

Factors to Consider in Determining the Extent to Which to Use Trusts

Many estate planning professionals believe that trusts should be considered whenever significant property will be transferred for estate planning and related reasons. Listed below are some facts and related matters which may be appropriate to consider in determining the extent to which property should be transferred in trust.

- Factors to consider in determining if an asset should be transferred in trust rather than outright
 - ✓ Beneficiary's capacity to manage the property prudently
 - ✓ Beneficiary's current legal capacity and probability of becoming incapacitated at some time
 - ✓ Beneficiary's propensity to be unreasonably influenced by others
 - ✓ Beneficiary's probability of divorce
 - ✓ Beneficiary's probability of being charged in paternity/maternity suit
 - ✓ Beneficiary's probability of facing large claims of creditors, including the government for unpaid taxes
 - ✓ Beneficiary's probability of needing to expend corpus
 - ✓ Relative additional costs of creating and administering a trust

- Common reasons why individuals seek wealth
 - ✓ To expend property for consumables (e.g., vacations, taxes, clothing)
 - ✓ To expend property for non-consumables (e.g., homes, recreational, real estate, art)
 - ✓ To invest, including starting and/or controlling a business
 - ✓ To control the distribution of the wealth to others
 - ✓ To achieve financial security
 - ✓ To make charitable contributions

- Some of the interests a trust can provide
 - ✓ Entitlement or eligibility to receive income or other periodic payments
 - ✓ Entitlement to make or participate with others in making investment decisions
 - ✓ Entitlement or eligibility to be able to use assets owned by the trust (rent-free or in exchange for maintenance or other payments)
 - ✓ Entitlement to control the distribution of trust assets to others (lifetime or at death) including payments to descendants, spouse, and charity.

- Some of the advantages a trust may provide compared to the outright transfer of property
 - ✓ Specific and well-known asset management vehicle
 - ✓ Fiduciary relationship rigorously enforced by the law
 - ✓ Protection from claims of creditors (depending upon trust terms, the settlor's interest and control over the trust and governing law), including governmental claims
 - ✓ Elimination or reduction in taxation
 - Income taxes
 - wealth transfer (e.g., gift, estate and generation-skipping transfer) taxes
 - ✓ Protection from foolish/unwise dissipation of wealth

- Choosing an appropriate term for a trust
 - ✓ General factors (goals)
 - ✓ Escape hatches for early termination
 - trustee discretion
 - trust protector discretion
 - powers of appointment (with or without fiduciary consent) held by beneficiaries
 - ✓ Rules limiting the duration of trusts (e.g., rule against perpetuities) or accumulation of income (e.g., rule against accumulations)
 - ✓ Jurisdiction without any rule against perpetuities, etc.