

A Study on Revocable Trusts and Custodial Trusts in the U.S.: Focused on Incapacity Planning

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Abstract

With the population aging and the weakening of family solidarity, it has become more difficult for the seniors in Taiwan to receive property manage and physical care from their families. Sometimes they need to purchase service from the market. Responding to these needs, trust companies have designed products such as “trust for elder care”, but due to the current framework of Trust Law and the Civil Code, these products are not as much popular as expected. In order to find a solution, this article researched revocable trusts and custodial trusts, both recognized to be a useful device for incapacity planning in the U.S. The original function of revocable trusts was probate avoidance but recently it has been pointed out that a revocable trust is commonly used as a conservatorship substitute in planning for incapacity. While the trustee holds legal title to the trust property, the settlor has the power to revoke the trust and direct the trustee. That is to say, the trust property is under the settlor's continued dominion and control. Upon the settlor's incapacity the trustee can assume fiduciary control of the trust property. In terms of custodial trusts, it is a statutory irrevocable trust where the settlor/transferor often names himself/herself as beneficiary. A custodial trust is a common administrative trust under which the trustee has the rights and powers over custodial trust property. Nevertheless, the right to direct the trustee and terminate the trust is retained to the beneficiary if the beneficiary is not incapacitated. Hence, it can accommodate the senior's wish to keep control of the property while capacitated and provide management of assets in the event of incapacity. Furthermore, guardianship/conservatorship is

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undoubtedly a last resort while there is no other less restrictive alternative. In the event that the elder is under guardianship or has a power of attorney, the power of the guardian or agent to amend or revoke a trust is limited by statute. From the experience of the American trust law, Taiwan needs to consider abandoning the requirement of the transfer of property in order to create a trust, which makes the elderly settlor reluctant to use a trust as an estate planning tool. Secondly, it is necessary to restrict the guardian's power to amend or terminate the trust set up by the protected person. More specifically, the modification of the trust done by the guardian should be reviewed and approved by the court. As a result, it will increase the credibility and stability of the trust and empower the autonomy of the protected person.

Keywords: aged society, guardianship/conservatorship, power of attorney, revocable trust, custodial trust, conservatorship substitute, fiduciary