

Fixing Old “B” Trusts

by
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PROGRAM DETAILS

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Start Time: 9am Pacific Time (10am MT, 11am CT, 12pm ET)

Duration: 60 minutes (including Q&A)

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FIXING OLD B TRUSTS

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A Typical Bypass Trust (not mine)

- Surviving spouse = Sole Trustee
 - Distributions of income/principal for spouse/descendants for “health, education, maintenance and support”
 - Sometimes pays out “all income” to spouse
- Spouse has a non-general power of appointment
- Distributions to children at ages 25, 30 and 35
- Home jurisdiction is trust situs

Irrevocable

But isn't it irrevocable???



Choice of Jurisdiction



Many planners fail to take advantage of jurisdictional opportunities

They assume that it must be too complicated or too expensive

How to Change an Irrevocable Trust

- Decanting
- Change of situs provision, then decanting
- Nonjudicial transfer of situs, then decanting

Decanting



de·cant (d -k nt)

tr.v. **de·cant·ed, de·cant·ing, de·cants**

- 1.** To pour off (wine, for example) without disturbing the sediment.
- 2.** To pour (a liquid) from one container into another.

Decanting a Trust



Just as you can decant wine by pouring it from its original bottle into a new bottle, leaving the unwanted sediment in the original bottle, you can pour the assets from one trust into a new trust, leaving the unwanted terms in the original trust.

First Jurisdiction Weak Decanting Statutes?



1. Decant into trust in better decanting jurisdiction
2. Then Re-decant to make the desired changes

Change of Situs, then Decanting

- What if the trust situs doesn't have a decanting statute?
 - Check trust agreement to see if situs can be moved
 - Move situs, then decant!



Nonjudicial Settlement Agreement

1. In this section, "interested persons" means persons whose consent would be required in order to achieve a binding settlement were the settlement to be approved by the court.

2. Except as otherwise provided in subsection 3 and 6 of this section, interested persons may enter into a binding nonjudicial settlement agreement with respect to any matter involving a trust.

3. A nonjudicial settlement agreement is valid only to the extent it does not violate a material purpose of the trust and includes terms and conditions that could be properly approved by the court under sections XXXXXX to XXXXXX or other applicable law.

4. Matters that may be resolved by a nonjudicial settlement agreement include:

(1) the interpretation or construction of the terms of the trust;

(2) the approval of a trustee's report or accounting;

(3) direction to a trustee to refrain from performing a particular act or the grant to a trustee of any necessary or desirable power;

(4) the resignation or appointment of a trustee and the determination of a trustee's compensation;

(5) transfer of a trust's principal place of administration; and

(6) liability of a trustee for an action relating to the trust.

5. Any interested person may request the court to approve a nonjudicial settlement agreement, to determine whether the representation as provided in sections was adequate, and to determine whether the agreement contains terms and conditions the court could have properly approved.

6. A nonjudicial settlement agreement may not be used to terminate or modify a trust for the reasons that a court could terminate or modify a trust as set forth in subsection 1 of section XXXXXX.

Nonjudicial Transfer of Situs, then Decanting

- Step 1: Nonjudicial Transfer of Situs to jurisdiction that has decanting statute
- Step 2: Decant trust



Health, Education, Maintenance and Support

- Support Trust
 - What is it?
 - Most are health, education, maintenance and support
 - Relies on spendthrift provision
 - Statutory exception creditors
 - Judicially created exception creditors



Support Trust

Exception Creditors

- Exception creditors—Restatement Second of Trusts
 - Alimony or child support
 - Necessary services or supplies rendered to the beneficiary (such as medical services)
 - A claim by the U.S. or a state to satisfy a claim against a beneficiary (such as a tax lien)
 - Services rendered and materials furnished that preserve or benefit the beneficial interest in the trust (such as attorneys' fees to protect a trust)

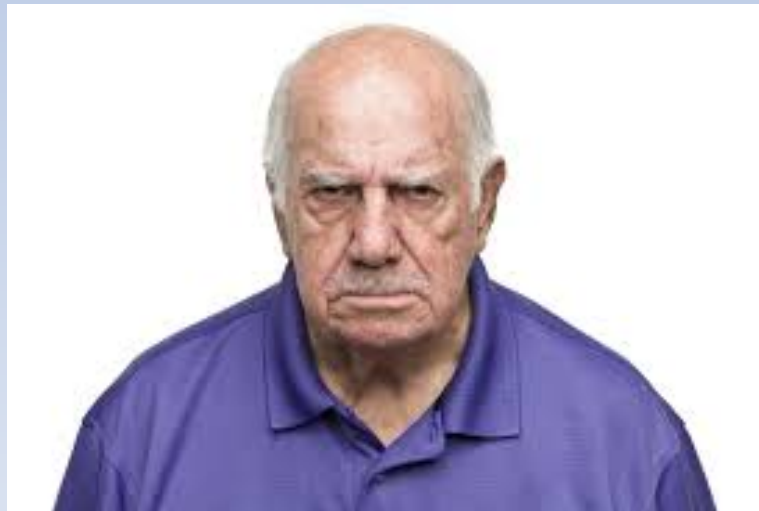
Discretionary Trust

- Discretionary trust
 - “Sole and absolute discretion”
 - “Unreviewable by a court of law”
 - Doesn’t have to rely on a spendthrift provision



Non-Grantor Trust

I hate paying state income taxes on accumulated trust income!



Non-Grantor Trust

- Is there undistributed income?
- Solution: Move the trust to a state with no state income tax
 - On a state-by-state basis
 - Take a look at the trust and the state tax laws
 - Source income
 - Domicile of decedent
 - Location of trustees
 - Location of beneficiaries
 - Location of administration



All Income

- Many bypass trusts must distribute “all income” to the surviving spouse
 - Income subject to creditors
 - Inability to shift taxable income to lower bracket beneficiaries
 - Inability to avoid state income tax if surviving spouse lives in high state income tax jurisdiction
 - By changing situs and complying with tax situs rules

Power of Appointment

- Many bypass trusts give the surviving spouse a non-general power of appointment
 - Some trusts don't give one
 - Some trusts give trust protector or independent trustee power to give and take away powers of appointment
- General power of appointment to get new income tax basis

Staggered Distribution Trust

- Nearly every trust you see (not from my law firm!) is drafted as a staggered distribution trust
- A “staggered distribution trust” is a trust that makes mandatory distributions to the beneficiary at staggered ages
- This subjects the trust assets to potential estate taxes, creditors and divorcing spouses

Beneficiary Controlled Trust

- Rather than make mandatory staggered distributions, why not just pick an age to give the beneficiary control?
 - Very few attorneys understand this which is why nearly every trust has the same drafting error
 - Once the client understands that the trust can be drafted as a beneficiary controlled trust, there is no reason to ever terminate the trust

Dynasty Trust

- A “Dynasty Trust” is an irrevocable trust that is not subject to estate taxes for as long as state law allows
- It can also be drafted to be protected from creditors and divorcing spouses
- Rule against perpetuities limitations

Why do we use Dynasty Trusts?



- To save estate taxes?
- To protect assets from creditors and divorce?
- To shift income to lower federal tax brackets?
- To save state income taxes?
- To be able to give beneficiaries GPOAs over low basis assets
- To make sure the assets pass to the intended remainder beneficiaries

Thank You For Attending Today's Seminar

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Steven J. Oshins is a member of the Law Offices of Oshins & Associates, LLC in Las Vegas, Nevada. He is rated AV by the *Martindale-Hubbell Law Directory* and is listed in *The Best Lawyers in America*® and was named the Las Vegas Trusts and Estates Lawyer of the Year by *The Best Lawyers in America*®, an honor given to only one lawyer. He was voted into the NAEPC Estate Planning Hall of Fame® and will be inducted in 2011. He has been named one of the Top 100 Attorneys in *Worth*, one of Southern Nevada's Best Lawyers in *In Business Las Vegas*, one of the Best Lawyers in America in the Trusts & Estates category in *The American Lawyer*, one of the Best Lawyers in America in the Tax Law category in *Corporate Counsel*, named Nevada Super Lawyer in the Wills, Trusts & Estate Planning category in *Nevada Business Journal*, named Nevada Super Lawyer in the Estate Planning & Probate category in *Las Vegas Life* and named *Mountain States Super Lawyer* in the Estate Planning & Probate category.

Steve has been featured and/or quoted in many media publications including, among others, The Wall Street Journal, Forbes, Bloomberg, Financial Times, Kiplinger's, Registered Rep, Private Wealth, The Trust Advisor, Investment News and Lawyers Weekly USA. He was interviewed by former Good Morning America Co-Host Joan Lunden for a dynasty trust DVD that has been distributed nationally by financial planners and life insurance agents since early 2009.

He has authored numerous estate planning and asset protection articles in magazines such as Estate Planning, Trusts & Estates, LISI, Probate & Property, Journal of Financial Service Professionals, The Monthly Digest of Tax Articles, CCH Estate Planning Review, Asset Protection Journal, Tax Management Estates, Gifts and Trusts Journal, as well as others. Steve received an EPIC Award as Best Young Author from Trusts & Estates magazine in 1998. He is also a frequent lecturer nationally on advanced estate planning and asset protection techniques, including lecturing at the Heckerling Institute on Estate Planning.

Steve has been very active in helping get some of the most valuable trust and creditor protection laws passed in Nevada. In the 2001 legislative session, he co-authored Nevada's charging order law for limited liability companies and limited partnerships, making the charging order the exclusive remedy for a judgment creditor under Nevada law. He co-authored a change to that law in the 2003 legislative session that enhanced the 2001 version of the Nevada law and then again co-authored another charging order bill in the 2011 legislative session which included statutorily protecting single member LLCs with charging order protection and statutorily disallowing any equitable remedies to apply to Nevada limited liability companies, limited partnerships and corporations (except for the alter ego theory which still applies to corporations). In the 2005 legislative session, Steve authored Nevada's 365-year rule against perpetuities law that now allows people to set up 365-year dynasty trusts in Nevada. He authored a law creating a new form of business entity called the Restricted LLC and Restricted LP in the 2009 legislative session making Nevada the first state to offer these favorable laws that allow for significantly higher valuation discounts than are allowed under any other state law.

He can be reached at soshins@oshins.com or at (702) 341-6000 x2.

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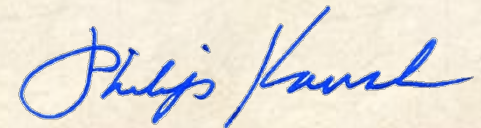
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Philip J. Kavesh, President

Teleconference Response Form

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