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Can Your Brother-in-Law Do It? Trustee Selection

By Sumner B. Tilton, Jr., Esq.

The keystone to any well thought out estate plan for married individuals is reciprocal revocable trusts. They are sometimes called "credit shelter" trusts because one of their functions is to shelter each grantor's unified credit (currently $1.5 million) from taxation in the estate of the second-to-die. They are sometimes called "A/B" trusts because they typically split into two parts at the grantor's death. Part B is an amount equal to the credit ($1.5 million currently) and Part A is the remainder which will qualify for an unlimited marital deduction. Thus, by use of such a trust no federal estate tax will be due upon the death of the grantor and no federal estate tax will be due on Part B upon the subsequent death of the surviving spouse.

Signing such a revocable trust seems like a no-brainer and, to a certain extent, it is. It avoids estate taxation; it provides a vehicle to manage one's portfolio for the benefit of the surviving spouse; and it ensures, by its terms, that the corpus will be paid over to the children or grandchildren following the death of the surviving spouse.

However, every trust requires a trustee (or co-trustees) to administer it. The choice of a trustee is important and requires a certain amount of thought. The appointment of the spouse or one or more of the children involves the conflict of interest inherent in the trustee making discretionary distributions (or withholding them) to the surviving spouse. In fact, there are several tax reasons why a surviving spouse should not have the absolute unfettered discretion to distribute principal to himself or herself. Moreover, many surviving spouses do not want to rely on the children to distribute money that, except for the distribution, would eventually be theirs. Conflicts abound.

Beyond the conflict problems surrounding the appointment of immediate family members, there are areas of concern surrounding the appointment of any relative. A trustee must have the experience and knowledge necessary to effectively manage the corpus of the trust. This includes the ability to make and monitor asset allocation decisions. Those decisions must balance the need for current income with the need for growth of the principal. The trustee must have the ability to formulate a strategy for determining a reasonable distribution of income/principal to the beneficiary without sacrificing longer term investment objectives.

A trustee must not only invest the funds prudently, but he must prepare and render annual accountings to the beneficiaries. He must prepare and file income tax returns. He must keep the assets segregated from his own.

Many estate planning clients, when confronted with the choice of a trustee (and a successor trustee) tend to think that "my brother-in-law can do it." This may or may not be prompted by a reluctance to subject the trust to the imposition of trustee fees in the future. Trustee fees charged by professional trustees typically range from one-half of one percent to one percent per year. The creators of many revocable trusts assume that a family member would not charge a fee.

It is the rare case where a family member has the expertise to manage a trust fund and not charge a fee. To manage a trust properly one must not only possess investment and financial skills, but must devote a fair amount of time monitoring the investments, making distributions to beneficiaries and taking care of the necessary annual accountings and tax returns.

Maybe your brother-in-law can manage your trust and maybe he can't. If he can't, you have put the fund at risk and with it the future financial well being of your family. It might be prudent to consider naming a professional as trustee and let the trust pay for services that will be well worth the price.

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