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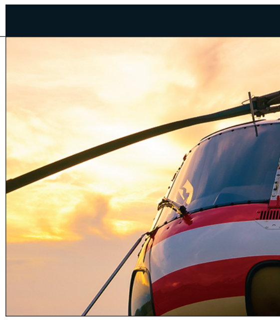

The Anatomy of the Perfect Modern Trust—Part 2

Educate clients to understand the advantages that a well-designed and administered trust has over outright bequests.

RICHARD A. OSHINS AND STEVEN G. SIEGEL

With estate planning often focused on strategies to shift wealth, the wealth receipt planning component of estate plans may receive inadequate attention. Yet wealth receipt planning can be the more significant factor in the long run. Trusts are a key to both the shifting and receipt aspects.[1] Part 1 of this article,[2] which was published in the January 2016 issue of ESTATE PLANNING, began an exploration of a solution to these estate planning issues: the Perfect Modern Trust. That discussion is continued below.

Better than conventional trust planning

Asset protection is as much a part of modern estate planning as is tax planning.[3] For most people, losing wealth to the taxing authorities is more tolerable than losing it to creditors or divorcing spouses. Most of the transfer tax avoidance planning techniques are equally applicable to creditor protection sheltering, and one of the most powerful strategies is to use trusts with little, if any, trust depletion due to unnecessary distributions.

Beneficiary-taxed grantor trusts under Section 678 substantially increase the estate depletion both for tax and asset protection consequences. Similar to the concept noted in Part 1 of this article that the estate tax is a "voluntary tax,"[4] the exposure of family assets to potential claimants in many instances is elective as well. For most families who follow the recommended planning, as well as taking advantage of other common planning strategies, their wealth can be passed generation after generation free of unnecessary estate depletion.

Assets that are transferred in trust are given more respect by inheritors than those same assets would be given if they were transferred outright and commingled with the recipient's other assets. There is a far greater probability that inheritors will remember and appreciate a gift or bequest in trust. In addition, there is also a much greater probability that trust assets will be invested or spent in a more prudent manner than if they lost their identity and were simply part of the aggregated personal wealth of the recipient.

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Conventional tax and trust planning does not guide clients properly and asks clients the wrong questions. Asking the client, "When do you want your children to receive their inheritance?" is the wrong question. The better question is, "How do you want your children to receive their inheritance?"—accompanied by an explanation of the differences between outright inheritance and inheritance using a properly crafted trust.

Clients generally listen to their advisors when business planning is discussed. Advisors use their experience to take the lead in providing business planning advice. Estate planning for the client's loved ones is certainly no less important. Advisors should not be passive in these planning engagements.

An advisor would not recommend to a client a business entity that could be pierced by creditors or subjected to unnecessary income taxes. Neither would an advisor allow a client to make such a choice. Clients have no problem accepting advice to wrap their business assets in a protective entity. They should be similarly receptive to wrapping their personal assets in a protective trust. With proper and thorough explanation of the benefits and the ability to adjust controls using the trust wrapper, clients will recognize the benefits of trust planning for their heirs that the heirs cannot provide for themselves.

Clients should be made to understand that trusts are not just a good idea for beneficiaries who lack capacity. Properly and carefully advised, clients will normally do what their advisers tell them to do. If they do not see the wisdom in the advice being provided, the advisors have not adequately explained the disparities, and they need to try harder.

Conventional trust techniques to be avoided

A fundamental credo of physicians, similarly applicable in the estate planning process, is "First, do no harm." That principal is frequently violated by advisors, however, often as a result of attempting to improve the trust without adequately factoring into the equation the detrimental concessions that occur. Consider some of the "standard" techniques advisors typically recommend, none of which are helpful to the goal of proper family estate and tax planning:

1. Pay out the income annually or more frequently.
2. HEMS (health, education, maintenance, and support) withdrawal rights.
3. The annual lapsing right to withdraw the greater of 5% or $5,000 of the trust corpus.
4. Staggered distributions, such as one-third at 25; one-half of the balance at age 30, and the remainder at age 35.
5. Investment committees.
6. Distribution committees.

Under the theory that "more is not always better," does the inclusion of the foregoing attributes help the competent inheritor (i.e., a beneficiary who is a competent, mature, and capable adult)? If their inclusion does not help but instead imposes unnecessary controls, complexities, exposure, or costs, then they should not be included in the planning. As a general rule, entitlements, enforceable rights, and force-outs are not beneficial. Rather, they can be extremely harmful. Unnecessary committees add complexities which interfere with the essentially uninterrupted enjoyment that most competent inheritors desire.

Avoid required income payments

When income from a trust must be paid to a beneficiary, the income that is paid out, or that which the beneficiary is entitled to receive, becomes part of the beneficiary's personally owned estate unless spent, and has thereby "leaked out" of the protective trust wrapper. Why not make distributions only when they are needed? Furthermore, consider these issues:

- Where does the beneficiary live? If the beneficiary's state of domicile has an income tax, the distribution from a trust in a no-tax state will now be subjected to the income tax of a taxing state.
- Paying out all of the income, especially if to a single beneficiary, does not allow for the flexibility of paying income to multiple beneficiaries to shift income and take advantage of multiple tax brackets.
- If the required income beneficiary has creditor concerns, the mandatory distributions are exposed to creditors' claims at any time.

What if there is an existing irrevocable trust that forces out income? First, consider decanting the trust. Decanting a trust that provides entitlements is prohibited in most jurisdictions. Six states,[5] however, allow the elimination of enforceable rights in the decanting process.

1 This article does not discuss the virtues of professional trustees. For those virtues, please see Akers, "Structuring Trustee Powers to Avoid a Tax Catastrophe (or Twenty Things You Need to Know About Selecting a Trustee and Structuring Trustee Powers)," Hawaii Tax Institute, 11/5/2014.

2 Oshins and Siegel, "The Anatomy of the Perfect Modern Trust—Part 1," 43 ETPL 3 (January 2016).

3 Fox and Huft, "Asset Protection and Dynasty Trusts." 37 Real Property, Probate and Trust J. 287 (Summer 2002).

4 Professor A. James Casner, Harvard Law School, Hearings before the House Ways and Means Committee, 94th Congress, 2d Session, pt. 2, 1335 (3/15/1976 - 3/23/1976); Cooper, *A Voluntary Tax? New Perspectives on Sophisticated Tax Avoidance* (Brookings Institution, 1979).

5 Delaware, Missouri, Nevada, Ohio, South Carolina, and South Dakota.

If decanting is impermissible under the then-applicable state law, consider a change in situs to a state that permits a change to a discretionary trust format. If that is not allowable, consider placing the trust assets into an LLC wrapper where the LLC is taxed as a disregarded entity. This should result in blocking the force-out of distributions from the trust by virtue of state trust accounting laws as the trust will not have any trust accounting income to distribute. Where distributions are not advisable, this can be a valuable protection. For instance, the LLC would block distributions to a beneficiary who is being sued, or has an estate tax exposure. Where distributions are appropriate, discretion and flexibility have not been compromised.

Avoid allowing HEMS distributions

The Internal Revenue Code permits trust beneficiaries to have the right to withdraw from a trust based on an ascertainable standard (i.e., HEMS) without resulting in estate tax inclusion.[6] Often this technique is used where the trustee is also a beneficiary in order to avoid the imposition of general power of appointment status under Section 2041(b)(1)(A).

Just because the Code permits certain rights to exist does not mean that they should be used. In many instances, because a beneficiary has an entitlement, due to its enforceability, the rights actually compromise the benefits that can be obtained with better planning.

Providing such a provision in a conventional trust may place the creditor protection of the beneficiaries at risk. The statutes of some states—but not all—protect beneficiaries from creditors' claims when the trust has an ascertainable standard for distributions. How will a judge in the state where a trustee/beneficiary resides and where the creditors have asserted claims view a HEMS standard, if protection is repugnant to that state's strong public policy and is different from the governing law of the state selected in the instrument?[7] Even if the governing law of the trust state protects the beneficiary, the domicile of the beneficiary and the presence of creditors in a different state may yield a different result.

The standard of "support" is judicially defined differently from one state to another. Will "support" referenced in a trust be extended to a divorcing spouse? Is the spendthrift clause in the trust document a sufficient protection against all creditors, or will exception creditors be permitted to attach trust assets by either statute or judicial determination? Why expose the client to any of these risks? A wholly discretionary trust controlled by an independent trustee in a protective jurisdiction provides the most protection and the most flexibility for the beneficiaries.

The advice to avoid giving a beneficiary HEMS access is applicable both to typical HEMS trusts where the beneficiary is also the sole trustee as well as the perceived enhancement that some advisors suggest where the trust design provides unlimited sprinkling power by an independent trustee plus enabling the favored beneficiary to withdraw or demand a distribution for HEMS purposes. The theoretical advantage is that the comfort of the beneficiary is increased. The actual result is that the power of the independent trustee to block the trust assets from creditors and predators is negated, because of the entitlements given to the beneficiary. In such instance, more is less.

The reason for concern about the evolution of theories to override spendthrift protections can be illustrated by the *Pfannenstiehl*[8] case where the appellate court in Massachusetts concluded that a discretionary HEMS trust with independent trustees (the beneficiary's brother and lawyer) having the distribution control, in a divorce proceeding was part of the marital estate for equitable distribution purposes.[9] This expanding theory of attack on spendthrift trust planning should be disconcerting to advisors who recommend HEMS standards, especially if the decision-making capacity is in the hands of a beneficiary/trustee. Therefore, the authors suggest:

1. The totally discretionary trust pattern.
2. An independent trustee, preferably located in a protective jurisdiction.
3. Use of applicable state laws of the favorable situs.

Avoid giving the trust beneficiary the "5 and 5" power

Another power that often seems innocuous (except to the extent that such right is owned at death) to most estate planners, which is allowed by the Code, is the lapsing right to withdraw the greater of 5% or $5,000 of the trust corpus annually.[10] The "5 and 5" noncumulative power of withdrawal given to a beneficiary to elect annually to withdraw a defined portion of the trust fund is a mistake on many levels.

A decedent's possessing this power at death subjects the property that is withdrawable at death

[6] Section 2041(b)(1)(A).

[7] Oshins, 39th Annual Heckerling Institute on Estate Planning, "Asset Protection Other Than Self-Settled Trusts: Beneficiary Controlled Trusts, FLPs, LLCs, Retirement Plans and Other Creditor Protection Strategies," (2005); Hirsch, Macauley, and Butcher, "Interest in Irrevocable Trust Is Marital Asset," Tr. & Est. (9/9/2015).

[8] Pfannenstiehl v. Pfannenstiehl, Mass. App., Slip # 13-P-906 (2015).

[9] Hirsch, Macauley, and Butcher, *supra* note 7.

[10] Section 2041(b)(2).

to being included in the decedent's estate. Some advisors suggest limiting the exercise of the power to the month of December, or even to just December 31. The typical justification for providing this power is that it enhances the comfort of the beneficiary. Contrarily, it accomplishes the opposite. It unnecessarily potentially exposes the trust assets to creditors, including divorcing spouses.

The withdrawal right exposes the assets to creditors who can enforce the withdrawal right every time it is available to the beneficiary. Compressing the withdrawal period, perhaps even to the last day of the year, will reduce the potential estate tax inclusion period; however, the creditor's right issue is not repaired. The potential estate depletion from creditors will continue to exist. Control by the distribution trustee is a far more attractive alternative without the unnecessary risk.

The 5 and 5 power can result in numerous time-consuming and expensive administrative complexities. In Ltr. Rul. 9034004, the IRS concluded that where a beneficiary of a 5 and 5 power did not exercise the power, there was an accelerating exposure to income tax liability every year (i.e., tax the beneficiary on 5% of the income the first year, 5% of the income plus 5% of 95% of the income the second year, and so on for successive years). Why expose the client and the client's heirs to these issues when a flexible discretionary trust with none of these risks is an available alternative?[11]

Avoid required distributions at designated ages

Clients generally want to do what is best for their children. Most believe that absent obvious problems, their children are, or will at some point become, capable beneficiaries. Accordingly, clients are often receptive to "force out" trust provisions where the trust principal is to be distributed in increments, often at ages 25, 30, and 35. The "theory" often explained by advisors here is that if the kids "mess up" at one age, they will have another chance to succeed several years later.

Many clients are impressed by what they believe is some wonderful creativity on the part of the advisor. Forcing assets out of a sheltered trust into the hands of beneficiaries, which unnecessarily exposes the inherited wealth to loss to the tax collector, creditors, and divorcing or dissident spouses, is not being creative. All force-outs should be visualized as partial terminations. Trust terminations or partial trust terminations also terminate the trust benefits. If a client wants to give children multiple "bites of the apple," the client can use the "staggered distribution" philosophy but the transfer should be to a beneficiary-controlled trust, which will preserve the trust benefits, rather than to the inheritor outright.

Clients often favor the idea that their beneficiaries should enjoy their inherited wealth without what they may see as "unnecessary restrictions." However, why expose the clients and their heirs to the unnecessary risks of outright ownership when that goal can be achieved by providing similar control in a beneficiary-controlled trust? Otherwise, creditors and predators can simply be standing by waiting for the appointed birthday to pounce.

If the alternative is a protective trust with flexible distributions paid when appropriate, with all of the beneficiary controls—without the risk—described here, why introduce the potential harm associated with distributions at specified ages? A fully discretionary trust with distributions controlled by an independent trustee will maximize the protection of all beneficiaries from claimants and taxes.

The competent inheritor, and each succeeding competent inheritor, will have all of the powers available under the law that will not compromise the creditor and taxation protections sought. With no distribution entitlements and no designed force-outs, the trust wrapper can shelter the family assets. Clients, with the planner's guidance, have the opportunity to determine who will inherit and enjoy their wealth. The options are: family and friends, charities, creditors, or the taxing authorities. Certainly, the preferable options are family, friends, and charities, with the minimum depletion to the tax authorities and none to claimants.

[11] Discussion of additional increased complexities and potential costs are beyond the scope of this article.

Anticipate concerns and objections

An important step in counseling clients, is for advisors to anticipate the concerns and objections that typical clients may have to the intended planning.

Too complex. The client may erroneously think a trust is too complex. Yet, when the assets are in a trust, the investment trustee (who can be the primary beneficiary, at the proper time—i.e., the anticipated attainment of maturity), manages the trust, controls the investments, determines the identity of the independent trustee, and does everything the law allows to be done without risking adverse tax or creditor issues. The independent trustee addresses distributions. Properly designed and administered, this should be easier for the client to deal with than a revocable trust where the client must deal with titling and reporting—with no tax or creditor protection.

When the client says, "All I want is a simple will," the client is failing to realize the unnecessary loss of assets that can occur that a trust can protect against. Real complexity would arise if there is a divorce or lawsuit and all of the assets owned outright or in a revocable trust were "in play." Business assets may have to be purchased from a divorcing spouse, complex appraisals might be required—much of which can be avoided if assets are held in a third-party-created trust wrapper with creditor protection.

From a practical perspective, in operation it is anticipated that the Perfect Modern Trust will make few if any distributions because of the "use" trust preference. If distributions are necessary, in most instances it will be good that the trust is in place as a protective vehicle for the beneficiary.

Because it is a "use" trust, the trust will be operated in a manner similar to a revocable trust with two exceptions. First, beneficiaries will be prohibited from making gifts to the trust. Second, an income tax return must be filed for the trust unless it is a grantor trust. If it is not a grantor trust, the income tax savings will generally well exceed the costs and complexities of filing an income tax return. The distribution trustee can elect to make tax beneficial distributions, or retain income in the trust if deemed advantageous (e.g., save state income taxes) and make such elections as are determined to be in the best interests of the beneficiaries, taking into account, but not being controlled by, tax efficiencies.

Too expensive. The client may think trusts are too expensive. In fact, the opposite is true over time. The trust assets are not commingled with the beneficiary's other assets, leaving fewer assets to be taxed at the beneficiary's death. The assets in the dynastic GST exempt trust are not taxed at the death of any beneficiary. State income tax can be often be avoided by the careful choice of the trust situs, careful drafting, and proper choice of trustees.

The magnitude of the state income tax savings is dependent on the nature of the underlying trust assets and possible other factors. Creditor avoidance should be clear, resulting in fewer creditor claims and less creditor success if claims are made. There will be divorces at some generational level. If a marriage ends in divorce, the trust wrapper provides appropriate protection. All of these factors will save, not cost, the family money.

Fear of unpredictable future. The client does not know how family members will "turn out"—and fears law changes. This concern is an argument *for* the Perfect Modern Trust, not against it. Rather than mandating outright distributions at designated ages and "hoping" for the best, this trust is flexible in its design.

The primary beneficiary and subsequent primary beneficiaries can be given a limited power of appointment to transfer the wealth in the trust to anyone except the power-holder, him or herself, the creditors of the power-holder, the estate of the power-holder, or the creditors of the estate of the power-holder. This limited power of appointment can be exercised to appoint property outright or in further trust. The model of the Perfect Modern Trust would suggest that this power be given generation after generation in order either to continue with the trust design, amend the present trust design, or create new trusts for the beneficiaries unless personal factors or law changes make it undesirable or unwise to give the power to the successor generation or to continue with the trust structure.

The power can be used to compress or expand the class of potential recipients as circumstances dictate. Essentially it is a power to re-write the trust. (It may be helpful to the client's and the beneficiaries' understanding to refer to this as a "re-write power" rather than a special power of appointment). Accordingly, it gives a person as much power and flexibility over the trust as would be the case if the property was owned outright—except there is more wealth to pass along and less tax and potential creditor liability to address.

The ultimate irrevocable life insurance trust (ILIT)

The Perfect Modern Trust is an ideal vehicle for the acquisition of life insurance on the lives of the trust

beneficiaries or others on whom the trust has an insurable interest. Consider the two primary components of a permanent life insurance policy—the lifetime benefit of the inside build-up and the death benefit. Both are often considered to be very valuable attributes.

In traditional estate planning, an election often must be made between the two—minimize estate taxes or preserve access to the cash value. If the insured owns the life insurance policy to preserve access to the inside build-up, the insured's estate will face inclusion of the policy proceeds at death. If the insured arranges for the policy to be owned in an ILIT, the estate tax inclusion can be avoided, but the ability to access the inside build-up during lifetime is sacrificed.

Placing an existing life insurance policy into an ILIT may involve gift tax consequences by either requiring some use of the donor's applicable transfer tax exclusion amount or requiring tax to be paid. The estate tax avoidance compromises the insured's access to the cash value. Borrowing the cash value of the policy can be problematical for the insured as it may expose the death benefits to the transfer tax system.

The Perfect Modern Trust solves these concerns. The investment trustee can acquire life insurance on any beneficiary of the trust with one exception—he or she cannot acquire life insurance or make any other decisions with respect to life insurance where he or she is an insured. That is a meaningless restriction because life insurance on the life of the investment trustee can be acquired by the independent trustee or a special trustee who would be expected to follow the guidance of the "tainted" investment trustee. Where the trustee is an insured, in addition to requiring that all decisions on that life insurance policy be made by the independent trustee, the insured beneficiary cannot have a power of appointment over the policy or its proceeds.

Subject to the foregoing, the trustee can access the inside build-up if necessary or desirable. Because the beneficiary will not have any incidents of ownership in such policies, there is no concern of estate inclusion and no limitation on access to the policy's inside build-up. Think of this opportunity as a "cascading" funded ILIT—every trust beneficiary in successive generations can be an insured.

Because the trust will have assets, generally the ability to fund life insurance premiums is simplified. The complexities of meeting *Crummey* notice requirements, using the annual exclusion, and needless use of the unified credit is avoided forever.

It may be very advantageous to acquire the policies when the insureds are young in order to lock in the most favorable premium rates. The client, and subsequently the trustees, should certainly recognize the wisdom of this planning opportunity. In effect, the life insurance is much more valuable to the insured if he or she does not have to elect between access or estate tax savings as to which benefit should prevail.

Trust for all types

Can the Perfect Modern Trust be "nimble" enough to be the right planning choice in a variety of very disparate circumstances that clients may present? Absolutely. To illustrate the wide range of possible circumstances the trust can address successfully, consider an example of a client with seven children. The children are equally loved and respected, and the client wants to treat all of them equally. However,

the client identifies unique issues and concerns for each child.

Affluent physician. Child #1 is a successful surgeon earning a seven- or eight-figure annual income. Child #1 needs creditor protection, especially from potential malpractice claims. Matrimonial protection could also be an issue. Distributions from the trust may not be advisable in order to avoid estate tax exposure. Depending on state law, in many instances, state income taxes can be avoided on certain trust-owned assets and Child #1 can serve as the investment trustee.

Perhaps the trust for Child #1 owns an office building with a low basis. The independent trustee could give other trust beneficiaries with estates that fall below the applicable exclusion amount a general power of appointment at death over the building to the extent it will not result in an estate tax. At the death of the power-holder, the asset will be includable in his or her estate and there would be a new stepped-up basis to its then fair market value even though the power might not be exercised. As a result of the new basis, there would be a new depreciation opportunity to shelter income taxes.

Having the proper trust situs is very important to Child #1 because of the state income tax savings potential, as well as the potential creditor risk due to Child #1's occupation. Although distributions are permissible, they probably will not be made from the trust. If Child #1 is in the top bracket based on other income, there is no federal tax detriment by leaving the income in the trust. If Child #1 needs money, preferably the money will be loaned from the trust to Child #1 at market rates and the loan will be secured so that it has preference over others.

Affluent business owner. Child #2 is a wealthy, successful business owner. Child #2 has an estate tax problem. The trust will allow business investments to be made outside of the transfer tax system. If the trust is a beneficiary-taxed trust (e.g., a beneficiary defective inheritors trust (BDIT)) under Section 678, Child #2 will pay income taxes on the trust income, which will help burn off the assets otherwise includable in Child #2's estate. Certainly creditor and matrimonial protection is important here as well.

For all inheritors, particularly of this profile, the allowable distributees should include the client, the client's descendants (preferably including the spouses of all of them so that if a blood beneficiary is being sued, a distribution might be made to the spouse), and trusts for any of the foregoing—including one that is set up by the independent trustee. Enabling the independent trustee to set up a trust for the benefit of a permissible beneficiary (including the competent inheritor or any other beneficiary), as an alternative to outright distributions, creates some powerful planning opportunities. In such instance, the independent trustee can make a distribution to a second trust subject to a lapsing *Crummey* power of withdrawal. That would create a BDIT for the beneficiary. The second trust could invest in a favorable business opportunity or acquire assets from Child #2 income tax-free, and the trust income would tax burn Child #2's estate.

To illustrate, assume that Child #2 had a child ("the grandchild") who also enjoyed economic success similar to Child #2. The independent trustee could create two separate trusts, one for Child #2 and one for the grandchild. Although subject to variation, one trust would be controlled by and taxed to Child #2. The other would be controlled by and taxed to the grandchild. The potential of estate depletion as a result of grantor trust status, opportunity shifting, and installment sales is very compelling.

Spendthrift. Child #3 is a spendthrift. The trust would be modified to address this situation and reduce the controls of Child #3. In particular, the right to control the identity of the independent distribution trustee would be limited.

Serial marriages. Child #4 is marrying for the fourth or fifth time or marrying someone who has been married multiple times. The trust will protect Child #4's inherited wealth from being lost in a divorce.

A third-party trust created in a jurisdiction that protects assets from support claims is much less susceptible to attack in a matrimonial situation than a pre-nuptial agreement designed to protect assets owned outright by the divorcing parties. In addition, telling an intended spouse that the assets were inherited in a trust is generally a much more comfortable discussion than asking a potential spouse for a prenuptial agreement.

Distrusted in-law. Child #5 is married to a spouse who is disliked and not trusted by the client. The client does not want this in-law spouse to be an heir, preferring to keep all inheritances in the bloodline of the family.

Here, the power of disposition is a key factor and must be limited. The trust will be modified to make certain that the scope of the special power of appointment is restricted to persons in the bloodline of Child #5. Other modifications may address and limit the ability of Child #5 to select the independent trustee who might make unnecessary distributions which could be recycled to the in-law spouse.

Unproductive heir. Child #6 is a "trust fund baby," an unproductive person with no ambition who simply is waiting to receive the anticipated inheritance. Here, the trust would be drafted to limit the controls of Child #6, as well as the power to determine the identity of the independent trustee.

The client remains hopeful that Child #6 will become a responsible member of society and does not want Child #6 to be able to rely on the trust except possibly for necessary help, such as medical need and possibly educational funds to pursue a meaningful educational degree.

Special needs. Child #7 is a person with special needs. These needs may be permanent, in the nature of a physical disability, or in the nature of substance abuse, gambling addiction, or criminality. The trust for Child #7 would either minimize or eliminate beneficiary control. There would not be an opportunity for Child #7 to remove and appoint an independent trustee. A carefully selected independent trustee—and designated successors—would be instructed to address issues of the distribution and use of the trust property, being mindful of public assistance opportunities if available.

Conclusion

With proper explanation, the rational client will understand and embrace the Perfect Modern Trust. Given the disparity in benefits between (1) inheriting property outright and the tax and creditor risks it involves and (2) inheriting property in trust with the protections and enhancements it provides, with proper guidance, clients can and will make the correct decision. Most clients come to their advisors wanting to do what is "best" for their children and other heirs.

In the planning process, it is often helpful to show clients the Wish List of control, use and enjoyment, flexibility, creditor protection, tax savings, and simplicity (described in Part 1 of the article). Then ask the clients if they were going to receive an inheritance, (1) which of the components on the Wish List would they want, and (2) which of the items would they not care about. In the authors' experience, without exception, clients who are candid want all six of the Wish List elements.

The next question is which of the six components the client would want to give to his or her loved ones. A reasonable assumption is that the client would want to provide all beneficiaries with the shelter protections (asset protection and tax avoidance). Every client wants simplicity. Thus, the only variables are the controls, which would have to be modified for those inheritors that the client would not be inclined to give the wealth to outright.

The Perfect Modern Trust satisfies all of the items on the client Wish List. It is flexible in its design to allow sufficient control for those capable of having control and sufficient protections for all potential beneficiaries, both those capable and those incapable. It should be embraced as the solution to the planning process that all clients seek and all advisors strive to provide. ■