

Presenting a live 90-minute webinar with interactive Q&A

Divorce and Trust Assets: Support and Property Settlement Considerations

Identifying and Discovering Trusts, Classifying Trust Assets as Marital Property, and Valuing the Beneficiary's Interest

TUESDAY, JUNE 19, 2012

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

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DIVORCE AND TRUST ASSETS:

SUPPORT AND PROPERTY SETTLEMENT CONSIDERATIONS

Speakers:

Richard S. Chisholm, Esq.

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Camellia Saunders, Esq.

WHAT WE WILL COVER:

- ① Introduction to Trusts and Types of Trusts
- ② Discovery Trust Assets
- ③ Classifying the Trust Interest as Marital Property
- ④ Valuation of Trusts
- ⑤ Practice Tips: Ways to Reach Trust Assets or Protect Beneficiary's Assets
- ⑥ Question & Answer Session

INTRODUCTION TO TRUSTS AND TYPES OF TRUSTS

Richard S. Chisholm, Esq.

INTRODUCTION TO TRUSTS: WHAT IS A TRUST?

- ⊙ A legal contract formed by two parties for the benefit of a third party.
- ⊙ A Trust is a legal arrangement where one person (the “trustee”) holds assets for the benefit of another (the “beneficiary”). The person creating this arrangement is called the “grantor.” The grantor and the trustee enter into a contract referred to as a “trust agreement,” which describes the duties of the trustee, identifies the beneficiaries of the trust, and instructs the trustee how to use the trust assets for the benefit of the beneficiaries.

INTRODUCTION TO TRUSTS: KEY CHARACTERISTICS OF TRUSTS

- ⊙ Trusts may be “revocable” or “irrevocable
- ⊙ Trusts may be established during the grantor’s lifetime (“inter vivos”) or at the grantor’s death (“testamentary”)
- ⊙ Income earned by a trust may be taxed to the grantor (a “grantor trust”) or be a separate taxpaying entity (which will actually be a pass-through entity if distributions are made to beneficiaries)

INTRODUCTION TO TRUSTS: THREE KEY PARTICIPANTS

⊙ Grantor

- ⊙ Typically, although not always, controls the drafting of the trust agreement
- ⊙ Contributes assets to the trust – although there can be multiple grantors contributing property to a trust, either at the same or different times

⊙ Trustee

- ⊙ Enters into the written contract with the Grantor (the “Trust Agreement”) and is identified therein
- ⊙ Is the legal titleholder to the trust’s assets and therefore has the authority to invest and otherwise manage those assets, including making (or deciding not to make) distributions to the beneficiaries.
- ⊙ There may be multiple trustees serving at the same time (i.e. “co-trustees”)
 - Co-Trustees may be required to act unanimously or by a majority on all trust matters
 - Alternatively some Co-Trustees may have authority for certain tasks (such as making discretionary decisions) whereas other Co-Trustees are authorized to make investment decisions only

INTRODUCTION TO TRUSTS: THREE KEY PARTICIPANTS

⊙ Beneficiary(ies)

- ⊙ Persons identified in the Trust Agreement as being eligible to receive distributions of income and/or principal under stated circumstances/conditions.
- ⊙ Although beneficiaries are usually persons who are close to the grantor by blood, marriage, or other relationships, it also possible to create trusts which have charitable beneficiaries or for other purposes.
- ⊙ Beneficial interests may be classified in different ways, depending upon the trust's structure.
 - One way to do so is to determine whether a beneficiary is entitled to trust income or principal.
 - Another is to determine whether the beneficiary has a life estate or a remainder interest.
 - Further, some trusts provide for the outright distribution of assets to beneficiaries upon the occurrence of a particular event or at a particular time, while others hold their assets in trust for a beneficiaries lifetime, or even through the several generations.

BASIC CHARACTERISTICS OF DIFFERENT TYPES OF TRUSTS

- ⊙ Revocable v. Irrevocable Trusts
 - ⊙ Revocable trusts are ones in which the grantor retains the right to revoke the trust or modify it in any manner
 - Revocable trusts are commonly used in many states for estate planning purposes.
 - In those cases the grantor is also usually both a trustee and a beneficiary.
 - Revocable trusts are mere alter-egos of the grantors, provide no protection from creditors, and all of the income is taxed to the grantor.
 - Married couples sometimes form “joint revocable trusts” where each is a grantor and a beneficiary during their joint lives. These trusts also provide no creditor protection.
 - ⊙ Irrevocable Trusts are ones in which the grantor has relinquished the ability to alter or amend the trust agreement.
 - Treated as separate entities from the grantor and provide some level of creditor protection to the beneficiaries (including the grantor depending upon the state in which the trust is created)
 - May be either inter vivos or testamentary

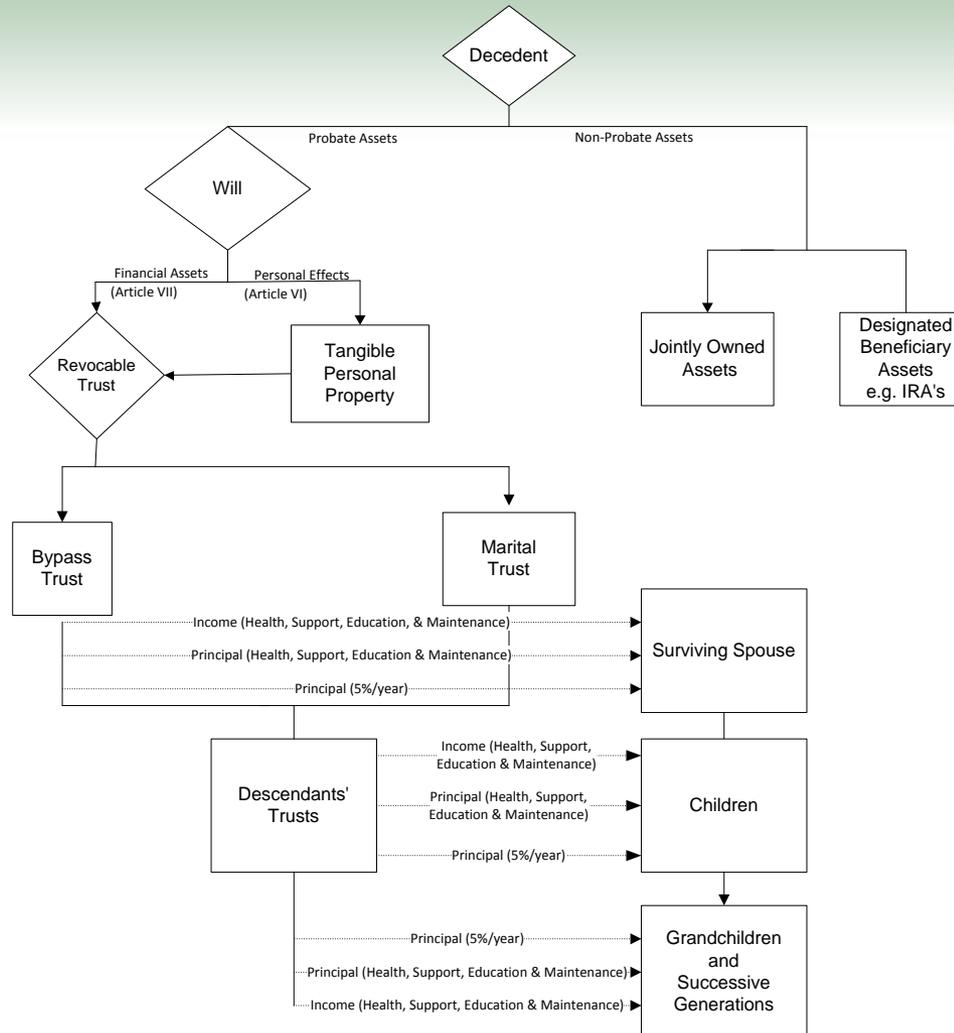
BRIEF OVERVIEW OF VARIOUS TYPES OF TRUSTS FAMILY LAW PRACTITIONERS MAY CONFRONT

- ◎ Common Estate Planning Trusts
 - ◎ Bypass (Credit Shelter) Trusts - an irrevocable trust that is usually established by a married decedent's testamentary document (i.e. will or revocable trust) upon the first spouse's death.
 - Purpose is to shelter assets from estate taxation at the surviving spouse's death, thereby making use of the first spouse to die's estate tax exemption.
 - Surviving spouse is usually the beneficiary along with any minor children, however, some wealthy couples allow children and/or other descendants to be the sole beneficiaries.
 - Beneficial interests may be structured in a variety of ways, but the use of an ascertainable standard (i.e. distributions for "health, support, education and maintenance") is quite common.

BRIEF OVERVIEW OF VARIOUS TYPES OF TRUSTS FAMILY LAW PRACTITIONERS MAY CONFRONT

- ⊙ Common Estate Planning Trusts (cont'd)
 - ⊙ Marital Trusts – an irrevocable trust that is usually established, along with the Bypass Trust, by a married decedent's testamentary document, also upon the first spouse's death.
 - Purpose is to establish a trust for the surviving spouse that will not cause assets contributed to the marital trust to be subjected to estate taxes at the first spouse's death.
 - In order to avoid estate taxation at the first spouse's death, the marital trust must satisfy certain requirements:
 - ⊙ Surviving spouse must be a U.S. citizen,
 - ⊙ All of the income generated by the marital trust's assets each year must be distributed to the surviving spouse,
 - ⊙ The surviving spouse must have the right to convert income producing property to non-income producing property, and
 - ⊙ No other person may be a beneficiary of the marital trust during the surviving spouse's lifetime.
 - ⊙ Qualified Domestic Trusts ("QDOTs") – a subset of marital trusts which may be established for spouse's who are not U.S. citizens

BRIEF OVERVIEW OF VARIOUS TYPES OF TRUSTS FAMILY LAW PRACTITIONERS MAY CONFRONT- ESTATE PLAN WITH BYPASS TRUST AND MARITAL TRUST PROVISIONS



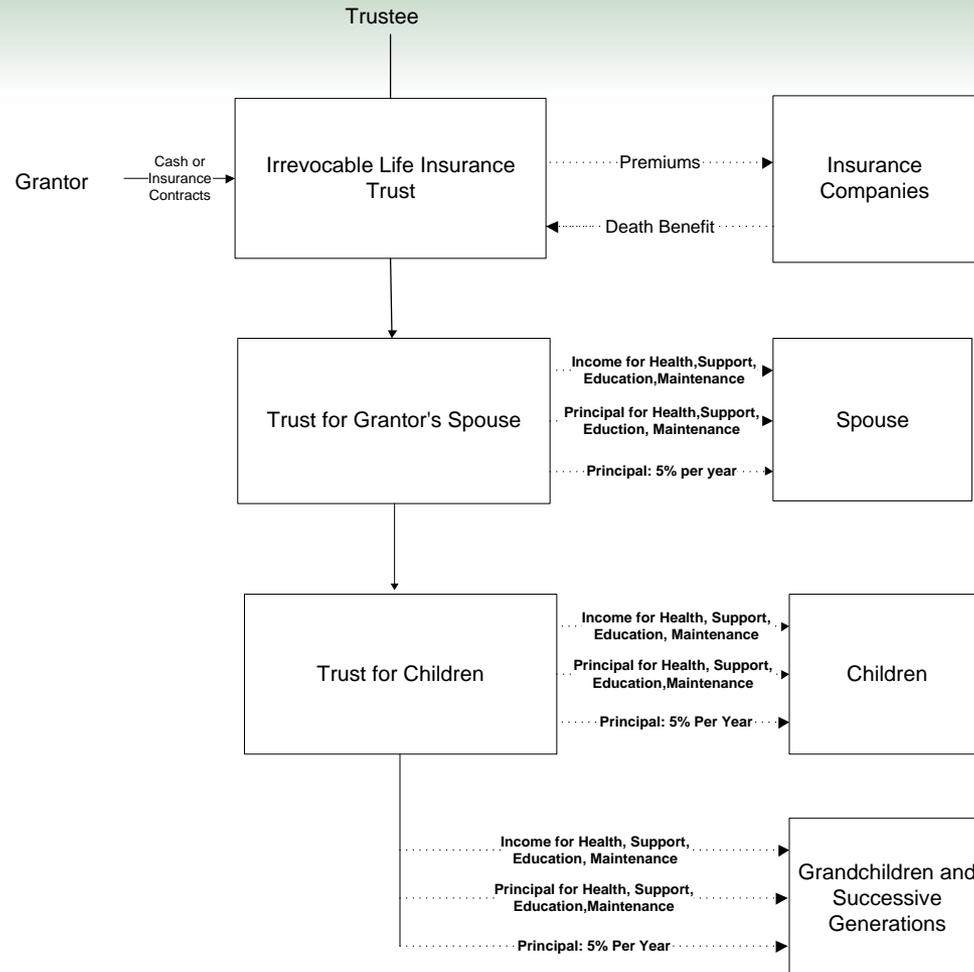
BRIEF OVERVIEW OF VARIOUS TYPES OF TRUSTS FAMILY LAW PRACTITIONERS MAY CONFRONT

- ⊙ Irrevocable Trusts Established for Children and Other Descendants by a Parent's Will or Revocable Trust.
 - ⊙ Trusts Holding the Residue of Bypass and Marital Trusts or established at the surviving spouse's death:
 - If the married couple had children, then the assets remaining in the Bypass and/or Marital Trusts are typically continued in trust for those children for some period of time, although they may also be distributed outright.
 - Likewise, the surviving spouse may choose to fund trusts at his or her death rather than distribute assets outright to beneficiaries.
 - Trusts may be established for certain periods of time (i.e. until a beneficiary attains a stated age), or
 - Structured to last of the beneficiary's lifetime with any remaining assets held in further trust for that beneficiary's descendants.
 - Trusts structured to last for a beneficiary's lifetime, or perhaps the lifetimes of multiple generations of descendants, are sometimes referred to as "generation skipping trusts" or "dynasty trusts".
 - Beneficial interests can be structured in different ways, but the use of the ascertainable standard is quite common.
 - Frequently, beneficiaries are named as trustees or co-trustees and given the ability to appoint successor trustees
 - Beneficiaries may also be given the ability to unilaterally withdraw a certain amount of assets once a year.

BRIEF OVERVIEW OF VARIOUS TYPES OF TRUSTS FAMILY LAW PRACTITIONERS MAY CONFRONT

- ③ Irrevocable Life Insurance Trusts – intervivos trusts established to own one or more life insurance policies on the life of the grantor or on the lives of married grantors.

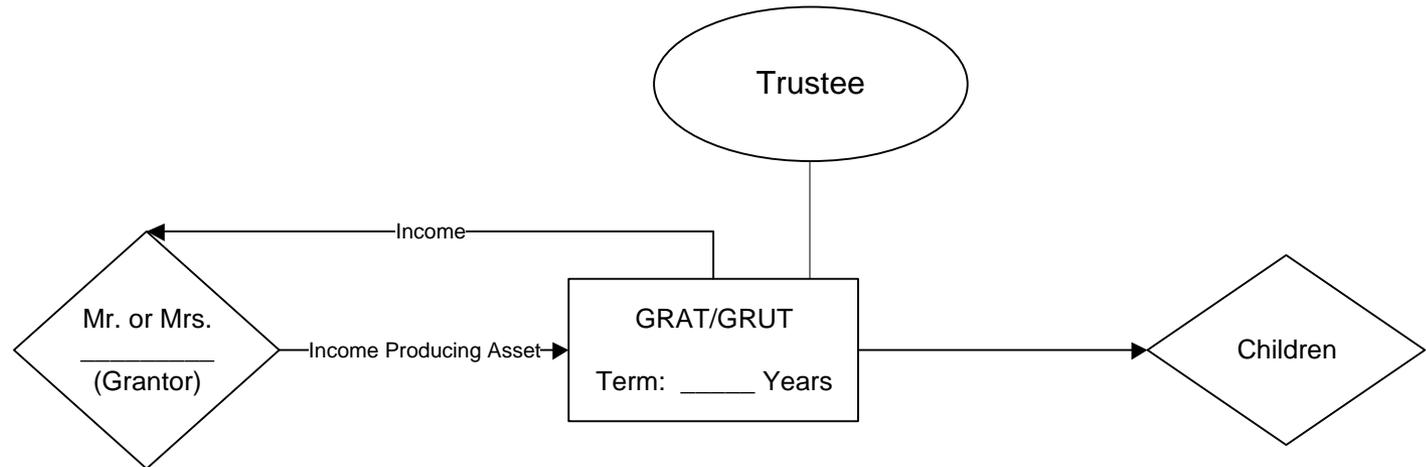
BRIEF OVERVIEW OF VARIOUS TYPES OF TRUSTS FAMILY LAW PRACTITIONERS MAY CONFRONT- IRREVOCABLE LIFE INSURANCE TRUST



BRIEF OVERVIEW OF VARIOUS TYPES OF TRUSTS FAMILY LAW PRACTITIONERS MAY CONFRONT- GRANTOR RETAINED TRUST

- ◎ Grantor Retained Interest Trusts – irrevocable inter vivos trusts used to transfer assets to beneficiaries at discounted values for gift tax purposes
 - ◎ The grantor transfers assets to the trust and retains the right to receive an annual income stream for a term of years
 - ◎ The retained income interest may be expressed either as a fixed percentage of the value of the assets initially transferred to the trust, referred to as an annuity interest, and with the resulting trust referred to as a Grantor Retained Annuity Trust (or “GRAT”),
 - ◎ or as a fixed percentage of the value of the trust’s assets determined annually, referred to as a unitrust interest, and with the resulting trust referred to as a Grantor Retained Unitrust (or “GRUT”).

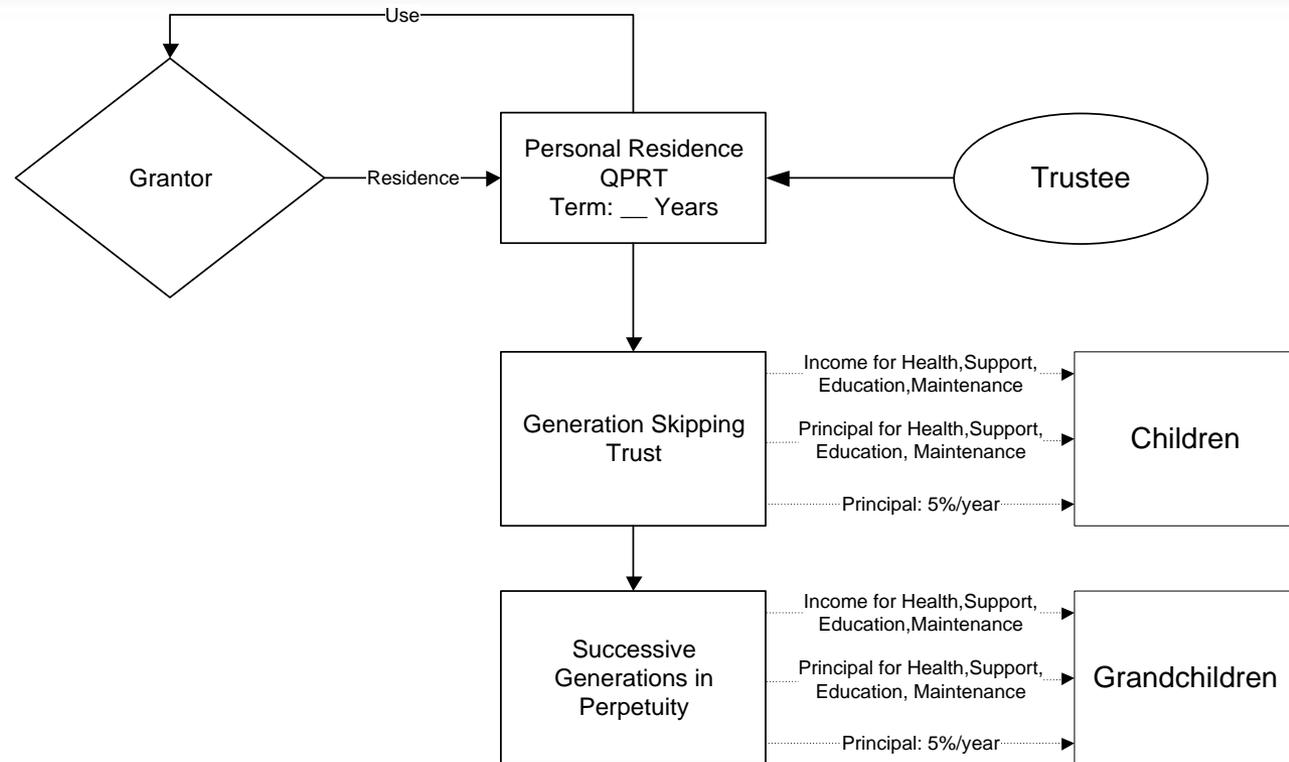
BRIEF OVERVIEW OF VARIOUS TYPES OF TRUSTS FAMILY LAW PRACTITIONERS MAY CONFRONT- GRANTOR RETAINED TRUST



BRIEF OVERVIEW OF VARIOUS TYPES OF TRUSTS FAMILY LAW PRACTITIONERS MAY CONFRONT- QUALIFIED PERSONAL RESIDENCE TRUST

- ⊙ Qualified Personal Residence Trust (“QPRT”) - A QPRT is an irrevocable inter vivos trust funded with a personal residence.
- ⊙ It is structured similarly to a GRAT, except the asset contributed to the trust is a personal residence and the benefit of the initial term is the right, indeed the requirement, to use the personal residence during that time rather than to receive cash from the trust.
- ⊙ At the conclusion of the “initial term” the grantor’s required use of the property ends and the property passes to the remainder beneficiaries.
- ⊙ After the initial term ends the grantor must pay the new owner of the property fair market value rent in order to continue using the property.

BRIEF OVERVIEW OF VARIOUS TYPES OF TRUSTS FAMILY LAW PRACTITIONERS MAY CONFRONT- QUALIFIED PERSONAL RESIDENCE TRUST



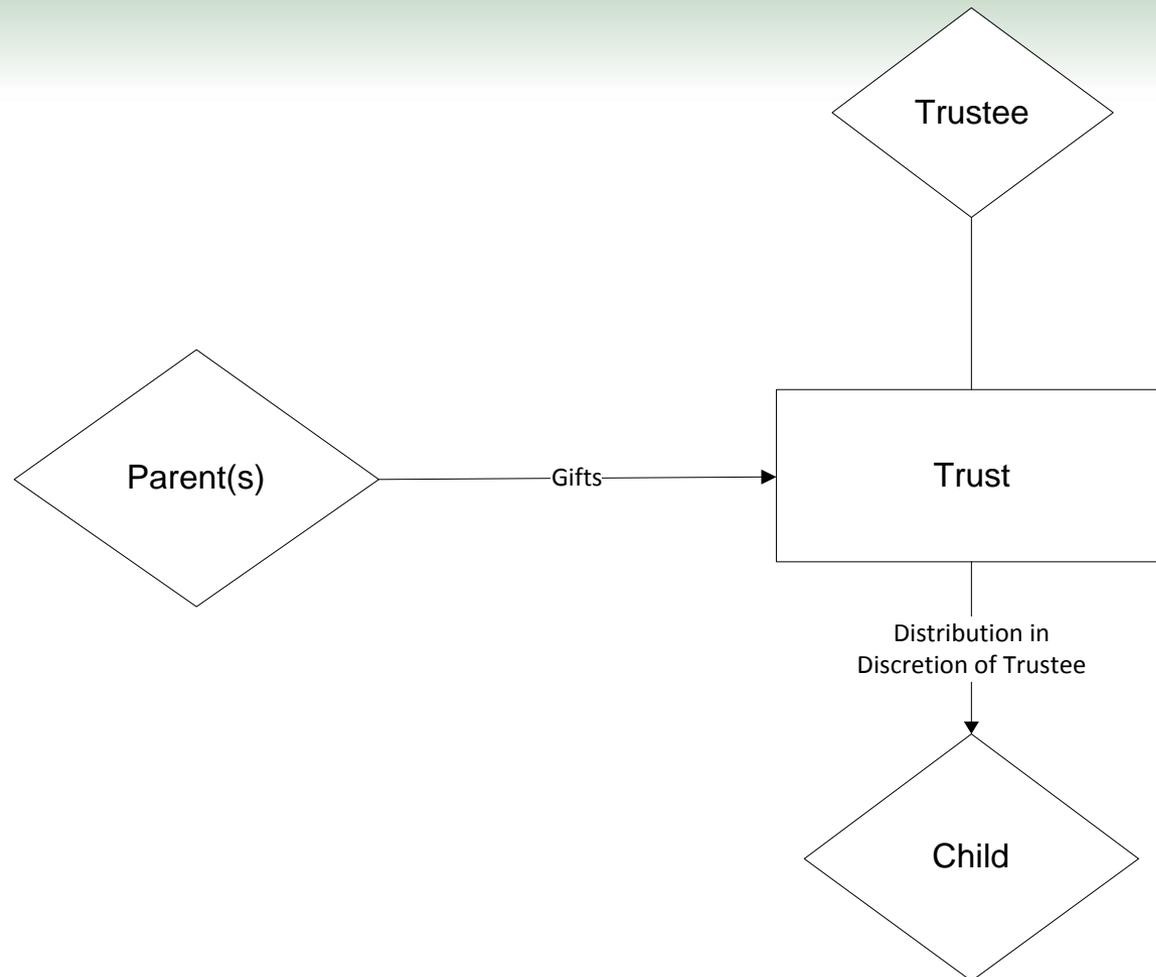
BRIEF OVERVIEW OF VARIOUS TYPES OF TRUSTS FAMILY LAW PRACTITIONERS MAY CONFRONT- TRUSTS FOR THE BENEFIT OF CHILDREN

- ⊙ UTMA and UGMA Accounts – The Uniform Transfers to Minors Act (“UTMA”), which revises and restates the Uniform Gifts to Minors Act (“UGMA”), has been adopted by most states.
 - ⊙ The UTMA and the UGMA are essentially bare-bones trust instruments that have been embedded in the statutes of the adopting jurisdictions.
 - ⊙ The statutes allow a custodian to hold assets for the benefit of a minor and allow the gifts to the minor to qualify for certain gift tax benefits.
 - ⊙ The custodian holds the property for the minor’s benefit until the minor reaches age twenty-one (eighteen for UGMAs) and is given broad powers over the management and investment of the property.
 - ⊙ After reaching 21 (or 18 for UGMAs), the child receives control of the gifted assets.

BRIEF OVERVIEW OF VARIOUS TYPES OF TRUSTS FAMILY LAW PRACTITIONERS MAY CONFRONT- TRUSTS FOR THE BENEFIT OF CHILDREN (CONT'D)

- ◎ 2503(c) Trusts - A 2503(c) Trust is an irrevocable inter vivos trust established for the benefit of a minor child. It is named after an Internal Revenue Code section.
- ◎ A 2503(c) trust holds gifts in trust for a child until the child reaches age 21, while at the same time qualifying for certain gift tax benefits for the grantor.
- ◎ A 2503(c) trust's property and its income must either be expended by or for the benefit of the minor before the minor attains age twenty-one or the residue becomes the minor's property outright and free of trust.
- ◎ While a 2503(c) Trust may look a lot like a UGMA/UTMA, it can actually be customized in ways those accounts can not and consequently estate planners view 2503(c) Trusts as the preferred estate planning tool.

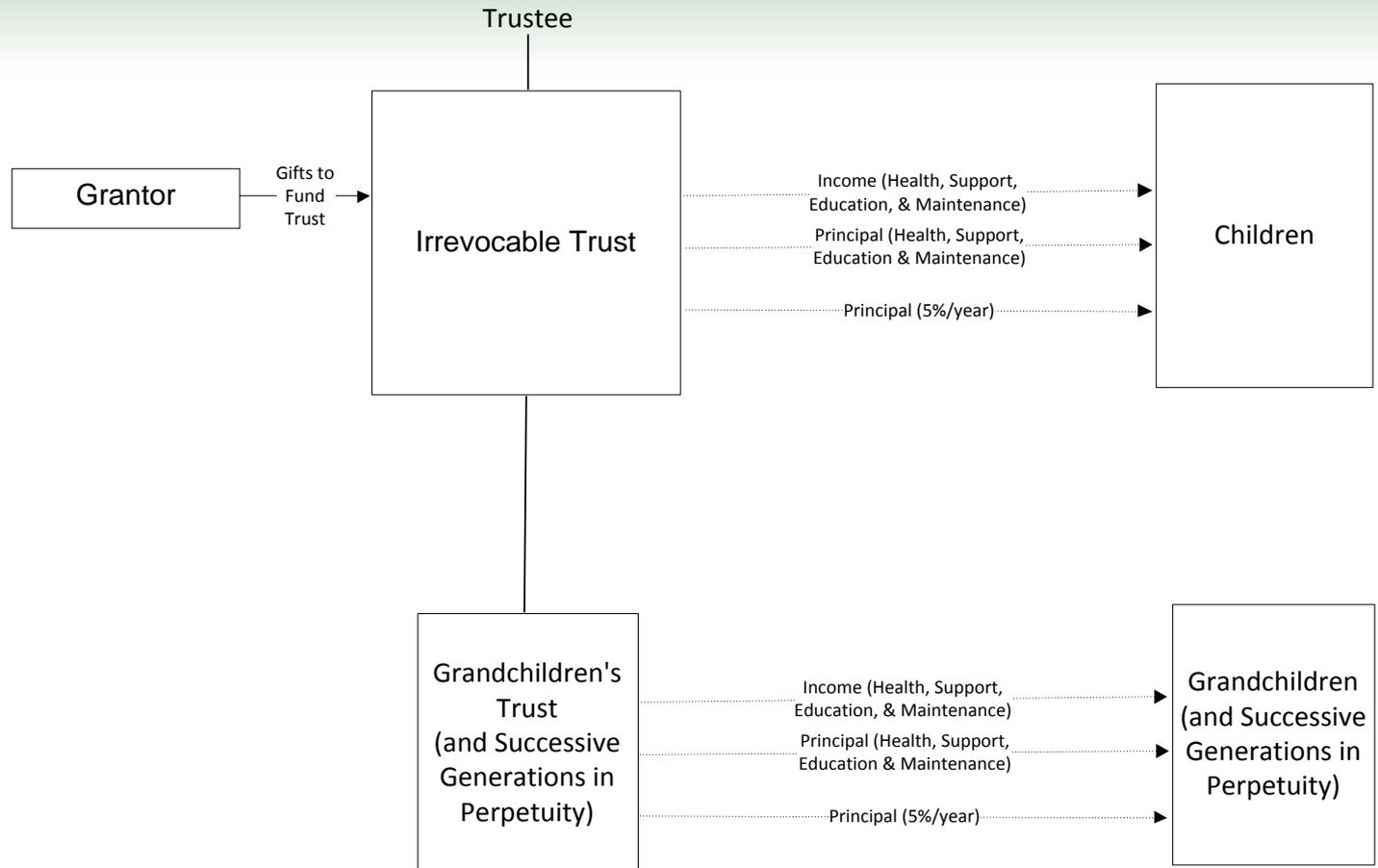
BRIEF OVERVIEW OF VARIOUS TYPES OF TRUSTS FAMILY LAW PRACTITIONERS MAY CONFRONT- 2503(c) TRUST FOR MINORS



BRIEF OVERVIEW OF VARIOUS TYPES OF TRUSTS FAMILY LAW PRACTITIONERS MAY CONFRONT- TRUSTS FOR THE BENEFIT OF CHILDREN (CONT'D)

- ◎ Irrevocable Children's Trusts – If the constraints of UTMA/UGMA accounts and 2503(c) are too restrictive, some clients prepare irrevocable inter vivos trusts for the benefit of their children.
 - ◎ The provisions in these trusts generally mimic the provisions of the children's trusts established to receive the residue of Bypass and Marital Trusts, which were discussed above.
 - ◎ In order to preserve gift tax benefits for the grantor, these trusts typically give the beneficiaries specific powers for a limited period of time to withdraw gifts made to the trust on a beneficiary's behalf.
 - These withdrawal powers are referred to by the estate planning community as "Crummey Withdrawal Powers" after the name of a case which allowed the technique's use.

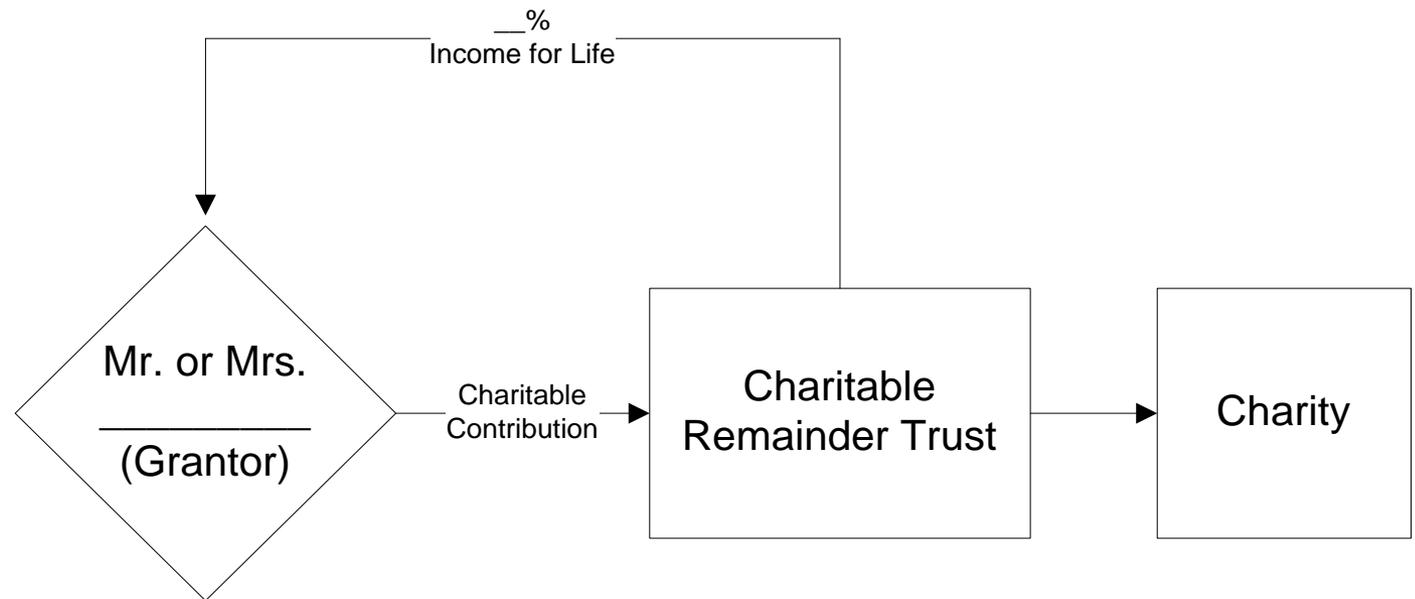
BRIEF OVERVIEW OF VARIOUS TYPES OF TRUSTS FAMILY LAW PRACTITIONERS MAY CONFRONT- IRREVOCABLE TRUST FOR CHILDREN



BRIEF OVERVIEW OF VARIOUS TYPES OF TRUSTS FAMILY LAW PRACTITIONERS MAY CONFRONT- CHARITABLE TRUSTS

- ⊙ Charitable Remainder Trusts – an irrevocable trust which can be either inter vivos or testamentary and, as the name implies, names a charity as the remainder beneficiary with the grantor or a person or persons designated by the grantor receiving an immediate benefit.
 - ⊙ Two types:
 - Charitable Remainder Annuity Trusts (“CRATs”), and
 - Charitable Remainder Unitrusts (“CRUTs”)
 - ⊙ Distinction between CRATs and CRUTs is the same as between GRATs and GRUTs – annuity interests are fixed percentages of the initial contribution to the trust whereas unitrust interests are a fixed percentage of the trust’s value on a certain date each year.
 - ⊙ The interest in the property which is retained by the grantor can be for (i) a term of years (not exceeding twenty years), (ii) a term measured by the life or lives of the beneficiaries, or (iii) a term which is the shorter of a term of years or the life or lives of the designated persons.
 - ⊙ There are many different types of Charitable Remainder Trusts and they can be drafted in a multitude of ways to accomplish a wide variety of objectives.

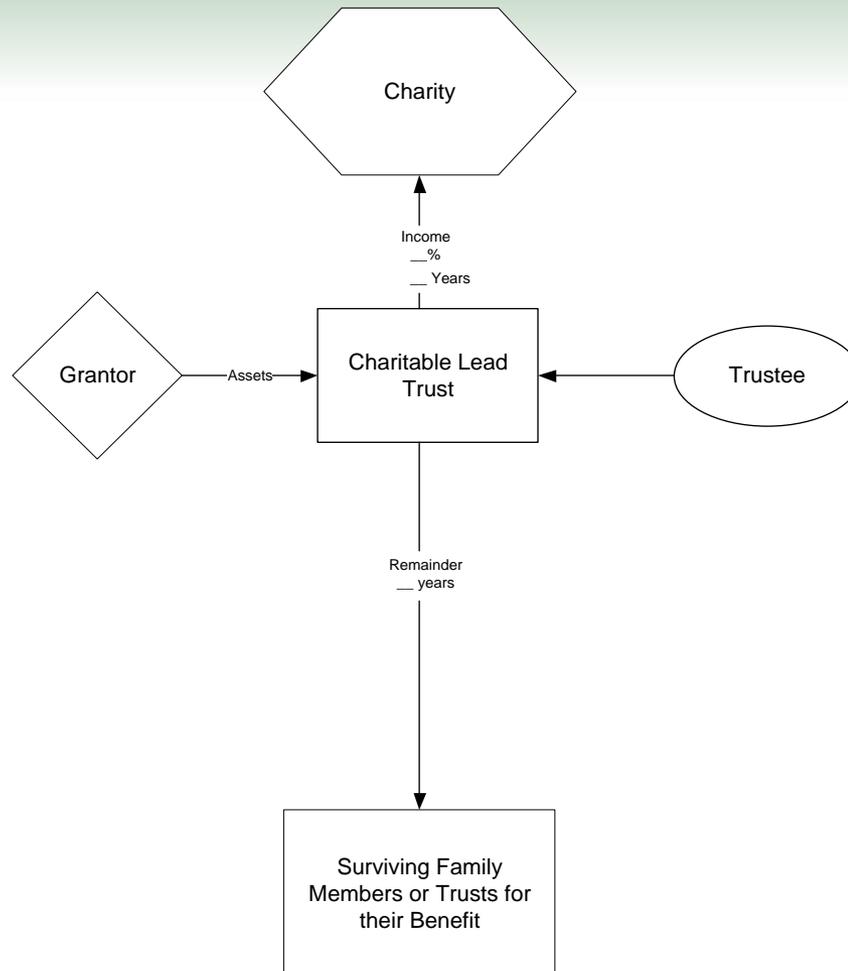
BRIEF OVERVIEW OF VARIOUS TYPES OF TRUSTS FAMILY LAW PRACTITIONERS MAY CONFRONT- CHARITABLE REMAINDER TRUST



BRIEF OVERVIEW OF VARIOUS TYPES OF TRUSTS FAMILY LAW PRACTITIONERS MAY CONFRONT- CHARITABLE TRUSTS (CONT'D)

- ⊙ Charitable Lead Trusts - A Charitable Lead Trust (“CLT”) is an irrevocable trust in which the income (or lead) interest is held by one or more a qualifying charitable organizations and the remainder interest is held by a non-charitable beneficiary.
 - ⊙ Like a CRT, a CLT can be either inter vivos or testamentary.
 - ⊙ The charity receives payments for a specified period of time which can be measured by a term of years or someone’s lifetime.
 - ⊙ At the end of the charitable lead term, the assets remaining in the trust are distributed to the non-charitable beneficiaries (or continued in trust for their benefit).
 - ⊙ There are several different types of CLTs and, like CRTs, they can be drafted in a multitude of ways to accomplish a wide variety of objectives.

BRIEF OVERVIEW OF VARIOUS TYPES OF TRUSTS FAMILY LAW PRACTITIONERS MAY CONFRONT- CHARITABLE LEAD TRUST



BRIEF OVERVIEW OF VARIOUS TYPES OF TRUSTS FAMILY LAW PRACTITIONERS MAY CONFRONT- ASSET PROTECTION TRUSTS

- ◎ What are Asset Protection Trusts (“APTs”)?
 - ◎ All of the trusts discussed above, other than revocable trusts, have some asset protection benefits for the grantor and the beneficiaries.
 - This asset protection can, and is often intended to, provide protection from current or future marital creditors.
 - In fact, asset protection trusts are frequently used in place of prenuptial agreements as the primary vehicles for pre-marital planning.
 - ◎ Asset Protection is based on Spendthrift Trust Provisions
 - Spendthrift trust provisions are typically creatures of common law and act to prohibit distributions of income and principal to the creditors of a beneficiary.,
 - Because all of those trusts discussed above have one or more classes of remainder beneficiaries who have a contingent interest in the trust assets, creditors typically can not reach those assets.

BRIEF OVERVIEW OF VARIOUS TYPES OF TRUSTS FAMILY LAW PRACTITIONERS MAY CONFRONT- ASSET PROTECTION TRUSTS (CONT'D)

- ⊙ Self-Settled Asset Protection Trusts – are designed to protect the assets of the trust against the claims of the grantor's spouse and creditors, yet allow the grantor to remain a beneficiary of the trust.
- ⊙ A self-settled asset protection trust may be established either in one of several U.S. jurisdictions allowing the formation of such trusts (a “Domestic Asset Protection Trust” or “DAPT”) or under the laws of a non-U.S. jurisdiction (a “Foreign Asset Protection Trust” or “FAPT”).
- ⊙ DAPTs and FAPTs are cutting edge asset protection strategies
- ⊙ Constantly being challenged by creditors and how the laws controlling the effectiveness of self-settled asset protection trusts will be ultimately decided is uncertain.

BRIEF OVERVIEW OF VARIOUS TYPES OF TRUSTS FAMILY LAW PRACTITIONERS MAY CONFRONT- ASSET PROTECTION TRUSTS (CONT'D)

- ⊙ Statutory Provisions which are thought to provide asset protection and which are common among all domestic and foreign jurisdictions are:
 - ⊙ extremely short statutes of limitations during which current or future creditors may make a claim against the assets the grantor transfers to the DAPT or FAPT;
 - ⊙ aggressive limitations on claims made by divorcing spouses for alimony or child support (so-called “exception creditors”);
 - ⊙ enhanced protection from other pre-existing and potential future creditors; and
 - ⊙ no state income tax on income earned by the trust.

BRIEF OVERVIEW OF VARIOUS TYPES OF TRUSTS FAMILY LAW PRACTITIONERS MAY CONFRONT- ASSET PROTECTION TRUSTS (CONT'D)

- ◎ Common Features of DAPTs and FAPTs
 - ◎ Grantor relinquishes, or appears to relinquish, control over the assets transferred to the APT
 - ◎ Close family members as well as the grantor are beneficiaries
 - ◎ Trust is purportedly irrevocable, although grantor's frequently try and retain some ability to amend or revoke, usually through a third party "controlled" by the grantor
 - ◎ Trust is located in a jurisdiction which has legislation specifically authorizing and providing protections for self-settled trusts
 - There are three to four dozen jurisdictions around the world which have made serious attempts to attract foreign capital by adoption of bank secrecy and asset protection laws.
 - Fourteen U.S. jurisdictions currently offer some type of domestic self-settled asset protection trust provisions. Of these, the current acknowledged leaders are Alaska, Delaware, Nevada, Tennessee and South Dakota.

DISCOVERING TRUST ASSETS

Richard S. Chisholm, Esq. & Justin L. Kelsey, Esq.

ISSUES IN DISCOVERING TRUST ASSETS

- ⊙ Finding out if a Trust Exists
- ⊙ Who are the Players / Who has the Information?
- ⊙ Required Disclosures in Divorce Court
- ⊙ Standard Discovery Requests
- ⊙ Not-so-standard Discovery Requests

FINDING OUT IF A TRUST EXISTS

- ◎ The Easy Part:
 - ◎ Most Trust assets will be disclosed through standard disclosures (financial statements or tax returns) or by compliance with well-crafted standard discovery requests.
 - ◎ The Exception: If a trust is not disclosed but believed to exist, there are usually clues that will lead you to the trust through asset or income. Traditional discovery techniques are generally used to determine whether a trust exists.
- ◎ The Hard Part:
 - ◎ Once you know a Trust exists, discovering its terms and assets is the next step.
 - Who are the parties?
 - Who has the information?
 - Language for standard discovery requests
 - Thoughts on advanced discovery techniques

WHO ARE THE PLAYERS? / WHO HAS THE INFORMATION?

- ③ Identify the Players: Grantor, Trustee, and Beneficiary are identified in the Trust Document
- ③ A divorcing party could occupy one, two, or all three positions.
- ③ Typically the Trustee is going to have the most information relating to the current assets of the trust.
 - ③ Although you will start with the divorcing party, you likely will need to involve the trustee in your discovery requests if they are different person from the divorcing party.

REQUIRED DISCLOSURES IN DIVORCE COURT

- ⊙ Financial Statement
- ⊙ Automatic Disclosure requirement
 - ⊙ e.g. Mass Supplemental Probate Court Rule 410 (3 years tax returns, 3 years bank statements, etc.)
- ⊙ Documents already in possession of your client:
 - ⊙ Income tax returns for divorcing parties may show trust income
 - ⊙ Financial and bank account statements may show deposits from trusts
- ⊙ Review how payments for divorcing parties' living expenses are being made. Look for usual expenses that are missing (i.e. mortgages, taxes, credit cards, utilities, vehicles, vacations, etc.).
- ⊙ Documents available to the public
 - ⊙ Trust documents may be available from public sources in some instances. For example, in Massachusetts Trusts that hold Real Property will be recorded...

STANDARD DISCOVERY REQUESTS

- ◎ Request for Financial Statement (if not automatic in your jurisdiction)
- ◎ Request for Production of Documents:
 - ◎ All records, documents and information relating to any trusts that you, your spouse, and/or your children are a beneficiary, trustee or grantor of including, but not limited to, the documents that establish the trust, statements of the assets of the trust, fiduciary accountings, tax returns filed by or on the behalf of the trust or its beneficiaries, records of disbursements, and/or all instruments recorded by or on behalf of the trust or its beneficiaries.

STANDARD DISCOVERY REQUESTS

Interrogatories

- ⊙ Please state the name of any trusts that you and/or your current spouse and/or your children are a beneficiary, trustee or grantor of and for each please state:
 - a. Name and contact information of all the trustees of the trust;
 - b. Name and contact information of all beneficiaries of the trust;
 - c. Name and contact information of the grantor(s) of the trust;
 - d. Whether the Trust is revocable or not;
 - e. Whether the Trust is a spendthrift trust or not;
 - f. A complete list of the assets of the trust, their location and approximate value;
 - g. The date that the trust was established;
 - h. The date and amount of any distributions from said trust and to whom the distributions were made;
 - i. The procedure for receiving a distribution from the trust;
 - j. Whether you have asked for any distributions from the trust and the date of your request;
 - k. Whether you are willing to ask for a distribution from the trust to assist in the payment of your domestic obligations; and
 - l. The description and location of any and all documents that support your Answer to this Interrogatory.

STANDARD DISCOVERY REQUESTS

Interrogatories

- ⊙ Please list any and all financial accounts in which you have any interest, including bank accounts held individually, with another person, **for management of property held in a trust which you or a third party established for your benefit or for the benefit of an ancestor or descendant of yours, regardless of whether such beneficial interest is vested or contingent**, or by a business with which you and/or your current spouse have any interest whatsoever; any and all investment accounts, operating accounts, business escrow accounts, 401K's, IRA's or any other financial account, and for each, please state...
- ⊙ Please describe any and all gifts in excess of one hundred dollars (\$100) made directly from or on behalf of you to any source, including but not limited to gifts to family members, and **distributions from trusts** during the applicable period and for each provide the...

STANDARD DISCOVERY REQUESTS

- ◎ Deposition Questions:
 - ◎ Review all sources of income
 - ◎ Review all gifts, devises and bequests from family members;
 - ◎ Review all bank accounts or other assets which the party has access to, or at anytime during the marriage had access to;
 - ◎ Review all gifts or transfers made by the party during the marriage (or prior if relevant).

NOT-SO-STANDARD DISCOVERY REQUESTS

- ⊙ Subpoena Duces Tecum of Trustee and/or Grantor
 - ⊙ All records, documents and information relating to any trusts that either spouse, and/or any of their children are a beneficiary, trustee or grantor of including, but not limited to, the documents that establish the trust, statements of the assets of the trust, tax returns filed by or on the behalf of the trust or its beneficiaries, records of disbursements, and/or all instruments recorded by or on behalf of the trust or its beneficiaries.
 - ⊙ Discern the purpose of the trust, and the actual management of the trust: e.g. even if the trust document states it's a spendthrift trust, has the trustee previously allowed all requests of the beneficiary?

ONCE DISCOVERY IS COMPLETE, WHAT TO LOOK FOR IN THE TRUST DOCUMENTATION

- ◎ Identify the Grantor(s):
 - ◎ Who has contributed financially to the Trust? It may be more than one person
 - ◎ What assets were contributed to the Trust and when were they contributed?
- ◎ Who are the current and potential future beneficiaries?
 - ◎ Is a divorcing party a current beneficiary? If not, will he or she become one upon the occurrence of a future event? If so, what event?
- ◎ What is the jurisdiction whose laws apply to the trust's operation and the law for settling trust administration disputes?
 - ◎ Although seemingly a minor point, if the trust is being administered to your client's detriment the jurisdictional laws may be used to apply pressure and obtain information regarding the trust.

ONCE DISCOVERY IS COMPLETE, WHAT TO LOOK FOR IN THE TRUST DOCUMENTATION (CONT.)

- ⊙ Review the management of the trust's assets to determine whether the manner in which the assets are being administered is detrimental to your client
 - ⊙ Are distributions being withheld or limited in contravention of the trust agreement?
 - ⊙ Is the trust being invested in a manner which diminishes the value of a divorcing party's interest in income and/or principal?
 - ⊙ Has a divorcing party's interest in the trust been modified inappropriately?
 - ⊙ Is the divorcing party receiving hidden benefits from the trust, perhaps through inter-related transactions, investments or loans?
 - ⊙ If the divorcing party is a trustee, is the divorcing party receiving trustee fees or alternatively has that person stopped taking trustees fees?

ONCE DISCOVERY IS COMPLETE, WHAT TO LOOK FOR IN THE TRUST DOCUMENTATION (CONT.)

- ⊙ Who are the beneficiaries, both vested and contingent and what is the nature of each class of beneficiaries' interest in the trust's income and principal?
- ⊙ Are distributions made in the Trustee's discretion, subject to some type of ascertainable standard (i.e. for a beneficiary's health, support, education and maintenance), or by some other subjective or objective measurement?
- ⊙ May the beneficiary act unilaterally, or in conjunction with one or more other persons who are not trustees, to withdraw assets from the trust.
- ⊙ Has a divorcing party contributed assets to the trust and also retained a beneficial interest in trust income or principal?

CLASSIFYING THE TRUST INTEREST AS MARITAL PROPERTY

Justin L. Kelsey, Esq.

ISSUES IN DECIDING IS THE TRUST MARITAL PROPERTY?



- ⊙ First Step: What Role does the party play? What is their equitable or legal interest?
- ⊙ Second Step: If there is a beneficial interest available or due to a party, is it marital property? Even if it's not marital property, is there income that is relevant?
- ⊙ Third Step: If it is marital property, can it be divided?

STEP 1: THE SPOUSE'S INTEREST?

- ⊙ Grantor:
 - ⊙ If the spouse is the grantor, is the trust revocable?
 - ⊙ Even if not revocable, was the granting a wasting of marital assets?
- ⊙ Trustee:
 - ⊙ If the spouse is the trustee, is their interest only a legal interest, i.e. they are only managing someone else's property for their benefit.
 - ⊙ Are the beneficiaries relevant? Children of the marriage, or the other spouse?
 - ⊙ What is their discretion?
 - ⊙ Do they receive any income as trustee?



STEP 1: THE SPOUSE'S INTEREST?

- ◎ Beneficiary:
 - ◎ MOST IMPORTANT QUESTION: - What are the trust assets?
 - If there are no trust assets – such as a testamentary trust, then there is no present property interest to be worried about dividing.
 - If there are trust assets, are they significant with respect to the rest of the marital estate? – Worth further investigation?
 - ◎ Other Relevant Questions:
 - Are there other Beneficiaries?
 - Are they both trustee and beneficiary?
 - Are their limits on distribution (spendthrift or nominee)?
 - Are limits on distribution actually enforced? – Does this matter?
 - Is there a history of distributions?



STEP 2: IS THE INTEREST MARITAL PROPERTY?

- ⊙ Usually only when the spouse is a beneficiary does this come into play (though a grantor of a revocable trust could get any trust assets back).
- ⊙ Community Property State
 - ⊙ Trusts are typically funded with gifts or inheritance so in most cases would not be Community Property.
 - ⊙ If trust assets would be considered separate property, then trust interest is likely separate property as well.
 - ⊙ Still may be equitably divisible, but equal interest is not automatic.



STEP 2: IS THE INTEREST MARITAL PROPERTY?

- ⊙ Equitable Division State
 - ⊙ Each State defines marital property differently and can be very broad or limiting.
 - ⊙ Trusts are typically funded with gifts or inheritance so in most states this would not be considered marital property.
 - ⊙ In some states, marital property is defined broadly. For example: Massachusetts, all property in which either spouse has a beneficial interest is considered, but equitable division takes into account many factors, including contribution, acquisition, maintenance, etc.
 - ⊙ Use of income, or trust assets during marriage for marital purposes could cause entire trust to be considered marital property, even if originally exempt as an inheritance.



STEP 2: IS THE INTEREST MARITAL PROPERTY?

- ⊙ Even if Exempt, what about Income?
 - ⊙ Even if the trust asset is not marital property under the laws of your state, income from the trust may be considered in most states for calculating child support, and in some states for calculating alimony.



STEP 3: CAN IT BE DIVIDED?

- ③ The Easy Case: The court can usually order a spouse to share a portion of a trust asset if
 - ③ 1. the trust assets are considered marital property; and
 - ③ 2. a spouse practically has control over the asset (such as a beneficiary in a nominee trust, or a grantor of a revocable trust).



STEP 3: CAN IT BE DIVIDED?

- ⊙ The Hard Cases:
 - ⊙ The court may be able to order a spouse to share a portion of a trust asset or income if
 - 1. the trusts assets are considered marital property; and
 - 2. the spouse has shown that they have traditionally had access to some of the trust assets
 - ⊙ Example: Even though it's a spendthrift trust, the beneficiary asked the trustee for funds every time there was a significant marital expense (car purchase, home addition, home repair, children's braces, etc.), and every time the trustee approved it.
 - ⊙ The difficulty arises when a Judge may order a division, that the trustee refuses top make (the nightmare Contempt case).
 - ⊙ In cases where a Judge can order an unequal distribution of other assets as offset, that is probably preferable.



VALUATION OF TRUSTS

Camellia Saunders, Esq.

- ◎ Of great importance is the date that the value of each asset is determined. There are generally two dates used when determining asset valuation. One date must be used for all assets when determining their value. You cannot choose one date for one asset and another date for another asset.
- ◎ The date that the Trustor/Grantor/Settlor dies.
- ◎ The federal government also allows the use of a valuation date six months following the date the Trustor/Grantor/Settlor dies.
- ◎ Why would you choose one date of valuation over the other?

- ③ If you choose you use the six month valuation period, any assets sold or distributed prior to the six months ending will be valued based upon the date of the sale or distribution.
- ③ The federal government will allow the use of the six month valuation period if it will lower the total estate tax due.

- ③ The next order of business is to determine the method(s) that trust assets are valued. Trust assets are generally determined by what is known as the fair market value.
- ③ What exactly is the fair market value of an asset? The fair market value of an asset is the amount of money a buyer is willing to pay for a particular asset at the time of the sale. However, fair market value does not necessarily equate to the actual worth or value of an asset. It is simply what the asset is worth to the buyer at that time.

- ③ In order to determine the value of trust assets we must first determine what kind of assets can be included in a trust.
- ③ Is there any limit as to what assets can be placed in a trust?
- ③ What specific types of assets can be placed in a trust?

- ① Cash
- ① Real property
- ① Bank accounts
- ① Business interest
- ① Outstanding loans and notes
- ① Vehicles
- ① Furniture/furnishings
- ① Life insurance policies

- ⊙ Retirement Accounts
- ⊙ Pensions
- ⊙ IRA's
- ⊙ Stocks and Bonds
- ⊙ Income tax refunds
- ⊙ Of course there are other assets that can be included as owned by the Trustor/Grantor/Settlor.

PRACTICE TIPS: WAYS TO REACH TRUST ASSETS OR PROTECT BENEFICIARY'S ASSETS

Richard S. Chisholm, Esq. , Justin L. Kelsey, Esq., & Camellia Saunders, Esq.

WHO DO YOU REPRESENT?

- ① Practice Tips for Grantors
- ① Practice Tips for Trustees
- ① Practice Tips for Beneficiaries
- ① Practice Tips for Spouses of Beneficiaries

NON-PARTY GRANTORS: REVOCABLE TRUSTS

- ⊙ As long as a Grantor retains ownership over the trust (revocable trust), a beneficiary's interest is subject to the Grantor's whim and it cannot be subject to division in a divorce action as the divorcing beneficiary spouse is not the actual owner of the trust.

NON-PARTY GRANTORS: REVOCABLE TRUSTS

- ◎ If a Grantor creates a revocable trust and a beneficiary spouse is in the process of a divorce, the Grantor has the power and authority to change and/or modify the terms of the trust as he or she sees fit to protect the interests of the beneficiary spouse.

NON-PARTY GRANTORS: IRREVOCABLE TRUSTS SPENDTHRIFT & TIMING

- ⊙ A spendthrift provision in an irrevocable trust prevents creditors, including a divorcing spouse, from attaching the interest of the beneficiary in the trust before that interest is actually distributed to him or her. However, once those assets are distributed they are no longer protected.
- ⊙ Some states will not honor a spendthrift provision against creditors or may put caps on the amount that can be placed in the trust. Additionally, there are laws that allow trust accounts to be touched for such things as child support and spousal support.

NON-PARTY GRANTORS: IRREVOCABLE TRUSTS SPENDTHRIFT & TIMING

- ⊙ If the Grantor creates an irrevocable trust and is concerned about the possibility of a pending divorce of a beneficiary spouse, then the Grantor should try to ensure that the beneficiary's outright access to the trust occurs at as late a date as possible so that the beneficiary does not have immediate access to the trust whereby it does not create a present interest for the beneficiary spouse to have to divide.

GRANTORS WHO ARE ALSO PARTIES

- ③ Trusts created by spouses themselves are marital property to the extent that they were created with marital contributions and therefore are typically subject to property division in a divorce.

GRANTORS: ASK THE QUESTION - WHY NOW?

- ⊙ If the Grantor is aware of a pending divorce matter, should they wait to create the trust?
- ⊙ Or wait to transfer any assets into the trust?

NON-PARTY TRUSTEES

- ⊙ All Court Orders may not apply to a non-party Trustee:
 - ⊙ Discovery on Trustee may be proper – but ask is there a proper objection to be made? Trustee must act in beneficiaries' best interest.
 - ⊙ Orders against parties that are beneficiaries may require them to do things that the trustee could refuse. Trustee must consider their duties under the trust document, which may conflict with court orders.

BENEFICIARIES

- ③ Consider what legal control and actual control/influence a beneficiary actually has.
- ③ If a beneficiary exercises influence even in a spendthrift trust then that actual influence may be considered to break the spendthrift clause.

REPRESENTING SPOUSE:

- ⊙ If the grantor is not the divorcing party, determine the grantor's relationship to the divorcing party and why gifts to the trust were made.
- ⊙ Determine whether third parties serving as Trustee are subject to divorcing party's influence (i.e. relative, employee, adversary, or friend)
- ⊙ Determine if the trust is set up in an all-property state or a dual-classification state. This will help determine whether the divorcing spouse's assets will be considered separate property or marital property subject to division in the divorce.

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