

Helping Trustees Make Good Decisions

In last month's article about the benefits of keeping property in trust, I noted that some people avoid this technique for two reasons. There is no mechanism for making good distribution decisions and there are no qualified people to make the decisions.

Decision Making Mechanism

People avoid controlling property beyond their lifetimes because they do not understand how and under what circumstances distributions will be made. An excellent means by which to provide for flexible control beyond death is to permit trustees to make "appropriate" distributions to beneficiaries. But, who determines what is "appropriate"? The creators of the trusts should be the ones to make the decisions, but often they are not alive, so the trustees must decide. This leads to the obvious questions of how do trustees decide what is appropriate.

Because the trust creator is often not available to make a decision, a written understanding of the trust creator's objectives is necessary. In my practice, I have clients attempt to define an "appropriate" distribution and, as importantly, an "inappropriate" distribution. We discuss how the definition changes based on the beneficiary and the circumstances. We certainly do not cover every situation, but we cover enough different circumstances to document the desires of the trust creator. This written understanding of the creator's intent stays with the trust file to provide a good mechanism for future decisions.

Trustees

An additional reason for poor control from the grave is the trustees themselves. In some cases, trust creators exclusively name family members as trustees. The problem with this approach, in addition to the usual unfamiliarity of the family member trustees with fiduciary laws, investment alternatives and tax laws, is that the family member trustees are usually either too liberal in making distribution decisions out of love, affection or fear of the beneficiary or they are too conservative in making distribution decisions out of a desire to perpetuate their responsibilities. When a trust creator names solely a corporate trustee, decisions are often poorly made as well. Trust officers can change through bank mergers leaving the beneficiaries to request a distribution from someone who never met the trust creator and knows only the terms of the trust.

I often recommend using the combination of a family member trustee and a professional trustee. The family member trustee provides the lifeline of information about the beneficiaries and the professional can deal with the legal, tax and investment issues. This combination of trustees provides the family member trustee relief from the pressure to make or deny distribution requests and provides the professional trustee an understanding of the personal background and circumstances surrounding the distribution request.

Good Mechanism and Good Trustees

When a family member and a professional trustee, with their diverse personal and professional knowledge, consider the documented objectives of the creator of the trust, they almost always make the “right” distribution decision. Control from the grave is appropriate and beneficial, just be careful to select good trustees and provide them with a good mechanism with which to make decisions. Before creating a trust or otherwise providing for the disposition of your property, I suggest that you consult with an estate planning attorney.

The author of this article, Joseph G. Imbriani, Esq., CPA/PFS, practices in the areas of taxation and estate planning and is a partner of the Boston law firm of Taylor, Ganson & Perrin, LLP.