

ASSET PROTECTION FOR YOUR CHILDREN, GRANDCHILDREN AND OTHERS

A recent change to North Carolina law has presented a tremendous opportunity to provide additional protection to the beneficiaries of our estate plans. NC adopted a version of the Uniform Trust Code (UTC). Section 36C-5-504 of the UTC provides that a "...discretionary trust interest is an interest in which the trustee has no duty to pay or distribute any particular amount to the beneficiary, but has only a duty to pay or distribute to the beneficiary, or apply on behalf of the beneficiary, those sums that the trustee, in the trustee's discretion, determines are appropriate for the health, support, education, or maintenance of the beneficiary."

It goes on to say "... a creditor or assignee of a beneficiary may not reach a discretionary trust interest or a distribution by the trustee before its receipt by the beneficiary." It even declares "A creditor may not reach the interest of a beneficiary who is also a trustee or cotrustee, or otherwise compel a distribution, if the trustee's discretion to make distributions for the trustee's own benefit is limited by an ascertainable standard." An ascertainable standard is health, education, maintenance and support.

In the past we created trusts for our children that had a trustee to help with the management and distribution of trust property for the health, education, maintenance and support of our children and grandchildren. However, we generally provided for outright distribution to the children at a chosen age or ages (1/3 at 30, 35 and 40 for example). This provided protection until distribution, but upon distribution, the trust assets would be subject to the claims of others: spouses, creditors, bankruptcy, etc. In light of the UTC, there is a better way. Rather than provide for outright distribution at a certain age, we can allow our beneficiaries to remove the trustee or trustees at a certain age and name themselves as their own trustees. This means that, if they will leave the assets in the trust, they will have protection for those assets for life. Even if your children are older, they can benefit from the creation of a trust to protect their inheritance. Since they can make all decisions regarding the investment, management and distribution of the assets in the trust, it is as if you have given the inheritance outright but wrapped it in a blanket of protection from spousal claims, creditors, and bankruptcy.

For example, you have two children who are 20 and 15. You provide that their favorite Uncle would be the trustee over their assets until they reach 35. The Uncle would provide for their educations, living expenses, allowance, etc. As a child attains 35, he or she can remove the Uncle and take over management and distribution of the assets. You will counsel the children to leave the assets in the trust. The trust can be the owner of checking, savings, CD's, autos, household goods and furnishings, jewelry and other tangible personal property, real estate, stocks, bonds, life insurance, and other investments. The trust can also be the beneficiary of an IRA or other retirement plan. The interest, dividends, and rent generated by the trust would be used for the living expenses of the beneficiary and taxed to the beneficiary. The trust would file a separate income tax return but generally would not pay taxes if an annual distribution of income is made to the beneficiaries.

At the death of the parents, the children would merely transfer the assets to accounts in the name of the trust and would obtain a taxpayer ID for the trust. Real estate is deeded to the trust or becomes the property of the trust by will. If the assets are properly titled, none of this happens in the probate process.

At the death of the child, you can specify how the balance of the inheritance that you left is distributed. If you wish, you can insure that any balance will go to the grandchildren or you may give the flexibility to your child to benefit his or her spouse or others. It is up to you. After the death of both parents, the child would need to make provisions in his or her will as to how the trust assets pass to the permitted beneficiaries.

In conclusion, this asset protection trust provides an excellent way to provide protection of assets and maintain flexibility in management of the assets for your beneficiaries. The cost to prepare the trust is small but the benefits can be significant.