

A LITTLE PLANNING NOW

Protects Heirs Later

By Bruce W. Martin

Parents and grandparents will almost always want to set up a trust to leave any amount of inheritance to minors under the age of 18. Not doing so prompts the local probate court to place the assets into a court-supervised conservatorship and, in most states, conservatorships terminate automatically when the child reaches the age of 18. Can you imagine a worse time to put a large sum of money into a child's hands? In order to delay the distribution past this age, your will or trust must contain language that sets out the terms of the trust, appoints a trustee, and specifies how and when assets will be distributed.

Protect Heirs

The most basic trust arrangement is to hold assets in trust for minors and young adults. The trustee named in the documents would hold, administer, and distribute assets in accordance with the trust provisions. Typically distributions are made for the child's health, support, education and maintenance at the trustee's discretion until the heir reaches the age of 21, 25 or older. After a specified age, a child may begin to automatically receive all income from the trust. Depending on the size of expected inheritance, a child might have the right to withdraw funds at certain ages, for example half at 25, and the balance at 30. The specifics are up to the clients.

“In most states conservatorships terminate automatically when the child reaches the age of 18. Can you imagine a worse time to put a large sum of money into a child's hands?”

You also may hold assets in trust when a child has some sort of known problem, such as over-spending, or drug and alcohol abuse. In that case, you can hold the assets in trust for a longer span of time — such as the child's lifetime — with specific provisions aimed at discouraging the child's self-destructive behavior. The trustee may be given authority to cut off disbursements if he or she deems that the child is, for instance, back on drugs.

Encourage Behaviors

Another variation on a continuing trust is known as an “incentive trust,” which may hold assets in trust for life, with provisions specifically designed to enhance a beneficiary's sense of responsibility. For instance, some trusts only distribute a matching amount to what a child earns through his or her own wages and salary. Others may only allow distributions so long as a child is gainfully employed, raising a family, engaged in full-time volunteer work, or incapacitated through no fault of his or her own (e.g. not through drug or alcohol abuse or addiction).

Generally the settlor of a trust is allowed broad discretion in setting forth criteria for the administration and distribution of their assets via trust. Typically, the guiding principal has been whether the offending trust provision violates public policy. A trust provision is said to violate public policy when its enforcement would be contrary to the public interest. The public policy argument is balanced against the person's testamentary freedom. Most states in the U.S. have typically given persons great freedom to freely dispose of their assets at their death.

For example, you cannot stipulate that your heirs divorce their spouse or forego marriage altogether. But you can stipulate that your heirs not marry outside the family's religion, according to a recent Arizona court ruling.

“Most states in the U.S. have typically given persons great freedom to freely dispose of their assets at their death.”

Deflect Creditors

A trust legally grants some protection from the beneficiary's creditors. It should be noted that in Arizona — unlike a handful of other states — a person cannot establish a trust, whether revocable or irrevocable, to protect his or her own assets from his or her own creditors. However, under most situations, an individual who is the beneficiary of a trust that he or she did not establish himself or herself will have additional protection from creditors. In fact, a recent change to the Arizona trust law makes it clear that this protection exists even if the beneficiary is a trustee or co-trustee of the trust.



Bruce W. Martin is a Certified Specialist in Estate & Trust Law and attorney at Bogutz & Gordon, P.C., a Tucson-based law firm with a concentration in estate planning and elder law.

A continuing trust also is much less likely than other assets to be commingled with a beneficiary's spouse's assets. This helps keep the property clearly separate in the event of a divorce or other marital property dispute.

Choose wisely

Whatever special terms you decide to include in your trust, you need to pay special attention to the selection of a trustee. Imagine the family tension that you will create if you name little Johnny's sister the trustee of Johnny's incentive trust. Often a better choice for a trustee will be a third party trustee such as a bank or trust company, your CPA, or your attorney. Not only will the unrelated trustee find it easier to turn down Johnny's request for a third car, but an institution such as a law firm or trust company provides continuity that an individual trustee simply cannot. Although you may not have thought about it, naming your brother as trustee for your great-grandchildren is simply not a possibility — for obvious reasons.

For more information, call **520-321-9700** or visit **BogutzAndGordon.com**.