ACC 2021 Trusts & Estates Series

Planning Ahead for You and Your Family

Management, Alignment and Stewardship of Your Assets through Trusts

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Management, Alignment and Stewardship of Your Assets through Trusts

Second of Three Webinars

Presenters

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Nutter at a Glance

- 150 lawyers; headquartered in Boston and an office in Hyannis
- 26 Private Client attorneys, one of the largest groups in Massachusetts
- Our private clients are individuals and families, entrepreneurs, private business owners, and executives
- Our Nonprofit and Social Impact group advises individuals, private foundations, charitable trusts, other nonprofit organizations, and businesses
- Nutter Investment Advisors (NIA) is a registered investment adviser that is wholly-owned by the firm and may provide investment advisory services to trustees, foundations and other clients

Our Agenda

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1. What is a trust?
2. What is the difference between a donor, trustee and beneficiary?
3. Why use a trust and what are the benefits?
4. What is needed to create a trust?
5. What is a typical trust structure?
6. How do you fund a trust?
7. What does a trustee do?

What is a Trust?

- A trust is an agreement creating a fiduciary relationship between the creator of the trust (the donor) and the trustee.
  - A fiduciary is a person or organization that acts in the best interests of another person.
- The donor agrees to give the trustee the right to hold title to the donor’s property on specified terms for the benefit of the beneficiary.
- The trustee agrees to accept title to the donor’s property and administer the property for the beneficiary on those specified terms.

Important Parties

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- **Donor:** The person who creates the trust (a/k/a “settlor”, “trustor” or “grantor”)
- **Trustee:** The person or entity who holds the trust property in a fiduciary capacity for the benefit of one or more beneficiaries, is the legal owner of the trust property.
- **Beneficiary:** The person on whose behalf the trustee holds and administers the trust property and is the equitable owner of the trust property.
- There can be multiple donors, trustees and beneficiaries.
- Parties can wear multiple “hats.”

Division of Ownership

- A fundamental concept of trusts is the bifurcation of ownership into **legal title** and **equitable title**.
- The trustee holds legal title to the trust property and has full ownership rights, including possession, use, acquisition, conveyance, etc. The trustee has the fiduciary duty to manage the trust in the interest of the beneficiary.
- The beneficiary holds equitable title to the trust property and has the right to receive and enjoy the benefits of the property.
- If there is merger of legal and equitable title in the same person, the trust terminates.

Revocable Versus Irrevocable

- What is the difference between a **revocable trust** and **irrevocable trust**?
- A revocable trust can be amended, modified or revoked by the donor at any time while living and not incapacitated.
- An irrevocable trust generally cannot be amended or revoked after the donor's death.
- Under Massachusetts law, a trust is presumed to be revocable unless it expressly states that it is irrevocable.

Other Trust Terms

- Living trust or inter vivos trust
  - Established during the donor's lifetime
  - Can be revocable or irrevocable
- Testamentary trust
  - Established under will (a/k/a "trust under will")
  - Created on the testator's death
- Nominee or realty trust
  - Recognized in Massachusetts as a vehicle to hold legal title to real estate or other assets
  - Trustees can act only with the express authority of the beneficiaries
  - Preserves confidentiality and ease of transfers

Advantages of Trusts (Part 1)

- Probate avoidance
  - Saves time and money
- Planning for incapacity of donor
  - More efficient than using a power of attorney
  - May avoid conservatorship
- Privacy
  - Probate requires docketing the will with the probate court
- Preserving wealth and maintaining control over assets
  - Donor may place restrictions and limits on how, why and for whom the trust property may be used
  - Protections against spendthrifts

Advantages of Trusts (Part 2)

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- Tax planning
  - May include provisions that allow for deferral and minimization of transfer taxes
  - Facilitates tax efficient transfers between generations
  - Charitable provisions
- Creditor protection
  - May protect assets from beneficiaries' creditors, including ex-spouses and lawsuits
- Planning for minors or disabled beneficiaries
  - For minors, an alternative to distributing assets outright upon reaching age 18
  - May avoid conservatorship
  - May preserve a disabled beneficiary's eligibility for government benefits

Creating a Trust: Beneficiaries and Trustees

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- Naming (or excluding) beneficiaries
  - Donor is beneficiary of a revocable trust during lifetime
  - Donor's spouse, children, further descendants, extended family members, etc.
  - Charitable entities (e.g., public charities, donor advised fund, private foundation, charitable trusts)
- Choosing the trustee(s)
  - Individual or entity (e.g., trust company); professional or non-professional
  - Successor trustees
  - Can a beneficiary be a trustee?
  - Why is an independent or disinterested trustee necessary?

Creating a Trust: Dispositive Provisions

- What property will eventually be used to fund the trust?
  - Real estate versus tangible property
  - Intangible property (e.g., liquid assets, intellectual property)
  - Retirement accounts
- Determining how and when the beneficiaries should receive the property
  - Distributions outright or retained in further trust
  - Distributions in the independent trustee's broad discretion or for a specific purpose (e.g., health, education, maintenance and support)
  - Dynasty trust

Example of Typical Trust Structure

DONOR'S LIFETIME

Donor's Death

SURVIVING SPOUSE'S LIFETIME

Death of Spouse

Revocable Trust

- Trustees: Donor and spouse
- Donor can amend/terminate trust
- Donor has unlimited control over trust assets

Credit Shelter/Family Trust

- Trustees: Spouse and co-trustee
- Beneficiaries: Spouse and descendants
- Discretionary distributions to beneficiaries

Marital Trust

- Trustees: Spouse and co-trustee
- Beneficiary: Spouse
- Spouse must receive income and may receive principal

Common Trust for all Children

- Independent trustee
- Beneficiaries: Until youngest child reaches certain age, all property held for all children

Separate Trusts for Children

- Trustee: Each child and co-trustee
- Beneficiaries: Each child and his/her descendants

Funding a Trust During Lifetime

1. How does one fund a trust during lifetime?
2. What property should be used?
   1) Real estate
   2) Investment or bank accounts
   3) Other property
3. Why would one fund a trust?
   1) Probate avoidance
   2) Incapacity planning
   3) Anonymity

Funding a Trust at Death

1. Pour-over will
   1) Directs all or some portion of probate property to the trust at death
   2) Example: "The residue of my estate shall be paid to my trust."
2. Beneficiary Designations
   1) Retirement accounts
   2) Life insurance policies
   3) "Transfer on Death" (TOD) designations

Role of Trustee

- Accept appointment as trustee
- Notify beneficiaries about the trust
- Deal with property as provided in the trust
  - Divide property into a marital trust and family trust
  - Distribute property outright to beneficiaries or hold in continuing trust
- Invest trust assets
- Exercise discretion in making appropriate distributions
- Provide account statements to beneficiaries
- File annual tax returns
- Stay informed as to beneficiaries

Webinars

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Upcoming:

"Tax Planning to Preserve and Enhance Long-Term Wealth"

Wednesday, September 22, 12-1 PM

Past:

"Why You Need an Estate Plan and Steps to Getting the Right One in Place"

Recording Available on the Nutter Website

THANK YOU

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