The Inheritor's Trust

The Art of Inheriting Property

Introduction

Harvard Law School Professor A. James Casner illustrated the power of proper trust planning when he told Congress that "in fact, we haven't got an estate tax, what we have is you pay an estate tax if you want to; if you don't want to, you don't have to."[1]

Our mission is to show the immense value of structuring gifts and inheritances in trust. This is true even when the transfer is rather small and seems to not deserve the costs and complexities of a trust.

What is an "Inheritor's Trust"?

Clients should not only *leave* property in trust, but also *receive* property in trust. The ideal trust is drafted from the viewpoint of the inheritor (or beneficiary), referred to as the "Inheritor's Trust".

Holding assets in a trust controlled by the inheritor greatly improves their value.[2] The inheritor will achieve tax savings and creditor protections that they otherwise could not.

Put in Trust, Keep in Trust

No other technique offers as much protection from the IRS and other would be claimants as a trust set up and funded by someone other than the inheritor. This is true even though the inheritor has essentially full control over and beneficial enjoyment of the trust property.

Since wealth received and retained in trust is far superior to wealth received either outright or from trust distributions, we wonder why property is so often transferred outright. Further, we wonder why the trust is often created with a mandatory pay-out at specified ages.

For those clients who wish to preserve wealth for the family unit (or for charity) it is difficult to justify an estate plan that does not follow a "put it in trust, and keep it in trust" design.

Protection from Predators

Despite the large tax bite of the wealth transfer tax system, our increasingly litigious society, and the fact that more marriages end in divorce than death, many wealthy families do not incorporate sufficient protective measures in their estate planning. The primary failure is the inadequate use of trusts.

It is reasonable to assume that most clients faced with the simple question "do you desire that your children's and grandchildren's inherited wealth be sheltered from loss to the IRS, or other creditors, including a disgruntled spouse?" would answer *yes*.

Even if we assume that the family unit will not do anything to cause liability, we know that there is a reprehensible segment of our population, including ethically challenged lawyers, who will take advantage of the judicial system for personal gain. Why expose the wealth of clients to the wrongful decision of a jury?[3]

Structure

The design of the Inheritor's Trust will generally include the following attributes:

1. Perpetual: The trust will continue for as long as the law permits.[4]
2. Separate Income Tax: The trust would provide for separate income tax payers which are subject to the general trust income tax rules. The trust is taxed as a separate entity.
3. Full Control: In most instances, the trust vehicle is desirable to the inheritor only if they are in control of the trust.
4. Special Power of Appointment (Re-Write Power): The inheritor would be given the power to re-write the trust.[5] The virtually unrestricted ability to amend the trust adds flexibility to adapt to changes in the law, family circumstances, the attitude of the primary inheritor, etc. This is at least equal to outright ownership, and in many instances it gives the trust more flexibility than outright ownership.

Why this Works

An often overlooked point is that the planning must be done in advance. Once a gift or inheritance is received by the inheritor, it is too late to maximize the trust protections. The key here is that the trust protections are only available if the trust is created and funded by someone other than the inheritor and the assets remain in the trust.

Conclusion: The Inheritor's Trust – Centerpiece of the 21st Century Estate Planner's Tool Box

The Inheritor's Trust is a very flexible concept that can assume an unlimited number of forms. It can achieve:

- estate tax savings
- generation skipping tax savings
- federal income tax savings
- state income tax savings
- capital gains tax savings, or stepped up to fair market value without gain recognition at all
- creditor/predator protection

The Inheritor's Trust does all this and more, while the inheritor retains virtually total control. It provides flexibility in the face of changing tax laws, changing family structures, a more hostile climate for litigation victims, and a rapidly changing investment climate.

The Inheritor's Trust is a concept particularly well suited for the 21st Century estate plan.

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References

1. A. James Casner (Harvard Law Professor) *Hearings Before the House of Ways and Means Comm.,* 94th Cong., 2nd Sess. Pt. 2 1335 (1976)
2. Richard A. Oshins, "Advanced Planning Strategies Using Grantor Trusts", NYU 60th Inst. on Fed. Tax, 2002, p. 2; R.A. Oshins and S.J. Oshins, Protecting & Preserving Wealth Into the Next Millennium, Trusts and Estates, September/October 1998
   For a complete unedited 29 page legal paper, click here
3. Keydel, "Trustee Selection, Succession, and Removal: Way to Blend Expertise With Family Control," 23 *U. Miami Inst. on Est. Plan.*, Ch. 4 at ¶ 409.1 (1989).
4. R. Oshins and J. Kasner, "The Dynastic Trust Under the Relief Act of 2001", Tax Notes Oct. 8, 2001
5. One exception, beyond the scope of this article is the Delaware Tax Trap whereby an exercise in trust may not extend the duration of the trust beyond the original perpetuity period. IRC §§2041(a)(3) and 2514(d).