GRANTOR ACCESS TO IRREVOCABLE TRUSTS – EASE THE STRESS OF COMPLETED GIFTS

For the moderately wealthy, giving up Control (and Access) is a barrier in deciding to make irrevocable trusts. Techniques for grantor access to trust assets make the decision easier.

Irrevocable trusts famously provide many **benefits** when properly designed and funded. For example:

– Asset protection (e.g., against frivolous lawsuits, bankruptcy, angry spouses, spendthrifts)
– Estate-tax-free generational wealth transfer (even perpetually with a GST-dynasty trust)
– Financial security for family members and descendants, for generations (even perpetually)
– Impartial asset management & distribution of benefits (w. professional trustee)
– Continuation of grantor's wishes/values (beyond the grave)
– Family business management and continuation
– Tax-free growth + tax-free "income" & death benefit in irrevocable life insurance trust (ILIT)
– Techniques for adaptation to changing laws, economy and family situation

Reasons to form irrevocable trusts. When establishing an irrevocable trust, a grantor (also called "settlor") typically gives up all dominion, control and enjoyment of trust assets. This is done obviously for one or more purposes, such as asset protection (e.g., against business creditors, malpractice claims, divorce) and tax-efficient generational wealth transfer (e.g., avoid estate and GST taxes, capital gains taxes). Another reason could be to lock in the temporary exemption "bonuses" for the gift and estate tax exemption and generation skipping transfer tax (GSTT) exemption. Currently, these exemptions are $13 million for each individual, $26 million for a couple (amounts indexed annually to inflation). These amounts, however, are scheduled to decrease to $7+ million per individual, $14+ million per couple, starting 2026 (indexed to inflation). Thus, an individual having assets greater than 2026 exemption amounts might want to make completed gifts to an irrevocable trust now to avoid losing the bonus.

Grantor hesitation: While the benefits of irrevocable trusts are attractive to most grantors when they finally consider them, grantors often **hesitate to relinquish all enjoyment and control of the assets**. To get trust assets out of the estate of the grantor (to avoid estate and GST taxes), the grantor must make a "completed gift", that is, give up legal control of the assets to the trustee. Additionally, in most US jurisdictions, **to protect trust assets against creditors of the grantor**, a trust **cannot be** a **"self-settled trust"**, that is, the trust grantor may not be a beneficiary of the trust. That generally means the grantor may not receive any income or principal back from the trust. For the very rich, these are not great concerns – they have enough money to create irrevocable trusts and still have plenty for their financial security. The moderately wealthy, however, (e.g., net worth $2-10 million), understandably have **reservations about giving away so much money that they might be left wanting in the future**. What if their other investments fail or unexpected expenses arise **after irrevocably giving away a substantial portion of wealth to the trust?**

SOLUTIONS – GRANTOR ACCESS TO TRUST ASSETS

1. SLATs – Spousal Lifetime Access Trusts

Spouse 1 establishes irrevocable, discretionary **Trust 1** naming **Spouse 2 as primary beneficiary**. **Spouse 2** establishes **non-reciprocal**, irrevocable, discretionary **Trust 2** naming **Spouse 1 as primary beneficiary**. Each trust may purchase a life insurance policy on the life of the other spouse for the value of the trust assets in case the other spouse dies young (thereby ensuring that the value of other spouse's benefits remains available to the grantor spouse). An optional **"floating spouse clause"** in each trust provides that only the **current spouse** of the grantor is the beneficiary (in case of death or divorce of the original spouse). Of course, it is unnecessary for both spouses to settle a trust. This technique can also be used by only **Spouse 1** to set up a trust for **Spouse 2**; for example, if **Spouse 1** owns significantly more assets than **Spouse 2** and/or if only **Spouse 1** has significant exposure to liability (e.g., professional malpractice, construction lawsuits.)

This technique **avoids the problems of self-settled trusts** because neither spouse is a beneficiary of that spouse's trust. Also, the **SLAT** technique is usable **not only by spouses**. It can be used among siblings and relatives **(a "RELAT"?)** or even good friends. Help avoid the **"reciprocal trust doctrine"** by settling **Trust 1 now**, and **Trust 2 later** (also, the trust provisions should differ from each other).

FLLC variation for improved Grantor Access: A Family LLC owns the investment assets. The trust owns most (e.g., 98%) of the LLC, while the Grantor retains a small LLC interest and also manages and controls the LLC. As manager, the grantor can access LLC assets by taking a salary or by taking a loan from the LLC, securing the loan with a note.

2. SPAT – Special Power of Appointment Trust

A trust grantor can create access to trust assets through one or more special (limited) lifetime powers of appointment in non-fiduciary, non-beneficiary individual(s). Appropriate powers for this purpose include, for example: the power to instruct the trustee to appoint trust property to the grantor; the power to make a distribution to the grantor; the power to order a trust loan to the grantor (if trust is non-grantor); a power to reimburse tax payments (if grantor trust status). The grantor is never named a beneficiary. The non-fiduciary power-holder may or may not exercise the power, in his discretion.

3. THIRD-PARTY IRREVOCABLE TRUST (also called "Hybrid DAPT")

The grantor is not initially a beneficiary, so the trust is non-self-settled. The trust document, however, appoints a special power in a non-fiduciary, non-beneficiary individual (e.g., in the trust Protector) to add one or more **beneficiaries from a class** of potential beneficiaries, such as the descendants of the grantor's grandfather (which **class** conveniently **includes the grantor!**). It might be a good idea for the power-holder to add the grantor as beneficiary at least 10 years and one day after the grantor contributes property in order to protect against inclusion of the property under § 548(e) of the Bankruptcy Code.

4. DAPT – DOMESTIC ASSET PROTECTION TRUST

Self-settled trusts are statutorily sanctioned **in 19 states**. For residents of these DAPT states, asset protection is probably pretty good, although it might be a good idea for the grantor to become a beneficiary 10 years and one day after its start date to protect against inclusion under § 548(e) of the Bankruptcy Code. For non-residents of DAPT states who establish a DAPT in a DAPT state, the law regarding asset protection is less clear. Nevertheless, a DAPT can only help these non-residents, not harm. Further, it is probably a good idea to use some of the techniques described above together with DAPTs.

5. IAPT – INTERNATIONAL ASSET PROTECTION TRUST

For assets that can be moved out of the United States (e.g., cash, securities), an international trust provides the **best asset protection**. Further, **IAPTs can be self-settled**, that is, the grantor can also be a beneficiary without loss of asset protection. These structures can be versatile. For example, the law of a country with favorable trust laws can be used to govern a trust administered in another jurisdiction. The trust can have a **US-based trustee** and a **foreign trustee**. During normal times, the US trustee is in charge and the trust is considered a domestic trust for tax (IRS) purposes. Domestic status makes trust administration simpler and less expensive. But in perilous times, a **trust protector** dismisses the US trustee and the foreign trustee takes over. Since trust assets are located outside of the US (e.g., in foreign banks having no US branch) and the foreign trustee is not subject to US courts or the IRS, the trust assets are protected. Administration of international trusts is more complex and expensive than domestic trusts, but these trusts have other benefits in addition to asset protection. They have favorable fraudulent conveyance laws with short look-back periods (e.g., as short as one year). They have more **investment flexibility**; for example, an international trust can own non-US-dollar assets and/or buy and own foreign, **offshore PPLI** (private placement life insurance), which is useful for building wealth in a **dynasty trust**. Click on this link to see a diagram of a model **ILIT-PPLI** structure.

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