

Trusts have long been used to transfer wealth from one generation to the next. While there are many benefits (privacy, control, asset protection, tax savings), trusts can also create problems and regrets if not carefully planned in advance, especially irrevocable trusts whose terms are difficult to change.

What key things should people consider *before* an attorney starts drafting the trust document? For answers and insights, we sat down with Brandon Smith, JD, LL.M Taxation, the experts' expert at LNW on all things trusts and estate planning. As LNW's Director of Estate Planning, Brandon is sought out for his expertise, curiosity and genuine interest in finding wealth transfer solutions that balance needs, wants and aspirations, often over many generations.

Q&A with Brandon Smith, LNW Director of Estate Planning

Brandon, revocable trusts are widely used these days. When should an irrevocable trust be considered?

Brandon: For people and families with significant multigenerational wealth, revocable and irrevocable trusts work in tandem to achieve pretty much everything one would want to do with their assets over time, efficiently and effectively.

One approach is to use trusts sequentially: revocable trust(s) are in place during the grantor's lifetime, and they specify that certain assets will flow into an irrevocable trust(s) once the grantor passes away or becomes incapacitated. This way, the flexibility and control provided by revocable trusts is combined with the estate tax savings, consistent administration and asset protection that irrevocable trusts can provide.

Regardless of how and when an irrevocable trust is used (during the lifetime of the grantor or upon passing), thoughtful planning is required for it to work well over time.

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Revocable Vs. Irrevocable Trusts

| Attributes | Revocable or "Living" Trust* | Irrevocable Trust |
|--|------------------------------|--|
| Assets out of grantor's taxable estate | No | Yes (in most cases) |
| Grantor controls assets | Yes | No (however, the grantor sets the rules of the trust) |
| Terms of trust can be changed | Yes, easily | Maybe, but with difficulty |
| Assets protected from creditors | No (during grantor's life) | Yes (if structured appropriately in line with state law) |
| Asset ownership private | Yes | Yes, with potential to keep private from trust beneficiaries** |

*Revocable trusts are in effect only during the lifetime of the grantor. **Depending on state law where trust is based.



What is the most important thing people should keep in mind when considering an irrevocable trust?

Brandon: It's really important up front to think of an irrevocable trust in terms of making a permanent, significant gift. When you make a gift, you know it is out of your control once given. This may sound obvious, but it is difficult for most people to fully appreciate the longevity of an irrevocable trust. Through an irrevocable trust you are putting in place something of significance that will outlive you and pass on to future generations.

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An irrevocable trust is an entity separate from the individual who set it up, the grantor. There are different varieties of irrevocable trusts with varying degrees of entanglement with a grantor, but an irrevocable trust is at its core a separate entity. The trustee (and if applicable the co-trustee) make the decisions about administration, asset management and trust distributions based on the terms specified within the trust.

What are the next steps?

Brandon: Once you settle on the trust mechanism, you need to focus on the reasons for this trust: Is the purpose to lower estate taxes? Is it to transfer appreciation? Is it to protect transferred assets from lawsuits and creditors? To support future generations of the family in a private and lasting way? To define your legacy? To ensure the orderly disposition of assets at death? It is often for a mix of these and other reasons.

Perhaps most important is this question: To whom and for what are you giving this gift? Because it is a gift, there are going to be recipients, aka trust beneficiaries. Without beneficiaries, an irrevocable trust would not be legally valid.

What if estate tax savings is truly your number one goal?

Brandon: I would say it is not enough of a purpose to say you want to avoid estate taxes. Yes, that can be accomplished by giving title to valuable assets to an irrevocable trust managed by a trustee. But remember that assets transferred to an irrevocable trust are gifts.

For whom is this gift and how/when do you want the recipient(s) to interact with it? Trusts are taxed at the highest rate of income tax at a much lower threshold than individuals. These taxes are applied on any income or capital gains the trust retains and does not distribute to the beneficiaries. So by making distributions a trust may actually be subject to lower income taxes and the trust vehicle may last longer.

If you do not take the time to explore and answer the beneficiary side of the equation, regret and frustration can set in down the road, turning the trust into a trap for your family instead of a financial backstop or springboard for the people and organizations you want to support.

Can you give us an example of regrets?

Brandon: Back in 2012, it was common knowledge that people with significant wealth were rushing to set up irrevocable trusts in anticipation of a lower estate tax exemption. Assets were moved into one or more irrevocable trusts to shield them from potential estate taxes. What actually happened is the opposite: the exemption stayed the same and increased dramatically in 2017 (Tax Cuts & Jobs Act).



The main reason some people set up these trusts in 2012 no longer existed. And I would bet some people are frustrated by that, having lost control of a fair amount of assets or designated terms and beneficiaries they no longer want. But others are probably OK and even happy with their decisions.

Who are the happy people?

Brandon: I would venture to say they are the people who carefully answered some really important questions up front, with the help of analysts and trust planning experts, such as those we have here at LNW:

- What assets can I transfer and still live the way I want?
- Will this transfer interfere with my intended lifestyle?
- Am I comfortable with how and when these assets are going to be distributed to the beneficiaries?
- Are the beneficiaries the right people to benefit?
- Do I want to build in flexibility for my beneficiaries? Am I comfortable with the level of flexibility I've built into the document?
- Does my trustee selection give me enough confidence to relinquish control?

Interestingly, there was concern last year that the federal estate tax exemption would be allowed to expire and much lower levels would prevail. Again, the opposite just happened. The exemption, which in 2025 is \$13.99 million per person, was made permanent at a level of \$15 million as of 2026 (per the OBBB Act passed July 4, 2025 and will rise with inflation). If you were ready to set up an irrevocable trust this year having considered all aspects of doing so carefully, then it may make sense to proceed. Why? Because you have a purpose for your forever gift beyond estate tax savings and the knowledge that appreciation is powerful only through the opportunity and passage of time.

When it comes to beneficiaries, what are the most important considerations?

Brandon: Each situation is unique, but there are some fundamental issues that need to be addressed before proceeding with setting up an irrevocable trust. [See box on next page.] The answers to these questions sometimes are not obvious or can cause family strife. This is where we can help as an objective third party that knows the family concerns and issues and can advocate to balance the needs, wants and aspirations of everyone involved.

These are just some of the considerations and each situation is different. Answering these questions can help determine which assets transfer to the trust and also in which jurisdiction it is best to locate the trust. LNW operates trust companies in two different states [Washington State and South Dakota] to offer more options when it comes to trust longevity, asset protection, privacy and taxes.

Other Ways to Reduce Size of Taxable Estate

Direct gifts to nonprofits or people can also be a good way to get assets out of a taxable estate, including:

- Funding a new foundation or creating a Donor Advised Fund that family members can be involved with to create a legacy around shared values;
- Making a major gift to a nonprofit, such as a college endowment or for a new Chair;
- Paying for things that do not incur gift taxes – annual exclusion gifts of \$19,000 or less (as of 2025), direct payment of college or graduate school tuition or direct payment of medical expenses, including health insurance premiums.

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How do you come up with the terms or restrictions for the trust starting from a blank slate?

Brandon: The number of strings attached varies but there have to be some guidelines for the trustee to follow in making distributions to the beneficiaries. Most often those guidelines are quite broad and tax-related. One often-used standard for making distributions to beneficiaries is known as the ascertainable standard, HEMS (Health, Education, Maintenance and Support), which means the trust assets are to be used for those purposes. The ascertainable standard is provided by the IRS, which generally means the lifestyle a beneficiary has become accustomed to as of the trust's date of creation, with some variance in the definitions of maintenance and support depending on the applicable state and the grantor's articulated intent for the trust.

If an independent trustee such as LNW is administering the trust, the standard is often more generous, such as "in the best interests of the beneficiary." Keep in mind that trusts are legal documents, so the wording can be rather challenging, including on the process for distributions. That is why when setting up a trust, some people choose to include a "Trust Policy Statement" or what is also known as a "Grantor Intent letter." These letters spell out in plain English what the trust terms are and can be very useful for everyone involved.

For instance, say you want to provide your descendants with funding for health, education, maintenance and support, but you do not want any of them to be students for life. You can insert a statement into the Grantor Intent Letter to this effect. While such letters are not usually legally binding, they can allow the people administering the trust to view things from your point of view when making distribution decisions.

I would say a critical consideration, perhaps the most critical, is who will be trustee, because that entity will ultimately determine how well the trust operates.

But can't you just change trustees?

Brandon: Changing trustees can be easy, but at some point you will not be around to switch trustees, so it is worth the effort to make the best possible choice from the start. The trustee is the person or entity interacting with the trust beneficiaries, administering the trust and making sure the trust is functioning as you intend.

This is why as corporate trustee, the LNW trust companies are so focused on advance planning. As we do that, we develop relationships with the people and families funding the trusts so we can then step into the grantor's shoes, administer the trust and work with the beneficiaries at their comfort level. Also, the LNW trust companies can work with the various fiduciaries that can be associated with a trust, from designated co-trustees to "trust protectors" designated to preserve the trust from changes in tax and estate law.

Trust Beneficiary Issues & Concerns

- Who are the intended beneficiaries? What happens when the primary beneficiary has passed?
- Do you want to give preference to certain beneficiaries over others in terms of distributions?
- Do you have concerns about keeping the assets available only for direct family members (not spouses, ex-spouses etc.)? Should there be limits on non-family members and their ability to receive assets (income only, etc.)? What about limits on family members?
- What is the structure of the distributions? Does a steady level of annual income get paid out (a unitrust) or are the distributions for a specified purpose such as a health, education, maintenance and support (HEMS) trust? Or do you want to give an independent trustee more general guidelines in making distributions?
- How much discretion do you want the trustee to have in taking taxes into consideration when making distributions?
- When do you want the beneficiaries to find out about the trust? Who should receive information about the trust until then?
- How long do you want the trust to last?



What is the most important thing people should keep in mind during trust planning?

Brandon: That this is a process, and it's important to take all the time required to get it right. Also, realize that each trust created is unique in what assets it holds, the people it serves and goals it supports. The good news is that you get to set up the rules; the challenge is that you have to decide what those rules are and their application.

The level of customization means it is possible to attain what you want to happen with your assets, when and how by being specific about your intent. At LNW, we are here to help you make the best possible choices when it comes to the type of trust(s), its terms and how it can best support the people and/or organizations you love, often over many generations.



ABOUT THE AUTHOR



Brandon Smith, JD, LL.M. Taxation, serves as a subject matter expert for LNW clients, wealth managers and analysts, helping to identify appropriate tax, trust and estate planning strategies for the unique circumstance of individuals and families with multigenerational wealth. He also works closely with the LNW trust services team on matters pertaining to the firm's trust companies in Washington State and South Dakota and is a member of the South Dakota entity's Board of Directors. An important aspect of Brandon's work is monitoring developments in tax and financial law at the federal and state levels to provide LNW colleagues and clients with proactive analysis and insights.

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