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Modern trust drafting and planning

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A New Perspective on Modern Irrevocable Trusts

The modern irrevocable trust is quite different from traditional trusts in a myriad of ways. But it is not merely an issue of trust drafting. The entire process of planning, drafting, funding, and administering a modern trust is quite different from how that process was handled for a traditional trust. A traditional irrevocable trust tended to be a one-dimensional plan consummated by the client's estate planning attorney. In contrast, a modern irrevocable trust is more likely to be the result of a holistic, collaborative process that is focused on a broad array of goals, including income tax savings, asset protection, and flexibility, that involves a multidisciplinary team. This article will review many aspects of modern irrevocable trusts and contrast them to more traditional irrevocable trusts. The result will be a more robust and beneficial trust plan that remains vital to most clients regardless of the size of the estate tax exemption. In prior studies we discussed "The Modern Revocable Trust" (July 2016) and "Modern Trust: Fiduciary and Non-Fiduciary Positions" (October 2017). This article will build on the later study by providing an expanded and different focus on the modern irrevocable trust. It will complement the prior study by providing a similar analysis of irrevocable trusts.

The approach to a modern irrevocable trust is different from that typically used for a more traditional trust. Understanding the process will help enhance the importance of the advisers involved and improve the results for clients. The process involved with the modern irrevocable trust is more involved than traditional trust planning.

Modern versus Traditional Trust

A traditional trust may have named a spouse as trustee or co-trustee (to permit someone else to make distributions that might discharge the spousal/trustee's obligation of support for children beneficiaries). At some specified age, each child would receive an outright equal share of the trust corpus, and the trust would terminate. If a child died before the stated age, that child's share would be distributed to his or her children in a similar fashion. The trust instrument itself may have been a rather simple instrument.

A modern trust might well differ in many respects. Because of the current very high estate and gift tax exemptions of $11.18 million (2018) contrasted to perhaps a $1 million level that existed for many years, it may be imperative that the couple making the gifts have access to the trust assets. Thus, a modern irrevocable trust is more likely to be structured as some type of spousal lifetime access trust then merely as a trust for children. The more modern view of asset protection planning for the beneficiaries, which now are more likely to include the spouse and/or settlor, is for long-term or perpetual trusts, and if the concerns are more than modest, for the trust to have situs in a jurisdiction with favorable trust law supporting the asset protection goals, regardless of where the client resides. The tax dynamics are such that more trusts are structured in tax friendly states.

Other aspects of the differences between traditional versus modern trusts will be reviewed below. Although many of the differences are quite technical, many are qualitative. Too many estate planners dismiss these "soft" issues or ignore them. That is a mistake because as trusts continue for lengthy periods, or perpetually, and society values and family units

evolve, addressing human aspects of planning is vital. These soft issues also can be more complex to address than many of the technical tax issues that so many focus on.

Simplicity

There appears to be little about the modern irrevocable trust in the following discussion that would constitute simplicity. Some clients, and even advisers, view simplicity as a goal. The flexibility, protections, and tax advantages of the modern trust cannot be achieved without adding new and more complex mechanisms. It is more important with these modern trusts that advisers play a more active role throughout the process of planning, drafting, funding, and administering the trust. With a proactive collaborative adviser team, the client need not have to struggle with the additional complexity. More important, if a client or heir is divorced or sued, the protections of modern trusts might make settling that case "simpler" than had no trust or a less robust traditional trust been used. Although planning to minimize taxes is often inherently complex, many clients will gladly trade off more complexity for tax savings. Some may not.

Modern Family Dynamics

Modern family dynamics are forcing modern trust drafting to evolve. Family relationships are more varied than ever before in history and are likely to continue evolving.

The number of single people has grown dramatically. The assumption that planning can rely on a spouse as a source of access to assets in an irrevocable trust, or to be a trustee, is not valid for many clients. Despite some commentators naysaying the use of self-settled domestic asset protection trusts ("DAPTs") for clients residing in states that do not have enabling legislation, the growth in single clients will necessitate a greater use of DAPTs and variations of DAPTs so that single clients can also make completed gifts, use their high temporary exemption before the 2026 sunset, have access to those assets, yet also have asset protection benefits. Without the use of these and other techniques, married couples can readily accomplish these goals with non-reciprocal spousal lifetime access trusts ("SLATs"), but single clients might be precluded from any such planning benefits.

Reproductive technologies continue to advance and stretch the definitions of "issue." How should child or heir be defined? What can be done so as to integrate flexibility to deal with future issues that perhaps we cannot even envision today? What definitions of "descendant" should be used? Might a protector or other person be given some latitude to modify the definitions to keep them current with evolving technological options?

Silver divorce is the fastest-growing demographic for divorce and, if the trend continues, will require rethinking many aspects of trust drafting. When the impact of both aging and silver divorce are considered, trusts created for tax or asset protection reasons earlier in life may present a range of issues in later life. What becomes of spousal lifetime access trusts, intervivos QTIP trusts, and other irrevocable trusts as clients live later, divorce later, and have later-life remarriages? More trusts utilize the concept of floating spouse clauses, a concept that was rarely used in more traditional trusts. How are those clauses to be interpreted considering these societal trends? How trustees should be named and who should be given powers of appointment, all need to be examined considering these changes. Relying on the permanency of any relationship for planning purposes may not be prudent in most instances.

Example: If non-reciprocal spousal lifetime access trusts ("SLATs") are created, should siblings be named as trustees? With the growth of silver divorce, and longevity increasing the likelihood of the surviving spouse remarrying, spousal trustees could prove antagonistic to one or both settlors. Perhaps an institutional trustee, even if only in an administrative and distribution capacity, is a better choice to provide objective rather than emotional distribution decisions. Fiduciary choices that have served many practitioners for most of their careers are not optimal considering the changes in society, trust drafting, and the more varied offerings of how institutional trustees can be involved.

Holistic Planning

Addressing families, aging, and marital status are only some of the many human factors that are more commonly being addressed in trust drafting. The world continues to evolve and become more complex. A traditional trust often named the client's home state for all purposes and provided no means of changing governing law or situs. This has evolved in the modern trust to the use of whatever jurisdiction provides the optimal planning benefits and the naming of a trustee (whether merely administrative or something more) to create nexus to that favorable jurisdiction. Change in situs clauses

are now common if not the norm. Addressing in more robust terms the challenges of aging as they may affect individual trustees and beneficiaries has become more common. The realization that "incapacity" is not a light switch, and as health issues or aging progresses, there may be a slow downward progression in capabilities, has become more commonly reflected in trust clauses. For example, given the common incidence of chronic illness as the population ages, provisions providing that the named individual trustee will continue to serve through temporary periods of short-term incapacity will become more common.

Religious considerations can be integrated into planning and are too often ignored. Given the potential that the settlor's religious affiliations may differ from those of current beneficiaries as family composition continues to evolve, with regard to the remainder beneficiaries, how can this be addressed?

Alternative dispute resolution mechanisms, such as arbitration of disputes, are more commonly discussed with clients and integrated into trusts. This is not only a result of more humanistic planning, but also reflects the realities of longer-term trusts that expand the time periods over which issues can arise, and the evolution of the family unit to a less cohesive more diverse structure.

Example: Religious arbitration provisions are helpful in the context of resolving disputes of provisions based on religious law. But unless those to be bound consent to such provisions, courts may not uphold them.

Collaboration

The modern irrevocable trust is not merely about drafting, but the process of planning, creating, and operating a trust. Collaborative teams are becoming the standard for successful modern trust planning. With income tax being more important than estate tax for most wealthy clients, the client's CPA must be actively involved not only in the planning process but also in the trust administration process. Coordination of asset location decisions by wealth advisers, as illustrated below, requires active ongoing involvement of the wealth adviser. The modern trust cannot achieve its goals unless it is planned and, just as important, administered by a collaborative team. The examples of why this is necessary are considerable.

Example: Prenuptial agreements before later-in-life marriages should expressly address existing irrevocable trusts and issues raised by modern family provisions. For example, if a floating spouse clause were used in a spousal lifetime access trust drafted for a client in her 50's, should she remarry in her 70's and have rethought her desire to permit a new spouse to benefit from that trust, the rights that the new spouse might otherwise have under that irrevocable trust might be renegotiated in the prenuptial agreement. This requires the coordination of matrimonial counsel preparing a prenuptial agreement and estate and trust counsel familiar with the provisions in the existing irrevocable trusts and the nuances of how they might be varied.

Example: Clients have existing SLATs that were structured as grantor trusts. Separate life insurance trusts are decanted into each SLAT to minimize the number of trusts and obviate the need for annual gifts and *Crummey* power notices since the SLATs have adequate assets to pay premiums. Post-2017 Tax Act a non-grantor trust is created that shifts non-source passive investment assets outside the settlor's high-tax home state. This was done to avoid state tax considering the state and local tax ("SALT") restrictions that increase the out-of-pocket cost of SALT. Further, the client's house was transferred into an LLC, and part of that LLC was transferred to the non-grantor trust so that the trust could take advantage of its own $10,000 SALT limitation by deducting property taxes it paid. The LLC is used to avoid an out-of-state trust from having real property in the home state that would subject the trust to jurisdiction in that home state. Charitable contributions are also paid out of this non-grantor trust, for the deductions will not be lost as a result of the now doubled standard deduction if the settlor had instead paid those personally. This trust has a unique tax profile in that a portion of the income will be tax free because of the planned deductions. None of the income will be subject to state income tax, but the portion above the deductions will be subject to compressed federal trust tax rates. This provides another investment "bucket" that the settlor's wealth manager can plan for. Fine tuning the investment location decisions (which "buckets" hold which assets that are part of the overall asset allocation) can provide a better net of tax return on the client's overall portfolio. Without active involvement of the wealth adviser, this benefit could be lost.

Although some clients, and even some advisers, advocate "simplicity" as a goal, the real goal should be a collaborative team effort to best meet the client's needs in an environment that continues to grow in complexity. As the estate tax has waned in relevance, and aging and other soft issues have grown in importance, it is ever more important for every adviser to foster collaboration. Every member of the planning team will bring a different lens to the process, and often the least

technically capable advisers may offer some of the most important personal insights. Planning has become too complex, interdisciplinary, and personal, for any single adviser (even a robust wealth manager with all disciplines on staff) to assuredly have the best answers all the time.

Asset Protection

Asset protection has almost always been a result, if not a direct goal, of estate planning. The approximately 50% divorce rate, burgeoning of elder financial abuse, malpractice and other litigation for some clients, and other worries, have all supported this. As the estate tax has become irrelevant to many clients, the importance of asset protection has grown in the list of planning objectives. But the waning of the estate tax and the other changes in the evolution of modern trust planning, have changed how asset protection may be integrated into a plan. For many clients the absence of an estate tax benefit could leave the creation and funding of an irrevocable trust with no other justification but asset protection. It is preferable to have other motives to support the planning.

With the increasing relevance of income tax planning to modern trust planning, those benefits might replace the lost estate tax benefits as a non-asset protection planning motive for creating and funding trusts. If the CPA can quantify the income tax benefits of a non-grantor trust (e.g., state income tax savings; additional 199A benefits, although that may be limited by the proposed Regulations on 199A; SALT benefits; charitable contribution benefits; income tax flexibility in shifting income to lower-bracket beneficiaries; etc.) that could be quite useful to support the plan. Further, given the current high exemptions, the value of assets that can be transferred is not only greater than ever before in history, but also for most clients will be a substantially greater percentage of their net worth. That raises a greater concern over large transfers constituting a fraudulent conveyance. Thus, integral to modern trust planning might be due diligence to confirm the absence of current claims, financial forecasts to demonstrate the ability of the settlor to support herself and family financially without the assets transferred, etc.

A common asset protection step for married couples is the creation of non-reciprocal (each trust is sufficiently different to deflect a challenge by a creditor or the IRS to uncross the two trusts) SLATs. A challenge with this plan in the current environment is that the settlors may want (or, as in the case of some asset protection, require) the income tax benefits of non-grantor trusts. If the settlor's spouse is named a beneficiary that alone would result in characterization of the trust as a grantor trust. But all these seemingly disparate goals can be achieved if the spouse's rights to distributions are conditioned upon the approval of an adverse party. This type of non-grantor trust is a variation on traditional trust drafting that can be tailored to endeavor to accomplish the settlor's goals in the current tax environment (use current high temporary exemptions, make a completed gift, retain access to trust assets, yet have a non-grantor trust for income tax and asset protection advantages).

Although the number of states permitting self-settled DAPTs has increased to about 17, the number of cases challenging DAPTs, and the concerns of some commentators, have grown. As a result, the variations of the DAPT technique have also grown. Hybrid DAPTs are a common response in which a person is given the power in a non-fiduciary capacity to add descendants of the settlor's grandparents as beneficiaries of the trust. Unless and until that power is exercised, the trust cannot be characterized as self-settled. Prior to exercise the trust might be divided into two, with only the power to appoint being exercised over a smaller portion that seems necessary for current access. Another approach is to have a person hold a power to require the trustee to make a distribution to the settlor, but not to add him or her as a beneficiary. If the trust is a grantor trust the power to loan (that itself should characterize the trust as a grantor trust for income tax purposes) can be used to provide benefit to the settlor without the settlor being named a beneficiary. Arguably, such a trust should not be characterized as self-settled.

The numbers and roles of fiduciaries and other power-holders/positions in modern irrevocable trusts have proliferated. One concern is how the people serving in these roles might impact a particular trust. Will a state argue for taxation or jurisdiction because a trust protector resides in that state? If the protector is not acting in a fiduciary capacity, would that result differ? Instead of having individuals serve in such capacities, a trust instrument might instead name an entity and have the people selected by the settlor to serve in those capacities serve as managers of the entity, e.g., a limited liability company, and act in that capacity. This might provide a buffer to hinder or even prevent states from asserting jurisdiction because of the involvement of a resident of that state. For those concerned about asset protection, e.g., the potential for a state to assert jurisdiction based on the residence of a trust protector or investment trustee, this type of planning may be an important safeguard to consider.

The result of the above techniques is that modern irrevocable trusts can provide significant asset protection, but the variations of techniques are considerable, and the planning team will have to select the appropriate technique based on the settlor's particular circumstances. Also, the trust and plan will have to be monitored so that the persons involved are aware of the powers they hold and know if, when, and how to exercise them.

Flexibility

Flexibility to better deal with changing circumstances, whether societal norms, personal situation, tax law changes, and developments in the law is becoming commonplace and further differentiates the modern irrevocable trust from its predecessors. Although the range of provisions to be included will vary based on objectives, consider the following:

With a new focus on non-grantor trust planning, consider explicit mechanisms to turn off non-grantor status (i.e., to convert the trust to a grantor trust) if the tax laws change yet again.

Change in situs and governing law provisions to facilitate moving the trust to minimize state taxation, take advantage of better state laws, etc. Some clauses expressly permit moving the trust to different countries, not merely different states.

Decanting language in the trust instrument itself. Although more than 20 states have statutes permitting decanting, and that number will likely continue to grow, including express decanting language in the instrument may provide important flexibility to the trustee.

Broader use of powers of appointment to permit each generation to revise the terms of trusts as assets pass in continued long-term or perpetual trusts to the next generation. This can readily facilitate each generation modernizing trusts for future heirs based on drafting techniques at that time. Also, consider broader powers. In many traditional trusts, powers of appointment were limited to merely endeavoring to avoid a generation-skipping transfer ("GST") tax by causing estate inclusion. When limited powers were provided, they were often limited to descendants of the settlor. But as the definition of "descendants" evolves, and the family unit continues to grow more complex and diverse, such limitations may prove too severe.

Techniques to cause estate inclusion so as to achieve a basis step-up on the death of the settlor or a beneficiary. Although clearly the focus of income tax planning for trusts has extended well beyond merely achieving a basis adjustment on death, that remains a critical component of many plans. Attention should be paid to basis issues if a non-grantor trust is included, as such trusts cannot include a power for the settlor to substitute assets (because that alone would characterize the trust as a grantor trust), thus that option for achieving a basis step-up is precluded.

Trust protectors with powers to effectuate changes in the instrument. Be cautious as to the use of terminology and the powers given as different draftspersons may use different terminology and assign powers in different ways. Be certain that if a position requires the person appointed to act in a fiduciary capacity that the powers given are appropriate to that classification. For example, a person who is a fiduciary may be precluded from adding a new beneficiary because of the fiduciary duty owed other beneficiaries.

If the trust is a grantor trust, consider a power to lend to the settlor, even if not necessary to grantor trust characterization, so as to provide another means of enabling the settlor to access trust assets.

Evaluate the benefits of including permissible charitable beneficiaries and include the requisite language to comply with Code Section 642(c) requirements for a charitable contribution deduction. This differs from the inclusion of a person authorized to add charitable beneficiaries in the future, which will characterize the trust as a grantor trust. Including permissible charitable beneficiaries provides a means to garner charitable contribution deductions if the trust is, or becomes, non-grantor. It also provides a means of facilitating charitable contributions by heirs considering the growing trend of using long-term or perpetual trusts for most gifts and bequests.

Trust Administration Must Evolve

Modern irrevocable trusts require more proactive ongoing attention to administration. The proliferating powers of appointment and fiduciary and non-fiduciary positions, power to substitute, power to loan, potential to change the trust's characterization from grantor to non-grantor or vice versa, potential for change in situs, and more, all require more and regular attention as contrasted to more traditional trusts that had few if any of these flexibilities. The most critical difference in a modern versus traditional irrevocable trust is that historically it had generally been assumed that an irrevocable trust

“could not be changed.” In fact, that was how the term “irrevocable” was defined to clients planning irrevocable trusts, often as a caution for them to carefully consider their decisions because they were permanent. With the common use of decanting, non-judicial modifications, trust protector provisions, options to change situs and governing law, and so on, the modern irrevocable trust, while “irrevocable,” however that might now be defined, can be modified in a myriad of ways. The very flexibility that is a distinguishing feature of the modern irrevocable trust creates the imperative for regular trust administration formalities. These should include a periodic—perhaps annual, but the frequency will depend on actions taken, trust assets, and other factors—meeting of all relevant parties. This should include the adviser team, trustee, trust protector, investment adviser, and others.

Example: An accountant was preparing a trust income tax return for an irrevocable trust. It was likely reasonable to assume that the trust instrument in her permanent file remained the trust instrument, unmodified by any extraneous actions. If the trust were taxable in a particular state, it likely remained so taxable. So typically, once the facts were known, little changed.

Example: An accountant is planning to prepare an income tax return for a modern trust. If the trust has a decanting provision included, as well as a power to the trustee (or others) to change governing law and situs, it may no longer be appropriate to assume that if the trust had been taxable in a particular high-tax state that it remains so taxable. Even if it is, in fact, so taxable for the current year, the flexibility in the modern trust instrument may readily facilitate making changes to the trust and moving it to a low- or no-tax jurisdiction to reduce or avoid state income tax. Is it reasonable for the accountant to merely assume continued taxation in the high-tax state? Should the possibility of instituting changes to save state income taxes at least be explored? The decision may not be simple or obvious. What types of assets are included in the trust? If some assets are business interests actively operated in the high-tax state (source income), there may be no means to shift those interests to a lower-tax state. Perhaps a restructure of certain aspects of the business might facilitate shifting some income out of state. If the trust holds both source income and passive investment assets that are not sourced to that state, might it be necessary to divide the trust into two separate trusts and move the non-source asset trust to a low- or no-tax jurisdiction? These decisions may well require input from trust counsel, the trust accountant, and wealth adviser.

The need for ongoing proactive administration is much broader than merely the above income tax examples. If a trust protector has the authority to change governing law and situs, will the accountant or other advisers know whether any such action has been taken without confirmation? If someone holds the power to add a beneficiary, can the trustees know for certain whether such an addition was made? Whether or not an action was taken to add a beneficiary, might it be advantageous to do so?

The inclusion of powers to substitute (to swap trust assets for personal assets) is nearly ubiquitous in grantor trusts. Can an accountant preparing an income tax return know whether a particular asset is still on the trust balance sheet at year-end without confirmation as to whether the power holder has acted? Too often settlors, without appreciating the formalities of trust administration, may gift assets to a trust, or swap assets out of a trust, without informing the adviser team. This can be particularly nettlesome in a directed trust when the settlor is also named as the investment adviser as he or she may view it as solely within his or her purview to effectuate a swap. Although the settlor may be granted the right to swap assets, the trustee likely will have to confirm that the assets swapped are of equivalent value. What steps are required by the trust instrument to implement a swap? How will the trustee corroborate equivalent values? If the settlor in his or her capacity as trust investment adviser merely swaps assets, the changes made may not be reflected in a timely fashion on the administrative (i.e., directed) trustee’s records. Might such actions be viewed by a claimant, the IRS, or a court as a disregard of the independent nature of the trust?

Another aspect of trust administration is reporting to beneficiaries. Under some state laws, if sufficient disclosures are made to the beneficiaries, the time period during which a beneficiary can make a claim against a trustee is then limited. Should reports be so issued? If so, what should be reported? Before issuing any communications to beneficiaries, are there special circumstances that the trustee might wish to consider? For example, is a beneficiary in the midst of a divorce and sending the reports to the beneficiary’s home may subject him or her to interception by the beneficiary’s ex-spouse? Are one or more beneficiaries too young to receive reports? Does the trust include provisions making it a “quiet trust” for which disclosures cannot be made? Does applicable state law permit those restrictions? The concept of quiet trusts is generally new, and state law continues to evolve. Although most, if not all, institutional trustees have policies and procedures to address communication to beneficiaries, few individual trustees appear to address these matters. For the institu-

tional trustee, addressing at the periodic meeting any unique circumstances that the trustee should be informed of could be important. For the individual trustee, addressing the need to communicate and the potential effect to that individual trustee's potential liability may be important to address.

As the number of fiduciary and non-fiduciary positions and power holders has grown, the need for periodic reviews has become more important. These may include general or limited powers of appointment or more specialized powers to direct a trustee to make a distribution to the settlor or to add a beneficiary and more. It is likely impossible for any trustee or practitioner to recall the nuances of each modern trust without periodic review. Further, many of the people holding these powers, even if properly informed of them at the outset and even if they signed the trust instrument, may not recall or understand the role that they play. Further, to make an informed decision as to whether they should act on any of the powers they have, they will require current information and guidance.

In a directed trust, especially if the directed trustee is an institution, likely most or all investment decisions will be corroborated by a written signed direction letter that the trustee will insist on. If the trustee is an individual, those important formalities may be overlooked. But in addition to that step, what actions and records should the investment adviser who is directing the trustee retain? That person is likely acting in a fiduciary capacity and has a responsibility to the trust beneficiaries, even if empowered to make investment decisions. If the assets held in the trust are private equity, which is often the case as that is the precise reason why the trust was structured as a directed trust, should the investment trustee perform and document some of the same due diligence that an institutional trustee would if responsible for holding that asset?

In addition to the myriad of new powers and mechanisms that should be addressed at a periodic review meeting for the modern trust, many of the traditional trust considerations remain. For example, if the trustee is required or merely permitted to consider a beneficiary's other resources before making a distribution, that information may need to be obtained, and the decision process documented.

Conclusion

Modern irrevocable trusts are powerful planning tools that, despite the increased estate tax exemption, remain relevant for many clients. In fact, the flexibility and protections afforded by the modern irrevocable trust make these trusts valuable even to clients who may never face an estate tax. However, the modern irrevocable trust's strengths create a greater need for a collaborative well-thought-out plan, and greater care to funding and administration than what might have been necessary for many more traditional irrevocable trusts that had fewer "moving parts" and less flexibility.

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