Gift Taxes). Among Subtitle B, the most relevant sections are:

Estate Taxes of Citizens or Residents

- Sec. 2001. Imposition and rate of tax.
- Sec. 2002. Liability for payment.
- Sec. 2010. Unified credit against estate tax.
- Sec. 2011. Credit for State death taxes.
- Sec. 2012. Credit for gift tax.
- Sec. 2013. Credit for tax on prior transfers.
- Sec. 2014. Credit for foreign death taxes.
- Sec. 2015. Credit for death taxes on remainders.
- Sec. 2016. Recovery of taxes claimed as credit.
- Sec. 2031. Definition of gross estate.
- Sec. 2032. Alternate valuation.
- Sec. 2032A. Valuation of certain farm, etc., real property.
- Sec. 2033. Property in which the decedent had an interest.
- Sec. 2033A. Repealed.
- Sec. 2034. Dower or curtesy interests.
- Sec. 2035. Adjustments for certain gifts made within 3 years of decedent's death.
- Sec. 2036. Transfers with retained life estate.
- Sec. 2037. Transfers taking effect at death.
- Sec. 2038. Revocable transfers.
- Sec. 2039. Annuities.
- Sec. 2040. Joint interests.
- Sec. 2041. Powers of appointment.
- Sec. 2042. Proceeds of life insurance.
- Sec. 2043. Transfers for insufficient consideration.
- Sec. 2044. Certain property for which marital deduction was previously allowed.
- Sec. 2045. Prior interests.

- Sec. 2046. Disclaimers.
- Sec. 2051. Definition of taxable estate.
- Sec. 2052. Repealed.
- Sec. 2053. Expenses, indebtedness, and taxes.
- Sec. 2054. Losses.
- Sec. 2055. Transfers for public, charitable, and religious uses.
- Sec. 2056. Bequests, etc., to surviving spouse.
- Sec. 2056A. Qualified domestic trust.
- Sec. 2057. Family-owned business interests.

Gift Taxes

- Sec. 2501. Imposition of tax.
- Sec. 2502. Rate of tax.
- Sec. 2503. Taxable gifts.
- Sec. 2504. Taxable gifts for preceding calendar periods.
- Sec. 2505. Unified credit against gift tax.

Generation Skipping Transfers

- Sec. 2611. Generation-skipping transfer defined.
- Sec. 2612. Taxable termination; taxable distribution; direct skip.
- Sec. 2613. Skip person and non-skip person defined.
- Sec. 2631. GST exemption.
- Sec. 2632. Special rules for allocation of GST exemption.

Code of Federal Regulations (C.F.R.)

The Code of Federal Regulations (C.F.R.) is the codification of the general and permanent rules published in the Federal Register by the executive departments and agencies of the Federal Government. It is divided into 50 titles that represent broad areas subject to Federal regulation. Each volume of the CFR is updated once each calendar year and is issued on a quarterly basis. It can be found at any law library. Below is an important regulation in the area of estate planning.

26 CFR § 20.2036-1(b)(3):
(a) In general. A decedent's gross estate includes under section 2036 the value of any interest in property transferred by the decedent after March 3, 1931, whether in trust or otherwise, except to the extent that the transfer was for an adequate and full consideration in money or money's worth (see § 20.2043-1), if the decedent retained or reserved (1) for his life, or (2) for any period not ascertainable without reference to his death (if the transfer was made after June 6, 1932), or (3) for any period which does not in fact end before his death:

Georgia Statutes

The Georgia Code is available for free on the Georgia General Assembly website, but it only contains the text of the law. The more thorough annotated version is known as the Official Code of Georgia Annotated (O.C.G.A.) and can be found at any law library. Title 53 of the Georgia Code is entitled “Wills, Trusts, and Administration of Estates.” The relevant code sections to Irrevocable Trusts are highlighted below:

O.C.G.A. §53-12-1: Defines this chapter as the Georgia Trust Act.

O.C.G.A. §53-12-22 : Defines the essential trust terms.

O.C.G.A. §53-12-23: Defines what is necessary to create a trust.

O.C.G.A. §53-12-113: Codifies the Cy Pres doctrine in regards to trusts.

O.C.G.A. §53-12-114: Sanctions the perpetual charitable trust.

O.C.G.A. §53-12-150: Defines what is necessary to distinguish a revocable trust from an irrevocable trust. Shows that the presumption of the law is that the trust is irrevocable.

O.C.G.A. §53-12-152: Defines how even an irrevocable trust can be terminated due to manifest necessity.

O.C.G.A. §53-12-190: Defines trustees duties to beneficiaries of an irrevocable trust.

Additionally, information for trustees on filing taxes in Georgia can be found at the Georgia Department of Revenue. Specifically, information on estate taxes can be found here. Georgia does not have a gift tax or an inheritance tax, but it does have an estate tax. The tax is an amount equal to the amount allowable as a credit for state death taxes under

Section 2011 of the Internal Revenue Code. In effect, the estate taxes paid to Georgia may be used to reduce the estate taxes due IRS. The amount due may be determined by reference to the instructions for preparation of federal form 706.

Case Law

United States Supreme Court Cases

The cases below highlight the major decisions the U.S. Supreme Court has made regarding estate and gift taxation of irrevocable trusts. All of the cases cited are still good law. The case law can be accessed online via a variety of sources, both free and for a cost. They can also be accessed in any law library via the United States Reports.

Case Name	Facts	Holding
United States v. Estate of Grace, 395 U.S. 316 (1969).	Decedent had executed a trust instrument, in which the trustees were directed to pay trust income to decedent's wife during her lifetime, as well as a part of the principal. The wife then executed a trust instrument that was virtually identical to that of decedent. At decedent's death the Internal Revenue Service (IRS) determined that decedent and his wife had created "reciprocal trusts" and that the value of the trust created by the wife was includible in decedent's gross estate.	On certiorari, the Court held that it was undisputed that the two trusts were interrelated, as they were substantially identical in terms and were created at approximately the same time, and that it appeared that the transfers in trust left each party in the same objective economic position as before. Decedent's estate remained undiminished to the extent of the value of his wife's trust and the value of his estate had to be increased by the value of that trust.
United States v. Byrum, 408 U.S. 125 (1972).	Decedent created in 1958 an irrevocable trust to which he transferred shares of stock in three closely held corporations. Prior to transfer, he owned at least 71% of the outstanding stock of each corporation. The beneficiaries were his children or, in the event of their death before the termination of the trust, their surviving children. The trust instrument specified that there be a corporate trustee. Byrum designated as sole trustee an independent corporation,. The trust agreement vested in the trustee broad and detailed powers with respect to the control and management of the trust property. These powers were exercisable in the trustee's sole discretion, subject to certain rights reserved by Byrum: (i) to vote the shares of unlisted stock held in the trust estate; (ii) to disapprove the sale or transfer of any trust assets, including the shares transferred to the trust; (iii) to approve investments and reinvestments; and (iv) to remove the trustee and "designate another corporate Trustee to serve as successor."	The Supreme Court found that plaintiff executor of decedent's estate was entitled to a refund of estate taxes paid on shares of stock that the decedent had transferred into an irrevocable trust. The Court determined that the stock was not to be included in the taxable gross estate of the decedent pursuant to 26 U.S.C.S. § 2036 because, upon transfer into the irrevocable trust, the decedent had not retained before his death the possession or enjoyment of, or the right to the income from, the property. Nor had he the right to designate the persons who would possess or enjoy the property or the income therefrom. It was immaterial that the decedent had control of more than 50 percent of the shares, as this did not confer upon the decedent the power to give the trust proceeds to the person of his choosing. The decedent had no right to command the directors to pay or not pay dividends because the board of directors had to make its decision based on a number of factors.
Jackson v. United States, 376 U.S. 503 (1964).	A California state court allowed the widow a statutory widow's allowance, but her claim of that amount as a marital deduction on the federal estate tax return was disallowed as a terminable interest.	The Court held that the allowance was a terminable interest because the date of death of the testator was the correct point of time from which to judge the nature of the widow's allowance for the purpose of deciding terminability and deductibility under § 812(e)(1). Under California law, the interest was defeasible because it could have been lost if the widow had remarried or died prior to securing an order for the allowance. Thus, as of the date of the testator's death, the allowance was subject to failure or termination upon the occurrence of an event or contingency. There was no provision in the Internal Revenue Code for deducting all terminable interests which became nonterminable at a later date.

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United States Tax Court Cases

The cases below highlight the major decisions the U.S. Tax Court has made regarding estate and gift taxation of irrevocable trusts. All of the cases cited are still good law. The case law can be accessed online via a variety of sources, both free and for a cost. They can also be accessed in most law libraries.

Case Name	Facts	Holding
Estate of Cristofani v. Commissioner, 97 T.C. 74, acq., 1992-1 C.V. 1. (1991).	Decedent executed an irrevocable trust to her two children. Under the terms of the trust, her two children, as trustees, could each withdraw an amount not to exceed the amount specified for the gift tax exclusion under 26 U.S.C.S. § 2503(b). Decedent died before she made two $ 70,000 transfers into the trust. These transfers were not reported on federal gift tax returns. Instead, estate claimed them as annual exclusions for two years under § 2503(b) to her children and five grandchildren, who held contingent remainder interests in the trust. The IRS disallowed the exclusions for decedent's grandchildren. The estate sought review of the IRS' decision.	The court found that the estate was entitled to the exclusions for decedent's grandchildren because their right to withdraw an amount not to exceed the § 2503(b) exclusion represented a present interest for the purposes of § 2503.
Estate of Farrel v. United States, 553 F.2d 637 (1977).	Defendant government assessed a tax deficiency against plaintiff, decedent settlor's estate, for failing to include in decedent's taxable estate the value of a trust over which decedent could appoint new trustees whenever a position became vacant. The deficiency was paid and plaintiff sued to recover the taxes, contending that trustees' right to determine who would possess or enjoy trust property should not be attributed to the decedent under 26 U.S.C.S. § 2036 (a). Plaintiff argued that a power or right subject to a conditional event which did not occur prior to and did not exist at decedent's death was not covered by 26 U.S.C.S. § 2038 and that same rule was applicable to § 2036(a). Defendant disagreed.	The court found that fundamental differences between these statutes' underlying purposes made differing interpretations reasonable, as documented in Treas. Reg. § 20.2036-1(b)(3). Therefore, plaintiff was not entitled to recover the taxes.
Estate of Wall v. Commissioner, 101 T.C. 300 (1993).	Decedent placed property in three irrevocable inter vivos trusts in favor of her daughter and granddaughters. The trust agreement gave decedent the power to replace the corporate trustee with another trustee, other than herself. The commissioner argued that under 26 U.S.C.S. § 2036(a)(2) the property in the trusts was includable in the estate because decedent retained the right to affect the beneficial enjoyment of the trust property.	The court found that § 2036(a)(2) did not apply because the decedent did not have the right to appoint herself as trustee. The court reasoned that the having the power to remove the trustee did not give decedent the power to control the trustee because the trustee was only accountable to the beneficiary.

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Federal Court Cases

The cases below highlight the major decisions that U.S. federal courts have made regarding estate and gift taxation of irrevocable trusts. All of the cases cited are still good law. The case law can be accessed online via a variety of sources, both free and for a cost. They can also be accessed in any law library via the its corresponding reporter.

Case Name	Facts	Holding
Crummey v. Commissioner,	Petitioners filed gift tax returns, claiming a $ 3,000	The court determined that petitioners

397 F.2d 82 (9th Cir. 1968).	per beneficiary exclusion under 26 USCA § 2503(b) in establishing living trusts for their two children. Respondent determined that petitioners were entitled to only one exclusion for each year, believing that gifts held in trust for minors constituted future interests, which were disallowed.. The parties appealed for a determination of whether a present interest was given by petitioners to their minor children, qualifying as an exclusion under 26 USCA § 2503(b).	were entitled to claim exclusions, as postponed enjoyment did not constitute a future interest if the postponement was solely attributable to the beneficiaries' minority.
Cruse v. Leary, 727 S.W.2d 408 (Ky. Ct. App. 1987).	The beneficiary was one of seven beneficiaries named in her grandmother's irrevocable trust. The grandmother tried to revoke her irrevocable trust and also revived an earlier version of her will. The beneficiary attempted to block the probate of the will, alleging that the irrevocable trust could not be modified and that proof of the original will, which was lost, was unsatisfactory. The trial court granted summary judgment to the heirs, the beneficiary appealed, and the court reversed.	The court held that the beneficiary had presented factual issues that had to be resolved at trial, so summary judgment was improper. A trust could be rescinded or reformed upon a showing of factors such as fraud, duress, undue influence, or mistake
Morton v. United States, 457 F.2d 750 (4th Cir. 1972).	Commissioner of Internal Revenue assessed a deficiency against appellee, decedent's executor, for failure to include the proceeds of a life insurance policy in decedent's gross estate. Appellee brought suit in district court claiming that decedent did not possess any of the incidents of ownership of this insurance policy at the time of his death. Appellate court agreed. Court found that all the premiums of this insurance policy were paid by decedent's father-in-law, then decedent's wife's corporation, and finally his wife, and furthermore, decedent executed an irrevocable designation of beneficiaries and mode of settlement.	Court held that where, as here, an insured never paid a premium and never for any purpose treated the policy as his own that his irrevocable designation of beneficiaries and mode of payment of proceeds was an effective assignment of all incidents of ownership in the policy. Policy proceeds not includible in gross estate under I.R.C. § 2042(2).
Weadock v. Kavanagh, 62 F. Supp. 270 (E.D. Mich. 1945), affirmed 168 F.2d 840.	The decedent established a trust for the beneficiaries. One of the provisions of the trust provided that if the beneficiaries predeceased the decedent, the trust estate would revert back to the donor. At the decedent's death, the entire trust properties were included as part of the taxable gross of his estate. The beneficiaries filed an action seeking to recover a portion of the taxes paid, but the court entered judgment for the Commissioner. The court held that whenever a settlor or testator by trust created express conditions or contingencies upon the happening of which he might regain the corpus, such a gift was testamentary in character and intended to take effect in possession or enjoyment at or after his death. Because the disposition of the estate was held in suspense until the death of the donor, that event compelled the imposition of the tax.	The court held that it made no difference how vested the remainder interests in the corpus or how remote or uncertain may be the decedent's reversionary interest, if the corpus did not shed the possibility of reversion until at or after the decedent's death, the value of the entire corpus on the date of death was taxable.

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Georgia State Supreme Court Cases

The cases below highlight the major decisions that the Georgia State Supreme Court has made regarding estate and gift taxation of irrevocable trusts. All of the cases cited are still good law. The case law can be accessed online via a variety of sources, both free and for a cost. They can also be accessed in any law library via the Southeastern Reporter:

Case Name	Facts	Holding
Avera v. Avera, 268 Ga. 4; 485 S.E.2d 731 (Ga. 1997).	Title to home of the parties to a divorce action was in appellant wife's name, and had been transferred to her by a third party, an irrevocable trust established by appellee husband, with himself as trustee of the trust. The trial court denied appellant's motion for partial summary judgment on the ground that the conveyance of the home was the result of the joint	The court vacated the order of the trial court. It concluded that the conveyance of the property was a gift, under O.C.G.A. § 44-5-80. It was clear that the trust, a valid entity separate from appellee, intended to make a gift of the property because it irrevocably

	effort of the spouses to further the financial security of their family.	transferred present, immediate interest; the transfer of trust corpus to appellant was a conveyance authorized by the terms of the trust; and appellant accepted the deed. As such, the home was appellant's separate property.
Speed v. Speed, 263 Ga. 166; 430 S.E.2d 348 (Ga. 1993).	While the parties were married, they were in an automobile accident. In settlement of the resulting litigation, the husband received a lump sum award as well as an annuity. The husband later transferred such amounts into an irrevocable trust, naming himself as the sole beneficiary. The trust instrument contained a spendthrift clause, which prohibited the involuntary alienation of trust property for the satisfaction of debts or obligations incurred by the husband.	In reversing, the court held that under O.C.G.A. §53-12-28(c), the spendthrift clause was not enforceable, because the husband was both settlor and sole beneficiary of the trust.
Cooper v. Turst Co. Bank, 257 Ga. 272; 357 S.E.2d 582 (Ga. 1987).	The settlor established a trust and named the trustee as the governing entity. The terms of the trust provided that the settlor had no right to alter, amend, or revoke the trust. Thereafter, the settlor issued a notice of revocation that the trustee refused to honor. The trustee filed a declaratory judgment action seeking direction concerning the settlor's right to terminate the trust. The lower court held that the trust was irrevocable, and the settlor appealed the decision. The settlor argued that she was the sole beneficiary of the trust and thus was entitled to terminate it.	The court disagreed, however, and noted that if the beneficial interest of a trust was limited to the settlor for life and on death the property was conveyed to his or her children, issue, or descendants, the settlor was not the sole beneficiary of the trust. Finding that such was the case in the instant action, the court held that the settlor was not the sole beneficiary of the trust and was not entitled to terminate it.

Legislative History

Legislative history is a valuable resource that allows one to find out what was the purpose behind the law's enactment. It can be found through a variety of sources. Legislative History is available for free through Thomas. Search engines such as Lexis and Westlaw offer extensive histories. Additionally, legislative histories of both state and federal law can be accessed by viewing the annotated sections of the respective codes. Accessing federal legislative history will often take one through the C.F.R., the Federal Register and the List of Sections Affected. Also included are interpretive notes and decisions as well as ancillary laws and directives.

An example of how extensive federal legislative history can be is illustrated below, with the following search results turned up by Lexis for 26 U.S.C.S. § 2055, which covers what property is included in the decedent's estate that has been transferred by him/her in life by irrevocable trust or otherwise to a charity:

(Aug. 16, 1954, ch 736, 68A Stat. 390; Aug. 6, 1956, ch 1020, § 1, 70 Stat. 1075; Sept. 2, 1958, P.L. 85-866, Title I, § 30(d), 72 Stat. 1631; Dec. 30, 1969, P.L. 91-172, Title II, § 201(d)(1), (4)(A), 83 Stat. 560, 561; Dec. 31, 1970, P.L. 91-614, Title I, § 101(c), 84 Stat. 1836; Oct. 26, 1974, P.L. 93-483, § 3(a), 88 Stat. 1457; Oct. 4, 1976, P.L. 94-455, Title XIII, §§ 1304(a), 1307(d)(1)(B)(ii), (C), 1313(b)(2), Title XIX, §§ 1902(a)(4), (12)(A), 1906(b)(13)(A), Title XX, § 2009(b)(4)(B), (C), Title XXI, § 2124(e)(2), 90 Stat. 1715, 1727, 1730, 1804, 1805, 1834, 1894, 1919; Nov. 6, 1978, P.L. 95-600, Title V, § 514(a), 92 Stat. 2883; April 1, 1980, P.L. 96-222, Title I, § 105(a)(4)(A), 94 Stat. 219; Oct. 17, 1980, P.L. 96-465, Title II, § 2206(e)(4), 94 Stat. 2163; Dec. 28, 1980, P.L. 96-605, Title III, § 301(a), 94 Stat. 3530; Aug. 13, 1981, P.L. 97-34, Title IV, § 423(a), 95 Stat. 316; Sept. 3, 1982, P.L. 97-248, Title II, § 286(b)(2), 96 Stat. 570; Sept. 13, 1982, P.L. 97-258, § 3(f)(1), (2), 96 Stat. 1064; Jan. 14, 1983, P.L. 97-473, Title II, § 202(b)(5), 96 Stat. 2610; July 18, 1984, P.L. 98-369, Div A, Title X, §§ 1022(a), 1032(b)(2), 98 Stat. 1026, 1033; Oct. 22, 1986, P.L. 99-514, Title XIV, § 1422(a), 100 Stat. 2716; Dec. 22, 1987, P.L. 100-203, Title X, § 10711(a)(3), 101 Stat. 1330-464; Sept. 23, 1996, P.L. 104-201, Div A, Title X, § 1073(b)(3), 110 Stat. 2657; Aug. 5, 1997, P.L. 105-34, Title X, § 1089(b)(3), (5), Title XV, § 1530(c)(7), 111 Stat. 960, 961, 1078.)

Outside publications of legislative history are also available. For instance, the Economic Growth and Tax Relief Reconciliation Act of 2001, which provided for the repeal of the estate tax for those dying after December 31, 2009, among other things, can be purchased in book form. One book is titled: A Legislative History of the Bush Tax Cut: The Economic Growth and Tax Relief Reconciliation Act of 2001 Compiled by William H. Manz. Item #327610; ISBN 0-8377-3430-4 Published: Buffalo; William S. Hein & Co., Inc.;

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Secondary Sources

Treatises

The treatises available for the topics of trusts include a variety of information on trust creation to statutory and legislative enactment. Listed below are just a few of the available treatises:

Bertram L. Levy & Benjamin T. White, *Georgia Estate Planning, Will Drafting, and Estate Administration Forms*, (Aspen Publishers 1987). Call number: KFG140.A65 L48 1987.

George Gleason Bogert, *Handbook of the law of trusts*, (West Pub. Co. 1973). Call number: KF730 .B58 1973.

Boris I. Bittker, *Federal estate and gift taxation*, (Aspen Law & Business 8th. Ed. 2000). Call number: KF6572.A4 B573 2000.

William F. Fratcher & Mark L. Ascher, *The Law of Trusts* , (Little Brown 1987) Call Number: KF730.S3.

American Law Reports

American Law Reports (ALR) is one of the best secondary sources of law available, because it can direct you to primary and other secondary sources of law. ALRs are a great, quick way to find out what the law is on a matter in other jurisdictions. The most current versions can be found online at Westlaw and Lexis, but they can also be found at any law library. Searching the annotated codes will easily direct you to relevant ALRs for your topic. Listed below are important ALRs for irrevocable trusts. The titles are self explanatory.

Maurice T. Brunner, Annotation, *Construction and Effect of Will Provisions Expressly Relating to the Burden of Estate and Inheritance Taxes*, 69 A.L.R.3d 122 (1976).

J.R. Kemper, *Power of Court to Authorize Modification of Trust Instrument Because of Changes in Tax Law*, 57 A.L.R. 3d 1044 (1974).

R.D. Hursh, Annotation, *Taxability of Trustor's Estate for Retention of Power to Designate Persons Who Shall Possess or Enjoy*, 39 A.L.R. 2d 461 (1965).

L.S. Tellier, Annotation, *Cancellation of Irrevocable Inter Vivos Trust on Ground of Mistake or Misundersatnding*, 59 A.L.R.2d 1229 (1958).

Corpus Jurus Secundum/American Jurisprudence

Encyclopedias, Corpus Juris Secundum and Forms are yet another source of important secondary law sources. They can also be found online and at any law library. Annotated code sections can quickly provide you with relevant law review articles to your topic. Irrevocable trusts are discussed in the Corpus Juris Secundum and American Jurisprudence cites listed below:

Corpus Juris Secundum

90 C.J.S. Trusts § 58 (2005).

American Jurisprudence

62 Am. Jur. 2d, Powers of Appointment and Alienation § 155.

Uniform Trust Code (UTC)

The Uniform Trust Code was last amended in 2005 by the National Conference of Commissioners of Uniform State Laws, which recommended it for enactment in all states. It has been approved by the American Bar Association and adopted in the following states: Arkansas, District of Columbia, Kansas, Maine, Missouri, Nebraska, New Hampshire, New Mexico, North Carolina, Oregon, South Carolina, Tennessee, Utah, Virginia and Wyoming. For a comparison of Georgia's trust laws in relation to the UTC, click here.

Among its most relevant provisions to irrevocable trusts is Section 411. It states that noncharitable irrevocable trusts may be modified or terminated upon consent of the settlor and all beneficiaries, even if the modification or termination is inconsistent with a material purpose of the trust and that noncharitable irrevocable trusts may be terminated or modified upon consent of all of the beneficiaries if the court concludes that continuance of the trust is not necessary to achieve any material purpose of the trust.

Books

The following books related to trust administration are available at law libraries and can be referenced at the Georgia State law library:

Walter L. Nossaman & Joseph L. Wyatt, Jr., *Trust Administration and Taxation* (Matthew Bender 1972). Call number: KF6443.N6 1972.

Charles L. B. Lowndes, Robert Kramer & John H. McCord, *Federal Estate & Gift Taxes* (West Pub. Co. 3rd Ed. 1974). Call number: KF6572.L68 1974.

Paul L. Caron, Grayson M.P. McCouch & Karen C. Burke, *Federal Wealth Transfer Tax Anthology* (Anderson Pub. Co. 1998). Call number: KF6572.C32.

Mark L. Ascher, *Federal Income Taxation of Trusts and Estates* (Carolina Academic Press 2nd Ed. 1996). Call number: KF6572.A93.

Deborah A. Hall, Phillip I. Roitman, *Federal Estate and Gift Tax Returns: Keys to Preparing IRS Forms 706 and 709 for the Paralegal in Georgia* (NBI, Inc. 1997). Call number: KF6572.A4H35 1997.

Mary Randolph & Denis Clifford, *9 Ways to Avoid Estate Taxes* (Nolo Press 1998). Call number: https://gil.gsu.edu/cgi-bin/Pwebrecon.cgi?SC=CallNumber&SEQ=20051112210712&PID=25615&SA=KF6585+.C583+1998">KF6585.C583 1998.

Jeffrey N. Pennell, *Income Taxation of Trusts, Estates, Grantors and Beneficiaries* (West Pub. Co. 1987). Call number: KF 6443.A7P46 1987.

John L. Peschel & Edward D. Spurgeon, ***Federal Taxation of Trusts, Grantors and Beneficiaries*** (Warren, Gorham & Lamont 3rd Ed. 1997). Call number: KF6443.P4 1997.

Law Review Articles and Journals

Another great source of secondary law are law review and journal articles. These articles, written by scholars in the field, touch on popular areas of laws and provide extensive citations. Like ALRs, law review and journal articles can be found online and at any law library. Annotated code sections can quickly provide you with relevant law review articles to your topic. Irrevocable trusts are discussed in the law review and journal articles listed below. The titles are self explanatory.

Anne S. Emanuel, *Power to modify or revoke in Georgia: The Georgia Trust Act,"* 28 Ga. St. B.J. 95 (1991).

Eric A. Manterfield, *The revocable irrevocable trust*, 30 Res Gestate 452 (April 1987).

Jeffrey A. Baskies, *Tax Court case affects powers to remove and replace corporate trustees of irrevocable trusts*, 63 Fla. B.J. 90 (1994).

Leonard L. Scott, *Revocable-irrevocable trust- The way out?*, 42 Ark.L.Rev. 713 (1989).

J. Gregory Wyrick, *Tax Planning with charitable trust*, 38 La. B.J. 401 (1991).

Eric A. Manterfield, *The revocable irrevocable trust*, 30 Res Gestae 452 (1987).

Looseleaf Sources

The following articles are from a Looseleaf Service called Estate Tax Planning Advisor. It is published by Aspen Publishers and has one volume from 2003 and three volumes from 2002. It can be accessed at GSU through Legaltrac:

Bradley R. Coppedge, Morton A. Harris, Choice of Entity Impacts Estate Planning, (Aspen Publishers 2003).

George B. Jewell, The Need for Trust Administration after Atkinson , (Aspen Publishers 2003).

Keith Schiller, Determining Increase in the late GST Exemption Allocation, (Aspen Publishers 2003).

Sydney S. Traum, Grantor Trust in the S Corporation Context, (Aspen Publishers 2003).

Restatement 3rd of Trusts

Although the Restatement is not the law, it is influential, as it is the recommendation of numerous scholars. The Restatement 3 rd of Trusts can be found at any law library. Of particular importance to irrevocable trusts is Section 65, which states that (1) Except as stated in Subsection (2), if all of the beneficiaries of an irrevocable trust consent, they can compel the termination or modification of the trust. (2) If termination or modification of the trust under Subsection (1) would be inconsistent with a material purpose of the trust, the beneficiaries cannot compel its termination or modification except with the consent of the settlor, or after the settlor's death, with the authorization of the court if it determines that the reason for the termination outweighs the material purpose.

I.R.S. Revenue Rulings

These are rulings issued by the IRS, usually in response to a taxpayer question about tax consequences or from the IRS' own volition based on a common tax problem. These rulings are not binding on the courts, but are at least an indication of the IRS' stance on the issue. Further information on IRS revenue rulings can be found on its FAQ page. The revenue rulings listed below are ones that have particular relevance to irrevocable trusts:

79-129 (1979-1 C.B. 306)

ISSUE: To what extent are the proceeds of a life insurance policy on the decedent's life includible in the decedent's gross estate under section 2042 of title 26 of the Internal Revenue Code of 1954 where the Decedent obtained an ordinary life insurance policy on his life and simultaneously created an irrevocable funded insurance trust and named the X trust company as trustee?

HOLDING: Since the policy proceeds were payable to the Decedent's estate and because he also possessed the right to borrow against the cash surrender value of the policy to the extent of the premiums paid the Decedent and not recovered, the Decedent possessed incidents of ownership pursuant to sections 26 U.S.C. § 2042 (1), (2).

76-368 (1976-2 C.B. 271)

ISSUE: Whether under 26 U.S.C. § 2041 a power of invasion not limited by an ascertainable standard, granted to an independent trustee, can be imputed to the decedent-income beneficiary of a trust where the trustee, an independent bank, was authorized to invade the trust corpus and pay portions thereof to or for the use and benefit of the decedent in such manner as the trustee, in its sole and unfettered discretion, deemed advisable should the decedent be in need of funds in excess of the trust income for "health, comfort, maintenance, welfare, or for any other purpose or purposes."

HOLDING: The power of invasion not limited by an ascertainable standard, granted to the independent trustee, cannot be imputed to the decedent so as to render the power taxable in the decedent's gross estate under section 2041.

69-285 (1969-1 C.B. 222)

ISSUE: Where the will reads that "All the rest and residue of my estate . . . I bequeath to said B to be distributed to whatever charities she may deem worthy" whether under the terms of the will the local law would (1) impose a trust upon the residuary assets and (2) require the trustee to distribute the assets to organizations that are charitable within the meaning of 26 U.S.C. § 2055?

HOLDING: The executrix in this case has a fiduciary duty to use the net residuary estate for purposes which are exclusively charitable within the meaning of section 2055 of the Code. Accordingly, it is held that the charitable deduction is allowable for the value of the net amount of the residuary estate.

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Computerized Research

Lexis

One of the best sources of online research for irrevocable trusts is Lexis. Although this service comes at a cost for non-law school students, it provides quick and easy research for those who can afford it.

To access estate and gift information, one need go to the "Search" tab and find the "Estates, Gifts and Trusts" link under "Area of Law- by topic."

From there you can research the following topics in any jurisdiction by clicking on the respective links: Cases and Court Rules, Statutes and Legislative Materials, Administrative Materials and Regulations, Law Reviews & Journals, Treatises & Analytical Materials, General News & Information, Legal News, Forms, Legal Reference Materials & Clauses.

Once you have selected one of these topics, you can narrow your search further by entering specific search terms or typing your search in natural language. Some of the suggested search terms to use are: irrevocable trust, estate planning, trust, income, beneficiary, trustee, decedent, estate tax, settlor, beneficiary, irrevocable, and gross estate.

Lexis can also suggest words for your search.

Lexis One

LexisOne is geared towards the solo practitioner and offers some free and some paid services. Fortunately for an estate planner, they offer many forms for free, while others are at cost. You can just search for forms from the homepage and then search for "trust" or any other related search terms and find a list of available forms.

Westlaw

Another great source of online research for irrevocable trusts is Westlaw. Although this service comes at a cost for non-law school students, it provides quick and easy research for those who can afford it.

One of Westlaw's best features is that under "My Westlaw" one can set up an Estate Planning tab (found under "topical") for easy access to all estate planning issues.

Once you click on the tab, you are immediately presented with the following choices: Primary Law, West Group Treatises, WG & L Treatises, RIA Materials, Tax Management Materials, Law Reviews and Other Reference Materials.

Also from this screen you can search certain keywords using either "terms and connectors" or "natural language." You can use the same suggested search terms for Lexis that you did for Westlaw.

Zimmerman

Another good source provided by Lexis is the Zimmerman research guide. From the home page one can search under "E," and find Estate Planning.

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Important Interest Groups

Interest Groups

There are a variety of interest groups one can join within the estate planning field. Just a handful of them are listed below:

American Bar Association

The American Bar Association has two interest groups of importance to estate planners. The Section of Real Property, Probate and Trust Law has selected articles from magazines and journals and can direct you to estate planning discussion groups. Additionally, the ABA Law Practice Management Section's Estate Planning and Probate Interest Group offers guidelines, billing strategies and information on using automated forms.

The National Academy of Elder Law Attorneys (NAELA)

The National Academy of Elder Law Attorneys has sections for Public, Professionals, Media and Members only. Within NAELA, one can join even smaller interest groups.

American College of Trust and Estate Counsel (ACTEC)

The American College of Trust and Estate Counsel offers information on the following range of topics: Private, What's New, ACTEC Journal, Resources, Membership and College Information.

National Network of Estate Planning Attorneys

The National Network of Estate Planning Attorneys offers information on the following range of topics: Personal Estate Planning, Information for Attorneys, and Information for Other Professionals. The group offer workshops for its members.

Other Resources

Trusts & Trustees

Trusts & Trustees is a site that labels itself as "The Ultimate Reference Material for Trusts." It is a unique source because it gives you information on international trusts.

RIA Thompson

RIA/Thompson is a site that provides estate planning information "from a to z". Specifically, it provides a section on Irrevocable Trusts: Analysis with Forms.

Software

Estate Planning Analyzer

Superior Software offer the Estate Planning Analyzer, which allows you to download a demo plan.

Cowles Legal System

For a hefty fee, Cowles Legal System offers a variety paid products: Trust Plus, Trus Terminator and Cowles Complete: Trus Plus and Trus Terminator. For cheaper prices, it offers booklets and videos. All of its paid products can be found here.

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Conclusion

Conclusion

The following synopsis of the usefulness of irrevocable trusts is provided by a website called Tax Prophet:

An irrevocable trust is an arrangement in which the grantor departs with ownership and control of property. Usually this involves a gift of the property to the trust. The trust then stands as a separate taxable entity and pays tax on its accumulated income. Trusts typically receive a deduction for income that is distributed on a current basis. Because the grantor must permanently depart with the ownership and control of the property being transferred to an irrevocable trust, such a device has limited appeal to most taxpayers.

Irrevocable trusts, however, are useful in life insurance planning. For instance, a properly structured irrevocable life insurance trust can avoid probate costs and fees, and estate taxes on the insurance proceeds paid to the trust upon the grantor's death. Irrevocable trusts are also useful in providing children, especially those over age 14, with a fund for education or other specific planning purposes. Again, the trust is usually funded with "after-tax" dollars through a gift. The annual gift tax exclusion (an exclusion for gifts of $10,000 or less per year per donee) does not apply to gifts of a future interest (such as a gift to a trust), so the so-called "Crummy" trust provisions must be properly applied to make the gift a "present" interest. Drafting such clauses requires expertise.

A grantor's use of irrevocable trusts to avoid taxation of income, and to provide for accumulation of income to provide for beneficiaries at a later date, has been limited under the current tax system. The Revenue Reconciliation Act (RRA) of 1993 has made trusts subject to faster tax rate escalation than individual taxpayers. For example, trusts are taxed at 39.6 percent on taxable income in excess of $7,650. For filers of joint returns, the 39.6 percent rate does not begin until taxable income is $256,500.

Ironically, the impact of RRA changes will not severely impact trusts whose grantors or beneficiaries are already in the 39.6 percent bracket; they will affect the smaller estates of middle and upper-middle income taxpayers, whose grantors and beneficiaries are in lower tax brackets.

To avoid being taxed at the higher rates, trust income can be reduced by increasing distributions to beneficiaries, reducing the amount of taxable income produced by the trust assets, or having the trust invest in assets that produce capital gain (maximum tax rate is only 28 percent) rather than ordinary income.

Since a trust is taxed as a separate entity on accumulated income, it is sometimes desirable to create as many trusts as possible for purposes of accumulating income at the lower tax brackets. However, two or more trusts will be treated as one trust if the trusts have substantially the same grantor and primary beneficiaries, and federal tax avoidance is the principal purpose of the trusts. Code §643(f).

Although limited in recent years, income splitting among family members through family trust arrangements remains a valid way of reducing overall family income tax. Although an assignment of income from one family member to another is not sufficient, an outright transfer of income-producing property can achieve income splitting. If the family member to be benefited lacks the ability to manage the assets, you can use a trust. If the beneficiary is a minor, you may consider the creation of a custodial account under the applicable state's Gifts to Minors Act or the Uniform Transfers to Minors Act.

The use of irrevocable trusts in sophisticated tax planning involves a multitude of complex tax rules. You should consult with a tax planning professional to obtain the optimal tax results.

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