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## What happens to my child's interest in my trust if they divorce?

Trusts are a common estate planning tool, especially when parents are trying to protect their assets and maximize what they are able to leave to their children and grandchildren. There are, however, different types of trust with different benefits. If you have a trust and then one of your children divorces, the type of trust, when it was set up, the goals of the trust, what the child is receiving now or may receive in the future, whether there are children involved in the divorce, and more details will come into question.

Family law attorneys know to look for trusts and ask the appropriate questions to ensure that trust assets are given proper consideration in a divorce case. In most cases, for example, your child's ex-spouse should be removed if named as a fiduciary of the trust. There may be other estate documents, in addition to the trust, that need to be changed, including General and Health Care Powers of Attorney, if your child's soon-to-be ex-spouse is named as a successor agent. When your child first starts going through a divorce, reach out to your attorney to discuss the consequences of the divorce on your child or grandchild's interest in the trust.

The other concern many parents have is the potential that their child and grandchildren face a divorce situation after they are gone. At this point, you would no longer be in a position to step in and change documents, but there may still be active trusts that are benefiting your children and grandchildren. Anticipating these situations when setting up the trust initially is something an experienced lawyer can help you do.

### Trust Basics

Trusts are legal entities created by the grantor through which the initial and successor trustees hold the right to manage the trust's assets for the benefit of the beneficiaries. Trusts can be established during your life (living trusts) or at your death (testamentary trusts) and provide details and guidance to the trustee on how it is to be managed.

The beneficiaries can include lifetime beneficiaries, who get the benefits of the trust during their lifetime, and at-death beneficiaries, who get the benefits at the death of the lifetime beneficiaries. Further, trusts can be revocable, meaning that they can be changed or terminated by the grantor after their creation, or irrevocable, meaning they cannot be changed once created or after a fixed event such as the death of one of the grantors of the trust. For example, a husband and wife may set up a trust with the survivor and their children named as the beneficiaries of the trust. During the lifetimes of the husband and wife, the terms of the trust typically recite that they may change the terms of the trust as they chose until one of them dies. The trust, therefore, is deemed revocable until one of them dies. After one of them dies, the trust becomes irrevocable, meaning the terms of the trust cannot then be changed.

Whether a trust is revocable or irrevocable is an important consideration in the context of a divorce. The beneficiary's interest in a revocable trust is not deemed to be an enforceable property interest for purposes of a divorce. That is because the grantors of the trust could change their minds about the trust, who the trust's beneficiaries are, and what they get. Therefore, a beneficiary's interest in a revocable trust is usually disregarded by the court during a divorce. But, there can be exceptional circumstances. Consider, for example, a non-married aunt who has created a revocable trust naming her nieces and nephews as the beneficiaries of her trust following her death. If the aunt is terminally ill, receiving hospice care, suffers from dementia, and no longer has the mental capacity required to make a legally effective change to the terms of the trust, then a very strong argument may be made that the

terms of the trust have become irrevocable.

A beneficiary's interest in an irrevocable trust is regarded as an enforceable property interest and that interest is taken into consideration by the divorce court. Some irrevocable trusts are designed to hold and accrue wealth until a date certain when the trust assets are disbursed to the beneficiaries. For example, a grandfather may set up a trust for his grandchild providing for a fractional share of the trust assets to be disbursed to each of the grandchildren as he or she reaches the age of 30 years. Each of the grandchildren acquired an enforceable property interest in a fractional share of the assets as of the date the irrevocable trust was created and funded. The divorce court may regard that fractional share as the grandchild's separate property and set it aside to her as her sole and separate property. However, if the value of her fractional share of the assets has appreciated in value during the grandchild's marriage, then that appreciation in value may be regarded by the divorce court as marital property subject to division.

If the trust assets are also generating income and the trust terms provide that the trustee must make non-discretionary disbursements of the income to the beneficiaries, then the income received by the grandchild during her marriage may also be regarded by the divorce court as marital property subject to division. But, it depends. In one case, the daughter was receiving non-discretionary income from an irrevocable trust, but it was the daughter's children who were named as the beneficiaries of the trust assets. There, it was the grandchildren who had the enforceable property interest in the trust assets. The court in that case concluded the income being received by their mother was a gift and, therefore, her separate property. Where the trustee has discretion to decide whether to disburse income from even an irrevocable trust, a divorce court is likely to regard that income as a gift and treat it as the recipient's sole and separate property.

Valuing a beneficiary's interest in an irrevocable trust for purposes of a divorce action can be complex. A common type of estate planning involves a husband and wife setting up a trust naming their children as the beneficiaries. After one of the grantors dies the trust becomes irrevocable because of the death. Typically, such a trust will provide that the surviving spouse is entitled to consume the assets of the trust until his or her death after which event the children then get the remainder of the trust assets. This is commonly referred to as the children's "remainder interest." In some cases, the value of the trust assets is depleted by the surviving parent faster than the assets are able to grow in value. So, expert testimony from an actuary may be required to quantify the value of the beneficiary's remainder interest.

The effect and purpose of the trust are also important considerations. The way the trust is drafted and the specific language used can affect the ability of future ex-spouses of the beneficiaries to reach into the value of the trust. Any trust you set up should be drafted by an experienced estate attorney who understands your family dynamic and can help you think through what you would want to occur in such future situations.

If you'd like help putting your assets in a trust to best preserve the wealth you've built for your children and grandchildren, reach out to [Jersey Green](#) to understand the issues that are at the intersection of divorce and wealth. He's seen, and litigated, the kinds of problems that arise in divorce cases when trusts are involved. He is the "*business owner's attorney for divorce and business-related litigation*<sup>®</sup>". Call 303-296-4440 to set up a time to discuss your questions or to make an appointment.

Contact Us Today!

## Attorney Spotlight

***The business owner's attorney for divorce and business-related litigation.*<sup>®</sup>**

Trial lawyer Jersey Green has practiced law for more than three and half decades and is listed in *The Best Lawyers in America*<sup>®</sup>.

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