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Once Removed: **Options to Structure Gifts: The Asset Protection Trust, Asset Management Trust and Asset Preservation Trust**

Episode 39 Summary

There are numerous ways to give or leave assets to beneficiaries, and each structure should be carefully tailored to be consistent with the client's goals. Three common goals for estate planning are to protect, manage and preserve assets. This episode explores ways to structure asset protection, asset management and asset preservation trusts to balance access, control and flexibility.

Transcript:

(0:00):

Hello and welcome back. I'm Steve Murphy, a trust and estates attorney with McGuireWoods, LLP. And this is Legacy Planning, Once Removed – my podcast on property, legacy, trusts, estate planning, taxes, and everything else on my mind.

For those of you who are new to the podcast, I'll say that what I do here is talk about legacy planning in a broad sense.

In a prior episode, I talked about the legacy mindset of focusing on the mark. You leave on people, institutions, and things during life and upon death and the mark they leave on you.

And on this podcast, we talk about ways to clarify those goals and what structures to use to carry out those goals and some tax and other considerations. And I feel like it can all be summarized in my tagline, walk like You leave footprints.

In this episode, we'll talk about three structures to consider using when benefiting others. That's the asset protection trust, the asset management trust, and the asset preservation trust.

Now each of these are trusts, and on other episodes I've talked about the spectrum. When you leave assets to others or you give assets to others, you could opt for the simplest approach of just leaving the assets outright. That is simple, that's efficient.

But as we've seen in other episodes, there might be some pitfalls or disadvantages to that approach.

And so many clients explore leaving those assets in a structure. And the best structure to use usually is a trust.

And here are three examples. Now, those three trusts are not mutually exclusive. If we think about the Venn diagram of those three trusts, there's going to be lots of overlap.

You'll recall in one episode, actually it might be my most popular episode, I talked about a concept called a dynasty trust.

But I said there's no such thing as a actual complete dynasty trust. Instead, there are trusts that have dynastic elements.

We might think of a dynasty as benefiting other generations, but you could have a dynasty trust that could also benefit a surviving spouse or have primary beneficiaries as a certain generation and not others.

So again, trusts can have dynastic elements.

And similarly, here we're going to think about the elements of an asset protection trust, an asset management trust, or an asset preservation trust.

(01:06):

On this podcast, we talk about three aspects of any kind of trust, and those are access, control and flexibility.

Access. Who are the beneficiaries of this trust? To whom can distributions be made? And on what kinds of standards?

Control. Who's in control of the trust, who's making decisions about distributions and investments?

And that typically would be the trustee.

And third, flexibility. How are we building in flexibility to this trust or not in case circumstances change?

And in another episode, I talked about a very common strategy we use called a power of appointment of giving a beneficiary some powers to modify the terms of the trust later.

So, as we think about the aspects of a trust, we're going to think about those three concepts, access, control, and flexibility.

And as a reminder, those should always be tailored to the specific goal of the client.

So now let's get into these three examples and maybe how they balance those three aspects.

First, let's consider the asset protection trust. The client's overall goal here might be to protect the gift from the creditors of the beneficiary.

As I summarized on another episode, if you leave assets outright to an individual, then the individual's creditors like a business creditor or the victim of a car accident, could likely seize those assets of the individual.

Meanwhile, if the assets are left in a trust, then there are substantial creditor protections available for the assets where the assets can be protected for the beneficiary's benefit.

Many clients really like this feature of a trust. They want to make sure the assets are protected from creditors.

Again, maybe a business creditor or even a divorcing spouse.

So, this asset protection trust would be focused on that goal.

So, what would it look like?

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Well, number one, in terms of access, that individual can be the beneficiary of the trust, but the trust has to have very specific language to make sure the assets are protected from the beneficiary's creditors.

Again, to the extent possible. Then how about control?

Who should be the trustee of this trust?

Well, remember the goal. If the goal is to focus on asset protection, then you actually could have the beneficiary be the sole trustee or co-trustee, as long as applicable law allows that without interfering with the asset protection features of the trust.

And lots of clients like this idea of naming the beneficiary as co-trustee or sole trustee of this trust.

Again, as long as it doesn't interfere with the asset protection features of the trust.

Well, and then let's consider flexibility.

Again, if the goal is to protect the assets from creditors, the client might otherwise be very comfortable giving very broad flexibility to that beneficiary.

So, in many cases, the asset protection trust would include a broad power called a power of appointment to allow the beneficiary to benefit others at his or her death.

A second kind of trust is a little bit different. This is an asset management trust. Maybe the primary goal here would be to make sure the assets are managed appropriately for the benefit of the beneficiary.

Well, the provisions for access might not change.

The beneficiary still could get distributions for the beneficiary's health or support or education.

But I think the control of that trust is going to change.

(06:10):

Again, if the beneficiary is trustee, then the beneficiary is in charge and there's no opportunity for someone else to weigh in on management of the trust assets.

So, in this case, you might have a third party as the trustee as you're considering that you can check out the episode on who to name as the trustee, whether it's a corporate trustee or a family or member or a friend.

But you could even have the beneficiaries co-trustee here.

Again, as long as you feel comfortable that this third party will have the opportunity to manage the trust and keep the trust on track.

And third, for flexibility, again here it seems like the asset management trust is focused on just making sure the assets are properly managed for the beneficiary.

So, the client might be very comfortable giving broad flexibility to the beneficiary at his or her death.

And that leads us to the third category, the asset preservation trust and asset preservation trust would be focused on a slightly different goal.

Yes, asset protection, yes, asset management, but it seems to be focused on preserving the trust assets for the future, maybe for the beneficiary's life later on and maybe for further generations.

So, a trust that has asset preservation features might give less access to the current beneficiary.

Maybe distributions are only allowed for emergencies. That rainy day fund I sometimes talk to clients about.

The control of the trust, again, it might be even more important here to have a third party as trustee to make sure the trust is properly preserved for those future beneficiaries or interests.

And then third, importantly, for the asset preservation trust consider whether to give the beneficiary any flexibility over that trust as his or her death.

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As an example, a client who would like a trust with asset preservation features might want to make sure that the assets passed to his or her descendants after the first beneficiary's death.

Well, in that case, if the beneficiary has a broad power of appointment and is able to change those terms of death, that might frustrate the client's objectives.

Now again, there is no classic asset protection trust or asset management trust or asset preservation trust.

But I think each of these types of trusts has certain features that you could incorporate into your own plan.

On these episodes, I always like to end with a thought exercise.

So here it might be relatively simple.

As you think about these three structures and these three goals, consider whether any of these resonate.

In fact, you might be comfortable with outright gifts to beneficiaries if asset management or asset protection are not a concern of yours.

And then as you think about those three sets of goals, be sure to review your estate plan with your advisors to see whether what you have put in place is consistent with that overall approach.

I'm Steve Murphy and this has been Legacy Planning, Once Removed my podcast on thoughtful estate planning.

And until next time, walk like you leave footprints.

Thanks for listening.