



BUT IT'S GOING TO BE IRREVOCABLE:

DESIGNING NEW IRREVOCABLE TRUSTS TO ACHIEVE FLEXIBILITY IN LIGHT OF AN UNCERTAIN TAX PLANNING ENVIRONMENT

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The Tax Cuts and Jobs Act of 2017 (the “2017 Act”) increased the exemptions for federal estate tax, gift tax and generation-skipping (GST) tax to \$11,180,000 per person for 2018, indexed for inflation. For 2025 this means that the exemptions are \$13,990,000 per person. The tax rates on estates, gifts, and GST transfers above the exemption is forty percent (40%).

The 2017 Act contains a sunset provision, which is scheduled to revert to the 2017 amounts effective January 1, 2026. Clients are presented with an estate planning opportunity to transfer significant amounts of wealth out of their estate without the imposition of transfer taxes. It is uncertain if President Trump and Congress will vote to extend all or some part of the 2017 Act and if so, for how long such extension will apply.

We will discuss Irrevocable Trust planning to address the income taxation of Irrevocable Trust including Spendthrift/Dynasty Trusts to take advantage of the 2017 Act but with an eye toward flexibility to address the uncertainty ahead.

Disclaimer - The ideas set forth in these materials are for use in continuing education programing for participating professionals to facilitate discussion and consideration in using Nevada law in estate planning matters; but are not intended to provide legal advice to any person nor to create an attorney/client relationship between the authors/presenters. Planning professionals must consider the individual client circumstances and ascertain application to their own practices and clients; and make their own conclusions in advising their respective clients.

A silhouette of a family consisting of a man, a woman, and three children, walking away from the viewer. The man is on the left, holding the hand of a small child. The woman is in the center, holding the hand of another small child. A taller child is on the right. The background is a light blue gradient with faint circuit-like patterns in the corners.

WHAT IS A DYNASTY TRUST?

- Overview:

- A Dynasty Trust perpetuates from one generation to the next, for their lifetime

- Statutory Recognition

- True Perpetual Trusts and Extension of Common Law Rule Against Perpetuities
- Use of Limited Powers of Appointment/Trust Protectors
 - The use of limited testamentary powers of appointment creates flexibility; along with appointment of Trust Protectors

HOW IS INCOME EARNED IN A DYNASTY TRUST TAXED?

GRANTOR TRUST VS. NON-GRANTOR TRUST



ADVANTAGES TO STRUCTURING A DYNASTY TRUST AS A GRANTOR TRUST

- Revenue Ruling 2004-64 (“2004 Ruling”)

- Taxed as a Grantor Trust
- Not treated as taxable gift
- Powerful tool in taxable estates



ADVANTAGES TO STRUCTURING A DYNASTY TRUST AS A NON-GRANTOR TRUST

- Grantor Not Responsible for Income Tax Liability
 - Trust is responsible for income tax liability
 - Can avoid state income tax
 - QSBS Stacking
 - C corporations
 - Exclusion of capital gains



FLEXIBLE PROVISIONS IN GRANTOR TRUSTS

- “True” Grantor Trusts
- Intentionally Defective Grantor Trusts
- Sample Language
 - Grantor Trust Status
 - Power to Substitute Property
 - Trust Protector’s Ability to Terminate Powers
 - Tax Reimbursement Provisions



FLEXIBLE PROVISIONS IN NON-GRANTOR TRUSTS

- Retention of Beneficial Interests
- Avoiding Grantor Trust Powers
- Sample Language
 - Non-Grantor Trust for tax purposes
 - Carrying out Grantor's Intent



FLEXIBLE PROVISIONS TO INCLUDE IN DYNASTY TRUSTS

- Who Should be the Beneficiaries? (Grantor, Spouse, Children, Charity?)
- Determination of how Trust assets will be held and administered
 - Distribution standards
 - Statement of Intent / Letter of Wishes
 - Decanting Authority or Restrictions
 - Limited Amendment Power
 - Broad Amendment Power
 - Transfer of Situs and Change of Governing Law
 - Trust Protectors and Powers of Appointment Holders
 - Substitution Powers, Lending Powers, & Tax Reimbursement



(IN)COMPLETE GIFT ASSET PROTECTION TRUSTS

- Self-Settled Asset Protection Trusts
 - Grantor's Retention of Control - Is the transfer a completed gift?
 - Revenue Ruling 76-103
 - Revenue Ruling 77-378
- Is it includable in the Grantor's Estate?
- Grantor's Retained Beneficial Interest
 - Section 2036(a)(1)
 - 2004 Ruling
- Private Letter Rulings
 - 1998 PLR
 - 2009 PLR



(IN)COMPLETE GIFT ASSET PROTECTION TRUSTS

- Creditor Exceptions – State Laws Vary
- Valid Formation and Funding Issues
 - *Ernest Bock Case*
- Acts of Independent Significance
 - *Estate of Tully*
 - *Ellis v. Commissioner*
 - Revenue Ruling 80-255
- Importance of no implied understanding regarding distributions to grantor



USE OF QUIET TRUST LANGUAGE

- Uniform Trust Code
 - Default Requirements
 - Limiting Default Requirements
- Restatement (Third) of Trusts
 - Default Requirements
 - Limiting Default Requirements
- Delaware Disclosure Requirements
 - *McNeil Case*
 - Delaware Statute
- Nevada Disclosure Requirements
 - *Nevada Statutes*
 - *In Re 23 Partners Case*



DRAFTING AND ADMINISTERING SILENT TRUSTS

- Careful drafting of Trust For Silence
 - Crummey Powers – Crummey Notices
 - Trustee Discretion to Withhold Accounting
 - Trustee Discretion re Release of Trust Instrument
 - Trustee Discretion to Withhold Information
- Issues regardless of careful drafting
 - Public Policy Concerns
 - Distributions and Tax Reporting; K-1s
- Beneficiary Representatives – Virtual Rep, Designated Rep, Confidential Reviewer



WE ARE PRACTICING IN A TIME
WHEN . . .

