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)
– Impartial asset management & distribution (w. professional trustee)
– Continuation of grantor's wishes/values (beyond the grave)
– Family business continuation
– Tax-free growth, income & death benefit in irrevocable life insurance trust (ILIT)

Grantor hesitation: While the benefits of irrevocable trusts are attractive to most grantors when they finally consider them, grantors often **hesitate to relinquish complete 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 trust beneficiary. 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 the current spouse of the grantor is the beneficiary (in case of death or divorce of the original spouse).

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**.

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 order a trust loan to the grantor (if trust is non-grantor); a power to reimburse tax payments (if grantor trust status). The grantor can never be named a beneficiary.

3. THIRD-PARTY IRREVOCABLE TRUST (so-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!**).

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, an international trust provides the best **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 offshore 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 purposes. 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 and the foreign trustee is not subject to US courts, 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. The trusts can be self-settled, that is, the grantor can also be a beneficiary. 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 buy and own **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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